UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In Re: TERENCE PETER NERO CASE NO. 8:18-bk-1320-CPM

_____/

TERENCE PETER NERO,

Appellant,

v. CASE NO. 8:18-cv-1520-T-23

JON WAAGE, et al.,

Appellees.
_____/

ORDER

After Terence Nero petitioned for bankruptcy protection three times to delay foreclosure, failed to receive pre-petition credit counseling, and failed to disclose aliases, other residences, and a bankruptcy action in the Southern District of Florida, the United States Trustee moved to dismiss Nero's third bankruptcy action and to bar Nero for two years from petitioning for bankruptcy. After the Trustee moved to dismiss, The Florida Bar suspended for thirty days Nero's bankruptcy attorney. During the pendency of the attorney's suspension, the bankruptcy court held a hearing on the motion to dismiss. Neither Nero nor his attorney attended the hearing, at which the bankruptcy court dismissed Nero's third bankruptcy action and barred Nero for two years from petitioning for bankruptcy.

Appearing *pro se*, Nero appeals (Doc. 1) and argues that the bankruptcy court deprived Nero of due process by holding a hearing during the pendency of the attorney's suspension. Because a bankruptcy debtor possesses no right to counsel, because Nero received notice of the hearing, and because the bankruptcy court's dismissal and bar order enjoys substantial evidentiary support, Nero's appeal lacks merit and the bankruptcy court's order commends affirmance.

BACKGROUND

In 2012, Jennifer McClean sued in state court to foreclose her interest in property owned by Nero. *McClean v. Nero*, Case No. 2012-CA-10683 (13th Judicial, Circuit Hillsborough County, Florida). Brandon Kolb, a lawyer, appeared on behalf of Terence Nero and identified Nero by six aliases.[1] On December 31, 2015, the state court entered a judgment of foreclosure against Nero's property. (Doc. 4-32 at 1) The same day, Nero moved for emergency relief from foreclosure. (Doc. 4-32 at 1)

In February 2016, Nero petitioned in the Middle District of Florida for chapter 13 bankruptcy protection. *In re Nero*, Case No. 8:16-bk-01281-CPM. Attempting to halt foreclosure, Nero filed in state court a copy of the bankruptcy petition. (Doc. 4-30 at 2) On February 20, 2016, the state court denied Nero's emergency motion for relief from judgment. (Doc. 4-32 at 1) About a year later, the bankruptcy court dismissed Nero's bankruptcy action because Nero failed to remit payments in accord with the proposed chapter 13 plan. (Doc. 4-2 at 2)

[1] (1) Terrence Nero, (2) Terrence P. Nero, (3) Terence Nero, (4) Terence P. Nero, (5) Terance Nero, and (6) Terry Nero.

About two weeks after dismissal of Nero's bankruptcy, Nero petitioned in the Southern District of Florida for chapter 13 bankruptcy protection. (Doc. 4-2 at 2; *In re Nero*, Case No. 17-12225-RBR (Bankr. S.D. Fla. Feb. 24, 2017)). In the petition, Nero states that he lived in Hollywood, Florida, but — unlike Nero's first bankruptcy petition — Nero failed to disclose that he had lived in Tampa, Florida. (Doc. 4-30 at 3) Again attempting to halt foreclosure, Kolb filed in state court a copy of the second bankruptcy petition. (Doc. 4-30 at 3) On May 22, 2017, the Southern District of Florida denied confirmation and dismissed Nero's second bankruptcy. (Doc. 4-2 at 2)

In January 2018, Nero filed an emergency motion to stay the state foreclosure pending appeal. (Doc. 4-32) In the motion, Nero states that he had unsuccessfully attempted twice to obtain relief in bankruptcy because Nero lacked the ability to remit regular payments in accord with the proposed plan. (Doc. 4-30 at 4) Nero stated that he "is literally too broke to file Bankruptcy." (Doc. 4-30 at 4) In February 2018, the state court denied the motion to stay, which denial the appellate court approved. (Doc. 30 at 4)

Three days after the state court denied Nero's motion to stay, Nero filed in the Middle District of Florida a third petition for chapter 13 bankruptcy. (Doc. 4-7; *In re Nero*, 8:18-bk-01320-CPM) The petition and accompanying documents failed to disclose (1) that Nero had petitioned earlier in the Southern District of Florida, (2) that Nero had employed at least six aliases, and (3) that Nero had lived in

