

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Christopher D. Jaime
Bankruptcy Judge
Sacramento, California

October 25, 2016 at 1:00 p.m.

1. [16-25108](#)-B-13 JANE RIVERS ORDER TO SHOW CAUSE - FAILURE
Thru #2 Pro Se TO PAY FEES
10-7-16 [[41](#)]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law.

The court's tentative decision is to sustain the Order to Show Cause and order the case dismissed.

The Order to Show Cause was issued due to Debtor's failure to pay \$76.00 due October 3, 2016. The court's docket reflects that the default has not been cured.

2. [16-25108](#)-B-13 JANE RIVERS MOTION TO DISMISS CASE
JPJ-2 Pro Se 9-28-16 [[31](#)]

Tentative Ruling: Because less than 28 days' notice of the hearing was given, the Trustee's Motion to Dismiss Case is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further.

The court's decision is to dismiss the case due to Debtor's failure to pay filing fees as stated at Item #1. The motion is denied as moot. However, if the filing fee at Item #1 is paid at or before the hearing on the order to show cause, this motion will be granted.

Cause exists to dismiss this case. The motion is denied as moot but the case is dismissed on the sustained order to show cause for Debtor's failure to pay filing fees.

October 25, 2016 at 1:00 p.m.

3. [11-31915](#)-B-13 GEORGE DANOS AND PATRICIA MOTION TO DISMISS CASE
JPJ-3 MURRAY 9-8-16 [[79](#)]
James L. Bianchi

Final Ruling: No appearance at the October 25, 2016, hearing is required.

The Chapter 13 Trustee having filed a Notice of Withdrawal of Trustee's Motion to Dismiss Case, the motion is dismissed without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041. The matter is removed from the calendar and the case will proceed in this court.

4. [12-23935](#)-B-13 STACEY COUNCILMAN
JPJ-1 Catherine King

MOTION TO DISMISS CASE
10-3-16 [[62](#)]

Tentative Ruling: Because less than 28 days' notice of the hearing was given, the Trustee's Motion to Dismiss Case is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further.

The court's decision is to dismiss the case.

The Debtor is delinquent to the Chapter 13 Trustee in the amount of \$1,572.00, which represents approximately 2 plan payments. By the date this matter is heard, an additional plan payment in the amount of \$786.00 will also be due. The Debtor does not appear to be able to make plan payments proposed.

The Debtor has filed a response stating that she fell behind in payments due to unanticipated expenses and lower than normal income when school began. However, Debtor asserts that she will cure the arrearage by the hearing on this motion and expects to make all future monthly plan payments.

If the Debtor does not cure her delinquency, cause exists to dismiss this case pursuant to 11 U.S.C. § 1307(c)(1). The motion will be granted and the case will be dismissed.

5. [16-25436](#)-B-13 MARILYN OVERHOFF
JPJ-1 Douglas B. Jacobs
Thru #6

ORDER TO SHOW CAUSE RE:
OBJECTION TO CONFIRMATION OF
PLAN BY JAN P. JOHNSON
9-22-16 [[12](#)]

Tentative Ruling: The Trustee's Objection to Confirmation of the Chapter 13 Plan was sustained at the hearing held October 11, 2016. The plan filed August 17, 2016, was not confirmed. However, the court issued an order to show cause requiring the Debtor to show cause in writing why the case should not be dismissed where the power of attorney used to file the bankruptcy does not appear to include any provision that expressly authorizes the filing of a petition.

The court's decision is to discharge the order to show cause and the case shall proceed in this court for reasons stated below and as further supplemented by Item #6.

Background

The Debtor was ordered to show cause in writing for why this case should not be dismissed where the power of attorney used to file the petition commencing this Chapter 13 case did not appear to include any provisions that expressly authorizes the filing of a bankruptcy petition.

The Debtor filed a response on October 17, 2016, stating that the Durable Power of Attorney and Nomination of Conservator has been revised at para. 6 to include Michael Overhoff's power to file bankruptcy. A copy of the revised Durable Power of Attorney and Nomination of Conservator is filed as Exh. A, Dkt. 31.

The Declaration of Marilyn Overhoff has been filed in support of the response and states Ms. Overhoff's intent for her son, Michael Overhoff, to have the authority to file bankruptcy on her behalf and engage in its prosecution. Ms. Overhoff states that her reason for filing bankruptcy is to save her home after she was notified in early-September 2015 that her house would foreclose due to nonpayment of property taxes. Ms. Overhoff states that it is her intention to pay the property taxes through her plan.

Additionally, the Debtor did not appear at the meeting of creditors set for September 15, 2016. However, Michael Overhoff appeared at the continued meeting of creditors held on October 6, 2016. Nonetheless, the meeting of creditors was continued again to November 3, 2016, since it was unclear from the prior power of attorney whether Ms. Overhoff's son could attend on her behalf.

