UNITED STATES BANKRUPTCY 0COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No 0-6647-W
Jimmy Lee McAlister	**JUDGMENT**
Debtor.	Chapter 13

Based upon the Findings of Fact and Conclusions of Law as rec ted in the attached Order of the Court, this case should be dismissed with prejudice to bar a refiling under Chapter 13 of the Bankruptcy Code for a period of 180 days.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
August 13, 2001.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 0-6647-W
Jimmy Lee McAlister	ORDER
Debtor.	Chapter 13

THIS MATTER comes before the Court upon the Rule To Show Cause entered by the Court on July 13, 2001. The Court issued the Rule To Show Cause due to Jimmy Lee McAlister's ("Debtor") failure to comply timely with the Local Rules by filing the required Schedules, Statement of Affairs, and Chapter 13 Plan. After considering the arguments of counsel at the hearing on the Rule to Show Cause and taking into consideration Debtor's previous filing; the Court makes the following Findings of Fact and Conclusions of Law:[1]

FINDINGS OF FACT

1. Debtor first filed for relief under Chapter 13 of the Bankruptcy Code on October 8, 1999 (Case No. 99-08672).

2. A Notice, Chapter 13 Plan and Related Motions were filed with the Court on October 22, 1999 and amended on December 14, 1999. The Plan provided for a 3% payment to the general unsecured creditors on a pro-rata basis. Furthermore, it proposed to pay the mortgage arrearage to Long Beach Mortgage Company at $72.00 or more per month for 60 months, along with 10% interest, with regular payments to resume in November 1999.

[1] The Court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

9

3. An Order Confirming Plan and Resolving Motions was entered on May 22, 2000.

4. On June 14, 2000, Long Beach Mortgage Company filed a Motion for Modification of the Automatic Stay (the "Motion") pursuant to 11 U.S.C. §362[2] on the ground that Debtor had continuously and purposely failed to make the regular mortgage payments since the filing of the bankruptcy petition.

5. A hearing on the Motion was heard before the Court on June 23, 2000, at which time neither Movant nor its counsel appeared to argue the Motion. Therefore, due to Movant's failure to appear to prosecute its request for relief from the automatic stay and opposing counsel's request to deny the Motion for lack of prosecution, the Court entered an Order on June 28, 2000 denying the Motion.

6. On August 31, 2001, Movant filed a Motion for Relief From Order.[3] At the hearing on the latter Motion, the parties reached an agreement and a Consent Order on Motion for Relief From Stay and Regarding Relief From the Automatic Stay was entered on September 26, 2000 whereby the Order denying the Motion was set aside and the terms of an agreement of the parties resolving the Motion for Relief from Stay were set forth in writing.

7. Debtor again defaulted on his mortgage payments and failed to abide by the terms agreed to in the Consent Order entered into on September 26, 2000. As a result, on November 13, 2000, Movant's counsel filed an Affidavit of Default with the Court and an Order modifying the

---

[2] Further references to the Bankruptcy Code will be by section number only.

[3] In the Motion for Relief From Order, Movant's counsel explained that he had sent to the Court an Affidavit of Default and Order granting the relief requested, but, contrary to Local Rule 4001-1(e), said documents were filed in Columbia, South Carolina on the morning of the hearing held in Spartanburg, South Carolina on June 23, 2000, approximately 30 minutes before but too late to be processed prior to the scheduled hearing.

automatic stay was entered on November 20, 2000.

8. On June 27, 2001, Debtor filed a voluntary Motion to Dismiss Case, pursuant to §1307(b), and case number 99-08672 was dismissed on July 3, 2001.

9. On the same day that Debtor filed the voluntary Motion to Dismiss Case, he also filed the present bankruptcy petition under Chapter 13.

10. On June 27, 2001, Debtor and his attorney were served by the Clerk's Office with a Notice of Filings Due which specified that the Statement of Financial Affairs, Debtor's Schedules and the Chapter 13 Plan had to be filed no later than July 12, 2001, or the case could be dismissed without further notice, pursuant to Local Rule 1007-2.

11. Debtor failed to file said documents on or before July 12, 2001; therefore, the Court issued the Rule to Show Cause requiring Debtor and his attorney to appear before the Court to show cause why the case should not be dismissed with prejudice due to Debtor's failure to comply with Local Rule 1007-2[4] and due to his previous filing and voluntary dismissal of case number 99-08672.

