Dated: October 05 2005

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 05-31603
	)	
Gregory Lockhart,	)	Chapter 13
	)	
Debtor.	)	
	)	JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION RE: MOTION TO DISMISS AND OBJECTION TO CONFIRMATION OF PLAN

This case came before the court for evidentiary hearing on the Motion to Dismiss Case with Sanctions [Doc. # 11] and Objection to Confirmation of Plan [Doc. # 34] filed by City Side Wholesale Corporation ("City Side"). On the grounds of lack of good faith, City Side objects to confirmation of Debtor's Chapter 13 plan and moves to dismiss Debtor's Chapter 13 case. At the hearing, attended by counsel for City Side, Debtor and Debtor's counsel, the parties had the opportunity to present testimony and evidence in support of their positions.

This memorandum of decision constitutes the court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52, made applicable to this contested matter by Fed. R. Bankr. P. 9014 and 7052. Regardless of whether or not specifically referred to in this decision, the court has examined the submitted materials, weighed the credibility of the witness, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the reasons discussed below, the court will grant the motion to dismiss but will deny City Side's request for sanctions and will deny as moot the objection to

confirmation of Debtor's Chapter 13 plan.

FACTUAL BACKGROUND

At the hearing, Debtor testified as the sole witness for both parties. He testified that he graduated from high school in 1992 and has taken no college-level courses since that time. Debtor is self-employed, working as an employment consultant, a business he operates from his home. He is paid a commission when he places individuals in employment positions with a business. His commissions are paid by check; however, he testified that he uses money orders to pay his expenses. Although his bankruptcy schedules state that he has been operating as a consultant for the past five years, he testified that he has been involved in employment consulting for approximately one year. Debtor's 2004 federal income tax return indicates that his gross income for the year was $36,500. He reported $30,096 in business expenses, including advertising costs of $7,650, for total net income of $6,404. [Ex. C]. In 2003, Debtor reported gross consulting income of $27,427, business expenses of $27,071, and total net income of $356. [Ex. D]. He testified that his work as an employment consultant is his only source of income.

On February 2, 2005, City Side repossessed Debtor's 2000 Cadillac Deville, in which it held a security interest, after Debtor failed to make payments on his loan. On March 2, 2005, the eve of the vehicle's sale by City Side, Debtor filed his Chapter 13 petition, listing City Side as holding a secured claim in the amount of $4,400. No other creditor, either secured or unsecured, was listed in his schedules. He reported owning only personal property totaling $13,725, including his Cadillac Deville valued at $10,000, office equipment valued at $2,000, household goods and personal apparel valued at $1,700 and financial accounts at First Federal Savings in the amount of $25. He reported no cash on hand and no accounts receivable.

In the bankruptcy schedules filed with his original petition, Debtor reports monthly business income of $3,000. Debtor's business expenses set forth in a separate schedule total $1,108, including expenses for utilities of $1,000 and insurance of $108 (which appears to be double counted on his original Schedule J). Thus, he reports an average net monthly income of $1,892. On Schedule J, Debtor reports total monthly expenses, including his business expenses, of $2,726.96, leaving him with $273.04 of excess income that he proposed to pay into a Chapter 13 plan.

On April 10, 2005, City Side filed a motion to dismiss Debtor's Chapter 13 case, arguing that Debtor has dealt with the court and his creditors dishonestly by filing inaccurate bankruptcy schedules as well as an inaccurate Statement of Financial Affairs and that the case was filed for the sole purpose of stopping the sale of his repossessed vehicle. Attached to the motion to dismiss is a credit report on Debtor that suggests

that he owes significant additional debt that was not reported in his bankruptcy schedules.

Approximately two weeks after the motion to dismiss was filed, Debtor filed amended Schedules E, F, I and J and an amended Statement of Financial Affairs. [Ex. B]. In his amended Schedules E and F, Debtor reported an additional fourteen creditors with unsecured debt totaling approximately $33,370. Although he continued to report $3,000 gross monthly income, he reported a business expense of only $1,050 and total expenses of only $2,583, leaving him with $417 excess monthly income, of which he indicated $273 would be paid into a Chapter 13 plan. [*Id.*].

