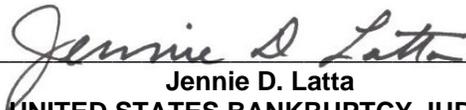


Dated: August 10, 2004
The following is ORDERED:





Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
CLYDE JAMISON,
Debtor.

Case No. 98-21325-L
Chapter 7

Joyce Marie Stokes,
Plaintiff,

v.
Clyde Jamison,
Defendant.

Adv. Proc. No. 02-0695

ORDER DENYING MOTION TO DISMISS

BEFORE THE COURT is the Plaintiff's motion to dismiss the Debtor-Defendant's bankruptcy case on the basis that the bankruptcy case was filed in bad faith or was converted from Chapter 13 to Chapter 7 in bad faith. The court conducted a hearing to consider the motion to dismiss on June 24, 2004. Neither party presented evidence beyond the pleadings and affidavits filed in connection with prior motions for summary judgment. Having reviewed the pleadings and

affidavits and considered the arguments of counsel, the court is of the opinion that the motion should be denied for the reasons set forth below. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A).

FACTS

The Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code on January 28, 1998. The case was converted to Chapter 7 on February 13, 2003, following the filing of the original complaint which commenced this adversary proceeding on August 16, 2002, and the substitution of counsel for the Debtor.

The original complaint resulted from a judgment obtained by the Plaintiff against the Debtor in the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis, Case No, 304554-8 T.D. In that cause summary judgment was entered on January 17, 2001, against the Debtor in the amount of \$200,000 for the wrongful death of the Plaintiff's son. The affidavit of the Debtor states that the state court complaint was filed against him to establish vicarious liability for the actions of the driver of a car that was involved in an accident which resulted in the death of the Plaintiff's son. The Debtor was not represented by counsel in the state court action.

The original complaint filed in this adversary proceeding alleges that the Debtor never informed the Plaintiff of his pending bankruptcy case, and seeks a declaration from this court that the Debtor has been guilty of substantial abuse and lack of good faith and thus should be precluded from enjoying the rights and protections of the Bankruptcy Code. The Debtor answered the complaint averring that he had represented himself in the state court action, and that because he was not knowledgeable in law, he did not notify his bankruptcy counsel of the pending state court litigation. The Plaintiff filed a motion for summary judgment on January 24, 2003, which was denied by order entered on March 25, 2003. In that order, the court pointed out that Bankruptcy

Code section 523(a)(3) provides remedies to creditors who are neither listed nor scheduled in a debtor's bankruptcy papers.

On May 22, 2003, the Plaintiff filed a second complaint commencing a second adversary proceeding against the Debtor, objecting to discharge and seeking declaratory relief. This complaint was dismissed by stipulation of the parties on October 20, 2003, and the Plaintiff was permitted to amend her complaint in this adversary proceeding to set forth additional theories of recovery.

The Plaintiff filed a renewed motion for summary judgment in this adversary proceeding on October 17, 2003, and the Debtor filed his own motion for summary judgment on November 18, 2003. By order entered April 12, 2004, the court granted in part and denied in part the Plaintiff's motion for summary judgment and denied the Debtor's motion for summary judgment. The court ruled that the Debtor would not be permitted to avail himself of the automatic stay to avoid the judgment rendered against him in state court because he had waited over one year after the judgment was entered and over four years after his Chapter 13 petition was filed to inform the Plaintiff of his pending bankruptcy case. The court also ruled that the Debtor was prevented by the *Rooker-Feldman* doctrine from relitigating defenses that should have been raised in the state court. The court granted the Plaintiff's motion insofar as it sought a determination that the state court judgment could not be avoided as the result of the prior pendency of the Debtor's Chapter 13 case, but denied the motion insofar as it sought a declaration that the Debtor's bankruptcy case was filed or converted to Chapter 7 in bad faith because section 707(a) of the Bankruptcy Code requires a hearing prior to the dismissal of a bankruptcy case.

In addition to her allegations about the Debtor not disclosing the pendency of his bankruptcy case, the Plaintiff alleges that the Debtor's bad faith is demonstrated by discrepancies between the

schedules filed at the beginning of his bankruptcy case and those filed after the conversion of his case to Chapter 7. The Plaintiff insists that this demonstrates either that the Debtor failed to disclose certain facts in his original schedules or that he incurred additional debt without permission during the pendency of his Chapter 13 case. A review of the Debtor's schedules does show that there were six additional unsecured claims for credit card debts listed in the schedules filed after the conversion to Chapter 7. The additional credit card claims total \$8,215. The court cannot determine from the schedules when this indebtedness was incurred. In addition, in an amendment to his Schedule F, the Debtor lists a debt to the United States Department of Education for \$17,356, which was not listed in his prior schedules. The Plaintiff also points out that the Debtor listed a large debt for child support in the initial schedules that was not listed in the subsequent schedules.

The Chapter 13 Trustee's Final Report indicates that the Debtor paid in \$51,522 while his case was being administered under Chapter 13. Of this amount, \$49,485 was paid to creditors. There were twenty-two creditors listed in the original schedules.

ANALYSIS

The Plaintiff brings her motion pursuant to section 707(a) of the Bankruptcy Code. That section provides:

The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—

- (1) unreasonable delay by the debtor that is prejudicial to creditors;
- (2) nonpayment of any fees and charges required under chapter 123 of title 28 [28 U.S.C. §§ 1911 et seq.]; and
- (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

11 U.S.C. § 707(a). None of the specifically enumerated examples of cause applies to the facts of the Debtor's bankruptcy case. The Plaintiff has not complained of unreasonable delay, except delay in informing her of the pendency of the bankruptcy case, or the nonpayment of fees, and the United States trustee has not sought the dismissal of the case. With the exception of this pending adversary proceeding, the estate has been fully administered. The case was converted to Chapter 7 on February 13, 2003, the Debtor's schedules and statement of financial affairs were timely filed, the Debtor appeared for his meeting of creditors, and the case trustee filed a report of no assets available for distribution to creditors on March 25, 2003. The word "including" is not limiting, however. *See* 11 U.S.C. § 102(3). Lack of good faith may also provide a basis for dismissing a bankruptcy case pursuant to section 707(a). *Industrial Ins. Serv., Inc. v. Zick (In re Zick)*, 931 F.2d 1124, 1127 (6th Cir. 1991). The Sixth Circuit has counseled trial courts concerning appropriate considerations in evaluating a motion to dismiss for lack of good faith:

Dismissal based on lack of good faith must be undertaken on an *ad hoc* basis. It should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence.

In re Zick, 931 F.2d at 1129.

The court must determine whether there has been some unreasonable delay on the part of the Debtor that is detrimental to the creditors including the Plaintiff and/or whether the Debtor's petition or conversion was motivated by bad faith.

A. Did the Debtor's Delay in Informing Plaintiff of the Pendency of His Bankruptcy Case Result in Prejudice to Creditors?

No other creditor has joined in the Plaintiff's motion to dismiss the bankruptcy case. The Plaintiff has not attempted to show that any other creditor has been prejudiced as the result of delay on the part of the Debtor. The Plaintiff relies solely upon events that affected her in support of her motion to dismiss.

The Debtor's bankruptcy case was filed before the Plaintiff's state court complaint. Although the accident which was the subject of that action occurred on November 1, 1997, the complaint for wrongful death was not filed until October 7, 1999, well after the filing of the Debtor's Chapter 13 bankruptcy petition on January 28, 1998. The Debtor represented himself throughout the state court proceedings. Because no suit was pending at the time of the filing of his petition, it is understandable that the Debtor did not list the Plaintiff as a potential claimant in his original bankruptcy schedules, even though technically an unliquidated claim existed at that time. The Debtor's affidavit indicates that he was not directly involved in the accident that resulted in the death of the Plaintiff's son, but that the complaint sought to hold him vicariously liable for the actions of the driver of the Debtor's automobile. The answer filed by the Debtor in the state court case denies that the driver of the automobile was acting as his agent or employee at the time of the accident and denies that the automobile was being operated with his knowledge at the time of the accident. The order granting the motion for summary judgment makes no factual findings from which the court can determine the basis for the entry of that judgment in the face of the Debtor's answer denying the factual allegations of the complaint. The only portions of the state court record that have been made a part of the record in this case are the complaint, the answer, the order granting the motion for summary judgment, a motion to quash garnishment/execution, and an order denying the motion to quash.

