

**IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
Eastern Division**

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2005 NOV 30 PM 4:17
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In Re:

In Proceedings Under Chapter 7

SUSAN M. TURNER,

Case No.: 05-17386

Debtor.

CHIEF JUDGE RANDOLPH BAXTER

MEMORANDUM OF OPINION AND ORDER

The matter before the Court is the Motion of Brian A. Bash, the Chapter 7 Trustee (the “Trustee”), for Reconsideration of Order Granting Debtor’s Motion to Dismiss (the “Trustee’s Motion”). The Court acquires core matter jurisdiction over this proceeding under 28 U.S.C. § 157(b)(2)(J) and General Order No. 84 of this District. Upon an examination of the parties’ respective briefs and supporting documentation, and after conducting a hearing on the matter, the following findings of fact and conclusions of law are hereby rendered:

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Susan M. Turner’s (the “Debtor”) Chapter 7 case was filed on May 24, 2005. The Debtor scheduled a life insurance policy in Manulife Financial Corporation. The policy was converted to a stock distribution (the “Stock”) after the plan was filed, but before the § 341 meeting, conducted on July 1, 2005. The Trustee discovered that the Debtor owned the Stock at the § 341 meeting. The Stock was valued at approximately \$38,000.

On August 18, 2005, the Debtor filed a motion to dismiss her case, on the grounds that the value of the Stock exceeded the \$20,000 in unsecured claims against the Debtor’s estate, and that therefore she was “now able to, and desirous of, paying all of her unsecured debt in full, and

does not need the protection of the Court to do so.”¹ The Trustee filed an objection to the Debtor’s motion, noting that a 2004 Examination had been scheduled for September 21, 2005,² and that the funds should instead be turned over to the Trustee for distribution to creditors.

At a hearing on September 27, 2005, the Court granted the Debtor’s motion, finding that sufficient cause was shown. The Debtor’s case was dismissed on October 3, 2005 (the “Dismissal Order”).

On September 29, 2005, the Trustee filed the pending Motion for Reconsideration, asking the Court to reconsider the Dismissal Order on the grounds that the Debtor did not show cause for dismissal of her case. The Trustee commented that the facts of this case are substantially similar to those presented in *In re Cohara*, in which the Sixth Circuit Bankruptcy Appellate Panel reversed the lower court’s ruling which dismissed a debtor’s Chapter 7 case. *In re Cohara*, 324 B.R. 24 (B.A.P. 6th Cir. 2005). A hearing on the Motion for Reconsideration was held on October 25, 2005.

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Since a motion for reconsideration is not addressed specifically under the Federal Rules of Civil Procedure, the Court will view the Trustee’s motion as a motion to alter or amend judgment pursuant to FED. R. CIV. P. 59. *In re Hogan*, 79 Fed. Appx. 846, 848 (6th Cir. 2003). The Court’s decision to deny a motion to alter or amend a judgment is reviewed for an abuse of discretion. *Id.* “Generally, there are three situations which justify reconsideration under Rule

¹ Debtor’s Motion to Dismiss, at ¶ 4.

² The Debtor later asserted at the September 27, 2005 hearing that the meeting had been adjourned, and that the Debtor had provided the Trustee with the requested documentation.

59(e): (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or to prevent a manifest injustice.” *E.g., Dualite Sales & Service, Inc. v. Moran Foods, Inc.*, 2005 WL 2372847, at *1 (S.D. Ohio 2005); *In re Bunting Bearings Corp.*, 321 B.R. 420, 422 (Bankr. N.D. Ohio 2004). It is apparent that the relevant situation that may justify reconsideration of the dismissal order is to correct a clear error of law. “[A] Rule 59(e) Motion to Alter or Amend brought on the basis of a manifest error of law or fact requires that the moving party show that matters or controlling decisions were overlooked that might have materially affected the earlier ruling.” *In re Bunting Bearings Corp.*, 321 B.R. at 422 (Bankr. N.D. Ohio 2004) (citing *Wechsler v. Hunt Health Sys. Ltd.*, 186 F.Supp.2d 402, 410 (S.D.N.Y. 2002)).

The Trustee argues that, by finding that the Debtor established cause for dismissal, the Court erroneously applied the legal standards set forth in *In re Cohara*. In *Cohara*, the Debtor asserted that she was to receive \$58,950 in annuity payments from a personal injury settlement. This amount, she argued, was more than sufficient to pay her scheduled unsecured claims. The lower court found that the Trustee had failed to demonstrate that the creditors would be prejudiced because they would be protected by virtue of their state law remedies.

The B.A.P.’s holding in *Cohara* found that the bankruptcy court had abused its discretion by erroneously shifting the burden of establishing cause for dismissal from the Debtor to the Trustee. In *Cohara*, the Debtor failed to establish a record, through testimony or other evidence, to show that, if her case was dismissed, her creditors would not be prejudiced, which is essential in establishing “cause” for dismissal. Specifically, *Cohara*, and other cases cited by the B.A.P., determined that “the proposed course of action to be followed if the case is dismissed is too

speculative to give this Court confidence that the interests of all pertinent parties would be served with dismissal.” *In re Cohara*, 324 B.R. at 28-29. Therefore, the B.A.P. found that the Debtor had failed to establish the requisite cause because she “failed to establish an evidentiary basis for her assertion that dismissal is necessary due to her continuing medical needs, and she failed to carry her burden of proving that dismissal of her bankruptcy petition will not prejudice her creditors.” *Id.* at 29.

As the movant, the Debtor has the burden of showing cause for dismissal. *In re Cohara*, 324 B.R. at 27. The present Trustee argues that the Debtor, like the debtor in *Cohara*, failed to provide “evidence or assurance that the debtors could or would follow through on assertions that creditors would be paid outside of bankruptcy,”³ and therefore did not meet her burden of establishing cause for dismissal. The Court has determined that it should vacate the Dismissal Order, for the purpose of allowing the Debtor to provide evidence or assurance of how and when her paying creditors will be paid in full outside of bankruptcy.

The Court has discretion under Fed. R. Civ. P. 62(b) to stay the execution of the motion to dismiss, and to order the Debtor to refrain from disposing of the subject stock until the Court has ruled on the Trustee’s motion. Federal Rule 62 states, in relevant part:

(b) Stay on Motion for New Trial or for Judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59 . . .

FED. R. CIV. P. 62(b).

³ Motion for Reconsideration, at ¶ 10.

Accordingly, the Trustee's Motion for Reconsideration of Order Granting Debtor's Motion to Dismiss is well-premised and is hereby granted. It is further ordered that the Debtor is enjoined from disposing of the Stock and/or Stock proceeds until further order of the Court.

Each party is to bear its respective costs.

IT IS SO ORDERED.

Dated, this ___ day of
November, 2005.


RANDOLPH BAXTER
CHIEF JUDGE
UNITED STATES BANKRUPTCY
COURT