UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CASE NO. 06-61237-JB
	)	
JAMES CAUSEY © U.C.C. 1-308,	)	CHAPTER 11
	)	
Debtor.	)	

ORDER

This *pro se* Chapter 11 case came before the Court on March 30, 2006, on a motion to dismiss with prejudice, filed by the United States Trustee on February 27, 2006 and supplemented on March 28, 2006. Debtor did not file a response to the motion to dismiss, although on March 28, 2006, he filed a pleading titled "Motion for leave of this court to Submit Proof of Military Service and Objection to the U.S. Trustee to Conduct a 341 Meeting of Creditors."

The March 30, 2006 hearing was scheduled for 10:00 a.m., by Order entered on March 3, 2006. Thomas Dworschak appeared on behalf of the United States Trustee, but Debtor failed to appear at 10:00 a.m. Debtor had telephoned the Courtroom Deputy prior to 10:00 a.m., stating that he was in traffic and would not be in Court for another hour. The Courtroom Deputy called the matter for Debtor's appearance at 11:00 a.m., but Debtor was still not present at 11:00 a.m. The Courtroom Deputy called the calendar again at 11:30 a.m., and Debtor had still not made an appearance. Debtor finally appeared in the courtroom at 11:41 a.m., and the matter proceeded at 11:42 a.m. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)((A).

Counsel for the United States Trustee argued that this case should be dismissed with prejudice on three grounds: (1) pursuant to § 1112(b)(4)(F), for failure, without excuse, to satisfy timely a filing requirement; (2) pursuant to § 1112(b)(4)(H), for failure to provide certain information and attend a meeting requested by the United States Trustee; and (3) pursuant to § 1112(b), alleging that Debtor has not filed this Chapter 11 case in good faith.

Debtor filed his Chapter 11 case on February 6, 2006. He failed to file a certification under 11 U.S.C. § 109(h)(1) that he had received a credit counseling briefing from an approved nonprofit budget and credit counseling agency during the 180 day period before filing. Instead, he completed a form, checking two boxes as follows:

> ☒ I have not received the budget and credit counseling briefing required by 11 U.S.C. §109(h), but I have attached an explanation (certification) of the exigent circumstances and listed the name of the approved nonprofit budget and credit counseling agency from which I requested counseling services and the date I requested them. If these circumstances are satisfactory to the Court, I qualify for a 30 day waiver under §109(h)(3), and I will obtain the required counseling services during this 30 day period, or my case may be dismissed. (emphasis added).
>
> ☐ I have not received the budget and credit counseling briefing required by 11 U.S.C. §109(h), but I am
>
> ☐ mentally incapacitated,
>
> ☐ physically disabled, or
>
> ☒ on active military duty in a military combat zone.
>
> I request a determination under §109(h)(4) as to whether I am unable to complete the requirements of §109(h)(1).

Although the first box checked on the form calls for an attachment of a certification that both explains the exigent circumstances and lists the name of the approved agency from which counseling was requested before filing bankruptcy, Debtor simply attached a page on which he wrote "I will receive counseling at a later time." The Court entered an Order on February 10, 2006, explaining the procedure Debtor could employ if he believed his

circumstances justified an exception to the pre-petition credit counseling briefing requirement, and the Order scheduled a hearing for March 15, 2006, to determine whether Debtor qualified for an exception to § 109(h)(1). On March 7, 2006, Debtor filed Form 23 stating that he had completed an instructional course from the Consumer Credit Counseling Service of Greater Atlanta, Inc. ("CCCS") in personal financial management on March 6, 2006. However, he failed to submit the required certificate from CCCS to prove that he had completed the course, and he still failed to explain any exigent circumstances or provide any information regarding any attempt to obtain the credit counseling briefing before filing his bankruptcy case as required under 11 U.S.C. § 109(h)(3). Debtor failed to appear at the March 15, 2006 hearing.

