UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
www.flmb.uscourts.gov

In re: Case No. 9:18-bk-04099-FMD
Chapter 13

William Joseph Klisivitch,

Debtor.
_____/

ORDER DENYING DEBTOR'S AMENDED MOTION FOR RECONSIDERATION OF ORDER GRANTING MOTION TO DISMISS

THIS CASE came on for consideration without a hearing of *Debtor's Amended Motion to Reconsider Order Granting Creditor, Colette Panebianco's, Motion to Dismiss or Convert Case Pursuant to 11 U.S.C. § 1307(c)* (Doc. No. 33) (the "Motion for Reconsideration") and the response filed by Creditor Colette Panebianco ("Creditor") (Doc. No. 34) (the "Response").

Debtor contends that this Court erred in granting Creditor's motion to dismiss his Chapter 13 case without an evidentiary hearing. In response, Creditor argues that Debtor seeks to relitigate the issues and he had a full and fair opportunity to be heard, including the opportunity to submit evidence prior to the Court's ruling. Having considered the Motion for Reconsideration, the Response, and applicable law, the Court finds that an evidentiary hearing on Creditor's motion to dismiss was not warranted. Therefore, the Court will deny the Motion for Reconsideration.

I. FACTS

On May 18, 2018, Debtor filed his voluntary Chapter 13 petition.[1] Debtor's Chapter 13 plan[2] (the "Plan") proposed for Debtor to make payments to the Chapter 13 Trustee of $722.00 per month. The Trustee was to distribute payments under the Plan to pay Debtor's attorney's fees of $3,000.00, the Chapter 13 trustee's fee (currently 10% of each payment received from a debtor), and, although not stated expressly, to unsecured creditors.

Creditor (Debtor's former spouse) moved to dismiss or convert Debtor's case under 11 U.S.C. § 1307(c) (the "Motion to Dismiss").[3] Creditor argued that Debtor did not file his Chapter 13 petition in good faith because his motivation in filing the case was to avoid paying her for amounts she is owed in connection with the dissolution of the parties' marriage. Creditor's claims against Debtor include a money judgment of over $250,000.00 and Debtor's failure to pay certain life insurance premiums.

Creditor contended that Debtor had no substantial reason to file a Chapter 13 case, other than the ability to discharge her claims in a Chapter 13;[4] that Creditor's claim constituted nearly 80% of Debtor's scheduled indebtedness; that Debtor's statement of financial affairs did not reflect collection activity by other creditors; that the timing of the bankruptcy filing was suspect in that it was filed after Debtor failed to appear in New York state court to respond to Creditor's motion for contempt; that Debtor's schedules did not reflect the need to protect assets; that Debtor continued to maintain a luxurious lifestyle, including owning a sailboat; and that Debtor's schedules and testimony at his creditors' meeting revealed that he had sold assets without accounting for the proceeds.[5] Creditor also alleged that Debtor had tried to avoid the payment of obligations he owed to his former spouse from a prior marriage by filing a bankruptcy case in 2004 in the United States Bankruptcy Court for the Eastern District of New York (the "Prior Bankruptcy Case").[6] In addition, Creditor moved the Court to take judicial notice of papers filed in the Prior Bankruptcy Case and of the marital dissolution case pending between Creditor and Debtor in the State of New York (the "Divorce

[1] Doc. No. 1.
[2] Doc. No. 2.
[3] Doc. No. 15.
[4] Although "domestic support obligations" are excepted from discharge in all bankruptcy cases under 11 U.S.C. § 523(a)(5), debts incurred in the course of a divorce or separation, which are not discharged in Chapter 7 cases under § 523(a)(15), are discharged in Chapter 13 cases. *See* 11 U.S.C. § 1328(a)(1). Creditor's claims herein are debts incurred in the course of a divorce or separation.
[5] Doc. No. 15, pp. 11-13. Creditor interpreted the Plan as not providing for *any* payment to unsecured creditors; however, this was not an accurate reading of the Plan.
[6] Doc. No. 15, p. 3, and Ex. C (15-3), pp. 1-28.

Case") since 2011.[7] Creditor also objected to confirmation of Debtor's Plan.[8]

Debtor filed an "omnibus objection" to the Motion to Dismiss, Creditor's request for judicial notice, and Creditor's objection to confirmation of the Plan ("Debtor's Objection").[9] But Debtor's Objection did not address any of Creditor's substantive arguments and merely argued that Creditor, in her request for judicial notice, improperly sought to introduce material from prior proceedings outside Debtor's current bankruptcy case. Debtor contended the Court should not consider these materials under Federal Rule of Evidence 404(b).

