

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

In re:)	
)	
JOHNETTA RUTH ALSTON,)	Case No. 08-80687
)	
)	
Debtor.)	
_____)	

ORDER AND OPINION

THIS MATTER came on before the Court on July 17, 2008, after due and proper notice, upon the Motion by Carol A. Smith to Dismiss Case. Carena Brantley Lemons appeared on behalf of Johnetta Ruth Alston (the “Debtor”), Kurt Douglas Weaver appeared on behalf of Carol A. Smith (the “Creditor”), Benjamin E. Lovell appeared as staff attorney on behalf of the Chapter 13 Trustee, and Richard M. Hutson, II appeared as the Chapter 13 Trustee. After considering the evidence on record, the testimony, and the arguments of counsel, this Court makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy:

FINDING OF FACTS

The Debtor filed a voluntary Chapter 13 petition on May 7, 2008 (the “Petition”). The Debtor filed a skeleton petition, as the Petition did not include any of the Debtor’s schedules. Due to the filing of an incomplete Petition, the clerk’s office set a deadline of May 22, 2008 for the Debtor to file the remaining sections of the Petition. The Debtor did not file the remaining Petition materials until June 12, 2008.

On June 4, 2008, the Creditor filed a Motion to Dismiss the Debtor’s case pursuant to 11 U.S.C. § 1307(c) (the “Motion to Dismiss”). The Creditor argued that the Debtor filed the

Petition in bad faith and sought dismissal of the Debtor's case with prejudice pursuant to 11 U.S.C. §1307(c) . In support of the Motion to Dismiss, the Creditor alleged that the following factors showed that the Debtor filed the Petition in bad faith: (1) the Debtor filed solely to avoid the execution of a state court writ, (2) the Debtor failed to disclose her two prior Chapter 13 filings, (3) the Debtor failed to list the Creditor on the Petition, (4) the Debtor did not list her interest in the corporation, JRuth, Inc., (5) the Debtor listed a homestead exemption in investment property located at 409 East End Avenue, Durham, North Carolina, and (6) the Debtor has not made an honest effort to repay the Creditor.

At the hearing, the Court was presented with evidence, arguments from counsel, and testimony from the Debtor. The Debtor is the director of a non-profit organization called JRuth, Inc., ("JRuth"). According to the JRuth website, JRuth is an organization that assists and advocates for the homeless, transient, and ex-offender communities. The Debtor is not a member of the board of directors or the board of advisors for JRuth. The Creditor is a Vietnam veteran, who qualified for the services of JRuth. As part of the services provided by JRuth, the Debtor testified that she helped the Creditor secure housing arrangements; subsequently, the Creditor was evicted due to non-payment of rent. After the eviction, the Debtor obtained possession of the Creditor's property. However, after the Creditor failed to collect her property, the Debtor testified that she donated the items to a rescue mission.

The Creditor filed a small claims action and received an award and judgment of \$5,000.00 on January 12, 2006. Due to the failure of the Debtor to pay the judgment amount to the Creditor, the Creditor pursued her state court remedies and received a writ of execution. On May 7, 2008, the Durham County Sheriff's Office scheduled an auction of the Debtor's real property, 409 East End Avenue, Durham, North Carolina to satisfy the judgment. On the same

day, the Debtor filed the Petition seeking protection under the Bankruptcy Code.

The Debtor has filed Chapter 13 in two prior instances. The Debtor filed her first Chapter 13 petition on July 10, 2000, case number 00-81737, in the U.S. Bankruptcy Court for the Middle District of North Carolina (the “First Case”). The Debtor testified that she filed the First Case to prevent foreclosure on her real properties located at 408 and 409 East End Avenue, Durham, North Carolina. A chapter 13 plan was confirmed on September 28, 2000. The Debtor testified that she was laid off from her employer, Verizon, in March 2003, which led to the dismissal of the First Case. The First Case was dismissed on September 9, 2003.¹ The Debtor filed her second Chapter 13 petition on December 17, 2003, case number 03-84206, in the U.S. Bankruptcy Court for the Middle District of North Carolina. The Debtor testified that she was unemployed when she filed the Second Case and filed to save her home. The Creditor presented exhibits showing that the Debtor filed the Second Case on or about the date of the foreclosure sales of the Debtor’s properties at 408 and 409 East End Avenue, Durham, North Carolina. A chapter 13 plan was confirmed on March 11, 2004. The Second Case was dismissed with prejudice on March 29, 2004.² The dismissal order for the Second Case provided that the Debtor would be barred from filing a bankruptcy petition for a period of one hundred and eighty (180) days.

