

**United States Bankruptcy Court
Northern District of Illinois
Eastern Division**

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Bankruptcy Caption: In re Luis Medina, Jr.

Bankruptcy No. 14-27755

Date of Issuance: November 7, 2014

Judge: Hon. Jacqueline P. Cox

Appearance of Counsel:

Attorney for United States Trustee: Ms. Kimberly Bacher

Attorney for Debtor: Mr. Kevin J. Benjamin

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:)	Chapter 11
)	
Luis Medina, Jr.,)	Case No. 14-27755
)	
Debtor.)	Honorable Jacqueline P. Cox
)	

Order on Motion to Dismiss Chapter 11 Case (dkt. no. 23)

This matter is before the Court for ruling on the Motion of the United States Trustee (“U.S. Trustee”) to Dismiss Debtor’s Chapter 11 Case pursuant to Section 1112(b) of the Bankruptcy Code and to bar the Debtor from refileing (“Motion”). For the reasons noted herein, the Motion is Granted.

I. Jurisdiction and Venue

This Court has jurisdiction to hear and determine this matter pursuant to 28 U.S.C. § 1334(a) which provides that federal district courts have original and exclusive jurisdiction of all cases under the Bankruptcy Code, Title 11 of the United States Code (“Bankruptcy Code”). 28 U.S.C. § 157(a) allows the district courts to refer title 11 cases to the bankruptcy judges for their districts. The District Court for the Northern District of Illinois has promulgated Internal Operating Procedure 15(a), which refers its bankruptcy cases to this Court.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), which governs matters concerning the administration of the estate.

II. Facts and Background

On July 30, 2014 (“Petition Date”), Luis Medina Jr. (“Debtor”) filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code (the “Petition”).

The Debtor’s Petition discloses five previous bankruptcy cases filed since 2010. *See* Bankruptcy Case No. 14-27755, dkt. no. 1, pp. 2, 4.

The Debtor's *Schedule A of Real Property* discloses his interest in a split level single family home located at 5325 W. Windsor Avenue, Chicago, Illinois 60630 (the "Property"). Debtor lists the current value of the Property as \$259,284.62. The Debtor scheduled the claims securing the Property as \$759,938.99.

According to Debtor's answer to question 4 of his Schedule of Financial Affairs ("SOFA"), a Sheriff's Sale of the Property (in mortgage foreclosure Case No. 09 CH 37706) was scheduled for July 30, 201[4]¹ at 10:30 a.m., the same date the case herein was filed. *See* SOFA, Question, No. 4, dkt. no. 15, p. 31 of 37.

Debtor's First Case

On June 1, 2010, the Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code, Case No. 10 B 25021 ("First Case"), using the name Luis Medina. According to Debtor's Schedule I in the First Case, the combined monthly income of the Debtor and his non-filing spouse totaled \$7,482.59. Schedule J disclosed that the Debtor's net income after payment of his expenses totaled (\$110.91).

The Debtor's SOFA filed in the First Case discloses that at the time of filing, the mortgage foreclosure suit (Case No. 09 CH 37706) was pending in the Circuit Court of Cook County with respect to the Property.

A discharge was entered in the First Case on October 5, 2010. *See* Case No 10 B 25021, dkt. no. 20.

Debtor's Second Case

On August 28, 2011, just ten months after receiving a discharge in his First Case, the Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code ("Second Case"), commencing Case No. 11 B 35051.

The Debtor's Schedule I in the Second Case disclosed that the combined monthly income of the Debtor and his non-filing spouse totaled \$7,426.95. The Debtor's Schedule J reflects that

¹The Debtor's SOFA states 2013.

his net income after payment of expenses (not including monthly mortgage payments for the Property) totaled \$2,925.26. *See* Case No. 11 B 35051, dkt. no.14, p. 16 of 17.

In the Second Case, the Debtor submitted a Chapter 13 plan which proposed to repay secured lender Bank of America \$479,900 (the Debtor's asserted valuation) at an APR of 3% for the loan on the Property. The plan did not provide for payment of mortgage arrears. *See* Case No. 11-35051, Dkt. No. 13, p. 3 of 6. Debtor's proposed treatment of Bank of America's claim is prohibited by Bankruptcy Code § 1322(b)(2). Section 1322(b) provides:

Subject to subsections (a) and (c), the plan may—

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

11 U.S.C. § 1322(b)(2)

Bank of America filed an objection to the proposed plan on that basis. (dkt. no. 18). On December 21, 2011, the Second Case was dismissed for unreasonable delay in confirming a plan. Case No. 11 B 35051, dkt. no. 23.

