


ORDERED.

Dated: October 01, 2018



Karen S. Jennemann
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

Case No.: 3:18-bk-659-JAF

THOMAS JOHNSON,

Debtor.

Chapter 13

**ORDER GRANTING CREDITOR'S RENEWED
MOTION TO DISMISS AND DENYING MOTION FOR SANCTIONS**

Charles Schwab Bank, N.A. seeks dismissal of this Chapter 13 case arguing the Debtor failed to timely surrender his legal interest in his home in a prior Chapter 7 case and now has filed this Chapter 13 case in bad faith to avoid complying with this Court's prior order.¹ Debtor opposes dismissal contending he filed nothing to stop Schwab from foreclosing on his home and now seeks to repay the debt in this Chapter 13 case.² Finding that the time for the Debtor to repay his mortgage debt has passed, the Court partially will grant Schwab's Motion to dismiss this case but decline to award any sanctions.

¹ Doc. No. 23 (the "Motion"). The Court will refer to the creditor as Schwab.

² Doc. No. 34. A trial was held on July 12, 2018.

In December 2004, the Debtor and his non-filing spouse (the “Johnsons”) executed a first mortgage to Schwab to purchase a home in Jacksonville Beach, Florida.³ In March 2012, Schwab filed a foreclosure action on the Property (the “Foreclosure Case”). On September 16, 2013, the Johnsons filed a Chapter 7 bankruptcy petition (the “Chapter 7 Case”).⁴ The Johnsons filed their Statement of Intention in the Chapter 7 Case indicating they intended to surrender the Property to Schwab.⁵ They received a Discharge on December 13, 2013.⁶

Contrary to their stated intentions, however, the Johnsons did *not* surrender their home to Schwab. They vigorously fought Schwab’s Foreclosure Case for several years. But, on October 4, 2016, the Eleventh Circuit Court of Appeals issued *Failla v. Citibank, N.A. (In re Failla)*.⁷ This decision clarified the law that a debtor who surrenders his property in a Chapter 7 bankruptcy case must relinquish all legal interests in the property to both the trustee and the creditor. Surrender specifically requires a debtor to stop opposing a state court foreclosure action.⁸

Relying on *Failla*, Schwab asked to reopen the Johnsons’ Chapter 7 Case to get an order directing the Johnsons to stop opposing the Foreclosure Case and to do what they promised—to surrender their home to Schwab.⁹ At trial, the Johnsons agreed to an order directing them to surrender their home to Schwab (the “Agreed Order”),¹⁰ and explicitly precluding them from defending the Foreclosure Case or taking any other action to delay the foreclosure of the Property

³ The property address is 1815 Oak Grove Circle, Jacksonville Beach, FL 32250 (the “Property”). The Johnsons also obtained a home equity loan with Schwab executing a second mortgage on the home. Both the first and home equity mortgages collectively are referenced as the “Mortgages.”

⁴ Doc. No. 1 in Case No. 3:13-bk-5605-JAF.

⁵ Doc. No. 15 in Case No. 3:13-bk-5605-JAF.

⁶ Doc. No. 41 in Case No. 3:13-bk-5605-JAF.

⁷ *Failla v. Citibank, N.A. (In re Failla)*, 838 F.3d 1170 (11th Cir. 2016).

⁸ *Id.* at 1175-76.

⁹ Doc. No. 83 in Case No. 3:13-bk-5605-JAF. The motion to reopen was granted (Doc. No. 84), and a trial was scheduled on Schwab’s Motion to Compel Surrender (Doc. No. 85) for December 16, 2016.

¹⁰ Doc. No. 93 in Case No. 3:13-bk-5605-JAF.

in the Foreclosure Case and requiring them to withdraw their affirmative defenses in the Foreclosure Case within 14 days.¹¹

The Johnsons timely withdrew their answer and affirmative defenses in the Foreclosure Case. On January 17, 2018, the state court entered an In Rem Final Judgment against the Property, scheduling a foreclosure sale of the Property for March 7, 2018.¹² On March 6, 2018, *the day before the scheduled foreclosure sale*, Thomas Johnson (the “Debtor”) filed this Chapter 13 case.¹³ Mrs. Johnson is not a debtor this time. Debtor’s Chapter 13 Plan indicates he hopes to keep his home and to modify the Mortgages, presumably to pay debt associated with the Property he promised to surrender in his earlier Chapter 7 case in 2013.¹⁴

Schwab then filed this Motion to Dismiss¹⁵ arguing the Debtor filed this case in bad faith and lost any right to retain his home when he surrendered the Property in his Chapter 7 Case and then again when he agreed a second time to surrender the Property under the Agreed Order. Schwab seeks dismissal of this Chapter 13 case, an injunction prohibiting the Debtor from filing another bankruptcy case for two years, and sanctions measured by Schwab’s attorney’s fees and costs. Debtor objects, contending that he is using this Chapter 13 case to repay the Mortgages and that Agreed Order only directed him to stop opposing the state court Foreclosure Case but did not stop him from filing a new bankruptcy case.¹⁶

Section 521(a)(2)(A) of the Bankruptcy Code¹⁷ requires a Chapter 7 debtor to file a statement of intention indicating whether he intends to surrender or retain property of the estate

¹¹ *Id.*

¹² Schwab’s Ex. 5.

