UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Wednesday, May 23, 2018
Place: Department B – Courtroom #13
Fresno, California

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called. The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions. If the parties stipulate to continue the hearing on the matter or agree to resolve the matter in a way inconsistent with the final ruling, then the court will consider vacating the final ruling only if the moving party notifies chambers before 4:00 p.m. (Pacific time) at least one business day before the hearing date: Department A-Kathy Torres (559)499-5860; Department B-Jennifer Dauer (559)499-5870. If a party has grounds to contest a final ruling under FRCP 60(a)(FRBP 9024) because of the court's error ["a clerical mistake (by the court) or a mistake arising from (the court's) oversight or omission"] the party shall notify chambers (contact information above) and any other party affected by the final ruling by 4:00 p.m. (Pacific time) one business day before the hearing.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

THE COURT ENDEAVORS TO PUBLISH ITS RULINGS AS SOON AS POSSIBLE. HOWEVER, CALENDAR PREPARATION IS ONGOING AND THESE RULINGS MAY BE REVISED OR UPDATED AT ANY TIME PRIOR TO 4:00 P.M. THE DAY BEFORE THE SCHEDULED HEARINGS. PLEASE CHECK AT THAT TIME FOR POSSIBLE UPDATES.

9:30 AM

1. 18-11951-B-13 **IN RE: SHAWN WILLIAMS**
JRL-1

MOTION TO IMPOSE AUTOMATIC STAY
5-17-2018 [9]

SHAWN WILLIAMS/MV
JERRY LOWE
OST 5/18/18

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The court will issue the order.

This motion is DENIED. Constitutional due process requires that the movant make a *prima facie* showing entitlement to the relief sought. Here, the moving papers do not present "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" In re Tracht Gut, LLC, 503 B.R. 804, 811 (9th Cir. BAP, 2014), citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), and Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

This Motion to Impose the Automatic Stay was properly set for hearing on the notice required by LBR 9014-1(f)(2)and an Order Shortening Time. Consequently, the creditors, the trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court may set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Under 11 U.S.C. § 362(c)(4)(A), if two or more cases of the debtor were pending within the previous year but were dismissed, the

automatic stay under subsection (a) shall not go into effect upon the filing of the later case and will ONLY go in to effect by order of the court after a request by the party in interest.

This is the fourth case filed by debtor within the last 14 months. The first case was filed on March 8, 2017 and was dismissed on April 6, 2017 for failure to timely file documents. Case no. 17-10818, doc. #19. The second case was filed on October 3, 2017 and dismissed on October 23, 2017, again for failure to timely file documents. Case no. 17-13846, doc. #16. The third case was filed on November 13, 2017 and dismissed on April 27, 2018 for unreasonable delay that was prejudicial to creditors. Case no. 17-14339, doc. #110. In that filing, the case had been proceeding for five months without a plan being confirmed. *Id.* The debtor claims that over $14,000 of payments were made to the Trustee in the immediately preceding case. The motion for confirmation of plan was denied on procedural grounds. *Id.* This most recent case was filed on May 15. All of debtor's filings have been to stop foreclosure sales on debtor's home. Case no. 18-11951, doc. #12. The first three filings were skeletal petitions, debtor being pro se in the first two filings and represented by counsel for the third filing and this current filing.

11 U.S.C. § 362(c)(4)(B) allows the court to impose the stay to any or all creditors, subject to any limitations the court may impose, after a notice and hearing where the debtor or a party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed.

Cases are presumptively filed in bad faith if any of the conditions contained in 11 U.S.C. § 362(c)(4)(D) exist. The presumption of bad faith arises in this case because three cases were pending within the last year. 11 U.S.C. § 362 (c)(4)(D)(I). The stay does not arise to all creditors in this case. Wells Fargo did file a stay relief motion in the immediately preceding case but it was denied as moot because the court previously declined to impose the automatic stay. Case # 17-14339 (Docs. 79 and 38, respectively)

The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* This evidence standard has been defined, in Singh v. Holder, 649 F.3d 1161, 1165, n. 7 (9th Cir. 2011), as "between a preponderance of the evidence and proof beyond a reasonable doubt." It may further be defined as a level of proof that will produce in the mind of the fact finder a firm belief or conviction that the allegations sought to be established are true; it is "evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case." In re Castaneda, 342 B.R. 90 (Bankr. S.D. Cal. 2006), *citations omitted*.

Based on the moving papers and the record, and in the absence of opposition, the court is not persuaded that the presumption has been rebutted. The court intends to DENY the motion.

