UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

Case No: 3:14-bk-00151

EUGENE WHITE and

AUDREY WHITE, **Chapter 13**

_____/

ORDER DENYING MOTION FOR RELIEF FROM STAY

This case is before the Court upon Creditor's, Marion Graham, Motion for Relief from Stay (Doc. 17, the "Motion"), to which Debtors, Eugene White and Audrey White, filed a Response. (Doc. 19). The Court held a hearing on the Motion and took the matter under advisement. Upon consideration of the parties' evidence and arguments, the Court concludes that the Motion should be denied.

Background

On January 14, 2014, Debtors filed a joint petition for relief under Chapter 13 of the Bankruptcy Code. On their Schedule F, Debtors listed an unsecured debt to Creditor in the amount of $19,022.50. (Creditor's Ex. 2). On their Schedule I, Debtors indicated that they are both retired and that they receive retirement income from Social Security Administration and from their pensions. (Creditor's Ex. 3). Eugene White receives $1,985.00 from Social Security Administration and $2,600.00 from his pension while Audrey White receives $1,568.00 from Social Security Administration and $2,200.00 from her pension. (Creditor's Ex. 3).

At the hearing, Creditor testified that he loaned Debtors money so that they could establish a school for underprivileged children. Eugene White promised he would repay Creditor when he retires with his retirement funds from his Duval County School Board retirement account. Eugene White presented to Creditor a document, Florida Division of Retirement

Estimate of Retirement Benefit statement, issued on June 19, 2008, which indicated that if Eugene White retired on July 1, 2009, he would be entitled to $62,221.48 as the "Average Final Compensation." (Creditor's Ex. 7). Thereafter, Debtors executed two promissory notes in favor of Creditor.

Creditor presented two promissory notes signed by both Debtors on August 1, 2008 (the "August Promissory Note"), and on December 1, 2008 (the "December Promissory Note") at the hearing. (Creditor's Exs. 4, 5). Pursuant to the August Promissory Note, Debtors agreed to repay $25,000 to Creditor and pledged the funds from the Florida Division of Retirement Account #72-732309001-72750300-00-31103100 as collateral for the loan. (Creditor's Ex. 4). Pursuant to the December Promissory Note, Debtors agreed to repay $10,500.00 to Creditor and pledged the identical collateral for the loan. (Creditor's Ex. 5). Creditor also testified that prior to commencement of Debtors' case he initiated a civil action against Debtors and obtained a judgment against them to recover the debt owed on the August and December promissory notes. Creditor testified he received some payments through Debtors' previous bankruptcy case, but he did not specify the amount.

Creditor also initiated another civil action against Debtors and obtained a judgment for damages he incurred due to Debtors' breach of a lease agreement. Creditor never received any payments from Debtors to satisfy this judgment. Creditor did not know if the promissory notes or judgments were ever recorded. Creditor was not sure if he obtained a writ of garnishment against Debtors or if it was ever recorded.

Creditor filed the Motion and claims that the Court should grant him relief from the automatic stay. (Doc. 17 at 2). Creditor explained that he holds "a security interest by virtue of promissory note" in Debtors' property. (Doc. 17 at 2). A close review of the Motion discloses

that Creditor is seeking relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1). However, at the hearing, it appeared that Creditor attempted to establish he is entitled to relief from the automatic stay pursuant to § 362(d)(2). In an abundance of caution, the Court will address both grounds.

Analysis

"When a debtor files a bankruptcy petition, an automatic stay applies to 'the enforcement, against the debtor or against property of the estate, of a judgment obtained before' the bankruptcy petition was filed." In re Ware, 562 Fed.Appx. 850, 852 (11th Cir. 2014) (quoting 11 U.S.C. § 362(a)(2)). The purpose of the automatic stay in reorganization cases has been described as follows:

> [T]he stay is particularly important in maintaining the status quo and permitting the debtor in possession or trustee to attempt to formulate a plan of reorganization. Without the stay, the debtor's assets might well be dismembered, and its business destroyed, before the debtor has an opportunity to put forward a plan for future operations. Secured creditors and judgment creditors might race to seize and sell the debtor's assets in order to obtain satisfaction of their claims, without regard to the interests of other creditors or the value of keeping assets together in an operating business. The stay prevents this piecemeal liquidation, offering the chance to maximize the value of the business.

2 Collier on Bankruptcy ¶ 362.03[3], at 362-9 (16th ed. 2013). Section 362 of the Bankruptcy Code governs motions for relief from the automatic stay. Section 362(d), which sets forth the grounds for granting relief, provides:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if—
>
> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to an effective reorganization.

"[T]he Court must lift the stay if the movant prevails under either of the two grounds." In re Elmira Litho, Inc., 174 B.R. 892, 900 (Bankr. S.D.N.Y. 1994).