Four years later, the Debtor filed this Petition. The Debtor did not list any of her prior bankruptcy filings on the Petition. As with the prior filings, the Debtor testified that she filed the

¹ The Trustee’s motion sought dismissal of the Debtor’s case due to the Debtor’s failure to make plan payments.

² The Trustee’s motion sought dismissal of the Debtor’s case due to the Debtor’s failure to appear at a scheduled §341 meeting on January 23, 2004 and for failure of the Debtor to make the first payment into the plan.

Petition to save her property at 409 East End Avenue, Durham, North Carolina. The Trustee stated that the Debtor owes approximately \$19,000.00 in mortgage arrearage on the real property at 409 East End Avenue, Durham, North Carolina.

DISCUSSION

11 U.S.C. § 1307(c) provides that “[e]xcept as provided in subsection (e) of this section, on request of party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, *for cause*, including -

- (1) unreasonable delay by the debtor that is prejudicial to creditors;
- (2) nonpayment of any fees and charges required under chapter 123 of title 28;
- (3) failure to file a plan timely under section 1321 of this title;
- (4) failure to commence making timely payments under section 1326 of this title;
- (5) denial of confirmation of a plan under section 1325 of this title and denial or a request made for additional time for filing another plan or a modification of a plan;
- (6) material default by the debtor with respect to a term of a confirmed plan;
- (7) revocation of the order of confirmation under section 1330 of this title, and denial of confirmation of a modified plan under section 1329 of this title;
- (8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan;
- (9) only on request of the United States trustee, failure of the debtor 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;

(10) only on request of the United States trustee, failure to timely file the information required by paragraph (2) of section 521; or

(11) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

11 U.S.C. § 1307(c) (2005) (emphasis added). While not specifically enumerated in § 1307(c), a bankruptcy case filed in bad faith may be dismissed or converted to chapter 7 “for cause.” *E.g.*, *In re Myers*, 491 F.3d 120, 125 (3rd Cir. 2007); *In re Kestell*, 99 F.3d 146, 148 (4th Cir. 1996). *See also* 8 COLLIER ON BANKRUPTCY § 1307.04[10] at 1307-19 (15th ed. revised) (stating that “[m]ost courts have held that lack of good faith can be cause for dismissal or conversion of a chapter 13 case.”). The party seeking the dismissal has the burden of proof to show the case was filed in bad faith. *Matter of Love*, 957 F.2d 1350, 1355 (7th Cir. 1992). Dismissal is a harsh remedy so courts should be more hesitant to dismiss a petition under § 1307(c) for lack of good faith than to reject a plan under § 1325(a) for lack of good faith. *Id.* at 1356.

Bad faith is not defined in the Bankruptcy Code, so to determine whether a debtor filed the bankruptcy case in bad faith, the courts look to the totality of the circumstances. *Matter of Love*, 957 F.2d at 1355; *In re Carr*, 344 B.R. 776, 780 (Bankr N.D.W. Va. 2006). In applying the totality of the circumstances approach under § 1307(c), courts have looked at a non-exhaustive list of factors to determine bad faith including: the nature of the debt, whether the debt would be non-dischargeable in a chapter 7 proceeding, the timing of the petition, how the debt arose, the debtor’s motivation in filing the petition, the debtor’s treatment of the creditors both before and after the petition was filed, the debtor’s past bankruptcy filings, whether the debtor has been forth coming with the bankruptcy court and the creditors, whether the debtor only intended to defeat state court litigation with no successful chance of reorganization, and

whether egregious behavior is present. *E.g.*, *In re Myers*, 491 F.3d at 125; *Matter of Love*, 957 F.2d at 1357; *In re McFadden*, 383 B.R. 386, 389 (Bankr. D.S.C. 2008); *In re Carr*, 344 B.R. at 780. The focus on the totality of the circumstances inquiry is fundamental fairness, *Matter of Love*, 957 F.2d at 1357, as the list of factors are illustrative, not exclusive. *See In re McFadden*, 383 B.R. at 389 (stating that the “determination of good faith is a fact intensive inquiry”).

