
**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH**

In Re:

JIM TILSON

SSN: 528-62-7563

Debtor

Case No. 03-22735

Chapter 13

**ORDER GRANTING MOTION TO DISMISS WITH PREJUDICE
Docket Number 5**

This matter comes before the Court on a motion to dismiss with prejudice pursuant to 11 U.S.C. § 109(g)(1)¹ (Motion) filed by Errol and Julia Raven (Ravens). After the Ravens filed their Motion, Jim Tilson (the Debtor) moved to voluntarily dismiss his chapter 13 case. The Court granted the Debtor's motion, but retained jurisdiction to hear the Ravens' Motion. The Motion is based upon the Debtor's failure to meet the deadlines required to maintain his bankruptcy action and his failure to attend the meeting of creditors, and the fact that the case was filed on the day scheduled for a foreclosure sale of real property in which the Ravens have an interest. A hearing was held on

¹ All statutory references are to Title 11 of the United States Code unless otherwise indicated.

May 14, 2003 at which both parties appeared and presented evidence. Based upon the evidence presented, having made an independent review of applicable law, and having set forth the rationale of the decision below, the Court orders that this case be dismissed with prejudice, barring refiling by the Debtor under any chapter of Title 11 for 180 days.

FACTS

The relationship between the parties began in late 1997 when the Ravens, who own certain commercial property (Property) enter into a real estate contract with the Debtor. The agreement required the Debtor to make monthly payments of \$2,500 for the first year, then \$3,000 per month thereafter, and also obligated the Debtor to pay the real property taxes on the Property. No other evidence regarding the nature of the contract was offered, but based upon other testimony noted below the contract apparently granted the Debtor an option to sell the Property.

The Debtor filed a chapter 13 bankruptcy petition in August of 1999 in an ill-fated attempt to save certain residential property from foreclosure. He filed the required statements and schedules as well as a plan of reorganization, but was unable to prosecute the plan. The 1999 case was dismissed in January of 2000 on motion of the chapter 13 trustee for failure to make required payments.

At some point thereafter, the Debtor relocated his residence to the Property. He paid the contract payments monthly, but not the full amount called for in the contract. Rather than increasing to \$3,000 per month, the Debtor continued to pay \$2,500 per month until January of this year. He failed entirely to pay the property tax obligation, resulting in a substantial delinquency and penalties that totaled at least \$19,000. The Ravens elected to foreclose based upon the back payments owing, and initiated proceedings in state court to obtain possession of the Property. During the course of

these proceedings, the Ravens received notice that the county intended to take action against the Property based upon the unpaid real property taxes. Faced with the county's action, the Ravens stepped in and paid the property taxes to preserve their rights in the Property. They ultimately obtained an order of restitution in state court, and scheduled a sale of the Property for February 19, 2003.

The sale was halted when the Debtor filed his chapter 13 petition in this case. The Debtor stated that the reason he filed was to prevent foreclosure. The petition was signed by the Debtor under penalty of perjury that the information provided was true and correct, but the petition fails to disclose the Debtor's prior bankruptcy filing. The Debtor's attorney also signed the petition, and the Debtor was represented by counsel at all times during the case.

Although the Debtor had a list of creditors in his possession at the time he filed the petition, he failed to file it. He also failed to file the statement of financial affairs, schedules, or a plan of reorganization. None of the papers required by § 521, FED. R. BANKR. P. 1007, Local Rule 2002-1(d) and Local Rule 5005-1 have been filed at any time in this case.

A meeting of creditors was scheduled for March 27, 2003. Because no list of creditors was filed, only the Debtor, his attorney, and the chapter 13 trustee received Official Form 9, Notice of Commencement of Case. Neither the Debtor nor his attorney appeared at the first meeting of creditors. The Debtor also failed to tender his first plan payment. Instead of appearing on March 27, the Debtor filed a notice of dismissal. The Ravens filed their motion to dismiss with prejudice a few hours later on the same day.

The Debtor offered two explanations for his failure to file the required papers. In his Notice of Dismissal of Bankruptcy filed on March 27, 2003, the Debtor alleged he was unable to assist in

the compilation of business records necessary for preparation of the required papers due to increased duties in the Utah National Guard. He testified that he was called to active duty for a period of ten days, but later indicated that the time period was six to seven days. After this period he was released to resume his normal activities. Exactly when the Debtor was activated is unclear. At first the Debtor testified on direct examination that he was called up six weeks before the start of the war. The Debtor later stated that he believed he was activated three weeks before, or near the end of March. The war in question was Operation Iraqi Freedom, which began on March 19, 2003. Under further questioning by the Court, the Debtor indicated he thought the call-up was prior to the March 27 meeting of creditors by a couple of weeks, but that he was unsure. This places his activation at some point in time between the second week of February and the end of March. From the evidence presented, it is impossible to determine when the Debtor was on active duty. This lack of specificity, however, does not affect the Court's ruling.

During the time the Debtor was on active duty, he was under "lock down" conditions which limited his access to a telephone. The Debtor explained that this prevented him from contacting his attorney. The Debtor also testified that he continued operating his business on the Property during this time, despite the fact that he was aware his Utah State tax license had been revoked.² During his absence, the Debtor had another person running the business. The Debtor was able to telephone this individual each evening to check in on work progress.

A second rationale offered by the Debtor for failing to file the required papers was that he

² Here again, the Debtor was unclear about when this event occurred, but when asked by the Court whether he had received notice of the revocation prior to filing his bankruptcy petition, he answered in the affirmative. The actual revocation may have occurred a couple of weeks prior to the meeting of creditors, but the exact date is illusive.

had a proposed sale of the Property in the works which, if the deal closed, would satisfy all of his outstanding obligations and obviate the need for pursuing bankruptcy. Since no schedules were filed, it is impossible to tell what obligations the Debtor had, how many creditors exist, or what dollar amount would be necessary to accomplish full satisfaction of outstanding obligations. The Debtor testified that he was working on one deal and had also received a second offer, but he was unable to present any evidence of sales documents pending or in progress. It was unclear whether the second offer was made before or after the petition was filed. At some point, the prospect of a sale evaporated, though again the Debtor could not offer a point in time when this occurred. Ultimately, the Debtor abandoned this course of action and elected to voluntarily dismiss the case.

While his testimony on other points was remarkably vague and often inconsistent, on one point the Debtor was clear: he always intended to pay his creditors through sale of the property rather than through a plan of reorganization. He never intended to prosecute the bankruptcy case.

DISCUSSION

I. JURISDICTION AND BURDEN OF PROOF

The Court has jurisdiction over this contested matter pursuant to 28 U.S.C. §§ 1334 and 157(a). Venue in this division is proper. This is a core proceeding as contemplated by 28 U.S.C. § 157(b)(2)(A).

Dismissal with prejudice is a severe sanction that should be infrequently invoked by the courts.³ The burden is on the movant to show that the sanction is appropriate.⁴ Once the movant has

³ *Hall v. Vance*, 887 F.2d 1041, 1045 (10th Cir. 1989).

⁴ *Montgomery v. Ryan (In re Montgomery)*, 37 F.3d 413, 416 (8th Cir. 1994) (Judge Arnold, concurring); *In re Pike*, 258 B.R. 876, 882 (Bankr. S.D. Ohio, 2001); *In re Estrella*, 257 B.R. 114, 117-118 (Bankr. D.P.R. 2000).

set forth a sufficient *prima facie* case, the burden shifts to the debtor to show that § 109(g)(1) does not apply.⁵ Ultimately, the burden of persuasion lies with the movant to demonstrate, by a preponderance of the evidence, either that the debtor willfully failed to abide by orders of the court, or that the debtor willfully failed to appear before the court in proper prosecution of the case.

II. DISMISSAL WITH PREJUDICE

The effect of dismissal is governed by § 349(a). Unless otherwise ordered, the dismissal of a case is without prejudice and does not bar a subsequent discharge of debts that were dischargeable in the dismissed case. In order for an individual debtor to obtain a subsequent discharge once a case is dismissed, however, a debtor must file a subsequent case. Subsequent filing is governed by § 349(a) and §109(g). Section 349(a) provides that the dismissal of a bankruptcy case does not prevent the debtor from filing a subsequent petition under Title 11 except as provided in § 109(g). In the Tenth Circuit, it is only through § 109(g) that a debtor can be precluded from refiling, and then only under the conditions and time frames set forth in § 109(g).⁶

Section 109(g) provides in relevant part:

Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if

- (1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper

⁵ *Estrella*, 257 B.R. at 117; *In re Basile*, 142 B.R. 930 (Bankr. D. Idaho 1992); *Melver v. Phillips (In re Melver)*, 78 B.R. 439 (D.S.C. 1987).

