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JUDGE: M. A. Mahoney

PARTIES: Gregory Dewayne Shirah, Sandra Elain Denham Shirah, Mobile Educators Credit Union

CHAPTER: 13

ATTORNEYS: M. Lewis, R. D. Johnston, Jr.

DATE: 1/3/97

KEY WORDS:

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

GREGORY DEWAYNE SHIRAH
SANDRA ELAINE DENHAM SHIRAH

Case No. 96-12553

Debtors.

ORDER

Martin Lewis, Mobile, AL, for debtors.
Robert D. Johnston, Jr., Mobile, AL, for Mobile Educators Credit Union.

This matter is before the Court on the motion of Mobile Educators Credit Union (Credit Union) to dismiss the debtors' Chapter 13 case on the ground that the debtors' petition was not filed in good faith. 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 is a core proceeding pursuant to 28 U.S.C. §157(b)(2). For the reasons indicated below, the Credit Union's motion to dismiss the case is denied.

FACTS

The debtors filed their Chapter 13 petition on July 17, 1996. The unsecured claims listed on debtors' schedules include two credit card accounts with Mobile Educators Credit Union. Debtors amended Chapter 13 plan proposes a monthly payment of \$578 to the trustee and indicates that unsecured creditors will receive a 5% dividend. On July 31, 1996, the Credit Union filed a motion to dismiss, alleging that the debtors' case was not filed in good faith. In support of its contention, the Credit Union states that the debtors used their credit cards to make numerous cash advance transactions immediately before the present case was filed.

At the hearing on the motion to dismiss the Credit Union called Lorie Ishmael to testify. She testified that she works in collections at the Credit Union and handled the debtors' account. She explained that in mid June the debtors' credit card payments were ninety days past due. At that time, the balances on the accounts were "brought in house" -- the Credit Union made a loan to the debtors and used the proceeds to pay off Visa and MasterCard. Ms. Ishmael testified that she spoke with Mrs. Shirah over the telephone and notified her that (1) all future payments on the credit card balances should be made to the Credit Union and (2) the credit cards could no longer be used. Ms. Ishmael forgot to block usage of the credit cards. She testified that this was an oversight on her part. Shortly thereafter, Ms. Ishmael received notice that the credit cards were still being used. Cash advance transactions totaling \$3,273.98 were made on the credit cards in a five day period.

Mr. Shirah did not deny that he made the cash advance transactions. He stated that the money had been used for necessities and that he intended to pay the money back. Mrs. Shirah also testified that it was their intention to pay everyone back 100%. Neither debtor admitted to knowing that the credit cards were not supposed to be used. Both debtors agreed that they could not afford to pay their creditors more than \$578 per month. Mr. Shirah recently returned to work after knee surgery and earns \$1,363.12 per month. Mrs. Shirah intermittently works part time at the school board. She last worked in January 1996. The Shirahs have two children and are caring for two others.

LAW

Pursuant to Section 1307(c) of the Bankruptcy Code, a court may dismiss a case under Chapter 13 "for cause." A finding of a lack of good faith is sufficient cause for dismissal. *In re Love*, 957 F.2d 1350, 1354 (7th Cir. 1992); *In re Gier*, 986 F.2d 1326, 1329 (10th Cir. 1993); *In re Eisen*, 14 F.3d 469, 470 (9th Cir. 1993). The Bankruptcy Code, however, fails to define the term

good faith. The Eleventh Circuit has indicated that good faith requires that a Chapter 13 petition be filed “with the honest intent and genuine desire to effectuate a reorganization.” *In re Waldron*, 785 F.2d 936, 938 (11th Cir. 1986). In *Love*, 957 F.2d at 1357, the court provided the following list of factors relevant to a bad faith inquiry:

the nature of the debt, including the question of whether the debt would be nondischargeable in a Chapter 7 proceeding; the timing of the petition; how the debt arose; the debtor’s motive in filing the petition; how the debtor’s actions affected creditors; the debtor’s treatment of creditors both before and after the petition was filed; and whether the debtor has been forthcoming with the bankruptcy court and the creditors.

The principle question is “whether the Chapter 13 case should ever have been filed at all -- whether debtor needs or deserves relief of any sort under Chapter 13 -- whether the mere filing of the case is sufficient to abuse Chapter 13 provisions.” *In re Jernigan*, 130 B.R. 879, 894 (Bankr. N.D. Okla. 1991). Only in extraordinary circumstances should a petition be dismissed prior to consideration of the plan. *In re Robinson*, 18 B.R. 891, 893 (Bankr. D. Conn. 1982).

The Credit Union alleges that a portion of the debt owed to it was incurred in bad faith. It suggests that fraud and dishonesty were involved on the part of the debtors in incurring this debt. The Credit Union attempted to show that the pre-petition conduct of the debtors was dishonest. The Court finds the evidence failed to establish the debtors’ actions were dishonest. The testimony showed (1) the debtors were in dire financial need at the time the transactions were made; (2) the debtors intended to pay back the full amount owed to the Credit Union; and (3) the debtors had been good customers of the Credit Union for the last five years. Furthermore, the debt arose partially due to the failure of the Credit Union employee to cancel the purchasing privileges of the debtors.

The Credit Union also alleges that the debtors are acting in bad faith by proposing a 5% dividend to unsecured creditors. However, nothing in the Bankruptcy Code prohibits such a plan.

Mr. Shirah earns \$1,363 per month and has committed \$578 per month to his Chapter 13 plan. There is no money in the debtors' budget to suggest that they have any ability to pay more.

Mobile Educators Credit Union has not demonstrated the extraordinary circumstances that would justify the dismissal of the case. The Court does not believe that it should read additional eligibility requirements into Chapter 13 by in essence stating, if one has potentially nondischargeable debts, the person doesn't qualify for Chapter 13. That cuts against the whole policy of allowing a superdischarge in Chapter 13. If one can't use it, why is it in the Code? For the Court to dismiss a case for bad faith filing requires a serious abuse of the Code or process beyond the facts here. The debtors have a genuine need for the rehabilitative provisions of Chapter 13. Accordingly, it is ORDERED that Mobile Educators Credit Union's Motion to Dismiss the case is DENIED.

Dated: January 3, 1997

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE