UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: JAMES ALLAN HENNIS **CASE NO. 11-50044-KMS**

DEBTOR **CHAPTER 13**

MEMORANDUM OPINION DISMISSING CASE PURSUANT TO SHOW CAUSE ORDER AND GRANTING IN PART AND DENYING IN PART TRUSTMARK'S MOTION TO DISMISS, OR, IN THE ALTERNATIVE, TO TERMINATE THE AUTOMATIC STAY AND CO-DEBTOR STAY AND ABANDON PROPERTY

This matter came on for hearing on February 17, 2011, (the "Hearing") on Trustmark National Bank's ("Trustmark") Motion to Dismiss Chapter 13 Case of James Allen Hennis, or, in the Alternative, to Terminate the Automatic Stay and Co-Debtor Stay and for Abandonment ("Motion")(Dkt. No. 8); and the Order Granting Motion For Extension of Time to File Document and Conditionally Setting Show Cause Hearing("Show Cause Order")(Dkt. No. 14). The debtor, James Allan Hennis ("Hennis"), proceeding in this bankruptcy *pro se*, filed a response to Trustmark's motion (Dkt. No. 15) but did not appear at the Hearing. Trustmark's counsel was present at the Hearing and presented arguments and the testimony of witnesses to the Court. After considering the pleadings, the testimony, Trustmark's arguments, the totality of circumstances surrounding this case and the pertinent legal authorities, and for the reasons set forth below, the Court finds that the Motion should be granted in part and denied in part as more specifically set forth herein. The Court further finds that this case should be dismissed for cause.

I. JURISDICTION

The Court has jurisdiction of the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157 (b)(2)(A) and (G). Notice of both the Motion and the Show Cause Order was proper under the circumstances.

II. FACTS

As this court has previously noted (Dkt. No. 14), Hennis is not a stranger to the bankruptcy process. He has been the debtor in three prior bankruptcy proceedings, the most recent of which was terminated less than a month before the present case was filed. See Case Nos. 90-03509-EE, 91-04881-EE and 10-51884-KMS (the "2010 bankruptcy case") (dismissed on November 17, 2010, and closed on December 20, 2010). Like the case at bar, the 2010 bankruptcy case was a Chapter 13 proceeding. The present bankruptcy and the 2010 bankruptcy case are inexorably intertwined with a case filed in the United States District Court for the Southern District of Mississippi (the "District Court") on January 19, 2010.[1] A review of the combined history of all three of these cases will facilitate the legal analysis to follow.

On July 1, 2003, Hennis and his wife Sandra (hereinafter referred to collectively as the "Hennises") executed a promissory note in the amount of $96,635.00 in favor of Trustmark. The note was secured by a deed of trust on three tracts of land in Wayne County, Mississippi, owned by Sandra Hennis. On April, 11, 2008, the Hennises executed two promissory notes, one in the amount

[1]The action is styled Hennis v. Trustmark Bank, Civil Action No. 2:10cv20-KS-MTP (the "District Court Action"). To the extent that documents filed in the District Court Action have not been made part of the record in this case, this Court may take judicial notice of the proceedings before the District Court as well as earlier proceedings in this Court. CitiFinancial Corp. v. Harrison, 453 F. 3d 245, 249 n.3 (5th Cir. 2006); Enriquez-Gutierrez v. Holder, 612 F.3d 400, 410 (5th Cir. 2010). Citations to the docket of the District Court Action are noted herein as "Dist. Ct. Dkt. No. ___."

of $141,200 and the other in the amount of $65,800, in favor of Trustmark. Both notes were secured by, among other things, a deed of trust on twelve acres of land in Wayne County, Mississippi, owned by the Hennises.[2] The Hennises fell behind in certain of their payments to Trustmark; and on January 19, 2010, the Hennises filed the District Court Action seeking a nullification of all four promissory notes, a release of all liens on their property and $4,000,000 per day for various "injuries." In addition to filing an answer, Trustmark counterclaimed for judicial foreclosure of the deeds of trust. Ultimately, Trustmark filed a motion for summary judgment ("First MSJ").

On July 30, 2010, the District Court issued a memorandum opinion and order granting in part and denying in part Trustmark's First MSJ. The Court stated that the "Hennises [ ] failed to present any evidence that the promissory notes were invalid, that they were not in default, that the amounts sought are not actually the balances due, or any other evidence demonstrating a triable issue of fact." Hennis v. Trustmark Bank, No. 2:10cv20-KS-MTP, 2010 WL 3024861 at *6 (S.D. Miss. July 30, 2010). Accordingly, the District Court dismissed all of the Hennises' claims against Trustmark with prejudice. The Court also recognized Trustmark's right to judgment on three of the four promissory notes, including its right to conduct a foreclosure sale on the collateral securing those notes. Id. The District Court denied Trustmark's First MSJ regarding what was identified as the "Second April 11, 2008 Note" because Trustmark had failed to attach a copy of the note to the motion.[3] Id. at 11. On August 2, 2010, Trustmark filed a second motion for summary judgment

[2]On April 11, 2008, the Hennises also executed a promissory note in the amount of $27,800 in favor of Trustmark. This note was secured by the deed of trust on the twelve acres in Wayne County, Mississippi, among other things.

[3]The Second April 11, 2008 Note was the note in the amount of $65,800 secured by the deed of trust on twelve acres in Wayne County, Mississippi.

regarding the Second April 11, 2008 Note, this time with a copy of that note attached to the motion ("Second MSJ"). (Dist. Ct. Dkt. No. 210). On August 6, 2010, the District Court entered a final judgment in accord with its ruling on Trustmark's First MSJ. The judgment awarded Trustmark $251,247.50 in damages and appointed a special commissioner to conduct a foreclosure sale on the applicable deeds of trust. (Dist. Ct. Dkt. No. 221). Trustmark's Second MSJ was pending and the foreclosure sale ordered by the District Court was still being arranged when Hennis initiated a Chapter 13 bankruptcy case in this Court on August 16, 2010. See Bankr. Case No. 10-51884-KMS, Dkt. No. 1. As a result of the 2010 bankruptcy case, the District Court proceedings were stayed for over three months.

Even though ninety-two days passed between the initiation and the dismissal of the 2010 bankruptcy case, substantively speaking, the bankruptcy case never left the starting line due to Hennis's failure to respond to Court notices and orders. See generally Bankr. Case No. 10-51884-KMS, Dkt. No. 70. In order for a Chapter 13 case to make any meaningful progress towards a successful adjustment of debt, the debtor must file a group of initial documents which detail his or her financial affairs so that the Court, the trustee and all other interested parties can evaluate proposed payment plans, protect the interests of creditors, etc. See 11 U.S.C. § 521(a); Fed. R. Bankr. P. 1007(b) and (c). The bankruptcy rules state that all of these documents (hereinafter referred to as "Initial Documents") should be filed either when the bankruptcy petition is filed or within fourteen (14) days of the initiation of the case. The code also provides that failure to file these Initial Documents within the forty-five days following the filing of the bankruptcy petition is grounds for automatic dismissal of the case. See 11 U.S.C. § 521(I). Hennis received appropriate notice of his statutory duty to file the Initial Documents. He also requested and received an extension of time to

file this critical documentation.[4] Although he managed to file seven pleadings containing a total of approximately two-hundred pages of material, Hennis never complied with this Court's instruction to file the Initial Documents. As a result, the Court held a hearing on November 16, 2010, on an order to show cause why Hennis's bankruptcy case should not be dismissed. Hennis appeared at this hearing without counsel, but failed to provide any credible explanation for his failure to abide by the orders of the Court and file the Initial Documents; consequently, his bankruptcy case was dismissed by an order dated November 17, 2010. See Bankr. Case No. 10-51884-KMS, Dkt. No. 70.

The day after this Court dismissed the 2010 bankruptcy case, the District Court entered an order granting Trustmark's Second MSJ, recognizing Trustmark's right to collect under the fourth promissory note. See Dist. Ct. Dkt. No. 265. On November 30, 2010, the District Court entered a judgment in accord with this second summary judgment ruling awarding Trustmark an additional $65,504.15 in damages and authorizing the previously appointed special commissioner to foreclose on the appropriate deed of trust. See Dist. Ct. Dkt. No. 272. On December 3, 2010, the Hennises filed several documents in the District Court asking the Court to vacate all of the judgments rendered against them; these motions were denied. See Dist. Ct. Dkt. Nos. 274 and 275. The special commissioner scheduled the foreclosure sales for January 7, 2011. However, on the day of the sales,

[4]Although represented by counsel, Hennis filed a *pro se* motion for extension of time asserting that personal illness, medical treatment and the death of a close friend were preventing him from filing the Initial Documents. Hennis also asserted that he was going to use the extension of time to seek new counsel. See Bankr. Case No. 10-51884-KMS, Dkt. No. 8. In response to this motion, Hennis's counsel filed a motion to withdraw which was ultimately granted. Id. at Dkt. Nos. 13, 69. Despite his inability to file the necessary documents in his bankruptcy proceeding, Hennis was able to file several pleadings in the District Court Action during the pendency of his bankruptcy case. See generally Docket of Civil Action No. 2:10cv20-KS-MTP. At the Hearing, Counsel for Trustmark noted that while the 2010 bankruptcy case was pending, Hennis also managed to file a maritime lien against Trustmark and a UCC-1 Financing Statement against Trustmark, the District Court Judge and various creditors.

Hennis filed the instant bankruptcy and notified Trustmark of the filing. (Dkt. Nos. 1, 8 at 3). Consequently, the foreclosure sales did not take place.

Four days after Hennis filed the instant bankruptcy case, Trustmark filed its motion seeking dismissal of this case or termination of the stays imposed by 11 U.S.C. §§ 362(a) and 1301. (Dkt. No. 8). Trustmark argues that pursuant to 11 U.S.C. § 109(g)(1), Hennis is not qualified to be a debtor in this case because his previous case was dismissed due to his "willful failure to abide by the Court's orders," and, therefore, dismissal is appropriate. See id. at 2. Trustmark also argues that, given the totality of the circumstances, there is cause to terminate both the automatic stay and the co-debtor stay.

The instant Chapter 13 bankruptcy case has been pending for approximately two months. Its progress, or lack thereof, is strikingly similar to that of the 2010 bankruptcy case. Once again, Hennis has failed to file the required Initial Documents even after requesting and being granted an extension of time to file these documents.[5] (Dkt. No. 14). In its order granting the extension of time, the Court clearly informed Hennis that if he failed to file the Initial Documents by the new deadline, he would be required to appear on February 17, 2011, the same date set for hearing on Trustmark's Motion, to show cause why his case should not be dismissed for cause including his failure to file the Initial Documents, for bad faith, abuse of the bankruptcy process and for unreasonable delay that is prejudicial to creditors. See id. Furthermore, the Court informed Hennis that if his Chapter 13 case was dismissed, the Court would consider whether he should be barred from filing a new bankruptcy case of any kind for *at least* 180 days. See id. Hennis did not file the Initial Documents by the

[5]The extension of time was requested "due to personal illness." Hennis also stated that he would use the extension of time to "**seek qualified** counsel to handle this proceeding as well." (Dkt. 12)(emphasis in the original). See n. 4, *supra*.

deadline established by the Court or at any time thereafter nor did he appear at the February 17, 2011, hearing on the Show Cause Order and on Trustmark's Motion.

