UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 02-02058-W
James Garner, III,	**JUDGMENT**
Debtor.	Chapter 13

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Court annuls the automatic stay invoked upon James Garner, III's ("Debtor") filing the petition in this case. The Court also dismisses this case with prejudice to bar Debtor from filing a petition under any chapter of the Bankruptcy Code for a period of 180 days from the entry of this Order. The Court also sanctions Jason T. Moss, Debtor's attorney, in the amount of $985.00 representing the amount of attorney's fees received to date in connection with this case. Moss shall pay the sanction to the Clerk of the United States Bankruptcy Court for the District of South Carolina or to the South Carolina Bar Pro Bono Program within ten days of the entry of this Order.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
March 11, 2002.

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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:

MAR 11 2002

box + via mail

DEBTOR, DEBTOR'S ATTORNEY, **TRUSTEE**, UST via mail

VANNA L. DANIEL jgmt indiv

Deputy Clerk

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 02-02058-W
James Garner, III,	**ORDER**
	Chapter 13
Debtor.	

THIS MATTER comes before the Court for hearing on a Rule to Show Cause requiring James Garner, III ("Debtor") and his attorney, Jason T. Moss ("Moss"), to show cause why this case should not be dismissed with prejudice or why sanctions should not be imposed.

On February 16, 2001, Debtor filed a voluntary petition under Chapter 13, Case No. 01-01557-B. In that case, Debtor's Schedules reflected a total monthly net income of $2,127.86 earned from working as a nursing assistant at Palmetto Baptist Hospital and as a music director at Zion Baptist Church. His Schedules also indicated $1,640.35 in total monthly expenses. Moss represented Debtor in this first case, and he disclosed a pre-petition payment of $1,185.00 in February 2001 for attorney's fees in connection with the case. The Plan filed by Debtor on February 16, 2001 provided for payments of $487.00 per month to the Trustee, and the payments included $143.00 per month to cure the arrearage due to Chase Manhattan Mortgage ("Chase") on a first mortgage on Debtor's residence. Debtor was to make regular monthly mortgage payments directly to Chase beginning in March 2001. The Plan was confirmed on April 9, 2001. By Motion to Modify Stay filed on August 30, 2001, Chase alleged it had not received direct payments due for March 2001 and thereafter. Resolving the Motion to Modify Stay, the parties entered a Settlement Order on September 28, 2001 whereby Debtor agreed to make regular

monthly mortgage payments beginning October 1, 2001 and to cure the post-petition arrearage for the months of March, April, May, June, July, August, and September, with late charges and attorney's fees, in six consecutive additional monthly installments beginning on October 1, 2001. On December 21, 2001 and according to the terms of the Settlement Order, Chase filed an Affidavit attesting that Debtor again failed to make any direct payments, neither the regular nor arrearage payments, due in October and November. This Court granted Chase relief from the stay on December 27, 2001. On February 15, 2002, the Chapter 13 Trustee filed a Petition to Dismiss the case for nonpayment of payments also required by the Plan to be paid to the Trustee for distribution. The Trustee's Petition is scheduled for hearing on March 13, 2002. According to Debtor's testimony, subsequent to receiving relief from the stay, Chase scheduled a foreclosure proceeding for March 4, 2002.

On February 20, 2002, Debtor, again represented by Moss, filed a second voluntary petition under chapter 13, Case No. 02-02058-W. In his Schedules and Statement of Affairs in this case, Debtor disclosed the same net income from jobs as a nursing assistant at Providence Hospital, a position he stated he held for six months, and as a music director for the same church. In this case, Moss disclosed fees of $1,500.00 for services in connection with the case and showed a payment of $985.00 made in February 2002 with a balance due of $515.00. The Plan filed on February 20, 2002 indicated Moss would file a claim for $615.00 to be paid through the Trustee.[1] At the hearing in this matter, Moss indicated that, upon the filing of the second case,

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[1] The Court notes that the information Debtor provided regarding the balance due for attorney's fees is inconsistent as the Disclosure of Compensation indicates $515.00 due and the Plan indicates $615.00 due. The failure to disclose compensation accurately is itself a serious violation of the Bankruptcy Code. See 11 U.S.C. §329; Federal Rule 2016 of Bankruptcy Procedure; In re Walker, C/A No. 01-11884-W (Bankr. D. S.C. Feb. 27, 2002).

his office advised representatives of Chase that the foreclosure proceeding scheduled for March 4, 2002 should not take place, or it would violate the automatic stay. The Court issued its Rule to Show Cause on February 25, 2002 and directed Debtor and Moss to appear.

