Appeal History:

appealed to B.A.P. on January 27, 2000,
Affirmed by B.A.P. February 16, 2000

In the United States Bankruptcy Court

for the Northern District of Iowa

RICHARD KEITH TURPEN and
MARCIA ANN TURPEN
Debtor(s).

Bankruptcy No. 97-02407M

Chapter 7

ORDER RE: DEBTORS' MOTION TO DISMISS CASE

Debtors Richard and Marcia Turpen ask the court to dismiss their chapter 7 case. Objections to the motion were filed by the trustee, the United States trustee, and the Iowa Department of Revenue and Finance (IDRF). The United States of America on behalf of the Internal Revenue Service (IRS) filed what may be called a conditional objection, asking that its claim against debtors for pre-petition taxes be paid in full before a dismissal of the case (docket no. 277). Hearing on the motion was held August 24, 1999 in Mason City. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

Procedural Background

Richard and Marcia Turpen filed their joint chapter 13 petition on August 8, 1997. They filed a proposed plan on August 26, 1997 (docket no. 8). Confirmation of the plan was denied (docket nos. 64, 65). The United States filed a proof of claim for $142,038.00 (claim no. 22). Comprehensive Systems, Inc. filed a claim for $515,169.92 (claim no. 17). Each of these creditors alleged its claim was nondischargeable. If that were so, there were insufficient assets in the estate to provide for payment of all claims in full.

Debtors did not file another plan. They filed an objection to the claim of Comprehensive Systems, Inc. (docket no. 38) and to the claim of the United States (docket no. 71).

The United States trustee moved to convert the debtors' case to a case under chapter 7. Creditors joined in the motion. On February 2, 1999, the court granted the motion (docket no. 134). The basis of the order was the court's finding that there had been an unreasonable delay in the case that was prejudicial to creditors. Debtors made no attempt to dismiss their case prior to the court's ruling on the motion to convert.

Larry S. Eide was appointed as chapter 7 trustee. He began liquidating the estate. Debtors refused Eide's informal requests that debtors turn over to him property of the estate. Eide filed a turnover motion against the debtors (docket no. 146). I granted the turnover motion on March 11, 1999 (docket no. 154). Because he was not satisfied with debtors' response to the turnover motion, Eide sought an order holding debtors in civil contempt (docket no. 158). His motion was granted (docket nos. 184, 185). The debtors later purged themselves of contempt by satisfying Eide's demands.

Findings of Fact

The claims deadline in this case was July 28, 1999. As of the date of the hearing, 46 timely claims had been filed. Debtors' exhibit 2 shows only 34 such claims, but I base my finding of a higher number upon my judicial notice of the court's claims register as it existed on August 18, 1999. The unduplicated claims appear to total $1,017,955.76. This total is affected by settlements and payments. The debtors and Comprehensive Systems, Inc. settled their dispute, and Comprehensive's claim for $515,169.92 will be withdrawn. The United States withdrew its claim for $142,038.00; however, it tardily refiled the claim in the amount of $124,941.00 (claim no. 47). Marcia Turpen testified that Turpens have paid at least $93,492.82 of these claims (claim nos. 1, 2, 3, 5, 6, 8, 9, 11, 16, 18, 19, 28). Four of the claimants which have been paid have also filed consents to the dismissal (exhibit no. 4). Creditor Whitfield & Eddy, holding unpaid claim no. 29 for $20,507.10, has also consented to the dismissal. One of debtors' attorneys, David Morse, has filed a claim for $22,945.38 (claim no. 45). He consents to the dismissal. Marcia Turpen testified that attorney May, representing the holder of claim no. 20, also consents.

It appears that the filed, unpaid claims in the case total $392,196.03. The United States, on behalf of the Internal Revenue Service, says it is owed $6,676.54 in interest on taxes which have been paid by the debtors, and it is owed $2,250.21 in post-petition 1998 income taxes.

From the liquidation of assets, the trustee is holding $108,788.00 (Exhibit A). He projects that after further liquidation, there will be $136,164.00 available for distribution in the case after the payment of costs and expenses of sales.

