

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT



In re:

**James Kendall,
Debtor.**

**Chapter 13
Case # 21-10182**

ORDER
DENYING DEBTOR’S MOTION TO EXTEND AUTOMATIC STAY

On October 22, 2021, the Debtor filed a motion to extend the automatic stay, in this repeat filer case, pursuant to 11 U.S.C. § 362(c)(3) (doc. # 20, the “Motion to Extend Stay”). It was set for hearing on November 9, 2021. Before addressing the Debtor’s assertions in, or the opposition to, the Motion to Extend Stay, some procedural context is necessary.

This is the third bankruptcy case the Debtor has filed in this District, within the last five years. He filed chapter 13 case # 16-11244 on May 31, 2016, which the Court dismissed on October 16, 2017. Two months later, on December 19, 2017, he filed chapter 13 case # 17-10533, which the Court dismissed on June 17, 2021. The Debtor filed the instant chapter 13 case three months later, on September 16, 2021.

When the Debtor filed this case, he filed only his chapter 13 petition and the master mailing list of creditors (doc. # 1). Therefore, on September 17, 2021, the Clerk’s Office issued a deficiency notice reminding the Debtor that he was required to file all schedules and statements, the chapter 13 plan, the certificate of credit counseling, payment advices, and a wage withholding authorization within two weeks of the petition date, *i.e.*, by September 30, 2021 (doc. # 3). *See* Fed. R. Bankr. P. 1007(b), (c). The Debtor failed to file the missing documents by September 30, 2021. So, on October 1, 2021, the Court issued an order requiring the Debtor to appear at a hearing on October 19, 2021 to show cause why the Court should not dismiss this case based on the Debtor’s failure to cure the filing deficiencies (doc. # 6). On October 18, 2021, one day before the show cause hearing, the Debtor filed a chapter 13 plan and the required schedules, statements, and other documents, except for the payment advices (doc. ## 8–11). In light of the tardy filing of these essential documents, and the Debtor’s failure to file the payment advices, the Court held the show cause hearing on October 19, 2021.

At the October 19th hearing, Alec Slater, Esq., appeared on behalf of the Debtor, Jocelyn L.

Koch, Esq., appeared on behalf of the Internal Revenue Service (the “IRS”), Ryan M. Long, Esq., appeared on behalf of the Town of St. Johnsbury, and Jan M. Sensenich, Esq., appeared as the chapter 13 trustee. The Debtor’s attorney apologized for the delay in filing the required documents, reported that he had not filed any payment advices because the Debtor was not employed, and indicated he would file a statement to that effect later that day. Counsel for the IRS then pointed out that this case is subject to the stay expiration described in 11 U.S.C. § 362(c)(3) and, since the Debtor had not filed a motion to extend the stay during the first thirty days of the case, there may not be a stay in effect at this time. The Debtor’s attorney did not dispute this; he stated he intended to file a motion seeking to extend the stay. In reliance on the Debtor’s attorney’s representation that he would promptly file a statement addressing the payment advices, and in the absence of any motion before the Court with respect to the automatic stay issue, the Court deemed the show cause order satisfied and closed the hearing.¹

Following up on his assertion at the October 19th hearing, on October 22, 2021, the Debtor filed the Motion to Extend Stay, in this repeat filer case, and it was set for hearing on November 9, 2021. On November 8, 2021, both Community National Bank (“CNB”) and the IRS filed timely opposition to the Debtor’s Motion (doc. ## 24, 25, the “Oppositions”). The Oppositions set out an accurate history of the Debtor’s filings, the controlling statute, and solid legal arguments.

The Bankruptcy Code addresses the applicability of the automatic stay in a repeat filer case, in pertinent part, as follows:

- [I]f a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—
- (A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;
 - (B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period 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
 - (C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

¹ Unfortunately, the Debtor failed to file any statement regarding the payment advices promptly, so the Court entered an Order (doc. # 21), on October 27, 2021, renewing the Order to Show Cause. That order made note of the Debtor’s failure to file a notice of motion, certificate of service, or proposed order in connection with his motion to extend stay. The Debtor filed the payment advices on November 2, 2021; he has not filed the required attachments to the Motion.

(i) as to all creditors, if—

...
(II) a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to—

...
(cc) perform the terms of a plan confirmed by the court[.]

11 U.S.C. § 362(c)(3) (emphasis added). There is no dispute that the Debtor had a case pending within one year of the Debtor’s filing of the instant case, which was dismissed, nor that the Debtor had failed to file a motion to extend the stay within 30 days of filing the petition in this case. Accordingly, the Court must deny the Motion to Extend Stay. Moreover, under the statute, even if the tardiness did not compel the Court to deny the Motion, the presumption that the Debtor did not file this case in good faith would arise, and the Motion would have to be denied based on the Debtor’s failure to offer any admissible proof that the instant case was filed in good faith.

Finally, since none of the parties addressed the scope of the stay that has expired, nor this Court’s published decision on the issue, and to ensure the record is clear, the Court addresses the impact of the termination of the stay in this case. This Court has adopted the interpretation of § 362(c)(3)(A) known as the “Minority Approach,” and therefore the entire stay in this case has expired.

[W]hen a debtor files a second bankruptcy case within one year of his or her prior bankruptcy case being dismissed, the automatic stay terminates, in its entirety, 30 days after the filing of the second petition unless, within that initial 30-day period, the debtor or a party in interest proves the debtor filed the second bankruptcy case in good faith.

In re Goodrich, 587 B.R. 829, 832 (Bankr. D. Vt. 2018) (emphasis added).²


The Court is aware of the grave impact the termination of the automatic stay, under § 362(c) and Goodrich, will have here. It has carefully considered the full record in this chapter 13 case, the Debtor’s filing history, the timing and cause for dismissal of the Debtor’s previous chapter 13 case, and the controlling law, as well as the arguments CNB and IRS articulated in their Oppositions.

Based on these considerations, THE COURT FINDS that § 362(c)(3) applies to this case, the automatic stay terminated as to all creditors on the 30th day after the filing of this case, and the Debtor failed to file a motion to extend the stay prior to the expiration of that 30-day period, i.e. failed to establish the essential condition precedent for extending the stay. THE COURT FUTHER FINDS the presumption of abuse arises in the case, and the Debtor failed to present clear and convincing evidence – or any admissible evidence – to rebut the presumption of abuse.

² In Goodrich, the Court reconsidered and changed the position it had taken in In re McFeeley, 362 B.R. 121 (Bankr. D. Vt. 2007). In McFeeley, this Court had held that when the stay terminates by operation of § 362(c), it terminates only as to acts against the debtor or the debtor’s property. In Goodrich, this Court held a termination of stay under § 362(c) is a termination

Based on this record and findings, IT IS HEREBY ORDERED that the objections of the IRS and CNB are sustained, and the Debtor's Motion to Extend the Stay (doc. # 20) is denied. IT IS FURTHER ORDERED the hearing set for November 9, 2021 is canceled.

November 8, 2021
Burlington, Vermont



Colleen A. Brown
United States Bankruptcy Judge