United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re: Dimitrios Tsanos

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Adversary Caption: N/A

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Date of Issuance: April 29, 2022

Judge: David D. Cleary

Appearance of Counsel:

Attorney for Debtor: Richard F Morton, Law Office Richard F Morton PC, 5189 S. Archer Ave, Chicago, IL 60632

Attorney for Trustee Marilyn O. Marshall: Yanick Polycarpe, 224 South Michigan Ste. 800, Chicago, IL 60604

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Case No. 22 B 998
	)	
DIMITRIOS TSANOS,	)	Chapter 13
	)	
Debtor.	)	Judge David D. Cleary

MEMORANDUM ORDER

This matter comes before the court on the motion of chapter 13 Trustee Marilyn O. Marshall ("Trustee") to dismiss this bankruptcy case with a bar to refiling ("Motion to Dismiss"). Debtor Dimitrios Tsanos ("Debtor") filed an objection to the Motion to Dismiss ("Response"). No party having requested an evidentiary hearing, the court reviewed the papers and heard the arguments of the parties. For the reasons stated below, the court will grant the Motion to Dismiss but deny the Trustee's request that the dismissal include a bar to refiling.

I. Facts.

Debtor filed for relief under chapter 13 on January 28, 2022. This is his fifth bankruptcy case in 28 months:

Case Number	**Petition Date**	**Case Dismissed**	**Events**
20 B 1349	January 17, 2020	February 11, 2020	Dismissed for failure to file documents. No 341 meeting and no payments.
20 B 8754	April 2, 2020	September 8, 2020	Dismissed for failure to file documents. No 341 meeting and no payments.
21 B 12003	October 21, 2021	November 29, 2021	Dismissed for failure to file credit counseling certificate. No 341 meeting.
22 B 997	January 28, 2022	January 31, 2022	Closed as duplicate, filed in error.

At the time the Trustee filed the Motion to Dismiss on March 18, 2022, Debtor had not filed Schedules A through J, had not attended his scheduled § 341 meeting and had not made any plan payments. The petition he filed is dated October 20, 2021, and appears to be the same petition that he filed in prior case 21 B 12003. Although Debtor's attorney had represented him in each of his four previous cases, none of those cases were disclosed on that petition; in fact, Debtor checked "no" when asked if he had filed for bankruptcy in the past 8 years. His counsel had not filed the required fee disclosure, a fee application or the court-approved retention agreement.

The Trustee requests that the Debtor's case be dismissed with a 180-day bar to refiling pursuant to Section 1307(c) of the Bankruptcy Code.[1] She contends that cause exists to dismiss the case because Debtor has not shown that he can propose a feasible plan. In her reply, she further asserted that Debtor's failure to file all of the documents required by 11 U.S.C. § 521(a)(1) requires automatic dismissal of this case.

Failure to successfully prosecute several cases, she alleges, establishes the Debtor's willful failure to abide by court orders or appear and prosecute the case and therefore supports a 180-day refiling bar permitted by Section 109(g)(1) of the Bankruptcy Code. The Trustee also seeks a finding that Debtor's failures to file certain documents, to begin plan payments and to show an ability or willingness to reorganize, all support the conclusion that this case was filed in bad faith pursuant to *Matter of Love*, 957 F.2d 1350 (7th Cir. 1992). And, based on a finding of bad faith, that cause exists to impose a refiling bar upon dismissal.

[1] In the title of the Motion to Dismiss, the Trustee references a 365-day bar. The court assumes this is an error, since the initial paragraph, the prayer for relief and the proposed order all request a 180-day bar, as does the Trustee's reply.

Only two creditors filed proofs of claim in this case. NewRez LLC d/b/a Shellpoint Mortgage Servicing ("Shellpoint") filed a claim in the amount of $268,238.58, secured by a mortgage on Debtor's property at 906 W 36th Street in Chicago. Shellpoint's claim, to which there is no objection, includes an arrearage in the amount of $100,320.83. US Bank Trust N.A. ("US Bank") also holds a claim secured by a mortgage on a piece of real property. It filed a claim in the amount of $269,434.18, including an arrearage in the amount of $86,117.88, and no party in interest filed an objection to this claim. US Bank's claim is secured by a mortgage on Debtor's property at 3612 S Halsted Street in Chicago. Both Shellpoint and US Bank filed objections to confirmation, and both support the Trustee's request to dismiss this case with a bar to refiling.