III. DISCUSSION

A. Motion to Terminate the Co-Debtor Stay of 11 U.S.C. § 1301.

Trustmark has requested that this Court terminate both the automatic stay of 11 U.S.C. § 362(a) and the 11 U.S.C. § 1301 co-debtor stay applicable to Hennis's wife, Sandra, a co-debtor on the notes at issue in this case. Both Hennis and his wife received notice of Trustmark's Motion. (Dkt. No. 10). Hennis, proceeding *pro se*, filed a response to the Motion, while Sandra Hennis did not. [6] An individual proceeding *pro se* in a bankruptcy case may only represent himself or herself, thus Hennis's response is not considered a response on behalf of Sandra Hennis. See Miss. Bankr. L.R. 9010-1(b)(2)(B). The notice which was mailed to both Hennis and his wife stated that if no

[6]In his response to Trustmark's Motion, Hennis argued among other things, that Trustmark did not possess the original documentation necessary to prove that he owes a debt to Trustmark or that Trustmark has a lien on his real property; and therefore, Trustmark did not have standing to seek relief from the stay. (Dkt. No. 15). First, the Court notes that many of the arguments regarding the validity of the loan documents were previously considered and rejected by the District Court, and the doctrine of collateral estoppel precludes the re-litigation of issues actually litigated and necessary to the outcome of the District Court Action. See United States v. Davenport, 484 F.3d 321, 325-26 (5th Cir. 2007); see also Hennis v. Trustmark Bank, No. 2:10cv20-KS-MTP, 2010 WL 5346262 at *1 (S.D. Miss. Dec. 21, 2010)("The Court has, on numerous occasions, addressed the Hennises' complaints regarding the jurisdiction of the Court, their right to wet ink contracts, ..., the standing of [Trustmark and other parties] as the real parties in interest ... ."). Second, to the extent that any of Hennis's claims on this point are not barred by the doctrine of collateral estoppel, they are barred by the doctrine of res judicata since these claims involve the same parties and the same nucleus of operative facts as the District Court Action, and Hennis's claims certainly could have been raised in the District Court Action. See Davenport, 484 F.3d at 325-26. Finally, the record established in this Court fails to support these arguments. At the Hearing, Trustmark presented the Court with its original files containing the original signed and, when necessary, sealed documents for the four loans at issue. Additionally, Trustmark presented the testimony of the two Trustmark officers, Diane Herrington and Aaron Oberschmidt, who authorized and processed the loan(s) made to the Hennises. These bank officers verified that the loans were made, the terms of the security agreements, that the loans were in default and the amounts currently due under the terms of each loan.

response was filed, the court may decide that "you do not oppose the Motion," and the Court may thereafter enter an order granting the relief requested in the motion. (Dkt. No. 10); see also Miss. Bankr. L.R. 9013-1(d); Roberts v. Pierce (In re Pierce), 435 F.3d 891, 892 (8th Cir. 2006)(negative notice authorized by Code and shifts burden to interested party to evaluate matter and request hearing). Since Sandra Hennis did not respond to Trustmark's Motion, the Court will grant Trustmark's motion to terminate the co-debtor stay.[7]

B. Motion to Terminate the Automatic Stay of 11 U.S.C. § 362(a).

The filing of a bankruptcy petition operates as a stay against actions against the debtor to obtain possession of property of the estate. 11 U.S.C. § 362(a). However, the automatic stay may be modified or terminated at the request of a creditor for "cause." 11 U.S.C. § 362(d)(1). The Bankruptcy Code does not define what constitutes "cause" for purposes of lifting the stay. See Little Creek Dev. Co. v. Commonwealth Mortg. Corp. (In re Little Creek Dev. Co.), 779 F.2d 1068, 1072 (5th Cir. 1986)(term "cause" not comprehensively defined in the relevant statutes "so as to afford flexibility to the bankruptcy courts"). "Whether cause exists must be determined on a case by case basis based on an examination of the totality of the circumstances." In re WGMJR, Inc., 435 B.R. 423, 432 (Bankr. S.D. Tex. 2010)(citing Reitnauer v. Tex. Exotic Feline Found., Inc. (In re Reitnauer), 152 F.3d 341, 343 n.4 (5th Cir. 1998); Mendoza v. Temple-Inland Mortg. Corp. (In re Mendoza), 111 F.3d 1264, 1271 (5th Cir. 1997)).

The Fifth Circuit has noted that, generally, "'cause' is any reason cognizable to the equity power and conscience of the court as constituting an abuse of the bankruptcy process." In re Little

[7]Regardless of this decision, the co-debtor stay will be terminated by operation of law since this Court has also determined that a dismissal of Hennis's bankruptcy case is warranted. See 11 U.S.C. § 1301(a)(2).

Creek Dev. Co., 779 F. 2d at 1072 (citation omitted). Additionally, the Fifth Circuit has explained that "[n]umerous cases have [specifically] found a lack of good faith to constitute 'cause' for lifting the stay to permit foreclosure . . . ." Id.; see also Collier on Bankruptcy ¶ 362.07[7][a], pp. 362-123 to 362-124 (16th ed. 2010).

"Findings of lack of good faith in proceedings based on [ ] § 362(d) . . . are based on a conglomerate of factors rather than on any single datum." In re Little Creek Dev. Co., 779 F.2d at 1072; see also Collier, *supra* (noting case law indicates that "good faith" is an "amorphous notion" based on the totality of the circumstances). "Although particular cases are of little precedential value, a broad review reveals certain . . . conduct that [has] in specific cases been characterized as bad faith . . . [including] . . . unnecessary delay, i.e., serial filings." Collier, *supra*; see also Sterling Bank & Trust v. Merchant (In re Merchant), 256 B.R. 572, 576-77 (Bankr. W.D. Pa. 2000)(citing various cases discussing relief from stay for "cause").

Considering the totality of circumstances surrounding the present bankruptcy case, the Court finds that there is cause to terminate the automatic stay as it relates Trustmark's collateral. Hennis has had a bankruptcy case pending in this Court for nearly five out of the last seven months. In obvious disregard of Court notices and orders, Hennis has steadfastly refused to file the Initial Documents required to effectively and efficiently proceed with the Chapter 13 bankruptcy process. Likewise, Hennis failed to appear at the Hearing on February 17, 2011, to explain his lack of action. Hennis's conduct in both of his recent bankruptcy cases evidences that he had absolutely no intention of complying with his obligations as a Chapter 13 debtor. He has had two opportunities to avail himself of meaningful bankruptcy relief but has failed to take advantage of either of these opportunities. His efforts have been focused solely on stymying the foreclosures ordered by the

District Court and re-litigating the issues previously decided by the District Court. "Where a debtor seeks protection of the Bankruptcy Code, creditors may legitimately expect the debtor at a minimum, to abide by provisions of the Code [and the Rules]. When debtors flout the code, they lose their protection from creditors and relief from the automatic stay will be granted." In re Merchant, 256 B.R. at 578 (citations omitted). Hennis's actions confirm a lack of good faith in the filing of the instant bankruptcy and constitute an abuse of the bankruptcy process. Therefore, Trustmark's Motion to terminate the stay is granted, for cause, under 11 U.S.C. § 362(d)(1).

The stay is also terminated under the provisions of 11 U.S.C. § 362(d)(4), which provides in pertinent part:

> On request of a party in interest after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section ..
>
> ...
>
> (4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder or defraud creditors that involved either-
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> ...
>
> (B) multiple bankruptcy filings affecting such real property.[8]

11 U.S.C. § 362(d)(4) (2011). The Court finds that the filing of the bankruptcy petition in this case was part of a scheme to delay, hinder or defraud a creditor that involved multiple bankruptcy filings and affected real property that was subject to the section 362(a) automatic stay. Specifically, as noted

[8]On December 22, 2010, the Bankruptcy Technical Corrections Act of 2010 (the "Corrections Act") was signed by the President of the United States and was designated Public Law Number 111-327. See 124 Stat. 3558. Under the provisions of this act, a typographical error in 11 U.S.C. § 362(d)(4) was remedied. Prior to the Corrections Act, a plain text reading of section 362(d)(4) indicated that it addressed "a scheme to delay, hinder, *and* defraud." 11 U.S.C. § 326(d)(4) (2010) (emphasis added). The Corrections Act clarified that Congress intended this section to address "a scheme to delay, hinder, *or* defraud." 11 U.S.C. § 326(d)(4) (2011) (emphasis added).

above, the record reflects that Hennis used the 2010 bankruptcy case and the pending bankruptcy case as part of a scheme to unjustly delay and hinder Trustmark from seizing and selling the real property that serves as its collateral. Therefore, the Court finds that Trustmark is also entitled to relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(4).[9]

C. Dismissal and Bar to Refiling.

Bankruptcy petitions filed under Chapter 13 may be dismissed for "cause." 11 U.S.C. § 1307(c). In addition to the grounds specifically identified in the statute, bad faith is also recognized as a basis for dismissal under § 1307. Jacobsen v. Moser (In re Jacobsen), 609 F.3d 647, 656 (5th Cir. 2010)(citing Marrama v. Citizens Bank of Mass., 549 U.S. 365, 374 (2007)). The record reflects that Hennis has failed to file the Initial Documents, failed to file a plan and has failed to take any action to move his case forward causing unreasonable delay, each of which failure constitutes cause for dismissal under § 1307. 11 U.S.C. § 1307(c)(1),(3),(9). Additionally, based upon all of the facts and circumstances set forth above and in the record in this case, the Court concludes that there has been a sufficient pattern of abuse of the Chapter 13 process to constitute "cause" to dismiss under § 1307. Considering the totality of circumstances in this case, the Court finds that the same "cause" which compelled the termination of the automatic stay as to Trustmark's collateral also compels the dismissal of this Chapter 13 bankruptcy case. See In re Lippolis, 228 B.R. 106, 112 (E.D. Pa. 1998)(bad faith sufficient to justify lifting of automatic stay also justified dismissal under §1307). Cf. Collier, *supra* at p. 362-125 ("It has been held that there is 'no substantive difference between

[9]Pursuant to 11 U.S.C. § 362(d)(4), if the order issued in conjunction with this opinion is recorded in compliance with applicable State laws governing notices of interests or liens in real property, the order terminating the stay shall be binding for two years from the date of the entry of the order in any other bankruptcy case which purports to affect the real property identified in Trustmark's Motion.

the cause requirement for dismissal of a petition under Section 1112(b) and the cause requirement for relief from an automatic stay under Section 362(d)(1).'") (citation omitted).

Furthermore, pursuant to the authority granted by 11 U.S.C. §§ 105(a) and 349(a), this Court finds that Hennis should be barred from filing another bankruptcy petition under any chapter of Title 11 for a period of one (1) year beginning on the date of the entry of the order which will be issued in conjunction with this opinion. See Stathatos v. U.S. Trustee (In re Stathatos), 163 B.R. 83, 88 (N.D. Tex. 1993)(bankruptcy court acted within its discretion to enjoin future filings for 24 months to prevent abuse of bankruptcy process). In reaching this conclusion, the Court makes a finding (based on the history set forth above) that, if this case is dismissed without prejudice, the Debtor will more likely than not file another bankruptcy once the new foreclosure date is set.

IV. CONCLUSION

Based on the foregoing, Trustmark's Motion (Dkt. No. 8) is **GRANTED** to the extent that the stays imposed by 11 U.S.C. §§ 362(a) and 1301 (Dkt. No. 8) are terminated; and Trustmark's collateral is abandoned from the estate. Furthermore, with regard to the Show Cause Order (Dkt. No. 14), the Court finds that this Chapter 13 is **DISMISSED** for cause pursuant to11 U.S.C. § 1307(c), and that Hennis is barred from filing another bankruptcy petition under any chapter of Title 11 for a period of one (1) year from the date of the entry of the order which will be issued in conjunction

with this opinion. Because the Court is dismissing this case for cause under 11 U.S.C. § 1307(c), Trustmark's motion to dismiss is **DENIED** as **MOOT**.

An order consistent with this Memorandum Opinion shall issue herewith.

Katharine M. Samson
United States Bankruptcy Judge
Dated: March 4, 2011