



IT IS ORDERED as set forth below:

Date: August 6, 2015

A handwritten signature in black ink, appearing to read "Barbara Ellis-Monro", is written over a horizontal line.

**Barbara Ellis-Monro
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE:

DAVID L. TODD,

Debtor.

CASE NO. 14-50640-BEM

CHAPTER 7

ORDER

This chapter 7 case came before the Court on July 16, 2015 and on July 21, 2015, for a hearing (the "Hearing") on Debtor's Motion to Dismiss (the "Motion"). [Doc. No. 58]. Adam Herring and Howard Rothbloom appeared on behalf of David L. Todd ("Debtor") and Neil Gordon and Michael Barger appeared on behalf of the chapter 7 trustee, Neil Gordon (the "Trustee"). At the hearing, the parties presented documentary evidence as well as the testimony of Debtor, Marsha Milligan ("Milligan"), and Robert Chambers ("Chambers").

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 158(b)(2)(A), (O). Having considered the evidence and legal arguments presented by the parties, the Court concludes that the Motion should be granted.

FACTS

This chapter 7 case was filed on January 7, 2014. Ten days later, on January 17, 2014, a motion to dismiss (the “First MTD”) was filed by Chambers, who at that time represented Debtor. There were no grounds for dismissal set forth in the First MTD. Rather the motion merely recited when the case had been filed and requested dismissal. [Doc. No. 10]. The Trustee filed a response and objection to the First MTD because a preliminary investigation in the case indicated that Debtor’s house was unencumbered, contrary to Debtor’s Schedule A—Real Property which showed a value of \$100,000 and Schedule D—Secured Creditors, which showed a mortgage of \$80,000. The Court held a hearing on the First MTD on February 26, 2014, at which time Chambers advised the Court that the case had been mistakenly filed and that Debtor had not signed the documents necessary for a filing, including the petition. Chambers further advised the Court that Debtor was confined to his home due to ill health. In response to this information, the Court ordered the Trustee and United States Trustee (“UST”) to investigate whether the case was authorized and ordered Debtor to appear at the section 341 meeting of creditors, whether at his home or at the courthouse. The First MTD was then taken off the Court’s calendar to be rescheduled after discovery into the issue of whether Debtor had authorized the filing of the case.

In accordance with the Court’s direction at the hearing on the First MTD, on March 11, 2014, the Trustee and counsel for the UST conducted the 341 meeting and examined Debtor at his home. In addition, the Court granted the Trustee’s motions for 2004 examinations of Chambers and his secretary, Milligan. These examinations were conducted on March 17, 2014. The Trustee continued the 341 meeting to April 8, 2014, for production of documents. The docket reflects that the April 8, 2014 meeting was held and again continued and that each

month thereafter until April 14, 2015, the meeting was continued due to Debtor's failure to appear. The docket also reflects that the meeting was concluded on April 14, 2015, the same day Debtor's new counsel filed a notice of appearance. [Doc. No. 54].

On June 16, 2014, the UST filed a motion for sanctions against Chambers. The Court held a hearing on the motion for sanctions on July 16, 2014. The next day, a stipulation was filed in which Chambers agreed to disgorge the funds received from Debtor and pay a \$10,000 sanction, both of which he would remit to the estate. Chambers also stipulated to certain facts, including, without limitation: (1) Debtor and Chambers knew prepetition that there was no security interest of record filed against Debtor's Canton, Georgia home; (2) Chambers did not know how the mortgage information came to be included on the schedules filed in this case; and (3) Debtor testified at the 341 hearing that he had stopped receiving collection calls from creditors and that he has no practical way of repaying his \$75,000 in credit card debt. [Doc. No. 47]. Shortly thereafter, on July 28, 2014, Chambers withdrew the First MTD. Chambers testified at the Hearing that Debtor did not authorize withdrawal of the First MTD; instead, Chambers withdrew the First MTD because he felt pressured to do so by the UST. Debtor testified at the Hearing that he believed the First MTD had taken care of his case and was unaware that it had been withdrawn until so advised by his current counsel.

