UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CHAPTER 7
	)	
THELMA HATCHETT,	)	
	)	CASE NO. 05-63378
Debtor.	)	
	)	
	)	JUDGE RUSS KENDIG
	)	
	)	
	)	**MEMORANDUM DECISION**
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	)	

There are two matters pending before the court – the motion of Thelma Hatchett ("Debtor") to dismiss her Chapter 7 bankruptcy case, and the motion of Joanne Paulino, Chapter 7 Trustee ("Trustee") for an order compelling Debtor to turn over non-exempt equity in Debtor's automobile. For reasons that follow, Debtor's motion is **DENIED** and the Trustee's motion is **GRANTED.**

I. JURISDICTION AND VENUE

The court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334(b) and the General Order of Reference entered in this district on July 16, 1984. This is a core proceeding over which the court has jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(A). Venue is proper in this judicial district pursuant to 28 U.S.C. § 1408.

II. SUMMARY OF THE CASE

Debtor filed her chapter 7 petition on June 13, 2005. The schedules accompanying the petition disclose total debts of $13,624, all of which is classified as unsecured, nonpriority debt on Schedule F. Debtor owns no real estate and receives $1,786 in monthly pension and Social Security payments. Debtor disclosed ownership of two vehicles – one 1988 Oldsmobile and one 1999 Chrysler. A review of the scheduled debts reveals $11,315 of credit card and other consumer purchases, and $2,309 in medical bills. Debtor's responded "no" to questions in the Statement of Financial affairs which require her to disclose under penalty of perjury whether she

had made any preferential transfers to creditors and insiders, or transferred any property within the year preceding commencement of her case.

The meeting of creditors required by Section 341[1] of the Bankruptcy Code was scheduled for July 26, 2005 and continued several times as the Trustee investigated Debtor's financial affairs. On September 6, 2005, Debtor filed a motion to dismiss alleging that she had re-evaluated her finances and felt she would be better off without the bankruptcy proceeding. See Dkt. #11. The trustee objected to the motion to dismiss because she had requested an accounting from the sale of Debtor's real estate and the information had not been provided.

On October 7, 2005, the Trustee filed a motion for turnover of Debtor's nonexempt equity in the 1999 Chrysler automobile. The Trustee had obtained an appraisal the vehicle which showed that it was valued at $7,200, and according to Debtor's schedules, the car was unencumbered. The Trustee seeks an order compelling the Debtor to turn over the vehicle or pay her the amount of $6,200 for distribution to creditors. Debtor objected that the motion for turnover was premature because she had already filed her motion to dismiss. The motion for turnover was set for hearing along with the motion to dismiss on November 21, 2005 and following the hearing the parties submitted briefs to further support their arguments.

III. PARTIES' ARGUMENTS

Debtor argues that she should be permitted to dismiss her case because the errors and omissions in her petition were inadvertent, a result of her confusion and "now known" Alzheimer's disease. Debtor argues that she properly complied with Fed. R. Bankr. P. 1017, which requires that the court hold a hearing on a motion to dismiss. Debtor also advances the theory that Fed. R. Bankr. P. 7041 incorporates Fed. R. 41 and allows a Debtor to voluntarily dismiss her petition in the same manner that a plaintiff may dismiss an adversary proceeding in district court. Debtor offers the assurance that she seeks to dismiss her petition so she can pay her creditors in full with her family's assistance.

The Trustee cites Section 707 and its requirement of "cause" as the starting point for determining when a court may grant a debtor's motion to dismiss. The Trustee argues that Debtor's reliance upon Fed. R. Bankr. P. 1017 is misplaced, as it merely governs the procedures that must be followed in a motion to dismiss. The Trustee relies on Turpen v. Eide (In re Turpen), 244 B.R. 431 (B.A.P. 8th Cir. 2000), in which the court denied a motion to dismiss where debtors claimed that they would repay their creditors outside the bankruptcy in full as soon as the case was dismissed. The Trustee argues that if Debtor's case were dismissed, creditors would not be able to recover preferential payments unless they first obtained a judgment of fraud, and that Debtor's assertions of full repayment with family assistance are no guarantee.

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[1] Unless otherwise stated, references to "the Code" or "the Bankruptcy Code" are to Title 11 of the United States Code. Unless otherwise stated, a reference to a "Section" is a reference to a section within the Bankruptcy Code.

IV. ANALYSIS

A. Dismissal of a Chapter 7 Case

Section 707(a) provides that "[t]he court may dismiss a case under this chapter only after notice and a hearing and only for cause." A debtor has no absolute right to voluntarily dismiss a Chapter 7 petition. See Bartee v. Ainsworth (In re Bartee), 317 B.R. 362, 366 (B.A.P. 9th Cir. 2004); In re Martin, 30 B.R. 24, 26 (Bankr. E.D.N.C. 1983). In re Waldrep, 20 B.R. 248, 250 (Bankr. W.D. Tex. 1982) (noting that debtor has an absolute right to dismiss a Chapter 13 case, but no corresponding right exists under Chapter 7). A debtor's ability to repay her debts will not, standing alone, constitute cause for dismissal. In re Hopkins, 261 B.R. 822, 823 (Bankr. E.D. Pa. 2001); In re Williams, 15 B.R. 655, 657 (E.D. Mo. 1981), *aff'd*, 696 F.2d 999 (8th Cir. 1982). A benefit to be derived by the debtor from dismissing a Chapter 7 case does not constitute cause for dismissal. In re Watkins, 229 B.R. 907, 909 (Bankr. N.D. Ill. 1999).