12. On the day the Rule to Show Cause was issued, Debtor filed his Schedules along with a Statement of Financial Affairs and a Notice, Chapter 13 Plan and Related Motions. The Plan provided that general unsecured creditors would be paid 1% of their allowed claims and further provided for payments for a term of 57 months, of $239.00 or more per month with 10% interest

---

[4] Local Rule 1007-2(a) provides:

> **Dismissal of Case on Failure to File.** Unless otherwise provided by this local rule, the court will enter an order dismissing a voluntary case upon the certification by the clerk that the debtor has failed to file lists, schedules and statements' within the time limits established by Fed. R. Bankr. P. 1007(e) or within the period of any extension of time granted pursuant to this local rule.

on the mortgage arrearage to Long Beach Mortgage Company, which has significantly increased since the first filing.

13. At the hearing on the Rule To Show Cause, Debtor's counsel explained that the sole purpose of voluntarily dismissing the previous Chapter 13 Case and to immediately refile for relief under the same chapter of the Bankruptcy Code was to again stop the foreclosure on Debtor's residence by Long Beach Mortgage Company.

CONCLUSIONS OF LAW

The main issue before the Court in this case is whether Debtor is entitled to the protections granted by the Bankruptcy Code or whether the filing of the present case on the same day on which he voluntarily dismissed the previous Chapter 13 case is barred pursuant to the provisions of §109(g)(2).

Section 109(g)(2), which was preceded by §109(f), was enacted in 1984 in an attempt to grant bankruptcy courts more control over abusive multiple filings. The section provides in pertinent part:

> (g) Notwithstanding any other provision of this section, no individual or family farmer 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--
>
> (1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or
>
> (2) 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.

In enacting this section of the Bankruptcy Code, Congress was attempting to protect creditors from some abusive practices instigated by debtors through multiple filings. More specifically,

> [S]ection 109(g) prevents certain tactics on the debtor's part that could be deemed abusive . . . The debtor who obtains dismissal of the case when faced with a motion for relief from the section 362 automatic stay may not immediately refile and thereby frustrate creditors' attempts at having their rights adjudicated within a reasonable period of time.

Tooke v. Sunshine Trust Mortgage Trust (In re Tooke), 149 B.R. 687, 690 (M.D. Fla. 1992) (quoting 2 Collier on Bankruptcy, §109.32 (15th ed. 1991)); see also Kinbrough v. Bass, 1996 WL 908942, *2 (W.D. Tenn. 1996) (quoting In re Ulmer, 19 F.3d 234 (5th Cir. 1994)) ("In enacting §109(g)(2), Congress intended 'to prevent debtors from frustrating creditors' attempts to recover funds owed to them' by prohibiting debtors from engaging in a series of filings and voluntary dismissals, thereby continuously invoking the automatic stay of the bankruptcy code.").

Despite the straightforward language of the statute, jurisdictions have applied different interpretations to §109(g)(2). Most courts have applied the plain and unambiguous meaning to the section and have held that a court must dismiss a bankruptcy petition if the debtor was a debtor in another bankruptcy case within the preceding 180 days and the debtor "requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay." Courts viewing the language of §109(g)(2) as mandatory have noted that:

> [T]here is no basis, either in the text itself or in the legislative history, for requiring that the creditor establish a causal connection between the request for relief and the voluntary dismissal. Instead, the statute specifically states that no individual can be a debtor if within the preceding 180 days that individual requested and received a voluntary dismissal of the first case following the filing of a request for relief from the automatic stay. If these preconditions are met, then the debtor is barred from filing the second petition until the lapse of the 180 day period, and the Bankruptcy Court is prohibited from accepting the petition for filing.