In his Response, Debtor asserts that his counsel was hospitalized in September and October 2021, thus explaining certain issues with his prior case 21 B 12003. He intends to file his tax returns and to tender his February and March plan payments in the amount of $5,000 each. He states that he missed only one § 341 meeting, and alleges "[t]here has been no bad faith on the part of the Debtor, simply illness on [c]ounsel's part." Response, p. 3.

On April 9, 2022, Debtor filed a copy of a letter he sent the day before to the Trustee by certified mail. With the letter he enclosed two cashier's checks in the amount of $5,000 each, representing his February and March plan payments. Copies of the cashier's checks were included in the filing. Counsel also filed the required Disclosure of Compensation, indicating that Debtor promised to pay him $2,500 for his services in this bankruptcy case.[2] The next day, Debtor filed Form 122C-2, Schedules A through J, and copies of his federal and state tax returns for 2017, 2018 and 2019.

[2] To the extent the Motion to Dismiss also requests examination of fees paid to Debtor's counsel, the request will be denied. The Disclosure of Compensation indicates that counsel received no payment.

II. Dismissal of the Case.

A. Automatic Dismissal.

The court will first address Debtor's failure to file his schedules within 45 days of the petition date, and whether that results in the automatic dismissal of his case. 11 U.S.C. § 521(a)(1)(B) requires the filing of schedules of assets and liabilities as well as of income and expenditures. According to § 521(i), "if an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition."

In this case, the 45-day deadline passed on March 14, 2022. Debtor filed his schedules on April 10, 2022. Practically speaking, at least in this jurisdiction, automatic dismissal does not happen "automatically." In her Motion to Dismiss, filed after the 45-day deadline, the Trustee did not request dismissal under § 521(i)(2).[3] Although she referenced automatic dismissal in her reply, citing a non-existent Code section (11 U.S.C. § 522(h)(2)(i)(1)), no party in interest requested automatic dismissal. The Debtor did file his schedules. Without the statutory request, the Debtor's tardy compliance may serve as a basis to establish cause when considering dismissal, but automatic dismissal is not appropriate.

B. Cause to Dismiss.

Since the case will not be "automatically" dismissed, the court then turns to the question of whether cause exists to dismiss the case under 11 USC § 1307(c): "Except as provided in subsection (f) of this section, on request of a party in interest or the United States trustee and

[3] "Subject to paragraph (4) and with respect to a case described in paragraph (1), any party in interest may request the court to enter an order dismissing the case. If requested, the court shall enter an order of dismissal not later than 7 days after such request." 11 U.S.C. § 521(i)(2).

after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause[.]" Although § 1307(c) includes a list of circumstances that constitute cause, that list is not exclusive. The Trustee argues that cause exists to dismiss the case because Debtor has not shown that he can propose a feasible plan.

The court finds that cause exists to dismiss this bankruptcy case. First, Debtor did not timely file his schedules, which are required by the Bankruptcy Code and are a crucial component of any bankruptcy case. *See In re McNichols*, 254 B.R. 422, 432 (Bankr. N.D. Ill. 2000) ("probably the most important papers that are filed by a debtor in a Chapter 13 case are Schedules I and J") (quotation omitted).

Second, Debtor admits that he did not attend the scheduled § 341 meeting. In fact, the Trustee scheduled two § 341 meetings and neither were concluded. See EOD 29 and 41.

Third, debtors are required to begin making payments not later than 30 days after their plan is filed. 11 U.S.C. § 1326(a)(1). According to the filed copy of his counsel's letter, Debtor did not mail his first payment to the Trustee until nearly two months had passed from the plan filing date. As of the last hearing on April 11, 2022, there was no evidence that the Trustee had received any funds yet.

Finally, there is no evidence before the court that Debtor can propose a confirmable plan. Based on the schedules filed the day before the April 11 hearing, Debtor does not have the ability to do so. According to Schedule J, he has $3,090 available in net income for a plan payment.[4] Yet the plan on file proposes monthly payments of $5,000. Moreover, as the Trustee points out

[4] The court makes no finding at this time as to whether a budget that proposes $5,000 for mortgage payments, $150 for electricity/heat/natural gas, $19 for water/sewer, $44 for telephone/cell phone, $100 for food, $50 for clothing/laundry and $20 for car insurance is realistic.

in her reply, any plan would require Debtor to pay approximately $8,000 per month to cure the prepetition arrearages and to keep current on postpetition mortgage payments. For all of these reasons, the court finds that cause exists to dismiss this bankruptcy case.