The majority view regarding voluntary dismissal is that a Chapter 7 debtor is entitled to dismissal only if the dismissal will not prejudice interested parties. See In re Klein, 39 B.R. 530, 532 (Bankr. E.D.N.Y. 1984); Hammerer v. IRS (In re Hammerer), 18 B.R. 524 (Bankr. E.D. Wis. 1982); Gill v. Hall (In re Hall), 15 B.R. 913, 917 (B.A.P. 9th Cir. 1982). Debtor has the burden of proving that dismissing her Chapter 7 case will not prejudice her creditors. Bartee, 317 B.R. at 366. Assertions by counsel do not constitute probative evidence. McClure v. Dome (In re McClure), 234 B.R. 889, 890 (Bankr. N.D. Tex. 1999); Nielsen v. DLC Invest., Inc. (In re Nielsen), 211 B.R. 19, 22 n. 3; Smith v. GTE North Inc. (In re Smith), 170 B.R. 111, 117 (Bankr. N.D. Ohio 1994); Haymaker v. Green Tree Consumer Discount (In re Haymaker), 166 B.R. 601, 607 (Bankr. W.D. Pa. 1994). See, also, Sicherman v. Cohara (In re Cohara), No. 04-8051, 2005 WL 756571 at *3-*4 (B.A.P. 6th Cir. 2005) (bankruptcy court did not abuse its discretion in denying debtor's motion to dismiss Chapter 7 petition where debtor failed to provide any evidence as to how creditors would be paid if case was dismissed). And finally, dismissal of a case where it appears that a debtor has failed to account honestly for assets should not be permitted, because the lack of truthfulness indicates the likelihood of further evasive tactics by the debtor. In re Watkins, 229 B.R. at 909.

B. Hearing Testimony

Debtor attended the hearing on the motion to dismiss which was held on November 21, 2005. She testified that she lives at 4157 Leander Street NE, East Canton.[2,3] (Hearing record at

[2] If Debtor's hearing testimony is accurate, she still lives in the house that she sold to her daughter, and according to her Schedule J, pays $803.49 monthly for rent.

[3] A search of property records maintained by the Stark County Auditor and Stark County Recorder show that Zelda Hatchett is the owner of record of 4157 Leander Street NE, East Canton. The transfer was recorded on February 1, 2005. The Stark County Auditor record discloses a taxable sale value of $34,060. On February 17, 2005, Charter Mortgage Co., Inc. of Worthington, Ohio recorded a mortgage against the property as security for a promissory note signed by Zelda Hatchett on February 11, 2005. The mortgage was executed in Franklin County,

3:17:25). Debtor claimed she was confused about her two vehicles and was thinking of the 1988 Oldsmobile when she estimated the value for the Chrysler Concorde at $2,000. (Hearing record at 3:19:46). Debtor remembers selling her real estate to her daughter in February 2005, (hearing record at 3:21:30), and agreed with her attorney that the property was sold at fair market value. (Hearing record at 3:21:50). She received proceeds of $10,384 from the sale, but gave her daughter $6,000 of the proceeds because of a defect in the flooring. (Hearing record at 3:22:14).[4] When Debtor's attorney inquired, "[i]s it fair to say that you have early Alzheimer's disease?" Debtor responded "I guess you could say that." (Hearing record at 3:22:52). However, when questioned about whether she had the opportunity to visit a doctor, Debtor claimed, "No, I don't have insurance," and her attorney propounded no further questions on that subject. (Hearing record at 3:22:58). Debtor did not offer any documents to support her assertion that the property was sold at fair market value, such as a broker's price opinion or real estate listing agreement. Debtor agreed with her attorney that her children thought she would be better off outside of bankruptcy than in it. (Hearing record at 3:23:54).

Debtor's daughter, Zelda Hatchett, also testified. According to Zelda, a realtor was involved in the sale of the real estate and received a commission. (Hearing record at 3:24:50). She, too, agreed with leading questions that her mother suffered from possible early stage Alzheimer's disease (Hearing record at 3:25:40), and testified that they did not know of this condition when Debtor decided to file her case. (Hearing record at 3:25:48). No documents were offered to support the claim of broker involvement and payment of a broker commission.

The court has considered the arguments of each party and the testimony presented at the hearing, and finds that Debtor has not met her burden of proving that dismissal of her Chapter 7 case would not prejudice her creditors. The court is troubled by Debtor's and Debtor's daughter's claim that Debtor was so confused she could not accurately schedule debts or report financial information on her bankruptcy petition and yet she was competent to transfer her home, the only thing of value that she owned. Despite claims of repayment with assistance from family members, Debtor offered no evidence that her family members have the intent or current capacity to pay Debtor's obligations in full. Anything less than full payment, tendered immediately, is prejudicial to creditors. Debtor did not file her motion to dismiss until the Trustee discovered the possibility of fraudulent and preferential transfers, and the mortgage recorded against Debtor's former property raises obvious questions. See fn. 3, *supra.* Debtor purportedly suffers from Alzheimer's disease, but still needs two cars. Debtor lives in the residence that is now owned by her daughter, and if her schedules are accurate, pays more than $800 in monthly rent.

Ohio and recites that the amount of the promissory note is $96,900. There is a second home rider attached to the mortgage which states that Zelda Hatchett, as borrower, will occupy and use the property as her second home, and keep the property available for her exclusive use. The mortgage raises obvious questions.

[4] All of the questions propounded to Debtor by her attorney were leading, and required little more than a "yes" or "no" response.

Whatever all of this may mean can be questioned. What all of this does clearly establish is the absence of legal cause required for dismissal.

Accordingly, Debtor's motion to dismiss is **DENIED.** The Trustee's motion for turnover is **GRANTED.**

/s/ Russ Kendig MAR 3 1 2006

Judge Russ Kendig
U.S. Bankruptcy Judge

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All creditors and parties in interest