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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

FOR PUBLICATION

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In re: SEAN PATRICK GJERDE,
Debtor.

Case No. 15-11520-C-7

OPINION

Before: Christopher M. Klein, Chief Judge

Sean Patrick Gjerde, Wilton, California, in propria persona.
Robert A. Hawkins, Fresno, California, Chapter 7 Trustee.

KLEIN, Bankruptcy Judge:

The court "may waive" the chapter 7 case filing fee by virtue of 28 U.S.C. § 1930(f)(1) for individuals whose income is below a designated threshold and who are unable to pay the filing fee in installments. The case law on § 1930(f)(1) applies a "totality-of-circumstances" approach to the waiver decision, focusing mainly on ability to pay. This case holds that bad bankruptcy conduct may suffice to defeat a fee waiver for an otherwise-eligible debtor. It also draws attention to the role of the discharge suspension mandated by Federal Rule of Bankruptcy Procedure 4004(c)(1)(G) as a fee collection device, in lieu of dismissing the case.

1 The pro se debtor, a disbarred bankruptcy attorney, was the
2 debtor in four prior chapter 7 cases during the past three years,
3 each of which was dismissed because he did not attend the meeting
4 of creditors. In those cases, he ran up \$931 in unpaid
5 bankruptcy filing fees. He did not identify those cases in his
6 petition or in his fee-waiver applications and did not include
7 the \$931 in unpaid fees in his schedules. For these reasons, the
8 filing fee will not be waived.

9 This fee waiver denial, however, does not necessarily deny
10 bankruptcy relief to the debtor (who now seems to be complying
11 with basic bankruptcy duties and has a new incentive to obtain a
12 discharge). Rather, the denial means that a chapter 7 discharge
13 is contingent, by virtue of Federal Rule of Bankruptcy Procedure
14 4004(c)(1)(G), on payment of the \$335 filing fee and all other
15 filing fees accruing during the case.

16 17 Facts

18 Sean Patrick Gjerde requests that the \$335 chapter 7 filing
19 fee¹ be waived pursuant to 28 U.S.C. § 1930(f)(1). The chapter 7
20 trustee objects to waiver of the fee.²

21
22 ¹The \$335 filing fee represents the sum of the \$245 filing
23 fee prescribed by 28 U.S.C. § 1930(a)(1)(A), plus the \$75
24 "administrative fee" prescribed by the Judicial Conference of the
25 United States pursuant to § 1930(b) under Bankruptcy Court
26 Miscellaneous Fee Schedule #8, plus the \$15 trustee payment
27 prescribed by Bankruptcy Court Miscellaneous Fee Schedule #9 as
28 mandated by 11 U.S.C. § 330(b)(2)(A).

²The fee waiver application was initially granted and then
vacated as a clerical mistake pursuant to Federal Rule of Civil
Procedure 60(a) because the court was unaware of the objection by
the trustee. Fed. R. Civ. P. 60(a), incorporated by Fed. R.
Bankr. P. 9024.

1 When he filed the case, Gjerde was a federal prisoner
2 nearing release from a 30-month sentence for mail fraud
3 conspiracy and false statements in mortgage applications.³ He
4 was released during this chapter 7 case.

5 Gjerde was a bankruptcy attorney who, before his disbarment
6 in 2014,⁴ had filed eighty-one bankruptcy cases in this judicial
7 district as an attorney representing debtor clients.

8 Gjerde also filed four chapter 7 cases for himself within
9 the past eight years: No. 12-35578-C-7 (filed 8/27/12); No. 12-
10 40107-C-7 (filed 11/16/12); No. 13-23058-C-7 (filed 3/7/13); No.
11 13-28881-C-7 (filed 7/1/13). Each case was dismissed because
12 Gjerde skipped the meeting of creditors.

13 In each of his cases, Gjerde obtained permission to pay
14 filing fees in installments and then failed to complete the
15 payments. His accumulated unpaid installments total \$931.⁵

16 In this case, Gjerde did not properly identify his four
17 prior cases in his petition or in his fee waiver application.
18 The petition requires disclosure, under penalty of perjury, of
19 "all prior bankruptcy cases filed within last 8 years," with
20 location where filed, case number, and date filed. He indicated
21 only one case, with the case number "unknown" and the date of
22 filing left blank. He also put the same misinformation in his

23
24 ³United States v. Gjerde, No. 2:10CR00223-07, U.S. Dist.
Ct., E.D. Cal., Sep. 24, 2013.