Chrysler Fin. Corp. v. Dickerson (In re Dickerson), 209 B.R. 703, 706 (W.D. Tenn. 1997); see also Andersson v. Security Fed. Savings & Loan (In re Andersson), 209 B.R. 76, 78 (B.A.P. 6th Cir. 1997) (quoting Connecticut Nat'l; Bank v. Germain, 503 U.S. 249, 253-54 (1992)) ("As the United States Supreme Court has instructed courts in examining the provisions of the Bankruptcy Code, '[w]e have stated time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'"); In re Munkwitz, 235 B.R. 766, 768-69 (E.D. Pa. 1999) ("The cases that hold application of §109(g)(2) to be mandatory are persuasive. As a matter of statutory interpretation, legislated law, whenever practicable and plausible, should be read and applied literally. . . . Though this approach may be over-inclusive--covering abuses that Congress was trying to prevent as well as cases where no abuse is evident--a blanket rule to curb potential abuse of the Bankruptcy Code is sensible."); Kimbrough v. Bass, 1996 WL 908942, *2 (W.D. Tenn. 1996) ("The wording of §109(g)(2) is mandatory--if a motion for relief from stay was filed prior to the voluntary dismissal, the debtor cannot refile any bankruptcy petition for 180 days."); In re Richardson, 217 B.R. 479, 493 (Bankr. M.D. Lo. 1998) ("[I]t seems completely rational to believe that Congress intended the statute to be applied as written, so that debtors would know the consequences of dismissal after a motion for relief from stay, and would avoid effectuating it voluntarily unless the benefits outweighed the downside. . . While some may believe that §109(f)(2) leads to unjust results, the fact remains that it is entirely within the power of Congress to decide who will be a debtor, and under what conditions. It is not within the power of the bankruptcy courts, themselves creatures of Congressional act, to question the wisdom of a Congressional act that determines who may be a debtor in bankruptcy, through the conjuring maneuver or decrying, as absurd, consequences which are (to some) *felt* to be unfortunate.").

The second interpretation, known as the "causal approach" to §109(g)(2), views the section as discretionary and rather looks for a causal relationship between the debtor's voluntary motion to dismiss the case and the motion for relief from the stay. These cases focus on Congress' intent in enacting the statute which was aimed "to address the situation in which the debtor files a bankruptcy case to stay a foreclosure, and when the creditor seeks relief from the automatic stay, the case is then voluntarily dismissed by the debtor." In re Sole, 233 B.R. 347, 349 (Bankr. E.D. Va. 1998). In other words, the court focuses on the circumstances that surround a creditor's motion for relief from the automatic stay and a debtor's subsequent motion to dismiss the bankruptcy petition.

> If the examination reveals that the debtor was acting in response to the motion for relief from stay, then the debtor is barred by the terms of Section 109(g)(2) from being a debtor under Title 11 for 180 days. If, on the other hand, the examination reveals some other reason for the debtor's motion to dismiss, apart from an effort to thwart a creditor's valid exercise of its rights, then the Court should deny the creditor's motion to dismiss.

Id. at 350; see also Tooker v. Sunshine Trust Mortgage Trust (In re Tooke), 149 B.R. 687, 692 (M.D. Fla. 1992) (commenting that following a strict, technical application of §109(g)(2) would "'fly in the face of Congressional intent to dismiss cases which do not fit these circumscribed situations on the basis of a distinct multiple-filing scenario.'"); In re Copeman, 161 B.R. 821, 824 (Bankr. E.D. Mo. 1993). In determining whether sufficient causal connection exists to invoke the prohibitory period set forth in §109(g)(2), courts consider various factors such as "evidence of an intent to forestall the creditor seeking dismissal, the existence of prior request for relief by the petitioning creditor, and any prejudicial effect of the prior dismissal." In re Copeman, 161

B.R. at 823 (citing In re Santana, 110 B.R. 819 (Bankr. W.D. Mich. 1990)).[5]

---

[5] Other cases have also diverged from the two main interpretations of §109(g)(2) and have applied different approaches to the section. For example, some courts have applied an equitable approach by considering the equities of the situation, thus avoiding results that would lead to absurd, inequitable, or unfair results. See, e.g. Home Savings of America v. Luna (In re Luna), 122 B.R. 575 (B.A.P. 9th Cir. 1991). In In re Luna, the debtor filed a petition under Chapter 13 of the Bankruptcy Code. Following the court's granting of Home Savings request for relief from the automatic stay, the debtor filed a motion to voluntarily dismiss the pending Chapter 13 case. Thereafter, the debtor filed a second Chapter 13 petition. Despite having actual knowledge of the filing of the second petition, Home Savings authorized its agent to proceed with the foreclosure sale. The debtor filed an objection to the scheduled foreclosure sale on the basis that the sale would violate the automatic stay imposed by the second petition; however, Home Savings responded by filing a motion to dismiss on the ground that the debtor's second filing was in violation of §109(g)(2). In considering the equities of the situation, the court held that it would adopt a discretionary approach yet declined to dismiss the debtor's second bankruptcy petition noting:

> We decline to follow the line of authority which requires mandatory application of section 109(g)(2). Mechanical application of section 109(g)(2) would reward Home Savings for acting in bad faith and punish Luna for acting in good faith. Accordingly, because "[l]egislative enactments should never be construed as establishing statutory schemes that are illogical, unjust, or capricious", we conclude that the bankruptcy court properly declined to apply section 109(g)(2) to Luna's second bankruptcy petition.