Debtor's Third Case

On May 20, 2012, the Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code, commencing Case No. 12 B 20514 ("Third Case"). Debtor's Schedule I in the Third Case reflects that the combined monthly income of the Debtor and his non-filing spouse totaled \$4,420.41. Schedule J reflects that the Debtor's net income after deducting expenses (not including monthly mortgage payments) totaled \$2,451.41. *See* Case No. 12 B 20514, dkt. no.14, pg. 16 of 17.

On June 1, 2012, the Debtor filed a Chapter 13 plan which did not provide for payments to Bank of America for pre-petition mortgage arrears (which at the time totaled \$193,638.06), in violation of 11 U.S.C. §§ 1322(b)(5) and 1325(a)(5)(B)(ii). *See* Case No. 12 B 20514, dkt. no. 12, p. 3 of 5.

An objection was filed, noting that Debtor's plan "modifies the rights of the Creditor

which is secured only by a mortgage lien on the real estate which is the debtors' [sic] principal residence" and "does not 'provide for curing' of the pre-petition mortgage arrears." See Objection to Confirmation, Case No. 12 B 20514, dkt. no. 23, ¶¶ 12-13. On August 22, 2012, the Court entered an order denying confirmation of Debtor's plan. See Case No. 12 B 20514, dkt. no. 25.

On September 19, 2012, the Third Case was dismissed for unreasonable delay. Case No. 12 B 20514, dkt. no. 27.

Debtor's Fourth Case

On December 9, 2012 (just three months after dismissal of his Third Case), the Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code, commencing Case No. 12 B 48288 ("Fourth Case").

The Debtor's Schedule I in the Fourth Case reflects that the combined monthly income of the Debtor and his non-filing spouse totaled \$4,760.58. Schedule J discloses that the Debtor's net income, after payment of expenses (not including monthly mortgage payments for the Property) totals \$2,791.58. See Case No. 12 B 48288, dkt. no. 23, p. 14 of 15.

On April 9, 2013, the Debtor filed a Modified Chapter 11 Plan of Reorganization, which provided that "the prepetition default of \$224,962.48 shall be waived in accordance [sic] Section 1123(a)(5)(G) which authorizes 'curing or waiving any default' in a plan." See Case No. 12 B 48288, dkt. no. 44, p. 6 of 13.

In addition, the plan proposed to value the Property at \$445,447.97 and pay Bank of America at an interest rate of 2% with monthly payments of \$2,060.06 per month for sixty months. See Case No. 12-48288, dkt. 44, p. 6 of 13. The Debtor's proposed plan attempted to modify Bank of America's claim, in violation of 11 U.S.C. § 1123(b)(5), which prohibits debtors from modifying the rights of creditors secured by real property that is the debtor's principal residence. Section 1123(b) provides:

Subject to subsection (a) of this section, a plan may –

- (5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or

leave unaffected the rights of holders of any class of claims;

11 U.S.C. § 1123(b)(5).

Debtor's Fourth Case was dismissed on April 18, 2013 for failure to timely file monthly operating reports. *See* Case No. 12-48288, dkt. nos. 41 & 59.

Debtor's Fifth Case

On October 3, 2013 (five months after dismissal of the Fourth Case), the Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code, commencing Case No. 13 B 39061 ("Fifth Case"). Debtor's Schedule I in the Fifth Case reflects that the combined monthly income of the Debtor and his non-filing spouse totaled \$5,960.84. Schedule J reflects a net income of \$3,607.84, not including Debtor's monthly mortgage payments on the Property. *See* Case No. 13 B 39061, dkt. no. 12, pp. 13-14 of 34.

On March 13, 2014, the Debtor filed a Modified Chapter 13 Plan in which he proposed to pay Bank of America monthly payments of \$1,375 over the life of the plan, although monthly mortgage payments were \$4,035.37. *See* Case No. 13 B 39061, Schedule J, dkt. no. 38, pg. 2 of 5; Objection to Confirmation, ¶ 3, dkt. no. 45. Again, the Debtor's proposed treatment of Bank of America's claim violated §1322(b)(2) of the Bankruptcy Code.

