

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
PRISCILLA J. GARCIA,
Debtor.

No. 13-08-13998 SS

**ORDER DENYING MOTION FOR CONTINUANCE
OF AUTOMATIC STAY**

The motion of Debtor Priscilla J. Garcia for a continuation of the automatic stay pursuant to 11 U.S.C. 362(c)(3) (doc 9) came before the Court for a trial on December 19, 2008. For the reasons recited below, the motion must be denied. The Court has jurisdiction over the parties and the subject matter. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A) and (G).

Background

Debtor had previously filed a chapter 13 case on August 30, 2008, No. 08-12865-s13, which had come up for a preliminary hearing on confirmation on November 18, 2008. On November 3, the Chapter 13 Trustee had filed and noticed out a motion to dismiss the case based on Debtor's failure to make her first required payment in the amount of \$2,605. Docs 18 and 19. At that time the Trustee argued that Debtor had filed three previous bankruptcy cases dating back to 1994 and had made no payments of any amount in the pending case (two were due by the time of the preliminary confirmation hearing, each in the amount of \$2,605). Debtor through her counsel argued that the \$2,605 number was erroneously too high but that Debtor was prepared to make both payments in the higher amount shortly and then seek to modify the

payment amount later. The Court orally dismissed the case without prejudice. The written order was entered November 26. When the case was dismissed, there were pending two motions to modify the automatic stay (docs 20 and 22), filed by Del Norte Credit Union seeking permission to repossess three vehicles: a 2001 BMW, a 1994 Ford pickup, and a 2001 Indian motorcycle. The motions asserted among other things that Debtor did not have the vehicles insured for comprehensive and collision damage.

In the meantime, Debtor obtained other counsel and filed her chapter 13 petition for this latest of her bankruptcy filings on November 21, 2008. Doc 1. Debtor promptly filed the continuation motion on November 26, Del Norte and the Trustee filed objections (docs 17 and 18 respectively), and Debtor filed a Response (doc 19).

Analysis

Section 362(c)(3) provides in relevant part, as to a case that is filed when another case by the same debtor was pending within the preceding one-year period, that the stay with respect to a debt or property securing such a debt expires thirty days after the filing of the petition unless the court, after notice and a hearing, extends the stay. The court may extend the stay

only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and for purposes of subparagraph B [quoted in part immediately above], a case is presumptively filed not

in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary) -

...

as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending....

(Internal numbering deleted.)

A totality of the circumstances test, such as courts in the Tenth Circuit frequently uses in other contexts, e.g., Flygare v. Boulden (In re Flygare), 709 F.2d 1344 (10th Cir. 1083)(good faith filing test for chapter 13), is appropriate. See, e.g., In re Baldassarro, 338 B.R. 178, 188 (Bankr. D. N.H. 2006). Factors in the test may include the timing of the filing of the later case, how the debts in the later case arose, why the debtor's prior case was dismissed, how the debtor's actions affected the stayed creditors, debtor's motive in refileing, whether debtor's circumstances have changed since the earlier filing, whether the debtor will be able to fund a plan, and who objects to the continuation motion. Id. at 188.

Clear and convincing evidence is

that weight of proof which produces, in mind of trier of fact, a firm belief or conviction as to truth of allegations sought to be established, i.e., evidence so clear, direct, weighty, and convincing as to enable fact finder to come to clear conviction, without hesitancy, of truth of precise facts in issue.

Barry Russell, Bankruptcy Evidence Manual, §301.44 (West 2008), citing In re Garrett, 357 B.R. 128 (C.D. Ill. 2006). The clear and convincing standard is applicable in this case because of the

two pending stay motions in the first 2008 case. And even if the debtor rebuts the presumption of bad faith filing, the debtor still has the burden, under a preponderance of evidence standard, to persuade the court that the stay should be extended.

Baldassaro, 338 B.R. at 187.

The continuation motion recites little more than that Del Norte has liens on the three vehicles, that they are necessary for the reorganization, and that Debtor intends to pay the full amount of the claim. Doc 9. (The Plan puts the total amount of Del Norte's claim at \$22,000 and proposes to pay it in full with 6% interest. Doc 2.) Del Norte cited previous bankruptcy filings by the Debtor, a continuing lack of proof that the vehicles were insured, the two pending stay motions, and the fact that Debtor was now unemployed. Doc 17. Debtor's response to Del Norte's objection recites why the \$2,605 payment was too high, that Debtor intends to pay Del Norte in full plus 6%, and that Debtor's attorney has been presented with proof of insurance on the vehicles.

At the trial, Debtor attempted to prove that the vehicles were insured, but following the introduction of Debtors' exhibits 1 and 2, Del Norte's exhibit 1, and Debtor's testimony, there is still no firm evidence that the vehicles have been insured or are insured now. In addition, the schedules in No. 08-12865 value the three vehicles collectively at \$24,175; the schedules in No.

