

8-18-06

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
NEWNAN DIVISION

IN THE MATTER OF:	:	CASE NUMBER
	:	
TERRANCE OWENS,	:	NO. 04-17420-WHD
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Debtor.	:	BANKRUPTCY CODE

**ORDER**

Before the Court is the Motion to Dismiss Chapter 7 Case filed by Orlanders Looney (hereinafter the "Movant") against Terrance Owens (hereinafter the "Debtor"). The Debtor opposes the Motion. Following a hearing, the Court took the Motion under advisement. This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. §§ 157(b)(2)(A); § 1334.

**BACKGROUND**

The Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code on August 31, 2004. On November 3, 2004, the matter of confirmation of the Debtor's Chapter 13 plan came before the Court. At that time, the Chapter 13 Trustee objected to confirmation and requested dismissal pursuant to section 109(g). An order dismissing the Debtor's case was entered on November 5, 2004. On November 8, 2004, the Debtor filed a motion for reconsideration of the dismissal order, stating that he had not realized at the

time of the confirmation hearing that he could have sought conversion of his case to Chapter 7. Because the Court would most likely have granted such a request had the Debtor made it at the call of the confirmation hearing, the Court granted the Debtor's motion, vacated the dismissal order, and converted the Debtor's case to Chapter 7. See Docket Number 16, Order Granting Motion for Reconsideration, November 9, 2004. On November 10, 2004, the Standing Chapter 13 Trustee filed a response to the Debtor's Motion for Reconsideration. In his response, the Trustee alleged that the Debtor had not inquired of the Trustee's counsel regarding conversion of his case and that the Trustee's counsel had explained to the Debtor that he could present his case to the Court, but that the Trustee was seeking a dismissal of the case pursuant to section 109(g)(1) of the Code. In connection with a related adversary proceeding, the Movant filed the affidavit of Jill Zubler, the Trustee's counsel, which avers that the Debtor made false statement in his Motion for Reconsideration, as she did not tell the Debtor that he could not address the Court during the confirmation hearing.

The Movant owns real property located at 110 Monmouth Drive, Fayetteville, Georgia (hereinafter the "Property"). The Debtor resided in the Property, and the Movant has engaged in three attempts to dispossess the Debtor from the Property. The Movant also obtained judgments against the Debtor for unpaid rent and attorney's fees. The Debtor filed a previous voluntary petition under Chapter 13 on July 23, 2004 (case number 04-17372), which the Debtor voluntarily dismissed on August 16, 2004, prior to confirmation. According to the complaint, after the dismissal of the Debtor's first bankruptcy case, the

Debtor appealed the magistrate court's entry of the writ of possession, and, on the day that the writ of possession would have become enforceable, the Debtor filed his second Chapter 13 petition, which he later converted to Chapter 7.

The Movant previously filed a complaint objecting to the Debtor's Chapter 7 discharge and seeking a determination that the judgment held by the Movant against the Debtor is nondischargeable. In that related adversary proceeding, the Movant sought summary judgment, in part, upon the basis that the Debtor's general bad faith in filing the bankruptcy case, as well as his actions throughout the pendency of the bankruptcy case, justify a denial of his discharge. In an order dated February 3, 2006, the Court denied the motion for summary judgment on the basis that insufficient evidence had been submitted to permit the Court to grant summary judgment. Additionally, the Court noted that the Debtor's bad faith in filing the petition was not a basis for denying the Debtor's discharge and that a split of authority exists as to whether bad faith in filing the petition is a sufficient basis for dismissal of the bankruptcy case under section 707(a). Despite Movant's counsel's characterization of the Court's February 3rd Order, the Court did not "urge" the Movant to file a motion to dismiss, but merely explained that the Court could not consider the motion for summary judgment as a request for dismissal of the main case, as such a motion can only be granted following a hearing on notice to the debtor, the trustee, and all creditors. *See* FED. R. BANKR. P. 1017(a); 2002(a)(4).

Movant now seeks dismissal of the Debtor's Chapter 7 bankruptcy case for "cause,"

pursuant to section 707(a) of the Code. The Movant puts forth four bases upon which the Court should find cause to dismiss the Debtor's case. First, the Movant contends that the Debtor filed the instant bankruptcy case in bad faith, solely to interfere with the Movant's attempts to dispossess the Debtor from the Property. In support of this, the Movant points to the fact that the Debtor filed his petition on the eve of the eviction proceeding. Second, the Movant submits that the Debtor made false statements to the Court in his Motion for Reconsideration. The Movant has submitted the affidavit of Jill Zubler, counsel to the Standing Chapter 13 Trustee. The Debtor did not object to the Court's consideration of the affidavit and did not choose to testify on his own behalf as to whether or not the statement he made in his motion was false and, if so, whether he intentionally made this false statement to the Court. Third, the Movant alleges that the Debtor has inappropriately involved himself with the litigation that remains pending in the state court. Fourth, the Movant contends that the Debtor engaged in conduct during the course of the related adversary proceeding that was designed to interfere with the Movant's counsel's representation of the Movant and to intimidate Movant's counsel, Ms. Rich. Specifically, the Movant claims that the Debtor's wife served a pleading upon Ms. Rich at the address of her business associate in an effort to negatively impact her ability to do future work for his firm. Even if the Court were to find that the Movant's allegations are all well founded, the Court concludes that dismissal of the Debtor's case would not be appropriate.

## CONCLUSIONS OF LAW

Section 707 of the Code provides the grounds for dismissing a Chapter 7 case. The Court may dismiss a case for "cause" after notice and hearing, *see* 11 U.S.C. § 707(a), or may dismiss the case for "substantial abuse." *See* 11 U.S.C. § 707(b). Section 707(b) is not applicable to this case, as the primary focus of the inquiry is whether the debtor has the ability to pay his debts, and the existence of bad faith or bad conduct is a secondary consideration. *See Waites v. Braley*, 110 B.R. 211 (E.D. Va. 1990). In any event, a creditor or other party in interest, such as the Movant, lacks standing to proceed under section 707(b). *See* 11 U.S.C. § 707(b) ("After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter").<sup>1</sup>

Section 707(a) states that a Chapter 7 case may be dismissed for "cause, including -- 1) unreasonable delay by the debtor that is prejudicial to creditors; 2) nonpayment of any fees or charges required under chapter 123 of title 28; and 3) failure of the debtor in a voluntary case to file, within fifteen days . . . , 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). These

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<sup>1</sup> The Debtor's petition was filed prior to the October 17, 2005 effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Accordingly, the version of section 707(a) in effect prior to the 2005 amendments applies to this case.

bases for finding "cause" are "illustrative and not exhaustive." See *In re Padilla*, 222 F.3d 1184, 1191 (9th Cir. 2000) (citing 11 U.S.C. § 102(3)).

The appellate courts are split on the issue of whether bad faith, or lack of good faith, in filing the petition is grounds for dismissal under section 707(a). Compare *In re Sherman*, 441 F.3d 794 (9th Cir. 2006), *In re Padilla*, 222 F.3d 1184, 1191 (9th Cir. 2000), and *In re Huckfeldt*, 39 F.3d 829 (8th Cir. 1994), with *Industrial Insurance Services, Inc. v. Zick (In re Zick)*, 931 F.2d 1124 (6th Cir. 1991) and *In re Tamecki*, 229 F.2d 205 (3d Cir. 2000). The Eleventh Circuit has not yet determined whether bad faith constitutes "cause" within the meaning of section 707(a). See *In re Johnson*, 318 B.R. 907, 911 (Bankr. N.D. Ga. 2005) (Mullins, J.).

Those courts holding that bad faith in filing the petition does not constitute "cause" to dismiss a Chapter 7 case have done so after concluding that, unlike Chapters 11 and 13, Chapter 7 does not contain a good faith requirement. *In re Padilla*, 222 F.3d 1193. Additionally, these courts have noted that "a debtor's misconduct should be analyzed under the most specific Code provision that addresses that type of misconduct." *Id.* In short, a case should not be dismissed under section 707(a) if the debtor's conduct "is contemplated by any specific Code provision applicable to Chapter 7 petitions." *Id.*

Having considered both views, the Court agrees with the court's holding in *In re Bilzerian* that good faith in filing the petition is not a requirement of Chapter 7 and that bad faith alone is not a basis for the dismissal of a Chapter 7 case. *In re Bilzerian*, 258 B.R.

850, 857 (Bankr. M.D. Fla. 2001). Instead, the "court should look at all of the facts and circumstances and determine whether or not 'cause' exists for dismissal." *Id.* The factors to be considered in such an analysis include: 1) the debtor's motive for filing the bankruptcy petition; 2) the purposes that will be achieved by the bankruptcy filing; and 3) and "whether the debtor's motive and purposes are consistent with the purpose of chapter 7, that is, to provide an honest debtor with a fresh start in exchange for the debtor's handing over to a trustee all of the debtor's non-exempt assets for liquidation for the benefit of the debtor's creditors." *Id.* Additionally, the Court agrees with the holdings of *Padilla* and *Sherman* that the Court should not use the section 707(a) "for cause" standard to dismiss a Chapter 7 case when other provisions are available to address the particular conduct at issue.

The crux of the Movant's argument is that the Debtor filed his bankruptcy petition in order to frustrate the Movant's ability to regain possession of the Property. The Debtor initially filed a Chapter 13 petition with the obvious intent of stopping the state court eviction process. The Debtor was unable to propose a confirmable Chapter 13 plan and was faced with the option of dismissal or conversion to Chapter 7. The Debtor opted for conversion to Chapter 7. The Debtor contends, and the Movant has presented no evidence to contradict him, that, aside from his dispute with the Movant, he was in need of bankruptcy relief. While the facts are clear that the Movant is the Debtor's largest creditor and that the bankruptcy is essentially a dispute between the Movant and the Debtor over whether the Debtor's debt to the Movant should be discharged, this is not an uncommon scenario in the

bankruptcy court. This case is essentially a "run of the mill bankruptcy." In essence, the Debtor has merely availed himself of the relief provided by the Bankruptcy Code as intended by Congress. A central feature of the Bankruptcy Code is the discharge of debts and a fresh start for the debtor. The Code is specifically designed to exclude certain debtors from obtaining a discharge (section 727) and to prevent the discharge of certain types of debts (section 523). The Debtor's pre-petition conduct *vis a vis* the Movant and his post-petition conduct with regard to his disclosure of debts and assets should be judged against the standards of section 727 and 523 of the Code. In fact, the Movant has already begun the process required for the Court to address the Debtor's alleged misconduct by filing a complaint objecting to the Debtor's discharge and for a determination of dischargeability of the debt. So long as the Code provides another source of redress, the Court should refrain from dismissing the case for "cause."

The only two items that cannot be addressed under sections 727 and 523 of the Code are the allegations of misconduct following the filing of the petition. As to the Movant's contention that the Debtor has engaged in conduct that was intended to prolong, confuse, and frustrate the Movant from pursuing his collection remedies against the Debtor's wife in state court and to intimidate the Movant and his counsel throughout his attempts to litigate the discharge and dischargeability issues before this Court, the proper remedy to address this conduct is the court's inherent sanction authority and Rule 9011, which adopts Federal Rule of Civil Procedure 11. *See In re Weiss*, 111 F.3d 1159 (4th Cir. 1997) (bankruptcy court



properly invoked its inherent sanction authority when the debtor's "entire course of conduct throughout the [proceedings] evidenced bad faith and an attempt to perpetrate a fraud on the court, and the conduct sanctionable under the Rules was intertwined within conduct that only the inherent power could address."").

Rule 11 provides that, "[b]y presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; . . . the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; the allegations and other factual contentions have evidentiary support . . . ; and the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief." FED. R. CIV. P. 11. After notice and a reasonable opportunity to respond, the Court may conclude that a party has violated Rule 11 and impose "an appropriate sanction" upon the party.<sup>2</sup> *Id.* The Court also has the inherent authority to sanction litigants for misconduct that does not specifically fall within

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<sup>2</sup> The Court will not consider the imposition of sanctions at this time, as a "motion for sanctions . . . shall be made separately from other motions or requests." FED. R. CIV. P. 11.

the purview of Rule 11. *See In re Weiss*, 111 F.3d 1159 (4th Cir. 1997) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44 (1991)).

As to the allegation that the Debtor made a misrepresentation to the Court in order to obtain the reinstatement and conversion of his case, the Court also finds that Rule 11 was intended to address situations in which a litigant makes a misrepresentation to the court in a pleading.<sup>3</sup> As reprehensible as the Debtor's misrepresentation to the Court was, dismissal under section 707(a) is not appropriate when a more appropriate alternative exists. From the Court's standpoint, the goal of sanctioning the Debtor's conduct is to protect the integrity of the Court and to deter the Debtor from making future misrepresentations. Rule 11 is designed for this purpose.

Additionally, from the Movant's standpoint, the dismissal of the Debtor's instant case would not necessarily preclude the Debtor from filing another bankruptcy proceeding in the future. The Debtor could attempt to reorganize his debts in another Chapter 13 case or file another Chapter 7 case and again seek a discharge. A subsequent Chapter 7 filing could inure to the Debtor's benefit because the later filing date would subject additional debts, incurred between the filing of the first case and the second case, to the discharge. A later filing would also only harm the Movant because he would simply be forced to re-file his

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<sup>3</sup> The Court has previously noted that, because the Debtor did not make the statement in his pleading under oath, it cannot be the basis upon which the Debtor's discharge is denied. Additionally, although the Movant or the Chapter 13 Trustee could have filed a motion for reconsideration following the entry of the Court's order reinstating the Debtor's case, the time for doing so under Rule 60(b) has passed.


complaint objecting to the Debtor's discharge and the dischargeability of the debt and begin anew. Dismissal of the case is not likely to provide meaningful relief to the Movant. Instead, the Movant would be best served by proceeding in the framework of the existing case and concluding the litigation pending in the related adversary proceeding. For this reason, the Court finds that "cause" does not exist within the meaning of section 707(a) or, alternatively, if "cause" does exist, the Court hereby declines to exercise its discretion to dismiss the case.

#### CONCLUSION

For the reasons stated above, the Movant's Motion to Dismiss is hereby **DENIED**.

**IT IS ORDERED.**

At Newnan, Georgia, this 18 day of August, 2006.

A handwritten signature in black ink, appearing to read 'W. Homer Drake, Jr.', written over a horizontal line.

W. HOMER DRAKE, JR.

UNITED STATES BANKRUPTCY JUDGE