Discussion

An express authorization in the power of attorney itself is required to file a bankruptcy petition and prosecute a bankruptcy case, a general power of attorney is insufficient to permit either. See *In re Ballard*, 1987 WL 191320 at *1 (Bankr. N.D. Cal. 1987) ("A better view of the allowability of a petition by power of attorney is found in *In re Sullivan* (Bkrtcy.E.D.Pa.1983) 30 B.R. 781. In that case, the court would not allow a petition to be filed using a limited power of attorney, but did allow a filing pursuant to a power of attorney which specifically authorized a bankruptcy filing."); see also *In re Eicholz*, 310 B.R. 203, 207 (Bankr. W.D. Wa. 2004) (power of attorney sufficient if express language of document authorizes bankruptcy filing).

The court finds that the revised Durable Power of Attorney and Nomination of Conservator specifically provides Michael Overhoff authorization to file a bankruptcy. The bankruptcy was filed in good faith pursuant to 11 U.S.C. § 1325(a) (3).

Therefore, the order to show cause is discharged and the case is not dismissed for reasons stated above and as further supplemented by Item #6.

The court shall enter an appropriate minute order.

Tentative Ruling: Because less than 28 days' notice of the hearing was given, the Trustee's Motion to Dismiss Case is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further.

The court's decision is to not dismiss the case provided that the Debtor has cured her delinquency.

The Trustee moves for dismissal on the ground that the Debtor is delinquent \$192.00, which represents 1 plan payment. By the time this matter is heard, an additional plan payment in the amount of \$192.00 will also be due. The Debtors have filed a response stating that they will be current by the hearing date of this matter.

Additionally, the Trustee asserts that the case should be dismissed because Debtor's son Michael Overhoff, and not Debtor, appeared at the continued meeting of creditors held on October 6, 2016, and because it was unclear from the power of attorney whether Michael Overhoff had authority to file bankruptcy or engage in its prosecution. As stated at Item #5, the court determines that the revised Durable Power of Attorney and Nomination of Conservator filed October 17, 2016 (dkt. 31), specifically authorizes Michael Overhoff to file bankruptcy and pursue bankruptcy on Debtor's behalf.

Provided that the Debtor has cured her delinquency, cause does not exist to dismiss this case. The motion is denied without prejudice and the case is not dismissed.

7. [16-24043](#)-B-13 LAURA SHORTRIDGE
JPJ-3 Matin Rajabov

MOTION TO CONVERT CASE FROM
CHAPTER 13 TO CHAPTER 7 AND/OR
MOTION TO DISMISS CASE
9-29-16 [[35](#)]

Tentative Ruling: Because less than 28 days' notice of the hearing was given, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The court's decision is to convert this Chapter 13 case to a Chapter 7.

This motion has been filed by Chapter 13 Trustee Jan Johnson ("Movant"). Movant asserts that the case should be converted or in the alternative dismissed based on the following grounds.

First, the Debtor is \$5,750.00 delinquent in plan payments, which represents 1 plan payment. By the time this matter is heard, an additional plan payment in the amount of \$5,750.00 will also be due. Failure to make plan payments is unreasonable delay which is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Second, the Debtor has not prosecuted this case causing an unreasonable delay that is prejudicial to creditors pursuant to 11 U.S.C. § 1307(c)(1). The Objection to Confirmation filed by a creditor was heard and sustained on September 6, 2016, but the Debtor has not taken further action to confirm a plan in this case.

Third, the Debtor has failed to provide the Trustee with requested copies of certain items related to Debtor's business including, but not limited to, a completed business examination checklist, income tax returns for the 2-year period prior to the filing of the petition, bank account statements for the 6-month period prior to the filing of the petition, profit and loss statements for the 6-months period prior to filing of the case, proof of all required insurance and proof of required licenses or permits. The Debtor has also failed to amend the Statement of Financial Affairs Question #27 and Schedule I as requested by the Trustee. The Debtor has not complied with 11 U.S.C. § 521.

Fourth, based on Schedules A and B and after accounting for the Chapter 7 Trustees fees, the total amount of non-exempt equity in the estate is \$469,777.43, which would make conversion to a Chapter 6 proceeding in the best interest of creditors and the estate pursuant to 11 U.S.C. § 1307(c).

Discussion

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

[O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause....

11 U.S.C. § 1307(c). The court engages in a "totality-of circumstances" test, weighing facts on a case by case basis in determining whether cause exists, and if so, whether conversion or dismissal is proper. *In re Love*, 957 F.2d 1350 (7th Cir. 1992). Bad faith is not one of the enumerated grounds under 11 U.S.C. § 1307, but it is "cause" for dismissal or conversion. *Nady v. DeFrantz (In re DeFrantz)*, 454 B.R. 108, 113 FN.4, (B.A.P. 9th Cir. 2011), citing *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1224 (9th Cir. 1999).