Id. at 577; see also In re Santana, 110 B.R. 819 (Bankr. W.D. Mich. 1990).

Other interpretations of §109(g) focus on the term "following" and have attached different meanings to that word.

> [M]ost courts, regardless of result, assume without discussion that "following" means "after." Some courts have interpreted the word to mean "because of" and have thus read the statute to require a causal connection between the motion for relief and the motion for dismissal. Finally, according to [other] cases . . ., the statute should be read in such a manner that a motion for voluntary dismissal will be deemed to "follow" a motion for relief from stay only if the motion for relief from that is still pending at the time the motion for dismissal is filed.

In re Richardson, 217 B.R. 479, 483 (Bankr. M.D. Lo. 1998).

Regardless of whether the mandatory or the discretionary approach to §109(g)(2) is applied, the 180 days prohibition period begins to run from the date that the first petition is finally dismissed.[6] As the court noted in In re Roland:

> Although section 109(g)(2), by its terms, bars a debtor from filing a successive petition within 180 days of the voluntary dismissal of a prior case in which a creditor moved for relief from the automatic stay, courts have applied the section to bar debtors from filing bankruptcy for 180 days from the date on which a filing barred by section 109(g)(2) is finally dismissed. A failure to apply the 180 day period from the date of the final dismissal of the improperly filed successive bankruptcy case would defeat the purpose of the 180 day period because it frequently takes longer than 180 days for the process of dismissing the improperly filed case to occur.

In re Roland, 224 B.R. 401, 404 (Bankr. E.D. Mo. 1997) (quoting In re Dickerson, 209 B.R. 703, 708 (D. Tenn. 1997).[7]

---

[6] From the arguments of Debtor's counsel, it may be implied that, in considering the 180-days prohibition period for refiling a bankruptcy case, Debtor may have begun the 6-month-count from the date of the relief from the automatic stay. The Court does not accept such interpretation of §109(g)(2) and rather views the section as clearly providing that the count begins to run from the time the dismissal is granted.

[7] Furthermore, in McIver v. Phillips (In re McIver), 78 B.R. 439, 442 (D.S.C. 1987), the court noted that a debtor would also be precluded from refiling for 180 days from the date of the entry of the order dismissing the second proceeding, rather than for 180 days from the date of the order dismissing the first bankruptcy petition. As the court noted in dismissing the second petition for an additional 180 days:

> The purpose of section 109(f)(1) [presently 109(g)(1)] is to prevent the refiling of reimposition of stays and controls under Title 11 where the prior performance of the debtor was willfully inconsistent with his responsibilities to the bankruptcy court. Although [debtor] was not a legitimate debtor under the Bankruptcy Code because of section 109(f)(1), he was still able to enjoy the automatic stay provision and delay a foreclosure sale until the dismissal of his second case. It would be inappropriate to allow [debtor] to benefit any further from his second filing by ignoring the time he gained before its dismissal. Accordingly, we affirm the order of the bankruptcy court dismissing appellant's

The facts of the case presently before the Court are very similar to the factual presentation in In re Roland. In that case, the debtors had filed a voluntary petition under Chapter 13 on April 25, 1995. The debtors' mortgage company, United Companies Lending Corporation, objected to the debtors' plan and moved for relief from the automatic stay. On April 17, 1996, Debtors and the mortgagee entered into a consent order whereby they agreed to a schedule through which the debtor could catch up their mortgage arrearage. The consent order further provided that upon the debtors' failure to make any of the required mortgage payments as required by their agreement, the mortgagee would file for relief from the automatic stay. Due to the debtor's failure to abide by the agreed upon terms of the consent order, United Companies Lending Corporation's motion for relief from the automatic stay was granted on March 6, 1997. Four days later, on March 10, 1997, the debtors filed a voluntary motion to dismiss the Chapter 13 petition, which was granted on March 13, 1997. On the same day that they filed the motion to dismiss, the debtors also commenced the second Chapter 13 case. The court acknowledged the two interpretations of §109(g)(2) followed by different jurisdictions and concluded that, regardless of which approach was followed, §109(g)(2) would constitute a bar to the debtors' successive filing. More specifically, the court explained:

> Regardless of whether one applies the view that a court may utilize discretion in applying section 109(g)(2) or, the alternative view that the section's application is mandatory, it is apparent that section 109(g)(2) applies and bars the Rolands' successive bankruptcy petition. The Rolands voluntarily dismissed their prior bankruptcy case after [the mortgagee] moved for relief from the automatic stay. In fact, Debtors dismissed their prior case immediately after [the mortgagee] obtained relief from the

---

> Chapter 13 proceeding pursuant to 11 U.S.C. §109(f)(1) and prohibiting him from refiling under Title 11 for 180 days from the date of its order.

