

**In the United States Bankruptcy Court**  
**for the Northern District of Iowa**

DENNIS L. TITUS and MARSHA K. TITUS  
Debtors.

Case No. 87-01706F  
Chapter 7

**MEMORANDUM OF DECISION AND ORDER RE: DEBTORS' MOTION TO DISMISS**

The matter before the Court is the Debtors' "Motion For Voluntary Dismissal" filed November 3, 1987.

Hearing was held on December 16, 1987 in Fort Dodge, Iowa.

Pursuant to Bankr. R. 7052, the Court makes the following Findings of Fact, Conclusions of Law and issues the following Order. This is a core proceeding under 28 U.S.C. section 157(b)(2)(A).

**FINDINGS OF FACT**

1. The Debtors, Dennis L. and Marsha K. Titus, husband and wife, filed their joint voluntary petition under Chapter 7 of Bankruptcy Code on August 7, 1987.
2. Dennis L. Titus is 48 years old. The Debtors live in Emmetsburg, Iowa. They have one minor child living at home.
3. Mr. Titus is disabled and is receiving \$400.00 per month disability income. Mrs. Titus is a bus driver.
4. The intent of the Debtors at the time of the filing of the Chapter 7 case was to discharge their debts.
5. At the time the case was filed, Mr. Titus' mother was living. His mother died unexpectedly on November 22, 1987.
6. As a result of his mother's death, Mr. Titus believes that he is entitled, from his mother's estate, to a sum of money yet to be determined but which Mr. Titus expects will be in the range of forty thousand to fifty thousand dollars. Mr. Titus believes that the entire estate of his mother will be shared by himself, brothers and a sister.
7. At the time of the filing of the Chapter 7 case, Mr. Titus was the primary beneficiary in a life insurance policy which he purchased, in which his mother was the insured. The face value of the policy is \$10,000.00. Mr. Titus disputes that the proceeds of this life insurance policy are property of the estate. This issue, however, is not before the Court.
8. Prior to the filing of the bankruptcy case, Mr. Titus sold an undivided one-fifth remainder interest in certain farm ground for approximately \$15,000.00. Mr. Titus used some of the proceeds of the sale for general living expenses and attorney fees for the bankruptcy. However, most of the money was used by him to purchase a life insurance policy, with his wife as the insured. This life insurance policy was shown as an asset of the estate with a value of \$12,800.00 (see Schedule B-2(r)). It was claimed by the Debtors as exempt.
9. The trustee, Clive Clark, represented to the Court at the hearing on the motion to dismiss that he had objected to the claim of exemption in this life insurance policy. The Court in reviewing the court file, can find no such objection to the claim of exemption.
10. The meeting of creditors in this Chapter 7 case was conducted on August 31, 1987 in Fort Dodge, Iowa.

11. In the Chapter 7 case, the Brenton Bank of Palo Alto County sought and obtained relief from the automatic stay to permit foreclosure on debtors' real estate mortgaged to it. It also successfully obtained a court order granting its motion to abandon the mortgaged property.

12. The following is a summary of the Debtors' listing of liabilities on their Chapter 7 schedules:

(a) unpaid real estate taxes	\$ 1,300.00
(b) wage claim of Tim Leuer	130.00
(c) indebtedness to "Palo Alto County Bank" (with an estimate by the Debtors that \$27,000.00 is the market value of the security as to such claim.)	45,500.00
(d) Iowa State Bank, West Bend, second mortgage on the real property	3,000.00
(e) unsecured claims in the amount of	11,695.00

13. On November 3, 1987, the Debtors filed a "Motion for Voluntary Dismissal" of their Chapter 7 case. The Debtors allege: "That with a combination of insurance proceeds, inheritance and debtors' assets, there will be adequate monies available to cover the debts sought to be discharged (sic) in the bankruptcy." (Debtors' motion, filed November 3, 1987.) Debtors further allege in their motion that the underlying purpose for the bankruptcy no longer exists and that to continue the bankruptcy would create unnecessary delay, time, expense and attorney fees.

14. "Notice of Motion for Voluntary Dismissal" was served on all creditors and parties in interest with a bar date for request to be heard set as November 24, 1987.

15. The Trustee, Clive Clark, filed his request to be heard on November 24, 1987.

16. Since service of the notice of the motion, a creditor, Ready-Mix, has brought an action against Mr. Titus in state court seeking recovery of a pre-petition debt.

17. Mr. Titus has not made any arrangement with his creditors for the payment of their debts absent bankruptcy. He has discussed the matter with the attorney for the Brenton County State Bank which holds the real estate mortgage on his home. This attorney is also apparently the attorney for his mother's estate.

18. Mr. Titus says he desires to pay his creditors in full outside the framework of a bankruptcy case.

19. Mr. Titus has been told he is uninsurable and as of December 25, 1987 his health insurance carrier will cancel his health insurance if he does not pay a delinquent premium exceeding \$1,200.00.

DISCUSSION

Debtors seek to voluntarily dismiss their bankruptcy case. Such a dismissal may be granted pursuant to 11 U.S.C. section 707.