At the hearing on the motions at issue, Debtor was questioned extensively regarding his schedules and his financial condition. His testimony was, for the most part, evasive and not credible. Although his amended schedules indicate that he disputes only five of the additional fourteen creditors' claims, he testified that he listed only City Side in his original petition because its claim was the only claim that was undisputed. This testimony is contrary to his averments in a complaint filed in this case by Debtor, wherein he indicates that the reason for his filing a bankruptcy petition was his belief that the amount he owed City Side differed from the amount stated by City Side in its Notice of Repossession and Sale.[1] [Doc. # 8, ¶ 3].

Debtor failed to give a direct answer to any question asked regarding his financial affairs. Notwithstanding the fact that he stated on Schedule B that he had no accounts receivable, he testified that he was "not sure" if anyone owed him money at the time he filed his petition. Notwithstanding the fact that he reported in his Statement of Financial Affairs that no financial accounts were closed by him during the year before filing, he was "not sure" if any bank account was closed within one year before filing. In fact, Debtor had produced a bank statement from First Federal Savings at his deposition that indicated a savings account was closed on September 23, 2004. [*See* Ex. G]. Debtor was also "not sure" whether he held any accounts at any financial institution other than First Federal Savings during the one-year time period before filing, and was "not sure" whether two savings accounts held by him at First Federal Savings were opened before or after filing his bankruptcy petition. Although he testified that he did not know when he last had a checking account, he later testified that he currently has a checking account with Bank of America but that he did not know whether it was opened before or after he filed his petition. The checking account, however, is not disclosed in his bankruptcy schedules.

Debtor was also evasive in his testimony regarding his income earned in 2005. In his Statement of

[1] The court takes judicial notice of the contents of its case docket. Fed. R. Bankr. P. 9017; Fed. R. Evid. 201(b)(2); *In re Calder*, 907 F.2d 953, 955 n.2 (10th Cir. 1990).

Financial Affairs, he reports gross income for the time period of January 1, 2005, until March 2, 2005, the date of filing, to be $6,000. But when asked whether he generated any revenue from his business in 2005 before filing his petition, he answered, "I'm not sure." When asked if the $6,000 was deposited into any of his accounts, he testified that he did not know. Debtor's bank statements from his two First Federal Savings accounts indicate that only one deposit of $75 was actually made to either account during the 2005 pre-filing period. Although Debtor reported net income for his consulting business in 2004 of only $6,404 for the entire year, and in 2003, only $356 for the year, [Ex. C and D], his original bankruptcy schedules indicate net business income of $1,892 per month, or $22,704 annually. His amended schedules increase this slightly to $1,950 per month, or $23,400 annually. When asked to explain why he believed his income would increase so dramatically in 2005, his general response was, "I'm not sure." He was also "not sure" what utilities he paid that accounted for the $1,000 per month business expense for utilities set forth in his Business Income and Expenses schedule. His business expense for utilities for the entire year in 2004 was only $900. [Ex. C].

Debtor also testified that he sold a Ford Taurus, which he valued at approximately $1,000, but that he did not know whether it was sold before or after he purchased a 2000 Cadillac in November, 2004. He did not, however, disclose the sale in his Statement of Financial Affairs. In short, Debtor's entire testimony, which lasted several hours, was generally uninformative due to his professed lack of knowledge about even the most basic aspects of his business and financial affairs.

Debtor's original Chapter 13 Plan proposed to pay to the Chapter 13 Trustee $273.04 per month for five months as payment for the arrearage owed to City Side and with 0% payment to unsecured creditors. After amending his schedules, Debtor has twice amended his Plan. Debtor's second Amended Chapter 13 Plan, together with the Stipulated Order Amending Chapter 13 Plan, proposes to pay to the Chapter 13 Trustee $305 per month for 32 months for 100% payment to both City Side and unsecured creditors. As of the date of hearing on the matters now before the court, Debtor was current with his Plan payments.