On August 30, 2018, the Court held a hearing on the Motion to Dismiss and the request for judicial notice. Counsel for both parties attended the hearing and argued on behalf of their clients. During argument, Debtor's counsel requested an evidentiary hearing on the Motion to Dismiss. At the conclusion of the hearing, the Court granted Creditor's request for judicial notice, but only to the extent that the Court took judicial notice of the existence of the court filings in the Prior Bankruptcy Case and the Divorce Case, with the Court to give the existence of those filings the appropriate weight.[10] The Court then took the Motion to Dismiss under advisement.

Shortly thereafter, at a hearing attended by counsel for the parties, the Court orally announced its ruling and dismissed the case as a bad-faith filing. The Court made these findings:

A. Debtor filed his Chapter 13 case in May 2018, while litigation with Creditor, that included Debtor's appeal of a ruling against him, had been pending in New York since 2011.

B. Debtor listed only a handful of creditors: Creditor, Creditor's attorney, Debtor's brother, two American Express accounts, and one H.H. Gregg account. Debtor listed American Express and H.H. Gregg as being "last active" in April and May 2018.[11] These creditors did not file proofs of claim.[12] Debtor's brother filed a proof of claim, and then an amended claim, but both were filed after the claims bar date.[13] Another creditor, PYOD, LLC, filed a proof of claim for $918.00,[14] to which Debtor objected as barred by statute of limitations.[15] Debtor did not list any amounts owed to the attorney representing him in the Divorce Case.

C. The Plan proposed monthly plan payments of $722.00 per month for 60 months, that the Court calculated would result in the distribution to unsecured creditors of about $33,588.00. The plan payments were based on the liquidation value of Debtor's assets, including a 38-foot sailboat that Debtor valued at $27,500.00.[16]

D. Debtor's Schedule J listed a monthly expenditure of $160.00 for boat insurance but did not list any other expenses for the sailboat, such as dock or storage fees or other maintenance charges.[17]

E. Standing alone, the fact that Debtor is using Chapter 13 to discharge an otherwise nondischargeable debt is not by definition bad faith.

---

[7] Doc. No. 22.
[8] Doc. No. 21.
[9] Doc. No. 23.
[10] *See* Doc. No. 36.
[11] Doc. No. 1, pp. 19-21.
[12] Debtor's Schedule E/F (Doc. No. 1, pp. 19-21) reflects American Express (AMEX) having a balance of $899.00, with a last active date of May 7, 2018 (just 11 days before Debtor filed his petition); American Express (AMEX) having a balance of $3,708.00, with a last active date of April 27, 2018; and Synchrony Bank/H.H. Gregg owed $2,647.00, with a last active date of April 22, 2018. At the August 30, 2018 hearing, the Court observed that it seemed unusual for institutional unsecured creditors to fail to file proofs of claim if, in fact, they were owed outstanding balances on the petition date.
[13] Proof of Claim Nos. 4-1 and 4-2. Late filed claims in Chapter 13 cases are not allowed and receive no distribution under the debtor's plan. *See In re Solomon*, 2017 WL 2543884 (Bankr. M.D. Ga. June 12, 2017).
[14] Proof of Claim No. 2-1.
[15] Doc. No. 13.
[16] Doc. No. 1, p. 10. 11 U.S.C. § 1325(a)(4) requires, as a condition of confirmation of a Chapter 13 plan, that the plan provide for unsecured creditors to receive not less than they would be paid if the estate of the debtor were liquidated under Chapter 7.
[17] Doc. No. 1, pp. 28-29.

F. The Court did not consider Creditor's allegation that Debtor had tried to avoid his obligations to his first wife in the Prior Bankruptcy Case; accordingly, to the extent that the Court had granted Creditor's request for judicial notice, the Court gave no weight to the filings in the Prior Bankruptcy Case.

The Court concluded that the record evidence established the following: first, that this is a two-party dispute, as the parties' divorce has been pending since 2011 and Debtor's other debts are minimal; second, that Debtor's obligation to Creditor would be dischargeable only in a Chapter 13 case; third, that the parties have been litigating for years over the true amount of Debtor's income, and it would prejudice Creditor to have to relitigate that issue before this Court in the context of an objection to confirmation; and fourth, Debtor's lack of good faith was shown in the Plan's proposal that Debtor keep his luxury sailboat, while Debtor had failed disclose in his bankruptcy schedules the expenditures necessary to maintain the sailboat.

In considering all these facts, the Court concluded that Debtor did not file his case in good faith and it was in the best interests of the creditors to dismiss the case. Shortly thereafter, the Court entered a written order.[18] Debtor timely moved for reconsideration.

II. DISCUSSION

A. Standard for Motion for Reconsideration

Motions for reconsideration may be filed under Rule 59 or Rule 60, Federal Rules of Civil Procedure, made applicable in bankruptcy cases by Federal Rules of Bankruptcy Procedure 9023 and 9024. Here, Debtor has not specified whether he moves for reconsideration under Rule 59 or Rule 60. His only argument in support of the Motion for Reconsideration is that this Court erred in not conducting an evidentiary hearing on the Motion to Dismiss after his attorney requested one during oral argument at the August 30, 2018 hearing.

Federal Rule of Civil Procedure 59 provides a court with authority to reconsider orders after their entry on certain limited grounds: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; (3) to correct a clear error of law; or (4) prevent manifest injustice."[19] Rule 59 motions are "an extraordinary remedy and should not be used 'as a means to reargue matters already argued and disposed of or as an attempt to relitigate a point of disagreement between the Court and the litigant.'"[20] Likewise, under Rule 60 a party may be relieved from a final judgment or order for reasons such as newly discovered evidence, mistake, or fraud.[21]

B. Dismissal of a Chapter 13 case for cause is within the Court's discretion.

The Court's power to dismiss a Chapter 13 case or to convert it for cause under 11 U.S.C. § 1307(c) is discretionary.[22] A bankruptcy court's decision to dismiss a case as a bad-faith filing is reviewed for abuse of discretion.[23]

C. Section 1307 does not mandate an evidentiary hearing.

Section 1307 provides that the court may after "notice and a hearing" convert a case to a Chapter 7 or dismiss the case "whichever is in the best interests of creditors and the estate, for cause."[24]

Section 101(A)(2) defines the phrase "notice and a hearing" as meaning "after such notice as is appropriate under the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances."[25] Thus, a plain reading of the Bankruptcy Code does not require an evidentiary hearing to dismiss a case for cause, only that there be fair notice and an opportunity to be heard.

Many courts have held that an evidentiary hearing is not always required when a case is dismissed for bad faith. For example, in *In re C–*

[18] Doc. No. 29.
[19] *Lindros v. Brewer (In re Brewer)*, 500 B.R. 130, 136 (Bankr. M.D. Fla. 2013).
[20] *Id.* (quoting *In re CHC Indus., Inc*., 381 B.R. 385, 389-90 (Bankr. M.D. Fla. 2007)).
[21] Fed. R. Civ. P. 60.
[22] *See In re Mallory*, 476 F. App'x 766, 767 (5th Cir. 2012); *In re Dempsey*, 247 F. App'x 21, 25 (7th Cir. 2007); *In re Soppick*, 516 B.R. 733 (Bankr. E.D. Pa. 2014).
[23] *In re Myers*, 491 F.3d 120 (3d Cir. 2007).
[24] 11 U.S.C. § 1307(c).
[25] 11 U.S.C. § 102(1)(A).

TC 9th Ave. Partnership,[26] the court found that it was within the bankruptcy court's discretion to decide the issue of bad faith and to dismiss a Chapter 11 case, for cause, without a formal evidentiary hearing. The court held that "when the record is sufficiently well developed to allow the bankruptcy court to draw the necessary inferences to dismiss a Chapter 11 case for cause, the bankruptcy court may do so."[27] And in *Blaise v. Wolinsky*,[28] the court held that the "notice and hearing" requirement of § 1307(c) did not mandate an evidentiary hearing. In *Blaise*, the affidavits in support of the motion to convert the case revealed that the debtor had failed to disclose assets, sold property of the estate without court approval, and failed to make payments under the Chapter 12 plan.

The cases that Debtor relies upon do not mandate an evidentiary hearing on a motion to dismiss; they merely acknowledge that the debtors, in those cases, had not requested evidentiary hearings. For instance, in *In re Cabral*,[29] the Bankruptcy Appellate Panel for the First Circuit found that the bankruptcy court did not err in reconverting the debtor's case from a Chapter 13 to a Chapter 7 without an evidentiary hearing because the debtor did not raise any disputed facts that would require an evidentiary hearing. And in *In re Piazza*,[30] the Eleventh Circuit noted that a debtor could not argue on appeal that the "notice and hearing" requirement was not fulfilled because debtor's counsel expressly declined an evidentiary hearing on a motion for bad-faith dismissal. But the issue in *In re Piazza* was not whether it was error for the bankruptcy court to dismiss the case without an evidentiary hearing; the issue was whether the bankruptcy court applied the correct legal standard—totality of the circumstances—in dismissing a Chapter 7 case for bad faith.

