

**ENTERED**

SEP 26 2003

**K.R.W.**

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

**FILED**  
at                                            
SEP 26 2003

BRENDA K. ARCOE, CLERK  
United States Bankruptcy Court  
Columbia, South Carolina 29201

IN RE:

Roy E. Brown,

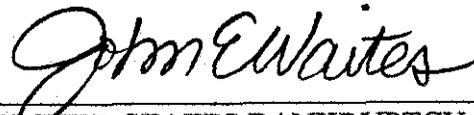
Debtor.

No. 03-07515-W

**JUDGMENT**

Chapter 13

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, Debtor's case is dismissed with prejudice for 180 days.



UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,

September 26, 2003.

**ENTERED**

SEP 26 2003

**K.R.W.**

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

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United States Bankruptcy Court  
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IN RE:

Roy E. Brown,

Debtor.

No. 03-07515-W

**ORDER**

Chapter 13

THIS MATTER comes before the Court upon the Chapter 13 Trustee's ("Trustee") Petition to Dismiss Chapter 13 Case with Prejudice ("Petition"). Based upon the pleadings presented to the Court and the arguments presented by Roy E. Brown ("Debtor"), the Trustee, and Wilshire Credit Corporation ("Wilshire"), the Court makes the following findings of fact and conclusions of law.

**FINDINGS OF FACT<sup>1</sup>**

Debtor owns real property located at 150 Breezyhill Road, Graniteville, South Carolina 29829 and has filed two Chapter 13 Bankruptcy cases prior to filing the current Chapter 13 case that is now before the Court. Debtor filed his first Chapter 13 Petition on March 15, 2000. On September 11, 2000, TMS Mortgage, Inc., ("TMS"), the entity that originated Debtor's loan that Wilshire currently services, filed a Motion for Relief from Stay. Thereafter, on October 13, 2000, Debtor entered into a settlement order with TMS to cure a post-petition arrearage. On February 16, 2001, Judge Bishop dismissed Debtor's first case upon the Trustee's Motion to Dismiss for Non-compliance because Debtor failed to fulfill his obligations pursuant to an agreement with the Trustee.

A year after filing his first Bankruptcy Petition, Debtor filed a second Chapter 13 Petition on March 15, 2001. On February 5, 2002, Residential Funding Corporation ("RFC"), Wilshire's

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<sup>1</sup> The Court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, these are adopted as such, and, to the extent any of the following Conclusions of Law constitute Findings of Fact, they are also so adopted.

immediate predecessor in interest to Debtor's loan, filed a Motion for Relief from Stay. On February 27, 2002, Debtor entered into a settlement order with RFC to cure a post-petition arrearage. On April 15, 2002, RFC obtained relief from the automatic stay because Debtor defaulted on the February 27, 2002 settlement order. For a second time, Debtor failed to fulfill his obligations pursuant to an agreement with the Trustee; thereby prompting the Trustee to file a Motion to Dismiss with Prejudice for Non-Compliance. An Order dismissing Debtor's second case with prejudice was entered on September 5, 2002 and barred Debtor from filing a bankruptcy petition for the 180 days following September 5, 2002. Thereafter, Wilshire prepared to initiate a foreclosure action in state court by filing a Lis Pendens and performing a title search.

After Debtor defaulted under a forbearance agreement with Wilshire and in order to prevent the imminent foreclosure action, Debtor filed a third Chapter 13 Petition on June 19, 2003. At the time Debtor filed his third Chapter 13 Bankruptcy, Debtor had only two debts, the home loan serviced by Wilshire and a tax assessment. After filing, Debtor paid his July 2003 payment to Wilshire. On July 8, 2003, the Trustee filed his Petition to dismiss Debtor's third case with prejudice. The Trustee asserts that Debtor's third case should be dismissed with prejudice because (1) Debtor has had a previous Chapter 13 case dismissed within the preceding year, (2) Debtor is unable to show a change in circumstances that would justify a refiling under Chapter 13, and (3) Debtor's third filing represents a "bad faith" filing and constitutes an unreasonable delay that is prejudicial to creditors. Trustee has also noted that Debtor's primary debt, his mortgage, has a payment arrearage that has grown from approximately \$3,000 to over \$12,000.

In response to the Trustee's Petition, Debtor asserts that it should be determined that he filed his third bankruptcy case in good faith since he filed his third bankruptcy following the expiration

of the 180 day period following the dismissal of his second bankruptcy. Debtor also states that he has experienced a change in circumstance since his second bankruptcy filing because he now earns consistent cash flows through the operation of his dry walling business. Furthermore, Debtor apparently asserts that his reorganization is feasible since his only other debt is a tax assessment from the United States.

