UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 03-08067-W
Kendrick Lamont Allen, Sr.,	**ORDER**
Debtor.	Chapter 13

THIS MATTER comes before the Court upon a Petition to Dismiss with Prejudice pursuant to 11 U.S.C. § 109(g)(2)[1] ("Petition") filed by the Chapter 13 Trustee ("Trustee") and a Motion for Relief from Automatic Stay ("Motion") filed by Branch Banking and Trust Company ("BB&T") pursuant to § 362(d)(1) and (2). Kendrick Lamont Allen, Sr. ("Debtor") objected to both the Petition and the Motion.

FINDINGS OF FACT

Debtor filed a Chapter 13 case, Case No. 02-12723-W on October 24, 2002. In that case he was represented by counsel J. Steven Huggins. A Chapter 13 Plan was filed by Debtor on November 8, 2002 which, among other things, provided for any arrearage owed to BB&T, the holder of a mortgage on Debtor's residence and a lien on an automobile, to be paid through the Trustee, but also provided that regular payments would be directly made by Debtor to BB&T beginning in September, 2002. Debtor failed to make direct payments to BB&T as called for in his Plan. BB&T filed and served upon Debtor and his counsel a Motion for Relief from Stay, and upon no objection by Debtor or the Trustee, an Order Granting Relief was entered on December 12, 2002 ("First Order"). The First Order was served upon Debtor and his counsel on December 14, 2002. No appeal or Motion to Reconsider was filed. The November 8, 2002 Plan was subsequently confirmed by Order entered on May 8, 2003.

[1] Further references to the United States Bankruptcy Code will be by section only.

In January 2003, Debtor attempted to make a direct payment to BB&T but it was rejected because foreclosure had been commenced. BB&T's foreclosure sale was scheduled for July 7, 2003. On June 17, 2003, Debtor filed a pro se Motion to Dismiss his bankruptcy case. An Order dismissing that case was entered on June 24, 2003.

On July 2, 2003, Debtor, represented by counsel Andrea Vanias, filed a second Chapter 13 case, Case No. 03-08067. Debtor admits the refiling was to stay the foreclosure and save his residence. While the filing of that case acted as a stay of the foreclosure action, BB&T was not notified of the filing and the sale was conducted, but the conclusion of that proceeding has since been stayed. At the time of filing, Debtor paid Ms. Vanias $1,000.00 towards a total attorney's fee of $1,500.00 for service in this case. BB&T has incurred approximately $3,600.00 in attorneys fees in connection with the second filing.

Both the Trustee and BB&T argue that § 109(g)(2) prohibits the filing of this second case by Debtor and request dismissal of this case with prejudice. BB&T also requests annulment of the automatic stay to validate the foreclosure sale and proceedings held without notice of the second filing. Debtor argues that his representation by counsel in his first case was ineffective and therefore an exception to § 109(g)(2)'s prohibition should be recognized.

CONCLUSIONS OF LAW

The express terms of § 109(g) make Debtor ineligible to file this second case. This Court has found the application of § 109(g)(2) mandatory with four exceptions. In re Ragin, C/A No. 01-11256-B, slip op. at 2 (Feb. 4, 2002).[2] See also In re McAlister, C/A No. 01-06647-W, slip op. at

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[2] Judge Bishop has held that a literal reading of § 109(g)(2) is required except when (a) the prior § 362 motion was denied, (b) the prior § 362 motion was dismissed, (c) the prior § 362 motion was withdrawn, or (d) relief from the stay was granted and a liquidation of the

5 (Aug. 13, 2001) ("Most courts have applied the plain and unambiguous meaning to the section.") The four possible exceptions to the statute set forth by Judge Bishop in Ragin are not applicable to Debtor's case. This Court has repeatedly applied § 109(g)(2) to dismiss cases similar to this case and dismissed cases in which Debtors appeared to manipulate the proceeding to escape § 109(g)'s application and to stay pending foreclosures. See In re Martin, C/A No. 03-03551, slip op. (Apr. 8, 2003); and In re Moore, C/A No. 03-02974, slip op. (Apr. 8, 2003); In re Garner, C/A No. 02-02058, slip op. (Mar. 11, 2002); In re Simons, C/A No. 01-07246, slip op. (Sept. 20, 2001); In re Kelly, No. 01-07701, 2001 WL 1806044 (Sept. 20, 2001).