At the hearing, Moss stated that the filing of the second Chapter 13 case while the first Chapter 13 case was still pending was an innocent clerical error made by his office. He further argued that Debtor should be allowed to refile a second Chapter 13 case due to a change in circumstances occurring since the time he ceased making payments due under the confirmed Plan in the first case. Debtor testified that his employment with Palmetto Baptist Hospital was terminated in October 2001 and that he was employed by Providence Hospital on December 3, 2001 at a higher salary. The Court notes that this testimony is inconsistent with Debtor's Schedules in two respects: the time when he began working at Providence Hospital as well as the wage he earns.

The Chapter 13 Trustee argues that the filing of the second case effectively stayed the foreclosure even though Debtor could not legitimately refile until after the first case was dismissed, the hearing on which is not scheduled until March 13, 2002. Had Debtor voluntarily dismissed his first case, §109(g)(2) would have prohibited him from refiling for 180 days after the dismissal of the first case. The Trustee asserts that Debtor and Moss acted in bad faith to circumvent the prohibitions of §109(g)(2). The Court notes that the Chapter 13 Trustees in this District and the Court itself have recently undertaken renewed efforts to identify serially filed cases in violation of §109(g)(2) due to the large number of refiled cases after relief from stay is granted.

While some courts hold that the filing of a bankruptcy case while another is pending is

not per se prohibited, it is clear that two simultaneously pending Chapter 13 cases would be inconsistent and, at least, regarded as indicia of bad faith. See In re Cowan, 235 B.R. 912, 915 (Bankr. W.D. Mo. 1999) (concluding that the concurrent filing of two bankruptcy cases should be considered indicia of bad faith rather than an absolute ground for dismissal of the second case); In re Cormier, 147 B.R. 285, 288 (Bankr. D. Me. 1992) (concluding that filing a petition while a bankruptcy case remains open indicates bad faith but refusing to adopt a per se rule providing that a simultaneous filing is not permitted); In re Fountain, 142 B.R. 135, 137 (Bankr. E.D. Va. 1992) (ruling that simultaneous bankruptcy cases is an abuse of process that evidences bad faith as it causes confusion to creditors and creates repetitive litigation); see also In re McDaniels, 213 B.R. 197, 199 (Bankr. M.D. Ga. 1997) (noting that if a debtor filed a second case while the first was pending, the second case could be promptly dismissed). Indeed, one court that decided a debtor could have multiple pending bankruptcy cases limited the debtor's ability to have simultaneous cases to instances when debtors file the second case in good faith and without an intent to abuse the bankruptcy process and when extreme circumstances warrant the second filing. See Transamerica Credit Corp. v. Bullock (In re Bullock), 206 B.R. 389, 393 (Bankr. E.D. Va. 1997) (finding a second case filed while the first was pending appropriate when the debtor initially had incompetent counsel, the debtor mistakenly thought she had paid a claim in full, the debtor's creditors failed to give her notice of the default for over one year and then initiated foreclosure proceedings, and the debtor attempted to use lawful means to retain her residence).

In this case, Debtor has failed to demonstrate good faith, a change of circumstances, or other grounds so as to warrant a refiling, much less a refiling when a Chapter 13 case is already

pending. Debtor provided testimony that is inconsistent with his Schedules, and the inconsistencies make it difficult for the Court to agree that there has been a sufficient change of circumstances. For example, Debtor testified that he lost his job in October 2001 at Palmetto Baptist Hospital and regained employment at Providence Hospital for a higher wage on December 3, 2001. His Schedules, however, indicate that he has been employed at Providence Hospital for six months prior to February 20, 2002 and that his wages were unchanged. Because of the conflicting information Debtor provides to support his conclusion that a change of circumstances has occurred, the Court cannot find good faith or a sufficient change of circumstances.[2]

Giving the Court more pause is the contrast of good faith actions found in Bullock with Debtor's actions in his bankruptcy cases. Unlike the debtor in Bullock who completed all of her Chapter 13 plan payments and received her discharge, Debtor is not a person who could credibly believe that his bankruptcy issues were resolved. Instead, Debtor must have realized he was inviting action by Chase after he failed to make post-petition mortgage payments as required by his own confirmed Plan for seven consecutive months and then, after entering into a Settlement Agreement, in which he agreed to make his monthly mortgage payments and pay the post-petition arrearage that accrued for seven months, failed to make any payment. Indeed, the obvious result is what occurred: Chase sought relief from the stay and commenced foreclosure proceedings. It seems clear to the Court that the refiling within two weeks of the scheduled

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[2] The Court notes that, upon an actual change of circumstances that would allow Debtor to meet his obligations in the first case, Debtor could, by motion in the first and still pending case, seek reconsideration of the Order granting Chase relief from the automatic stay. The Court could have considered such a motion upon notice to Chase before the March 4, 2002 foreclosure proceeding.