08-13998, filed 84 days later, valued the vehicles collectively at \$11,000. (And as noted above, the chapter 13 plan filed in the instant case values the vehicles at \$22,000.) Debtor admitted she looked at and signed both schedules, but was unable to explain the discrepancy in the values.

Debtor testified that both cases were filed to keep the vehicles. She testified the family needed all three vehicles: she needs a vehicle to take their 13 year old daughter to school, they need a pickup because of the rough terrain where their residence is located, and her husband takes the motorcycle to work, and just to ride, during the summer months and in the winter when the weather is pleasant enough. The motorcycle uses less fuel than the truck. No payments have been made on any of the three vehicles since November 2008; Debtor asserts that Del Norte has refused to accept payments during that time because it has accelerated the two loans that were secured by the vehicles without telling her. It is clearly true that the cases were filed to save the vehicles; whether all three of them are needed, the motorcycle in particular, is much more debatable. And the Court has some doubt that Debtor was as genuinely uninformed about the status of her loans as she stated.

Debtor had lost her job due to a reduction in force on October 10, 2008. She testified that she was quite sure that she would be employed beginning the following week, at an hourly wage

of \$12.00 per hour, more than the \$10.50 per hour (with benefits) that she was previously being paid. At the time of trial, she was receiving \$235 per week in unemployment compensation. Her husband continues to receive \$14.02 per hour. This set of circumstances constituted in effect relatively little change from the situation when she filed her first 2008 case. It also takes Debtor out of the category of debtors whose cases are dismissed and then lose their income so that they should be entitled to file again.

Debtor also presented evidence about additional sources of income that would come into play in the coming year: a reduction in her husband's child support payments (to another person) that would begin going to the estate after April 2009, a tax refund, and a raise her husband will likely get in 2009. Presumably these additions to income were or would have been applicable to the first 2008 chapter 13 case, so in a sense, there was little change here.

Considering more directly the factors listed above, the Court first finds that the timing of the new filing is logical. Although she refiled before the entry of the written order dismissing the first 2008 case, she presumably did so only after learning of the oral ruling that the 2008 case would be dismissed. At the same time, allowing her second 2008 filing to stand in effect allows her to "get away with" deciding not to

make any of her payments in her first 2008 case. This suggests as well that Debtor may be manipulating the Code a tad unfairly. And the lack of payments as one of the two reasons for dismissal of the first 2008 case by itself is a factor working against Debtor.

Del Norte continues to be unpaid; indeed, had Debtor performed in the previous case, she might well be paying Del Norte now. Instead, were the Court to grant the continuation motion, Del Norte would be waiting more months before receiving payment, in addition to the year or so it has waited so far. This is even more significant if in fact the collateral is decreasing in value as Debtor's schedules suggest. The only creditors listed by Debtor in the present case are the Internal Revenue Service for a sum that will probably be paid by part of Debtor's tax refund, H&R Block for a few hundred dollars (not listed), and Del Norte. Both Trustee and Del Norte have opposed the continuation motion.

Were the standard to decide this case a preponderance of evidence, the Court would probably find against Debtor. Given that the standard is clear and convincing, there can be no question that Debtor has failed to meet her burden of proof. And even if she had, she would still not meet the burden of persuading the Court that the stay should be continued in view of

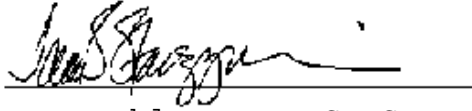
her failure to demonstrate that the vehicles - all of them - are fully insured.

The Court fully understands that if the stay is not extended, Del Norte will continue its repossession action in the Santa Fe County state court, and that the result is likely to be that Del Norte will repossess the vehicles at some point. However, the dictates of the Code do not allow the Court to adopt a standard different than what is in the statute. The Court is also not without sympathy for Debtor based on her testimony about what she understood and did not understand from, and how her first 2008 case was handled by, her then counsel. (Of course, the Court did not hear the other side of that chain of events, so it can consider as evidence only what it heard in trial.) Nevertheless, it does appear to the Court that Debtor is not completely without fault, since she should have known, from the history of the cases she had already participated in, that making no payments at all, even in an incorrect amount, was not the way to deal with her first 2008 case, particularly when a motion to dismiss on those very grounds had been filed and noticed out two weeks earlier.

Conclusion and Order

For the foregoing reasons, the Court finds it must deny the continuation motion, consistent with the language of the statute and the clear intent of Congress.

IT IS THEREFORE ORDERED that the motion of Debtor Priscilla J. Garcia for a continuation of the automatic stay pursuant to 11 U.S.C. 362(c)(3) (doc 9) is denied.



Honorable James S. Starzynski
United States Bankruptcy Judge

Date Entered on Docket: December 23, 2008

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