25 ⁴In re Sean Patrick Gjerde, No. 12-O-16479-LMA, State Bar
26 Ct. Cal., May 11, 2014.

27 ⁵Court records reflect the following payment: No. 12-35578-
28 C-7, \$153; No. 12-40107-C-7, \$60; No. 13-23058-C-7, \$40; No. 13-
28881-C-7, \$40. The filing fee for those cases was \$306 per
case. The unpaid balance of the \$1,224 total is \$931.

1 fee waiver application, once again under penalty of perjury.

2 Similarly, Gjerde omitted from his schedules, also executed
3 under penalty of perjury, his \$931 debt to the United States for
4 unpaid filing fees in his prior cases.

5 He has amended his schedules once, incurring an additional
6 filing fee that he also wants waived. His second application
7 repeats the problems that are in his initial application.

8 This fifth case differs from the four previous cases.
9 Gjerde has filed an adversary proceeding seeking to discharge a
10 student loan debt as an undue hardship. Since a discharge is an
11 essential prerequisite to discharging a student loan, it appears
12 that he may actually perform his duties as debtor in this case.

13 14 Jurisdiction

15 Jurisdiction is founded on 28 U.S.C. § 1334(a). Fee waivers
16 under 28 U.S.C. § 1930(f)(1) are core proceedings concerning the
17 administration of the estate. 28 U.S.C. § 157(b)(2)(A).

18 19 Discussion

20 A review of the terms of the statute and the cases
21 construing it set the stage for considering the question whether
22 prior bad bankruptcy conduct warrants denying a chapter 7 fee
23 waiver to an otherwise-eligible individual.

24 25 I

26 The § 1930(f)(1) fee waiver provision gives the court
27 discretion to waive the chapter 7 filing fee for individuals
28 whose income is less than 150 percent of the income official

1 poverty line applicable to a family of the size involved and is
2 unable to pay that fee in installments.⁶

3 Under basic textual analysis, a § 1930(f)(1) fee waiver is a
4 matter of discretion. The verb form "court may waive" the filing
5 fee indicates that a waiver is discretionary and not mandatory.
6 28 U.S.C. § 1930(f)(1) (emphasis supplied); Bishop v. Mann (In re
7 Bishop), 2007 Westlaw 7532285, *3 (9th Cir. BAP 2007) (abuse of
8 discretion standard of review for § 1930(f)(1)).

9 Congress provided for judicial discretion in § 1930(f)(1),
10 instead of creating a right to a waiver, because a fee waiver is
11 a mixed blessing. It facilitates access to bankruptcy relief for
12 impoverished individuals who might otherwise be too poor to file
13 bankruptcy. But, a fee waiver also impairs the functioning of
14 the bankruptcy system because it deprives the chapter 7 trustees
15 of the \$60 from the filing fee that often is their sole source of
16 compensation in a no-asset case, in effect conscripting them to

17
18 ⁶The text of the statute is:

19 Under the procedures prescribed by the Judicial
20 Conference of the United States, the district court or
21 the bankruptcy court may waive the filing fee in a case
22 under chapter 7 of title 11 for an individual if the
23 court determines that such individual has income less
24 that 150 percent of the income official poverty line
25 (as defined by the Office of Management and Budget, and
26 revised annually in accordance with section 673(2) of
27 the Omnibus Budget Reconciliation Act of 1981)
28 applicable to a family of the size involved and is
unable to pay that fee in installments. For purposes
of this paragraph, the term "filing fee" means the
filing fee required by subsection (a), or any other fee
prescribed by the Judicial Conference under subsections
(b) and (c) that is payable to the clerk upon the
commencement of a case under chapter 7.

28 U.S.C. § 1930(f)(1).

1 work for free. 11 U.S.C. § 330(b). And, it deprives the courts
2 of fee revenue that Congress counts on to assist in funding the
3 Judicial Branch.

