

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)
)
JEREMIE SHENEMAN,) CASE NO. 03-35804 HCD
) CHAPTER 11
)
DEBTOR.)

Appearances:

William L. Wilson, Esq., attorney for debtor, Anderson Agostino & Keller, P.C., 131 South Taylor Street, South Bend, Indiana 46601; and

Alexander L. Edgar, Esq., Assistant United States Trustee, 555 One Michiana Square Building, 100 East Wayne Street, South Bend, Indiana 46601.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 24, 2004.

Before the court is the United States Trustee's Motion to Dismiss, filed on October 22, 2003, and the objection thereto filed by the debtor Jeremie Sheneman on November 26, 2003. A hearing on the motion and objection was held on December 4, 2003, and the matter was taken under advisement at that time. For the reasons that follow, the court grants the United States Trustee's Motion to Dismiss.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(A) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rule of Bankruptcy Procedure 7052. Any

conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The debtor filed two different bankruptcy cases in the year 2003. He first filed a voluntary chapter 13 petition on March 26, 2003 (Case Number 03-31651). However, on July 9, 2003, the court granted the debtor's motion to dismiss his case. Significantly, in that chapter 13 case, motions for relief from the automatic stay had been filed by four secured creditors before the debtor had filed his voluntary motion to dismiss.¹

Three months later, on October 10, 2003, the debtor commenced the present chapter 11 case. The United States Trustee ("U.S. Trustee"), through her able representative Assistant U.S. Attorney Alexander L. Edgar, Esq., sought dismissal of this bankruptcy pursuant to 28 U.S.C. § 586(a)(3)(D) and (G) and 11 U.S.C. § 109(g)(2). He contended that this case was filed in violation of § 109(g)(2) and constituted an abusive serial filing that was prejudicial to creditors.

In his Objection to the United States Trustee's Motion to Dismiss, the debtor explained the circumstances that led to his filing each of his bankruptcy cases. He stated that he owns approximately twenty low-income residential rental properties, almost all of which are subject to debt secured by mortgages. Two weeks after filing his chapter 13 petition, on April 8, 2003, he submitted his chapter 13 plan. However, fifteen secured creditors and the Standing Chapter 13 Trustee filed objections to the proposed plan, and one creditor filed a motion to dismiss under § 109(e). On June 5, 2003, the court denied confirmation of the plan and directed the debtor to file an amended plan by July 7, 2003. Four secured creditors then filed motions for relief from the stay. After assessing his options, therefore, instead of filing an amended plan on July 7, the debtor filed his motion to dismiss the chapter 13 proceeding. According to the debtor, he chose dismissal after he had determined that his

¹ Motions for relief from stay were filed on June 9, June 16, June 25, and June 27, 2003. They were pending when the debtor filed his Motion to Dismiss Case on July 7, 2003.

rental operations would not provide sufficient cash flow to fund a chapter 13 plan that would meet the requirements for confirmation. The court granted the debtor's motion on July 9, 2003.

After the dismissal of his chapter 13 case, the debtor stated, he endeavored to bring many of his secured debts current by requesting mortgage reinstatement figures. The only creditor to provide reinstatement amounts to him in a timely fashion was Countrywide Mortgage. The debtor reinstated his mortgage loan with Countrywide. However, a sheriff's sale scheduled for October 16, 2003, on one of the properties forced him to file this chapter 11 proceeding on October 10, 2003.

At the hearing on the U.S. Trustee's motion to dismiss, the parties agreed that there were no facts in dispute and that the debtor had filed both the chapter 13 case and the chapter 11 case because of mortgage foreclosure issues. The court then under advisement the dismissal motion brought pursuant to 11 U.S.C. § 109(g)(2).

Discussion

The issue before the court is a legal question: whether the debtor was eligible to file the present chapter 11 case on October 10, 2003, after having voluntarily dismissed his prior chapter 13 case on July 9, 2003. The controlling Bankruptcy Code provision on this issue is 11 U.S.C. § 109(g)(2), which states:

. . . [N]o 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 – . . . (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.

11 U.S.C. § 109(g)(2). The U. S. Trustee asserts that the provision is mandatory. The debtor contends that it is discretionary.

In his Objection, the debtor recognized that § 109(g)(2) was enacted under the Bankruptcy Amendments and Federal Judgeship Act of 1984 to curb abusive repetitive bankruptcy filings. In his view, a

Georgia bankruptcy court reviewing the new law soon after its enactment properly interpreted the type of bankruptcy abuse Congress intended to curb by this provision:

In the Court's opinion, section 109(f)(2) [predecessor to § 109(g)(2)] is intended 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. The debtor then refiles prior to the creditor's completing his next attempt to foreclose, and through this scheme, the debtor can continually frustrate the creditor's attempts to foreclose.

In re Patton, 49 B.R. 587, 589 (Bankr. M.D. Ga. 1985). The debtor insisted that his circumstances were not those described in *Patton*. He explained that he "chose to honorably dismiss his Chapter 13 proceeding and try to work out agreements with his creditors" once he realized that he would not be able to propose a confirmable plan. R. 21 at 6-7. He blamed the creditors for not cooperating with him.

