

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
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In re: Case No. 9:19-bk-03218-FMD
Chapter 13

Stanley J. Howe,

Debtor.

**ORDER DENYING CREDITORS
CHRIS AND LISA LUCKERMAN'S
MOTION TO DISMISS
CHAPTER 13 BANKRUPTCY FILING FOR
BAD FAITH FILING**

THIS CASE came before the Court for trial on October 16, 2019, of *Creditors Chris and Lisa Luckerman's Motion to Dismiss Chapter 13 Bankruptcy Filing for Bad Faith Filing* (the "Motion to Dismiss").¹ Creditors Chris and Lisa Luckerman ("Creditors") allege that Debtor receives rental income from a number of properties in which he may hold an interest and that he did not disclose the rental income on his bankruptcy schedules. Accordingly, Creditors contend that Debtor filed his Chapter 13 bankruptcy in bad faith and the case should be dismissed under 11 U.S.C. § 1307.²

After carefully considering the evidence, the Court finds that Creditors did not satisfy their burden of proving Debtor's lack of good faith under § 1307. Accordingly, the Motion to Dismiss is denied.

A. Background

Creditors assert that they are former tenants of Debtor.³ In September 2016, Creditors obtained an

amended final judgment against Debtor in the Circuit Court for Sarasota County, Florida, in the amount of \$88,516.11 (the "Judgment").⁴ The total amount of the Judgment includes \$2,850.00 for the disconnection of electricity service, \$2,850.00 for the disconnection of water service, \$950.00 for the unlawful retention of Creditors' security deposit, and \$81,866.11 for Creditors' attorney's fees and costs. After entry of the Judgment, Creditors initiated a proceeding supplementary in state court in an effort to collect the Judgment.⁵

On April 9, 2019, Debtor filed a petition under Chapter 13 of the Bankruptcy Code. On his schedule of real property, Debtor listed a condominium located at 10447 Waterbird Way, Bradenton, Florida, as "in foreclosure."⁶ On his schedules, Debtor listed a creditor, "WWD Trust c/o L.D. Howe, Ttee," with a claim in the amount of \$148,000.00 secured by "Apts. 25-30, Flamingo Cay Apartments;" an executory contract with "Birchwood Trust No. 5430" that gives "Debtor an option to act as a collection agent for the trust to collect delinquent receivables for a fee of one half of the amount collected;" and a codebtor of certain scheduled debts, identified as "Stanley J. Howe as Trustee of Price Trust II."⁷

On his schedule of income, Schedule I, Debtor stated that he is retired, and that his only income is \$1,340.00 per month in Social Security benefits.⁸ On his schedule of expenses, Schedule J, Debtor listed expenses of \$1,289.00 per month, and stated that he was 77 years old and expected his health care expenses to increase.⁹

On his Statement of Financial Affairs, Debtor disclosed two pending legal actions, a foreclosure action involving Bank of New York Mellon, and the state court litigation with Creditors.¹⁰

Debtor's Chapter 13 Plan¹¹ proposes to make payments to the Trustee of \$51.00 per month,

¹ Doc. No. 19.

² Unless otherwise stated, statutory references are to the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.*

³ Doc. No. 19, ¶ 7.

⁴ Amended Final Judgment attached to Creditors' Claim No. 4-1.

⁵ Doc. No. 19, ¶ 7.

⁶ Doc. No. 9, Schedule A.

⁷ Doc. No. 9, Schedules D, G, and H.

⁸ Doc. No. 9, Schedule I.

⁹ Doc. No. 9, Schedule J.

¹⁰ Doc. No. 9, p. 37.

¹¹ Doc. Nos. 11, 74.

representing the difference between his monthly Social Security income and his scheduled expenses. In other words, Debtor proposes to fund his Chapter 13 Plan with his Social Security income, even though Social Security income is expressly excluded from the definition of “current monthly income” in § 101(10A) of the Bankruptcy Code, and debtors are not required to include Social Security income in their plan payments.¹²

Creditors timely filed Proof of Claim Number 4-1 in the amount of \$221,381.34.

B. Creditors’ Motion to Dismiss

In the Motion to Dismiss Debtor’s bankruptcy case for bad-faith filing, Creditors allege that Debtor failed to disclose all his familial income on his Schedule I and Official Form 122C-1. Specifically, Creditors allege that Debtor has failed to disclose his rental income derived from several properties which are ostensibly owned by familial trusts and/or his non-filing spouse’s familial rental property income.¹³ In their post-trial closing argument, Creditors assert that “Debtor failed to disclose rental income and any interests in the rental properties in his initial filing.”¹⁴

Section 1307(c) provides that, on request of a party in interest, the court may dismiss a Chapter 13 “for cause.”¹⁵ Section 1307(c) then sets forth a non-exclusive list of examples that may constitute “cause” for dismissal. “Although bad faith, or lack of good faith, is not included in this list, bad faith can constitute cause for dismissal under section 1307(c).”¹⁶ In the Eleventh Circuit, a good-faith analysis includes consideration of the facts and

circumstances of the specific case, including factors such as the nature of the debt, the debtor’s motive in filing the petition, and whether the debtor misrepresented the facts in the petition.¹⁷ “Broadly speaking, the basic inquiry should be whether or not under the circumstances of the case there has been an abuse of the provisions, purpose or spirit” of the Bankruptcy Code.¹⁸

Dismissal of a Chapter 13 case is a more severe remedy than simply denying confirmation of a debtor’s chapter 13 plan.¹⁹ Accordingly, a dismissal under § 1307(c) requires a more stringent showing of bad faith by the debtor, and the creditor or moving party bears the burden of demonstrating the debtor’s bad faith.²⁰ Here, the issue is whether Debtor owns rental properties and collects rents on those rental properties that he failed to disclose in his bankruptcy schedules.

C. Summary of Creditors’ Evidence

To establish Debtor’s alleged bad faith, Creditors presented the trial testimony of three witnesses at trial. Bryan Kessler testified that he is an attorney who previously represented Debtor in a landlord-tenant action and that he is not in possession of any trust documents for Debtor. Heather Paschky is a former tenant of the property located at 1805 Cascadas Avenue, North Port, Florida. Ms. Paschky testified that she had leased a home from Debtor for approximately ten and one-half years, that she signed a new lease agreement in 2018 when Debtor notified her that his wife, Marilyn Howe, was “taking over” the lease, and that she no longer resides at the home. Krystal Fargo testified that she signed a lease with Marilyn

¹² *In re Damron*, 598 B.R. 350, 354 (Bankr. S.D. Ga. 2019).

¹³ Doc. No. 19, ¶ 11.

¹⁴ Doc. No. 90, p. 5.

¹⁵ 11 U.S.C. § 1307(c).

¹⁶ *In re Kirk*, 548 B.R. 597, 603 (Bankr. S.D. Ga. 2016)(citing *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 373, 127 S. Ct. 1105, 166 L. Ed. 2d 956 (2007); *In re Piazza*, 719 F.3d 1253, 1263 (11th Cir. 2013); and *Orcutt v. Crawford*, 2011 WL 4382479, at *2 (M.D. Fla. Sept. 20, 2011)).

¹⁷ *In re Kirk*, 548 B.R. at 603-04(citing *In re Kitchens*, 702 F.2d 885 (11th Cir. 1983), and *In re Buis*, 337 B.R. 243, 251-52 (Bankr. N.D. Fla. 2006)).

¹⁸ *In re Kirk*, 548 B.R. at 604(quoted *In re Kitchens*, 702 F.2d at 888).

¹⁹ Significantly, the Chapter 13 Trustee filed an Unfavorable Recommendation and Objections to Confirmation of the Plan (Doc. No. 56). To determine whether Debtor has dedicated all disposable income to the Plan, the Trustee requested “proof of all rents received or collected by the Debtor, on behalf of Debtor, Debtor’s non-filing spouse, 3rd party and/or L.D. Howe for the last two years.”