4 Although the first element of the two-part test (income less
5 150 percent of the income official poverty line) is objective,
6 the second element ("unable" to pay installment fees) entails
7 subjectivity and discretion.

8
9 II

10 Most of the reported decisions regarding § 1930(f)(1) fee
11 waivers focus on construing inability to pay.

12
13 A

14 The decisions adopt a case-by-case, totality-of-
15 circumstances approach to the exercise of § 1930(f)(1)
16 discretion. E.g., In re Stickney, 370 B.R. 31, 40-42 (Bankr.
17 D.N.H. 2007) (collecting cases); In re Spisak, 361 B.R. 408, 413-
18 14 (Bankr. D. Vt. 2007).

19 Courts have considered as relevant whether there are assets
20 or income that might not be property of the estate but that may
21 affect § 1930(f)(1) inability to pay installments. Bishop, 2007
22 Westlaw 7532285, at *7; In re Robinson, 2006 Westlaw 3498296, at
23 *3 (Bankr. S.D. Ga. 2006).

24 Likewise, resources of other persons, such as a non-filing
25 spouse or domestic partner or persons paying for bankruptcy
26 counsel, are probative of inability to pay. E.g., In re Burr,
27 344 B.R. 234, 237 (Bankr. W.D.N.Y. 2006).

28 Future financial prospects of the debtor also matter.

1 Spisak, 361 B.R. at 414.

2 The common element in these cases is their focus on
3 inherently financial issues.

4
5 B

6 Those decisions agree that the court must be persuaded to
7 waive the filing fees and that the burden of proof (and
8 correlative risk of non-persuasion) is on the applicant for a
9 § 1930(f)(1) fee waiver. Burr, 344 B.R. at 236.

10 Sometimes persuasion involves close calls. Just as baseball
11 umpires may have different strike zones, differences in outcomes
12 in fee waiver cases may reflect differences in the threshold of
13 doubt of individual judges. Compare In re Machia, 360 B.R. 416,
14 420-21 (Bankr. D. Vt. 2007), with Burr, 344 B.R. at 237.

15
16 C

17 Fee waiver cases involving prior bad bankruptcy behavior are
18 more difficult to find.

19 As relevant to this case, a district court in a bankruptcy
20 appeal recently noted that a bankruptcy court does not abuse its
21 discretion by denying a § 1930(f)(1) fee waiver on the basis that
22 the debtor owes unpaid filing fees from prior cases. In re
23 Duroser, 2015 Westlaw 4068243, *3 n.5 (N.D. Ga. 2015) (dictum).

24
25 III

26 In assessing a fee waiver, it is appropriate to be mindful
27 of the consequences of a denial of fee waiver.

28 Contrary to a common assumption, declining to waive the

1 filing fee is not necessarily fatal to bankruptcy relief for the
2 debtor, and nonpayment does not require dismissal of the case.

3
4 A

5 To be sure, nonpayment of the filing fee constitutes "cause"
6 to dismiss a chapter 7 case and often does lead to dismissal. 11
7 U.S.C. § 707(a)(2).

8 Nevertheless, as with § 1930(f)(1), the verb form
9 controlling § 707(a)(2) is permissive - "court may dismiss" - and
10 is not mandatory. It follows that the decision to dismiss
11 entails the exercise of judicial discretion and that the burden
12 of persuasion is on the proponent of § 707(a) dismissal. Hence,
13 the existence of "cause" to dismiss a chapter 7 case does not
14 automatically require dismissal.

15
16 B

17 The alternative to dismissal is to permit the case to
18 proceed with the filing fee unpaid. This alternative is
19 particularly viable where the debtor otherwise is performing the
20 debtor's duties and does not appear to be inappropriately
21 exploiting the automatic stay as a form of delay to the prejudice
22 of creditors. See 11 U.S.C. § 707(a)(1).

23 When a chapter 7 case is permitted to proceed with an unpaid
24 fee, the debtor will not receive a chapter 7 discharge until the
25 filing fee is paid in full, unless the court on further
26 reflection waives the fee. Fed. R. Bankr. P. 4004(c)(1)(G).⁷

27
28 ⁷Rule 4004(c)(1)(G) provides:

1 This tool enables a variety of alternatives for the court.
2 If the debtor wants a discharge, then the filing fee will have to
3 be paid, unless the court waives the fee later in the case. If
4 the fee is paid, the discharge will issue and the chapter 7
5 trustee will be paid. If the court takes a "wait and see"
6 approach, it can revisit the waiver question later in the case.
7 In this court's experience, the filing fee eventually is paid.

8 In sum, if the fee is not paid, the court retains three
9 options. It can waive the filing fee, thereby removing the
10 obstacle to entry of discharge. It can close the case without
11 entry of discharge. Or, it can dismiss the case under § 707(a).

12
13 C

14 Rule 1006(b)(2) does not compel a contrary conclusion. That
15 rule provides that there shall not be more than four installments
16 of the filing fee, that the final installment shall be payable
17 not later 120 days after filing the petition, and that extensions
18 are payable not later than 180 days after filing the petition.

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22 (1) In a chapter 7 case, on expiration of the times fixed
23 for objecting to discharge and for filing a motion to
24 dismiss the case under Rule 1017(e), the court shall
25 forthwith grant the discharge, except that the court shall
26 not grant the discharge if: ...

27 (G) the debtor has not paid in full the filing fee
28 prescribed by 28 U.S.C. § 1930(a) and any other fee
prescribed by the Judicial Conference of the United
States under 28 U.S.C. § 1930(b) that is payable to the
clerk upon the commencement of a case under the Code
unless the court has waived the fees under 28 U.S.C.
§ 1930(f); ...

Fed. R. Bankr. P. 4004(c)(1)(G).

1 Fed. R. Bankr. P. 1006(b)(2).⁸

2 This rule does not call for dismissal of a case on account
3 of late installments and does not forbid the payment of late
4 installments even after 180 days.

5 The immediate consequence for noncompliance with an
6 installment filing fee schedule is that no payment may be made to
7 an attorney or other person who renders services to the debtor in
8 connection with the case until all installments have been paid.

9 Fed. R. Bankr. P. 1006(b)(3) ("Postponement of Attorney's
10 Fees").⁹ Tardy installments operate to extend the suspension of
11 attorney's fees. Such a suspension may be an efficacious filing
12 fee collection strategy in a chapter 13 case where the chapter 13
13 trustee is doling out attorney's fees as administrative expenses,
14 but it is more difficult to police in cases under other chapters.

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⁸Rule 1006(b)(2) provides:

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18 (2) Action on Application. Prior to the meeting of
19 creditors, the court may order the filing fee paid to the
20 clerk or grant leave to pay in installments and fix the
21 number, amount, and dates of payment. The number of
22 installments shall not exceed four, and the final
installment shall be payable not later than 120 days after
filing the petition. For cause shown, the court may extend
the time of any installment, provided the last installment
is paid not later than 180 days after filing the petition.

23 Fed. R. Bankr. P. 1006(b)(2).

24 ⁹Rule 1006(b)(3) provides:

25 (3) Postponement of Attorney's Fees. All installments of
26 the filing fee must be paid in full before the debtor or
27 chapter 13 trustee may make further payments to an attorney
or any other person who renders services to the debtor in
connection with the case.

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Fed. R. Bankr. P. 1006(b)(3).

1 The court is left with the main alternatives of dealing
2 with tardy installments by blocking the discharge under Rule
3 4004(c)(1)(G) or by dismissing the case under § 707(a)(2).

4 Since either consequence can be averted by paying the filing
5 fee, even after the 180-day deadline for installments, the time
6 limits specified for installments in Rule 1006(b)(2) seem to be a
7 toothless tiger.¹⁰

8 In reality, the leverage to collect filing fees in chapter 7
9 cases is provided by the Rule 4004(c)(1)(G) bar to entry of the
10 chapter 7 discharge if the filing fee is neither paid nor waived.
11 As the long-term goal of the ordinary chapter 7 individual debtor
12 is entry of discharge, the price of achieving that goal is the
13 \$335 filing fee.

14
15 IV

16 Against the backdrop of the option to keep the case open
17 when the filing fee has not been paid, the question becomes
18 whether non-financial factors may warrant denying a fee waiver.

19 This court accepts for purposes of § 1930(f)(1) analysis
20 that the debtor's income is less than 150 percent of the income
21

22
23 ¹⁰The advisory committee note to the adoption of former
24 Bankruptcy Rule 107(b)(2) in 1973 and carried forward as Rule
25 1006(b)(2) in 1983 explains:

26 The administrative cost of installments in excess of 4 is
27 disproportionate to the benefits conferred, and prolongation
28 of the period of payment beyond 6 months after bankruptcy
causes undesirable delays in administration.

29 Bankr. R. 107(b)(2), Advisory Committee Note; accord, Fed. R.
30 Bankr. P. 1006(b)(2), Advisory Committee Note. No particular
result for noncompliance is specified.

1 official poverty line applicable to a family size of one and that
2 he is unable to pay the filing fee in installments. Similarly,
3 for purposes of this portion of the analysis, the court takes at
4 face value the debtor's assertions that his release from federal
5 custody during the case has not improved his finances.

6 Two obstacles remain for the debtor's requests for fee
7 waivers. First, he established a pattern of noncompliance with
8 basic bankruptcy duties during the course of his four previous
9 chapter 7 cases. He did not bother to attend the meeting of
10 creditors required by 11 U.S.C. § 341 in any of those cases. In
11 doing so, he violated the debtor's duties to cooperate with the
12 trustee as necessary to enable the trustee to perform the
13 trustee's duties and to attend and submit to examination at times
14 ordered by the court. 11 U.S.C. § 521(a)(3); Fed. R. Bankr. P.
15 4002(a)(1). Nor did he pay the filing fees in full for any of
16 the four previous cases. The bad bankruptcy conduct in his prior
17 cases constitutes an adequate, independent basis to decline to
18 waive the filing fee. Duroser, 2015 Westlaw 4068242, at *3 n.5.

19 Second, in this case, the debtor falsely omitted from his
20 petition correct identification of his four prior cases. He also
21 falsely omitted correct identification of those four prior cases
22 in his applications for fee waivers. And, he falsely omitted
23 from his schedules his debt to the United States for the \$931 in
24 unpaid filing fees that remain from those four prior cases. All
25 of these omissions are in documents signed under penalty of
26 perjury. These omissions provide an adequate, independent basis
27 to decline to waive the filing fee.

28 None of these problems can be chalked off as mistakes by an

1 untutored, self-represented debtor. As noted, when he practiced
2 law, the debtor represented debtors in eighty-one bankruptcy
3 cases in this district. It is implausible that he does not
4 understand the abc's of preparing schedules and of elementary
5 duties of a debtor in a bankruptcy case.

6 This constellation of problems warrants exercise of
7 discretion to decline to waive the filing fee under § 1930(f)(1),
8 regardless of whether the debtor's finances qualify him for the
9 fee waiver.

10 As noted, if the debtor eventually performs his duties in
11 this case so as to qualify for the chapter 7 discharge, then he
12 will have to pay the \$335 filing fee and all related fees.

13
14 V

15 Returning to the question of inability to pay the filing
16 fee, it is not clear that the debtor actually will be unable
17 eventually to pay the \$335 filing fee, as well as miscellaneous
18 fees.

19 The gravamen of his argument, on which he has the burden of
20 proof, is that the debtor never again will be able to earn a
21 living because he has been disbarred from practicing law and is
22 saddled with a felony conviction. This argument proves too much.

23 Although it is apparent that the debtor faces self-inflicted
24 obstacles to future success, that does not mean he is
25 unemployable. As a college graduate with a law degree, he still
26 has the intelligence, knowledge, and ability to earn a living.

27 The court is confident that during the time that it takes
28 for the debtor to prosecute his adversary proceeding to discharge

1 a student loan as an undue hardship, he will be able to
2 accumulate the funds to pay the filing fees on which his
3 discharge depends.

4 An order will be entered denying the debtor's applications
5 for waiver of filing fees.

6 Dated: August 17, 2015.

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9 UNITED STATES BANKRUPTCY JUDGE

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