⁶ *Frieouf v. United States (In re Frieouf)*, 938 F.2d 1099, 1103 (10th Cir. 1991) (§ 349(a) limited by § 109(g)); *but see Casse v. Key Bank Nat'l Assoc. (In re Casse)*, 198 F.3d 327 (2d Cir. 1999) (discussing the split in the Circuits on this issue and disagreeing with *Frieouf*, characterized as the minority position, on all points); *Colonial Auto Center v. Tomlin (In re Tomlin)*, 105 F.3d 933, 938 (4th Cir. 1997) (§ 349 was never intended to limit the bankruptcy court's ability to impose a permanent bar to discharge).

prosecution of the case.⁷

To enjoin a debtor from refile for 180 days, the movant must show (1) that the debtor has failed to abide by an order of the court or failed to appear before the court in proper prosecution of the case and (2) that such failure was willful. The second clause of § 109(g)(1) relates to a broad category of conduct. An “appearance” is a term of art “by which one against whom suit has been commenced submits himself to the court’s jurisdiction.”⁸ As the term is used in the Federal Rules of Civil Procedure, an appearance is more than physical presence at a hearing before a judicial officer. An appearance includes, among other things, being represented at non-court hearings related to a case or filing papers in the case.⁹ “Proper prosecution of a case” is not a defined phrase, but includes compliance with the various statutory duties the debtor must perform including those outlined in §§ 341, 521, 1304, 1321, 1322, 1326, the Federal Rules of Civil and Bankruptcy Procedure, and this Court’s Local Rules.

Conduct is willful within the meaning of § 109(g)(1) when the debtor had notice of the responsibility to act, and the debtor intentionally engaged in conduct that resulted in a failure to

⁷ 11 U.S.C. § 109(g)(1).

⁸ BLACK’S LAW DICTIONARY (7th Ed. 1999).

⁹ *Gomes v. Williams*, 420 F.3d 1364, 1367 (10th Cir. 1970) (discussing whether an attorney’s appearance representing a client at a deposition constituted an appearance in a case for purposes of Fed. R. Civ. P. 55(b)(2)). See also *Civic Center Square, Inc. v. Ford (In re Roxford Foods, Inc.)*, 12 F.3d 875, 881 (9th Cir. 1993) (concluding that a Chapter 11 Trustee had made an informal appearance in an adversary proceeding for purposes of Fed. R. Civ. P. 55(b)(2) as a result of contacts between creditor and trustee in underlying bankruptcy case); *United States v. McCoy*, 954 F.2d 1000, 1003 (5th Cir. 1992) (stating that the concept of “appearance” is not limited to those instances in which the party has made a physical appearance in court or has filed a document in the record, but can include instances where a party indicated in some way an intent to pursue a defense, for purposes of Fed. R. Civ. P. 55(b)(2)); *North Central Ill. Laborers’ Dist. Council v. S.J. Groves*, 842 F.2d 164, 169-70 (7th Cir. 1988) (for Fed. R. Civ. P. 55(b)(2) purposes, “has appeared” has not been read to require the filing of responsive papers or actual in-court efforts, and may include settlement conferences or even informal phone calls).

fulfill that responsibility.¹⁰

In this case, the Debtor testified that he had a list of creditors available at the time he filed his petition, but decided not to file it in contravention of § 521(1), FED. R. BANKR. P. 1007(a), Local Rule 2002-1(d) and Local Rule 5005-1(b) & (c). At argument, the Debtor's counsel indicated that no list of creditors was filed concurrently with the petition due to the local procedure, as allowed by Local Rule 5005-1(c), of filing creditor address lists, or mailing matrices, by email rather than on paper. Regardless of the procedure required by the Clerk's office for filing matrices, none was ever filed by the Debtor, either with the petition or thereafter. The Debtor also failed to file the statement of financial affairs and schedules required by § 521(1), FED. R. BANKR. P. 1007(a), and Local Rule 5005-1(b) and failed to file a plan of reorganization as required by § 1321 and Local Rule 5005-1(b). The failure to file these required papers constitutes a failure to appear before the court in proper prosecution of the case.

The Debtor failed to attend the meeting of creditors as required by § 343 and Local Rule 2003-1(a). No payment was tendered at this time as required by Local Rule 2083-1(b). These actions also constitute failures to appear before the court in proper prosecution of the case.

These multiple failures trigger dismissal under § 109(g), however, only if the conduct was willful. Of the two explanations offered by the Debtor for failing to file the required papers, only his intent not to prosecute the bankruptcy case is supported by credible evidence. The Debtor's testimony was inconsistent about both the date of his military activation as well as the duration. The

¹⁰ *Pike*, 258 B.R. at 883 (willful means deliberate or intentional); *Estrella*, 257 B.R. at 117 (willful failure requires a finding that the person, with notice of the responsibility to act, intentionally disregarded it or demonstrated plain indifference); *Walker* 231 B.R. at 347-48 (willful as used in § 109(g)(1) means deliberate or intentional); *In re Walker*, 171 B.R. 197, 203 (Bankr. E.D. Pa. 1994) (debtors conduct is willful within the meaning of § 109(g)(1) if it is intentional, knowing and voluntary, as opposed to conduct that is accidental or beyond a persons control).