To be sure, there was a significant delay by the Debtor in informing the Plaintiff of the pendency of his bankruptcy case. The Debtor explains in his answer that he was not knowledgeable of the law and did not inform his then attorney of the pendency of the state court lawsuit. The bankruptcy case file shows no activity by the Debtor's original attorney, Anne Tipton, after May 29, 1998, well before the filing of the state court complaint on October 7, 1999. There is no indication in the record that the Debtor ever consulted Ms. Tipton about the state court lawsuit. In the court's experience, it is not uncommon for a Chapter 13 debtor not to consult his attorney about matters during the pendency of a Chapter 13 plan in order to avoid incurring additional legal fees. The Debtor states that he represented himself throughout those proceedings, and there is nothing in the record that contradicts his statement. Further, there is nothing in the record that indicates that the Debtor deliberately concealed the pendency of his Chapter 13 case to gain some advantage over the Plaintiff. His statement that he was not knowledgeable of the law is supported by his failure to raise the statute of limitations as a defense in the state court lawsuit, and perhaps by his failure to respond to the Plaintiff's motion for summary judgment. The Debtor's delay in informing the Plaintiff of the pendency of his Chapter 13 case is not unreasonable given his lack of knowledge of the significance of that fact.

The Plaintiff's attorney has filed an affidavit indicating that he was informed of the Debtor's Chapter 13 case on July 18, 2002, some two and one-half years after the filing of the state court complaint and more than one year after the entry of judgment against the Debtor. It appears that the Plaintiff's attempt at collection of her judgment by way of garnishment was the catalyst for the Debtor seeking the advice of counsel concerning the state court proceeding. The order denying motion to quash garnishment was entered July 12, 2002. The affidavit of Sam F. Cole, Jr., attorney

for the Debtor, indicates that Mr. Larry Weissman informed him of the Debtor's Chapter 13 case on July 18, 2002. The Plaintiff's original adversary complaint was filed on August 16, 2002, and Mr. Weissman was substituted as counsel for the Debtor in the Chapter 13 case on September 25, 2002. The Plaintiff was informed of the pendency of the Debtor's Chapter 13 case as soon as new counsel was consulted, counsel who understood the connection between the bankruptcy case and the state court litigation. Had Ms. Tipton been informed of the state court lawsuit, the court feels confident that she, too, would have informed Plaintiff's counsel of the pending Chapter 13 case. Ms. Tipton is known to be a knowledgeable and diligent attorney. There is simply no indication in the record that Ms. Tipton was ever informed of the state court lawsuit and likewise no indication that the Debtor deliberately concealed this information either from his attorney or from the Plaintiff. The court credits the Debtor's statement that he was not informed in the law, and thus that he failed to understand the connection between the two events. Given this fact, the Debtor's delay in informing the Plaintiff about his bankruptcy case was not unreasonable.

Even if the Debtor's delay in informing the Plaintiff of the pendency of his Chapter 13 case were unreasonable, unreasonable delay is not enough to support dismissal of the Debtor's bankruptcy case. The Plaintiff must show that creditors were prejudiced as the result of the Debtor's delay. The Plaintiff has not suggested any specific prejudice to her or to other creditors. At the beginning of the Debtor's bankruptcy case, the Plaintiff held an unliquidated claim arising from an automobile accident that admittedly did not arise from any intentional or negligent act of the Debtor. Had the Plaintiff known of the pendency of the Chapter 13 case, she nevertheless would have been compelled to liquidate her claim against the Debtor in order to share in the distributions made under the plan. The claim was not liquidated in fact until January 17, 2001, some three years after the

commencement of the Debtor's Chapter 13 plan. No explanation appears in the record for the delay in entry of judgment for the Plaintiff.

At the time of the filing of the Debtor's petition, his income consisted of \$2,528 in disability payments per month. The Debtor listed a mortgage arrearage of \$2,800, priority claims of \$14,300, and unsecured claims of \$39,730. The Debtor proposed a plan payment of \$1,015 per month, which included his ongoing mortgage payments of \$578 per month.

Had the Plaintiff's claim of \$200,000 been added to the plan sometime after January 17, 2001 (the date judgment was entered), it would have swamped the other unsecured claims of \$39,730. The percentage to be paid to unsecured creditors was set by the Chapter 13 trustee at 60%. (*See Order Providing Percentage to Unsecured Creditors*, entered February 19, 1999, document no. 30-1). Given the level of the Debtor's income, it is not difficult to conclude that the Debtor would not have been able to pay 60% of the Plaintiff's claim over the remaining months of the plan.¹ Even if payments had been spaced over 60 months, they would have exceeded the Debtor's ability to pay.² Thus it is not surprising that the Debtor chose to convert his case to Chapter 7 in the face of the large judgment rendered in favor of the Plaintiff.