¹³ Doc. No. 1.

¹⁴ Doc. No. 10. Before Schwab filed this Motion to Dismiss, the Debtor had requested and obtained an Order Directing Mortgage Modification Mediation (the “Mediation Order”) Doc. Nos. 13 and 14. Schwab sought reconsideration of the Mediation Order, which was denied. (Doc. Nos. 24 and 50).

¹⁵ Doc. No. 23.

¹⁶ Doc. No. 34.

¹⁷ References to the Bankruptcy Code refer to 11 U.S.C. § 101 *et. seq.*

that is collateral for a debt. Section 521(a)(2)(B) requires the debtor to perform the declared option within thirty days after the date set for the meeting of creditors unless the court for cause establishes a longer time. Surrender under § 521(a)(2) means giving up a right or claim.¹⁸ A debtor who acts to preserve his right to property “by way of adversarial litigation” has not relinquished all of his legal rights to the property, “including the rights to possess and use it.”¹⁹ “The ‘retention of property that is legally insulated from collection is inconsistent with surrender.’”²⁰

Failla clarifies that a debtor who files a statement of intention surrendering his property must drop his opposition to a state court foreclosure action. “Otherwise, debtors could obtain a discharge in bankruptcy based, in part, on their sworn statement to surrender and ‘enjoy possession of the collateral indefinitely while hindering and prolonging the state court process.’”²¹

The issue here is whether *Failla*’s strictures prevent a debtor, who surrendered property in a Chapter 7 bankruptcy case and obtained a discharge, from filing a Chapter 13 bankruptcy case the day before a scheduled foreclosure sale in a desperate attempt to keep the “surrendered” property. I discussed a similar issue in *In re Holland*,²² a Chapter 13 case where the debtor’s Chapter 13 plan provided for the surrender of his home.²³ After this surrender, the mortgagee filed a foreclosure action,²⁴ just as Schwab did here. The debtor in *Holland* strenuously opposed the foreclosure, just as the Johnsons did in their Chapter 7 case until the Agreed Order was entered. Mr. Holland completed his plan payments and received a discharge.²⁵ Less than two months after he received a discharge, however, Mr. Holland filed a new Chapter 13 case in which he proposed

¹⁸ *Failla*, 838 F.3d at 1177.

¹⁹ *Id.* (quoting *In re White*, 487 F.3d 199, 205 (4th Cir. 2007)).

²⁰ *Id.*

²¹ *Id.* (quoting *In re Elowitz*, 550 B.R. 603, 607 (Bankr. S.D. Fla. 2016)).

²² Doc. No. 119 in Case No. 6:13-bk-14751-KSJ.

²³ *Id.* at pp. 1-2. In this case, the Johnsons surrendered their interest in the Property in their Statement of Intention in the earlier Chapter 7 case. Doc. No. 15 in Case No. 3:13-bk-5605-JAF.

²⁴ *Id.* at p. 1.

²⁵ *Id.*

to pay the mortgagee's claim in full.²⁶ The mortgagee sought to reopen the debtor's first Chapter 13 case and compel him to drop his foreclosure defenses.²⁷

The Court recognized that, because a statement of intention is not required in a Chapter 13 case, *Failla's* analysis under §§ 521 and 105 was persuasive but did not control.²⁸ The issue was whether the debtor could promise to surrender the property in his first bankruptcy case, receive a discharge, defend a later foreclosure, and then file a Chapter 13 case to keep the property.²⁹ I found that Mr. Holland's continuing opposition to the foreclosure contradicted his Chapter 13 plan and the Court's confirmation order. I further found the debtor forfeited his right to change his mind, now keeping the "surrendered" home, in his second Chapter 13 case.³⁰ Using its authority under § 105 of the Bankruptcy Code, the Court reopened the first Chapter 13 case, compelled the debtor to surrender the property, and ordered the debtor to cease defending the foreclosure action.³¹ The Court dismissed the second Chapter 13 case and enjoined the debtor from filing another bankruptcy case for 180 days.³²

The takeaway from *Holland* is that filing a Chapter 13 case in which the debtor seeks to retain property on the heels of a Chapter 13 case in which the debtor surrendered the same property is an impermissible continued defense of a pending state court foreclosure action. The analysis applies equally to a debtor who files a Chapter 7 followed by a Chapter 13—a Chapter 7 debtor who surrenders property subject to a pending foreclosure proceeding, obtains a discharge, and shortly thereafter files a Chapter 13 seeking to keep the very same property he just offered to

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at p. 4.

²⁹ *Id.*

³⁰ *Id.* at p. 6.

³¹ *Id.* at p. 7.

³² Doc. No. 47 in Case No. 6:17-bk-4503-KSJ.

surrender has not complied with § 521's requirement as interpreted by the Eleventh Circuit Court of Appeals in *Failla*.³³

Section 1307(c) of the Bankruptcy Code provides that a bankruptcy court may dismiss a case for "cause" and provides a non-exhaustive list of examples of cause. Although bad faith or the lack of good faith is not included in the list, it can constitute cause for dismissal under § 1307(c).³⁴ The Bankruptcy Code requires a debtor to file both a petition and a plan in good faith.³⁵ While courts consider various factors to determine whether a debtor is proceeding in good faith, "[t]he basic inquiry is whether, under the circumstances, the debtor has abused the provisions, purpose, or spirit of the Bankruptcy Code."³⁶

Debtor has filed this case to thwart Schwab's efforts in the Foreclosure Case. He is attempting to enjoy indefinite possession of the Property while simultaneously hindering and prolonging the state court process. Why else would the Debtor wait until the day before the scheduled foreclosure sale to try this gambit of filing a Chapter 13 case? If he wanted to modify the Mortgages with Schwab, he could have done so without filing a new bankruptcy case.

Debtor wants the automatic stay imposed to stop the foreclosure sale and to keep his home a little longer. The Court finds that such actions are an abuse of the provisions and purpose of the Bankruptcy Code. This case was not filed in good faith. The Court will dismiss the case and enjoin the Debtor and his wife, Angela M. Johnson, from filing a bankruptcy case for 180 days from this Order. The Court also will grant stay relief to permit Schwab to conclude the foreclosure sale.

³³ As the Court noted in *Holland*, there are exceptions to the general rule that debtors who declare an intent to surrender a home in a bankruptcy case forfeit their defenses in pending state court foreclosure proceedings.

³⁴ *In re Buis*, 337 B.R. 243, 250 (Bankr. N.D. Fla. 2006); *See also In re Gruffy*, 216 B.R. 888, 891 (Bankr. M.D. Fla. 1998) ("While good faith is not specifically denominated therein, it is implicit to the concept.")

³⁵ *In re Buis*, 337 B.R. at 250.

³⁶ *In re Vick*, 327 B.R. 477, 486 (Bankr. M.D. Fla. 2005) (citing *In re Kitchens*, 702 F.2d 885, 888-889 (11th Cir. 1983)).

Schwab also seeks the imposition of sanctions against the Debtor and his attorney for the attorney's fees and costs Schwab has incurred in this improperly filed Chapter 13 case. Section 105 of the Bankruptcy Code allows the Court to issue any order or judgment to prevent an abuse of process or carry out the Bankruptcy Code. "Thus, a court may impose sanctions if a party violates a court order or rule."³⁷ A court may also impose sanctions under its inherent power if it finds bad faith.³⁸ "A finding of bad faith is warranted where an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent."³⁹ While the Court found that filing this case was not in good faith, it does not find it rises to the level of frivolity or that it was filed to harass Schwab. Accordingly, the Court will not impose sanctions against the Debtor and his attorney and, it is

ORDERED:

1. Schwab's Renewed Motion to Dismiss and for Sanctions is granted in part and denied in part.
2. This case is dismissed.
3. The automatic stay imposed by 11 U.S.C. § 362 is terminated.
4. Under 11 U.S.C. §§ 105(a) and 109(g), the Debtor and his spouse, Angela M. Johnson, are enjoined from filing for relief under Title 11 of the United States Code for a period of one hundred and eighty (180) days from the effective date of this Order. Any attempt to invoke the automatic stay provisions of 11 U.S.C. § 362 is annulled during the injunction period provided above.

³⁷ *In re Evergreen Sec., Ltd.*, 570 F.3d 1257, 1273 (11th Cir. 2009).

³⁸ *Id.* (citing *In re Walker*, 532 F.3d 1304, 1309 (11th Cir. 2008)).

³⁹ *Barnes v. Dalton*, 158 F.2d 1212, 1214 (11th Cir. 1998) (quoting *Primus Automotive Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 649 (9th Cir. 1997)).

5. The relief granted is with prejudice, shall be binding in any other case under the Bankruptcy Code purporting to affect the above-described real property, and any attempt to impose the automatic stay on the above-described property will be void.
6. The Trustee shall refund all funds on hand to the Debtor in care of the Debtor's attorney.
7. The Trustee is discharged from any further duties.
8. Schwab's request for sanctions is denied.

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Attorney Sean A. Espenship is directed to serve a copy of this Order on interested parties who are non-CM/ECF users and to file a proof of service within three days of entry of the Order.