Cause exists to convert this case pursuant to 11 U.S.C. § 1307(c) since the Debtor has failed to make plan payments, prosecute this case, provide the Trustee with requested business documents, amend the Statement of Financial Affairs and Schedule I, and has non-exempt equity in the estate for liquidation. The motion is granted and the case is converted to a case under Chapter 7.

8. [16-25346](#)-B-13 ERIKA VLACH
Michael O'Dowd Hays

ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
9-19-16 [[14](#)]

Tentative Ruling: The Order to Show Cause will be discharged and the case will remain pending but the court will modify the terms of its order permitting the Debtor to pay the filing fee in installments.

The court granted the Debtor permission to pay the filing fee in installments. The Debtor failed to pay the \$79.00 installment when due on September 14, 2016. While the delinquent installment was paid on October 3, 2016, the fact remains the court was required to issue an order to show cause to compel the payment. Therefore, as a sanction for the late payment, the court will modify its prior order allowing installment payments to provide that if a future installment is not received by its due date, the case will be dismissed without further notice or hearing.

9. [15-25952](#)-B-13 ANTHONY/LEETA HIGHTOWER MOTION TO DISMISS CASE
JPJ-2 Gerald B. Glazer 10-3-16 [[40](#)]

Tentative Ruling: Because less than 28 days' notice of the hearing was given, the Trustee's Motion to Dismiss Case is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtors, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further.

The court's decision is to dismiss the case.

The Debtors are delinquent to the Trustee in the amount of \$10,700.00, which represents approximately 1.8 plan payments. By the date this matter is heard, an additional plan payment in the amount of \$5,350.00 will also be due. Cause exist to dismiss this case pursuant to 11 U.S.C. § 1307(c)(1).

Cause exists to dismiss this case. The motion is granted and the case is dismissed.

10. [16-25261](#)-B-13 SHAMEKA BATTE
Thru #11 Pro Se

ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
9-15-16 [[18](#)]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law.

The court's tentative decision is to sustain the Order to Show Cause and order the case dismissed with prejudice for reasons stated at Item #11.

The Order to Show Cause was issued due to Debtor's failure to pay \$79.00 due September 12, 2016. The court's docket reflects that the default has not been cured.

11. [16-25261](#)-B-13 SHAMEKA BATTE
JPJ-1 Pro Se

MOTION TO DISMISS CASE
9-30-16 [[20](#)]

Tentative Ruling: Because less than 28 days' notice of the hearing was given, the Trustee's Motion to Dismiss Case With Prejudice Pursuant to 11 U.S.C. § 349(a) is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further.

The court's decision is to dismiss the case with prejudice and bar the Debtor from filing another petition for a period of 180 days.

The Trustee filed a motion to dismiss case on grounds that the Debtor failed to file a certificate of completion from an approved budget and credit counseling agency, is delinquent in approximately one plan payment, failed to appear at the duly noticed first meeting of creditors set for September 29, 2016, failed to provide the Trustee with copies of payment advices, and failed to provide the Trustee with a copy of tax returns for the most recent year a return was filed.

Furthermore, the Trustee requests a permanent bar to discharge under 11 U.S.C. § 349(a) for Debtor's egregious conduct in filing five bankruptcy petitions within the last 11 months and doing little or nothing to prosecute these cases after the petition was filed.

Discussion

The court has the authority to preclude serial, abusive bankruptcy filings. A number of remedies exist to redress such abuses: (1) dismissal with prejudice that bars the subsequent discharge of existing, dischargeable debt in the case to be dismissed, 11 U.S.C. § 349(a); and (2) dismissal with prejudice that bars future petitions from being filed or an injunction against future filings, 11 U.S.C. §§ 105(a), 349(a); *see also Kistler v. Johnson*, No. 07-2257, 2008 WL 483605 (Bankr. E.D. Cal. Feb. 15, 2008) (McManus, J.) (unpublished decision). These provisions and remedies complement each other and are cumulative. *See In re Casse*, 198 F.3d 327, 337-41 (2d Cir. 1999).

Section 349(a) invokes a "cause" standard. While cause for dismissal under § 349 has not been specifically defined by the Code, "bad faith" has been used as "cause" to dismiss a case under § 1307(c). *See In re Leavitt*, 171 F.3d at 1224; *In re Eisen*, 14 F.3d 469, 470 (9th Cir. 1994). The overall test used to determine bad faith is to consider the totality of the circumstances. *See, e.g., In re Leavitt*, 171 F.3d at 1224; *In re Eisen* at 470. In determining whether bad faith exists, "[a] bankruptcy

court must inquire whether the debtor has misrepresented facts in his plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed [a plan] in an inequitable manner." *In re Goeb*, 675 F.2d 1386, 1390 (9th Cir. 1982).

A filing bar may be ordered pursuant to § 349 if the appropriate objective factors are found: (1) whether the debtor misrepresented facts, unfairly manipulated the Bankruptcy Code, or otherwise filed his petition or plan in an inequitable manner; (2) the history of debtor's filings and dismissals; (3) whether the debtor intended only to defeat state court litigation; and (4) whether the debtor's behavior was egregious. *In re Leavitt*, 171 F.3d at 1224.

Based on the undisputed facts stated above, the court finds cause to impose a filing bar for a period of 180 days pursuant to § 109(g)(1). The facts show that Debtor has unfairly manipulated the Code without genuine intent to prosecute the case to discharge or reorganization and, consistent with her actions in prior cases referenced below, has failed to appear before the court in the proper prosecution of this case.

The Debtor has filed 4 prior cases that were each dismissed for various reasons including failure to appear at the meeting of creditors, failure to file a credit counseling certificate, failure to provide the Trustee with payment advices and tax returns, failure to make plan payments, and failure to file a motion to confirm plan (case nos. 15-29155, 16-20596, 16-21111, 16-23487). The Debtor has failed to disclose 2 previous cases (case nos. 15-29155, 16-20596) on this petition. All 4 prior cases were filed within the past 11 months. In response to each of her cases being dismissed, the Debtor simply filed another bankruptcy petition without making any effort to address the issues raised by the Trustee in the prior cases or fulfill the duties required of a debtor.

The Debtor will be barred from filing another bankruptcy petition in the Eastern District of California without leave of court for a 180-day period commencing on the entry of the order dismissing the Debtor's bankruptcy case.

The court shall enter an appropriate minute order.

Tentative Ruling: Because less than 28 days' notice of the hearing was given, the Trustee's Motion to Dismiss Case is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtors, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further.

The court's decision is to dismiss the case.

First, the Debtor did not appear at the duly noticed first meeting of creditors set for August 18, 2016, as required pursuant to 11 U.S.C. § 343. Cause exists to dismiss this case pursuant to 11 U.S.C. § 1307(c)(1).

Second, the Debtor is delinquent to the Trustee in the amount of \$5,720.00, which represents approximately 2 plan payments. By the date this matter is heard, an additional plan payment in the amount of \$2,635.00 will also be due. The Debtor has failed to make any plan payments since this petition was filed on July 13, 2016. Cause exist to dismiss this case pursuant to 11 U.S.C. § 1307(c)(1) and (c)(4).

Cause exists to dismiss this case. The motion is granted and the case is dismissed.

13. [14-32275](#)-B-13 RAY/ROSE DEPRIEST
JPJ-2 W. Scott de Bie

MOTION TO CONVERT CASE FROM
CHAPTER 13 TO CHAPTER 7 OR
MOTION TO DISMISS CASE
9-19-16 [[35](#)]

CONTINUED TO 11/15/16 AT 1:00 P.M. TO BE HEARD IN CONJUNCTION WITH DEBTORS'
MOTION TO MODIFY PLAN.

Final Ruling: No appearance at the October 25, 2016, hearing is required.

14. [16-24559](#)-B-13 STEVEN SIPE CONTINUED COUNTER MOTION TO
LBG-1 Lucas B. Garcia DISMISS CASE
9-27-16 [[48](#)]

Tentative Ruling: The motion will be denied provided that the plan is confirmable at Item #15.

If the plan is not confirmable, the Debtor will be given a further opportunity to confirm a plan. But, if the Debtor is unable to confirm a plan within a reasonable period of time, the court concludes that the prejudice to creditors will be substantial and that there will then be cause for dismissal. If the Debtor has not confirmed a plan within 75 days, the case will be dismissed on the Trustee's ex parte application.

15. [16-24559](#)-B-13 STEVEN SIPE EVIDENTIARY HEARING RE: MOTION
LBG-1 Lucas B. Garcia TO CONFIRM PLAN
8-29-16 [[33](#)]

Tentative Ruling: The Motion to Confirm First Amended Chapter 13 Plan Dated August 29, 2016, has been set for hearing on the 42-days notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Opposition having been filed, the court will address the merits of the motion at the hearing.

The court's decision is to confirm the first amended plan provided that the Debtor has cured the delinquency in plan payment in the amount of \$350.00, which represents approximately 0.5 plan payment.

The objection to confirmation by Wells Fargo Bank, N.A. regarding the valuation of the 2013 Chevy Silverado has been resolved by stipulation entered October 21, 2016.

Provided that the delinquency is cured, the amended plan complies with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is confirmed.