LAW AND ANALYSIS

City Side moves for dismissal of Debtor's Chapter 13 case with sanctions, arguing that his petition was not filed in good faith. City Side also objects to confirmation of the Second Amended Chapter 13 Plan based, at least in part, on Debtor's lack of good faith and lack of disposable income to meet all plan payments. A debtor has an obligation to file both his petition and his Chapter 13 plan in good faith. *In re Smith*, 286 F.3d 461, 465 (7th Cir. 2002). The Bankruptcy Code expressly requires that a debtor's plan be "proposed in good faith" and that the plan be feasible, that is, that "the debtor will be able to make all

payments under the plan and to comply with the plan." 11 U.S.C. § 1325(a)(3) and (6). The Sixth Circuit has also held that the Code's provision for dismissal of a Chapter 13 case "for cause" empowers a bankruptcy court to dismiss a Chapter 13 petition upon a finding that the debtor did not file it in good faith. *Alt v. United States (In re Alt)*, 305 F.3d 413, 418 (6th Cir. 2002); 11 U.S.C. § 1307(c). Debtor has the burden of proving each element necessary for confirmation of his plan, including that it was proposed in good faith. *Hardin v. Caldwell (In re Caldwell)*, 895 F.2d 1123, 1126 (6th Cir. 1990); *In re Aguirre*, 174 B.R. 233, 235 (Bankr. E.D. Mich. 1994). But the party seeking dismissal, in this case City Side, has the burden of showing the debtor's lack of good faith in filing the Chapter 13 petition. Both inquiries are factual inquiries based on the totality of the circumstances. *See Alt*, 305 F.3d at 419-20. The Sixth Circuit recognized that "'[t]here will often be a substantial overlap between the two inquiries.'" *Id.* at 420 (quoting *In re Love*, 957 F.2d 1350, 1356 (7th Cir. 1992)).

While numerous factors have been set forth by courts, including the Sixth Circuit, in considering whether a petition has been brought in good faith, the key inquiry is "whether the debtor is seeking to abuse the bankruptcy process." *Id.* at 418-19. The Sixth Circuit has cautioned that "no precise formula or measurement to be deployed in a mechanical good faith equation" may be promulgated. *Metro Employees Credit Union v. Okoreeh-Baah (In re Okoreeh-Baah)*, 836 F.2d 1030, 1033 (6th Cir. 1988). Rather, the totality of the circumstances of each case must be considered. In doing so, the court finds the following factors particularly relevant in this case: the timing of the petition, debtor's sincerity to repay his debts through the bankruptcy process, debtor's motive in filing the petition, and whether the debtor has been forthcoming with the bankruptcy court and the creditors. *See Alt*, 305 F.3d at 419.

In this case Debtor filed his petition on the eve of the sale of his vehicle by City Side, listing no creditor other than City Side, notwithstanding the fact that other creditors were also owed money by Debtor. Debtor did not identify other creditors and bring them into the bankruptcy process until after City Side filed its motion to dismiss and expressly raised the existence of other creditors. Clearly, the sole reason for filing was to thwart the efforts of City Side to enforce its rights under state law rather than to reorganize his debt. *See In re McAloon*, 44 B.R. 831, 835 (Bankr. E.D. Va. 1984) (purpose of Chapter 13 is to allow debtors to reorganize rather than liquidate). In Debtor's favor, there does appear to be a real dispute over the amount of the debt City Side claims is due and owing. But such conduct nevertheless provides some indicia of Debtor's lack of good faith, especially in light of his lack of candor and forthrightness displayed at the hearing in this matter as well as in his petition and schedules. The court emphasizes that the motive of stopping secured creditors' exercise of their contractual and state law statutory remedies with respect

to cars and homes is not alone bad faith. Suffice to say, most of the Chapter 13 cases filed in this court arise under similar circumstances, so as to garner the statutory benefit of the automatic stay to provide necessary breathing room in which to genuinely reorganize one's financial life. Here, however, Debtor started out trying to make City Side the *only* one of his creditors forced to get repaid through the Chapter 13 process. It is this fact when considered in combination with all of the other factors discussed in this opinion that adds up to bad faith at the outset of this case.