foreclosure hearing was not an innocent mistake, particularly when considering the case was not set for a dismissal hearing upon the Trustee's request until a date after the foreclosure proceeding was to occur and a voluntary dismissal under the circumstances would prohibit a refiling under §109(g)(2). The only way for Debtor to use a refiling to stay the foreclosure was to refile while the first case was pending, which, in this case, was an apparent act of bad faith and an abuse of the Bankruptcy Code and Rules. See In re Barnes, 231 B.R. 482, 484 (E.D. N.Y. 1999) (affirming the bankruptcy court's decision that simultaneous cases are not permitted and noting that the debtor's filing of the second case was an attempt to stall a foreclosure sale). Contrary to the testimony of Debtor and statements of counsel, the Court concludes the refiling was an objective attempt to delay the foreclosure further and circumvent the prohibitions of §109(g)(2).[3]

Finally, the Court is unconvinced by Moss' characterization of the refiling when the first case was pending as an innocent clerical mistake. This Court has made it crystal clear that an attorney who undertakes the filing of a debtor has a duty to check the records of the Court to ensure that Debtor is not refiling a prohibited case. See Operating Order 02-01 (Bankr. D. S.C. Feb. 5, 2002); In re Brown, C/A No. 02-00089-W, slip op. 2 (Bankr. D. S.C. Jan. 31, 2002). Such an inquiry would have shown that the first case was still pending. In this instance, Moss represented Debtor in both cases and clearly knew or should have known that Debtor was filing a second simultaneous Chapter 13 case that, under these circumstances, would be improper. The Court notes that Moss has been the debtor's attorney in at least two prior cases in which this

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[3] The Court notes that, upon dismissal of the first case, an argument could be made that such a flagrant failure to pay any payments to Chase as provided in Debtor's confirmed Plan coupled with Debtor's complete failure to honor the Settlement Order he entered constitute grounds for a finding that a refiling should be barred for 180 days pursuant to §109(g)(1). See McIver v. Phillips (In re McIver), 78 B.R. 439 (D. S.C. 1987).

Court has warned him regarding the serial filing of cases. See Brown, supra; In re Diaz, C/A No. 01-11809-W slip op. (Bankr. D. S.C. Dec. 7, 2001).

Accordingly, the Court concludes that sanctioning Moss is necessary to enforce the rules of this Court and to deter abuse and misuse of the bankruptcy process in the future. More and more frequently, this Court is confronted with debtors and their counsel who serially refile cases in bad faith in an attempt to invoke the automatic stay to halt foreclosure proceedings or the repossession of automobiles or mobile homes. By filing the petition, even in bad faith, a debtor obtains the benefit of delaying the foreclosure and retaining possession of the property, often without any payment, until the secured creditor can address the problem in this Court. In a refiling, the debtor's attorney gains a benefit of being paid a new fee, even though much of the effort is merely refiling the schedules and the statement of affairs from the prior case. Of course, the dismissal and refiling of cases or the filing of simultaneous cases causes enormous confusion to creditors and parties in interest. This Court has seen the problem of serial filings grow to epidemic proportions in this District and has renewed efforts to address such abuses. To deter such abuses effectively, the Court believes debtors' counsel should not be allowed to benefit from refilings that are made in bad faith.

Therefore, for the reasons stated above and based upon the circumstances of this case, including a consideration of the lowest amount of a sanction to deter future abuses, the Court sanctions Moss in the amount of attorney's fees paid to date in this case, pursuant to §105. See GE Capital Mortgage v. Asbill (In re Asbill), 3:99-0773-19 slip op. (D. S.C. Feb. 23, 2000).

Based upon these conclusions,

IT IS THEREFORE ORDERED that the automatic stay invoked upon the filing of the

petition in this case is annulled;

IT IS FURTHER ORDERED that the case is dismissed with prejudice to bar Debtor from filing a petition under any chapter of the Bankruptcy Code for a period of 180 days from the entry of this Order; and

IT IS FURTHER ORDERED that Moss is sanctioned in the amount of $985.00 representing the amount of attorney's fees received to date in connection with this case. Moss shall pay the sanction to the Clerk of the United States Bankruptcy Court for the District of South Carolina or to the South Carolina Bar Pro Bono Program within ten days of the entry of this Order.[4]

AND IT IS SO ORDERED.

John E. Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
March 11, 2002.

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[4] Upon a decision to pay the sanction to the South Carolina Bar Pro Bono Program, Moss should provide a copy of this Order to the Program to ensure the Program is aware the payment is in the nature of a sanction and to ensure that Moss is prohibited from taking a charitable deduction for such payment. Moss should also provide proof of payment to the Clerk of this Court.

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:

MAR 11 2002.
box + mail

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE, UST via mail

VANNA L. DANIEL
Deputy Clerk

jgmt indy