Applying the totality of circumstances approach, the Debtor’s conduct does not rise to the level of bad faith. The fact that the Second Case was filed while the Debtor received unemployment is not enough to show bad faith. The Debtor did fail to list the Creditor on the Petition; however, the Petition was subsequently amended and the Creditor has not asserted that the omission prejudiced her in any way. *See In re Luxford*, 368 B.R. 63, 71 (Bankr. D. Mont. 2007) (showing that debtors have a right to amend their schedules under F.R.B.P. 1009(a), however in this case, the court found that the debtor’s failure to amend their schedules until four months after the Creditor’s inquiry weighed in favor of a bad faith filing); *See also In re Eisen*, 14 F.3d 469, 470-71 (9th Cir. 1994) (finding bad faith where the debtor entered into a contract to sell a duplex to the creditor and failed to execute the contract; subsequently the debtor filed bankruptcy to avoid selling the duplex through state court enforcement; further the debtor did not disclose his relationship with the owner of the complex or his interest in the duplex). This is the Debtor’s third chapter 13 filing. *See In re Finizie*, 184 B.R. 415, 419 (Bankr. D. Conn. 1995) (showing support for the conclusion of bad faith when the debtor filed three bankruptcy cases on the eve of foreclosure and the debtor was still unable to propose a viable plan for satisfying the creditor’s tax claim). However, both of the prior bankruptcies were filed before the Creditor had a claim against the Debtor, and the Debtor has not had a bankruptcy pending before a court in the past four years. *See In re Craighead*, 377 B.R. 648, 655 (N.D. Cal. 2007) (stating that the

“[c]ourt can determine that a debtor filed a case in bad faith based on a pattern of conduct, and may impute bad faith from the timing and circumstances of the filings,” and the court found egregious behavior when the debtor filed six bankruptcy cases in the past five years, there had not been a confirmed plan, five of the cases were skeletal filings, and the debtor listed a false interest in the real property). The Debtor showed a likelihood of successful reorganization in the prior cases because a plan was confirmed in both cases. *See In re Myers*, 491 F.3d at 125 (stating that the “Bankruptcy Court may reasonably find that bad faith exists ‘where the purpose of the bankruptcy filing is to defeat state court litigation without a reorganization purpose.’”); *In re Virden*, 279 B.R. 401, 410 (Bankr. D. Mass. 2002) (finding bad faith when the Debtor had only one debt and filed chapter 13 to avoid payment of that debt when in fact the court found that the Debtor had the resources to satisfy the debt). Furthermore, the evidence does not support a finding that the Debtor filed the Petition simply to defeat state court litigation. The Debtor filed the Petition not only to stop the Creditor’s writ of execution, but also to cure a substantial arrearage on her first mortgage. Dismissing the case would hinder the mortgage creditor’s opportunity to be repaid in full through the Debtor’s proposed Chapter 13 plan. Lastly, the Court does not find that the Debtor engaged in egregious behavior. *See In re Brogdon*, 2001 WL 1699687, at *3 (Bankr. M.D.N.C. Sept. 7, 2001) (finding bad faith when the debtor prepared fake court orders, filed misleading and inaccurate schedules, and failed to be forthcoming with the court, among other things).

Although the Debtor’s conduct may have not been ideal, the Creditor has failed to meet the burden of showing the Debtor filed the Petition in bad faith. Therefore, considering the totality of the circumstances, the Court will DENY the Creditor’s motion to dismiss. Since, the Creditor has not met her burden under § 1307(c), the Court need not address the Creditor’s

request to dismiss the Debtor's case with prejudice.

CONCLUSION

Based upon the foregoing, the Court finds that the Debtor did not file the Petition in bad faith, and the Creditor's motion to dismiss is DENIED.

IT IS SO ORDERED.

SERVICE LIST

Johnetta Ruth Alston
Debtor

Carena Brantley Lemons
Attorney for Debtor

Kurt Douglas Weaver
Attorney for Carol A. Smith

Richard M. Hutson
Trustee