Chambers first met Debtor in late 2012 when Chambers represented the purchaser of Debtor's home in Douglasville, Georgia. (Exhibit T-8, p. 12). At that time Debtor mentioned to Chambers that he was having some financial difficulty and Chambers advised Debtor that his practice included bankruptcy. Debtor netted approximately \$70,000 from the sale of the home which he received over the course of several months after the sale. (Exhibit T-8, p. 28, 29).

Debtor incurred significant expenses paying for nursing homes and end of life care for his wife, who died in or about April 2013, and for his own medical expenses. (Exhibit T-8, p. 36, 74-75).

Chambers met with Debtor on November 20, 2013 and December 4, 2013, at Debtor's home to discuss Debtor's filing bankruptcy. (Exhibit T-8, p. 13). At their meeting in November 2013, Debtor provided Chambers with information that Chambers used to fill in an information sheet regarding Debtor's finances. (Exhibit T-2). That sheet contains line items for real estate owned or being purchased by Debtor. The line items also include spaces for the names of mortgage companies for a first mortgage and a second mortgage, the dollar amounts of each of the mortgages and the monthly payment amount, the original purchase price, the year of purchase, the minimum market value of property and how that value was determined. (Exhibit T-2, p. 2). On the information sheet Chambers filled out for Debtor, the purchase price of Debtor's home of \$100,000 is noted, the purchase date of 4-19-13, and the value equal to the sales price are noted in the appropriate blanks. The lines for the mortgages are blank. However, in the bottom margin of the page is the notation "\$100,000/\$80,000 Thomas Forest Todd." (Exhibit T-2, p. 2). Thomas Forest Todd is Debtor's brother. Chambers testified that he would only write information provided by the client on the information sheet. At the 341 meeting, the Trustee asked Debtor, "Did you tell your attorney he had a mortgage?" Debtor responded, "I told him I was – yeah, I probably did." (Exhibit T-8, p. 40, li. 20-23). At the Hearing, Debtor testified that he never told Chambers there was a mortgage on the property, and his 341 testimony to the contrary was an attempt to protect Chambers.

Chambers testified that at his December 4, 2013 meeting with Debtor, he advised Debtor that there was a problem with filing a case because the mortgage in favor of his brother was not of record. He told Debtor to "work it out and let me know, because I can't file your –

you are going to lose your house and your car potentially.” (Exhibit T-10, page 14). In addition, Chambers had questions about how the Debtor had spent the proceeds from the sale of his house in Douglasville. (Exhibit T-10; p. 22). Notwithstanding, these issues, Debtor signed an engagement letter with Chambers for the filing of a chapter 7 case, gave Chambers a check for \$1,000 for his fee and filing fees and signed a Social Security Number verification document. (Exhibit T-8, p. 13-14; Exhibit T-10, p. 21-22).

Milligan testified at the Hearing that Debtor called Chambers’ office eight times between November 26, 2013 and January 8, 2014 asking for an update and/or a case number. Similarly, she testified at the 2004 examination taken in March 2014, that Debtor “had also called several times and asked for a case number because the creditors were asking for a case number and harassing him” and that “he was very adamant about filing as far as needing a case number where those calls would stop.” (Exhibit T-9, p. 38). Milligan also testified that Debtor wished for the case to be dismissed once it was filed, that he wasn’t ready to file. (Exhibit T-9, p. 36).

At the 341 meeting, the Trustee asked Debtor, “[s]o you were expecting a bankruptcy to be filed, were you not? You’ve done everything for it and you needed it.” Debtor answered that “[w]ell, I needed probably another counseling session with him. I needed to sign the paperwork. That’s what I said.” (Exhibit T-8, p. 49, li. 9-14). Debtor indicated that he would have corrected incorrect information if he had reviewed the filing and that perhaps he could work things out and at any rate he wanted to think about it a bit more and that he wanted the case stopped, and that he didn’t sign all the paperwork. (Exhibit T-8, p. 15-16, li. 48-51, 61-62; 66; 72; 78-79).

Through miscommunication in Chambers' office, Milligan filed the case on January 7, 2014. (Exhibit T-9, p. 31-33). Once Chambers realized this, he instructed Milligan to file a motion to dismiss. (Exhibit T-9, p. 33). Debtor agreed and authorized the filing of the First MTD over the phone with Chambers and Milligan¹. (Exhibit T-8, p. 56-57 li. 13-25; l. 1-7; T-9, p. 79, li. 17-25). Debtor testified at the Hearing that he met with Chambers in November and December and that he gave Chambers a list of creditors and some medical bills and that Chambers said he would get back with Debtor the first of the month (January 2014) to review and sign papers. Debtor testified that he called Chambers several times and did not get a call back. Debtor testified that the next time he heard from Chambers was in January when Chambers called to tell him the case had been mistakenly filed and that the error would be corrected the next day. Debtor also testified that he did not recall signing any documents when he met with Chambers.² At the 341 meeting, Debtor acknowledged that after the filing of the case, the number of phone calls from creditors decreased dramatically which was a relief and allowed him to sleep at night. (Exhibit T-8, p. 71).

It is undisputed that Debtor did not sign the petition commencing this case, the schedules or statement of financial affairs. Accordingly, Debtor argues that the case is a nullity and must be dismissed. The Trustee argues that, notwithstanding the lack of signature, the case was authorized because Debtor sought assistance from Chambers for relief from his creditors, signed an engagement letter, paid a retainer, obtained a credit counseling certificate and called Chambers' office repeatedly to obtain a case number to give to creditors. In the alternative, the

¹ Milligan notarized a verification of Debtor over the telephone. The verification was attached to the First MTD. This was done with Chambers' knowledge and, after deliberation, the Court concludes that the sanctions award was sufficient to address the improper notarization as well as the lack of procedure in Chambers' office that led to the filing of this case.

² At the Hearing, Debtor did not recall signing any documents at the December, 2013 meeting. Given the passage of time and Debtor's health issues the Court concludes that Debtor's testimony at the 341 meeting is more reliable than the testimony at the Hearing.

Trustee argues Debtor ratified the filing by accepting the benefit of the automatic stay. The Court now turns to each of these contentions.

ANALYSIS

A chapter 7 debtor does not have an absolute right to dismiss a case. 11 U.S.C. § 707(a). Rather, to succeed on a motion to dismiss a debtor must show cause why dismissal is justified. *Id.* However, “[w]ithout proper authorization from the debtor, a bankruptcy case is void *ab initio*.” *In re Harmon*, 435 B.R. 758, 767 (Bankr. N.D. Ga. 2010) (Diehl, J.) (citing, *In re Glover*, No. 07-95002, 2009 WL 6498524, at *3 (Bankr. N.D. Ga April 29, 2009) (Bonapfel, J.)). Notwithstanding, it is also possible for a debtor to ratify a filing that was not authorized in the first instance. *In re Amir*, 436 B.R. 1, 18 (B.A.P. 6th Cir. 2010); *In re Rice*, 521 B.R. 405, 408 (Bankr. N.D. Ga. 2014) (Murphy, J.). Passage of time by itself is not sufficient to ratify an unauthorized filing. *In re Eicholz*, 310 B.R. 203, 208 (W.D. Wash. 2004).

It is undisputed that Debtor did not sign the documents necessary to file his case. Debtor denied asking Milligan for a case number and testified that he called for a status, to “see what we could do” and merely left messages for Chambers who was not returning his calls. The evidence showed that Debtor called Chambers’ office twice on November 26, 2014 asking for a status update. On December 2, 2014, Debtor called for an update and a case number. After the December 4, 2014 meeting, Debtor called on December 5 to ask Milligan to obtain copies of his tax returns from the individual who prepared them. Debtor called again on December 19, 2014 seeking an update. Debtor called twice on January 2, 2015 and asked for an update and for Chambers to call him. Finally, on January 8, 2015, the day after the case was filed, Debtor called and asked for a case number or an update. Thus, the majority of Debtor’s calls were limited to a

request for a return call and a status update, but on two occasions, Debtor did request a case number.

