

In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)	
)	Chapter 7 Case
MARVIN W. COURSON, III)	
JENNIFER H. COURSON)	Number <u>02-42016</u>
)	
<i>Debtors</i>)	

ORDER ON MOTION TO DISMISS

On June 28, 2002, Marvin W. Courson, III, and Jennifer H. Courson (“Debtors”) filed for relief under Chapter 7 of the Bankruptcy Code. On March 13, 2003, the Chapter 7 Trustee filed a Motion to Dismiss pursuant to 11 U.S.C. § 707(a). Trustee’s motion was precipitated by Debtors’ failure to provide him with copies of their individual income tax returns for the years 2000 and 2001.

This Court has jurisdiction pursuant to 28 U.S.C. § 157(a) and (b)(1) over this core proceeding. Pursuant to Federal Rule of Bankruptcy Procedure 7052(a), I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The facts of this case are not in dispute. When Debtors filed for relief on

June 28, 2002, they properly included the Statement of Financial Affairs. In response to questions in such statement that asked for their “income from employment or operations of business” and “income other than from employment or operation of business” for the two prior years, 2000 and 2001, Debtors checked “NONE.” Thus, Trustee questioned Debtors concerning their income at the Creditors Meeting held pursuant to 11 U.S.C. § 341 . During the questioning it was discovered that Debtors had owned two businesses (Alista Contracting, Inc. and Courson Contracting, Inc.) and that they had in fact earned money during the two years in question.¹ Still unsure of earnings from prior years, Trustee requested that he be provided with tax returns from the prior two years. Trustee has repeated his request for the returns during the intervening months to no avail.

Given the nature of Debtors’ businesses, Trustee argues that he needs the tax returns to effectively administer the estate and since Debtors have failed to provide the returns their case should be dismissed. A hearing on Trustee’s motion was held April 30, 2003. Debtors were not in attendance to explain their failure to deliver the tax returns and their attorney stated that he lost contact with them “a while ago.” Debtors’ counsel argued, however, that the conduct of a debtor must be “egregious” in order for this Court to dismiss a case for “cause” and that Debtors’ conduct has not fallen to such a level.

CONCLUSIONS OF LAW

¹Debtors conceded that Mr. Courson had earned net income of approximately \$350 per week and Mrs. Courson had earned \$200 per week during 2000 and 2001.

Section 707(a)² vests this Court with the authority to decide whether a case should be dismissed and such decision is within my discretion. *See Matter of Atlas Supply Corp.*, 857 F.2d 1061, 1063 (5th Cir. 1988). The authority to dismiss is, however, limited by two mandatory conditions: (1) dismissal may occur only after notice and a hearing, and (2) dismissal may be “only for cause.” § 707(a). In authorizing dismissal “for cause,” the statute does not define “cause” beyond setting forth three specific examples. *Id.* Importantly, use of the word “including” when setting forth the examples means that the three types of “cause” are nonexclusive. *See* 11 U.S.C. §102(3) (“‘includes’ and ‘including’ are not limiting”); *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 77 n.7, 100 S.Ct. 328, 334, 62 L.Ed.2d 225 (1979) (“including” means the enumerated items are part of a larger group).

In determining whether cause exists for dismissal of a Chapter 7 case, the court must consider the interests of both the debtor and creditors. *Dinova v. Harris (In re Dinova)*, 212 B.R. 437, 441 (2nd Cir. B.A.P. 1997). Further, the burden for showing cause to dismiss a Chapter 7 case is on the moving party. *Dionne v. Simmons (In re Simmons)*, 200 F.3d 738, 743 (11th Cir. 2000). Included within the scope of “cause” under § 707(a) is a large

²Section 707(a) provides:

(a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including--

- (1) unreasonable delay by the debtor that is prejudicial to creditors;
- (2) nonpayment of any fees or charges required under chapter 123 of title 28;

and

- (3) failure of the debtor in a voluntary case 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, but only a motion by the United States trustee.

11 U.S.C. § 707(a).

category of conduct which expressly violates Code provisions. 11 U.S.C. § 521 sets forth a list of duties that debtors “shall” perform. Thus, courts have held that a case could be properly dismissed for a debtor’s failure to satisfy such § 521 duties even if debtors are asserting a Fifth Amendment privilege. *See, e.g. In re Peklo*, 201 B.R. 331, 334 (Bankr. D. Conn. 1996) (holding that debtor's refusal to answer questions while invoking Fifth Amendment privilege impairs the Trustee's ability to effectively administer the estate such that case was dismissed); *In re Moses*, 792 F.Supp. 529, 539 (E.D. Mich. 1992) (holding that case could properly be dismissed for debtor's failure to disclose estate assets, even if such refusal to testify was based upon validly asserted Fifth Amendment privilege, if such failure precluded fair and effective administration of estate). These rulings have largely been based on the recognition by courts that, “full disclosure of all relevant information has always been an important policy of the bankruptcy laws.” *In re Connelly*, 59 B.R. 421, 430 (Bankr. N.D. Ill. 1986).

Here, Debtors have proffered no reason for not providing Trustee with a copy of their tax returns. In not providing such returns, they have not satisfied the duties imposed upon them by § 521. Namely, they have failed to, “cooperate with the trustee as necessary to enable the trustee to perform the trustee’s duties.” 11 U.S.C. § 521(3). Debtors’ failure to provide Trustee with the tax returns certainly impairs his ability to administer their case and provides the basis for this Court to exercise its discretion and dismiss Debtors’ case.

Debtors rely on *In re Riney* for the assertion that in order for the court to dismiss a case “for cause,” a debtor’s conduct must be egregious. 259 B.R. 217, 222 (Bankr.

M.D. Fla. 2001). In Riney, it was reasonably inferred from the facts that the case was filed to obtain a discharge of a Final Judgment as it was the only debt of significance. Prior to filing, debtor had structured his life so as to avoid the collection efforts of the judgment holder and a discharge would end any collection efforts. Thus, the creditor argued that debtors' case should be dismissed and allowing debtor a discharge would undermine the "integrity of the bankruptcy process" as debtor was not in the honest, but unfortunate category. The Court, however, refused to dismiss the debtor's case because his conduct had not been egregious.

_____ In its holding, the Riney court discussed the standard for what is a "bad faith" *filing* such that a case can be dismissed for cause pursuant to § 707(a). The court stated that:

Absent egregious conduct, a debtor who files a chapter 7 should not be denied a discharge by denial of the recourse to bankruptcy without a showing that the debt is nondischargeable under Bankruptcy Code § 523 or that the debtor would not qualify for a discharge under Bankruptcy Code § 727.

Riney, 259 B.R. at 222.

It should be noted, however, that the Riney analysis dealt with the relatively narrow issue of whether a debtor's motive and purpose in filing are consistent with the purposes of Chapter 7. This case, in contrast, deals with Debtors' activities during the case. In making the duties of a debtor mandatory, § 521 uses the phrase, "[t]he debtor shall." Debtors have failed to satisfy their duties and it is, thus, appropriate that their case be dismissed.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Trustee's motion to dismiss Debtors' Chapter 7 case is granted and the case is dismissed, without prejudice.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ___ day of June, 2003.