> automatic stay and filed this successive petition to thwart an imminent foreclosure. The timing of the grant of relief, dismissal and refiling together with Roland's testimony that one reason she and her husband needed to file a second Chapter 13 case was to have a place to live, suggest that the dismissal of the first case was causally linked with the request for and subsequent grant of relief from the stay to [the mortgagee]. Therefore, whether one views section 109(g)(2) as a section to be mandatorily applied or discretionarily applied, it barred the Rolands from filing a successive bankruptcy petition within 180 days of the voluntary dismissal of their first case.

Id. at 404.

Like in In re Roland, the facts of the present case result in a dismissal of the Chapter 13 petition of Debtor under either interpretation of §109(g)(2). In fact, in this case, an order modifying the automatic stay was entered on November 20, 2000. Approximately seven months later, on June 27, 2001, Debtor moved to voluntarily dismiss the case, and an order granting such request was entered on July 3, 2001. On the same day that the motion to dismiss was filed by Debtor, Debtor also filed the present bankruptcy petition under Chapter 13. Despite the longer delay in time between the granting of the relief from the automatic stay and the voluntary dismissal in comparison to the facts of in In re Roland, it is clear from the arguments of Debtor's counsel at the hearing that the sole reason to move to dismiss the previous case and contemporaneously file another Chapter 13 petition was to hinder the imminent foreclosure of the property. Thus, even applying the causal approach to §109(g)(2), it is clear that the examination of the facts in this case indicates that Debtor was acting in response to the imminent threat of Long Beach Mortgage Company's foreclosure on his residence resulting from the earlier relief of the automatic stay.[8] It is exactly this thwarting of a creditor's rights that

[8] At the hearing on the Rule to Show Cause, Debtor also implied that there should be no bar to Debtor's refiling of a new Chapter 13 case if no creditor, such as the mortgage

§109(g)(2) intends to prevent.[9]

Therefore, the Court finds Debtor is barred from filing the present petition pursuant to §109(g)(2), and as concluded in In re Roland and In re McIver, Debtor will be barred from filing a successive bankruptcy case for 180 days from the date of this opinion. It is therefore,

ORDERED that Debtor's present petition should be dismissed with prejudice to bar a refiling under Chapter 13 of the Bankruptcy Code for a period of 180 days.

AND IT IS SO ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
August 13, 2001.

---

company, objected to Debtor requesting relief under the Bankruptcy Court. However, the Court is of the view that §109(g)(2) is applicable regardless of whether any party in interest objects to the refiling; in as much as this section sets forth Debtor's eligibility to file, it is the proper subject of a Rule to Show Cause.

[9] Another issue that emerges from the facts of the present case is whether §109(g)(2) prohibits the filing of a case while a prior bankruptcy case for the same debtor is still open. Some courts have refused to apply a *per se* rule precluding the filing of a bankruptcy petition while a prior bankruptcy case is still open. See, e.g. In re Cormier, 147 B.R. 285, 288 (Bankr. D. Maine 1992). However, other courts have specifically held that "the filing of a second bankruptcy petition regarding the same debts or assets as a pending bankruptcy case cannot be maintained." In re McDaniels, 213 B.R. 197, 199 fn.2 (Bankr. M.D. Ga. 1997) (citing Freshman v. Atkins, 269 U.S. 121 (1925)). Furthermore, in In re Roland, which was based on very similar facts, the court concluded that the dismissal of the debtors' second Chapter 13 case was warranted despite the fact that the order of dismissal in the first case was entered three days after the debtors had commenced the second petition.

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States Bankruptcy Court for the District of South Carolina hereby certifies that a copy of the document on which this stamp appears was mailed on the date listed below to:

AUG 13 2001 via mail

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE:

VANNA L. DANIEL
Deputy Clerk

order + judgment
All crs via bnc
jgmt index