IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 04-34635

ANGELA M. BLANCE

Debtor

MEMORANDUM ON MOTION TO SET ASIDE ORDER OF DISMISSAL AND MOTION TO DISMISS *NUNC PRO TUNC*

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This contested matter is before the court on the Motion to Set Aside Order of Dismissal and Motion to Dismiss *Nunc Pro Tunc* (Motion to Dismiss) filed by Manufacturers Acceptance Corporation (MAC) on October 1, 2004, seeking to set aside the court's Order entered on September 21, 2004, dismissing the Debtor's Chapter 13 bankruptcy case for failure to file a Chapter 13 plan, and asking the court to instead dismiss the Debtor's case *nunc pro tunc* to September 1, 2004.[1]

An evidentiary hearing on the Motion to Dismiss was held on October 20, 2004. The Debtor did not appear. The record before the court consists of seven exhibits introduced into evidence, along with the testimony of Joseph P. Burns, President of MAC.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A) and (O) (West 1993).

I

On March 31, 2000, the Debtor and her spouse, James Blance, (collectively Blances) executed a Promissory Note, Security Agreement, and Disclosure Statement (Note) in the amount of $160,020.00 in favor of MAC. The Note was secured by a Deed of Trust on the Blances' residence located at 220 Peterson Road, Knoxville, Knox County, Tennessee (Real Property). Pursuant to the Note, the Blances were required to make monthly payments to MAC in the amount of $889.00. The Blances did not make all payments required under the Note, and on December 13, 2000, they filed a joint Chapter 13 bankruptcy case, number 00-

[1] Alternatively, MAC requests that the court amend the September 21, 2004 dismissal Order to bar the Debtor and her non-debtor husband, James Blance, from filing another bankruptcy case for 180 days. The court need not consider this aspect of the Motion to Dismiss.

35036 (First Case). As of that date, the payoff on the Note was $75,125.17, including an arrearage of $4,096.79.[2]

The Blances made some payments under their Chapter 13 plan; however, they fell into arrears, and the First Case was dismissed on August 2, 2002, upon certification by the Chapter 13 Trustee. Following the dismissal of the First Case, MAC began foreclosure proceedings against the Real Property. The foreclosure was stayed, however, when the Debtor filed an individual Chapter 13 case, number 02-34821, on September 16, 2002 (Second Case). As of the filing date, the payoff on the Note was $78,368.86, and the arrearage had increased to $10,978.38. The Second Case was dismissed on January 10, 2003, upon motion of the Chapter 13 Trustee.

MAC again began foreclosure proceedings, which were stayed when the Debtor filed another Chapter 13 case, number 03-30902, on February 21, 2003 (Third Case). As of the filing date, the payoff on the Note was $84,156.86, with the arrearage now totaling $17,740.65. Upon the Chapter 13 Trustee's certification, the court dismissed the Third Case on December 19, 2003, with a 180-day refiling bar.

Following dismissal of the Third Case, MAC, for the third time, began foreclosure proceedings and scheduled a sale for February 20, 2004. The February 20, 2004 sale occurred but was not consummated, because Mr. Blance filed an individual Chapter 13 bankruptcy case, number 04-30940 (Fourth Case), prior to the foreclosure. The Trustee's

[2] The proof does not specify, but the court presumes that the payoff figures concerning the Note are principal balances only, and do not include accrued interest or foreclosure expenses.

Deed from the foreclosure was not recorded, and the sale was nullified. As of February 20, 2004, the payoff balance owed under the Note was $87,610.54, and the arrearage had grown to $26,496.44.

The Fourth Case was dismissed on July 27, 2004, for failure to make payments. Subsequent to the dismissal, MAC instituted foreclosure proceedings against the Real Property for a fourth time. The foreclosure sale was scheduled for and actually occurred on September 2, 2004, and pursuant thereto, a Trustee's Deed consummating the sale was recorded the same date with the Knox County Register of Deeds. As of September 1, 2004, the payoff balance on the Note was $95,102.29, with an arrearage of $32,835.34.

Unbeknownst to MAC at the time of the sale, on September 1, 2004, the Debtor, acting *pro se*, filed the present Chapter 13 bankruptcy case (Fifth Case), utilizing photocopies of the statements and schedules accompanying the Voluntary Petition commencing the Third Case filed in February 2003. The Debtor did not execute an original Declaration concerning her schedules, nor did she file a Chapter 13 plan. Accordingly, on September 9, 2004, the court entered an Order directing the Debtor to file her plan within the time required by Federal Rule of Bankruptcy Procedure 3015(b), or by September 16, 2004. The Debtor did not file a Chapter 13 plan, and the court entered its September 21, 2004 Order dismissing the Fifth Case for non-compliance with the Federal Rules of Bankruptcy Procedure.