III. Bar to Refiling.

The only remaining question is whether the court should grant the Trustee's request to dismiss with a temporary bar to refiling. The Trustee asserts that Debtor's history of filing multiple short-lived chapter 13 cases implicates 11 U.S.C. § 109(g)(1):

> (g) 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[.]

If the court grants this Motion to Dismiss on the grounds that Debtor "willfully" failed to abide by orders of the court or to appear before the court in proper prosecution of the case, then he is not eligible to file for relief under the Bankruptcy Code for 180 days.

It is the Trustee's burden to prove that Debtor's actions were willful. *In re Dos Anjos*, 482 B.R. 697, 703 (Bankr. D. Mass. 2012). In examining another section of the Bankruptcy Code, the Seventh Circuit told us that "willfulness requires a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *Gerard v. Gerard*, 780 F.3d 806, 811 (7th Cir. 2015) (quotation omitted). In the context of § 109(g)(1), this means that the court must find a deliberate or intentional failure to abide by court orders or appear before the court. If it imposes a bar to refiling under § 109(g)(1), the "court must make extensive and specific findings of willfulness[.]" *In re Grason*, No. 09-71353, 2013 WL 3781766, at *5 (Bankr. C.D. Ill. July 18, 2013).

The facts before the court do not establish that the Debtor deliberately and intentionally failed to abide by court orders or to appear before the court and prosecute this case. While he failed to timely file his schedules, they are on file now. His Statement of Financial Affairs and his proposed plan were filed within a few days after the petition date. His certificate of credit counseling, missing in prior cases, was filed on the first day of this case. Debtor attempted to attend the first § 341 meeting but alleged in his Response that he could not connect through Zoom.

Debtor's failures in this case warrant dismissal, but do not rise to the level of willfulness required for dismissal with a bar. Having reviewed the papers and considered the circumstances described in the Response, the court finds it more likely that counsel's illness rather than any deliberate actions by Debtor impacted the progress of this case as well as the most recent prior case. The Trustee did not call the Debtor as a witness, so the court has not had the opportunity to hear his explanations or to judge his credibility. It is the Trustee's burden to prove willfulness. Without testimonial evidence, and considering the alternative explanations for Debtor's failure to prosecute this and his prior case, the court cannot make the required extensive and specific findings of willfulness.

As an alternative ground for imposing a bar to refiling, 11 U.S.C. § 349(a) provides that the court may dismiss a case with prejudice:

> *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.

(Emphasis added.) Although courts differ in their statutory interpretation of section 349, the Seventh Circuit has ruled that, for cause, a court may dismiss a case with a bar to "the later dischargeability of debts … or it may preclude the debtor from filing a subsequent petition

related to those debts." *In re Hall*, 304 F.3d 743, 746 (7th Cir. 2002). Dismissal with a bar only is appropriate in "extreme situations, such as when a debtor conceals information from the court, violates injunctions, files unauthorized petitions, or acts in bad faith." *Id.* The Trustee claims that, applying the factors established by the Seventh Circuit, the Debtor did not file this case in good faith. Rather, the Debtor filed this case in bad faith and therefore cause exists to impose a bar upon dismissal.

Good faith in filing a chapter 13 case is determined by analyzing the totality of the circumstances. *Love*, 957 F.2d at 1355. In its good faith inquiry, the court considers the totality of the circumstances to determine "whether the filing is fundamentally fair to creditors and, more generally, is the filing fundamentally fair in a manner that complies with the spirit of the Bankruptcy Code's provisions." *Id.* at 1357.

> Keeping in mind that the focus of the inquiry is fundamental fairness, the following nonexhaustive list exemplifies some of the factors that are relevant when determining if a Chapter 13 petition was filed in good faith: the nature of the debt, including the question of whether the debt would be nondischargeable in a Chapter 7 proceeding; the timing of the petition; how the debt arose; the debtor's motive in filing the petition; how the debtor's actions affected creditors; the debtor's treatment of creditors both before and after the petition was filed; and whether the debtor has been forthcoming with the bankruptcy court and the creditors.

Id. While these are among the factors that may be considered, the key question underpinning the court's analysis is whether the Debtor's filing is fundamentally fair with respect to his creditors.

At the hearing on April 11, 2022, the Trustee argued that this filing is not in good faith because Debtor does not have the funds to cure the arrearages on his secured claims or to maintain his mortgage payments. She contends that two years of failed cases and the accumulation of arrearages constitute bad faith and warrant dismissal with a bar. Shellpoint and US Bank, the only creditors to have filed proofs of claim, and each holding secured claims over

$268,000, support the Trustee's position. The creditors stated at the hearing that Debtor has not made any postpetition mortgage payments.