First, the numerous filings by the debtor, while understandable, in part, do not support overcoming the presumption here. This is the fourth bankruptcy filing by the debtor within the last 14 months. In

the immediately previous filing, debtor's motion to impose the automatic stay was denied, in part because debtor had over $70,000.00 in arrearages owed to Wells Fargo. Case no. 17-14339, claim #2. Whether debtor was pro se or represented by counsel, the petitions were filed without the necessary schedules and motions were procedurally deficient, from missing necessary evidence (*Id.*, doc. #27, 36, 38) to docket numbers (*Id.*, doc. #110). The court may understand the reason for the first filing being dismissed. However, the last two filings have been with the help of legal counsel and still the cases were unsuccessful. While the Plan filed in the last case was denied confirmation for procedural reasons, confirmation was nevertheless denied.

Second, there is an unexplained discrepancy regarding the Wells Fargo claim in the debtor's proof on this motion. While Wells Fargo has yet to file a claim in this case, it is likely that the arrearages are still significant. In the immediately previous case, Wells Fargo's claim showed over $70,000.00 in arrearages. The schedules in this case do not dispute the large arrearage. The court is puzzled though – debtor states in her declaration that from the date of purchase through September 2016, debtor always made her mortgage payment. Case no. 18-11951, doc. #12. The evidence Wells Fargo included with their claim in the previous bankruptcy shows that payments were consistently late, and that debtor actually stopped making payments as of March, 2014, conflicting with debtor's declaration. *Id.*, doc. #12; Case no. 17-14339, claim #2. This does not support a finding of good faith.

Third, the alleged problems debtor experienced with negotiating a loan modification do not support the finding against the presumption of lack of good faith here. Debtor has had ample time to negotiate with her creditor and benefit from the automatic stay. If statements regarding creditor's inability or unwillingness to enter into a loan modification are true, this motion is not the proper vehicle to resolve that issue, nor is the bankruptcy court the proper forum.

Fourth, the debtor has a history of administrative compliance problems even with counsel. There were four motions to dismiss filed by the Chapter 13 trustee in the immediately preceding case. Three were eventually withdrawn. The fourth was opposed but the court granted the motion since there was a five month delay and still no Plan was confirmed.

Fifth, the debtor has provided no reason for the court to believe this case will be any different. In In re Whitaker, 341 B.R. 336, 345 (Bankr. S.D. Ga. 2006), the court held: "[T]he chief means of rebutting the presumption of bad faith requires the movant to establish 'a substantial change in the financial or personal affairs of the debtor . . . or any other reason to conclude' that the instant case will be successful. If the instant case is one under chapter 7, a discharge must now be permissible. If it is a case under chapters 11 or 13, there must be some substantial change."

Here, the debtor's declaration claims there are three reasons this case should be successful. Doc. #12. First, the debtor has completed the filing and paid the entire filing fee. The previous case

involved a completed filing and payment of the fee, so no change there. Second, the debtor claims to be employed with the Internal Revenue Service (IRS) for 22 years and employment is stable and that she also works for Tulare Occupational Medicine. But, the Schedules I and J filed in this case (doc. #1) and in the previous case (No. 17-14339, doc. #19) do not show any income from the IRS but rather from the same Occupational Medicine business, though the business's name has changed. This discrepancy is not explained or discussed in the declaration. Third, the debtor claims an aunt provides $600 per month and a "significant other" $1,000 per month. Both income sources were listed on both schedules I and J in both this and the immediately previous case. That is not a change.

What has changed does not support a successful effort in this case. The debtor's income has increased slightly and the debtor's aunt still lives with the debtor. There is a slight increase in expenses in this case compared to the previous case. The net result has been a slight increase in monthly income of less than $100. Yet the current proposed monthly Plan payment is less than $100 more than the proposed Plan payment in the previous case. Assuming the debtor did make approximately $14,000.00 of payments to the Chapter 13 Trustee in the immediately previous case, the debtor's financial situation remains unchanged. The debtor depends on contributions from two sources to make a Plan payment who have no obligation to continue to contribute. Plus, the substantial arrearage to Wells Fargo has grown since the last case.

The motion will be DENIED. The court will issue an order.

2. 18-11598-B-13 **IN RE: LYDIA CORONADO**
HV-1

MOTION TO IMPOSE AUTOMATIC STAY
5-22-2018 [17]

LYDIA CORONADO/MV
HECTOR VEGA
OST 5/22/18

NO RULING.