

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

IN RE:	)	CASE NO. 96-50311
DONALD CHATMAN	)	
GINA CHATMAN	)	CHAPTER 13
	)	
DEBTOR(S)	)	<u>ORDER</u> <u>OVERRULING</u>
<u>TRUSTEE'S</u>	)	<u>MOTION TO DISMISS</u>

On February 20, 1996, Debtors filed a petition under chapter 13 of the Bankruptcy Code. On February 29, 1996, the chapter 13 trustee filed a motion to dismiss the case pursuant to 11 U.S.C. §109(g)(1). The trustee premised his motion on the fact that within 180 days prior to the filing of this case, these Debtors were involved in another chapter 13 that was dismissed for a failure to submit payments. Debtors filed a response to that motion on February 29, 1996, and the trustee filed a reply to that response on April 3, 1996. The matter was set for hearing on April 4, 1996.

Appearing at the hearing were Jerome Holub, chapter 13 trustee; Robert Whittington, counsel for Debtors; and the Debtors, Donald and Gina Chatman. The Court heard argument from both parties, and evidence was taken in the form of testimony from Mr. Chatman. Thereafter, the Court took the matter under advisement. For the reasons stated herein, the trustee's motion to dismiss is denied.

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Section 109(g)(1) of the Bankruptcy Code provides that "no individual...may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if...the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case." 11 U.S.C. §109(g)(1). In the case at bar it is undisputed that the Debtors had a prior chapter 13 case pending within 180 days of the filing of this chapter 13 case which was dismissed for a failure to remit payments to the chapter 13 trustee.<sup>1</sup> What is in dispute is whether the Debtors' failure to make such payments after loss of employment constitutes the "willful" conduct required to invoke the sanction imposed by §109(g)(1).

"Willful" conduct, within the context of §109(g)(1), has been defined as conduct that is "deliberate," "intentional," and "voluntary," as opposed to conduct that is merely accidental or beyond a person's control. See *In re Nelkovski*, 46 B.R. 542, 544 (N.D. Ill. 1985); and *In re Bradley*, 152 B.R. 74, 76 (E.D. La. 1993). Cf. *In re Thompson*, 162 B.R. 748, 750 (W.D. Pa. 1992) (an act is "willful" under 11 U.S.C. §523(a)(6) if it is "done intentionally"). The issue of whether Debtors' conduct in the prior chapter 13 case was a "willful failure...to abide by orders of the court" is a question of fact, see 11 U.S.C. §109(g)(1); *In re Burgart*, 141 B.R. 90, 91 (W.D. Pa. 1992), and the trustee, as the moving party, bears the burden of demonstrating such willfulness on the part of the Debtors. *In re Arena*, 81 B.R. 851 (Bankr. E.D. Pa. 1988). In the case at bar Mr. Chatman testified that the failure to make payments in the prior chapter 13 case

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Debtors prior case, number 94-50560, was filed on April 13, 1994 and was dismissed on December 19, 1995.

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was due to an uncontrollable interruption in both his and his wife's employment. He acknowledged that he and Mrs. Chatman were required by court order to make the chapter 13 payments in the prior case but indicated that the suspension in their work made them unable to comply with that order. Mr. Chatman also testified that during the prior chapter 13 case he attended all required court hearings and creditors' meetings. The trustee did not introduce any evidence to refute Mr. Chatman's testimony. Mr. Chatman further testified that he has found new employment and therefore has a basis for performing in the new case.

Based upon the facts of this case and the evidence presented, the trustee has failed to meet his burden of proving that Debtors' non-payment in the prior chapter 13 case was a willful failure to abide by orders of the court. While that prior non-payment is a factor that the Court will be cognizant of as this chapter 13 plan goes forward, that nonpayment alone does not mandate the imposition of the 11 U.S.C. §109(g)(1) sanction. See *In re Inesta Quinones*, 73 B.R. 333, 336-37 (Bankr. D.P.R. 1987); *In re Glover*, 53 B.R. 14, 16 (Bankr. D. Or. 1985); and *In re Morris*, 49 B.R. 123, 124 (Bankr. W.D. Ky. 1985) (for the proposition that a mere failure to make payments in a prior chapter 13 case cannot be deemed to be a "willful" failure to abide by a court order).

Given the denial of the trustee's motion to dismiss, this chapter 13 case will go forward. However, as with all chapter 13 cases, it is expected that the Chatmans will immediately contact their counsel and the trustee should they experience another uncontrollable interruption in their employment. Further, it is expected that the Chatmans will use their best faith efforts at making all required payments under this chapter 13 plan as a repeated failure to perform under multiple chapter 13 filings can constitute the willfulness contemplated by §109(g). See, e.g., *In re Nelkovski*, 46 B.R. 542, 545 (Bankr. N.D. Ill. 1985).

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Based upon the foregoing the trustee's instant motion to dismiss is hereby denied.

**IT IS SO ORDERED.**

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MARILYN SHEA-STONUM  
Bankruptcy Judge

**DATED: 4/24/96**