

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

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DEC 06 2004
BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (11)

In re:)
)
Michael Renea Brown and Annette Sarah Brown,)
)
Debtor.)
_____)

Case No. 04-10616-W
Chapter 13

ENTERED
DEC 07 2004
K. E. P.

ORDER DISMISSING CASE WITH PREJUDICE AND
SANCTIONING COUNSEL

THIS MATTER is before the Court on its Rule to Show Cause, the chapter 13 trustee's motion to dismiss the case, and the United States Trustee's motion to examine the debtors' transactions with their attorneys pursuant to 11 U.S.C. § 329. This order disposes of all three matters. Present at the hearing were counsel for the United States Trustee, the chapter 13 trustee, counsel for the debtors, Christopher Edwards, and Jason Moss, a partner or shareholder in Moss & Reed. The debtors, although ordered to appear, were not present.

The debtors filed their joint, voluntary petition for relief under chapter 13 of the Bankruptcy Code on September 7, 2004. The debtors are represented by Christopher M. Edwards, Esquire of Moss & Reed. Helen Elizabeth Burris was appointed chapter 13 trustee in the case.

The debtors have filed six chapter 13 cases, including a 1991 case in which only Mr. Brown was a debtor. Mrs. Brown filed a series of four chapter 13 cases in her name alone. None of these four cases, 99-02459-jw, 00-03624-jw, 02-01188-jw, and 03-05353-jw, were completed and all were dismissed for the failure to make plan payments or to comply with agreements to cure defaults. The final two cases were dismissed with prejudice for 180 day time periods. Mr. Edwards and Moss & Reed were not counsel for the debtors in the previous cases.

The debtors' current petition discloses the filing of the 1991 case. Attached to the petition is a "case summary" report generated from the Court's Case Management and Electronic Case Filing system relating to the 2002 case. The other cases are not disclosed.

The debtors' schedules in the present case reflect the ownership of real property at 103 Frinnie Lane in Easley, South Carolina. The debtors value the property at \$ 18,000. The schedules and proposed plan reflect a mortgage debt encumbering the property in the amount of \$ 23,840.70, including a deficiency of \$ 8,004.00. An objection to the chapter 13 plan by the mortgage creditor recites an arrearage of \$ 21,117.44 and total debt of \$ 40,100.43. Given the \$ 266 per month mortgage payment reflected on Schedule J, it is clear that the debtors have not made a mortgage payment in many months. The remaining debts include a small income tax claim, property taxes to Pickens County, and other debt totaling less than \$1,500.00.

The chapter 13 trustee, on September 28, 2004, filed a motion to dismiss the case on the grounds that it was not filed in good faith, that there had been no change of circumstances from the prior case, and that the debtors failed to disclose all prior cases. The United States Trustee filed his § 329 motion on October 1, 2004. The Court entered a Rule to Show Cause on October 20, 2004, resulting from the lack of disclosure of the previous cases. The Rule was directed to the debtors, Mr. Edwards, and a partner or shareholder in Moss & Reed.

On October 12, 2004 the debtors filed a notice of voluntary dismissal. The United States Trustee responded, noted the debtors' absolute right to dismiss pursuant to 11 U.S.C. § 1307(b), and asked that the Court reserve jurisdiction of the trustee's motion to dismiss with prejudice and the United States Trustee's motion to examine the transactions between the debtors and counsel regarding fees. The Court entered an Order on October 15, 2004 dismissing the case but reserving jurisdiction as requested by the United States Trustee and further reserving jurisdiction

“to inquire into matters which may be a violation of the applicable law and rules, and issue process or order relief thereto, including sanctions.”

Mr. Edwards represented to the Court at the hearing on this matter that he was aware that the debtors had filed previous bankruptcy cases. He stated that he exercised his professional judgment and believed that the debtors were properly seeking relief from their creditors. He further stated that he believed that a change in circumstances existed from the previous case in that the debtors had reconciled following a period of marital separation. The information filed in the schedules by Mrs. Brown in her previous two cases indicates that she was separated from her husband at the time of her 2002 case but had reconciled with him at the time of her 2003 case. Based upon Mrs. Brown’s own admissions she was not separated at the time of the 2003 case and a subsequent reconciliation could have not formed the basis for a change in circumstances from the 2003 case to the present case as suggested by Mr. Edwards. No other change of circumstances was presented by the debtors to justify this serial filing.

Mr. Moss related that he suspected that the problem with the failure to disclose all the previous cases filed by debtors stemmed from the problem of attempting to electronically transmit too large a data file to the Clerk of Court and the resultant failure of receipt by the Court. The Court also notes that the image of the petition electronically filed by Moss & Reed in this case constitutes a relatively small file and that it is doubtful that the image of three additional pages would have resulted in the rejection of the file by the Court’s server. Most petitions are accompanied by the full set of schedules and statements from the Official Forms and the electronic file is significantly larger than the one at issue here.

CONCLUSIONS OF LAW

The Bankruptcy Code provides for dismissal or conversion of a chapter 13 case for cause,

including, but not limited to, the reasons set forth in subsections (1) through (8) of 11 U.S.C. §1307. *In re Wessinger*, 14 B.R. 737 (Bankr. E.D. Pa. 1981), *In re Black*, Case No. 91-3845, slip op. 2 (Bankr. D.S.C. October 7, 1991). The filing of chapter 13 petitions in bad faith is cause for dismissal of the case. *In re McElveen*, 78 B.R. 1005 (Bankr. D.S.C. 1986). Repetitive filings of bankruptcy cases by a debtor or filings seriatim by spouses is an old and growing problem in this and many other districts. *Johnson v. Vanguard Holding Corp. (In re Johnson)*, 708 F.2d 865 (2nd Cir. 1983), *In re Bolton*, 43 B.R. 48 (Bankr. E.D. N.Y. 1984), *In re Pryor*, 54 B.R. 697 (Bankr. D.S.C. 1985), *In re Brown*, Case No. 03-09534 (Bankr. D.S.C. November 19, 2003).

The Court has inherent authority to dismiss a case for cause when a debtor files a chapter 13 petition in bad faith. *In re Hartley*, 187 B.R. 506 (Bankr. D.S.C. 1995). Here the chapter 13 trustee has asked that the Court dismiss the debtors case with prejudice for a period of one year. Two of the previous dismissals have been for periods of six months. The debtors failed to appear in response to the Court's Rule to Show Cause, even through on notice that the Court would consider sanctions beyond those sought in the trustee's and United States Trustee's motions. A debtor filing a second or third bankruptcy case must prove by detailed testimony and convincing evidence an entitlement to relief under the Bankruptcy Code. *In re Pryor*, 54 B.R. 679 (Bankr. D.S.C. 1985).

The review of the record indicates that the Mrs. Brown has filed a series of petitions with the apparent motive of stopping the foreclosure of the real property owned jointly with Mr. Brown. The schedules in the prior cases show that the arrearage on the mortgage loan has ballooned over the years. As a result of these factors the Court dismisses this case with prejudice to a filing by either debtor under any chapter of the Bankruptcy Code for a period of two years. Additionally, the automatic stay of any bankruptcy case filed by any person deriving an interest

in the title to the real property from the debtors, or either of them, shall not apply for a two year period following entry of this order as such stay relates to the real estate located at 103 Frinnie Lane in Easley, South Carolina (Pickens County tax number 5142-00-54-6031). The order of this Court dated October 15, 2004 dismissing this case is so amended.

A debtor acting in bad faith may be subject to sanctions. *In re Fogle*, Case No. 03-13857 (Bankr. D.S.C. February 6, 2004). The actions of a debtor in serially filing cases combined with a failure to demonstrate any change of circumstances evidences bad faith. *Brown*. Additionally, the Court “possesses the inherent power to regulate litigants’ behavior and to sanction a litigant for bad faith conduct” pursuant to 11 U.S.C. § 105. *In re Kilgore*, 253 B.R. 179 (Bankr. D.S.C. 2000). The act of the attorney in assisting the debtors with a bad faith filing is at least somewhat analogous to assisting clients with the transfer of assets to avoid creditors¹. The purpose of the effort is to improperly frustrate creditors.

The United States Trustee’s motion pursuant to 11 U.S.C. § 329 seeks a determination that the fee paid to Mr. Edwards should be disgorged. Alternately, the Court’s Rule to Show Cause requires Mr. Edwards and Moss & Reed to show cause why sanctions should not be imposed in this case. This is an appropriate case for sanctions. Mr. Edwards and Moss & Reed shall pay to the Court or to the South Carolina Bar *Pro Bono* program the fee received in this case as a sanction for the conduct in assisting the debtor with a bad faith filing. If payment to the *Pro Bono* program is chosen, proof of payment shall be made to the United States Trustee within 10 days of the date of this order. The payment is not a donation and it shall not be deducted as such for income tax purposes by the firm, its partners and members or Mr. Edwards.

¹ Assisting clients with the fraudulent transfer of assets in order to frustrate creditors is misconduct for lawyers in South Carolina. *In the Matter of Kenyon and Lusk*, 327 S.C. 307, 491 S.E.2d 252 (1997).

This Court has previously discussed some of the duties of attorneys in filing bankruptcy cases. "When an attorney undertakes representation of a client and prepares to file a bankruptcy petition on behalf of that client, this Court believes that the attorney has an affirmative duty to determine whether that client is eligible for bankruptcy protection. Part of this duty includes checking court records and discovering whether the client has previously filed bankruptcy." *In re Brown*, Case No. 02-00089 (Bankr. D.S.C. January 31, 2002); *see also* Operating Order 02-01. The attorney must ensure that all prior filings of the debtor in the past 6 years are disclosed as a part of the petition. Here, Mr. Edwards reflected a stale 1991 case and attached information concerning the 2002 case of Mrs. Brown. The 1999, 2000 and 2003 cases are not disclosed. Given that only the petition and mailing matrix were filed in this case (without the schedules and statements that were to come later) it strains credibility for counsel to suggest that the problem was with the size of the electronic file. More likely the "case summary" forms from ECF were simply omitted from the filing. Where multiple cases must be disclosed counsel is confronted with the problem that the Official Form contains only a small block in which to disclose the required information. Counsel can best safeguard against error by making a notation of "see attached" on the petition and attaching a single list of the required information concerning each bankruptcy case from the prior six years. If necessary, counsel should check the electronic record once documents are filed to ensure the record's accuracy.

In this case counsel both failed in the responsibility to prepare a petition with all the required information concerning previous filings and aided the debtors in filing a bad faith petition. Sanctions have been levied against attorneys for debtors for filing cases during the time filings were barred under a previous dismissal order. *In re Brown*, Case No. 02-00089 (Bankr. D.S.C. January 31, 2004), *In re Diaz*, Case No. 01-11798 (Bankr. D.S.C. December 7, 2001).

Attorneys have been sanctioned for filing a subsequent case for the same debtor where a case is already pending when it appeared that the filing was made to circumvent 11 U.S.C. § 109(g). *In re Martin*, Case No. 04-10542 (Bankr. D.S.C. October 14, 2004), *In re Garner*, Case No. 02-0258 (Bankr. D.S.C. March 11, 2002). The cases noted in this paragraph all involve sanctions against the Moss & Reed firm. Mr. Moss has also been sanctioned or had fees disgorged in Cases No. 02-00591, 02-05559, 02-06225, 04-6712 and in other cases.

Finally, the Court notes that Moss & Reed operates a state-wide consumer bankruptcy practice. Mr. Edwards, the sole attorney in the Greenville, South Carolina office is a young attorney with no previous bankruptcy experience. Mr. Edwards is making many of the mistakes previously made by the firm's other offices and by its other attorneys. Rule 5.1 of the S. C. Rules of Professional Conduct imposes a duty upon supervisory lawyers to ensure that all lawyers in a firm conform to the Rules of Professional Conduct. These rules include the duty to act competently and to undertake representation and advance the client's cause subject to the proper limitations on the scope of representation.

“[T]he amount of monetary sanctions should always reflect the primary purpose of deterrence.” *Miltier v. Downes*, 935 F.2d 660, 665 (4th Cir. 1991) (quoting *In re Kunstler*, 914 F.2d 505, 522-23 (4th Cir. 1990)). As an additional sanction Moss & Reed shall pay the sum of \$250.00 to the Court or to the South Carolina Bar *Pro Bono* program. If payment to the Pro Bono program is chosen, proof of payment shall be made to the United States Trustee within 10 days of the date of this order. The payment is not a donation and it shall not be deducted as such for income tax purposes.

It is the order of this Court that:

- 1) This case is dismissed with prejudice to a filing of a bankruptcy case by either debtor

under any chapter of the Bankruptcy Code for a period of two years. Additionally, the automatic stay of any bankruptcy case filed by any person deriving an interest in the title to the real property from the debtors, or either of them, shall not apply for a two year period following entry of this order as such stay relates to the real estate located at 103 Frinnie Lane in Easley, South Carolina (Pickens County tax number 5142-00-54-6031). The order of this Court dated October 15, 2004 dismissing this case is so amended.

2) Mr. Edwards and Moss & Reed shall pay to the Court or to the South Carolina Bar *Pro Bono* program the fee received in this case as a sanction for the conduct in assisting the debtor with a bad faith filing. If payment to the *Pro Bono* program is chosen, proof of payment shall be made to the United States Trustee within 10 days of the date of this order. The payment is not a donation and it shall not be deducted as such for income tax purposes by the firm, its partners and members or Mr. Edwards.

3) As an additional sanction Moss & Reed shall pay the sum of \$250.00 to the Court or to the South Carolina Bar *Pro Bono* program. If payment to the *Pro Bono* program is chosen, proof of payment shall be made to the United States Trustee within 10 days of the date of this order. The payment is not a donation and it shall not be deducted as such for income tax purposes by the firm, its partners and members or Mr. Edwards.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
December 6, 2004