While debtors may voluntarily choose to "file bankruptcy, they do not enjoy absolute discretion in having the case dismissed. In re Blackmon, 3 B.R. 167, 169 (Bankr. S.D. Ohio 1980); In re Klein, 39 B.R. 530, 532 (Bankr. E.D. N.Y. 1984).

Absent affirmative assent from all creditors, the debtor may not obtain dismissal of his case where dismissal would cause legal prejudice. In re Astin, 77 B.R. 537, 538 (Bankr. W.D. Va. 1987), In re Klein, 39 B.R. 530, 532 (Bankr. E.D. N.Y. 1984).

The debtors point out in this case that no creditors have requested to be heard or filed an objection to the voluntary dismissal. However, the failure to resist or to request to be heard does not constitute consent. Penick v. Tice, 732 P.2d 1211 (4th Cir. 1984).

Under 11 U.S.C. section 707, a motion to dismiss a Chapter 7 case may be granted for cause shown. However, the determination of cause rests within the sound discretion of the Court. In re Heatley, 51 B.R. 518, 519 (Bankr. E.D. Pa. 1985).

The Trustee in this case has requested to be heard, and at the hearing on the motion to dismiss, resisted the voluntary dismissal.

The debtors argue that since no other creditors have objected, the Trustee can resist the voluntary dismissal only in order to assert his right to protect his statutory fees in the bankruptcy. While there may be authority for this position, this Court believes it is the minority view. The Court believes the better view is that the Trustee has the unqualified right to resist a dismissal on any ground, at least on behalf of unsecured creditors who do not affirmatively consent to the dismissal. Penick v. Tice, 732 F.2d 1211, 1214 (4th Cir. 1984).

The Debtors say they wish to dismiss their bankruptcy case and use the proceeds of the insurance policy on Mr. Titus' mother's life and his inheritance to pay all creditors.

The Debtors further argue that there is no prejudice to creditors because if the bankruptcy case is dismissed, creditors will be free to pursue their remedies in state court.

The Court cannot agree, however, that a voluntary dismissal of this Chapter 7 case is without prejudice to creditors.

This Court recognizes the need to balance the competing interests of the Debtors and their creditors. In re Heatley, 51 B.R. 518, 519 (Bankr. E.D. Pa. 1985).

Such a balancing, however, still leads this Court to the conclusion that the prejudice to creditors from a dismissal outweighs the benefit to the Debtors.

This is not a no-asset case. The Trustee may be entitled to Mr. Titus' share of his mother's estate and may also be entitled to the proceeds of the life insurance policy owned by Mr. Titus on his mother's life.

This Court need not now decide that these items are assets of the estate. There may be a strong possibility that they are, and this strong possibility militates against dismissal, as a liquidation of these assets and disbursement by the Trustee would provide an orderly and equitable distribution of these assets among the Debtors' pre-petition creditors. In re Schwartz, 58 B.R. 923, 926 (S.D. N.Y. 1986).

It is not enough for the Debtors to say that if the case is dismissed the pre-petition creditors would retain their state court rights against the Debtors.

It is assumed by the Debtors in their motion that the life insurance proceeds and the inheritance would provide funds to pay their creditors. If so, these funds would be distributed to creditors by the case trustee under bankruptcy law. A dismissal of the case provides absolutely no assurance that any of the prepetition creditors would receive any payment from these assets. In re Banks, 35 B.R. 59, 61 (Bankr. D. Md. 1983).

The pursuit by the creditors of their state court rights could occasion delays and expense, not necessarily present in this bankruptcy case.

This Court views it as prejudicial to the pre-petition unsecured creditors, that they would be left to scramble for available assets on the dismissal of this case or left to rely on the goodwill of the Debtors to pay them voluntarily without the necessity of pursuing these Debtors in state court proceedings.

It is noted that at one other time prior to the filing of this case, these Debtors had the opportunity upon the sale of a real estate interest to pay something to their creditors. They chose instead to purchase an asset which they now claim exempt from the bankruptcy estate. While the Court makes no finding and does not consider whether this conversion of non-exempt to exempt assets on the eve of bankruptcy was done with fraudulent intent, the actions of the Debtors do indicate

to the Court that given the opportunity to prefer themselves over their creditors, they will prefer themselves.

A dismissal of this bankruptcy would give them the opportunity to do so again.

**CONCLUSIONS OF LAW**

This Court concludes that a voluntary dismissal of this Chapter 7 case by the Debtors would prejudice unsecured creditors in this bankruptcy estate. Because of such prejudice, the Debtors are not entitled to this Court's order granting their voluntary dismissal.

IT IS, THEREFORE, ORDERED that the motion to voluntarily dismiss this Chapter 7 case is denied.

Judgment shall enter accordingly.

SO ORDERED ON THIS 18th DAY OF DECEMBER, 1987.

William L. Edmonds  
Bankruptcy Judge

(file stamped 2/18/87)

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1 In re Wolfe, 12 B.R. 686 (Bankr. S.D. Ohio 1981).