As in *In re C–TC 9th Ave. Partnership* and *Blaise*, the record here was sufficiently well developed to allow this Court to make the necessary inferences to dismiss Debtor's case for cause.

D. Debtor had a fair opportunity to dispute Creditor's assertions.

Even though an evidentiary hearing is not required, the parties must be afforded a "fair opportunity to offer relevant facts and arguments to the court and to confront their adversaries' submissions."[31]

Here, Debtor had a full and fair opportunity to offer facts, arguments to the court, and to dispute Creditor's assertions. The Motion to Dismiss was filed 20 days prior to the August 30, 2018 hearing; it set forth, in detail, Creditor's arguments for dismissal and twelve accompanying exhibits. Debtor had ample opportunity to respond to Creditor's assertions both in writing and at the hearing.

E. The record supports dismissal of Debtor's case as a bad-faith filing.

In *In re Piazza*, the court cited the United State Supreme Court's decision in *In re Marrama*,[32] stating "[i]n *Marrama*, the Supreme Court made clear bad faith is pertinent in all Chapters of the Bankruptcy Code, regardless of whether a provision contains an explicit good-faith filing provision."[33] Moreover, in Chapter 13 cases, § 1325(a)(3) explicitly states a court shall confirm a plan if the "the plan has been proposed in good faith."

In *In re Kitchens*,[34] the Eleventh Circuit listed factors that a court may consider in determining whether a case should be dismissed for bad faith:

> (1) the amount of the debtor's income from all sources; (2) the living expenses of the debtor and his dependents; (3) the amount of attorney's fees; (4) the probable or expected duration of the debtor's Chapter 13 plan; (5) the motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13; (6) the debtor's

[26] 113 F.3d 1304 (2d Cir. 1997).
[27] *Id*. at 1312.
[28] 219 B.R. 946 (B.A.P. 2d Cir. 1998).
[29] 285 B.R. 563, 578 (B.A.P. 1st Cir. 2002).
[30] 719 F.3d 1253, 1272 n.8 (11th Cir. 2013).
[31] *In re Marrama*, 345 B.R. 458, 473 (Bankr. D. Mass. 2006) (quoting *In re DeJounghe*, 334 B.R. 760, 766 (B.A.P. 1st Cir. 2005)).
[32] 127 S. Ct. 1105 (2007).
[33] *In re Piazza*, supra, at 1265.
[34] 702 F.2d 885 (11th Cir. 1983).

> degree of effort; (7) the debtor's ability to earn and the likelihood of fluctuation in his earnings; (8) special circumstances such as inordinate medical expense; (9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act and its predecessors; (10) the circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealings with his creditors; (11) the burden which the plan's administration would place on the trustee.[35]

In the context of the dismissal of a Chapter 7 case for bad faith, the Eleventh Circuit in *In re Piazza* adopted a "totality-of-the-circumstances" test:

> In light of its inherently discretionary nature, a totality-of-the-circumstances approach is the correct legal standard for determining bad faith under § 707(a). The totality-of-the-circumstances inquiry looks for "atypical" conduct that falls short of the "honest and forthright invocation of the [Bankruptcy] Code's protections." In making that determination, bankruptcy courts must, as they so often do, "'sift the circumstances surrounding [a] claim to see that injustice or unfairness is not done.'"[36]

Here, the totality of the circumstances is that (1) Debtor has been embroiled in litigation with Creditor since 2011, (2) Creditor's claim was subject to discharge in a Chapter 13 case, but would not be discharged in a Chapter 7 case, (3) Debtor had few other creditors, (4) Debtor proposed to retain ownership of his luxury sailboat, (5) and Debtor's schedules, while listing the cost of insurance for the boat, did not include other associated costs.

Weighing the *In re Kitchens* factors and considering the totality of the circumstances, the Court, in its discretion, determined that Debtor did not file his Chapter 13 case in good faith.

III. CONCLUSION

Debtor has proffered no evidence that might change the Court's analysis if it were to hold an evidentiary hearing. Nor has Debtor offered to propose an amended plan to pay creditors more than the value of the luxury sailboat that he seeks to retain.

The Court concludes that Debtor has not established any grounds for reconsideration. Debtor had a fair opportunity to respond to the Motion to Dismiss and he has shown no evidence of an actual error of law. For these reasons, the Court will deny Debtor's Motion for Reconsideration.

Accordingly, it is

ORDERED that the Motion for Reconsideration is **DENIED**.

DATED: December 11, 2018.

/s/ Caryl E. Delano

_____

Caryl E. Delano
United States Bankruptcy Judge

[35] *Id.* at 888-889.

[36] *In re Piazza*, 719 F.3d at 1271-1272 (citations omitted).