

FILED

at ___ O'clock & ___ min ___ M

AUG - 7 2006

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

**United States Bankruptcy Court
Columbia, South Carolina (7)**

IN RE:

James Allen Jones,

Debtor(s).

C/A No. 06-02691-JW

Chapter 13

JUDGMENT

ENTERED

AUG - 7 2006

S. R. P.

Based upon the Findings of Fact and Conclusions of Law made in the attached order of the Court, Debtor's Motion to Extend Stay is denied, and the stay shall expire on August 8, 2006. As a condition for allowing this case to continue, it is further ordered that any dismissal of this case shall be with prejudice for a period of one-hundred eighty (180) days.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
August 7, 2006

FILED

at ___ O'clock & ___ min

UNITED STATES BANKRUPTCY COURT**AUG - 7, 2006****FOR THE DISTRICT OF SOUTH CAROLINA**United States Bankruptcy Court
Columbia, South Carolina (7)

IN RE:

C/A No. 06-02691-JW

James Allen Jones,

Chapter 13

Debtor(s).

ORDER**ENTERED****AUG - 7 2006****S. R. P.**

This matter comes before the Court upon a Motion to Extend Stay filed by James Allen Jones ("Debtor") pursuant to 11 U.S.C. § 362(c)(3)(B).¹ The Motion was served on all creditors. National City Home Loans ("NCHL"), Debtor's mortgage creditor, filed an objection. In the objection, NCHL noted that Debtor's bankruptcy filings were filed on the eve of foreclosure after NCHL had incurred considerable costs to enforce its interests in Debtor's home. The Chapter 13 Trustee also filed a response to the Motion.

This current case (C/A No. 06-02691) is Debtor's third bankruptcy filing. On April 23, 2004, Debtor and his spouse initiated a Chapter 13 bankruptcy case (C/A No. 04-04769), which was converted to a Chapter 7 case on November 17, 2004, and then dismissed on January 12, 2005. The Court dismissed Debtor's first case because Debtor and his spouse failed to attend their meeting of creditors. On February 4, 2005, Debtor and his spouse filed a second Chapter 13 case (C/A No. 05-01300) which the Court dismissed on September 26, 2005 for failure to make payments pursuant to a confirmed Chapter 13 plan. Debtor's second case was pending and dismissed during the one (1) year period preceding the filing of this current case. Therefore, pursuant to § 362(c)(3)(A), the automatic stay provided by § 362(a) is scheduled to terminate on July 29, 2006, the thirtieth (30th) day after Debtor filed this current bankruptcy case. However, the Court

¹ Hereinafter internal references to the Bankruptcy Code (11 U.S.C. § 101 et. seq.), as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, shall be made by section number only.

extended the stay to August 8, 2006 pursuant to an interim order entered on July 27, 2006.²

Under § 362(c)(3)(C)(i)(II)(cc), there is a presumption that Debtor did not file this current case in good faith because Debtor's previous case was dismissed for failure to make timely plan payments. The lack of good faith presumption also arises with respect to NCHL pursuant to § 362(c)(3)(C)(ii) because NCHL reached a settlement agreement with Debtor to resolve a Motion for Relief from Stay that was filed before the dismissal of Debtor's second Chapter 13 case. In light of the presumption that Debtor filed this current case with a lack of good faith, Debtor must demonstrate, by clear and convincing evidence, that he filed this case in good faith in order to extend the stay beyond August 8, 2006.

According to Debtor, Debtor's second Chapter 13 filing failed because his income decreased when his work hours were reduced from forty (40) hours per week to thirty (30) hours per week. Debtor now contends that he can successfully reorganize in this case because of the following: (1) his hourly wages have increased from \$18.50 per hour to \$19.50 per hour; (2) Debtor currently works a forty hour work week; and (3) a \$320.00 decrease in monthly plan payments attributed to the full payment of a lien on an automobile belonging to Debtor's wife.³

The schedules and records of Debtor's second bankruptcy case indicate that during Debtor's second case, Debtor and his wife collectively earned \$3,371.53 in

² In the July 27, 2006 order, the Court preserved the authority to further address the issue of extending the automatic stay, and extended the stay subject to certain conditions and limitations as expressed therein.

³ In his Motion, Debtor asserted that his wife earns \$2,190.46 per month, which indicates a \$1,000 increase in her monthly income. Despite this assertion in the Motion, Debtor's schedules clearly indicate that Debtor's wife only earns \$1,216.92 per month, which is \$97.78 more than the \$1,119.14 in monthly earnings that reported in the prior case.

monthly net income, incurred \$2,911.00 in monthly household expenses, and had \$460.56 in monthly disposable income to fund plan payments of \$745.00. In this case, Debtor and his spouse collectively earn \$3,905.92 in monthly net income, incur \$3,460.62 in monthly household expenses, and have approximately \$445.30 in monthly disposable income to fund their plan proposed plan payments of \$445.00. Although Debtor has received a one dollar increase in his hourly wages and his working hours have returned to forty hours per week, Debtor's schedules indicate a decrease in monthly disposable income from \$460.00 per month in the prior case to \$445.00 per month in this case. Accordingly, the circumstances of this case do not indicate a substantial change in Debtor's financial circumstances.

NCHL also notes that Debtor's current plan payments do not adequately cure a sizable arrearage of \$31,107.47 and that Debtor's mortgage payment is actually \$998.00 rather than the \$838.00 listed on Debtor's schedules. On his schedules, Debtor lists his mortgage arrearage as \$20,000.00. Debtor intends to cure the arrearage by paying \$334.00 of his monthly plan payment to NCHL. NCHL, however, asserts that Debtor's arrearage is \$31,107.47, and that Debtor would have to pay \$518.00 per month under a plan to cure. According to the Chapter 13 Trustee's calculations, if NCHL were correct, then Debtor would have to increase his monthly payments to \$646.00 in order to reorganize under a confirmable plan. Under Debtor's current budget, Debtor cannot support monthly payments of \$646.00.

In response to NCHL's assertions, Debtor asserts that the arrearage cited by NCHL may not be correct because certain payments made under a forbearance agreement, outside of Debtor's bankruptcies, may not have been properly credited to the

arrearage. Under its state law rights outside of bankruptcy, however, it appears that NCHL may credit forbearance payments against costs incurred in pursuing foreclosure before applying such payments to any outstanding arrearage, capitalized interest, or principal. Therefore, costs associated with NCHL's foreclosure attempts would have reduced the amount of forbearance payments to be credited to Debtor's arrearage.

Furthermore, despite the fact that Debtor questions the accuracy of NCHL's arrearage claim, the history of Debtor's bankruptcy filings indicates that such an increase of the mortgage arrearage is credible. During Debtor's first bankruptcy case, which was filed on April 23, 2004, NCHL's proof of claim indicated that Debtor owed a mortgage arrearage of \$14,918.29. After the dismissal of Debtor's first case, Debtor filed his second bankruptcy case on February 4, 2005. During the second case, NCHL filed another proof of claim which indicated that Debtor's mortgage arrearage had increased, at that time, to \$25,668.03. In this current case, Debtor's arrearage is listed as \$31,107.47 on NCHL's proof of claim. Given the lack of timely payments and the fees associated with NCHL's foreclosure attempts, which apparently preceded each of Debtor's bankruptcy filings, the \$31,107.47 arrearage listed on NCHL's proof of claim appears credible. Furthermore, Debtor has not provided sufficient evidence rebutting the arrearage amount asserted by NCHL.

Accordingly, under the totality of the circumstances attendant in this case, the Court concludes that Debtor has failed to rebut, by clear and convincing evidence, the presumption that he filed this case with a lack of good faith.⁴ Therefore, Debtor's Motion

⁴ The Court's findings are limited to the context of this Motion and nothing in this Order shall be construed as *res judicata* to prevent Debtor, the trustee, or any party in interest from challenging or establishing that this case or plan was filed or proposed in good faith for purposes of 11 U.S.C. §§ 1307 or 1325. See In re Charles, 332 B.R. 538, 542 (Bankr. S.D. Tex. 2005) (holding that Congress, by enacting §

is denied, and the stay shall expire on August 8, 2006. As a condition for allowing this case to continue, it is further ordered that any dismissal of this case shall be with prejudice for a period of one-hundred eighty (180) days.

AND IT IS SO ORDERED.

Columbia, South Carolina
August 7, 2006


UNITED STATES BANKRUPTCY JUDGE

362(c)(3), intended the courts to conduct an early triage of a case and determine whether a case is doomed to fail or whether a case has a reasonable likelihood of success).