Following the filing of the Trustee's Petition, Wilshire decided to hold Debtor's August 2003 payment pending the outcome of the Trustee's Petition. Wilshire also filed a Response to the Trustee's Petition ("Response"). In the Response, Wilshire stated that it has a secured claim on Debtor's residence through a first mortgage lien on Debtor's real property. Wilshire also noted that Debtor is contractually due for the September 1, 2001 payment and all subsequent monthly payments. Furthermore, Wilshire stated that Debtor owes a pre-petition debt amount of approximately \$12,352.49 and holds no equity in his real property. In Wilshire's view, Debtor's third bankruptcy filing inhibits the legal processes that protect Wilshire's interest in Debtor's real property and has led Wilshire to suffer irreparable harm and injury. Therefore, in light of these two concerns, Wilshire asks the Court to dismiss Debtor's case with prejudice for a sufficient period of time to allow it to foreclose on Debtor's property.

#### CONCLUSIONS OF LAW

11 U.S.C. § 1307(c)<sup>2</sup> provides for dismissal of a Chapter 13 case or conversion of the case to Chapter 7, for cause, including but not limited to, the reasons listed in § 1307(c)(1)-(8). The Bankruptcy Court has the inherent power under § 1307 to dismiss a case filed under Chapter 13. See In re White, 72 B.R. 169, 170 (Bankr. D.S.C. 1986). Furthermore, the list of factors that support

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<sup>2</sup> Further references to the Bankruptcy Code will be by section number only.

dismissal of a Chapter 13 case for cause, as set forth in § 1307(c), is not exhaustive; and thus, the Court has the authority to dismiss a case for cause when a debtor files a Chapter 13 petition for relief in bad faith. In re Hartley, 187 B.R. 506 (Bankr. D.S.C. 1995); In re Seabrook, C/A No. 94-72044, slip op. at 4 (Bankr. D.S.C. Aug. 8, 1994); In re Black, C/A No. 91-03845, slip op. at 2 (Bankr. D.S.C. Oct. 3, 1991); In re Pryor, 54 B.R. 679, 680 (Bankr. D.S.C. 1985). To determine whether Debtor's third filing is filed in good faith, this Court will examine the following factors:<sup>3</sup> (A) Debtor's past bankruptcy filings, which includes a determination of whether Debtor experienced a change in circumstances warranting a third filing; (B) the period of time that elapsed between Debtor's second and third filing; (C) Debtor's pre-petition behavior, In re Marret, C/A No. 96-75003-W, 1996 WL 33340790, at \*\*8-10 (Bankr. D.S.C. Nov. 13, 1996); and (D) the effect of Debtor's repeated filings on creditors. See In re Seabrook, slip op. at 11.

A.

When determining whether Debtor's case is filed in good faith, a relevant factor to be considered is the debtor's past bankruptcy filings. In resolving whether the refiling of a Chapter 13 case, after a previous case has been dismissed, constitutes bad faith and cause for dismissal of the refiled case, courts should be mindful of § 109(f)(1) and (2), but remember that there is no statutory prohibition against repetitive filings. In re Pryor, 54 B.R. at 681 (citing Johnson v. Vanguard Holding Corp. (In re Johnson), 708 F.2d 865, 868 (2nd Cir. 1983)). When examining a debtor's past filings, the Court requires a debtor to demonstrate that he experienced a "bona fide change in circumstances" in order to justify another filing. In re Marret, C/A No. 96-75003-W 1996 WL

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<sup>3</sup> The Court recognizes that the analysis of a debtor's case for bad faith is normally a question of the unique facts presented in each case. Therefore, the factors examined here are not intended to be at the exclusion of any others not discussed in this Order.

33340790, at \*8; In re Pryor, 54 B.R. at 681 (quoting and applying In re Johnson, 708 F.2d at 868). Furthermore, a debtor bears the burden to prove by detailed testimony and convincing evidence an entitlement to a second or third opportunity for relief under the Bankruptcy Code. In re Hartley, 187 B.R. at 507; In re Heath, C/A No. 95-72915, slip op. at 4 (Bankr. D.S.C. Oct. 4, 1995); In re Black, slip op. at 2; In re Pryor, 54 B.R. at 681. See also In re White, 72 B.R. at 170.

Debtor asserts that he experienced a change in circumstances that warrants a good faith filing of his third bankruptcy because his business is currently generating profits that enable the Debtor to meet payment obligations. Applying the evidentiary standard expressed in Hartley, the Court finds that Debtor's new assertion is not enough to persuade this Court to find that Debtor experienced a change in circumstances between the dismissal of his second case and the filing of the third case because Debtor simply claims that the same business he operated during his earlier bankruptcy filings is now profitable. Without more detailed testimony and convincing evidence, Debtor has failed to demonstrate that he experienced a sufficient change in circumstances to indicate that the third case is more likely to succeed than his first and second cases. See In re Crawford, C/A No. 02-07791-W, slip op. at 4 (Bankr. D.S.C. Sept. 5, 2002) (stating "[t]o justify a refiling of a case so soon after the dismissal of a prior similar case, debtors have the burden of showing a change in circumstances.").

B.

Another aspect to be considered is the period of time that elapsed between Debtor's second and third filing. Debtor argues that waiting the 180 day period mandated by the Court Order dismissing Debtor's second bankruptcy case with prejudice translates into good faith in filing his third bankruptcy. However, this Court finds that the mere fact that Debtor waited 180 days before

filing his third bankruptcy case (as he was required to do) does not insulate him from an allegation of bad faith in this current case. In re Seabrook, slip op. at 9. Despite the passage of several months between the dismissal of Debtor's second case and the filing of his third case, the clear connection between all three filings is Debtor's efforts to delay and prevent foreclosure by his mortgage creditors that he has not timely paid. In light of these facts, the Court finds that Debtor's third bankruptcy filing is in bad faith. Between the second and third cases, Wilshire apparently delayed foreclosure pursuant to a forbearance agreement on which Debtor eventually defaulted. Debtor should not be allowed to use the passage of time under that forbearance period as a justification for his third filing. To do so would discourage mortgage creditors from offering forbearance agreements that should be promoted. See In re Brown, C/A No. 03-08534, slip op. at 5 (Bankr. D.S.C. Sept. 19, 2003); In re Cheeks 167 B.R. 817, 818 (Bankr. D.S.C. 1994).

C.

Debtor's pre-petition behavior is another factor to be examined. In re Marret, 1996 WL 33340790 at \*9; In re Seabrook, slip op. at 10 (considering debtor's pre-filing conduct when determining whether a case is filed in bad faith). Debtor has twice filed for Chapter 13 bankruptcy before filing his current case. In each of the two earlier cases, Debtor has frustrated the terms of an agreement with the Trustee by missing required payment obligations. In his two earlier cases, Debtor also failed to meet the terms of settlement agreements reached with his primary mortgage creditors in order to become current with payments in arrears. Furthermore, Debtor's payment arrearage increased from approximately \$3,000 to over \$12,000. Finally, Debtor filed his third case on the eve of Wilshire's imminent foreclosure action. This Court has previously dismissed cases for 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. See In re Simons, C/A No. 01-07246, slip op. at 3 (Bankr. D.S.C. Sept. 20, 2001); In re Kelly, C/A No. 01-07701-W, slip op. at 3 (Bankr. D.S.C. Sept. 20, 2001); In re Seabrook, slip op. at 11; In re Black, slip op. at 5. Therefore, this factor also weighs in favor of dismissing Debtor's third case.

D.

Another factor this Court will examine is the effect of Debtor's third filing on creditors. See In re Seabrook, slip op. at 11. Debtor currently has only one creditor other than Wilshire.<sup>4</sup> Debtor has repeatedly filed for bankruptcy to frustrate the legitimate attempts of his primary creditors, which took an interest in Debtor's mortgage, to collect on the mortgage debt.<sup>5</sup> Thus, the presence of only a few creditors coupled with Debtor's repetitive filings to block his primary mortgage creditor leads this Court to believe that Debtor filed this third case in bad faith. See In re Seabrook, slip op. at 12 (citing In re Jahnke, 146 B.R. 830, 833 (Bankr. E.D. Cal. 1992) and In re Jarman, C/A No. 91-01227, slip op. (Bankr. D.S.C. May 21, 1991)); In re Black, slip op. at 5

CONCLUSION

Therefore, in light of this Court's existing precedent and factors examined in Debtor's case, the Court finds that Debtor filed his third bankruptcy in bad faith and that cause exists to dismiss the case. It is therefore

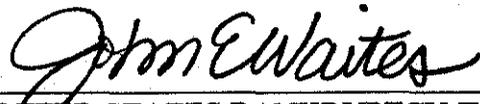
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<sup>4</sup> Debtor stated that the only other debt he owes is tax assessment.

<sup>5</sup> The Court notes that the interest in Debtor's mortgage has passed from TMS to RFC to Wilshire. Since each entity was a successor in interest to Debtor's original mortgage, the successors are treated as creditors who were collectively frustrated by Debtor's serial filings.

**ORDERED** that Debtor's Chapter 13 case be dismissed with prejudice for a period of 180 days following the entry of this Order.

**AND IT IS SO ORDERED.**

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UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,  
September 26, 2003.