UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

IN RE:	)	
	)	
TAMMY FERRELL BROGDON,	)	Case No. : 01-80488
	)	
Debtor(s).	)	
	)	

ORDER

This matter came on for hearing before the undersigned Bankruptcy Judge upon the Motion by Trustee to Dismiss Case with Prejudice for a period of one year. Appearing before the Court were Edward Boltz, counsel for the Debtor, and Richard M. Hutson, Chapter 13 Trustee. The Court, after hearing the testimony of the witnesses and reviewing the exhibits presented, for the reasons stated below grants the motion to dismiss the case with prejudice. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and the court has jurisdiction to enter a final order.

BACKGROUND

This is the Debtor's second filing. A prior case was filed on October 30, 1998, and confirmed by the Court on January 13, 1999. The Debtor failed to make the required plan payments and in July 2000, the Chapter 13 Trustee moved to dismiss the case, stating that the Debtor had failed to make plan payments since April 2000. The matter was scheduled for hearing on September 19, 2000. The Debtor filed a pleading in opposition to the motion to dismiss stating that she would increase her plan payments by $107.00 per month commencing with the month of August 2000 and that she would agree that her case would be automatically

dismissed without further notice, hearing or order if she failed to tender any extra payment within 30 days from the date it came due. Based upon the representations of the Debtor, the Court denied the motion to dismiss and ordered that the Debtor make her required monthly payments by the 19th day of each month beginning with September 19, 2000, and in the event the Debtor shall fail to make any payments within 30 days of the date they become due, the standing trustee shall notify the Court and an automatic dismissal shall be entered without further hearing. Due to the Debtor's failure to make timely payments, the case was dismissed on October 27, 2000.

On or about January 12, 2001, the Debtor purchased a 1996 Toyota Camry from Durham's Auto Mart for $11,324.85. The Debtor paid $3,685.85 in cash and the balance of the purchase price was financed by Durham's Auto Mart in the amount of $7,800.00. To secure the amount advanced, the Debtor granted a security interest in the vehicle to Durham's Auto Mart. On February 12, 2001, less than one month after the Debtor purchased the vehicle, she filed her second Chapter 13 petition. The Debtor did not list the 1996 Toyota Camry as property on her schedules. On Schedule B of her petition, the Debtor indicated that she did not own an automobile or other vehicle. The Debtor did not list Durham's Auto Mart as a creditor on her Petition. An Order Confirming Plan was entered on May 3, 2001. The Plan does not include payment to Durham's Auto Mart and does not acknowledge the claim or interest.

At the hearing on this matter, Mr. Durham testified that the Debtor purchased a 1996 Toyota Camry from Durham Auto Mart in January 2001. At the time of purchase, the Debtor brought a folder with copies of all necessary documentation to apply for financing, including a copy of a motion and order which stated that the Debtor had successfully made all payments under the first Chapter 13 plan and granting the Debtor a discharge dated September 25, 2000. Mr. Durham relied on that document during the process of approving the Debtor's financing for

the vehicle. After several timely payments, the Debtor missed several payments. Durham's Auto Mart was not notified of the second bankruptcy filing until it attempted to repossess the vehicle.

On June 27, 2001, Durham's Auto Mart filed a proof of claim in the amount of $9,199.80. On July 25, 2001, during the course of communications regarding a possible preference issue, Adrian Durham (hereinafter "Mr. Durham"), owner of Durham's Auto Mart, furnished the Trustee with a copy of an Order granting the Debtor a discharge in the prior Chapter 13 case. All parties stipulate that the document is a forgery. Counsel for the Debtor argued that Durham created the forged document in as much as his lien might be considered a preference. Counsel's argument is flawed. As a general rule, a lien will pass through the bankruptcy unaffected unless the plan "provides for" the interest. 11 U.S.C. § 1327(c). "A plan "provides for" a claim or interest when it acknowledges the claim or interest and makes explicit provisions for its treatment." Cen-Pen, 58 F.3d 89, 94 (4th Cir.) (citing, In re Work, 58 B.R. 868, 871 (Bankr. D. Or. 1986)). The Debtor failed to acknowledge or provide for the treatment of the Durham Auto claim. On August 2, the Trustee filed a motion to dismiss with prejudice for one year for cause. The Debtor was not present at the hearing on this matter.