Hollywood, Florida. Further, although Nero had earlier received credit counseling, the petition falsely states that Nero had received credit counseling within 180 days before filing the petition. (Doc. 4-7 at 5)

On April 10, 2018, the Trustee moved (Doc. 4-30) to dismiss with prejudice Nero's third bankruptcy petition and requested an injunction barring Nero from petitioning for further bankruptcy. The Trustee argued that Nero had devised a scheme to frustrate foreclosure by filing serial bankruptcy petitions and by purposefully omitting from the third petition (1) Nero's aliases, (2) the bankruptcy action in the Southern District of Florida, and (3) Nero's failure to receive credit counseling within 180 days before filing the third petition for bankruptcy. (Doc. 4-30 at 1–3) Responding (Doc. 4-36) to the motion to dismiss, Nero argued that he had improved his financial circumstance before the third petition and that he had inadvertently omitted the bankruptcy in the Southern District of Florida. The next day, the clerk of the bankruptcy court scheduled (Doc. 4-37) for May 9, 2018, a hearing on the motion to dismiss and the request for an injunction.

On April 22, 2018, Nero supplemented (Doc. 4-41) the response to the motion to dismiss and stated (Doc. 4-39) that he had received on April 16, 2018 — six days after the Trustee moved to dismiss — the credit counseling required by 11 U.S.C. § 109(h). The same day, Kolb, on behalf of Nero, moved (Doc. 4-39) to stay the bankruptcy action because The Florida Bar had suspended from Kolb from April 21,

2018, to May 21, 2018.[2] The next day, the bankruptcy court scheduled for May 9, 2018, a hearing on Nero's motion to stay and directed Kolb to serve interested parties with notice of the hearing. (Doc. 4-2 at 7) Kolb failed to timely serve notice of the hearing, and the bankruptcy court canceled the hearing on the motion to stay only. (Doc. 4-2 at 9) The hearing on the Trustee's motion to dismiss and the request for a bar order remained scheduled for May 9, 2018.

Neither Nero nor Kolb attended the May 9, 2018 hearing.[3] (Doc. 7 at 3–4) At the hearing, the bankruptcy court determined that, because Nero failed to receive mandatory credit counseling within 180 days before petitioning for bankruptcy, Nero was not a "debtor" under 11 U.S.C. § 109(h) and was ineligible for bankruptcy protection. (Doc. 7 at 9–11) Further, the bankruptcy court determined that "well-documented" facts demonstrated Nero's bad faith and declared that "Mr. Nero will not be welcome in my Court or any other Bankruptcy Court in the world before May 9th, 2020." (Doc. 7 at 10) A June 4, 2018 order (Doc. 4-71) dismisses Nero's action with prejudice for "the reasons stated orally and recorded in open court," finds Nero"an abusive serial bankruptcy filer," and bars Nero from petitioning for bankruptcy until May 9, 2020. (Doc. 4-71 at 1)

---

[2] The Florida Bar determined that in another action Kolb (1) had frivolously and repeatedly asserted in state court that a company formed by Nero possessed an ownership interest in certain property despite the expiration of the lease and the failure to exercise an option to purchase the property and (2) had filed on behalf of a client a transparently defective eviction notice. (Doc. 4-33 at 1–11)

[3] At the hearing, counsel for the Trustee stated that counsel had talked with Kristine Feher, The Florida Bar's inventory attorney assigned to offer representation for Kolb's bankruptcy clients during the pendency of Kolb's suspension. (Doc. 7 at 3–4) Counsel for the Trustee reported that Nero and Feher could not agree to representation. (Doc. 7 at 4)

DISCUSSION

Appealing *pro se*, Nero argues (1) that the bankruptcy court deprived Nero of due process by holding the hearing during Kolb's suspension, (2) that the bankruptcy court erred by dismissing the bankruptcy because of Nero's failure to receive credit counseling, and (3) that the bankruptcy court erred by determining that Nero's serial bankruptcy petitions warranted a bar order.[4]

1. Whether the unavailability of counsel deprived Nero of due process.

Nero accuses the Trustee of intentionally requesting that the bankruptcy court schedule the hearing during Kolb's suspension and argues that the bankruptcy court "forced [Nero] to proceed]" despite Kolb's suspension.[5] A civil litigant generally has no constitutional right to counsel except in limited circumstances in which the litigant might suffer a deprivation of physical liberty. *In re Fitzgerald*, 167 B.R. 689, 691 (Bankr. N.D. Ga. 1994) (Anderson, J.) (citing *Dean v. Barber*, 951 F.2d 1210 (11th Cir. 1992); *Poole v. Lambert*, 819 F.2d 1025, 1028 (11th Cir. 1987)). A debtor enjoys no constitutional right to obtain a bankruptcy discharge, and bankruptcy protection is not a fundamental right. *United States v. Kras*, 409 U.S. 434, 445 (1973).

---

[4] Nero has waived arguments (2) and (3) because Nero asserts these arguments in reply only. Regardless, the arguments lack merit.

[5] Also, Nero attaches (Doc. 14 at 19) to his opening brief two emails between the bankruptcy court and counsel for the Trustee. The email shows that in response to a scheduling request from the bankruptcy court, counsel for the Trustee stated that "[t]he 10th would be acceptable—although Attorney Kolb will be under suspension at that date. It is unlikely that the Court could provide adequate notice and due process prior to the effective date of the suspension order." The attached email pertains to a different matter, does not appear in the bankruptcy record, and was sent before Kolb moved on behalf of Nero to stay the bankruptcy action. Consideration of extra-record evidence on appeal is impermissible, and the evidence is irrelevant.

Accordingly, a debtor "clearly has no constitutional right to court-appointed counsel." *In re Fitzgerald*, 167 B.R. at 691 (citing *In re Martin-Trigona*, 737 F.2d 1254, 1260–61 (2d Cir. 1984)). Because Nero has no right to court-appointed bankruptcy counsel, Nero suffered no deprivation of due process because of counsel's inability to attend the hearing.

And the hearing otherwise comported with the requirements of due process and the bankruptcy code. Under 11 U.S.C. § 1307(c), a bankruptcy court may dismiss a bankruptcy action after "notice and a hearing," which 11 U.S.C. § 102(1) defines as "such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances." Nero received twenty-two days' notice of the hearing and twice objected to the motion to dismiss. Instead of securing alternate counsel, appearing *pro se* at the hearing, or requesting a continuance,[6] Nero refused to attend the hearing. The notice provided complies with 11 U.S.C. § 1307. Regardless, any error by the bankruptcy court was harmless because the dismissal order enjoys — as demonstrated below — substantial evidentiary support.

2. Whether the bankruptcy court erred by dismissing the bankruptcy action.

Nero argues that the bankruptcy court erred by dismissing the bankruptcy based on Nero's failure to receive prepetition credit counseling. Under 11 U.S.C. § 109(h)(1), "an individual may not be a debtor . . . unless such individual has"

[6] Although Kolb moved on behalf of Nero to stay the bankruptcy action, Kolb failed to comply with the notice requirements established by the bankruptcy court. Accordingly, the bankruptcy court properly declined to consider the motion to stay.

received credit counseling within 180 days before petitioning for bankruptcy.[7] Although section 109(h) is not a jurisdictional requirement, the bankruptcy court may dismiss a bankruptcy action if the putative debtor failed to receive prepetition credit counseling. *Vexler v. Baruch*, 564 B.R. 424, 429 (M.D. Fla. 2016) (Whittemore, J.) (citing *In re Zarnel*, 619 F.3d 156, 169 (2d Cir. 2010) ("The restrictions of . . . section 109(h) are not jurisdictional, but rather elements that must be established to sustain a voluntary bankruptcy proceeding.")); *In re Davenport*, 335 B.R. 218, 220–21 (Bankr. M.D. Fla. 2005) (May, J.) (holding that a putative debtor's failure to receive prepetition credit counseling warrants dismissal of the bankruptcy action).