The Bankruptcy Abuse Prevention And Consumer Protection Act of 2005 ("BAPCPA") requires that individual debtors receive a credit counseling briefing from an approved budget and credit counseling service before a bankruptcy case is filed. *In re Dixon*, 338 B.R. 383 (B.A.P. 8th Cir. 2006); *In re Talib*, 335 B.R. 417 (Bankr. W.D. Mo. 2005); *In re DiPinto*, 336 B.R. 693 (Bankr. E.D. Pa. 2006). Pursuant to § 109(h)(3), a debtor may obtain a 30-day waiver of the credit counseling briefing requirement if the debtor submits a certification that (1) describes exigent circumstances that merit a waiver of the credit counseling briefing requirement; (2) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services during the five day period beginning on the date on which the debtor made the request; and (3) is satisfactory to the Court. All three of these elements must be present in order for the debtor to be eligible for filing a bankruptcy case. *Talib*, at 420-21 ("Because the requirements are

stated in the conjunctive, each of the three requirements must be satisfied for the debtor to qualify for the described exemption") (citations omitted); *DiPinto*, at 696 .

Debtor has not filed the required budget and credit counseling certificate from an approved agency. Nor did Debtor provide an explanation of the exigent circumstances which caused him to file his case before obtaining the required credit counseling briefing. Nor did Debtor show that he tried to obtain the credit counseling briefing before he filed this case, but was unable to obtain it during the 5-day period beginning on the date he made his request. The certification that Debtor filed, on March 6, 2006, stating he had completed a course in financial management is not a substitute for the credit counseling briefing a debtor must have before filing his case. Rather, the instruction in personal financial management satisfies a separate requirement for discharge and must be received after the case is filed. Thus, the exception under § 109(h)(3) does not apply in this case.

The other exception to the requirement under § 109(h)(1) is found in § 109(h)(4) which states as follows:

> (4) The requirements of paragraph (1) shall not apply with respect to a debtor whom the court determines, after notice and hearing, is unable to complete those requirements because of incapacity, disability, or active military duty in a military combat zone. For the purposes of this paragraph, incapacity means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; and "disability" means that after reasonable effort, to participate in an in person, telephone, or Internet briefing required under paragraph (1). (emphasis added).

At the hearing on March 30, 2006, the United States Trustee submitted as an exhibit Debtor's Certificate of Release or Discharge from Active Duty (DD-214) ("Certificate of Discharge") which Debtor had attached to his pleading filed on March 28, 2006. The Certificate of

Discharge reflects that Debtor was separated from the United States Army in August of 1996. The United States Trustee noted that the Certificate of Discharge stated that Debtor was subject to active duty recall, but there was no showing that Debtor has, in fact, been recalled to military service at this time. Debtor argued at the March 30, 2006 hearing that he was subject to being called up for active duty at any time, but he did not establish that he was on active military duty in a military combat zone when he filed this case on February 6, 2006. Thus, the Court concludes that the exception under § 109(h)(4) does not apply, and the Debtor is not eligible to be a debtor.

Debtor's ineligibility under § 109(h) requires dismissal of his case under BAPCPA. However, the United States Trustee requests a dismissal for cause with prejudice, alleging, among other things, a lack of good faith in filing this bankruptcy case. The United States Trustee argues that Debtor has no legitimate bankruptcy purpose in filing this case. The Eleventh Circuit has held repeatedly that a Chapter 11 debtor's lack of good faith can constitute cause under § 1112(b) for dismissing a case. *In re State Street Houses, Inc.*, 356 F.3d 1345 (11th Cir. 2004); *In re Phoenix Piccadilly, Ltd.*, 849 F.2d 1393 (11th Cir. 1988); *In re Albany Partners, Ltd.*, 749 F.2d 670 (11th Cir. 1984). While § 1112(b) lists examples of what constitutes "cause," this list is not exhaustive, a point emphasized by the pertinent legislative history which states, "[t]he court will be able to consider other factors as they arise, and use its equitable powers to reach an appropriate result in individual cases." *Albany Partners*, 749 F.2d at 674 (*citing* H.R.Rep. No. 595, 95 Cong., 1st Sess. 406 (1977), U.S. Code Cong. & Admin. News 1978, 5787, 6362). The Eleventh Circuit has made it clear that the "cause" requirement of § 1112(b) extends to cases where a debtor has filed a bankruptcy

petition in bad faith. *Phoenix Piccadilly*, 849 F.2d at 1394 ("A case under Chapter 11 may be dismissed for cause pursuant to section 1112 of the Bankruptcy Code if the petition was not filed in good faith.") (citations omitted).

A determination of bad faith is a question of fact and must be made on a case-by-case basis. *In re SB Properties, Inc.*, 185 B.R. 198, 204 (E.D. Pa. 1995). There is no particular test for determining whether a case was filed or is proceeding in bad faith, but courts have considered the following factors:

(1) Whether the debtor has few or no unsecured creditors;

(2) Whether there has been a previous bankruptcy petition by the debtor or a related entity;

(3) Whether the pre-petition conduct of the debtor has been improper;

(4) Whether the petition effectively allows the debtor to evade court orders;

(5) Whether there are few debts to non-moving creditors;

(6) Whether the petition was filed on the eve of foreclosure;

(7) Whether the foreclosed property is the sole or major asset of the debtor;

(8) Whether the debtor has no ongoing business or employees;

(9) Whether there is no possibility of reorganization;

(10) Whether the debtor's income is sufficient to operate;

(11) Whether there was no pressure from non-moving creditors;

(12) Whether reorganization essentially involves the resolution of a two-party dispute;

(13) Whether a corporate debtor was formed and received title to its major assets immediately before the petition; and

(14) Whether the debtor filed solely to create the automatic stay.

SB Properties,, 185 B.R. at 198; *In re Northwest Place, Ld.,* 108 B.R. 809, 814 (N.D. Ga. 1988); *In re Grieshop,* 63 B.R. 657, 662-63 (N.D. Ind. 1986); *In re Gil Elisade,* 172 B.R. 996, 1000 (Bankr. M.D. Fla. 1994). This list is not exclusive, and "courts may consider any factors which evidence 'an intent to abuse the judicial process and the purposes of the reorganization provisions' or, in particular, factors which evidence that the petition was filed 'to delay or frustrate the legitimate efforts of secured creditors to enforce their rights.'" *Phoenix Piccadilly,* 849 F.2d at 1394 (citing *Albany Partners,* 749 F.2d at 674).

The information supplied in Debtor's Schedules, Statement of Financial Affairs, and at the March 30, 2006 hearing demonstrates that this is not a viable Chapter 11 reorganization case and that no legitimate bankruptcy purpose would be served by allowing Debtor to proceed. Significantly, Debtor stated at the March 30, 2006 hearing that he had no debts that he wanted to pay in this bankruptcy case. Debtor is not a business. He lists his occupation as "retired," and Schedule I indicates he receives military retirement pay and disability income . The only secured creditors Debtor lists are Ameriquest Mortgage for Deutsche Bank National Trust Co. and ABN AMRO Mortgage, but Debtor disputes both claims. When asked in court why he filed the case, Debtor stated that people had illegally foreclosed on his property and that he was litigating this in the District Court and in an "appellate court." In response to the fourth question on Debtor's Statement of Financial Affairs, there is reference to a foreclosure sale having taken place on September 6, 2005,

which Debtor describes as "unlawful foreclosure in violation of the Soldiers & Sailors Act [sic]." He refers to a case, "We the People, All Rights Restored and Reserved, Never Waived,": James Allen :Causey v. Deutsche Bank National Trust Company, ET AL, [United States District Court For The Northern District of Georgia] Case No. 1:05-cv-2652-TT" and to a case called "James Cause[y] vs. Deutshe [sic] Bank National Trust Company ET AL, Case No. 06-10882-CC," in the Eleventh Circuit Court of Appeals.

The Court records disclose that Debtor did not have a bankruptcy case pending in this Court on September 6, 2005. He had filed a previous Chapter 13 case, Case No. 05-66399-JB, through counsel, Brenden E. Miller, on April 4, 2005. The Chapter 13 Trustee filed two objections to confirmation, one on May 20, 2005 and the second on June 8, 2005. The first objection stated a number of deficiencies including the inability to proceed with the § 341 meeting of creditors on May 18, 2005, because Debtor failed to bring the required proof of social security identification. The second objection stated that Debtor appeared at the reset meeting of creditors on June 3, 2005, but that no meeting was held because Debtor announced that he was going to voluntarily dismiss his case. At the confirmation hearing on June 28, 2005, the Chapter 13 Trustee was present, but neither Debtor nor Debtor's counsel was present. On July 1, 2005, the Court entered an Order denying confirmation and dismissing the Chapter 13 case. Debtor did not file the instant Chapter 11 case until February 6, 2006. Consequently, Debtor had no bankruptcy case pending and there was no automatic stay in effect with respect to the Debtor or his property on September 6, 2005.

The major reason for filing a Chapter 11 case is to pay creditors under a plan of reorganization. Since this Debtor does not plan to pay any debts, no legitimate bankruptcy

purpose is served by filing a Chapter 11 case. It appears that Debtor has a dispute with certain parties regarding a foreclosure of his residence that took place outside of bankruptcy and that this dispute is or was the subject of litigation in other courts. When a debtor files a Chapter 11 case not to pay creditors and not to reorganize, but simply to assert non-bankruptcy claims that have been asserted in other courts, the bankruptcy case is not filed in good faith. The Bankruptcy Court is a court of limited jurisdiction and is not a proper forum to relitigate state law disputes or disputes under federal non-bankruptcy law.

Another basis for the United States Trustee's motion to dismiss is that Debtor failed to appear for the Initial Debtor Interview scheduled for February 21, 2006. On February 8, 2006, the United States Trustee sent a letter to Debtor, requesting that he provide certain information to the United States Trustee and appear at an Initial Debtor Interview on February 21, 2006. Debtor failed to attend this interview and did not call to reschedule the interview. Debtor did not dispute this or offer any reasonable explanation for his failure to appear. As the February 8, 2006 letter from the United States Trustee to Debtor states, the United States Trustee supervises the administration of all Chapter 11 cases, and the request for Debtor to appear for an interview was not unreasonable. Debtor's failure to attend or reschedule the interview is additional cause to dismiss this case under § 1112(b)(4)(H).

Finally, at the March 30, 2006 hearing, the Court notes that Debtor presented a paper entitled "Notice to the Bankruptcy of the Filing in the district court the demand to Recuse Judge Joyce Bihary, United States Trustee(s): Felicia S. Turner, Thomas Dworschak and James H. Bone, for the Combined acts of Treason and Conspiracy Against Rights and Rigts [sic] Deprivation." To the extent this pleading is addressed to the Bankruptcy Court,

Debtor's request for recusal must be denied. The test for recusal under 28 U.S.C. § 455 requires a judge to determine whether an objective observer fully informed of the facts would reasonably question the judge's impartiality. *In re Betts*, 165 B.R. 233 (Bankr. N.D. Ill. 1994) *quoting* (*Union Carbide v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 715 (7th Cir. 1986)). Debtor has not presented any legal or factual basis for recusal or disqualification and thus, to the extent that the notice filed in the Bankruptcy Court on March 30, 2006 is construed as a request for recusal, it must be and is hereby DENIED.

The totality of the circumstances supports the conclusion that this Chapter 11 case was not filed in good faith. Debtor does not plan to pay any debts through a Chapter 11 plan, and the economic reality is that there is nothing to reorganize under Chapter 11. Accordingly, it is

ORDERED that Debtor's Chapter 11 case is dismissed for cause and with prejudice pursuant to 11 U.S.C. §§ 105(a), 349(a), and 1112(b) of the Bankruptcy Code. Debtor is prohibited from filing a bankruptcy petition for relief under any chapter of Title 11 of the United States Code for a period of 180 days from the entry of this Order.

The Clerk is directed to serve a copy of this Order on Debtor, the United States Trustee, James H. Bone, and any other parties in interest listed in the creditor list provided by Debtor.

IT IS SO ORDERED, this 5th day of April, 2006.

JOYCE BIHARY
UNITED STATES BANKRUPTCY JUDGE