There is no indication that the debt owed to the Plaintiff is non-dischargeable. The court has invited consideration of this issue in its prior order and in discussions with counsel. To date, counsel for the Plaintiff has chosen not to pursue the question of the dischargeability of this particular debt. In the context of this motion to dismiss, it is appropriate for the court to assume that the debt is

¹ Sixty percent of \$200,000 is \$120,000. $\$120,000 \div 24$ months remaining is \$5,000 per month.

² Sixty percent of \$200,000 is \$120,000. $\$120,000 \div 60$ months is \$2,000 per month.

dischargeable. If it is dischargeable now, it has always been dischargeable. Thus it is difficult to see that the Plaintiff suffered any legal detriment as the result of the Debtor's failure to inform her of his bankruptcy case. Based upon the schedules that have been filed in the bankruptcy case, it does not appear that the Debtor ever had the ability to pay a judgment of the magnitude awarded to the Plaintiff. It seems likely that the Debtor would have converted his case to Chapter 7 whenever he learned that he owed a debt that he could not pay, and thus it seems unlikely that the Plaintiff ever would have received a distribution under the Chapter 13 plan. The court need not speculate, however. It is up to the Plaintiff to demonstrate that she and the other creditors have suffered prejudice as the result of the Debtor's delay in informing her of his bankruptcy case. She has failed to do this, and thus the bankruptcy case should not be dismissed on the basis of unreasonable delay that is prejudicial to the interests of creditors.

B. Did the Debtor Convert His Case to Chapter 7 in Bad Faith?

Whether to dismiss a bankruptcy case pursuant to section 707(a) is left to the discretion of the bankruptcy judge based upon the totality of the facts and circumstances of each particular case. Especially when the allegation is made that the case should be dismissed based upon a lack of good faith, the facts are as varied as the number of cases. *See Industrial Ins. Serv., Inc. v. Zick, (In re Zick)*, 931 F.2d 1124, 1127 (6th Cir. 1991). Factors that have been considered in determining the absence of good faith are the presence of a single creditor, the ability of the debtor to earn a substantial income, the ability of the debtor to repay his obligations through an adjustment of lifestyle, and an intent to abuse the Bankruptcy Code. *Id.* at 1128. The Plaintiff has pointed to no case in which a court found that the conversion of a case from Chapter 13 to Chapter 7 should result in dismissal of the bankruptcy case, but the court believes that the factors relevant to the

consideration of good faith in the case of conversion are the same as those to be considered upon the initial filing of a Chapter 7 petition.

Careful consideration of these factors militates against dismissing this case. As set forth above, this is not a single creditor case. The Debtor has multiple creditors, secured, priority, and unsecured. His bankruptcy case was filed *before* the filing of the Plaintiff's state court complaint, and the Plaintiff has given no indication that the Debtor should have known about the possible claim at the time his bankruptcy was filed. The Debtor apparently believed that he could not be found responsible for the actions of a person who drove his car without permission. The Plaintiff failed to rebut the Debtor's statement that he did not know that he should disclose his pending case at the time the state court complaint was filed. The Debtor made substantial payments to his creditors during the pendency of this Chapter 13 case. The Debtor's income is moderate and his expenses appear to be reasonable. As discussed above, the Debtor never had the ability to repay a debt in the amount of \$200,000 and he does not have that ability now.

The most troubling of the Plaintiff's contentions is that the Debtor incurred additional debt during the pendency of his Chapter 13 case. The Plaintiff is correct that debtors in Chapter 13 cases are precluded from incurring additional debt without first obtaining the permission of the Chapter 13 trustee. On the whole, however, this court believes that this additional debt probably indicates that the Debtor could not afford his combined living expenses and plan payments rather than that the Debtor was enjoying an extravagant lifestyle. The Plaintiff provided no information concerning the expenditures that underlie the new debts added in the Debtor's Chapter 7 schedules, and the court believes that it is best to draw inferences in the Debtor's favor in the context of this motion.

Based upon the schedules and statements filed in the bankruptcy case, the Debtor clearly was in need of relief from his creditors. The fact that he filed his original petition under Chapter 13, and made substantial payments over more than a three-year period, and converted his case to Chapter 7 only in the face of overwhelming debt which he had no ability to repay, all strongly indicate that the Debtor acted with a proper purpose in converting his case to Chapter 7.

CONCLUSION

For the foregoing reasons, the Plaintiff's Motion to Dismiss is **DENIED**.

cc: Debtor/Defendant
Attorney for Debtor/Defendant
Plaintiff
Attorney for Plaintiff