Debtor called Milligan and asked that she contact his tax preparer to obtain copies of his latest tax return. Debtor also completed a telephone credit counseling course. Debtor understood that he was retaining Chambers to file a case and also felt that he needed relief from creditors' calls. Thus, it appears that Debtor planned to file a case. However, Debtor testified that after the December 4, 2014 meeting he understood that Chambers would contact him after the first of the year regarding filing a case. Debtor testified at his 341 meeting that he wanted to review the documents, have another meeting and perhaps try to find another way to deal with his creditors. (Exhibit T-8, p. 49-52). Debtor clearly intended to review the statement of financial affairs and schedules before a case was filed. Chambers testified that the petition and other papers necessary to Debtor's filing were prepared by the time of the December 4 meeting but that Debtor did not review them at that time. This corroborates Debtor's statements regarding his state of mind in December 2014 in that he thought he would meet with Chambers again before any filing and that a filing would not take place for two to four months. (Exhibit T-8, p. 72). Thus, the evidence shows that Debtor was preparing to file case, but he was not ready to do so in December 2014 and expected to meet with Chambers again in January 2015 and also wanted to consider other possible solutions.

The Trustee argues that it was only after Debtor became aware that the Trustee would sell his house that he wanted to dismiss the case, but the Trustee presented no evidence in support of this argument. The Trustee has not filed anything to indicate an intention to sell Debtor's house, and Debtor did not meet the Trustee until after the hearing on the First MTD. The Trustee also argues that Debtor cannot pay his creditors on his fixed income and really has

no good alternative to filing a case because creditors could seek to obtain judgments against Debtor. The rationality of Debtor's intention is not the issue – it is not unusual for debtors to wait to file a case when it would have been much easier on them to file sooner. People generally, and Debtor is no exception to this, want to pay their creditors and do not want to file bankruptcy. Debtor testified at his 341 meeting that he always paid his debts and that he did not like bankruptcy. (Exhibit T-8, p. 15, 77). The Court finds this testimony credible, even if waiting to file a case or otherwise trying to work something out with his creditors is not the most logical avenue for Debtor to have taken. The Court also notes that at one point in his 341 testimony the Debtor said “I wanted to proceed with it.” in response to the UST's question “[b]ut in December when you met with Mr. Chambers, were you sure you wanted to file a bankruptcy case?” (Exhibit T-8, p. 72-73). However, this testimony came after several prior statements in which Debtor indicated he intended to review the bankruptcy papers and consider the matter further. In addition moments earlier, Debtor told the Trustee that he thought the filing would take place later, in the spring, and that he “was indecisive.” (Exhibit T-8, p. 72). The question of authority is a close one, but given the totality of the circumstances, I conclude that Debtor did not authorize the filing of this case.

Having determined that the filing was not authorized, the next issue the Court must decide is whether Debtor ratified the filing. It is clear that Debtor was relieved when creditors stopped calling him. But, it is equally clear that he wanted the case dismissed and was unaware that the First MTD had been withdrawn, which Chambers acknowledged was withdrawn without authorization from Debtor. Thus, the question is whether the passage of time coupled only with the relief from creditors' calls is sufficient to ratify the filing.

