UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:

Michael J. Keefe and
Sharon A. Keefe,
Debtors.

Chapter 13 Case
 # 03-10681

Appearances: *Michael Kainen, Esq.*
White River Jct., VT
Attorney for Debtors

ORDER

DETERMINING DEBTORS ARE NOT DISQUALIFIED FROM CHAPTER 13 RELIEF UNDER 11 U.S.C. § 109(g)(2)

On July 11, 2003, the Court *sua sponte* issued an Order directing the Debtors to appear and show cause why their case should not be dismissed for violation of the eligibility provisions of 11 U.S.C. § 109(g)(2). See doc. #20. On July 24, 2003, the Debtors appeared, through their attorney, Michael Kainen, to present both oral argument and a Bench Memo in support of their position that the 180-day filing prohibition of § 109(g)(2) should not be enforced against them. Based upon the facts and circumstances of this case, and for the reasons set forth below, the Court finds the Debtors have shown cause why the § 109(g)(2)[1] prohibition against serial filings is not applicable in this case.

The question of who may be a debtor is answered by §109 of the Bankruptcy Code. That provision also articulates the circumstances which may disqualify certain individuals from obtaining bankruptcy relief. At issue here is the applicability of § 109(g)(2) which 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—
> (1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or
> (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.

[1] All statutory references herein refer to Title 11 of the United States Code ("the Bankruptcy Code") unless otherwise indicated.

In this case, the Court issued an order to show cause why the case should not be dismissed because its records disclosed that the Debtors have a procedural chronology typical of serial filers. Specifically, the Court's records reflect that the Debtors filed a chapter 13 case on June 30, 2000 (case # 00-10751); two creditors filed motions for relief from stay, and obtained orders granting said relief from stay, in that case; on January 30, 2003, the Debtors' case was dismissed on their motion; and, on May 1, 2003, the Debtors filed the instant chapter 13 case.[2] This confluence of events, in turn, triggered an inquiry under the disqualification provisions of § 109(g)(2).

Section 109(g)(2) was enacted to address what Congress perceived to be a possibility of abuse of the bankruptcy system by debtors, namely "the filing of meritless petitions in rapid succession to improperly obtain the benefit of the Bankruptcy Code's automatic stay provisions as a means of avoiding foreclosure under a mortgage or other security interest." In re Casse, 198 F.3d 327, 337 (2d Cir. 1999) (citing In re Tomlin, 105 F.3d 933, 937 (4th Cir. 1997)). There are many cases interpreting this prohibition in situations where debtors' bankruptcy filings appear to be calculated to thwart or impede the legitimate efforts of secured creditors. They all reach the same general conclusion, which was succinctly stated in one of the first cases to consider the issue:

> 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 sections 362(a) and 1307(b).

In re Keul, 76 B.R. 79, 82 (Bankr. E.D. Pa 1987); see also In re Connelly, 195 B.R. 230 (Bankr. W.D.N.Y. 1993). There can be no question that when Congress enacted § 109(g)(2) it was generally instructing the bankruptcy courts to be vigilant in their efforts to prevent abuse of the bankruptcy system, and, was directing, in particular, that the courts deny bankruptcy relief to any debtor who files a subsequent bankruptcy case solely to avoid the consequences of a relief from stay order granted in the debtor's prior bankruptcy case.

The Court finds here that there are two discreet factors which compel a determination that § 109(g)(2) should not be used to deny relief to the Debtors. First, there is the critical distinguishing factor that in this instance, while one of the Debtor's creditors, Chrysler Financial, was granted relief from stay just prior to the dismissal of he Debtors' previous case, it also obtained possession of the underlying collateral. Hence, the Debtors' second filing cannot thwart Chrysler Financial from proceeding to enforce its rights under state law against said collateral. Therefore, the Court finds the Debtors' filing clearly was not motivated by a desire

[2] This chronology of events is admitted in the Debtors' Bench Memo dated July 24, 2003. See doc. #25.

to avoid the consequences of the earlier order granting relief from stay. Cf., In re Keul, 76 B.R. at 80.

