

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

In the matter of:)	
)	Chapter 13 Case
RUSSELL J. LANGLANDS)	
)	Number <u>04-43292</u>
<i>Debtor</i>)	

**MEMORANDUM AND ORDER
ON CINDY WEAVER’S MOTION TO DISMISS**

Cindy Weaver, Debtor’s ex-wife (hereinafter “Weaver”), filed a Motion to Dismiss or Convert the Debtor’s Chapter 13 case. *See* Dckt. No. 18 (April 4, 2006). In her Motion, Weaver argues that the Debtor filed both his Chapter 13 case and his Chapter 13 plan in bad faith. A hearing on this matter was held on July 19, 2006. *See* Dckt. No. 34 (July 19, 2006). Both parties sent letter briefs to the Court after the hearing. *See* Dckt. No. 35 (August 2, 2006)(for Weaver); Dckt. No. 36 (August 15, 2006)(for the Debtor). After considering the evidence provided by the parties, the arguments presented, and all applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Weaver and the Debtor married in June 1995. The parties moved into a home that Weaver had owned for 22 years, which was located at 718 Alford Road, Woodbury, Georgia, 30293. Due to the house’s need for repairs, the parties sought financing

to raise the funds for the project. One loan for approximately \$93,000.00 was obtained from ABN AMBRO, which took a mortgage to secure this debt (this is the “First Mortgage Debt”). The First Mortgage Debt was solely in the name of the Debtor. As a condition of ABN AMBRO’s granting of the loan, Weaver transferred one-half of her interest in the home to the Debtor. Later, in an attempt to secure more funds for additional repairs, another loan was secured by the parties, this time from CitiFinancial. CitiFinancial also took a mortgage on the home to secure a debt of \$16,247.00 (this is the “Second Mortgage Debt”). Like the First Mortgage Debt, the Second Mortgage Debt was solely in the name of the Debtor.

The parties later endured a contentious divorce. On July 19, 2004, Weaver and the Debtor entered into a Final Judgment and Decree, which finalized their divorce and ordered the parties to adhere to the Compromise and Settlement that they had previously agreed to. *See* Dckt. No. 34, Ex. M-1 (July 19, 2006). Under the Compromise and Settlement, Weaver was to pay off the First Mortgage Debt. The Debtor was to pay off the Second Mortgage Debt and release any interest he may have had in the house back to Weaver, subject to the First Mortgage Debt. The Debtor was also required to turn over the balance of his interest in his United Technologies 401(k) Retirement Account to Weaver.

Soon after the divorce, a foreclosure action was initiated by ABN AMBRO, the holder of the First Mortgage Debt. Because both the First Mortgage Debt and the Second Mortgage Debt were in the Debtor’s name, Weaver did not receive the initial notices of the pending foreclosure, even though she was the only party who still lived at the house. Instead, the foreclosure notices were sent to the Debtor. When the Debtor finally informed Weaver

of the pending foreclosure, she filed her own Chapter 13 case on October 1, 2004. Weaver contends that because her name was not on the First Mortgage Debt, the lender refused to provide her with any information concerning the account, such as any accumulated arrearage, moratorium on payments, possibilities of refinance and work-outs, etc. *See* Dckt. No. 35, p. 2 (August 2, 2006). She testified that she had previously asked the Debtor to grant her authority to access the account but that he delayed in providing this authorization.

In June 2005, Weaver's house burned to the ground. With the insurance proceeds, she was able to pay off the remainder of the First Mortgage Debt. The proceeds were insufficient, however, to pay off the balance of the Second Mortgage Debt, which the Debtor remains liable for under the Compromise and Settlement he signed with Weaver.

In support of her argument that the Debtor filed both his Chapter 13 case and plan in bad faith, Weaver alleges that the Debtor failed to reveal several assets and liabilities on his bankruptcy schedules when he filed his petition. Weaver's allegations include, *inter alia*, the following: (1) The Debtor failed to reveal the litigation stemming from his divorce from Weaver in question 4 of his Statement of Financial Affairs ("SOFA"); (2) The Debtor failed to reveal certain withdrawals of money and loans from his 401(k) in question 10 of his SOFA; (3) The Debtor failed to disclose the existence of an account with AFLAC; and (4) The Debtor failed to disclose the existence of an account with a Plumbers & Steamfitters MPP Plan. In addition, Weaver alleges that because the Debtor did not schedule her as a creditor, she was not aware of this Chapter 13 case until February 2006. *See* Dckt. No. 30 (June 14, 2006). Because the bar date for claims had long since passed, Weaver has also

filed a motion to allow her late claim. *See Id.*

The Debtor disputes all of Weaver's allegations. While he admits that some of his assets were not listed on his bankruptcy schedules, the Debtor asserts that he did not intentionally hide any asset or liability from the Court. Rather, the Debtor argues that his failure to reveal these items resulted from a mistake and oversight rather than an intent to mislead the Chapter 13 Trustee, this Court, and his creditors.

