

**United States Bankruptcy Court
District of New Mexico**

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
RONALD COLE,
Debtor.

No. 13-99-12512 SR

MEMORANDUM OPINION ON MOTION TO DISMISS

This matter came before the Court on August 9, 1999 to consider the Motion to Dismiss filed by creditors First Bank Southwest, N.A. ("FBS") and Citizens Bank of Clovis ("CBC"). The motion to dismiss was joined into by the Chapter 13 Trustee. FBS appeared through its attorney David Richards; CBC appeared through its attorney Max Best. The Chapter 13 Trustee appeared pro se. The debtor appeared through his attorney Bruce Fogarty. The Court set deadlines for filing memoranda of law and responses. Having considered the arguments of the parties, and being otherwise informed, the Court enters this Memorandum Opinion, which constitutes the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052. This is a core proceeding under 28 U.S.C. section 157(b)(2)(A).

FACTS

1. Debtor filed a voluntary chapter 13 proceeding on August 18, 1998.
2. On November 20, 1998, NationsBank, N.A. filed a Motion for Relief from Stay. This motion was denied on February 1, 1999.

3. On December 17, 1998, General Motors Acceptance Corporation filed a Motion for Relief from Stay. This motion was granted on February 22, 1999.
4. On January 15, 1999, FBS filed a Motion for Relief from Stay. This motion was granted on March 15, 1999.
5. On March 17, 1999, debtor filed a Motion to Dismiss, and the Court entered an order of dismissal on March 18, 1999.
6. On April 26, 1999, debtor filed the present case, which the creditors and trustee have sought to dismiss by virtue of 11 U.S.C. section 109(g)(2)¹.
7. In debtor's response to the motion to dismiss, he alleges that prior to dismissing the first case he had received a commitment for a \$500,000 loan, which he believed in good faith would fund and allow him to pay his creditors. Shortly after dismissal, the loan was not approved.² He also

¹11 U.S.C. § 109(g)(2) provides:

Notwithstanding any other provision of this section, no 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.

²The wiser course for debtor would have been to effectuate the \$500,000 loan while he was still in his first Chapter 13 case. The debtor provided no explanation why he failed to use a Chapter 13 plan to do that.

states that after the first case was dismissed creditors began to repossess vehicles necessary to his business, that he attempted to work out an arrangement with FBS but was turned down, and therefore filed this second case to be able to continue to operate his business. He argues that the literal language of section 109(g) should not be applied, but rather a flexible approach that looks at the good faith of the prior dismissal and refiling.

8. Movants argue that the language of 109(g)(2) is clear, leaves no discretion with the court, and mandates dismissal. Alternatively, they argue that, even if the Court were to use a flexible approach, this case would warrant dismissal because the debtor's refiling upon the eve of repossession is the exact evil that Congress addressed in the statute.

CONCLUSIONS OF LAW

As explained below, there are two lines of cases concerning the interpretation of Section 109(g)(2).³ However, regardless of which line of cases is followed, Section 109(g)(2) clearly applies to the facts set forth above. Debtor was in a prior

³ In fact, some courts discern three lines of cases; e.g., In re Sole, 233 B.R. 347, 348-350 (Bankr. E.D. Vir. 1998) ("equitable", "strict" and "causal" approaches). This memorandum effectively lumps the equitable and causal approaches under the rubric of the "flexible" approach, versus the strict approach. In re Richardson, 217 B.R. 479 (Bankr. M.D. La. 1998) contains an encyclopedic discussion of the many approaches to and permutations on the interpretation of the statute.

proceeding within 180 days of this case and sought a voluntary dismissal after three separate motions for relief from stay had been filed, two of which were granted. He then, within 180 days, filed a second bankruptcy.

On its face the statute, which appears to be clear and unambiguous, mandates dismissal on these facts. See, e.g. In re Denson, 56 B.R. 543, 546 (Bankr. N.D. Al. 1986) ("Court is not free to tamper with the statute, regardless of the debtor's motives."); In re Rist, 153 B.R. 79, 80 (Bankr. M.D. Fl. 1993) (Section 109(g)(2) is mandatory and neither the purpose nor the intent of the dismissal are relevant.); Andersson v. Security Federal Savings and Loan of Cleveland (In re Andersson), 209 B.R. 76, 78 (6th Cir. B.A.P. 1997) (Section 109(g)(2) is unambiguous and mandates dismissal).

Even if the Court were to adopt the flexible approach urged by debtor, see e.g., First National Bank of Rocky Mount v. Duncan (In re Duncan), 182 B.R. 156, 160 (Bankr. W.D. Va. 1995) ("Was there, during the relevant time period, a causal relationship between the Bank seeking to be relieved of the automatic stay and the Debtor seeking to dismiss her case?"); In re Ramos, 212 B.R. 29, 30 (Bankr. D. P.R. 1997) (while the statute is mandatory, there may be situations where court will suspend enforcement for equitable reasons); In re Sole, 233 B.R. 347, 350 (Bankr. E.D. Va. 1998) ("[W]e will look for a causal connection between a

motion for relief from the automatic stay and a debtor's subsequent request and receipt of a voluntary dismissal. Absent the causal connection, section 109(g)(2) is not triggered."), the court is of the firm conviction that 109(g)(2) would still bar the filing of this case. Debtor moved to dismiss the first case two days after FBS obtained stay relief. Debtor then admits that, because of the resulting collection actions, he filed the second case.

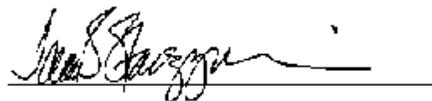
However one interprets the language of section 109(g)(2), Congress clearly determined that a debtor cannot voluntarily dismiss a bankruptcy case after a creditor has obtained relief from the stay and then file another bankruptcy petition within 180 days solely to avoid the consequences of the earlier order granting relief. To do so is an abusive use of section 362(a) and 1307(b).

In re Keul, 76 B.R. 79, 82 (Bankr. E.D. Pa. 1987). Also see Moran v. Frisard (In re Ulmer), 19 F.3d 234, 237 (5th Cir. 1994)(Frisard filed stay motion in first case, which debtor dismissed; debtor filed second case "to ward off Frisard"; "In other words... [debtor] act[ed] in the very manner that Congress proscribed through section 109(g)(2)"). The Court finds that this is exactly what debtor has done in his second case.

Furthermore, the debtor has not argued sufficient equitable grounds to avoid application of the statute. There are no allegations that the creditors are acting in bad faith, see Home Savings of America, F.A. v. Luna (In re Luna), 122 B.R. 575, 577

(9th Cir. B.A.P. 1991)("Mechanical application of section 109(g)(2) would reward [creditor] for acting in bad faith and punish [debtor] for acting in good faith"). There are also no allegations that application of the statute would result in an absurd result or go beyond the scope of what Congress was attempting to address, see In re Santana, 110 B.R. 819, 821 (Bankr. W.D. Mi. 1990)(stay motion in prior case by different creditor was withdrawn before request for dismissal, *held* section 109(g)(2) inapplicable because this is not the type of case that the statute was designed to prohibit).

An order dismissing this chapter 13 proceeding will be entered herewith.

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Honorable James S. Starzynski
United States Bankruptcy Judge

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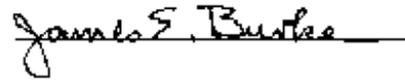
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A handwritten signature in black ink that reads "James S. Bustee". The signature is written in a cursive style and is positioned above a solid horizontal line.