The debtor also claimed that the language of § 109(g)(2) supported his position. According to his interpretation of the statutory terminology, the word "following" does not mean "to come after in order, time, or position," but rather means "to be determined by" or "to be the result of." R. 21 at 4. The debtor urged the court to interpret the statute to require a causal connection between the request for relief from the automatic stay and the debtor's motion to dismiss. He contended, as well, that it was more equitable to allow him to file a new case after the creditors did not respond to his repeated requests for cooperation and, by scheduling a sheriff's sale, forced him to file this chapter 11 proceeding. In his view, the court should not reward uncooperative creditors while punishing a debtor who tried to act in good faith.

There is a sizeable body of case law interpreting § 109(g)(2) and its predecessor, § 109(f)(2). The cases uniformly begin with the recognition that Congress added the provision intending to curb abuses in repetitive bankruptcy filings. Although the cases also acknowledge that the provision is plainly written, they often interpret the statute differently. There are perhaps three general constructions of the statutory language of § 109(g)(2).

The first group of cases adopts a strict construction approach. The cases hold that the statutory meaning is plain and unambiguous: Whenever a motion for relief from stay is filed earlier in time than the granting

of a debtor's voluntary dismissal, § 109(g)(2) has been violated. No examination of the debtor's motives in dismissing the prior case should be conducted. *See, e.g., In re Munkowitz*, 235 B.R. 766, 769 (E.D. Pa. 1999); *In re Stuart*, 297 B.R. 665, 670 (Bankr. S.D. Ga. 2003); *In re Richardson*, 217 B.R. 479, 486-87 (Bankr. M.D. La. 1998); *In re Jarboe*, 177 B.R. 242, 246 (Bankr. D. Md. 1995); *In re Tooke*, 133 B.R. 661, 663 (Bankr. M.D. Fla. 1991); *In re Keziah*, 46 B.R. 551, 555 (Bankr. W.D.N.C. 1985).

The second approach permits an equitable weighing of the facts of each case to determine whether strict application of the statute would lead to an absurd, inequitable, or unfair result. *See, e.g., Home Sav. of America, F.A. v. Luna (In re Luna)*, 122 B.R. 575, 577 (9th Cir. B.A.P. 1991) (adopting a discretionary approach, declining to apply § 109(g)(2) after considering the creditor's bad-faith conduct in holding foreclosure sale despite knowledge of debtor's second bankruptcy filing); *In re Hutchins*, 303 B.R. 503, 510 (Bankr. N.D. Ala. 2003) (finding that strict application of § 109(g)(2), when the two motions for relief from stay were settled, would have an absurd result); *In re Ramos*, 212 B.R. 29, 30 (Bankr. D.P.R. 1997) (stating that "effectuat[ing] the intent of the statute, while recognizing that strict application of section 109(g)(2), which lacks a causation requirement in its language, could work an injustice contrary to the purpose of the bankruptcy system"); *In re Santana*, 110 B.R. 819, 821-22 (Bankr. W.D. Mich. 1990) (finding that granting unsecured creditor's motion to dismiss would head to an absurd result and literal application of § 109(g)(2) would produce a futile result).

A third approach scrutinizes the facts in each case for a causal relationship between the voluntary motion to dismiss and the motion for relief from stay. In the view of those courts, unless the request for stay relief triggers the subsequent request for dismissal, there is no causal relationship and no abuse to curb. *See, e.g., In re Sole*, 233 B.R. 347, 350 (Bankr. E.D. Va. 1998) (finding that debtors' filing of second chapter 13 case 20 months after creditor's motion for relief from stay had been filed and resolved by consent was not an abusive filing); *In re Copman*, 161 B.R. 821, 824 (Bankr. E.D. Mo. 1993) (finding that dismissal of the second case was not required because creditors' requests for relief over three months before dismissal resulted in the debtor's

surrender of the property at issue and thus did not result in the debtor’s motion to dismiss); *In re Patton*, 49 B.R. 587, 589 (Bankr. M.D. Ga. 1985) (finding that, because creditor’s motion for stay relief was granted and creditor terminated service to debtors, there was no motion for relief pending and thus debtors’ subsequent filing was not an abusive filing).

Without direct guidance from the Supreme Court, Seventh Circuit Court of Appeals², or Indiana district and bankruptcy courts, this court began its analysis by returning to the statutory definition of who does or does not qualify to be a “debtor.” Section 109(g) first states that no one may be a debtor “who has been a debtor in a case pending . . . at any time in the preceding 180 days.” The statute then qualifies or limits that blanket 180-day bar, permitting its application only if either of two events occurred. Pertinent to this case is the second limitation: The bar to refiling within 180 days applies if “the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay.” § 109(g)(2).

The court is of the firm conviction that the language of this statute is clear and unambiguous on its face: When a debtor’s request for dismissal of his case follows – or comes after – filed requests for relief from the stay, the statute is triggered. Any other meaning of “follows,” in this statutory posture, is contrived. *See Moran v. Frisard (In re Ulmer)*, 19 F.3d 234, 236 (5th Cir. 1994) (noting that (a) debtor sought Title 11 protection, (b) creditor requested stay relief provided by Title 11, (c) debtor then voluntarily dismissed her case

² The Seventh Circuit Court of Appeals depicted the statute in this way:

11 U.S.C. § 109(g)(2) now specifically forbids a debtor in certain circumstances from refiling for bankruptcy within 180 days of a voluntary dismissal of a previous bankruptcy case. Section 109 thus reduces in importance the need to evaluate repetitive filings as indicative of a lack of good faith.

In re Smith, 848 F.2d 813, 820 (7th Cir. 1988) (citations omitted). Although this statement clearly is dictum, it suggests that the appellate court might agree that a bankruptcy court determining whether a debtor was eligible to file a second bankruptcy case under § 109(g)(2) should not conduct a good faith test or examine the motives of the debtor when he moved for dismissal of his case.

under Title 11, and then (d) debtor filed again for relief before 180 days had elapsed, concluding that “[t]he impropriety of this act is obvious”); *In re Richardson*, 217 B.R. at 486-87 (concluding that “following” clearly means “after”). Nothing in the statute or its legislative history suggests that a court has discretion in determining who can and cannot be a debtor. The provision does not state or imply that a court can consider the debtor’s motives, weigh the equities involved, evaluate the absurdity of the result of applying the statute, or require a causal relationship between a creditor’s motion for relief from the automatic stay and the debtor’s motion to dismiss. Because § 109(g)(2) clearly defines who may not be a debtor, this court is precluded from further interpretation. *See United States v. Ron Pair Enters.*, 489 U.S. 235, 214, 109 S. Ct. 1026, 103 L.Ed.2d 290 (1989) (When “the statute’s language is plain, ‘the sole function of the courts is to enforce it according to its terms.’”) (*quoting Caminetti v. United States*, 242 U.S. 470, 485, 37 S. Ct. 192, 194, 61 L.Ed.2d 442 (1917)).

When the court superimposes the facts in this case over the statutory definition of who may not be a debtor, it finds that this debtor fulfills those § 109(g)(2) criteria: The debtor filed the current chapter 11 case within 180 days of the voluntary dismissal of his prior chapter 13 case and after four motions for relief from stay had been filed and were pending. Under the § 109(g)(2) checklist, he is statutorily disqualified as a debtor. *See In re Hutchins*, 303 B.R. at 508 (“thus, the facts of this matter fit within the purview of § 109(g)(2) and if applied as written the statute prescribes dismissal of this case.”); 2 *Collier on Bankruptcy* ¶ 109.08 at 109-52 (Alan N. Resnick & Henry J. Sommer, eds-in-chief, 15th ed. rev’d, 2003) (“The debtor who obtains voluntary 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 time.”).

Even if the court were to find it appropriate to consider these facts under the other two approaches, however, the debtor would not be eligible to file this chapter 11 case. First, the court does not find that strict application of the statute leads to an absurd, inequitable, or unfair result. *See In re Richardson*, 217 B.R. at 493 (concluding that “an interpretation of § 109(g)(2) which gives each word its primary meaning leads to no absurd

consequences”). As debtor’s counsel agreed at the court hearing on the Trustee’s Motion to Dismiss, the debtor filed both cases because of mortgage foreclosure issues. In particular, he filed the second case less than 180 days after he dismissed the earlier case because a sheriff’s sale had been scheduled.³ There is no evidence of a creditor’s bad-faith conduct or of resolution of the stay motions. In addition, in spite of the debtor’s proffered reason for seeking a voluntary dismissal of his case, the court is persuaded that the four stay relief motions, filed immediately after the denial of confirmation of the chapter 13 plan, had a crucial temporal, if not causal, effect on his decision to move for dismissal. The court finds, therefore, that Sheneman is ineligible to be a debtor pursuant to 11 U.S.C. § 109(g)(2) under any reading of the statute.

Conclusion

For the reasons set forth in this Memorandum of Decision, the court finds that Jeremie Sheneman, the debtor in this chapter 11 case, is not qualified to be a debtor pursuant to 11 U.S.C. § 109(g)(2). Therefore, the U.S. Trustee’s Motion to Dismiss is granted and the debtor’s current case, Case Number 03-35804, is dismissed. The court further orders that the debtor is prohibited from filing another petition in bankruptcy for 180 days from the date of the dismissal of this petition.

SO ORDERED.



HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

³ To the extent that the debtor filed his first bankruptcy case to stay a foreclosure and then filed again prior to the creditor’s next foreclosure action, this debtor is like the debtor in *In re Patton*, 49 B.R. at 589, that § 109(g)(2) intended to block from refiling. *See p.4 supra*, quoting *Patton*.