CONCLUSIONS OF LAW

11 U.S.C. § 1307¹ permits a party in interest to move for the dismissal of a Chapter 13 case for cause. 11 U.S.C. § 1307(c). Due to its use of the term "including," Section 1307(c)'s list of examples of "cause" for dismissal is not exhaustive. Courts have found that a Chapter 13 debtor's failure to file his Chapter 13 case in good faith constitutes "cause" for dismissal under Section 1307. *See, e.g., Alt v. United States (In re Alt)*, 305 F.3d 413 (6th Cir. 2002).

When determining a debtor's good faith, the Eleventh Circuit has developed a totality of the circumstances test. *See Kitchens v. Georgia R.R. Bank and Trust Co. (In re Kitchens)*, 702 F.2d 885, 888-89 (11th Cir. 1983)(providing a non-exhaustive list of 11 factors that a court may take into account, including "the motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13"). It is well-established in the Eleventh Circuit that under the Bankruptcy Code, debtors have the imperative duty of

¹ Hereinafter, all Section references are to Title 11 of the United States Code.

revealing all their assets and any changes in their financial circumstances. *See* Ajaka v. BrooksAmerica Mortgage Corp., 453 F.3d 1339, 1344 (11th Cir. 2006)(“A debtor seeking shelter under the bankruptcy laws must disclose all assets, or potential assets, to the bankruptcy court.”); Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1286 (11th Cir. 2002)(“The duty to disclose is a continuing one that does not end once the forms are submitted to the bankruptcy court; rather, a debtor must amend his financial statements if circumstances change.”).

In ascertaining whether cause exists under Section 1307(c), a court may consider whether a debtor failed to timely and fully disclose his assets and financial dealings. *See* Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1225 (9th Cir. 1999)(affirming the bankruptcy court’s finding of cause for dismissal under Section 1307 after noting that the debtor, *inter alia*, failed to fully disclose some assets and the valuations of other assets). In the present case, there are significant discrepancies between the Debtor’s Chapter 13 schedules and the assets he owned. In particular, the Debtor did not reveal his divorce litigation with Weaver in his SOFA. Furthermore, he failed to schedule a stock account with AFLAC of undisclosed value as well as an account with a Plumbers & Steamfitters MPP Plan worth approximately \$23,000.00. *See* Dckt. No. 34 Ex. M-6, M-8 (July 19, 2006).

A Retirement Savings Statement concerning the Debtor’s United Technologies 401(k) Retirement Account shows that two withdrawals were made from the Debtor’s account on August 4, 2004, that totaled \$2,700.00. *See* Id., Ex. M-7, p. 17. These withdrawals were not listed on question 10 of the Debtor’s SOFA as property transferred

within one year preceding the commencement of the Debtor's Chapter 13 case on October 29, 2004. Furthermore, these transactions occurred after the parties' divorce was finalized in July 2004. Although the Debtor stated at the July 19, 2006, hearing that he did not withdraw this money, he acknowledged that he was the only individual with access to and control over this account. The 401(k) itself was not listed as an asset in the schedules.

The Debtor contends that his failure to list these assets and liabilities do not support Weaver's Motion because they were (1) inadvertent and (2) the assets in question may not be reached by creditors. With regards to the Debtor's first point, in determining a Chapter 13 debtor's lack of good faith, this Court is not required to make a finding of actual fraud, malice, scienter, or an intent to defraud. *See Shell Oil Co. v. Waldron (In re Waldron)*, 785 F.2d 936, 941 (11th Cir. 1986) ("Unmistakable manifestations of bad faith need not be based upon a finding of actual fraud, requiring proof of malice, scienter or an intent to defraud. We simply require that the bankruptcy courts preserve the integrity of the bankruptcy process by refusing to condone its abuse."). As for the Debtor's second point, Section 521(1) places a duty on debtors to disclose all assets and liabilities, even if they believe them to be exempt or worthless. As a result, it is this Court, not the Debtor, that makes the ultimate determination of which of his assets are exempt from the bankruptcy estate. *See In re Robinson*, 292 B.R. 599, 607 (Bankr. S.D. Ohio 2003) (quoting and citing *In re Yonikus*, 974 F.2d 901, 904 (7th Cir. 1992)).