Debtors amended their schedule of assets and exemptions in February 1999 to list three pension plans valued at $137,000.00. The trustee filed an objection to the claim of the plans as exempt and served notice of the objection on the Turpens. Notwithstanding the pendency of the objection, the Turpens have cashed in the three plans and spent all of the proceeds. A substantial amount was used to pay pre-petition claims. However, the debtors cannot account for all of the funds.

Discussion

Turpens move to dismiss their case. They contend the estate is solvent, save for the tardily filed fraud claim of the United States, which they dispute, and that it will be more efficient for creditors if Turpens are able to dismiss and pay them voluntarily. Turpens say that payment through the case would be slower because of litigation attendant to the case, particularly with the United States. Turpens say no creditors would be prejudiced by the dismissal, as Turpens intend to pay all unpaid creditors as soon as possible after dismissal, and even the United States would have its nonbankruptcy remedies.

Turpens also say a dismissal is in their best interests as it would enable them to control the liquidation of their assets, not only to pay creditors in full, but to retain income-producing assets as a source of support.

The trustee, the United States trustee, the United States (for its fraud claim and 1998 tax claim) and the Iowa Department of Revenue and Finance, all oppose dismissal, saying that the prejudice to them of dismissal would be the risk of Turpens' failure voluntarily to pay the claims.

It appears the debtors are asking to dismiss their case under 11 U.S.C. § 707(a). It provides that the court may dismiss a case for cause. A debtor may move to dismiss under 11 U.S.C. § 707(a), although this proposition is not free from doubt. Matter of Jennings, 31 B.R. 378, 380 (Bankr. S.D. Ohio 1983) (a debtor's voluntary dismissal controlled by equitable principles, not under § 707(a)). If a dismissal would prejudice creditors, the motion should be denied. Matter of Williams, 15 B.R. 655, 658 (E.D. Mo. 1981), aff'd, 696 F.2d 999 (8th Cir. 1982). A trustee may object to dismissal on any ground on behalf of unsecured creditors who do not affirmatively consent to a dismissal of the case. Penick v. Tice (In re Penick), 732 F.2d 1211, 1213 (4th Cir. 1984). The debtors do not specifically cite the provision of the Bankruptcy Code through which they seek dismissal. It may be that they seek dismissal under 11 U.S.C. § 305(a). If that is so, the debtors must show that "the interests of creditors and the debtor would be better served by such dismissal...." 11 U.S.C. § 305(a)(1); Eastman v. Eastman (In re Eastman), 188 B.R. 621, 624 B.A.P. 9th Cir. 1995). Under either Code section, there cannot be prejudice to creditors.

When all filed but unpaid claims are considered, it is doubtful that the estate is solvent. But I do not need to reach a resolution of this factual issue. Solvency may be a factor in considering the debtors' motion, but it is not an overriding one. The Bankruptcy Code contemplates the existence of fully administered, solvent estates. 11 U.S.C. § 726(a)(6). I consider the overriding factor to be the consideration of prejudice to creditors.

There would be prejudice to creditors if I dismissed debtors' case. Debtors promise that if the case is dismissed, they would voluntarily pay all creditors who have filed claims except for the United States, and they say that these creditors would be paid more quickly and efficiently than in this pending case. Even the United States, they argue, would have all its non-bankruptcy remedies. Creditors have only the debtors' word that they will voluntarily pay claims in full. Debtors, on the other hand, have interests opposed to the creditors. The continuation of the chapter 7 case would assure creditors of payment of their claims to the extent possible. A trustee is a fiduciary of the estate. The Turpens are merely debtors to their creditors. It would be prejudicial to these creditors, after more than two years of bankruptcy administration, to return the parties to the potential of the state law collection process.

Supportive of my decision is Turpens' use of the pension monies. While the trustee's objection to their exemption claims was pending, they withdrew the money and spent it all. Although they may have spent a substantial part of it paying pre-petition claims, they cannot account for the use of all the proceeds. Turpens appear to have the attitude that they can take any action in this case that they deem desirable, notwithstanding the rights of others. I doubt not that this attitude would continue if Turpens were enabled by dismissal to control the liquidation of their assets and the payment of creditors.

The debtors have failed to prove that dismissal is in the best interest of creditors or that it would not prejudice them. Therefore,

IT IS ORDERED that the debtors' motion to dismiss their case is denied.

SO ORDERED THIS 1st DAY OF SEPTEMBER 1999.

William L. Edmonds
U.S. Bankruptcy Judge

United States Bankruptcy Appellate Panel

FOR THE EIGHTH CIRCUIT

No. 99-6071NI

In re:

Richard Keith Turpen and
Marcia Ann Turpen,

Debtors.

Richard Keith Turpen and
Marcia Ann Turpen

Debtors - Appellants,

Appeal from the United States Bankruptcy Court for the Northern District of Iowa

v.

Larry Eide,

Trustee - Appellee,

Barbara Smart,

U.S. Trustee - Appellee,

United States of America and
Iowa Department of Revenue
and Finance

Creditors - Appellees.

Submitted: January 27, 2000

Filed: February 16, 2000

Before KOGER, DREHER, and KISHEL[(1)], Bankruptcy Judges.

DREHER, Bankruptcy Judge

Debtors Richard and Marcia Turpen ("Debtors') appeal the order of the bankruptcy court[(2)] denying their motion to dismiss their pending Chapter 7 bankruptcy case. For the reasons set forth below, we affirm.

I. Background

Debtors initially filed a joint Chapter 13 petition on August 8, 1997. They filed what purported to be a 100% plan on August 26, 1997, but confirmation of the plan was denied. Subsequently, the United States filed a proof of claim for $142,038.00. Comprehensive Systems, Inc., the Debtors' former employer, filed a claim for $515,169.92, which was related to a state court lawsuit pending at the time of the bankruptcy petition. The Debtors filed objections to each of these claims. If these claims were allowed, however, the estate would contain insufficient assets to provide for payment in full of all claims.

After more than one year, the Debtors had failed to file another plan. They assert that they delayed in order to complete litigation over the claims of the United States and Comprehensive Systems, which would allow them to propose a more meaningful plan. Because the Debtors were not making any payments during this time period, the United States Trustee moved to convert the case to Chapter 7, and several creditors joined in the motion. On February 2, 1999, the bankruptcy court granted the motion over the Debtors' objection. The court based its decision on a finding that there had been an unreasonable delay in the case that was prejudicial to the creditors.

Appellee Larry S. Eide ("Trustee") was appointed as the trustee for Debtors' Chapter 7 estate. The Trustee and the Debtors disagreed over the liquidation of the estate, which led to numerous conflicts between them. For instance, the Trustee informally sought the turnover of property of the estate, which was unsuccessful. After obtaining an order from the court for turnover, the Trustee was forced to seek an order holding the Debtors in contempt for their failure to comply with the turnover order. The Trustee also filed a motion objecting to the Debtors' claimed exemption in certain pension plans. While such motion was pending, the Debtors liquidated the plans and received approximately $137,000.00. Debtors claim to have used the money to pay prepetition creditors; however, they cannot account for line full amount they received upon liquidation.

Approximately 46 claims have been filed in the Debtors' case, totaling $1,017,955.76. Comprehensive Systems, Inc. settled its dispute with the Debtors and withdrew its $515,169.92 claim. The United States also withdrew its claim of $142,038.00 after apparently reaching a settlement with the Debtors. However, it refiled the claim in the amount of $124,941.00 after the claims bar date. After adjusting for these settlements and discounting the claims that the Debtors paid on their own accord, the filed,

unpaid claims total $392,196.03. The United States, on behalf of the IRS, asserts that it is also owed $6,676.54 in interest and $2,250.21 in postpetition taxes.