The Modified Chapter 13 Plan also failed to provide for payment of mortgage arrears which at the time totaled \$285,276.85, in violation of §1322(b)(5). *See* Objection to Confirmation, ¶ 4, dkt. no. 45.

On May 19, 2014, the Court entered an order denying confirmation of the Modified Chapter 13 Plan. On June 9, 2014, the Fifth Case was dismissed on the motion of the chapter 13 trustee based on the denial of confirmation.

Debtor's Sixth Case

This Chapter 11 bankruptcy case, No. 14-27755, filed on July 30, 2014, is the Debtor's sixth bankruptcy case filed since June, 2010 ("Sixth Case").

Schedule I in the Sixth Case reflects a combined net monthly income between the Debtor

and his non-filing spouse of \$6,053.91. Schedule J reflects that the Debtor's net income, after payment of expenses (not including monthly mortgage payments) is \$3,686.84. The current monthly mortgage payment, according to the Proof of Claim filed by Specialized Loan Servicing LLC ("SLS"), servicer of the Bank of America loan, is \$3,972.63. *See* Proof of Claim ("POC") 2-1, p. 4.

The Debtor has not made any mortgage payments since May 11, 2009. *Id.*

The total amount necessary to cure the mortgage default on the Property as of the Petition Date, is \$303,409.17. *Id.*

III. Discussion

Dismissal for Cause

Section 1112(b)(1) of the Bankruptcy Code provides:

Except as provided in paragraph (2) and subsection (c), on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1).

"Although section 1112(b) does not explicitly provide that lack of good faith may constitute cause, section 1129(a)(3) requires that plans be 'proposed in good faith'; courts have sensibly considered bad faith to be an acceptable basis for conversion or dismissal." *In re Jartran, Inc.*, 886 F.2d 859, 867 (7th Cir. 1989). "A § 1112(b)(2) dismissal is 'proper if the court determines that it is unreasonable to expect that a plan can be confirmed in the Chapter 11 case.'" *Matter of Woodbrook Assoc.*, 19 F.3d 312, 316 (7th Cir. 1994).

Section 1112(b)(4) enumerates a non exhaustive list of grounds which may constitute cause for conversion or dismissal. 11 U.S.C. § 1112(b)(4).

In *In re Tekena USA, LLC*, 419 B.R. 341, 346 (Bankr. N.D. Ill. 2009), this Court adopted the following factors to determine whether cause exists to dismiss a chapter 11 case.

(1) whether the debtor has few or no unsecured creditors; (2) whether there has been previous bankruptcy filings by the debtor; (3) whether the pre-petition conduct of the debtor has been improper; (4) whether the petition effectively allows the debtor to evade court orders; (5) whether there are few debts to non-moving creditors; (6) whether the petition was filed on the eve of foreclosure; (7) whether the foreclosed property is the sole or major asset of the debtor; (8) whether the debtor has no ongoing business or employees; (9) whether there is no possibility of reorganization; (10) whether the debtor's income is not sufficient to operate; (11) whether there was no pressure from non-moving creditors; (12) whether reorganization essentially involves the resolution of a two-part dispute; (13) whether a corporate debtor was formed and received title to its major assets immediately before the petition and; (14) whether the debtor filed solely to create the automatic stay.

Tekena, 419 B.R. at 345-46 (citing *In re Grieshop*, 63 B.R. 657, 663 (N.D. Ind. 1986)).

The movant bears the initial burden to establish cause under section 1112(b). *Woodbrook*, 19 F.3d at 317. That burden must be established by a preponderance of the evidence. *In re Draiman*, 450 B.R. 777, 826 (Bankr. N.D. Ill. 2011). Once a movant has established cause, the burden then shifts to the debtor to establish one of the exceptions enumerated in section 1112(b)(2). *Draiman*, at 826.