²⁰ *In re Kirk*, 548 B.R. at 604(citing *In re Jacobs*, 2005 WL 6742490, at *2(Bankr. S.D. Ga. Apr. 22, 2005)).

Howe in 2018, and that she has always made the rent payments to Marilyn Howe.

Creditors introduced only two exhibits into evidence. Creditors' Exhibit 22 was the transcript of Marilyn Howe's deposition taken on September 14, 2018, in the state court proceeding supplementary.²¹ At the deposition, Marilyn Howe, Debtor's wife, testified that she manages rental properties for a number of trusts, that there may have been as many as 35 such rental properties in 2014, and that she is compensated for her management services.²² According to Marilyn Howe, the rental properties "barely break even" and "are not turning a profit" after payment of maintenance expenses, vacancies, and other costs associated with leasing residential property.²³ Marilyn Howe testified that Debtor has no interest in the trusts, either as a trustee or as a beneficiary.²⁴ Further, Marilyn Howe testified that Debtor may have collected rent or filed eviction actions related to the rental properties at her direction, but that Debtor turned over the collections to her as manager of the properties, and that he was collecting no rent from the properties at the time of the deposition.²⁵

Creditors' Exhibit 30 is a copy of a handwritten letter dated August 26, 2014, signed by Debtor and addressed "to whom it may concern." In the letter, Debtor states that he and Marilyn Howe owned property located in Nokomis, Florida that they had leased to a tenant, Jennifer Armstrong, in September 2013.²⁶ The Court notes that the letter is dated more than four years before Debtor filed his bankruptcy petition, and does not evidence either the status of the property after 2014 or Debtor's entitlement to receive rent for the Nokomis property as of the bankruptcy petition date.

Creditors also filed an Affidavit of Jennifer Armstrong dated June 14, 2018, in which Ms. Armstrong stated that she had originally leased

property from Debtor in 2013, that she had received a Three Day Notice and Notice of Non-Renewal in June 2018, and that Debtor asked her to enter a new lease with an unidentified party.²⁷ The Three Day Notice and Notice of Non-Renewal attached to the Affidavit are signed by "M. Howe" as landlord.

Finally, Creditors filed a request for the Court to take judicial notice of a series of court documents and Value Adjustment Board filings.²⁸ The Court granted Creditors' request²⁹ and takes judicial notice of the following: (1) orders in the state court proceedings supplementary styled *Chris Luckerman and Lisa Luckerman v. Elizabeth Howe, as Trustee of the Price Trust III, et al.*, Case No. 2018 CA 003080 SC; (2) documents filed in "landlord-tenant evictions" in Charlotte County, Florida; (3) documents filed in "landlord-tenant evictions" in Sarasota County, Florida; (4) documents filed before the Manatee County Value Adjustment Board; and (5) documents filed in the separate Chapter 13 bankruptcy case of Marilyn Gail Howe, Case No. 8:19-bk-7110-CPM.

The documents from the proceedings supplementary include two orders enjoining Debtor and Marilyn Howe from transferring any property to third parties; the orders also state that Creditors were substantially likely to succeed on the fraudulent transfer claims asserted in the proceedings supplementary.³⁰ But other than the two temporary injunction orders, Creditors did not offer any evidence regarding the transfers of property that they sought to set aside in the proceedings supplementary as fraudulent transfers under Florida law.³¹

The documents from the landlord-tenant evictions reflect Marilyn Howe as the plaintiff in all of the eviction actions filed since 2018. The last eviction action in which Debtor was named as the

²¹ Creditors' Exhibit 22. Following the trial, Creditors designated portions of Marilyn Howe's deposition testimony "for evidentiary consideration" by the Court. (Doc. Nos. 83, 87.)

²² Creditors' Exhibit 22, pp. 7-8, 12, 53, 63.

²³ Creditors' Exhibit 22, pp. 31, 52, 74.

²⁴ Creditors' Exhibit 22, pp. 46, 53, 57, 109.

²⁵ Creditors' Exhibit 22, pp. 57, 64, 110, 166.

²⁶ Creditors' Exhibit 30.

²⁷ Exhibit B to Doc. No. 33.

²⁸ Doc. No. 64.

²⁹ Doc. No. 83.

³⁰ Exhibit 1 to Doc. No. 64.

³¹ Fla. Stat. §§ 726.105, 726.106, 726.108.

plaintiff was filed in Sarasota County on October 3, 2017.³²

The three Requests for Hearing filed with the Manatee County Value Adjustment Board in 2018 and 2019 reflect Marilyn Howe as the taxpayer for the properties at issue, and Marilyn Howe signed each of the Requests as the taxpayer. Debtor signed one of the Requests in 2019 as a “representative” of the petitioner, and completed the form indicating that he was an uncompensated representative filing the petition and that the taxpayer’s signature was also on the Request.³³

D. Analysis of Creditors’ Evidence

The Court can infer from Creditors’ evidence that a number of trusts associated with Debtor’s family were created and maintained for the purpose of owning and leasing residential properties. In fact, three trusts are referred to in Debtor’s schedules, and Debtor’s wife, Marilyn Howe, testified at length at her deposition that she serves as manager of a number of trust properties. The Court can also infer from the evidence that Debtor was involved in the lease of the trust properties prior to 2018, and that he discontinued his involvement during 2018. According to two tenants, for example, they had dealt with Debtor prior to 2018 and were advised in mid-2018 that Debtor would no longer act as their landlord. Additionally, Debtor does not appear as plaintiff in any eviction actions filed after 2017, even though he regularly had filed such actions in Charlotte County and Sarasota County through that year. But the filing of eviction actions alone is not evidence of the ownership of leased premises.

In a number of pre-2018 eviction complaints, Debtor alleged that he was the “owner” of the subject property.³⁴ Some of the complaints were prepared on pre-printed forms. But even if the allegations had a factual basis when made, there is no evidence that Debtor retained an ownership interest in any property when he filed his bankruptcy petition in April 2019, and no evidence that Debtor transferred any specific property on

any specific date before the bankruptcy petition was filed.

And although the Court has taken judicial notice of the two orders in the state court proceedings supplementary in which the state court found that Creditors were substantially likely to succeed in a fraudulent transfer claim, the Court gives these orders no weight for two reasons: first, because these orders are not final orders; and second, because there was no evidence at trial or in this bankruptcy case that Debtor transferred any property for less than reasonably equivalent value within the avoidance period for fraudulent transfers.

Creditors did not offer into evidence any trust documents to establish the structure or ownership of the trusts that own the rental properties—including whether Debtor has an equitable interest in the trusts. Likewise, Creditors did not offer into evidence any deeds, tax records, or other documents to establish that Debtor claims an ownership interest in any rental properties. Consequently, the Court cannot conclude that Debtor holds any interest in the trusts that entitles him to a share of the rents generated from trust properties or that he himself owns any rental properties.

Further, although Creditors offered evidence that Debtor “collected” rents from tenants, they did not offer any evidence regarding the expenses of the rental properties or that Debtor retained any rents for his own benefit at any time prior to his bankruptcy filing.

In summary, the issue for purposes of the Motion to Dismiss is whether Debtor has abused the provisions of the Bankruptcy Code by filing the Chapter 13 case and misrepresenting his ability to repay creditors. But Creditors did not establish that Debtor receives rental income that was not disclosed on his bankruptcy schedules, or that Debtor holds interests in trusts or any rental properties that were not disclosed in his bankruptcy schedules. Accordingly, the Court finds that Creditors did not satisfy their burden of proving

³² Exhibits 2 and 3 to Doc. No. 64.

³³ Exhibit 4 to Doc. No. 64.

³⁴ Exhibits 2 and 3 to Doc. No. 64.

Debtor's lack of good faith under § 1307 of the Bankruptcy Code.

Accordingly, it is

ORDERED that *Creditors Chris and Lisa Luckerman's Motion to Dismiss Chapter 13 Bankruptcy Filing for Bad Faith Filing* is DENIED.

DATED: January 21, 2020.

/s/ Caryl E. Delano

Caryl E. Delano
Chief United States Bankruptcy Judge