Debtor was unable to point to any specific period in time during which he was on active duty and thus unable to confer with his attorney. He testified variously to at least four different start dates, but indicated he could not remember when this actually occurred. He stated that the call-up lasted ten days, but later indicated that he was only on active duty for six days. In either event, he was able to resume his normal activities upon release from duty. Even assuming that the call-up occurred in the period of time immediately after he filed the petition, his absence for six to ten days does not adequately explain his failure to complete and file the required papers within the 15 day window allowable under Rule 1007(c) (assuming *arguendo* a timely filed creditor matrix). Although Rule 1007(c) allows the court to extend the time for filing the required papers for cause, no motion for an extension was filed. The plausibility of this explanation is further eroded by the Debtor's testimony indicating he was able to keep tabs on his business, but not his bankruptcy.

The Debtor also implied that the revocation of his sales tax license prevented him from continuing to conduct business and therefore fund payments into a plan, and that he learned of this event only after the date of filing. Once again, however, the testimony was contradictory as to when the Debtor became aware of the issues related to his sales tax license. The more credible testimony indicates proceedings to revoke the sales tax license occurred well prior to the filing date, and that the notice of revocation probably occurred prior to filing. Although the actual revocation may have occurred post filing, the Debtor apparently knew when he filed the petition he could not fund the chapter 13 plan payments through revenue from his business.

The Debtor stated that he never intended to complete the bankruptcy process and that it was always his intent to satisfy his creditors through a sale of the Property, rather than through payments under a plan. This assertion fits the facts, at least with respect to the intent not to prosecute the case.

The Debtor failed to disclose his prior bankruptcy filing on his petition, indicating at best that there was little thought or effort put forth to fully and truthfully provide the required information. The Debtor had a list of creditors but never filed it. He failed to file any other required papers, or to request an extension of time of time to file the papers. The Debtor's failure to act fits the facts if his intent was to not prosecute the case. Other than the petition, the only documents filed by the Debtor relate to his effort to voluntarily dismiss the case and to avoid dismissal with prejudice. This fits with the Debtor's stated intent not to pursue bankruptcy and supports the testimony that the only reason for filing the petition was to halt the Ravens' foreclosure. Filing a bankruptcy petition with the intent to avoid foreclosure is not improper. Filing a bankruptcy petition with no intent to prosecute the case *is* improper.

The Debtor was represented by counsel throughout this case. That fact, coupled with his prior filing, permits an inference that the Debtor was aware of his statutory duties as well as the potential consequences of not fulfilling those duties. In light of the Debtor's testimony, the Court can only conclude that his actions in failing to file the list of creditors, statement of financial affairs, schedules, and chapter 13 plan were knowledgeable and intentional, and therefore willful. Because his actions in this case constitute a willful failure to appear before the court in proper prosecution of the case, the Debtor's case will be dismissed with prejudice to refiling a voluntary bankruptcy petition under Title 11 for 180 days.

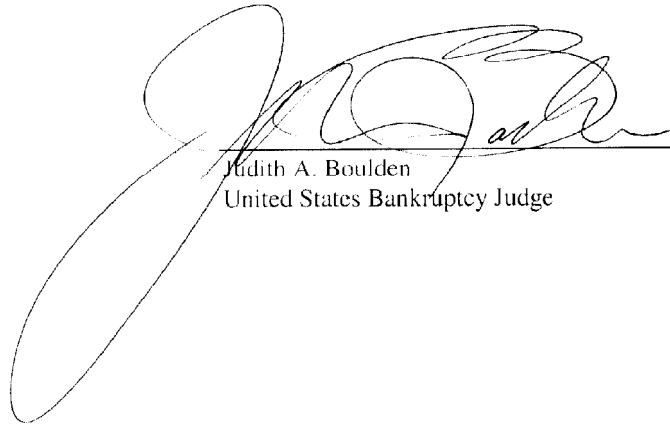
CONCLUSION

Based on the foregoing, it is hereby

ORDERED, that the motion to dismiss with prejudice filed by Errol and Julia Raven is hereby **Granted**, and it is further

ORDERED, that this case be and hereby is **Dismissed** and that such dismissal is with prejudice to refiling a voluntary bankruptcy petition under Title 11 for 180 days.

Dated this 6th day of June, 2003.



Judith A. Boulden
United States Bankruptcy Judge

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Motion to Dismiss With Prejudice on the following by depositing in the United States mail, postage prepaid, this ____ day of May, 2003.

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I hereby certify that the foregoing was forwarded to the Bankruptcy Court Noticing Center for distribution this ____ day of June, 2003.

Deputy Clerk