

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

IN RE:

EARL JEFFREY FULTZ and,
DEBORAH RAWLS FULTZ

Case No.: 03-14009 GVL1

Debtors

Chapter 7

ORDER DENYING MOTION TO DISMISS

THIS MATTER came on for hearing on the chapter 7 trustee's Motion to Dismiss filed on January 12, 2004. This Court has jurisdiction over this matter and this is a core proceeding under 28 U.S.C. §157(b)(1) and (2). For the reasons set forth herein, the motion is denied.

The pro-se debtors, Earl and Deborah Fultz, filed their chapter 7 voluntary petition on November 13, 2003. The trustee filed the present motion after the 341 meeting of creditors. The trustee discovered pre-petition activity by the debtors within one year of filing the petition that could be labeled as either a preferential transfer or a fraudulent conveyance. Upon discussing this activity with the debtors, the trustee, in her motion, stated that "Debtors have advised the Trustee that they believe it in their best interest to dismiss their case. The Trustee has no objection to the Court dismissing the case." At the hearing on the motion, held on February 5, 2004, the attorney appearing for the chapter 7 trustee¹ (the trustee) sought to have this case dismissed. The debtors were present at the hearing and added on the record that they were paying back a loan to their son² and intended no fraudulent behavior. Further, they felt that they were not favoring one creditor over the next and would prefer to pay back their creditors outside of bankruptcy. Aside from these statements, the debtors offered no other justification.

¹ The U.S. trustee was substituting for the chapter 7 trustee who was not able to attend the hearing.

² The loan was in the amount of six thousand dollars.

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Bankruptcy Code § 707 governs dismissal of chapter 7 liquidation cases. In particular, § 707(a) states that a court may dismiss a case after notice and hearing only “for cause.” When a debtor in chapter 7 seeks to dismiss his own case, he does not have an absolute right to voluntarily dismiss his bankruptcy case, he must show cause for his dismissal. *In re Maixner*, 288 B.R. 815, 817 (8th Cir. BAP 2003); *In re Simmons*, 200 F.3d 738, 743 (11th Cir. 2000)(*the burden to show cause in a § 707(a) action is on the moving party*) . However, even if a debtor does show cause, the bankruptcy court should deny the motion to dismiss if there is any showing of prejudice to creditors. *Maixner*, at 817; citing *In re Turpen*, 244 B.R. 431, 433 (8th Cir. BAP 2000); *In re Leach*, 130 B.R. 855, 857 (9th Cir. BAP 1991); *other cite omitted*. Established factors help govern consideration when a debtor seeks to dismiss his own chapter 7 case: (1) whether all of the creditors have consented; (2) whether the debtor is acting in good faith; (3) whether dismissal would result in a prejudicial delay in payment; (4) whether dismissal would result in a reordering of priorities; (5) whether there is another proceeding through which the payment of claims can be handled; and (6) whether an objection to discharge, an objection to exemptions, or a preference claim is pending. *Maixner*, at 817, citing *Turpen*, at 434. However, the predominant approach requires that dismissal not cause prejudice to the creditors. *In re Stephenson*, 262 B.R. 871, 874 (*Bankr.W.D.Okla. 2001*) *other cites omitted*.

Here, although the trustee has submitted the motion, for all intents and purposes it is the debtors who are asking for a dismissal of their case. During the hearing the trustee submitted that dismissal would not hurt or prejudice the creditors of the debtors because they still have a remedy; they could sue the debtors. However, I find that the reasons given for dismissal by the debtors and on behalf of the debtors do not give rise to “cause” as required in § 707(a) and therefore do not support dismissal of their case. The fact that the debtors made preferential payments is not included in § 707(a) as cause. Additionally, the “factors” and “the prejudice test” in prevailing case law do not support their position. In a chapter 7 case where there are potential recoveries it is not in the best interest of the creditors to dismiss the case. If the case was dismissed, the creditors would lose the

collection power of the trustee. If the debtors' payments to their relative were preferential, the creditors, outside of bankruptcy, would not be able to avoid them, thus, those funds would not be available for distribution. If payments were fraudulent, the creditors would have to obtain their judgment then pursue the transfers. Alternatively, Bankruptcy Code § 305 Abstention, does not support dismissal of this case. This section sets forth that the court may dismiss a case if creditors and the debtor are better served by such a dismissal. As discussed above, in a case where there are potential recoveries, it is clearly not in the best interest of the creditors to dismiss.

While the fresh start afforded to debtors by the discharge is one of the primary goals of bankruptcy, it is not all about the discharge. The other major policy behind bankruptcy is to provide for the efficient and equitable distribution of the debtor's available assets to creditors who would otherwise have to pursue individual collection remedies. In order to achieve the equitable distribution to creditors, bankruptcy gives the trustee the power to recover certain assets transferred prior to the bankruptcy that creditors would not be able to recover. Even if a debtor no longer desires to go forward and receive a discharge, he is not free to defeat the other goals of bankruptcy when they result in adverse consequences he had not foreseen prior to filing. Therefore, it is

ORDERED AND ADJUDGED that the Trustee's Motion to Dismiss is DENIED.

DONE AND ORDERED at Tallahassee, Florida, this 13 day of February, 2004.


LEWIS M. KILLIAN, JR.
Bankruptcy Judge

cc: debtors
Theresa Bender