If, as Debtor asserts, his counsel in the first case was ineffective, he could have sought substitution of counsel or brought his concerns directly to the Court in a timely fashion. Not only did Debtor fail to attempt to directly pay BB&T as required by his Plan until January 2003, but the record indicates that he knew of BB&T's actions because a separate notice of BB&T's Motion for Relief from Stay and the Order Granting Relief were served directly upon him. In fact, the first Chapter 13 case continued for several months after relief from stay was granted with Debtor's Plan ultimately being confirmed in May 2003. Debtor never acted on the concerns regarding his counsel during this entire time.

As admitted by Debtor and his counsel in this case, the voluntary dismissal and refiling of this case was intended and timed to thwart BB&T's foreclosure sale. The circumstances in this case clearly and precisely fall within the prohibitions of § 109(g)(2). Debtor's argument of ineffective assistance of counsel in the first case is not an exception to the effect of this statute. Therefore, this

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collateral completed before any subsequent refiling. In re Ragin, C/A No. 01-11256-B, slip op. at 2 (Bankr. D.S.C. Feb. 4, 2002).

case shall be dismissed with prejudice to bar the refiling of a bankruptcy petition under any chapter of the Bankruptcy Code for a period of 180 days from the entry of this Order.

Furthermore, there being no equity in the property and because of the actions of Debtor and the compelling circumstances in this case, there is cause to annul the stay retroactively to the time of the filing of this second case and therefore validate the foreclosure sale and proceedings to the extent occurring postpetition. See In re Scott, 260 B.R. 375, 381-82 (Bankr. D.S.C. 2001) ("Whether relief from the stay should be granted retroactively is within the 'wide latitude' of the court in that such decision should be made on a case-by-case basis."). See also In re Crown Victoria, LLC, C/A No. 99-10542-W, slip op. (Bankr. D.S.C. Jan. 3, 2000) (cause existed to annul stay retroactively to the filing of the petition where managing member of corporate debtor filed a pro se petition immediately prior to foreclosure sale). Annulment of the stay shall be deemed effective prior to the dismissal of this case and shall have continuing force and effect upon the dismissal.

Finally, BB&T has demonstrated attorneys fees and costs of approximately $3,600.00 incurred directly as a result of Debtor's refiling. Finding no permissible excuse for the refiling of this case and considering the clear precedent in this District prohibiting such action, the Court finds that sanctions are justified. First, the Court notes that since BB&T may presumably charge its attorney's fees and costs to Debtor as costs of collection under the promissory note and mortgage, it must also be seeking sanctions against Debtor's counsel for her part in the improper refiling. Based on the record and statements of counsel, the Court is convinced that Debtor's counsel knew or should have known that Debtor was ineligible to refile.

Pursuant to Operating Order 02-01, debtors and debtors' counsel are cautioned to inquire of the records of this Court to ensure a debtor's eligibility. Even if not actually advised of the

circumstances in the first case by Debtor, Debtor's counsel should have been aware that a voluntary dismissal after relief from stay made Debtor ineligible to refile especially when the purpose of refiling was to thwart the foreclosure. In such circumstances, this Court has consistently held that a debtor's counsel should not profit by a fee paid to pursue an improper refiling.

However, considering that sanctions should be in the least amount necessary to deter improper action and because BB&T's legal costs are high, the Court finds sanctions in the amount of $1,250.00 shall be assessed jointly and severally against Debtor and Andrea Vanias. Said sanctions shall be paid BB&T within ten (10) days of the entry of this Order. The award of sanctions shall survive the dismissal of this case.

AND IT IS SO ORDERED.

John E. Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
August 29, 2003.