Serial filings are not bad faith *per se*. *See In re Rios*, No. 13-11076, 2016 WL 8461532, at *3 (Bankr. D. Kan. Dec. 9, 2016) ("serial bankruptcy filings may not constitute bad faith *per se*, [but] a debtor's history of filings and dismissals may be evidence of bad faith") (footnote omitted); *In re LeGree*, 285 B.R. 615, 619 (Bankr. E.D. Pa. 2002) (bad faith found where ten prior cases over 18 years "were dismissed for reasons that tend to show that the Debtor made no realistic effort to reorganize"). *See, e.g., Johnson v. Home State Bank*, 501 U.S. 78, 87 (1991) ("Congress has expressly prohibited various forms of serial filings. The absence of a like prohibition on serial filings of Chapter 7 and Chapter 13 petitions, combined with the evident care with which Congress fashioned these express prohibitions, convinces us that Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization to a debtor who previously has filed for Chapter 7 relief.") (citations omitted). *See also In re Jartran, Inc.*, 886 F.2d 859, 869 (7th Cir. 1989) ("as we have noted, there is no prohibition of serial good faith Chapter 11 filings in the Code").

Just before the most recent court hearing, Debtor filed copies of two cashier's checks made payable to the Trustee. According to the cover letter for those checks, they represent Debtor's February and March payments. Those are the only payments that came due by the time of the hearing on the Motion to Dismiss. During argument at the April 11 hearing, the Debtor also asserted that he paid $7,000 in his most recent case, 21 B 12003. The Trustee acknowledged that the money was received, although after the case was already dismissed. These payments weigh against finding that Debtor is proceeding in bad faith.

In his Response, Debtor's counsel took the lion's share of the blame for the issues in this case. It is true that debtors are bound by the actions of their attorneys. *See Link v. Wabash R. Co.*, 370 U.S. 626, 634 (1962) ("each party is deemed bound by the acts of his lawyer-agent"). Debtor will be held accountable for his attorney's neglect to some extent, because his case will be dismissed. But the detailed allegations in the Response suggest that while dismissal is appropriate, dismissal with a bar would unfairly impose a punishment on the Debtor for issues that are due more to counsel's health problems than to any bad faith.

Additionally, Debtor argued that some of the delay in paying his creditors should be attributed to the COVID-19 pandemic. He asserted that his tenants were not paying rent, and he was unable to evict them due to the moratorium put in place by the City of Chicago. Debtor stated that he has now taken steps to evict the non-paying tenants. He will be entering into new leases that will bring in substantial additional income, although no leases are listed on the most recent Schedule G. While the court has only allegations and no evidence regarding the specific impact of the pandemic on this case, it can take judicial notice of the eviction moratorium. *See* https://www.chicago.gov/city/en/depts/doh/provdrs/renters/svcs/know-your-rights--covid-19-protection-ordinance.html (last accessed April 28, 2022).

Considering all of these circumstances, the evidence before the court does not rise to the level necessary to impose the harsh sanction of a bar. The court finds it more likely than not that Debtor filed this case with the genuine intent to reorganize. Debtor made the one payment that came due in his last case and submitted proof of two payments in this case. A combination of temporary factors, including his counsel's illness, lack of rent from his tenants and an inability to evict those tenants, explain the Debtor's inability to confirm a plan, but do not support a finding of bad faith.

Filing a bankruptcy case without any ability or intent to reorganize is an abuse. *See In re Traylor*, 628 B.R. 1, 7 (Bankr. D. Conn. 2021). But "the court must be careful not to deny the protection of the Bankruptcy Code to a debtor whose legitimate efforts at financial rehabilitation may be hidden among derivative benefits (such as the delay of creditors resulting from the automatic stay) that, if viewed alone, might suggest bad faith." *In re Bovino*, 496 B.R. 492, 498–99 (Bankr. N.D. Ill. 2013) (declining to dismiss chapter 11 case) (quotation omitted).

IV. Conclusion.

The court has considered the Motion to Dismiss and the Trustee's request for a bar to refiling. For all of the reasons stated above, **IT IS HEREBY ORDERED THAT**:

1. The Motion to Dismiss is **GRANTED**, except to the extent that it requests dismissal with a bar to refiling; and
2. Confirmation is **MOOT**.

ENTERED:

Date: April 29, 2022

DAVID D. CLEARY
United States Bankruptcy Judge