As noted in *Alt*, "Chapter 13 requires the debtor 'to be honest, forthcoming, truthful, and frank.' Whether the debtor has been forthcoming with the bankruptcy court and the creditors is properly considered in deciding whether dismissal for lack of good faith is appropriate." *Alt*, 305 F.3d at 421. In *Alt*, the court found a "strong inference of bad faith and abuse of the bankruptcy process" raised by the debtor's performance at her 2004 exam, at which she claimed not to know the answer to the most basic questions regarding her financial condition, as well as by her failure to schedule certain tax debt. *Id.* at 422. Similarly, in this case, Debtor intentionally evaded simple and straightforward questions that could shed some light on his true financial condition as discussed more fully above. The court finds Debtor's evasiveness intentional, because he otherwise impressed the court as smart, articulate and personable. The basic questions he was asked were well within his capabilities to answer meaningfully had he desired to do so. The court, as well as Debtor's creditors, are left with no ability on the current record to sort out truth from fiction and no ability to determine whether his Chapter 13 plan was proposed in good faith. That is, the court is unable to determine whether he had any basis for believing that he would have any disposable income to even apply to a Chapter 13 plan. There is no evidence that he actually received any income in January or February before filing his petition, which he said he could not recall, and his 2003 and 2004 income tax returns do not support the net business income figures indicated in his schedules. Although Debtor had made payments to the Chapter 13 Trustee for several months and was current in those payments at the time of the hearing in this matter, it does not reasonably appear that Debtor will be able to sustain those payments throughout the life of the plan. Debtor's lack of candor and evasiveness together with his apparent motivation in filing his bankruptcy petition leads the court to believe that his petition was an attempt to improperly "manipulate the Bankruptcy Code." *Copper v. Copper (In re Copper)*, 314 B.R. 628, 636 (B.A.P. 6th Cir. 2004). As such, the court finds that dismissal "for cause" under § 1307(c) is appropriate.

In finding dismissal of the case appropriate, the court has also considered the express provision of § 1307(c) that the court may dismiss a Chapter 13 case where confirmation of a plan and a request for

additional time to modify the plan are denied. 11 U.S.C. § 1307(c)(5). A Chapter 13 plan may not be confirmed unless the debtor demonstrates that the plan is feasible. *See* 11 U.S.C. § 1325(a)(6). As discussed above, the court is unable to determine feasibility due to Debtor's lack of honesty and forthrightness in answering questions regarding his financial condition. Debtor also did not provide honest and accurate information in his original petition and the court questions whether it has accurate information even now. Filing an amended plan will not cure this problem. In addition to Debtor's lack of good faith in filing his petition, § 1307(c)(5) is also a basis for dismissal of this case.

While the court will grant the motion to dismiss, it will not impose on Debtor additional sanctions as requested by City Side. At the hearing, City Side declined to specify the particular sanctions that it believed to be appropriate. The court nevertheless presumes that the desired sanction is a prohibition on refiling under Chapter 13 or a ruling that the automatic stay in any refiled case should not apply to City Side.

As to potential refiling of a bankruptcy petition, under 11 U.S.C. § 349, dismissal of a bankruptcy case does not prejudice the debtor with regard to the filing of a subsequent petition "except as provided in section 109(g) of this title." Section 109(g) applies only to cases dismissed "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," or in cases in which "the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay. . . ." 11 U.S.C. § 109(g). None of the circumstances set forth in § 109(g) apply in this case.

The dismissal is obviously not a voluntary dismissal effected at Debtor's request. And the dismissal does not involve any failure by Debtor to abide by a court order. Nor has Debtor ever failed to appear before the court in proper prosecution of the case, which the court understands from the plain language of the provision to mean failing to make a required appearance before the judge, not failing to properly prosecute a case in the broader and more general sense. *Contra In re Grischkan,* 320 B.R. 654, 661 (Bankr. N.D. Ohio 2005). If Congress intended the latter, the provision would limit refiling upon a debtor's "failure to proceed in proper prosecution of the case," without saying anything about appearing before the court. Debtor has appeared at several court hearings, even when not required to do so, albeit sometimes late. And although Debtor initially failed to appear at the first meeting of creditors [Doc. ## 13,16], he ultimately did so [Doc. ##31,35,38]; his initial failure to appear does not form any of the basis for dismissal of this case. Moreover, the court notes that the failure to appear about which § 109(g) is concerned is an appearance "before the court." The court does not conduct and may not even attend the first meeting of creditors. 11 U.S.C. § 341(c).

There is a conflict in the case law whether bankruptcy courts may limit the right to file a subsequent case other than under § 109(g). *Compare In re Frieouf*, 938 F.2d 1099, 1103-04 (10th Cir. 1991), *cert denied*, 502 U.S. 1091, 112 S.Ct. 1161 (1992)(language in § 349(a) "[u]nless the court, for cause, orders otherwise" does not apply to the second clause of the section, which permits filing limits only as provided in § 109(g)) *with Casse v. Key Bank National Association (In re Casse)*, 198 F.3d 327 (2d Cir. 1999)(language of § 349(a)does not prohibit a court from barring future filings for more than 180 days under 11 U.S.C. § 105). The statutory basis cited in cases like *Casse* authorizing broader limitations on refiling is 11 U.S.C. § 105. The Sixth Circuit has not decided this issue. Based on the plain words and structure of §§ 349(a) and 109(g), and established Supreme Court and Sixth Circuit authority emphasizing that § 105 is not a statutory fount of additional remedies not otherwise provided by Congress in the Bankruptcy Code, this court is inclined to agree with the *Frieouf* line of analysis (which is characterized in *Casse* as and appears to be the minority view) as better reasoned. Congress' express statutory actions regarding serial filings in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 also show the court that it thought existing provisions needed beefing up; if §§ 349 and 105 as interpreted in *Casse* were deemed by Congress adequate to the task, such new statutory provisions would not have been necessary. In any event, the court need not decide that issue here, because an adversary proceeding is required if an injunction or other equitable relief as to refiling or *in rem* application of the automatic stay beyond the express terms of the statute is sought. Fed. R. Bankr. 7001(7). City Side has not commenced an adversary proceeding and is proceeding by motion. Lastly, even if acting outside the temporal and substantive statutory bounds of § 109(g) is lawful, the lack of good faith in one case will not automatically translate to a lack of good faith in any subsequent case, at least not based on the evidence presently before the court in this case.

As a result of the court's decision that dismissal of this case is appropriate, the court will address the impact of dismissal on the two other pending matters. First, Debtor commenced an adversary proceeding against City Side alleging willful violation of the automatic stay and seeking both injunctive relief and damages under 11 U.S.C. § 362(h). The court will retain jurisdiction and proceed to determine Debtor's adversary proceeding notwithstanding dismissal. *Javens v. City of Hazel Park (In re Javens)*, 107 F.3d 359, 364 n.2 (6th Cir. 1997)(action for damages for violation of the automatic stay survives dismissal of case)*; Davis v. Courington (In re Davis)*, 177 B.R. 907 (B.A.P. 9th Cir. 1995)(court could retain jurisdiction after dismissal of main case over adversary proceeding to impose sanctions for violation of automatic stay); *see In re Carraher*, 971 F.2d 327 (9th Cir. 1992)(a bankruptcy court is not automatically divested of jurisdiction over cases related to the bankruptcy case that has been dismissed). Second, Debtor

has objected to City Side's claims. The court will deny the objections [Doc. ## 44,45] as moot, because as a result of dismissal the claims are not going to be paid through this case.

A separate order in accordance with this opinion will be entered by the court.