

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE**

In re:

Carolyn Chamness,

Case No. 05-40192 WHB

Debtor.

Carolyn Chamness,

Plaintiff,

v.

Adv. No. 05-0687

Countrywide,

Defendant.

**MEMORANDUM OPINION AND ORDER
GRANTING DEBTOR'S MOTION FOR TEMPORARY RESTRAINING ORDER
TO STOP FORECLOSURE AND TO IMPOSE THE AUTOMATIC STAY**

This adversary proceeding is before the Court on the Debtor's Motion for a temporary restraining order enjoining Countrywide, the mortgagee, from foreclosing on the Debtor's residence located at 9681 Kingsbridge Drive, Lakeland, Tennessee. After consideration of the testimony introduced at the hearing on this matter, the pleadings, the statements of counsel, and the entire record in this cause, the Court finds that the Debtor's motions should be granted. This opinion constitutes the Court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052. This is a core proceeding. 28 U.S.C. § 157 (b)(2)(G).

FACTUAL SUMMARY

The facts of this case are undisputed. This is the Debtor's third chapter 13 bankruptcy filing in 2005.¹ The Debtor made no payments in the two prior 2005 cases, and both of those cases were dismissed, the first being dismissed for failure to commence payments, and the second was dismissed on the chapter 13 trustee's objection to confirmation and motion to dismiss because the Debtor failed to respond to trustee interrogatories. The Debtor testified about the following circumstances:

The Debtor's first chapter 13 case in 2005 was commenced on February 17, 2005. The Debtor is by profession a medical nurse and she contracted shingles from her patients. As a result, she was off work for three months. The Debtor then suffered a recurrence of that infection and was forced to be on medical leave. Consequently the Debtor made no payments into her chapter 13 case, and the case was dismissed on April 21, 2005.

The Debtor then filed a chapter 13 case on April 25, 2005, which was dismissed on July 27,

¹ In fact, this is the Debtor's fifth bankruptcy filing in this district. In addition to the three 2005 bankruptcy filings, the Debtor also filed cases in 1999 and 2000. It is the 2005 cases, however, that are at issue in this proceeding. *See* 11 U.S.C. § 362(c)(4).

2005 . The Debtor testified that within ten days of returning to work from her medical leave, her infection recurred, and she was this time off work for six months and was eventually laid off from her job. As a result of the lay-off, the Debtor has filed a civil law suit against her employer.

The Debtor testified that she is presently working and earning \$25 per hour. She expects to net \$800 to \$900 per week, and proposes weekly payments into the chapter 13 plan of \$450. At this time, the Debtor's mortgage arrearages and the cost of foreclosure proceedings total approximately \$21,000, which the Debtor proposes to repay at \$318 per month. She also proposed to make the on-going monthly mortgage payments are \$1,209.82. Confirmation of the proposed plan has not yet taken place.

ISSUE

The issue is whether the Debtor has shown "good faith as to the creditors to be stayed" as required for imposition of the automatic stay in this case pursuant to § 362(c)(4)(B) of the Bankruptcy Code, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").

DISCUSSION

Prior to the amendments to the Bankruptcy Code brought about by BAPCPA, the automatic stay went into effect upon the entry of the Court's order for relief when the petition was filed, and it was up to a creditor to seek from the Court a termination of the automatic stay or other appropriate stay relief. Under § 362(c)(4)(A)(i) of the amended Code, however, applicable to bankruptcy cases filed on or after October 17, 2005, the automatic stay does not go into effect if the debtor had two or more bankruptcy cases that were both pending and dismissed within the previous year. Section (c)(4)(B) provides for possible relief from this result in favor of a debtor,

if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, 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.

11 U.S.C. § 362(c)(4)(B). Congress has shifted the burden to this Debtor to show that her present case has been filed “in good faith as to the creditors [in this case Countrywide] to be stayed” in order to enjoy the protection of the automatic stay and to rebut the presumption that the case was not filed in good faith. *See* 11 U.S.C. § 362(c)(4)(D).

Congress has not defined “good faith” in the Bankruptcy Code, instead continuing to leave that determination to the bankruptcy judge. Although the Sixth Circuit has not yet addressed the good-faith standard under the Bankruptcy Code as amended by BAPCPA, that Court has spoken often in the past on standards for determining “good faith” for plan-confirmation purposes, and those cases are instructive here, where we are dealing with good faith in the context of case filing rather than plan proposal. The Sixth Circuit has “emphasized that good faith is a fact-specific and flexible determination.” *Alt v. United States (In re Alt)*, 305 F.3d 413, 419 (6th Cir. 2002), citing *Metro Employees Credit Union v. Okoreeh-Baah (In re Okoreeh-Baah)*, 836 F.2d 1030, 1032-33 (6th Cir. 1988). The *Okoreeh-Baah* Court went on to direct, in a plan-confirmation context, that:

The bankruptcy court must ultimately determine whether the debtor’s plan, given his or her individual circumstances, satisfies the purposes undergirding Chapter 13: a sincerely-intended repayment of pre-petition debt consistent with the debtor’s available resources. The decision should be left simply to the bankruptcy court’s common sense and judgment. . . . [C]ourts should take into account the totality of the circumstances confronting a debtor, not simply his or her pre-plan conduct, when deciding whether or not to confirm a Chapter 13 plan.

In re Okoreeh-Baah, 836 F.2d at 1033 - 34. The Circuit Court has suggested twelve factors that the

bankruptcy judge should consider in making a good-faith determination for plan confirmation:

(1) the debtor's income; (2) the debtor's living expenses; (3) the debtor's attorney fees; (4) the expected duration of the Chapter 13 plan; (5) the sincerity with which the debtor has petitioned for relief under Chapter 13; (6) the debtor's potential for future earning; (7) any special circumstances the debtor may be subject to, such as unusually high medical expenses; (8) the frequency with which the debtor has sought relief before in bankruptcy; (9) the circumstances under which the debt was incurred; (10) the amount of payment offered by debtor as indicative of the debtor's sincerity to repay the debt; (11) the burden which administration would place on the trustee; and (12) the statutorily-mandated policy that bankruptcy provisions be construed liberally in favor of the debtor.

Society Nat'l Bank v. Barrett (In re Barrett), 964 F.2d 588, 592 (6th Cir. 1992), citing *In re Okoreeh-Baah*, 836 F.2d at 1032 n. 3. The *Barrett* Court affirmed the bankruptcy judge's finding of good faith on the part of the debtor, reasoning:

[A]s long as the court sufficiently considered [the debtor's] prior conduct under the totality of circumstances test, the exact manner in which the bankruptcy court weighed the prior conduct is irrelevant given the bankruptcy court's discretionary power in making a determination of good faith. . . . The bankruptcy court found that there was a change of circumstance such that there was "no question but [that] the Debtor intends in his plan to pay [the mortgagee] in full or of his capability of doing so." . . . The court weighed [the debtor's] prior conduct against his present ability to pay back the debt and found [the debtor] is now employed in a fairly stable job at a substantial income sufficient to insure eventual repayment of the entire debt. The bankruptcy court considered as well [the debtor's] offer to reaffirm his personal liability under the mortgage.

In re Barrett, 964 F.2d at 592.

If a totality-of-circumstances examination is required to find good faith in the plan-confirmation context, it is equally applicable under new Code § 362(c)(4)(D), which provides a presumption to the absence of good faith, which a debtor must rebut "by clear and convincing

evidence,” when any of the conditions found in § 362(c)(4)(D)(i) or (ii) exist. Since the bankruptcy court must consider all evidence under a “clear and convincing” standard, that leads to a conclusion that a totality-of-circumstances evaluation is appropriate. A consideration of the totality of the circumstances in this case leads the Court to find that this Debtor has commenced this case in good faith as to Countrywide, and has met the good-faith requirement for imposition of the automatic stay under § 362(c)(4)(B). The Debtor testified that she incurred unusual health and employment circumstances that resulted in her inability to fund plans in her prior chapter 13 cases. Her past illnesses, contracted through the nature of her profession, forced her to take medical leave which the Debtor alleges ultimately resulted in wrongful termination of her employment. The Debtor has now sufficiently recovered from her illnesses to again be employed as a nurse, earning a significant income sufficient to fund her proposed chapter 13 plan and to repay her mortgage to Countrywide. The Court finds that, under the totality of the circumstances presented in this case, the Debtor has met her burden of establishing that her current bankruptcy case is a good faith effort to reorganize and repay her obligations under the Countrywide mortgage.

The Court has also considered the Debtor’s bankruptcy history, however, and advises the Debtor that this case may be her last opportunity to cure the Countrywide mortgage through a chapter 13 bankruptcy. Section 362(c)(4)(B) provides that if the bankruptcy court orders the automatic stay to take effect in a case such as this one, it may impose “conditions or limitations.”

CONCLUSION AND ORDER

For the reasons stated herein, the automatic stay is imposed against Countrywide pursuant to the good-faith provisions of § 362(c)(4)(B) according to the conditions set forth below, and the

Debtor's motion for a temporary restraining order is **GRANTED**. The Court finds it appropriate to order that as conditions for imposing the automatic stay, the following are required:

1. The Debtor must obtain confirmation of a plan, and a failure to obtain confirmation will result in relief from the automatic stay to Countrywide, and

2. All plan payments must be timely submitted to the chapter 13 trustee for disbursement. Pending confirmation, as adequate protection to Countrywide, the Debtor must tender her proposed plan payments to the trustee, who is authorized to make the proposed cure and on-going payments to Countrywide, and

3. After confirmation, in the event of a default in plan payments, Countrywide's attorney shall provide a notice to the Debtor and her attorney of the default, giving the Debtor twenty (20) days from that notice to cure the default or to file a motion seeking appropriate relief from the default notice. In the absence of a cure or a timely motion within the twenty (20) days, Countrywide shall have a termination of the automatic stay so that the mortgagee may pursue its contractual and state-law remedies as to the real property.

No further action is needed in this adversary proceeding, and this Order shall also be entered in the underlying case file on the Debtor's motion to impose the automatic stay.

Cc:
Debtor
Debtor's attorney
Attorney for Countrywide
Chapter 13 trustee
U.S. trustee