Trustee holds $108,788.00 from the liquidation of assets and projects that there will be a total of $136,164.00 for distribution. The Debtors assert that, not including the tardily filed claim of the United States, which they dispute, the estate is solvent. On this ground they sought dismissal of the Chapter 7 case, arguing that they could more quickly pay the creditors outside of bankruptcy without forcing them to wait for the outcome of litigation with the United States. Moreover, they maintain that the creditors will not be prejudiced because they plan on paying every creditor in full, with the exception of the United Stales, as soon as the case is dismissed. The Trustee, the United States Trustee, the United States, and the Iowa Department of Revenue and Finance all opposed dismissal. They assert that prejudice will result from dismissal because there is no guarantee that the Debtors will follow through on their promise to pay the creditors in full. The bankruptcy court denied the Debtors' motion to dismiss, finding that the estate was likely not solvent and that the creditors would be prejudiced by dismissal. Given Debtors' actions during the case, in particular their liquidation of the pension funds, the court gave little weight to the promise to pay the creditors outside of bankruptcy.

II. Discussion

A decision of whether to grant a motion to voluntarily dismiss a bankruptcy petition lies within the discretion of the bankruptcy judge and is reviewed only for an abuse of discretion. Peterson v. Atlas Supply Corp. (In re Atlas Supply Corp.), 857 F.2d 1061, 1063 (5th Cir. 1988); Leach v. United States (In re Leach), 130 B.R. 855, 856 (B.A.P. 9th Cir. 1991); In re McCullough, 229 BR 374, 376 (Bankr. E.D. Va. 1999) (citing In re Marks, 174 B.R. 37, 39 (ED.Pa. 1994)). An abuse of discretion will only be found if the lower court's judgment was based on clearly erroneous factual findings or erroneous legal conclusions. Barger v. Hayes County Non-Stock Co-op (In re Barger), 219 B.R. 238, 243 (B.A.P. 8th Cir. 1998) (citing Mathenia v. Delo, 99 F.3d 1476, 1480 (8th Cir. 1996)).

Bankruptcy Code § 707(a) provides:

> The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including -
>
> > (1) unreasonable delay by file debtor that is prejudicial to creditors;
> > (2) nonpayment of any fees and charges required under chapter 123 of title 28; and
> > (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

11 U.S.C. § 707(a) (1994). Pursuant to this section, the court can only dismiss a Chapter 7 case after notice and hearing and only for cause. In re Williams, 15 B.R. 655, 657 (E.D. Mo. 1981); In re Haney, 241 B.R. 430, 432 (Bankr. E.D. Ark. 1999). Although this provision does not expressly refer to a

voluntary dismissal by the debtor, courts commonly conclude that it does apply to such a motion. Williams, 15 B.R. at 658; In re Watkins, 229 B.R. 907, 909 (Bankr. N.D. Ill. 1999); In re Eichelberger, 225 B.R. 437, 439 (Bankr. E.D. Mo. 1998).

Unlike under Chapter 13, the debtor has no absolute right to dismissal of a Chapter 7 case. In re Klein, 39 B.R. 530, 532 (Bankr. E.D.N.Y. 1984)("While a debtor may voluntarily choose to place himself in bankruptcy, he does not enjoy the same discretion to withdraw his case once it has been commenced."); Leach v. United States (In re Leach), 130 B.R. 855,857 n.5 (B.A.P. 9th Cir. 1991); Haney, 241 B.R. at 432. In order to succeed in a motion to dismiss, the debtor must make a showing of cause and demonstrate why dismissal is justified. Haney, 241 B.R. at 432; Watkins, 229 B.R. at 908; In re Harker, 181 B.R. 326, 328 (Bankr. E.D. Tenn. 1995). Even if the debtor can show cause, the court should deny the motion if there is any showing of prejudice to creditors. Haney, 241 B.R. at 432; Watkins, 229 B.R. at 909; Eichelberger, 225 B.R. at 439; Harker, 181 B.R. at 328. Courts generally consider the following factors when ruling on a debtor's motion to dismiss: (1) whether all of the creditors have consented; (2) whether the debtor is acting in good faith; (3) whether dismissal would result in an 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. See, e.g., Watkins, 229 B.R. at 909; Eichelberger, 225 B.R. at 439; Harker, 181 B.R. at 328; Klein, 39 B.R. 532-33; In re Pagnotta, 22 B.R. 521, 522 (Bankr. D. Md. 1982).