Creditor's Claim Under § 362(d)(1)

A movant seeking relief from the automatic stay under § 362(d)(1) "must demonstrate a factual and legal right to the relief that it seeks." In re Elmira Litho, Inc., 174 B.R. at 902. In other words, the party seeking relief from the automatic stay must establish a prima facie case of cause for relief. In re George, 315 B.R. 624, 628 (Bankr. S.D. Ga. 2004). Absent such showing, relief from the effect of a stay will be denied. In re Bogdanovich, 292 F.3d 104, 110 (2d. Cir. 2002). As the automatic stay provision may impose an unfair hardship on particular creditors, § 362(d)(1) directs the court to grant relief from the automatic stay upon a showing of "cause." Laguna Assocs. Ltd. P'ship v. Aetna Cas. & Surety Co. (In re Laguna Assocs. Ltd. P'ship), 30 F.3d 734, 737 (6th Cir. 1994). Because "cause" is not further defined in the Bankruptcy Code, relief from stay for cause is a discretionary determination made on a case-by-case basis. Id. The Eleventh Circuit Court of Appeals concluded that a petition filed in bad faith justifies granting relief from the automatic stay. Barclays–Am./Bus. Credit Inc. v. Radio WBHP, Inc. (In re Dixie Broad., Inc.), 871 F.2d 1023, 1026 (11th Cir. 1989) (citing In re Natural Land Corp., 825 F.2d 296 (11th Cir. 1987)).

In the Motion, Creditor argues that Debtors have filed four[1] Chapter 13 petitions since September 14, 2010, and that the Court dismissed their first three cases for failure to make payments to the Trustee. (Doc. 17 at 2). Creditor claims that he objected to every Chapter 13 plan submitted by Debtors on account of either Debtors' failure to include Creditor in the plans or because Debtors failed to properly value the amount of Creditor's claim in the plan. (Doc. 17 at 2). However, it is unclear as to whether these objections were filed in this case or in Debtors'

[1] At the hearing, Creditor argued that Debtors have filed five Chapter 13 petitions.

previous cases. In sum, Creditor claims that Debtors' "prior petitions for failure to make payments, and their omission of . . . Creditor from each [p]lan demonstrates a lack of good faith of Debtors." (Doc. 17 at 3).

The Court recognizes that repeated filings can demonstrate an abuse of the bankruptcy process and an inability or lack of intent to reorganize. See In re Webb, 294 B.R. 850, 852 (Bankr. E.D. Ark. 2003). However, in this case, Creditor did not present sufficient evidence to establish bad faith. The only evidence presented by Creditor that Debtors filed more than one petition since 2010 was Eugene White's testimony that he did not follow up with his filings and that he believed he filed two or three petitions since 2010. Creditor did not present any evidence establishing that the prior cases were dismissed due to Debtors' failure to make plan payments and did not ask the Court to take judicial notice of its record in Debtors' prior cases. Furthermore, the Court has no evidence to assess Creditor's assertion that he was not included in "each Plan." For this reason, the Court concludes that Creditor failed to carry his burden of proof under § 362(d)(1).

Creditor's Claim Under § 362(d)(2)

To obtain relief from the stay under § 362(d)(2), a debtor must have no equity in the property and the property must not be necessary to an effective reorganization. In re Lamelas, No. 12–26067–AJC, 2013 WL 324028 at *5 (Bankr. S.D. Fla. Jan. 28, 2013). "Both parts must be satisfied before relief can be granted." In re Moulton, 393 B.R. 752, 766 (Bankr. N.D. Ala. 2008). The burden of proof is on the movant to show the debtor's lack of equity in the property. In re George, 315 B.R. at 627. Here, Creditor had to establish that Debtors had no equity in the property and the Court finds that he failed to do so. Creditor did not definitively prove the amount of his claim as he failed to introduce a copy of the judgment on the promissory notes into

evidence[2]. In fact, Creditor did not present any documentary evidence to establish that he has a secured claim against Debtors' property. Creditor also failed to establish the current amount of funds in Eugene White's retirement account. As such, the Court cannot calculate an equity amount for purposes of section 362(d)(2).

According it is **ORDERED**:

Motion for Relief from Stay (Doc. 17) is **DENIED**.

DATED: this 3 day of September, 2014 in Jacksonville, Florida.

/s/_____
JERRY A. FUNK
United States Bankruptcy Judge

[2] At the hearing, Debtors introduced a copy of a Final Summary Judgment in favor of Creditor entered in Duval County Court for the Fourth Judicial Circuit in Florida against Defendants, Eugene White, et al (the "Judgment") into evidence. (Debtors' Ex. 2). The Judgment is inconclusive as to the basis of the money award in the amount of 19,022.50 to Creditor, but it stands to reason that this money award was entered in Creditor's action for a breach of Debtors' lease agreement. Creditor attached this Judgment to his unsecured Claim # 12 (Doc. 12-1). Creditor attached a different Final Summary Judgment issued by the Circuit Court for the Fourth Judicial Circuit in Florida to his alleged secured Claim #13 for $64,369.32, which apparently was obtained on the basis of a "Promissory Note." (Doc. 13-1). Creditor attached both promissory notes to Claim # 13. (Doc. 13-1). Creditor never asked the Court to take judicial notice of its record for purposes of establishing equity and the Court will not do so on its own motion to assist Creditor in making his case.