Section 1112(b) provides that a debtor may avoid dismissal if:

the court finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate, and the debtor or any other party in interest establishes that

(A) there is a reasonable likelihood that a plan will be confirmed within the timeframes established in sections 1121(e) and 1129(e) of this title, or if such sections do not apply, within a reasonable period of time; and

(B) the grounds for converting or dismissing the case include an act or omission of the debtor other than under paragraph (4)(A)–

- (i) for which there exists a reasonable justification for the act or omission; and
- (ii) that will be cured within a reasonable period of time fixed by the court

11 U.S.C. § 1112(b)(2)(A)-(B); *In re Draiman*, at 826.

Herein, the U.S Trustee asserts that Debtor's case should be dismissed, noting that each of the Debtor's previous cases was filed in an effort to delay the foreclosure proceeding. The U.S. Trustee further argues that the Debtor has failed to demonstrate a change in circumstances indicating an ability to fund a plan of reorganization in his Sixth Case. Motion, p. 9.

The Court finds that the U.S. Trustee has met his initial burden of establishing that cause exists to dismiss Debtor's case.

Between the period of June 1, 2010 and July 30, 2014, the Debtor filed a total of six bankruptcy cases. Of the Debtor's chapter 11 and chapter 13 bankruptcy filings, none resulted in a confirmed plan of reorganization.

The Proof of Claim filed herein by SLS reveals that during that four-year period, monthly mortgage payments on the Property ranged from \$4,047.03 to \$4,029.60. *See* POC No. 2-1. Meanwhile, the Debtor's schedules in each of those dismissed cases reflect that his net income after payment of expenses, excluding mortgage payments, ranged from \$2,451.41 to \$3,686.84 during that four-year period. Despite Debtor's inability to make monthly mortgage payments, the Debtor continued to file successive bankruptcy cases with no evident change in his finances.

In the current case, the Debtor's Schedules paint a similar picture. Schedule J reflects a combined net monthly income of \$3,686.84, while monthly mortgage payments on the Property are currently \$3,972.63. The Debtor's income is clearly insufficient to cover the monthly mortgage payments and cure the mortgage arrears, which to date, exceed \$303,409.17. To that end, the Debtor admitted during a Federal Rule of Bankruptcy Procedure 2004 examination conducted by the U.S. Trustee that he was unable to make *any* payments toward the arrears. *See* August 28, 2014 Hearing Transcript, p. 51, dkt. no. 45, Exhibit D. The Debtor's inability to pay is fatal to his case, as the Bankruptcy Code requires that any plan proposed by the Debtor provide for payment of both the current mortgage payment and arrears. *See* 11 U.S.C. §§ 1123(b)(5), 1123(a)(5)(G).

As the U.S. Trustee notes in the Motion, the Debtor cannot propose a feasible plan of reorganization without modifying the rights of secured lender Bank of America, which is explicitly prohibited by the Bankruptcy Code. *See* 11 U.S.C. § 1123(b)(5).

Having determined that the U.S. Trustee has established cause to dismiss, the burden now

shifts to the Debtor to establish one of the exceptions enumerated in 11 U.S.C. 1112(b).

The Debtor responds that his bankruptcy cases were filed in good faith, noting that the various chapter 11 and chapter 13 plans were contingent upon SLS agreeing to a modification of the loan on the Property. *See* Response, pp. 10-12.

In support, the Debtor relies in part on *In re Austin*, Case No 13-12304, 2014 WL 5151291 (D. Mass. Sept. 25, 2014), which ironically is more helpful to the U.S. Trustee's position than the Debtor's. At issue before the court in *Austin* was whether a chapter 13 plan is reasonable where it is contingent upon a debtor obtaining a loan modification. In the underlying bankruptcy case, the Chapter 13 trustee objected to confirmation of debtor's plan on the ground that the application for a loan modification was still pending and there was no indication that it would be approved prior to the end of the plan's term. The bankruptcy court sustained the trustee's objection, and denied confirmation of the Plan. The district court affirmed, noting:

Austin has failed to demonstrate that there was a "reasonable likelihood" that the loan modification would have been approved before the Proposed Plan expired. Simply claiming that the loan modification was likely to have been achieved solely on the basis that she had engaged a specialist attorney to negotiate with the Mortgagee, does not adequately reduce the speculative nature of actually obtaining a loan modification before the end of the Proposed Plan's term— "if wishes were horses, beggars would ride."

Austin, at * 7. (internal citation omitted).