ANALYSIS

Pursuant to 11 U.S.C. § 1307(c) the court, after notice and hearing, may dismiss a case under this chapter for "cause." Section 1307(c) sets out ten examples of cause but this list is only illustrative and is not exclusive. In re Pagnac, 228 B.R. 219 (D. Minn. 1998). One of the most frequent reasons to dismiss a Chapter 13 case is upon a finding of bad faith. In re Leavitt, 171 F.3d 1219 (9th Cir. 1999); In re Love, 957 F.2d 1350 (7th Cir. 1992). The party moving for dismissal has the burden of proof to demonstrate cause. In re Hilley, 91 F.3d 491 (3rd Cir. 1996).

In the matter before the Court, the Trustee has moved for dismissal with prejudice so as to bar the Debtor from refiling for one year. Courts recognize that in some circumstances where bad faith is found "more than mere dismissal is appropriate." In re Covino, 245 B.R. 162 (Bankr. D. Idaho 2000); In re Tomlin, 105 F.3d 933 (4th Cir. 1997) (only if a debtor engages in egregious behavior that demonstrates bad faith and prejudices creditors; for example concealing information from the court. . . will the bankruptcy court forever bar the debtor from seeking to discharge existing debts."); In re Inmon, 208 B.R. 455 (bad faith sufficiently egregious to warrant dismissal of case with prejudice); In re Gress, 275 B.R. 563 (Bankr. D. Mont. 2000) (bad faith based on egregious behavior can justify dismissal of a Chapter 13 with prejudice); In re Penny, 243 B.R. 720 (Bankr. W.D. Ark. 2000) (cause to dismiss focuses on the totality of the circumstances specifically (1) whether the debtor stated her debts and expenses accurately (2) whether the debtor has made any fraudulent representation or misleading the bankruptcy court, or whether the debtor has unfairly manipulated the bankruptcy code). The Penny case is quite similar to the case before the Court. In that case a document was altered to make it appear as if a company had filed Chapter 11. The court found that "in the absence of any explanation to the contrary, despite ample opportunity afforded to the debtor, the court must conclude that Mr. Penny himself was responsible for this alteration." Penny at 729. The court found that Penny has committed fraud on the Bankruptcy Court and that such conduct demonstrates "unmistakable manifestations of bad faith." Id. (citing In re LaMaire, 898 F.2d 1346, 1353n8 (8th Cir. 1990)). The court in Penny dismissed the case with a two-year bar from refiling.

The Third Circuit decision in Leavitt sets out the criteria for dismissal with prejudice. It should only occur after an opportunity for a hearing and a finding that the debtors conduct is egregious. The test involves the application of the "totality of the circumstances." The

bankruptcy court should consider the following factors:

(1) whether the debtor "misrepresented facts in his [petition or] plan, unfairly manipulated the Bankruptcy Code, or otherwise [filed] his Chapter 13 [petition or] plan in an inequitable manner," Eisen v. Curry (In re Eisen), 14 F.3d 469, 470 (9th Cir. 1994)(citing In re Goeb, 675 F.2d 1362, 1391 (9th Cir. 1982));

(2) "the debtor's history of filings and dismissals," Id. (citing In re Nash, 765 F.2d 1410, 1415 (9th Cir. 1985));

(3) whether "the debtor only intended to defeat state court litigation," Id. (citing In re Chinichian, 784 F.2d 1440, 1445-46 (9th Cir. 1986)); and

(4) whether egregious behavior is present, Tomlin, 105 F.3d 933, 937 (4th Cir. 1997); In re Bradley, 38 B.R. 425, 432 (Bankr. C.D.Cal 1984).

Leavitt, 171 F.3d at 1224.

In the present case, the Court finds that the totality of the circumstances constitutes grounds to dismiss the Debtor's Chapter 13 case. It is undisputed that the document dated September 25, 2000 which appears to discharge the Debtor is not an order that was entered by this Court. The Court finds the testimony of Mr. Durham very credible. The Court finds as fact that Mr. Durham received the fictious order of discharge from the Debtor, and that the Debtor misrepresented the status of her first bankruptcy filing when she applied for financing from Durham's Auto Mart.

Furthermore, the Debtor misrepresented facts in her petition by failing to list her ownership interest in a vehicle purchased just one month prior to filing and further failing to list the creditor that held a security interest in that vehicle. The schedules were misleading and inaccurate. The Debtor's plan was confirmed with no provision for a creditor owed in excess of

$9,000 and the Debtor did not amend her schedules or propose an amended plan after Durham filed a Proof of Claim. Further, the Debtor failed to appear at the hearing to provide any testimony regarding the allegations made in the Trustee's motions. The Debtor has not been forthcoming with the Court or her creditors. The Court concludes that the above conduct is sufficiently egregious to justify dismissal.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, that the Trustee's motion to dismiss this case with prejudice to bar refiling for a period of one year is hereby granted.

This the 7 day of September, 2001.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge