

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

C/A No. 01-07701-W

Clarence L. Kelly and Wanda B. Kelly,

**ENTERED**

**JUDGMENT**

Debtor.

SEP 20 2001

Chapter 13

K. E. P.

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Petition to Dismiss filed by the Chapter 13 Trustee is granted and this case is dismissed with prejudice to bar Debtors from filing for 180 days.



UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,  
September 20, 2001.

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DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

KIRK E. PORTH

Deputy Clerk

- K E Porth S

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Clarence L. Kelly and Wanda B. Kelly,

**FILED**  
O'clock & min. C/P No. 01-07701-W  
Debtor. SEP 20 2001  
BRENDA K. ARGOE, CLERK  
United States Bankruptcy Court  
Columbia, South Carolina (11)  
**ORDER**  
Chapter 13

**ENTERED**  
SEP 20 2001  
K. E. P.

THIS MATTER comes before the Court on a Petition to Dismiss the case with prejudice filed on August 23, 2001 by the Chapter 13 Trustee. In his Petition, the Trustee argues, among other things, that Clarence L. Kelly and Wanda B. Kelly ("Debtors") are not eligible to file this case pursuant to 11 U.S.C. §109(g)(2) because Debtors voluntarily dismissed a prior bankruptcy case after relief from the automatic stay had been requested in that prior case. Debtors filed an objection to the Petition and appeared with counsel to argue that it would be inequitable for the Court to dismiss this case pursuant to the Petition.

According to the record, Debtors filed a prior Chapter 13 case, Case No. 00-08081, on September 14, 2000 which was voluntarily dismissed on July 11, 2001 after relief from the automatic stay had been granted on March 9, 2001 to TMS Mortgage, Inc. d/b/a The Money Store, a secured creditor on Debtors' residence, located at 945 Deerfield Road, Timmonsville, South Carolina 29161. Debtors, through counsel, admit that the prior case was voluntarily dismissed and that this case was refiled for the purpose of reimposing an automatic stay and delaying any foreclosure or other collection action by this and other creditors. Debtors' counsel states it has been a common practice by the debtors bar in this District to voluntarily dismiss a bankruptcy case and refile another bankruptcy case in order to thwart relief from the stay granted

in the first case, at least, until this Court's recent decision in In re McAlister, 01-06647-W (Bankr. D.S.C. Aug. 13, 2001). In this matter, Debtors assert that it would be inequitable for this Court to dismiss Debtors' present case in that it was filed before the issuance of the McAlister opinion.<sup>1</sup>

The Court cannot accept Debtors' argument and finds Debtors ineligible to file this present bankruptcy case pursuant to §109(g)(2) and therefore dismisses the case with prejudice.

As stated in McAlister, in enacting §109(g)(2), which was preceded by §109(f), in 1984, Congress was attempting to protect creditors from some abusive practices associated with a debtor's multiple filings of bankruptcy cases. Most courts have held that a court must dismiss a bankruptcy case if the debtor "requested and obtained voluntary dismissal of the [prior] case following the filing of a request for relief from the automatic stay." McAlister at 5. Other courts have dismissed a bankruptcy case if the debtor's refiling was an effort to thwart a creditor's valid exercise of its rights after seeking relief from the automatic stay. Under either of these two main interpretations of §109(g)(2), Debtors' present case violates the statute; consequently, Debtors are ineligible to file or maintain this bankruptcy case. This Court lacks discretion to ignore the express language of §109(g)(2) and its application to this case.

Addressing specifically Debtors' equitable argument, the Court notes that Debtors had an opportunity to reorganize their financial affairs in their first Chapter 13 case. On December 5, 2000, Debtors entered into a Consent Order with the secured creditor on their residence which allowed Debtors a further opportunity to catch up their postpetition delinquencies in payments to that creditor as required by Debtors' Plan. Upon Debtors' failure to comply with this agreement,

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<sup>1</sup> In the present case, Debtors show the same mortgage on the same residence.

the secured creditor obtained relief from the automatic stay by Order entered March 13, 2001. The Order granting relief from stay is final, having not been reconsidered or appealed.

In summary, Debtors effectively prevented collection actions by their creditors from September 14, 2000 until July 11, 2001 and then refiled on July 26, 2001 which reimposed the automatic stay. Considering Debtors' admission that their refiling was for the purpose of again thwarting the secured creditor's foreclosure action, this Court believes equities lie against allowing this case to proceed.

Finally, Debtors appear to argue that they are "unfairly surprised" by this Court's enforcement of §109(g)(2) and its opinion in McAlister and request that the opinion only apply prospectively since its entry date of August 13, 2001. In essence, Debtors' counsel argues that this Court has not aggressively enforced §109(g)(2) in the past; therefore, it should not apply to Debtors' case. The Court disagrees with this argument. Initially, the Court notes that §109(g)(2) [preceded by §109(f)] was enacted in 1984 and has remained essentially unchanged. Its language is relatively clear and unambiguous, and its application is straight-forward. For example, Judge Davis noted that a debtor who filed her second case on February 8, 1985 was ineligible for bankruptcy relief under §109(f)(2) (now §109(g)(2)) when in her first case, the Court granted relief from stay on October 1, 1984 and the debtor voluntarily dismissed her case on December 19, 1984. See In re Carter, No. 85-0267, at 3 (Bankr. D.S.C. Mar. 20 1985)(JBD). Additionally, this Court has enforced §109(g) in In re McIver, a case affirmed on appeal to the U.S. District Court. See No. 85-0240, at 2 (Bankr. D.S.C. Apr. 25, 1985) aff'd 78 B.R. 439 (D.S.C. 1987) (dismissing a case with prejudice for 180 days for violation of §109(f)(1) [presently 109(g)(1)]). Cases have also been frequently dismissed for a lack of good faith as a result of multiple filings

which had the effect of thwarting collection efforts of creditors, including foreclosures by a secured creditor. In re Hartley, 187 B.R. 506, 508 (Bankr. D.S.C. July 24, 1995) (JW), In re Seabrook, 94-72044, at 15 (Bankr. D.S.C. Aug. 9, 1994)(WTB), In re Jarman, 91-01227, at 6 (Bankr. D.S.C. May 21, 1991)(WTB), In re McElveen, 78 B.R. 1005, 1008 (Bankr. D.S.C. Jan. 1, 1986)(JBD), and In re Pryor, 54 B.R. 679, 681 (Bankr. D.S.C. Sept. 10, 1985) (JBD).

The issue, as framed by Debtors, is whether, as a matter of equity, this Court should enforce a clear and unambiguous statute that was in place and known to counsel at the time of Debtors' decision to voluntarily dismiss and refile this case for the express purpose of thwarting a creditor who received relief from the stay. Whether or not creditors appear to complain, the Trustee has requested dismissal and the Court must apply the statute regarding eligibility. Moreover, equity not only does not favor Debtors under the circumstances of this case, but it also does not provide an exception to the statute.<sup>2</sup>

For reasons stated, the Court grants Trustee's petition to dismiss and dismisses the case with prejudice to bar refiling by Debtors for a period of 180 days.

**AND IT IS SO ORDERED.**

  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,  
September 20, 2001.

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<sup>2</sup> As a further practical matter, this Court observes that the practice by debtors bar of routinely refiling a Chapter 13 case after dismissal of a debtor's prior case has caused a strain on the resources of the Court and its Trustees.

**CERTIFICATE OF MAILING**

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DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

**KIRK E. PORTH**

Deputy Clerk

- All Parties