In addition to the unlisted assets described above, the Debtor failed to list Weaver as a creditor in this case. A Chapter 13 debtor's failure to properly schedule a

creditor may constitute cause in certain circumstances. *See In re Wright*, 300 B.R. 453, 470 (Bankr. N.D. Ill. 2003); *In re Brogden*, 274 B.R. 287, 293-94 (Bankr. M.D. Tenn. 2001). Weaver learned about the bankruptcy case in February 2006 and subsequently filed a proof of claim. *See* Dckt. No. 30 (June 14, 2006). Her proof of claim seeks an unsecured priority claim of \$21,367.74. In his original bankruptcy schedules, the Debtor scheduled a total of \$245.00 on Schedule F - Creditors Holding Unsecured Nonpriority Claims. *See* Dckt. No. 1 (October 29, 2004). The Debtor scheduled no claims under Schedule E - Creditors Holding Unsecured Priority Claims. *Id.* Although the Debtor subsequently amended his schedules to add Weaver and a claim of \$1,000.00 nearly a year and a half after the filing of this Chapter 13 case, these actions do not change the fact that he filed this case without initially scheduling the creditor holding by far the largest unsecured claim, both priority and non-priority, against him.

A debtor's pre-petition treatment of a creditor may factor into the Court's Section 1307 analysis as well. *See Gaertner v. McGarry (In re McGarry)*, 230 B.R. 272, 276 (Bankr. W.D. Pa. 1999); *State of Wisconsin v. Weller (In re Weller)*, 189 B.R. 467, 472 (Bankr. E.D. Wis. 1995). The Debtor and Weaver were granted a total divorce by the Final Judgment and Decree on July 19, 2004. *See* Dckt. No. 34, Ex. M-1 (July 19, 2006). That Final Judgment and Decree incorporated a Compromise and Settlement between the parties that required the Debtor to give her the balance of his United Technologies 401(k) Retirement Account. As described *supra*, it is undisputed that a total of \$2,700.00 was withdrawn from this account on August 4, 2004. Weaver denies that she received this money. Although the Debtor claims that he did not withdraw these funds, he acknowledges

that he is the only individual with access to this account. By a preponderance of the evidence, I conclude that this money was withdrawn by the Debtor after the entry of the Final Judgment and Decree, an action that violates the parties' pre-petition Compromise and Settlement.

The Debtor contends that dismissing his Chapter 13 case would be an "extremely harsh measure" that "would be unfair to the creditors in this case." Dckt. No. 36, p. 4 (August 15, 2006). In making its Section 1307 analysis, the Court is aware that the interests of creditors other than Weaver should be considered. See In re Henson, 289 B.R. 741, 753 (Bankr. N.D. Cal. 2003)(noting that in determining whether there was cause to dismiss or convert the debtor's case under Section 1307(c), the court was to consider the interests of other creditors and not just the interests of the moving creditor). The Debtor's Chapter 13 schedules indicate that there are four secured creditors in this case. The Debtor's primary assets include real property and two motor vehicles, all of which are encumbered by the claims of secured creditors. In addition, excluding Weaver, there are two unsecured creditors with claims that total \$245.00, and neither unsecured creditor has opposed the Motion to Dismiss. In contrast, Weaver is an unsecured creditor with a claim for more than \$20,000.00. As a result, the dismissal of this case is unlikely to lead to a chaotic scramble by unsecured creditors to assert their state law collection remedies and seize assets to repay substantial unsecured claims. Cf. Id. at 753-54 (electing to convert the Chapter 13 case to Chapter 7 after noting that the debtor had unsecured creditors who filed claims for, *inter alia*, \$222,651.83, \$6,841.47, and \$2,051.32, and determining that conversion would be in the best interests of creditors under those circumstances).

ORDER

An examination of the facts and circumstances described *supra* leads this Court to conclude that the Debtor's Chapter 13 case was not filed in good faith. Pursuant to the foregoing, IT IS THE ORDER OF THIS COURT that Weaver's Motion to Dismiss is GRANTED.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of September, 2006.