DOCKET NUMBER: 96-10341
ADV. NUMBER: None
JUDGE: M. A. Mahoney
PARTIES: Raymond Riley Fletcher, Rene McKinley
CHAPTER: 13
ATTORNEYS: M. E. Wynne
DATE: 2/26/96
KEY WORDS:
PUBLISHED: No

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

RAYMOND RILEY FLETCHER, Case No. 96-10341-WSS-13

Debtor.

ORDER DENYING McKINLEY MOTION FOR RELIEF FROM STAY

This matter is before the Court on the Motion of Rene (Fletcher) McKinley for Relief from Stay. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the motion is denied.

FACTS

Dr. Fletcher filed this Chapter 13 case on January 31, 1996. He presently has a Chapter 7 case pending as well in the Bankruptcy Court of the Middle District of Georgia. In that case, he was denied a discharge on October 20, 1995 pursuant to 11 U.S.C. § 727(a)(4). The party successfully prosecuting the denial of discharge claim was Ms. McKinley. The Court has no other information about the Chapter 7 case.

In this case, Dr. Fletcher has proposed a plan which would pay priority and secured creditors as required by the Bankruptcy Code and unsecured creditors 75% of their claims over a five-year period. In general, Ms. McKinley disputes the truthfulness of the schedule of assets and debts and the propriety of the income and expenses of Dr. Fletcher. In particular, she disputes the value he has placed on her alimony, child support and property settlement claims.

Ms. McKinley is proceeding *pro se*. Her motion seeks relief from the automatic stay. The Court believes the request is based on "cause" under 11 U.S.C. § 362(d)(1). Ms. McKinley seeks to domesticate in Alabama her Georgia judgment for an allegedly unpaid property settlement of $100,000. Once domesticated, she wishes to enforce her judgment by attaching assets and income of Dr. Fletcher. She alleges that Dr. Fletcher has filed this Chapter 13 case in bad faith and the Court has cause to lift the stay because (1) Dr. Fletcher already has a pending Chapter 7 case in which he has been denied a discharge; (2) he filed this case on the eve of the domestication of foreign judgment hearing; and (3) he is not being truthful in disclosure of his assets, income or expenses to the Court.

Dr. Fletcher is current in his most recent monthly alimony payments, both immediately prior to the filing of this Chapter 13 case and subsequent to its filing. His schedules admit to arrearages of $26,730 in child support and alimony to 1992.

LAW

This Court does not believe any of the reasons given by Ms. McKinley for relief from stay are sufficient to constitute "cause" under 11 U.S.C. § 362(d)(1) in this case. Granting relief to her now would take away any ability of the Debtor to propose a workable plan. The more appropriate time to deal with the issues raised by Ms. McKinley is at the confirmation hearing in this case. The Court can then better determine whether Dr. Fletcher is truly trying to pay his debts as best he can (which this Court believes is a proper use of Chapter 13), or is motivated simply by a desire to again stave off creditor collection efforts while making minimal payments to creditors or lying to the Court as he did in Georgia.

This Court does not believe that, standing alone, the denial of Dr. Fletcher's discharge in his Chapter 7 case in Georgia should preclude a Chapter 13 filing here. Many debtors come to

bankruptcy courts as a result of prebankruptcy fraudulent or criminal actions. That is why they are in need of bankruptcy. To deny an individual the right to file because of past transgressions would seek not only to punish the debtor again but also to punish creditors by preventing an equitable distribution of his or her assets. Therefore, the issue for this Court is whether the Debtor is being forthright and honest at the time of this case so that a fair distribution can be made.

Second, Ms. McKinley argues that this filing on the eve of her domestication of judgment hearing is "cause" because the filing is therefore in bad faith. Many bankruptcy cases are filed to prevent the occurrence of foreclosures or judgments. That is part of the purpose of bankruptcy—to stop creditors from taking actions which give them preferred status over other creditors to insure an orderly, equitable distribution. Therefore, the timing of a filing, standing alone, is not sufficient to establish grounds for relief from stay.

Third, Ms. McKinley argues that the Debtor is again not being truthful. To this point in the case, there is not enough evidence presented for the Court to find that the schedules or statement of affairs are not truthful. Such evidence, if any, will likely be produced in conjunction with Ms. McKinley's confirmation objection.

The fourth issue for the Court to consider is the propriety of a simultaneous Chapter 20, a Chapter 13 case filing during the pendency of a Chapter 7, case at all. The case law is mixed. *In re Hodurski*, 156 B.R. 353 (Bankr. D. Mass. 1993) (allowing simultaneous Chapter 20s); *In re Fulks*, 93 B.R. 274 (Bankr. M.D. Fla. 1988) (not allowing simultaneous cases). This Court believes that the reasoning of the *Hodurski* case is correct and adopts its reasoning. There is no prohibition in the Bankruptcy Code against such simultaneous cases.

However, the *Hodurski* case states that a Chapter 13 case filed where a Chapter 7 case is pending should be scrutinized closely:

> Commencement of a Chapter 13 case during the pendency of a Chapter 7 case may indicate exploitation of the bankruptcy process.

156 B.R. at 356.

As stated above, this issue is best addressed at the confirmation hearing where the good faith of the Debtor can be viewed, in part, by review of the plan proposed by the Debtor. Particularly in a case such as this one, where the Debtor has been denied a discharge previously, it will be important to examine and judge the Debtor's candidness, veracity, and the extent of his effort to pay creditors.[1] The whole point of Dr. Fletcher's case is to have the benefit of the automatic stay and to hold off creditors. To be able to fulfill the good faith requirement of 11 U.S.C. § 1325(a)(3) in a case such as this will likely require a high percentage plan or a 100% plan; otherwise, creditors should be able to exercise their rights of collection individually. They should not be delayed if all a debtor can or will offer is a commitment to repay a small part of his nondischargeable debts over a five-year period. Chapter 13 should not be a place where people who have already been denied a discharge of debt may hide.

The other practical issue which a bankruptcy court can better consider at confirmation is whether the pendency of the Chapter 13 case will in any way create problems for the Chapter 7 trustee in the pending Georgia case. This court at the relief from stay hearing had no facts as to the assets held or pursued by the trustee. In fact, there was no evidence offered as to whether the

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[1]This Court notes that Dr. Fletcher's plan proposes to pay creditors less than 100% of their claims over five years while Dr. Fletcher retains income to pay monthly expenses such as $1,000 for school tuition, $800 for a housekeeper, $200 for tutor transportation, $65 for cable television and $150 for recreation. These expenses may well not fit a definition of "good faith" or fulfill the test under 11 U.S.C. § 1325(b).

Chapter 7 case is an asset or no asset case. The *Hodurski* case indicated that a reason to dismiss or transfer a Chapter 13 case might be if the simultaneous cases raise issues such as "confusion among creditors as to the necessity and procedure for filing of claims, difficulties in determining in which estate assets belong, and the entitlement of the Chapter 7 trustee and other professionals to fees and commissions." 156 B.R. at 356. At this point, the Court has no evidence of any prejudice, so no cause has been established.

In summary, the creditor, Ms. McKinley, did not provide evidence of cause by a preponderance of the evidence. However, the Court orally indicated that her motion would also be treated as an objection to confirmation and motion to dismiss the bankruptcy case. The Court indicated the motion to dismiss will be heard in conjunction with confirmation and it will be by the judge now assigned to this case, Judge William S. Shulman.

THEREFORE IT IS ORDERED that the Motion of Rene (Fletcher) McKinley for Relief from Stay is denied without prejudice.

Dated: February 26, 1996

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MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE