


ORDERED.

Dated: January 23, 2018


Cynthia C. Jackson
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re:

Erminio Van Malleghem,

Debtor.

Case No.: 6:17-bk-00046-CCJ
Chapter 13

ORDER DENYING MOTION TO DISMISS CASE

This case came before the Court for trial to consider the Motion by Ocwen Loan Servicing, LLC to Dismiss Case and for Sanctions and Prospective In Rem Relief (Doc. No. 11; the “Motion to Dismiss”). Upon consideration of the evidence presented at the hearing, including the testimony of the Debtor, the Court denies the Motion to Dismiss.

Findings of Fact

The Debtor and his spouse, Dawn Van Malleghem (“Dawn”), are defendants in an action to foreclose real property located at 14203 Hogan Drive, Orlando, Florida (the Property”) pending before the Circuit Court of Orange County, Florida (the “Foreclosure Action”). Ocwen Loan Servicing, LLC services the loan for the plaintiff, Bank of America, N.A. (collectively the “Creditor”) in the Foreclosure Action.

The Circuit Court entered a judgment for almost \$600,000 in favor of the Creditor in the Foreclosure Action (the “Foreclosure Judgment”). The Foreclosure Judgment directed that the clerk of court sell the Property on April 11, 2013 (the “First Sale Date”) unless the amounts stated in the judgment were paid. The Debtor and Dawn filed an appeal of the Foreclosure Judgment to the Florida Fifth Circuit Court of Appeals. The Florida Fifth Circuit Court of Appeals affirmed the Circuit Court’s entry of the Foreclosure Judgment.

One day prior to the First Sale Date, the Debtor filed a Chapter 7 bankruptcy case (the “First Case”).¹ The Debtor filed the First Case without counsel and represented himself, *pro se*. The Debtor failed to file the required bankruptcy schedules and this Court dismissed the First Case approximately a month later. Over a year after this Court dismissed the First Case, the Circuit Court entered an order rescheduling the sale of the Property to January 5, 2015 (the “Second Sale Date”).

Prior to the Second Sale Date, Dawn filed a Chapter 7 bankruptcy case (“Dawn’s Case”).² Dawn filed her case without counsel and represented herself, *pro se*. Dawn complied with the applicable provisions of the Bankruptcy Code and about five months after Dawn filed her case, the bankruptcy court entered a discharge. The Creditor did not request stay relief to proceed with the foreclosure of the Property. Shortly after entry of the discharge, the Circuit Court entered an order rescheduling the sale of the Property to September 21, 2015 (the “Third Sale Date”).

Two months prior to the Third Sale Date, the Debtor filed a Chapter 7 bankruptcy case (the “Second Case”).³ The Debtor filed the Second Case without counsel and represented himself, *pro se*.

During the Second Case, the Debtor initiated an adversary proceeding against the Creditor (the “Adversary Proceeding”).⁴ The Debtor’s amended complaint attempted to allege several

claims and requested that the bankruptcy court nullify the Foreclosure Judgment, including the Creditor's rights under the Foreclosure Judgment.⁵ The Creditor requested dismissal of the Adversary Proceeding. After a hearing on the Creditor's motion to dismiss, the bankruptcy court dismissed the Adversary Proceeding (the "Adversary Dismissal Order"). The Debtor filed an appeal of the Adversary Dismissal Order to the United States District Court for the Middle District of Florida. Neither the bankruptcy court nor District Court granted the Debtor's request for a stay pending the appeal of the Adversary Dismissal Order.

Over a year after the Debtor filed the Second Case, the Creditor sought stay relief to proceed with the foreclosure sale of the Property. The bankruptcy court granted the Creditor *in rem* relief from stay to proceed with the sale of the Property. The Debtor complied with the applicable provisions of the Bankruptcy Code and the bankruptcy court entered a discharge in the Second Case. The Debtor filed a motion to reconsider the entry of the discharge and the bankruptcy court denied the request ("Discharge Reconsideration Order"). The Debtor appealed the discharge and Discharge Reconsideration Order to the United States District Court for the Middle District of Florida. Approximately a month later, the Debtor dismissed the appeal of the discharge and Discharge Reconsideration Order. A few months after the bankruptcy court granted the Creditor stay relief and the Debtor's dismissal of the appeal, the Circuit Court entered an order rescheduling the sale of the Property to January 5, 2017 (the "Fourth Sale Date").

One day prior to the Fourth Sale Date, the Debtor filed this Chapter 13 bankruptcy case (the "Current Case"). The Debtor filed the Current Case without counsel and has represented himself *pro-se*. The Debtor listed the Property on the bankruptcy schedules with a value of \$256,000 and subject to the Foreclosure Judgment. The Debtor's Chapter 13 Plan provides that the Creditor's claim- the Foreclosure Judgment- will be "avoided/stripped" and paid in monthly

installment of \$500 for fifty-nine (59) months with a balloon payment of any balance in month sixty(60). The Creditor filed the Motion to Dismiss approximately a week after the Debtor filed the Current Case.

By the Motion to Dismiss, the Creditor contends that the Current Case should be dismissed with sanctions because the Debtor filed the Current Case in bad faith, and the Debtor caused an unreasonable delay prejudicing the Creditor by filing multiple bankruptcy cases and appeals.

The Court held a trial on the Motion to Dismiss. The Debtor stated that he filed the Current Case to save his home- the Property. The Debtor asserted that he has several claims against the Creditor and recently initiated an adversary proceeding in this case to pursue those claims (the “Pending Adversary Proceeding”).⁶ The Debtor clarified that his Chapter 13 plan proposes to pay the Foreclosure Judgment, less any relief awarded the Debtor in the Pending Adversary Proceeding. The Debtor stated that he is current on his Chapter 13 plan payments and the Chapter 13 plan proposes monthly \$500 payments to the Creditor as adequate protection. The Debtor wanted to retain an attorney to assist him with the Current Case and believed that his current income is stable and sufficient to obtain counsel and fund a plan.

Conclusions of Law

Section 1307(c) of the Bankruptcy Code provides that upon the request of a party in interest, the bankruptcy court may dismiss a Chapter 13 case for “cause” and lists eleven bases for dismissal, all of which are non-exclusive.⁷ An “unreasonable delay by the debtor that is prejudicial to creditors” is one of the eleven basis listed as “cause” for dismissal.⁸ Although not listed as a basis, under binding case law, a debtor’s bad faith (or lack of good faith), in filing a bankruptcy case also constitutes such “cause” for dismissal.⁹ The bases for dismissal pursuant to Section

1307(c) are numerous, however, none require the mandatory dismissal of a case.¹⁰ A party seeking dismissal pursuant to Section 1307 of the Bankruptcy Code bears the burden of proof.¹¹

In evaluating a debtor's good faith under Section 1307, the Court must focus its inquiry on whether the debtor seeks to abuse the Chapter 13 process by using it for a purpose for which it is not intended.¹² Chapter 13 is intended to allow an honest and conscientious debtor to deal with his financial difficulties by paying off his debts over time.¹³

The Eleventh Circuit has established a variety of factors bankruptcy courts must consider in determining the debtor's good faith including:

- (1) the amount of the debtor's income from all sources;
- (2) the living expenses of the debtor and his dependents;
- (3) the amount of attorney's fees;
- (4) the probable or expected duration of the debtor's Chapter 13 plan;
- (5) the motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13;
- (6) the debtor's degree of effort;
- (7) the debtor's ability to earn and the likelihood of fluctuation in his earnings;
- (8) special circumstances such as inordinate medical expense;
- (9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act and its predecessors;
- (10) the circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealings with his creditors;
- (11) the burden which the plan's administration would place on the trustee.¹⁴

As with any totality of the circumstances test, no one factor will determine the issue. "Rather, the Court must consider all of the circumstances surrounding the Debtor's prepetition activity and the filing of the Case."¹⁵

The Creditor contends that this case was filed in bad faith because the Debtor's motivation for seeking Chapter 13 relief is to "hinder and delay" the Creditor from selling the Property and to challenge the validity of the Foreclosure Judgment. The Creditor alleges that this motivation is demonstrated by the Debtor appealing the Foreclosure Judgment, filing multiple bankruptcy cases, filing the Adversary Proceeding, appealing the Adversary Dismissal Order, and filing meritless motions in the Second Case and Foreclosure Action.

The Debtor has filed two prior cases within the last four years, with the most recent filing resulting in a discharge. Dawn has filed one case within the last four years, and received a discharge. Dawn and the Debtor's success in obtaining discharges in two of the three bankruptcy filings weighs in the Debtor's favor, despite the number of filings. The Current Case is the Debtor's first Chapter 13 bankruptcy case. The Debtor appears highly motivated and his testimony at the hearing was credible. The Debtor seeks to retain the Property and pay the Foreclosure Judgment, less any relief awarded the Debtor in the Pending Adversary Proceeding. The Debtor discloses that his income is stable and wants to retain counsel to assist him. The Debtor has timely filed his Bankruptcy Schedules and Statements and a Chapter 13 Plan. The Debtor has commenced plan payments and is current. The Debtor's degree of effort in this case to date, especially considering his *pro-se* status, demonstrates his sincerity in seeking bankruptcy relief. And, although the Creditor asserts that the Debtor's multiple bankruptcies, appeals and meritless filings demonstrate bad faith, such actions may be attributed to his *pro-se* status and limited knowledge of the law. This Court believes that the Debtor should be afforded at least one opportunity to file a Chapter 13 case and attempt to confirm a plan in an effort to save his home. For all of these reasons, the Court finds that the Creditor failed to meet its burden and the Debtor filed the Current Case in good faith.

The Creditor further argues that the Current Case should be dismissed due to the unreasonable delay by the debtor that is prejudicial to creditors. The Creditor asserts that the four bankruptcy filings have delayed the foreclosure sale of the Property and this delay prejudiced the Creditor by requiring the Creditor to pay real estate taxes, insurance and incur attorney fees and costs.

The record reflects that the four bankruptcy filings did cause some delay, but most of the delay may be attributed to the Creditor's own inactions. The First Case lasted approximately one month. The Creditor waited almost a year after dismissal of the First Case to request another sale date from the Circuit Court. Dawn's Case lasted approximately five months. During this time, the Creditor elected not to seek stay relief to proceed with a foreclosure sale of the Property. The Debtor's Second Case lasted approximately seventeen months, but the Creditor waited over a year before it requested stay relief to proceed with the foreclosure sale of the Property. Neither the bankruptcy court nor District Court granted the Debtor a stay pending the appeal of bankruptcy court orders. The Debtor's Current Case has been pending less than a year and confirmation should be scheduled after entry of this order. If the Creditor had been more diligent during the three prior bankruptcy filings, the resulting delay would have been significantly reduced. The delay caused by the Debtor does not appear unreasonable considering the circumstances. For these reasons, the Court finds that the Creditor failed to meet its burden and the delay caused by the Debtor is not unreasonable.

Conclusion

Based on all the facts and circumstances described above, it is ordered that the Motion to Dismiss (Doc. No. 11) is denied without prejudice.

The Clerk is directed to serve a copy of this order on all interested parties.

¹ *In re Erminio Van Malleghe*m, Case No. 6:13-bk-04369-CCJ filed in the United States Bankruptcy Court for the Middle District of Florida, Orlando Division.

² *In re Dawn Van Malleghe*m, Case No. 6:15-bk-00040-KSJ filed in the United States Bankruptcy Court for the Middle District of Florida, Orlando Division.

³ *In re Erminio Van Malleghe*m, Case No. 6:15-bk-06189-RAC filed in the United States Bankruptcy Court for the Middle District of Florida, Orlando Division.

⁴ *Van Malleghe*m v. *Ocwen Loan Servicing, LLC*, Adversary Case No. 6:15-ap-00147-RAC filed in the United States Bankruptcy Court for the Middle District of Florida, Orlando Division.

⁵ The Debtor attempted to assert claims pursuant to the Truth in Lending Act, the Fair Debt Collection Practices Act and the Florida Consumer Collection Practices Act.

⁶ *See Van Malleghe*m v. *Bank of America N.A.*, Adversary Case No. 6:17-ap-00113-CCJ filed in the United States Bankruptcy Court for the Middle District of Florida, Orlando Division. The complaint purports to assert claims against Bank of America and/or Ocwen Loan Servicing for declaratory relief, civil conspiracy to commit fraud, RICO violations, filing a false proof of claim, Fair Debt Collection Practices Act violations, Florida Consumer Collection Practices Act violations, Automatic Stay violations, Discharge Injunction violations, lack of standing, objection to proof of claim, and sanctions.

⁷ *See In re Fretwell*, 281 B.R. 745,749 (Bankr. M.D. Fla. 2002).

⁸ 11 U.S.C. §1307 (2010).

⁹ *See Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 373 (2007), *In re Bucco*, 205 B.R. 323, 324 (Bankr. M.D. Fla.1996).

¹⁰ *In re Haning*, 252 B.R. 799, 807 (Bankr. M.D. Fla. 2000).

¹¹ *In re Fretwell*, 281 B.R. at FN3 (citing *In re Love*, 957 F.2d 1350, 1355 (7th Cir. 1992)).

¹² *In re Haning*, 252 B.R. at 807.

¹³ *See In re Saylor*s, 869 F.2d 1434, 1436 (11th Cir. 1989).

¹⁴ *In re Kitchens*, 702 F.2d 885, 888-89 (11th Cir. 1983).

¹⁵ *In re Haning*, 252 B.R. at 808.