MAC filed its Motion to Dismiss on October 1, 2004. The relief requested is two-fold. First, MAC asks the court to use its inherent powers to vacate or set aside the September 21,

2004 Order dismissing the Fifth Case for non-compliance with the Bankruptcy Rules, and to instead, enter an order dismissing the case for cause; i.e., because it was filed in bad faith. Additionally, MAC asks the court to enter the dismissal order *nunc pro tunc* to September 1, 2004, the date upon which the Fifth Case was filed, in order to validate the September 2, 2004 foreclosure sale, which violated the automatic stay.

II

Section 105(a) of the Bankruptcy Code defines the power of the court as follows:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C.A. § 105(a) (West 2004). Section 105 provides bankruptcy courts with the ability and "power to take whatever action is appropriate or necessary in aid of the exercise of their jurisdiction." *Casse v. Key Bank Nat'l Ass'n (In re Casse)*, 198 F.3d 327, 336 (2d Cir. 1999) (quoting 2 COLLIER ON BANKRUPTCY ¶ 105-5 to -7 (Lawrence P. King ed., 15th ed. 1999)). Nevertheless, "§ 105(a) is not without limits, may not be used to circumvent the Bankruptcy Code, and does not create a private cause of action unless it is invoked in connection with another section of the Bankruptcy Code." *In re Rose*, 314 B.R. 663, 681 n.11 (Bankr. E.D. Tenn. 2004) (citing, among others, *Greenblatt v. Richard Potasky Jeweler, Inc. (In re Richard Potasky Jeweler, Inc.)*, 222 B.R. 816, 829 (S.D. Ohio 1998), and *Yancy v. Citifinancial, Inc. (In re Yancy)*, 301 B.R. 861, 868 (Bankr. W.D. Tenn. 2003)). Instead, the court may only use

§ 105(a)'s equitable powers "in furtherance of the goals of the [Bankruptcy] Code." *Childress v. Middleton Arms, L.P. (In re Middleton Arms, L.P.)*, 934 F.2d 723, 725 (6th Cir. 1991). Here, MAC urges the court to use its § 105(a) powers in connection with 11 U.S.C.A. § 1307(c) (West 2004), which allows the court to dismiss a Chapter 13 case "for cause."

Because all bankruptcy petitions must be filed in good faith and must be "fundamentally fair in a manner that complies with the spirit of the Bankruptcy Code's provisions," the failure to file in good faith may constitute cause for dismissal under § 1307(c). *In re Glenn*, 288 B.R. 516, 519-20 (Bankr. E.D. Tenn. 2002) (quoting *Norwest Fin. Tenn. v. Coggins (In re Coggins)*, 185 B.R. 762, 764 (Bankr. W.D. Tenn. 1995)*; see also In re Herrera*, 194 B.R. 178, 186 n.4 (Bankr. N.D. Ill. 1996). A determination of whether a debtor has filed in good faith, based on the totality of the circumstances, should include consideration of the following, non-exhaustive list of factors:

> (1) the motivation for filing for bankruptcy; (2) whether this is the first or subsequent filings; (3) the types of debts and how the debtor has dealt with his creditors; (4) whether the proposed payments are a mockery to other debtors; (5) the burden of administrating the plan; and (6) prospects for rehabilitation.

Glenn, 288 B.R. at 520 (citing *In re Sexton*, 230 B.R. 346, 351 (Bankr. E.D. Tenn. 1999)). As the party seeking dismissal under § 1307(c), MAC bears the burden of proof. *In re Duruji*, 287 B.R. 710, 713 (Bankr. S.D. Ohio 2003).

While "[m]ultiple filings by a debtor are not, in and of themselves, improper[,]" if a debtor has "a history of multiple filings and dismissals," bad faith may be inferred. *Glenn*, 288 B.R. at 520; *see also In re Pike*, 258 B.R. 876, 881 (Bankr. S.D. Ohio 2001); *In re McCoy*, 237

B.R. 419, 422 (Bankr. S.D. Ohio 1999). In that same vein, the court does not necessarily construe that a debtor has acted in bad faith because the bankruptcy was filed on the eve of foreclosure; however, such conduct may be "probative" of bad faith, especially when it has happened repeatedly with the same creditor. *Glenn*, 288 B.R. at 520 (citing *In re Falotico*, 231 B.R. 35, 40-41 (Bankr. D.N.J. 1999)).