The Trustee cited a number of cases in his initial objection and in supplemental papers in support of ratification. Each of these cases is distinguishable because the debtors did not raise unauthorized filing as a basis for dismissal until after the case had been pending for some period of time and after they actively participated in the case and/or actively used the stay to their benefit. *Amir*, 436 B.R. at 13-15 (debtor appeared in court, filed 11 pleadings in bankruptcy court, filed a plea of stay in state court suit and waited more than five months before asserting that he had not signed the petition); *In re Willis*, 345 B.R. 647, 652-53 (B.A.P. 8th Cir. 2006) (debtor waited almost ten weeks before telling anyone that she had not signed the petition and during that ten-week period amended her schedules five times, opposed three motions for relief from stay and withdrew a motion to dismiss); *In re Scotto*, No. 809-75956, 2010 WL 1688743, at *12-15 (Bankr. E.D.N.Y. 2010) (court concluded that debtor ratified a forged filing because debtor waited four months before seeking dismissal, ignored all orders of the court while delegating responsibility for resolution of case to his son where debtor received notices from the court and trustee who was actively investigating the case).

Here, in contrast, Debtor filed the First MTD ten days after the case commenced. Other than participating in 341 meetings, one of which was held at his home and two of which occurred, inexplicably, a year apart,³ Debtor took no action in the case. Thus, the question in this case comes down to whether passive receipt of the benefit of the stay is enough to ratify the filing. See *In re Parker*, 351 B.R. 790, 799 n.7 (Bankr. N.D. Ga. 2006) (Diehl, J.) (noting that once a case is filed, creditors often do not distinguish between dismissal and discharge for purposes of pursuing debt; thus, even when a case is dismissed a debtor may effectively enjoy

³ The docket reflects that two continued 341 meetings were held at the courthouse, one in April 2014 and another on the day Debtor's new counsel entered their appearance, in April 2015. Other than acknowledging that he had attended a 341 meeting at the courthouse, there is no evidence regarding the reason for continuing the 341 meeting or if Debtor appeared at both meetings.

the benefits of stay relief and discharge). Furthermore, the existence of administrative expenses incurred by the Trustee is not a basis to deny Debtor's Motion because the Motion can be granted subject to payment of such expenses. *See In re Kaur*, 510 B.R. 281, 289 (Bankr. E.D. Calif. 2014); *In re Aupperle*, 352 B.R. 43, 48 (Bankr. D.N.J. 2005). The administrative expenses were not caused by Debtor's actions, but by the need to investigate whether Debtor authorized the filing of this case. The Trustee has not sought to liquidate any assets or incurred any other expenses in this case. Thus, this case is distinguishable from cases where the debtor waited until after the trustee took action to liquidate assets to raise an issue about authorization. Here, it was clear from February 26, 2014 forward, that Debtor's authorization of the filing was in serious question. In addition, no other actions were taken in reliance on the pendency of the case. Under the circumstances of this case, in which Debtor believed the case would be dismissed, was unaware that the First MTD was withdrawn until approximately a year after the 341 meeting, and other than appearing at the 341 meetings took no action in the case, I conclude that the mere passage of time is not sufficient for Debtor to ratify the unauthorized filing of this case, and it is now hereby

ORDERED that the Debtor's Motion to Dismiss is GRANTED; it is further

ORDERED that the Court will retain jurisdiction to consider any applications for fees and expenses filed by the Trustee within 45 days after entry of this order; it is further

ORDERED that to the extent any funds remain in the estate after payment of allowed administrative expenses, such funds should be remitted to Debtor.

END OF ORDER

Distribution List

David L. Todd
202 River Terrace
Canton, GA 30114

Robert A. Chambers
The Law Firm of Robert A. Chambers
8440 Courthouse Square East
Douglasville, GA 30134

Howard D. Rothbloom
The Rothbloom Law Firm
31 Atlanta Street
Marietta, GA 30060

Adam D. Herring
31 Atlanta Street
Marietta, GA 30060

Neil C. Gordon
Arnall Golden Gregory LLP
Suite 2100
171 17th Street, NW
Atlanta, GA 30363

Michael J. Bargar
Arnall Golden Gregory, LLP
Suite 2100
171 17th Street, NW
Atlanta, GA 30363

Vivieon E. Kelley
Office of the United States Trustee
362 Richard Russell Building
75 Spring Street, SW
Atlanta, GA 30303