UNITED STATES BANKRUPTCY COURT

DISTRICT OF IDAHO

IN RE	)	
	)	**Case No. 12-21220-TLM**
PHILIP LEWIS HART,	)	
	)	**Chapter 13**
Debtor.	)	
_____	)	

MEMORANDUM OF DECISION

INTRODUCTION

Philip Lewis Hart ("Debtor") is a former Idaho state legislator who has been embroiled in litigation with federal and state taxing authorities. One of these suits is *United States of America v. Philip L. Hart, et al.*, Case No. 2:11-CV-00513-EJL, pending before the U.S. District Court for the District of Idaho (the "Federal Action"). In the Federal Action, the United States on behalf of the Internal Revenue Service ("IRS") "seeks to reduce to judgment certain outstanding federal tax liabilities assessed against [Debtor] and to foreclose certain federal tax liens on a parcel of real property in Kootenai County, Idaho[.]" *See* Federal Action, Doc. No. 1 at 2.[1]

The Federal Action was stayed by a chapter 13 case filed in this Court by

---

[1] The Court has taken judicial notice of the record before the District Court in the Federal Action for the purposes of providing background and context for the present Decision. Fed. R. Evid. 201.

Debtor in May 2012, Case No. 12-20648-TLM ("*Hart I*").[2] Following the voluntary dismissal of that bankruptcy case in August 2012, and consequent renewal of litigation in the Federal Action, Debtor once again filed a chapter 13 petition on October 24, 2012, commencing the instant bankruptcy case, Case No. 12-21220-TLM ("*Hart II*"). The District Court again stayed the Federal Action due to the second bankruptcy. Federal Action, Doc. No. 64 (Order of October 26, 2012).

The matter now comes before this Court on Debtor's "Motion to Extend Automatic Stay Under 11 U.S.C. 362(c)(3)," *Hart II*, Doc. No. 24 ("Motion"), filed on November 7, 2012. The IRS objected to the relief sought in the Motion. *Hart II*, Doc. No. 37 ("Objection"). In addition to the chapter 13 trustee, C. Barry Zimmerman ("Trustee"), counsel for Debtor and for the IRS appeared at a November 13, 2012 hearing ("Hearing") on the Motion and presented arguments.[3] At the conclusion of the Hearing, the Court took the matter under advisement.

The Court determines that the Objection will be sustained, and the Motion will be denied.[4]

---

[2] Unless otherwise indicated, all chapter, section and other statutory references are to the Bankruptcy Code, Title 11, U.S.C. §§ 101–1532 (the "Code"), and all rule references are to the Federal Rules of Bankruptcy Procedure 1001–9037.

[3] No evidence was presented at the Hearing.

[4] This Decision constitutes the Court findings and conclusions pursuant to Rules 7052 and 9014. This Court has jurisdiction over all the issues addressed in this Decision, 28 U.S.C.
(continued...)

BACKGROUND AND FACTS

Debtor filed a bankruptcy petition commencing his first chapter 13 case, *Hart I*, on May 29, 2012.[5] Upon receiving notice about that filing from the IRS, the District Court stayed the Federal Action.

Debtor filed his proposed plan and his schedules on June 12, 2012. *Hart I*, Doc. Nos. 15, 19. The IRS objected to confirmation of Debtor's chapter 13 plan on several grounds, including its contention that Debtor was ineligible for chapter 13 relief under § 109(e).[6] Debtor, through his counsel, thereafter stipulated with Trustee that Debtor was ineligible for chapter 13 relief.[7] *Hart I*, Doc. No. 35 at 1. Debtor then voluntarily moved to dismiss the case consistent with that stipulation. *Hart I*, Doc. No. 36 at 1. The Court granted Hart's motion to dismiss on August

---

[4] (...continued)
§ 1334, and the same are core proceedings, 28 U.S.C. §§ 157(b)(1), (b)(2)(A), (b)(2)(O).

[5] The Court also takes judicial notice of the filings and record in *Hart I*. Fed. R. Evid. 201.

[6] Section 109(e), as pertinent here, limits chapter 13 relief to "individuals with regular income" who owe as of the petition date "noncontingent, liquidated, unsecured debts of less than $360,475."

[7] Debtor's initial schedules filed with the Court listed on schedule E (unsecured priority claims) priority debts of $560.00 to the Idaho State Tax Commission ("ISTC") and $6,449.00 to the IRS, and unsecured debts not entitled to priority of $42,000 to the ISTC and of $549,000 to the IRS. These latter two debts were shown as "disputed," but not as contingent or unliquidated. *Hart I*, Doc. No. 19 at 11. Debtor also listed $27,550 of nonpriority unsecured debt on schedule F owed to two banks on credit cards, to a creditor on a stipulated judgment, and to a law firm for legal fees. *Id.* at 12–13. On an amended schedule E, Debtor marked "contingent" as to the "disputed" ISTC and IRS debts. *Hart I*, Doc. No. 21 at 3. It was after this amendment, however, that Debtor stipulated to a lack of eligibility under § 109(e).

27, 2012. *Hart I*, Doc. No. 38.

Debtor commenced the current bankruptcy case by filing a voluntary chapter 13 petition on October 24, 2012. *Hart II*, Doc. No. 1. Debtor's schedules and statement of financial affairs were not filed simultaneously with the petition, nor within the 15 days thereafter allowed by the Rules (*i.e.*, by November 7).[8]

Debtor filed his Motion on November 7. In addition to the Motion, he filed a supporting declaration, *Hart II*, Doc. No. 25 ("Declaration"),[9] as well as a notice of the Motion and of the scheduled Hearing, *Hart II*, Doc. No. 27 ("Notice"). The Declaration contends *Hart I* was dismissed by Debtor's previous counsel "without [Debtor's] absolute approval." *Hart II*, Doc. No. 25 at 1.[10] It also contends Debtor needs the automatic stay to prevent the IRS from garnishing his accounts and he needs the bankruptcy "to potentially discharge a large portion of the IRS' secured nonpriority claim of $564,091.54." *Id*. at 1–2. Finally, the Declaration asserts,

---

[8] On November 8, Trustee moved to dismiss this case based on the lack of required documents. *Hart II*, Doc. No. 29. This motion was issued on a 20-day "negative notice" basis.

[9] The Declaration sets forth certain facts that would appear to be within Debtor's personal knowledge and is sworn to by Debtor like an affidavit. This submission is significant because Debtor did not appear and testify at the Hearing to otherwise establish any facts relevant to the Motion or to his opposition to the Objection. The Court considers, *infra*, those factual assertions. While the Declaration also makes legal arguments about the merits of the Motion, as would a brief, those aspects are properly disregarded. In any event, Debtor's attorney advanced the same legal arguments at the Hearing.

[10] The IRS objected to confirmation of the chapter 13 plan in the fist case, and its counsel filed a declaration in support of that objection. *Hart I*, Doc. Nos. 34, 34-1. Attached to the declaration is a partial transcript of the § 341(a) meeting and examination of Debtor. During that examination, Debtor declined to answer numerous questions, and his counsel several times noted that Debtor would stipulate to dismissal of the case on § 109(e) eligibility grounds.

without discussion or explanation, that the IRS claim is "unliquidated" as well as disputed, and that he is eligible under § 109(e). *Id.* at 3.

The IRS' Objection asserts that a presumption of bad faith applies because Debtor's situation has not changed since *Hart I* and Debtor is unlikely to confirm a plan in the new bankruptcy case. *Hart II*, Doc. No. 37 at 3. Consequently, the IRS argues Debtor must meet a heightened burden of proof in order to extend the stay, and it contends Debtor has not done so. The IRS also argues its claim[11] is liquidated and not contingent, and so should be counted toward the debt caps for chapter 13 eligibility under § 109(e). *Id.* at 3–4. Finally, it argues Hart's timing in filing this petition is suspicious because it occurred only days before a scheduled deposition in the Federal Action to collect his unpaid tax liabilities. *Id.* at 2.

As of the Hearing, Debtor's schedules still had not been filed. No evidence was presented at the Hearing through testimony. However, the Debtor filed his schedules and statement of financial affairs, as well as a proposed chapter 13 plan ("Plan"), on November 16, 2012. *Hart II*, Doc. Nos. 40–42.

Debtor's schedules and statements have been carefully reviewed.[12] Debtor

---

[11] The IRS has not yet filed a proof of claim in *Hart II*, but instead relies on the proof of claim filed in *Hart I* to establish the amount of its claim. *Hart I* at Claim No. 3-2 (amended claim for $567,297.81).

[12] Schedules and statements executed by a debtor under penalty of perjury as being true and correct to the best of his knowledge, information and belief, can be considered as evidence against that party under Fed. R. Evid. 801(d)(2). *See, e.g., Jordan v. Kroneberger (In re Jordan)*, 392 B.R. 428, 444 n. 32 (Bankr. D. Idaho 2008).

shows the IRS on schedule E as holding a $3,116.22 priority unsecured claim that is not contingent or unliquidated.[13] Schedule F (nonpriority unsecured claims) includes the two credit card debts (listed at $6,368.89 and $25,647.54) and the litigation settlement (at $4,600.00). None of these three creditors are shown as unliquidated or contingent. The ISTC is listed as holding an "unliquidated" claim of $62,173.55 and the IRS is listed as holding an "unliquidated" (and disputed) claim of $564,091.54.

Debtor's statement of financial affairs does not show any pending litigation, an obvious omission given the Federal Action, and one inconsistent with the information in the statement of financial affairs in *Hart I*. The budget schedules (I and J) show Debtor has a monthly net income of $105.92 available to fund a plan. The plan proposes 36 monthly payments of $106.00 (a total of $3,816.00). The total is plainly insufficient to pay the Trustee's fees and Debtor's attorney's remaining fee and fund the required full payment of uncontested priority claims.

DISCUSSION AND DISPOSITION

The Motion and Objection raise the issue of whether and to what extent a stay under § 362(a) of the Code exists. For repeat filers who have had a bankruptcy case pending within the year preceding the filing of the most recent

[13] In *Hart I*, Debtor had contended that this portion of the IRS claim, for 2009–2011 taxes, was $6,449.00.

case, the automatic stay terminates on the thirtieth day after the petition was filed in the most recent case.[14] *See* § 362(c)(3)(A). *Hart I* was dismissed less than two months before Hart filed his petition in *Hart II*, so *Hart I* was pending within a year of the *Hart II* filing and the provisions of § 362(c)(3) apply in this case. The stay will expire as a matter of law on November 23, 2012, thirty days after Hart's petition was filed on October 24, 2012, unless a party in interest meets the requirements to extend the stay.

Even though the stay is set to automatically expire, a court may extend the stay as to any or all creditors, as long as certain minimum requirements are met: 1) a party in interest files a motion; 2) there is notice and a hearing; 3) the hearing is held before the 30-day stay expires; and 4) the moving party demonstrates the new case was filed in good faith.[15] *In re Castaneda*, 342 B.R. 90, 93 (Bankr. S.D. Cal 2006) (citing § 362(c)(3)(B)).

---

[14] The language of the statute says the stay "shall terminate with respect to the debtor," *see* § 362(c)(3)(A), and the Ninth Circuit Bankruptcy Appellate Panel has clarified that the provision terminates the stay in its entirety (i.e. also with respect to the bankruptcy estate). *Reswick v. Reswick (In re Reswick)*, 446 B.R. 362 (9th Cir. BAP 2011).

[15] Debtor filed his Motion and the Hearing was held well before the 30-day deadline, but he failed to establish he properly noticed the Motion and Hearing. Debtor's Certificate of Service says he sent a copy of the Motion, Declaration and Notice to "all parties on the attached MML" (*i.e.*, the "master mailing list" of all creditors and parties in interest), but he failed to attach the MML. *Hart II*, Doc. No. 28. The Court cannot determine whether service complied with the Rules because it cannot verify to whom the documents were served, if anyone, beyond those parties listed on the Notices of Electronic Filing associated with each of the documents. Ordinarily, in this situation the Court gives a party an opportunity to supplement the record to prove service was effected correctly, but that is unnecessary here because the Court concludes Debtor also failed to meet other burdens under § 362(c)(3)(B).

To determine whether the moving party has established the good faith required by § 362(c)(3)(B), courts look at the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006). The factors courts consider include, but are not limited to:

> 1. the timing of the second petition;
> 2. how the debt(s) arose;
> 3. the debtor's motive in filing the second petition;
> 4. how the debtor's actions affected creditors;
> 5. why the debtor's prior case was dismissed;
> 6. the likelihood that the debtor will have a steady income throughout the bankruptcy case, and will be able to fund a plan; and
> 7. whether the trustee or creditors object to the motion to continue the stay.

Id. at 814–15.

Generally, the moving party must establish the good faith element by a preponderance of the evidence. *Castaneda*, 342 B.R. at 94–95. However, under certain circumstances, a case is presumed not to be filed in good faith, and the moving party must rebut that presumption with "clear and convincing" evidence that the case was filed in good faith. *Id.* (citing § 362(c)(3)(C)). As pertinent here, the filing is presumed not in good faith as to all creditors when the debtor's financial or personal affairs have not substantially changed, and there is no other reason to conclude the case will result in a confirmed plan. *See* § 362(c)(3)(C)(i)(III) and (III)(bb). The burden of establishing the applicability of the presumption rests on the opponent to the motion. *Castaneda*, 342 B.R. at 95.

Here, the IRS raised sufficient facts, in large part based on its reference to the Court's record in *Hart I* and *Hart II*, to establish the presumption applies. In particular, the IRS pointed out that Debtor stipulated he was not eligible for chapter 13 relief in *Hart I*, and that he has not established his circumstances have changed since then so as to make him eligible. Additionally, other facts cast doubt on Debtor's ability to confirm a plan in this case, including Debtor's inability to fund a facially confirmable plan as outlined in the Court's factual findings, *supra.*

Debtor's assertion that the IRS' claim is unliquidated and disputed appear designed to establish a change in Debtor's circumstances since *Hart I*. They are not well taken. First, whether a debt is "disputed" is not relevant under the plain language of § 109(e), which examines solely the amount of "noncontingent, liquidated" unsecured and secured debts to determine chapter 13 eligibility. Second, Ninth Circuit case law has established that a debt is liquidated if the amount of the debt is "ascertainable with certainty," regardless of whether the debtor concedes liability for that debt. *Scovis v. Henrichsen (In re Scovis)*, 249 F.3d 975, 983 (9th Cir. 2001) (citing *Slack v. Wilshire Ins. Co. (In re Slack),* 187 F.3d at 1070, 1074–75 (9th Cir. 1999)).[16] The IRS debt is in an amount certain,

---

[16] Debtor has apparently abandoned the argument, found in the *Hart I* amended schedule E, that the IRS claim is "contingent." *Hart I*, Doc. No. 21 at 3. Contingency requires that a post-petition event occur before liability attaches. *Nicholes v. Johnny Appleseed of Wash. (In re Nicholes)*, 184 B.R. 82, 88 (9th Cir. BAP 1995) (citing *Fostvedt v. Dow (In re Fostvedt*), 823 F.2d 305, 306 (9th Cir. 1987)). Whether or not liability is disputed, a pre-petition tax obligation (continued...)

based on assessments made on specific dates and for specific amounts, and also reflected in multiple liens filed of record. *See Hart I* at Claim No. 3–2 ($564,091.54). Debtor's schedule F in *Hart II* readily identifies the amount of the asserted claim. Doc. No. 40 at 13 (noting claim amount as $564,091.54).

Debtor argues that the IRS improperly made the assessments, and the assessments resulted from "political persecution" of Debtor because of his views and prior writings on the subject of taxation. *See* Declaration at 2. But this forms the basis of a "dispute," not a basis for finding that the claim is "unliquidated." Neither Debtor's arguments, nor his Declaration's assertions of "facts," establish that the IRS' claim is unliquidated, and should therefore not be counted toward the § 109(e) debt caps. Thus, Debtor has failed to show in any sense that his situation has changed from that presented in *Hart I*.[17]

Because Debtor has not presented any other evidence that his situation has

---

[16] (...continued)
is not contingent because the legal obligation arose at the time taxes were to be paid and is not dependent on a future event. *United States v. Ahmed (In re Ahmed)*, 362 B.R. 445, 449 (C.D. Cal. 2006) (citing *Mazzeo v. United States (In re Mazzeo*), 131 F.3d 295, 303–04 (2d Cir. 1997)).

[17] Whether Debtor is eligible for chapter 13 relief under § 109(e) is not a question pending before the Court at this time. Trustee's motion to dismiss was solely advanced on the basis of lack of timely filed, required documents. The IRS has not as yet moved to dismiss. The Court therefore renders no ruling on dismissal at this time. It, instead, is examining the § 109(e) issue only in connection with whether Debtor presented sufficient evidence or argument to establish that his prior circumstances substantially changed so that his new bankruptcy case is likely to succeed where his prior case failed. However, since the record raises a credible issue, and the authorities instruct the Court to address eligibility as early in the case as possible, the Court will set a hearing on dismissal of this case for December 17, 2012, and notice will be issued accordingly.

substantially changed, the Court determines the rebuttable presumption that *Hart II* was not filed in good faith applies. Debtor must rebut that presumption with "clear and convincing" evidence that his new petition was filed in good faith. Ultimately, the arguments Debtor made in support of extending the stay did not focus on establishing a good faith filing as discussed above. Rather, they focus on the reasons *why* he needs a stay and the chapter 13 bankruptcy filing (*i.e.*, to halt IRS garnishments on the previously made assessments, and to provide time and protect resources to litigate the dispute). These are beside the point. One assumes that a debtor seeking extension of the stay under 362(c)(3) wants the stay and believes its continuation is in his interests, but that alone does not establish the case was filed in good faith.

Debtor made only conclusory statements at the hearing that his Motion and his filing were made in good faith. To the extent Debtor argued his previous counsel moved to dismiss *Hart I* without his permission, Debtor furnished no proof of that allegation. Further, even if that allegation were substantiated, it would not overcome the other factors weighing against a finding of good faith. Those factors, including the proximity in time of his two bankruptcy filings, the use of the filings to interrupt the Federal Action, the inability of Debtor to fund a facially confirmable plan and the difficulty Debtor faces in establishing chapter 13 eligibility, are outlined in the Court's factual findings, *supra*.

Debtor's burden is to establish that the requirements for an extension of the automatic stay, which are specifically set forth in § 362(c)(3), are proven. In this case, that includes a presumption that Debtor's petition was not filed in good faith, and a heightened evidentiary burden to overcome that presumption. Debtor failed to establish that the current case is filed in good faith by a preponderance of the evidence, let alone the clear and convincing evidence required under the statutory presumption.

CONCLUSION

For the reasons stated above, the IRS Objection will be sustained, and Debtor's Motion will be denied. The automatic stay will expire as to all creditors on November 23, 2012. The Court will enter an Order consistent with this decision.

DATED: November 23, 2012

TERRY L. MYERS
CHIEF U. S. BANKRUPTCY JUDGE