Second, the Debtors' circumstances are markedly different from those discussed in all of the cases which have applied § 109(g)(2) to deny relief because the only other relief from stay order granted in the Debtors' previous bankruptcy case (to the Debtors' mortgagee, The Money Store) was not entered just prior to the Debtors' dismissal of their case. The Bankruptcy Code does not define – or give any guidance as to the meaning of – the term "following" in § 109(g)(2). However, the facts of this case point out the importance of there being a proximate temporal relationship between the entry of the salient order granting relief from stay and a debtor's voluntary dismissal of the case. The lack of specificity as to what "following" means raises the question of whether this provision prohibits a debtor from filing a subsequent case for 180 days, whenever: (a) there is a motion for relief from stay filed in a debtor's case; and (b) a debtor ultimately voluntarily dismisses the case without regard to (I) the outcome of the motion for relief from stay, (ii) the debtor's performance in the case subsequent to the motion, (iii) the impetus for the subsequent case filing, (iv) the status of the creditor at the time of the latter bankruptcy filing, and (v) how much time elapsed between the date of the motion for relief from stay and the dismissal of the case. This interpretation would yield harsh and unfair consequences to the honest debtor who is not intending to – or acting in such a way that would, in fact – thwart a creditor who filed a motion for relief from stay in the earlier bankruptcy case.

> The fundamental purpose of the Bankruptcy Code is to afford the honest but unfortunate debtor "'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'"

In re Casse, 219 B.R. 657, 660 (Bankr E.D.N.Y. 1998) (citing Grogan v. Garner, 498 U.S. 279, 286, (1991) (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934))). As the Casse court noted, the fundamental inquiry for the bankruptcy court in the context of a § 109(g)(2) inquiry is to determine whether the subsequent filing is in good faith. If the repeat filing is "calculated solely to reap the benefits of the automatic stay and frustrate or delay enforcement of a secured creditor's foreclosure rights[, it is] an abuse of the system" and must be prohibited. In re Casse, 219 B.R. at 661.

The Court has the duty to enforce § 109(g)(2) to prevent abusive filings, and any case which meets the criteria set forth in § 109(g)(2) is presumptively an abusive filing. However, the Court has the equally important responsibility of scrutinizing the facts and circumstances of each such case and permitting bankruptcy cases to proceed where the abuse targeted by § 109(g)(2) is not present and the debtor is proceeding in good faith. Bankruptcy courts must use the net of § 109(g)(2) wisely – spreading it only as wide as is necessary to cull out abusive filings, and scrupulously reviewing the catch to ensure release of those cases which meet the technical requirements of the statute, but are not the intended prey.

Here, the first motion for relief from stay in the Debtors' prior bankruptcy case (filed by The Money Store) was granted almost six months prior to the voluntary dismissal of the case. While the dismissal of the Debtors' case did "follow" this motion for relief from stay, the Court finds that the relief from stay order was not sufficiently close in time to the date of the Debtors' voluntary dismissal of that first case to be the motivation for the Debtors' current bankruptcy filing. It is not credible that the Debtors filed this case in order to thwart that creditor's enforcement of the lift stay order. The second motion for relief from stay in the initial case resulted in creditor Chrysler Financial obtaining possession of the collateral prior to the instant bankruptcy filing. Hence, the Court finds the instant filing could not in any way impede Chrysler Financial's rights. (In fact, it is not even a secured creditor in this case.) In sum, the Court finds no evidence to persuade it that the instant bankruptcy case was not filed in good faith and further finds the abuse which § 109(g)(2) is intended to address is not present in this case.

Accordingly, the Court finds the Debtors have shown good cause why their case should not be dismissed under the 180-day filing prohibition of 11 U.S.C. § 109(g)(2).

Therefore, IT IS HEREBY ORDERED, based upon the findings set forth on the record at the confirmation hearing, that this case shall proceed in chapter 13.

SO ORDERED.

December 3, 2003
Rutland, Vermont

Colleen A. Brown
United States Bankruptcy Judge