The court went on to note that "without a confirmed loan modification, [the debtor's] actual future financial obligations are entirely speculative." *Id.*, at * 7.

Similarly here, the Debtor has not established that a loan modification is forthcoming or even a remote possibility. The record reveals that the Debtor's likelihood of obtaining the acquiescence of SLS in any such agreement is entirely speculative. At the hearing on the Motion, counsel for the Debtor represented to the Court that the Debtor was attempting to enter into a loan modification with SLS and that he was in possession of a letter memorializing a prospective modification. In particular, counsel stated that "We had an agreement as far as I'm concerned with the servicer to not sell at that time and to try to work it out." *See* August 27, 2014 Hearing Transcript, at 7, dkt. no. 45, Exhibit A. To date, the Court has not seen evidence of such an

agreement. However, a September 12, 2014 letter from SLS discloses that the Debtor has been denied for multiple loan modification and forbearance programs. *See* SLS Letter, dkt. no. 45, Exhibit B. It is clear from this correspondence that SLS has not agreed to modify the Debtor's existing mortgage terms or waive any arrears.

Debtor's inability to propose a feasible plan is evident by his failure to timely file a plan by the October 28, 2014 deadline set by the Court. *See* Debtor's Motion to Extend Time for Filing a Chapter 11 Plan, dkt. No. 51. At the November 6, 2014 hearing on the Debtor's Motion to Extend Time for Filing, the Debtor offered no credible explanation for his failure to timely file a plan as required by this Court's September 10, 2014 Order. *See* dkt. no. 36. Rather, counsel for the Debtor again rehashed the same argument that the Debtor hoped to obtain a loan modification through the HAMP program. The Court denied the Debtor's request for an extension. *See* Order, dkt. no. 53. The Court declines to subject creditors to further delays in this proceeding based solely on the representations of the Debtor and his counsel. The Debtor's wishful thinking is insufficient to propose and fund a confirmable plan of reorganization.

In light of the foregoing, it is abundantly clear to this Court that the Debtor is unable to propose a confirmable Chapter 11 plan of reorganization. For that reason, the Debtor's case is dismissed pursuant to 11 U.S.C. § 1112(b)(4)(J).

Dismissal with Prejudice

Pursuant to 11 U.S.C. § 349(a), the U.S. Trustee requests that the Debtor be barred from filing a case under any chapter of the Bankruptcy Code for a period of one year. Section 349(a) provides:

Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109 (g) of this title.

11 U.S.C. § 349(a).

Section 349(a) authorizes bankruptcy courts to bar a debtor from refile for cause. *In re*

B-3 Properties, LLC, Case No. 14 cv 00128, 2014 WL 4701163, at **7-8 (N.D. Ind. Sept. 19, 2014); *See also In re Dempsey*, 247 Fed. Appx. 21, 2007 WL 2478674 (7th Cir. 2007) (upholding one-year bar and noting that debtor’s eight rejected plans and current financial situation prevented him from presenting a workable plan of reorganization).

The Seventh Circuit has held that “Section 105(a) independently authorizes bankruptcy courts to prohibit bankruptcy refilings from debtors who are demonstrably ineligible to receive relief . . . This includes cases where the debtor has not acted in bad faith.” *In re Dempsey*, 247 Fed.App. at 25.

“[D]ismissal with prejudice is viewed as an appropriate response to a debtor’s egregious misconduct, contumacious actions, or abuse of the bankruptcy process.” *In re Hall*, 258 B.R. 908, 911 (Bankr. N.D. Ind. 2001).

As the Court has discussed at length above, the Debtor has filed six bankruptcy cases within four years, when his financial situation made it apparent that he would not be able to propose a confirmable plan of reorganization. Under the circumstances, the Court determines that Debtor’s conduct herein was an intentional abuse of the protections afforded by the Bankruptcy Code. Accordingly, the Court hereby dismisses the Debtor’s bankruptcy case, with prejudice, with a 365-day bar to refiling on or before November 6, 2015.

IV. Conclusion

For the reasons noted herein, the Debtor’s case is dismissed under section 1112(b)(1) for cause. The Debtor is barred from refiling a petition for relief under any chapter of the Bankruptcy Code for 365 days from entry of this order.

Dated: November 7, 2014

ENTER:

Jacqueline P. Cox
U.S. Bankruptcy Judge