Based upon the facts outlined above, the court can easily infer bad faith. With the exception of the first, and only jointly-filed case, the Debtor and Mr. Blance have filed four Chapter 13 cases on the eve of foreclosure. In this Fifth Case, the Debtor did not even complete new bankruptcy forms, but instead, merely photocopied the statements and schedules from the Third Case, filed in February 2003, and filed them with a newly executed Voluntary Petition. Accordingly, the information contained in the statements and schedules is no longer accurate. Furthermore, the Debtor did not execute an original Declaration concerning her statements and schedules in the Fifth Case, but again, simply attached a photocopy of the Declaration in the Third Case. The court has no hesitation in finding that this bankruptcy case was filed with the sole purpose of preventing MAC's foreclosure sale scheduled for the next day, September 2, 2004. It is also material that the Debtor did not file a plan, thereby allowing the case to be summarily dismissed after the foreclosure date passed, without making an appearance in the case.[3]

[3] Interestingly, the Debtor did not notify MAC that she had filed the Fifth Case on September 1, 2004, and instead, allowed the sale to proceed on September 2, 2004. Given the Debtor's experience in Chapter 13, the court concludes that she never intended to file a plan or to proceed with the present case. Rather, her sole purpose appears to have been designed to interfere with and thwart MAC's foreclosure.

The Blances have abused the bankruptcy system to avoid paying their creditors, primarily MAC. It is apparent that they filed their Chapter 13 cases in order to stay the foreclosure sales sought by MAC, with no real intention of maintaining those cases. Through their efforts, they have remained in possession of their residence, without paying for it, for more than two years. During that time, the payoff balance on the Note has increased by just under $20,000.00 rather than decreasing,[4] and the arrearage owed on the Note has skyrocketed from just over $4,000.00 to more than $32,800.00. Clearly, the Blances have used the automatic stay as a sword against MAC, and equity mandates relief in this case. The September 21, 2004 Order dismissing this case for non-compliance with the Bankruptcy Rules will be set aside.

III

MAC next asks the court to enter an Order dismissing this case *nunc pro tunc* to September 1, 2004. *Nunc pro tunc* is defined as "[h]aving retroactive legal effect through a court's inherent power." BLACK'S LAW DICTIONARY 1097 (7th ed. 1999). The Sixth Circuit has stated that "[n]unc pro tunc is translated from Latin as 'now for then.' The term 'signifies that there is to be a relation back to a designated past date and that the judgment and/or entry are to be given certain anterior effects.'" *Oates v. Oates*, 866 F.2d 203, 208 n.8 (6th Cir. 1989) (quoting 6A MOORE'S FEDERAL PRACTICE § 56.08 (2d ed. 1987)). *Nunc pro tunc*, or retroactive relief, should not be granted absent "unusual circumstances." *In re Allied Sign Co.*, 280 B.R.

[4] *See supra* n. 2.

688, 692 (Bankr. S.D. Ala. 2001). In egregious cases, a creditor who has conducted a foreclosure sale unwittingly in violation of the automatic stay may apply "for relief from the automatic stay or for dismissal of the bankruptcy case nunc pro tunc so as to erase the effect of the automatic stay and thereby validate the foreclosure sale." *In re Flores*, 291 B.R. 44, 62-63 (Bankr. S.D.N.Y. 2003).

As previously stated, the court believes this Fifth Case was filed in bad faith and should be dismissed accordingly. The court likewise concurs that the dismissal should be *nunc pro tunc* to September 1, 2004. On four separate occasions, MAC has attempted to exercise its foreclosure rights upon the Real Property pursuant to the Deed of Trust, incurring fees and expenses, only to have either of the Blances file a Chapter 13 bankruptcy case. From the time of the First Case, filed in December 2000, the arrearage owed by the Blances to MAC has grown from $4,096.79 to $32,835.34. With respect specifically to this Fifth Case, the Debtor inappropriately used photostatic copies of the statements and schedules that she filed with the Third Case in February 2003, rather than completing and executing statements and schedules to reflect her current information. Moreover, she did not notify MAC that she had filed on September 1, 2004, but instead, allowed the foreclosure to proceed on September 2, 2004. The egregious facts of this case dictate granting MAC's Motion to Dismiss *nunc pro tunc* to September 1, 2004, and thus, validating the September 2, 2004 foreclosure sale.

An order consistent with this Memorandum will be entered.

FILED: October 25, 2004

BY THE COURT

s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 04-34635

ANGELA M. BLANCE

Debtor

O R D E R

For the reasons set forth in the Memorandum on Motion to Set Aside Order of Dismissal and Motion to Dismiss *Nunc Pro Tunc* filed this date, the court directs the following:

1. The Motion to Set Aside Order of Dismissal and Motion to Dismiss *Nunc Pro Tunc* filed by Manufacturers Acceptance Corporation on October 1, 2004, is GRANTED.

2. The Order entered on September 21, 2004, dismissing this Chapter 13 bankruptcy case is VACATED.

3. This Chapter 13 case commenced by the Debtor Angela M. Blance on September 1, 2004, shall be and hereby is DISMISSED, with the dismissal to be effective *nunc pro tunc* to September 1, 2004.

SO ORDERED.

ENTER this October 25, 2004, *nunc pro tunc* for September 1, 2004.

BY THE COURT

s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE