

**IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION**

**IN RE: JANNA FAYE WITHERS,
Debtor**

**CASE NO: 4:08-bk-11108 E
Chapter 13**

**ORDER DISMISSING CHAPTER 13 CASE
WITH FIVE (5) YEAR BAR FOR REFILING**

Before the Court is the Motion to Dismiss Chapter 13 Case with Five (5) Year Bar for Refiling (“Motion”) filed by Joyce Bradley Babin, Chapter 13 Standing Trustee, in the case of the Debtor, Janna Faye Withers (“Debtor”). The Motion was set for hearing on February 18, 2009. At the time of the hearing, the Trustee appeared and counsel for the Debtor, Thomas W. Byarlay appeared. The Debtor did not appear. After the presentation of testimony, evidence and argument, the Court made findings on the record which are incorporated into this Order pursuant to Federal Rule of Bankruptcy Procedure 7052. For the reasons stated on the record and in this Order, the Court makes the following ruling:

I. Factual Background.

The Debtor filed this chapter 13 case on February 22, 2008. However, her plan is not confirmed.

Prior to filing this chapter 13 case, the Debtor filed two other chapter 13 cases in this Court:

A. *In re Janna Faye Withers*, Case No. 4:03-bk-21631 M (Filed on September 30, 2003; Plan Confirmed on March 23, 2004; Case Dismissed on April 17, 2006). Case No. 4:03-bk-21631 was dismissed as a result of the Debtor’s failure to make plan payments.

B. *In re Janna Faye Withers*, Case No. 4:06-bk-11691 E. (Filed on May 4 2006; Plan Confirmed on October 23, 2006; Case Dismissed on January 23, 2007). Case No. 4:06-

bk-11691 was dismissed as a result of the Debtor's failure to make plan payments. In this case, the Debtor only made two payments, one of which was returned as insufficient.

In addition to the three cases filed by the Debtor (Case No. 4:03-bk-21631, Case No. 4:06-bk-11691 and this case), the Debtor has benefitted from bankruptcy protection as a result of the chapter 13 filing of her spouse, Mike Withers, in this Court, in Case No. 4:07-bk-10918 M (Filed on February 22, 2007; Dismissed on December 17, 2007). The plan in Mr. Withers' case was never confirmed. Two plan payments made by Mr. Withers were returned for insufficient funds.

In the current case, the Debtor originally proposed to pay a monthly payment of \$3,395 to the Trustee through withholding by her employer, Gary Green (\$1,698), and by direct payment from the Debtor (\$1,697). On September 24, 2008, the Debtor modified her plan to provide for a monthly payment of \$500, to be paid in bi-weekly payments of \$230.77 to be paid by her employer, Gary Green.

The Debtor's payment history in this case has been inconsistent and the Debtor is significantly delinquent in her plan payments. The Debtor made some payments by money order or through employer withholding that were able to be applied to the Debtor's plan. These payments have totaled \$5,631.14.

The Debtor sent other non-legitimate payments to the Trustee totaling \$14,826 which have not been able to be applied as plan payments. The Debtor remitted checks, often undated, from a closed checking account in the name of Withers Paint & Body, LLC and from a checking account that never existed using checks in the name of Mike Withers. Withers Paint & Body, LLC was a business of Mr. Withers.

The following payments were received from a closed checking account:

Account Name: Withers Paint & Body, LLC
 Arvest Bank
 Account # XXXXXX2828

	<u>Check #</u>	<u>Check Date</u>	<u>Date Posted</u>	<u>Amount</u>	<u>Reason Returned</u>
A.	3336	Not Completed	10/31/08	\$1,000.00	Account Closed
B.	3335	Not Completed	10/9/08	\$ 500.00	Closed Account
		** Check not signed			
C.	3334	Not Completed	9/17/08	\$2,000.00	Closed Account
D.	3333	Not Completed	8/29/08	\$1,9269.00	Account Closed

The following payments were received on a checking account that never existed:

Name on Check: Mike Withers
 US Bank
 Account #XXXXXXXX4639

	<u>Check #</u>	<u>Check Date</u>	<u>Date Posted</u>	<u>Amount</u>	<u>Reason Returned</u>
A.	2289	5/29/08	5/30/08	\$3,500.00	Unable to Locate Acct
B.	2300	5/10/08	5/15/08	\$1,500.00	Unable to Locate Acct
C.	2299	4/28/08	4/30/08	\$3,400.00	Return to Maker
D.	2290	Not Completed	11/14/08	\$1,000.00	Unable to Locate Acct
E.	2276	Not Completed	01/13/09	\$ 500.00	Unable to Locate Acct

Additionally, the Debtor remitted at least one additional check on the US Bank account (Check No. 2260) in Case No. 06-11691 that was returned as insufficient.

The Trustee's Office continually informed the Debtor of the returned checks. At the hearing, the Trustee provided copies of letters dated May 12, 2008; May 22, 2008; June 6, 2008; September 10, 2008; and September 29, 2008; that were sent in the Debtor's current case. The Trustee also provided a letter dated August 9, 2006, from Case No. 4:06-bk-11691 for the returned Check No. 2260.

Additionally, on or about August 6, 2008, the Debtor provided an empty express mail envelope with no check inside to the Trustee's bank lock box address. When contacted by the Trustee's staff, the Debtor represented that she had sent two money orders for \$1,000 each.

Although the Debtor represented that she would investigate or replace the checks, no money orders were ever received by the Trustee.

The Trustee filed her Motion on January 18, 2009, seeking dismissal of the Debtor's case, along with a bar from refiling any bankruptcy case for five years. Subsequently, on January 26, 2009, the Debtor filed a Motion for Voluntary Dismissal of her case. The Trustee filed a Response to the Debtor's motion asserting that dismissal of the Debtor's case should be with the five-year bar from refiling.

II. Dismissal of the Instant Case for Cause.

At the hearing, the parties agreed that the Debtor's case could be dismissed, but disagreed regarding whether the dismissal should include a bar from refiling. The Trustee argued that the Debtor's conduct in this case, as well as her conduct in previous cases, demonstrated that the Debtor should be precluded from filing another bankruptcy case for a period of at least five years.

This Court previously has addressed dismissal of cases and has issued bars from refiling of subsequent cases when the filings have not been in good faith and the Debtor's conduct has warranted such a finding. *See, e.g., In re Roeben*, 294 B.R. 840 (Bankr. E. D. Ark. 2003); *In re Balmer*, 2003 WL 22658196, Case No. 1:03-bk-19058 (Bankr. E.D. Ark. Oct. 10, 2003); and *In re Stanley L. Paxton*, Case No. 4:04-bk-20269 (Bankr. E. D. Ark. June 14, 2004). This Court has stated:

Chapter 13 petitions may be dismissed or converted "for cause" under 11 U.S.C. § 1307(c), and such cause includes the filing of a petition in bad faith. *In re Ladika*, 215 B.R. 720, 725 (8th Cir. B.A.P. 1998). The determination of bad faith "focuses on the totality of the circumstances, specifically: (1) whether the debtor has stated his debts and expenses accurately; (2) whether he has made any fraudulent representation to mislead the bankruptcy court; or (3) whether he has unfairly manipulated the bankruptcy code." *Id.* (citing *In re LeMaire*, 898 F.2d 1346 (8th Cir. 1990).

Serial filing should be weighted as a factor in determining bad faith under the totality of the circumstances. See *In re LeGree*, 285 B.R. 615, 618-19 (Bankr. E.D. Pal. 2002). “The filing of successive petitions in bankruptcy . . . may be indicia of a bad faith filing where there is no bona fide change in circumstances that justify the multiple filing of where the subsequent filing was designed to frustrate statutory requirements and abuse the bankruptcy process.” *In re Coones Ranch, Inc.*, 138 B.R. 251, 258 (Bankr. D.S.D. 1991). Factors that courts consider in making this assessment include “the length of time between petitions, whether the filing was made to induce the automatic stay, the debtor's efforts to comply with a previously confirmed plan, and whether a debtor is making multiple attempts at a fresh start.” *Id.* See also *LeGree*, 285 B.R. at 618-19.

In re Roeben, 294 B.R. at 845.

In considering the totality of the circumstances in this case, the Court finds that sufficient cause exists for dismissing the Debtor's case pursuant to 11 U.S.C. § 1307(c). The Court makes the following findings of fact: (1) The Debtor did not made payments in good faith. The Debtor knowingly provided false payments with her remittances on the closed and non-existent checking accounts . The Debtor's repeated remittances from the checking accounts after being informed that the checks were returned demonstrates that the Debtor knew that the payments made by checks were not legitimate payments. The Debtor deceived the Court and the Trustee regarding her ability to make payments and to stall dismissal of her case; (2) The Debtor has caused unreasonable delay to the extent that creditors' rights have been prejudiced; (3) The Debtor has received the benefits of the automatic stay almost continually since the filing of her first case through this current case without performing under the chapter 13 plans, including her spouse's case and has prevented creditors from reaching her property; (4) The Debtor has been unable to propose a confirmable plan in her last two cases; (5) The Debtor has demonstrated a consistent pattern and inability to make chapter 13 plan payments; and (6) The Debtor's purpose behind her filing was not to obtain a “fresh start,” but rather simply to frustrate creditors. See *In re Roeben*, 294 B.R. at 845. In conclusion, the

Debtor has abused the bankruptcy process by her actions and demonstrated bad faith in her filing of her case and her plan.

Because of the Debtor's abuse and bad faith, the Court finds it necessary to employ its equitable powers under 11 U.S.C. § 105(a) to protect the integrity of the bankruptcy system by barring the Debtor from filing under any chapter of the Bankruptcy Code for a period significantly longer than 180 days. *See, e.g., In re Balmer*, 2003 WL 22658196, slip op. at 6, and cases cited therein. As in *Balmer*, the Debtor's disregard for the entire bankruptcy process warrants extraordinary action. *Balmer*, slip op. at 6. **The Debtor is barred from filing any case under any chapter of the Bankruptcy Code anywhere in the United States for a period of five (5) years from the date of the entry of this Order.**

III. Service of this Order Upon Debtor by United States Marshal.

A copy of this Order shall be served upon the Debtor by the United States Marshal with evidence of the service filed into the record of the Debtor's case.

IT IS SO ORDERED.



The Honorable Audrey R. Evans
United States Bankruptcy Judge

Date March 09, 2009

cc: Thomas W. Byarlay, Esq.
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