Section707(a) provides three illustrative examples of cause. 11 U.S.C. § 707(a). However, these examples are not exclusive; therefore, other grounds constituting "cause" may justify dismissal. Leach, 130 B.R. at 857 n.5; Watkins, 229 B.R. at 908. In this case, the Debtors have made no showing of cause. They assert that the estate is solvent, so they should be allowed to pay their creditors outside of bankruptcy. The first problem with this argument is that the findings of the bankruptcy court indicate that the estate may not be solvent. However, even if the estate is solvent, the ability of the Debtors to repay their debts does not constitute adequate cause for dismissal. Williams, 15 B.R. at 655 (citing H.R. Rep. No. 95-595, at 380 (1977); S. Rep. No. 95-989, at 94 (1978)); Kirby v. Spatz (In re Spatz), 221 B.R. 992, 994 (Bankr. M.D. Fla. 1998) ("It is well established and supported by Legislative History that the fact that a debtor is willing and able to pay his debts outside of bankruptcy does not constitute adequate cause for dismissal under section 707(a).").

Furthermore, even if the Debtors could make a showing of cause, the court cannot dismiss the case if there is a showing of prejudice to the creditors. Haney, 241 B.R. at 432; Watkins, 229 B.R. at 909; Klein, 39 B.R. at 532. Creditors can incur prejudice if the motion to dismiss is brought after the passage of a considerable amount of time and they have been forestalled from collecting the amounts owed to them. Watkins, 229 B.R. at 909 (quoting In re Schwartz, 58 B.R. 923, 925-26 (Bankr. SD.N.Y. 1986)). In the present case, the automatic stay has prevented creditors from collecting their debts for more than two years. To send them back to their state court remedies at this point would constitute prejudice. See Klein, 39 B.R. at 532-33.

Moreover, dismissal of a case after it has appeared that the debtors failed to account honestly for their assets should not be permitted because such a failure indicates the likelihood of further questionable practices to the detriment of creditors. Watkins, 229 B.R. at 909 (quoting In re Schwartz, 58 B.R. 923, 925-26 (Bankr. S.D.N.Y. 1986)). In this case the Debtors sold assets that were the subject of a dispute with the Trustee and used a large portion of the proceeds to pay prepetition creditors themselves. This action places the honesty of the Debtors in serious doubt, not only because of their inability to fully account for the proceeds of the sale, but because they seem to believe that they can choose which creditors will be paid first even while in bankruptcy. Their actions throughout their bankruptcy

strongly suggest that such practices will continue outside of bankruptcy to the prejudice of some or all of the creditors. See Watkins, 229 B.R. at 909 (quoting In re Schwartz, 58 B.R. 923, 925-26 (Bankr. S.D.N.Y. 1986)). Indeed, the Debtors stated that they did not know which creditors they would pay first if it turned out that they did not have enough money to pay them all in full. In short, by the time Debtors brought this motion, they had lost all credibility with the court, leaving the court with ample evidence to conclude that dismissal would be prejudicial to creditors.

CONCLUSION

The Debtors have not established any adequate cause for dismissal, and there has been an ample showing of prejudice to the creditors. Accordingly, the bankruptcy court did not abuse its discretion, and the decision of the bankruptcy court is AFFIRMED.

A true copy.

Attest:

CLERK, U.S. BANKRUPTCY APPELLATE PANEL
FOR THE EIGHTH CIRCUIT

1. The Honorable Gregory F. Kishel, United States Bankruptcy Judge for the District of Minnesota, sitting by designation.

2. The Honorable William L. Edmonds, Chief Judge, United States Bankruptcy Court for the Northern District of Iowa.