

SO ORDERED.

SIGNED this 8th day of December, 2014.



Lena Mansori James

LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION**

IN RE:)
RICKEY McKINNEY) Case No. 14-81196
MARY S. McKINNEY)
)
Debtors.) Chapter 13
_____)

ORDER DISMISSING CASE WITH PREJUDICE

THIS MATTER came before the Court for hearing on November 25, 2014, after due and proper notice, upon the motion (the “Motion”) of the Bankruptcy Administrator (the “BA”) to dismiss this case with prejudice for a bad faith filing, under 11 U.S.C. § 1307, with a one-year bar from refiling a Chapter 13 petition. In addition, the BA requested sanctions for the Debtors or Debtors’ counsel in the amount of \$250.00 for failure to comply with the Court’s order of May 15, 2014 (the “Order”). William Miller, the Bankruptcy Administrator, and Benjamin Lovell, counsel for the Chapter 13 Trustee, appeared at the hearing. Rickey and Mary McKinney (the “Debtors”) and Joe Weinberger, Jr. (“Mr. Weinberger”), counsel for the Debtors, were not present.

The Debtors have filed four Chapter 13 petitions in the last five years as follows:

- (1) On October 5, 2009, the Debtors, represented by Mr. Weinberger, filed a Chapter 13 petition (Case No. 09-81753). The case was dismissed as to the male Debtor on November 25, 2009 (less than two months after filing) and as to the female Debtor on May 7, 2010.
- (2) The female Debtor filed a Chapter 13 petition (Case No. 10-80982) less than a month after the dismissal of her first case, again represented by Mr. Weinberger. This case was dismissed on October 14, 2010.
- (3) On February 29, 2012 the Debtors filed a third Chapter 13 petition (Case No. 12-80294) represented by The Law Offices of John T. Orcutt, P.C. This case was dismissed on May 15, 2014 with prejudice for 180 days as to the refiling of a Chapter 13 Petition for relief. The 180-day bar period expired on November 10, 2014.
- (4) On October 28, 2014, within the 180-day bar period imposed by order in the previous case, Mr. Weinberger filed this fourth Chapter 13 case on behalf of the Debtors (Case No. 14-81196).

The BA now requests that the case be dismissed with a one-year bar on refiling. The BA also requests that the Court sanction the Debtors or Mr. Weinberger in the amount of \$250.00 for failure to comply with the May 15, 2014 Order barring refiling for 180 days.

As a preliminary matter, the Court finds that this case must be dismissed. The Debtors filed this Chapter 13 petition for relief in violation of this Court's Order dated May 15, 2014. Section 349 of the Bankruptcy Code provides that dismissal of a case does not prejudice the debtor as to subsequent petitions unless otherwise ordered by the court. 11 U.S.C. § 349(a).¹

¹ 11 U.S.C. § 349(a) provides:

Here, however, the Court finds the Debtors' filing during the 180-day period to be a willful violation of an Order of the Court. Consequently, 11 U.S.C. § 109(g)² is triggered, and the Debtors will be dismissed with prejudice so as to bar them from filing another Chapter 13 petition within 180 days from the entry of this order.

In the Motion, the Bankruptcy Administrator requests that the Court bar the Debtors from refiling another petition for a period of one year. There is precedent in the Middle District of North Carolina for a bar of greater than 180 days under certain circumstances. The BA specifically relies on the case of *In re Brogden*, 2001 WL 1699687 (Bankr. M.D.N.C. 2001 Sept. 7, 2001), in which the debtor made material misrepresentations in her schedules and to a creditor regarding her first bankruptcy filing. The debtor did not attend the hearing to refute the Trustee's allegations, and the case was dismissed with prejudice with a bar prohibiting the debtor from refiling within one year. *Id.* In a more recent case, *In re Carpenter*, 2013 WL 1194865 (Bankr. M.D.N.C. March 22, 2013), the debtor filed four petitions in fewer than nine months. In imposing a one-year bar on filing another bankruptcy case, the court determined that the debtor "failed to make meaningful attempts to participate in the bankruptcy process" in his four cases. *Id. at* *2. In the present case, the Court finds that the Debtors' conduct in filing their latest petition justifies an additional 180-day bar from refiling, but that the record presently before the Court does not rise to a level that warrants a one-year bar or monetary sanction.

Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

² 11 U.S.C. § 109(g) provides:

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 prosecution of the case; or
- (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

In addition, the Bankruptcy Administrator requests that the Court sanction Mr. Weinberger in the amount of \$250.00 for failure to comply with the Order of May 15, 2014. As previously noted, neither the Debtors nor Mr. Weinberger attended the hearing on November 25, 2014. The BA represented to the court that Mr. Weinberger had been in contact and indicated that he had no explanation for his failure to investigate whether the Debtors had a prior dismissal with prejudice. The Court will not impose a monetary sanction on Mr. Weinberger at this time, as this appears to be an isolated incident in Mr. Weinberger's representation of clients before the Court. The Court, however, admonishes Mr. Weinberger not only to check PACER for previous cases but to review the dockets carefully in situations of repeat filings. Failure to check for previous filings has resulted in strong consequences for attorneys of repeat bankruptcy petition filers. *See In re Alessandro*, 2010 WL 3522255 (Bankr. S.D.N.Y. Sept. 7, 2010) (ordering disgorgement of the attorney's fee of \$4,000.00 for failure to conduct a PACER search and for lack of reasonable inquiry subsequent to the filing of the petition under the time pressure of foreclosure); *In re Oliver*, 323 B.R. 769 (Bankr. M.D. Ala. 2005) (imposing a monetary sanction of \$500.00 for the attorney's failure to check PACER and for the filing of a seventh bankruptcy case of the debtor in violation of the injunction); *In re Bailey*, 321 B.R. 169 (Bankr. E.D. Pa. 2005) (imposing a monetary sanction of \$1,000.00 on an attorney who filed a petition in violation of a bar and a non-monetary sanction requiring the attorney to conduct a PACER search of a potential debtor's complete bankruptcy history, reviewing not only the dockets but the orders and stipulations entered therein that are relevant to the individual's ability to refile a case in good faith). A pattern of failure to check PACER for previous filings and to review the dockets of previous cases will warrant additional sanctions.

Based on the foregoing, it is ORDERED that the Debtors' case is dismissed **WITH PREJUDICE FOR 180 DAYS** so as to bar the Debtors from seeking relief under Chapter 13 of the Bankruptcy Code or otherwise seeking relief under Chapter 13 for a period of 180 days from the date of dismissal.

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