

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

**FILED**  
at \_\_\_ O'clock & \_\_\_ min. \_\_\_ M

SEP 16 2009

United States Bankruptcy Court  
Columbia, South Carolina (6)

IN RE:

C/A No. 09-05732-JW

Sonya M. Fraiser,

Chapter 13

Debtor(s).

**ORDER**

This matter comes before the Court upon a Motion to Extend the Automatic Stay ("Motion"), filed by Sonya M. Fraiser ("Debtor"). William K. Stephenson, Jr., Chapter 13 Trustee ("Trustee"), filed a response to the Motion.

Debtor filed this chapter 13 bankruptcy case on August 3, 2009, *pro se*. The Motion was filed on August 24, 2009, after Debtor obtained counsel. Although Debtor's Motion is untimely under this Court's local rules, the Court is considering the Motion pursuant to Debtor's request for an expedited hearing on the Motion.

Debtor has filed three bankruptcy cases within the past three years. Debtor filed a chapter 13 bankruptcy case, Case Number 06-71571, on October 23, 2006 in the U.S. Bankruptcy Court for the Eastern District of Virginia ("Virginia Bankruptcy Court"). This case was dismissed on February 8, 2008 after Debtor failed to comply with an order settling the chapter 13 trustee's petition to dismiss for nonpayment. On May 2, 2008, Debtor filed another chapter 13 bankruptcy case, Case Number 08-71463, in the Virginia Bankruptcy Court. On April 24, 2009, the Virginia Bankruptcy Court entered an order granting a motion for relief from stay filed by Walter Mortgage Servicing, Inc., Debtor's mortgage creditor. On April 28, 2009, the Virginia Bankruptcy Court entered an order dismissing Case Number 08-71463 on Debtor's motion ("Dismissal Order"). The

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Dismissal Order provided that “this Chapter 13 Bankruptcy Case is dismissed without prejudice.”

Since Debtor’s previous case (Case Number 08-71463) was pending within a one year period preceding the filing of this case, the automatic stay was scheduled to terminate on the thirtieth day after Debtor filed this case pursuant to 11 U.S.C. § 362(c)(3)(A). The Court has entered two interim orders extending the stay on a temporary basis and the stay is now scheduled to expire on September 17, 2009. In order to obtain a further extension of the stay, Debtor must demonstrate that the filing of this case was in good faith as to the creditors to be stayed. 11 U.S.C. § 362(c)(3)(B).

The Trustee objects to the Motion on the basis that Debtor is not entitled to be a debtor under 11 U.S.C. § 109(g),<sup>1</sup> which provides that “no individual ... may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if ... the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.” The Trustee asserts that § 109(g) applies because Debtor voluntarily dismissed her previous case after her mortgage creditor obtained stay relief and 180 days had not passed since the dismissal of the previous case when this case was filed. Debtor asserts that this provision does not prohibit the filing of this case because the Virginia Bankruptcy Court’s Dismissal Order stated that her prior case was “dismissed without prejudice.”

Under the Bankruptcy Code, the general rule is that the dismissal of a case is without prejudice. In re Tomlin, 105 F.3d 933, 937 (4th Cir. 1997). Section 349(a) provides for dismissal without prejudice “unless the court, for cause, orders otherwise”

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<sup>1</sup> The Trustee has filed a motion to dismiss Debtor’s case on this ground, which is pending.

and “except as provided in section 109(g).” The Court has reviewed the Virginia Bankruptcy Court’s Dismissal Order and finds no indication that the Virginia Bankruptcy Court considered § 109(g)(2) in making its ruling or that it intended its Dismissal Order to preclude the application of § 109(g)(2). This Court has previously found the application of § 109(g)(2) to be mandatory with four exceptions that are not applicable here.<sup>2</sup> In re Allen, C/A No. 03-08067-JW, slip op. (Bankr. D.S.C. Aug. 29, 2003). Without evidence that the Virginia Bankruptcy Court intended its Dismissal Order to negate the effect of § 109(g), the Court concludes that § 109(g)(2) applies to make Debtor ineligible to file this case.

Since the dismissal of the case is not an issue presently before the Court, the Court must determine the effect of the application of § 109(g)(2) on the determination of Debtor’s motion to extend the automatic stay. It appears that the application of § 109(g)(2) to this case is a factor that is appropriately considered by the Court in its determination of whether this case was filed in good faith for purposes of deciding the Motion. To determine whether a bankruptcy case has been filed in good faith, the Court examines the totality of the circumstances, including: (1) the debtor’s past bankruptcy filings, which includes a determination of whether the debtor has experienced a change in circumstances warranting another filing, (2) the period of time that has elapsed between the debtor’s filings, (3) the debtor’s pre-petition behavior, (4) the effect of the debtor’s repeated filings on creditors, (5) the percentage of proposed repayment to creditors through the debtor’s chapter 13 plan, (6) the debtor’s financial situation, (7) debtor’s

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<sup>2</sup> Exceptions to the mandatory application of § 109(g) include (1) when the prior § 362 motion was denied, (2) when the prior § 362 motion was dismissed, (3) when the prior § 362 motion was withdrawn, or (4) when relief from the stay was granted and a liquidation of the collateral was completed before any subsequent refiling. See In re Ragin, C/A No. 01-11256-B, slip op. at 2 (Bankr. D.S.C. Feb. 4, 2002).

honesty in representing facts, (8) whether the debts would be dischargeable in a chapter 7 proceeding; and (9) any other unusual or exceptional problems the debtor faces. See In re Goodwin, C/A No. 05-45110-JW, slip op. (Bankr. D.S.C. Dec. 19, 2005).

Based on the totality of the circumstances, the Court is unable to determine that this case was filed in good faith. Debtor's serial filings appear to be an effort to thwart her mortgage creditor from foreclosing the mortgage on real property she owns in Sumter County, South Carolina.<sup>3</sup> This is precisely what § 109(g) is designed to prevent<sup>4</sup> and its application in this case weighs heavily in favor of a finding that the case was filed not in good faith. For the foregoing reasons, it is hereby

ORDERED that Debtor's Motion to Extend the Automatic Stay is denied. The automatic stay shall terminate on September 17, 2009 in accordance with the Court's prior order.

**AND IT IS SO ORDERED.**

  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina  
September 16, 2009

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<sup>3</sup> It appears that Debtor is a Virginia resident. Debtor's counsel advised the Court that the Sumter County property is inhabited by Debtor's sister.

<sup>4</sup> Section 109(g) was enacted to prevent debtors from using serial filings as a method of frustrating creditor's efforts to recover what is owed to them. Moran v. Frisard (In re Ulmer), 19 F.3d 234 (5th Cir. 1994).