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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED

04 OCT 19 PM 2:35

U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
CLEVELAND

In re: ) Case No. 04-18392  
)  
SHAQUILLE AZIR and ) Chapter 13  
TONYA L. AZIR, )  
) Judge Pat E. Morgenstern-Clarren  
Debtors. )  
) **MEMORANDUM OF OPINION**

The chapter 13 trustee filed a motion to dismiss this case on the ground that it was not filed in good faith and thus cause exists to dismiss under bankruptcy code § 1307(c). The debtors deny that cause exists to dismiss. For the reasons stated below, the motion is denied.

**JURISDICTION**

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(O).

**FACTS<sup>1</sup>**

The debtors filed their chapter 13 case on July 1, 2004. At that time, they owned two pieces of real estate: their residence at 10314 McCracken Blvd., Garfield Heights, Ohio and rental property at 10310 Harvard Avenue, Cleveland, Ohio. The amended plan proposes that the debtors will surrender the Harvard property to secured creditors Option One Mortgage and Nayyir Mahdi. (Docket 6). In the debtors' schedules, they listed Option One as holding a first

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<sup>1</sup> Counsel stipulated to these facts and to the admission of three exhibits at the evidentiary hearing. Neither side called any witnesses.

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mortgage on this property and Nayyir Mahdi as the second mortgage holder. (Docket 1). These events followed:

1. By deed recorded on July 22, 2004, and without bankruptcy court authority, debtor Shaquille Azir quitclaimed the McCracken property to Nayyir Mahdi. The transfer states that Mahdi gave \$30,000.00 consideration. (Exhs. A, B).

2. On August 18, 2004, the chapter 13 trustee moved to dismiss the case based on this transfer.

3. On an unidentified date after that, Nayyir Mahdi transferred the McCracken property back to Shaquille Azir.

4. By deed recorded on August 23, 2004, and again without bankruptcy court permission, Shaquille Azir quitclaimed the Harvard property to Nayyir Mahdi. (Exh. 3).

At the September 10, 2004 meeting of creditors, *see* 11 U.S.C. § 341, Shaquille Azir testified:

Okay. Yeah, what happened was, in the plan that we had established, we were supposed to be surrendering the [10310 Harvard] property to Nayir Amadi [sic]. So I had a miscommunication. I misunderstood that—I thought that I was okay to surrender the property once the petition had been filed. So when I received a copy of the petition, I went to Mr. Amadi [sic] and signed a quitclaim deed. His representative went downtown and pulled the wrong exhibits and quitclaimed the 10314 Harvard—I mean McCracken address instead of 10310 Harvard. At that time my attorney called me and let me know that the Trustee, you know, had filed a dismissal because—. . . he felt that this was not—a transfer not done in good faith. So once we realized the mistake, I contacted Mr. Amadi [sic] and he immediately went down that following business day, which was Monday, and reversed the quitclaim to do it the correct way.

(Exh. 2 at 6-7).

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**THE POSITIONS OF THE PARTIES**

The chapter 13 trustee argues that the case should be dismissed because the debtors have not acted in good faith. He points to the McCracken and Harvard property transfers made without court authority and also notes that the Harvard property has not been returned to the estate. The debtors argue that the plan provided for the surrender of the Harvard property and that they transferred it by mistake, thinking that they could act as soon as the plan was filed.

**DISCUSSION**

Under bankruptcy code § 1307(c), a chapter 13 case may be dismissed for cause, including but not limited to 10 stated reasons. *See* 11 U.S.C. § 1307(c). The trustee argues that cause exists to dismiss this case because the debtors have not acted in good faith. *See Alt v. United States (In re Alt)*, 305 F.3d 413, 418-19 (6th Cir. 2002) (holding that a debtor's lack of good faith is cause to dismiss his case). The trustee bears the burden of proof on this issue. *Id.* Good faith is not defined in the code. Under the case law, the court is to consider these factors in determining good faith: the debtor's income and expenses; the debtor's attorney's fees; the anticipated duration of the chapter 13 plan; the debtor's sincerity in seeking relief; the debtor's earning potential; any special circumstances, such as unusually high medical expenses; the frequency with which the debtor has sought bankruptcy relief; the circumstances under which the debt was incurred; the amount of payment offered; the burden which administration would place on the trustee; and the statutorily-mandated policy of construing bankruptcy provisions in favor of the debtor. *Id.* at 419-20 (noting that the factors used to analyze whether a plan has been proposed in good faith are also properly considered on a motion to dismiss for lack of good

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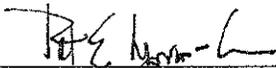
faith). Additional factors include: the nature of the debt; how the debt arose; the timing of the petition; whether the debt would be dischargeable in chapter 7; the debtor's motive in filing; how the debtor's actions affected creditors; the debtor's treatment of creditors before and after the filing; and whether the debtor has been forthcoming with the court and creditors. *Id.* (citing *In re Love*, 957 F.2d 1350, 1357 (7th Cir. 1992)).

The trustee argues that the debtors showed a lack of good faith when they transferred two parcels of property out of the chapter 13 estate without bankruptcy court permission and that this lack of good faith is reinforced by the fact that only one parcel has been returned. The debtors' actions have certainly been less than exemplary to date: (1) they should not have transferred the McCracken or Harvard properties without court permission; (2) they have not explained what they did with the \$30,000.00 they received as consideration for the McCracken transfer; (3) they were on notice after the trustee filed his motion to dismiss that they should not transfer any property and yet they transferred the Harvard property; and (4) it is not clear why they quitclaimed the Harvard property to Mr. Mahdi when he held only the second mortgage. However, the evidence was not strong enough to show that they did not act in good faith. They did act promptly to return the McCracken property to the estate. While the trustee is correct that the Harvard property has not been returned to the estate, that is an issue better addressed in the context of whether the debtors can propose a confirmable plan. The trustee did not meet his burden of proof on this motion.

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CONCLUSION

The motion to dismiss is denied. The confirmation hearing will be held on **October 26, 2004**, as previously noticed to parties in interest. (Docket 20). A separate order will be entered reflecting this decision.

Date: 19 October 2004

  
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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

Charles Van Ness, Esq.  
Holly Scherf, Esq.

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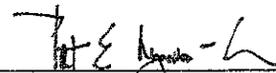
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TONYA L. AZIR, )  
Debtors. ) Judge Pat E. Morgenstern-Clarren  
)  
) **ORDER**

For the reasons stated in the memorandum of opinion filed this same date,

IT IS, THEREFORE, ORDERED that the chapter 13 trustee's motion to dismiss this case is denied. (Docket 15). The adjourned confirmation hearing will be held on **October 26, 2004** at 1:30 p.m.

Date: 19 October 2004

  
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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

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