

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)
)
JOHN C. NEARY,) CASE NO. 14-31174 HCD
) CHAPTER 13
)
DEBTOR,)

DECISION and ORDER

At South Bend, Indiana, on July 17, 2014.

On July 10, 2014, the court held a duly scheduled hearing on Wells Fargo Bank's Motion to Dismiss Case with Prejudice for Bad Faith Filing. The Motion had been filed May 30, 2014. On July 9, 2014, the debtor filed a Voluntary Motion to Dismiss without prejudice. Wells Fargo Bank filed an Objection to the debtor's Voluntary Motion on the morning of the hearing, and the court addressed both motions in open court. Appearing at the hearing were Michael J. Kulak, Esq., counsel for Wells Fargo Bank, N.A., and Debra L. Miller, Esq., Chapter 13 Trustee. Neither the debtor nor his counsel was present.

In its Motion, Wells Fargo Bank presented the following facts to demonstrate the debtor's bad faith in filing his petition: The debtor filed three bankruptcy petitions on the eve of three sheriff's sales; he filed his third petition while the second case still was pending without entry of discharge; and the mortgage arrearage was \$56,807.61. The Trustee agreed that bad faith was evident, stating that the debtor also failed to attend four § 341 meetings of creditors; had made no chapter 13 plan payments to her; had failed to turn over to her any bank statements or tax information; and was delinquent on his payments in the amount of \$6,100.00. The Bank's Motion sought both dismissal of the debtor's case with prejudice and an injunction from his filing a bankruptcy petition for a period of 180 days.

The debtor filed no response to the Bank's Motion. He filed only his own Voluntary Motion to Dismiss, in which he admitted that his previous chapter 7 case had not been dismissed. Without denying any of the Bank's allegations in its Motion, the debtor simply requested dismissal without prejudice.

The court turns first to the debtor's two bankruptcy cases presently active in this court. It is a bedrock principle that "a debtor may not maintain two or more concurrent actions with respect to the same debts." *In re Sidebottom*, 430 F.3d 893, 898 (7th Cir. 2005) (discussing *Freshman v. Atkins*, 269 U.S. 121, 46 S. Ct. 41, 70 L.Ed. 193 (1925)). The debtor's filing of this case while an earlier case was pending constitutes an abuse of the bankruptcy system. *See In re Jackson*, 2011 WL 768098 at *3 (Bankr. D.D.C. Mar. 4, 2014) (finding abuse, dismissing case with prejudice). The court concludes that dismissal of this second filed case is required. *See In re Brandford*, 386 B.R. 742, 751 (Bankr. N.D. Ind. 2008) (dismissing second pending case "for cause" under § 1307(c)). However, two issues remain: whether dismissal is with or without prejudice and whether the 180-day sanction requested by the Bank is appropriate.

Section 1307(b) directs the court to dismiss a case under chapter 13 "[o]n request of the debtor at any time," if the case has not been converted. 11 U.S.C. § 1307(b); *see In re Williams*, 435 B.R. 552, 555 (Bankr. N.D. Ill. 2010) (stating § 1307(b) "accords no discretion to deny a debtor's request to dismiss an unconverted chapter 13 case"). However, § 1307(c) allows the court to dismiss or convert a bankruptcy case, "whichever is in the best interests of creditors and the estate, for cause." 11 U.S.C. § 1307(c); *see In re McNichols*, 254 B.R. 422, 435 (Bankr. N.D. Ill. 2000) (listing "causes," confirming that bad faith is cause for dismissal) (citing *In re Love*, 957 F.2d 1350, 1354 (7th Cir. 1992)). Courts are split when faced with both a debtor's assertion of his "absolute" § 1307(b) right to dismiss and another party's claim of its § 1307(c) right to dismiss or convert "for cause," and there is no controlling precedent in this circuit. *Compare In re Williams*, 435 B.R. at 559 (concluding debtor's § 1307(b) right is unlimited), *with In re Johnson*, 228 B.R. 663, 668-69 (Bankr. N.D. Ill. 1999) (stating debtor's § 1307(b) right to voluntary dismissal "can be trumped" by § 1307(c) motion to convert; finding debtor filed § 1307(b) "as an escape hatch"; granting motion to convert for cause); *see also In re Davis*, 352 B.R. 758, 762-65 (Bankr. D.S.C. 2006) (allowing consideration of egregious or abusive conduct warranting denial of debtor's motion to dismiss; concluding such proof was not present in this case).

In this case, the court determines that it has the authority, when weighing dismissal with or without prejudice, to consider the Bank's unchallenged allegations of bad faith and abuse. It may condition the dismissal of the debtor's case by reviewing the circumstances herein. See *In re Rosson*, 545 F.3d 764, 767 (9th Cir. 2008) (holding that debtor's § 1307(b) right is "qualified by an implied exception for bad-faith conduct or abuse"); *In re Criscuolo*, 2014 WL 1910078 at *5 (Bankr. E.D. Va. May 13, 2014) (holding that debtor's § 1307(b) "absolute" right did not trump § 1307(c) dismissal motion); *In re Wyatt*, 317 B.R. 159, 162 (Bankr. D. Idaho 2004) (stating that no Code section, including § 1307(b), denies court's ability to order dismissal with prejudice; but finding that § 1307(c) "cause" was not sufficiently proven); *In re Glenn*, 288 B.R. 516, 520 (Bankr. E.D. Tenn. 2002) (confirming court's authority under § 1307(b) to bar debtor's ability to re-file when abuse or bad faith conduct is found). Here, both the Bank and the Trustee demonstrated that cause exists to warrant dismissal with prejudice despite the debtor's conflicting motion for dismissal without prejudice. The filing of two concurrent cases shows an abuse of the bankruptcy system, as well. Since counsel for the debtor failed to appear at the hearing and failed to offer any defense to the Bank's allegations of bad faith and abuse, the court ruled in open court that the Bank's Motion was granted.

In conclusion, the court now finds that the record evidence before it demonstrates a lack of good faith and an abuse of the bankruptcy process in the filing of this concurrent case. It further finds that it is in the best interest of the creditors and of the estate to dismiss this case with prejudice and to bar any refiling for 180 days. For the reasons presented from the bench at the hearing and set forth more fully in this Decision and Order, the chapter 13 case of John C. Neary is dismissed pursuant to 11 U.S.C. § 1307(c) with prejudice to refiling under any chapter of the Bankruptcy Code in this or any other court for a period of 180 days from the entry of this Order.

SO ORDERED.

HARRY C. DEES, JR.
Harry C. Dees, Jr., Judge
United States Bankruptcy Court