

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
O'clock & min

MAY 12 2004

BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (11)

In re:

Donnell Lee and
Wilhelmenia D. Lee

Debtors.

ENTERED
MAY 12 2004
K. E. P.

Chapter 13
Case No. 03-12206-W

ORDER

This matter comes before the Court upon a Motion for Reconsideration (the "Motion") filed by Donnell Lee and Wilhelmenia D. Lee (the "Debtors") pro se on April 22, 2004. In the Motion, Debtors seek reconsideration of an Order entered April 19, 2004 which dismissed this Chapter 13 case with prejudice for a period of 180 days and request the case be reinstated. As grounds for the Motion, Debtors assert "gross misconduct and poor representation" by their attorney and "extreme financial hardship". The Chapter 13 Trustee objects to the Motion. Debtors' attorney, Lawrence Keitt, denies any wrongdoing or misconduct but seeks to withdraw as counsel for Debtors.

Debtors have filed a number of Chapter 13 cases in this District. Case No. 93-74575 was filed by Wilhelmenia D. Lee on September 17, 1993 and dismissed October 11, 1994 due to Debtor's failure to make payments to the Chapter 13 Trustee. Case No. 00-10602 was filed jointly on November 21, 2000 and dismissed on July 19, 2001 due to Debtors' failure to make payments to the Chapter 13 Trustee. Case No. 03-2964 was filed jointly on March 7, 2003, with Lawrence Keitt representing Debtors, and dismissed on September 19, 2003 due to Debtors' failure to file an adequate plan of reorganization. Debtors filed the current case on September 30, 2003, 11 days after the dismissal of the

prior case, with Lawrence Keitt again representing Debtors. The record reflects that Debtors, through counsel, entered into a Consent Order on November 18, 2003 which provided that, in lieu of the filing of a petition to dismiss the case by the Chapter 13 Trustee because of the repeated filing of cases, Debtors agreed that any dismissal of this case would be with prejudice to bar a further filing of a Chapter 13 case for 180 days. Such Orders are routinely entered in instances of serial filings in this District.

The record further reflects that the Consent Order was served upon Debtors on November 22, 2003. No motion to reconsider or notice of appeal was filed at that time. On February 10, 2004 the Chapter 13 Trustee filed a petition to dismiss this case due to Debtors' failure to make payments. On April 19, 2004 this case was dismissed with prejudice. At the hearing on this Motion, Debtors admitted their failure to pay. The Chapter 13 Trustee reported the arrearage owed in trustee payments was in excess of \$4,000. Debtors did not have funds at the hearing to cure the arrearage and requested four (4) additional months to catch up on their plan payments.

As the primary grounds for reconsideration, Debtors assert that their attorney failed to properly represent them during a prior case, Case No. 03-2964, in failing to timely and properly file an adequate plan that resulted in dismissal of that case. Without that dismissal, Debtors argue they would not have been required to agree to any dismissal of this case as a dismissal with prejudice.

The Court does not accept Debtors' "relation back" argument for a number of reasons. Initially, the Court notes that Debtors do not dispute their failure to pay in this case nor do they raise a due process challenge associated with the Dismissal Order entered on April 19, 2004. Further, Debtors do not dispute their prior consent to the condition of

dismissal being with prejudice as represented by the Order entered on November 19, 2003. Debtors have also never challenged nor sought reconsideration of the dismissal of Case No. 03-2964 which occurred in September 2003. Debtors have waited ten (10) months since the Chapter 13 Trustee filed a petition to dismiss Case No. 03-2964 for failure to file an adequate plan to allege poor representation by their counsel. This delay, particularly in light of Debtors' admitted failure to pay according to their own confirmed plan, weakens the strength and credibility of their argument. See In re Allen, C/A No. 03-08067, slip op. (Bankr. D.S.C. Aug. 29, 2003).

In Allen, Debtor objected to dismissal of his Chapter 13 case with prejudice, arguing that the dismissal of his prior case due to ineffective representation by counsel should be recognized as an exception to a bar against re-filing. Id. at 2-3. The Court disagreed with debtor, noting that debtor delayed in raising his concerns regarding counsel and could have sought substitution of counsel or brought his concerns to the Court in a timely fashion. Id. at 3. The Court is reluctant to review prior cases and consider allegations of malpractice between debtors and their attorney, particularly in instances where no complaint was timely voiced. Interestingly Ms. Lee, during the current case and the previous case, worked for Mr. Keitt and was knowledgeable and even participated in the preparation of pleadings in those cases. Further, Debtors have personal experience with the Chapter 13 process, having had four Chapter 13 cases in this District – three of which were dismissed for a failure to make plan payments.

Finally, Debtors ask the Court to vary from its normal standards that have been developed to address the epidemic of serial filings in Chapter 13 cases. See Operating Order 02-01. Dismissals with prejudice are usually reconsidered only upon strict

compliance with Fed. R. Civ. P. 60. Debtors have failed to meet these requirements. Furthermore, as a frequent requirement of reinstatement of any case that has been properly dismissed for failure to pay, debtors are required to present at the hearing funds necessary to catch up the delinquency in payments to the Chapter 13 Trustee. Debtors' inability to cure the arrearage is an indication of the lack of feasibility of the plan Debtors seek to revive. In this case, Debtors seek an additional four (4) months to cure their arrearage, a period of time that is not reasonable.

For all of these reasons, the Court finds no merit in the Motion and denies it.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
May 12, 2004