Nero argues that, because the requirement to receive credit counseling is waivable, the bankruptcy court abused discretion by dismissing the bankruptcy action. Although the requirement is waivable, no waiver occurred because the Trustee expeditiously moved to dismiss Nero's bankruptcy action because of the failure to receive prepetition credit counseling. *In re Littlejohn*, 2019 Bankr. LEXIS 1573, at *7 (Bankr. N.D. Ga. May 23, 2019) (Baisier, J.) (holding that "[w]aiver requires the 'intentional and voluntary relinquishment of a known right'" and finding that the Trustee timely objected to the putative debtor's failure to comply with 109(h)). And although Nero received credit counseling after petitioning for bankruptcy, "an individual must establish that a request was made for credit

[7] Section 109(h)(1) states that "an individual may not be a debtor under this title unless such individual has, during the 180-day period ending on the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency. . . an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis."

counseling before the petition was filed." *In re Davenport*, 335 B.R. at 221 (dismissing a bankruptcy action despite the putative debtor's receiving credit counseling two days after petitioning for bankruptcy). Because Nero admittedly failed to receive credit counseling within 180 days before Nero petitioned for bankruptcy, the bankruptcy court properly granted the Trustee's motion to dismiss.

Also, the bankruptcy court correctly dismissed the bankruptcy action after determining that Nero petitioned in bad faith. Under 11 U.S.C. § 1307(c), a party may move to dismiss a bankruptcy action "for cause," which exists if the debtor petitioned in bad faith. *In re Gros*, 173 B.R. 774, 776 (Bankr. M.D. Fla. 1994) (Funk, J.); *In re McGovern*, 297 B.R. 650, 655–56 (S.D. Fla. 2003) (Hurley, J.); *see also In re Piazza*, 719 F.3d 1253, 1262 (11th Cir. 2013) (holding that bad faith constitutes cause to dismiss a chapter 7 case under section 707(a)). And bad faith exists if the debtor petitions for bankruptcy "only for the purpose of inhibiting or forestalling a foreclosure action without the intention of financial rehabilitation." *In re Earl*, 140 B.R. 728, 739 (N.D. Ind. Jan. 10, 1992). Nero thrice petitioned for bankruptcy during the pendency of the foreclosure action and asserted in state court days before filing the third petition that Nero was "literally too broke to file Bankruptcy." Accordingly, the bankruptcy court correctly found that Nero petitioned for bankruptcy to stall foreclosure and that Nero lacked a genuine intent to remedy his financial circumstance. Further, Nero falsely stated in the petition that (1) he had received pre-petition credit counseling; (2) he had lived in Tampa, Florida, only within the last three years; (3) he had not employed an alias within the last eight

years; and (4) he had not petitioned for bankruptcy protection in the Southern District of Florida. The bankruptcy court's determination that Nero petitioned in bad faith was clearly not erroneous.

3. Whether the bankruptcy court abused discretion by barring Nero for two years from petitioning for bankruptcy protection.

Under 11 U.S.C. § 349(a), a bankruptcy court may "for cause" bar a debtor from filing a subsequent petition.[8] *In re Leavitt*, 171 F.3d 1219, 1225 (9th Cir. 1999); *In re Casse*, 198 F.3d 327, 339 (2d Cir. 1999); *In re Tomlin*, 105 F.3d 933, 938 (4th Cir. 1997); *Dietrich v. Nob-Hill Stadium Properties*, 2007 WL 579547, at *5 (6th Cir. Feb. 15, 2007). Although the bankruptcy code contains no definition for "cause," in Section 707(a), which governs the dismissal of a chapter 7 bankruptcy, "cause" means "adequate and sufficient reason," which includes bad faith. *Piazza*, 719 F.3d at 1262. And "cause" under Section 349 includes bad faith. *In re Stathos*, 163 B.R. 83, 88 (N.D. Tex. 1993) (imposing a two-year bar because the debtor petitioned in bad faith); *Lerch v. Federal Land Bank of St. Louis*, 94 B.R. 998, 1002 (N.D. Ill. 1989) (same); *In re Stump*, 280 B.R. 208, 217 (Bankr. S.D. Ohio 2002) (same). The bankruptcy court's determination that Nero petitioned in bad faith enjoys substantial evidentiary support, and the bankruptcy court did not abuse discretion by barring Nero for two years from petitioning for bankruptcy protection.

[8] Section 349(a) states, "Unless the court, for cause, orders otherwise, the dismissal of a cause 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 cause under this title prejudice the debtor with regard to the filing of a subsequent petition under this title . . . ."

CONCLUSION

The issues raised by Nero's appeal lack merit, the bankruptcy court's determination enjoys substantial evidentiary support, and the bankruptcy court did not abuse discretion. The June 4, 2018 dismissal and bar order is **AFFIRMED**.

ORDERED in Tampa, Florida, on August 26, 2019.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE