

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE: *
* CASE NUMBER 06-40102
JAMES G. SPENCER - and - *
* JEANETTE B. SPENCER, *
* CHAPTER 7
*
Debtors. * THE HONORABLE KAY WOODS
*

ORDER GRANTING IN PART AND DENYING
IN PART MOTION TO RECONSIDER

The matter before the Court is one of first impression. On April 4, 2006, Debtors James G. Spencer and Jeanette B. Spencer ("Debtors"), through counsel, filed Motion to Reconsider Entry Dated March 29, 2006, and/or, Motion to Vacate Entry Dated March 29, 2006 and Debtors [sic] Response to Trustee's Motion to Dismiss (With Request for Evidentiary Hearing) ("Motion to Reconsider"). For the reasons set forth below, this Court grants in part and denies in part the Motion to Reconsider.

Procedural Background

Debtors filed a voluntary petition pursuant to Chapter 7 of Title 11 on February 8, 2006. As a consequence, this case is governed by the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). Schedule I to Debtors' petition states that Debtor James G. Spencer is unemployed (disabled) and Jeanette B. Spencer is employed at Cooper & Cooper (7 years). On February 23, 2006, Debtors filed Amended Voluntary Petition to update forms. On March 1, 2006, Debtors filed Employee Income Records. The employee records consisted of a "Payroll Journal" and covered checks issued to Jeanette B. Spencer dated 11/03/05 (check no. 2206), 11/10/05

(check no. 2223), 12/14/05 (check no. 2299), 12/22/05 (check no. 2315), 12/29/05 (check no. 2331), 01/26/06 (check no. 2375), 02/(date not readable) (check no. not readable), and 02/02/06 (check no. 2888). No employee income records were filed for James G. Spencer and no document was filed stating that payment advices for the sixty (60) day period prior to the filing date did not exist for Mr. Spencer.

The meeting of creditors pursuant to 11 U.S.C. § 341 was scheduled to be held on March 21, 2006. On March 22, 2006, the Chapter 7 Trustee filed a notice that the meeting of creditors had been held and continued. On March 27, 2006, Saul Eisen, United States Trustee for Region 9 ("United States Trustee"), filed Motion Requesting Order Dismissing Chapter 7 Case Pursuant to 11 U.S.C. Section 521 ("Motion Requesting Dismissal Order").

Section 521(i)(2) provides that "with respect to a case described in paragraph (1), any party in interest may request the court to enter an order dismissing the case. If requested, the court shall enter an order of dismissal not later than 5 days after such request." (Emphasis added.) As a consequence, on March 29, 2006, this Court granted, by marginal order, Motion Requesting Dismissal Order.

Discussion and Analysis

11 U.S.C. § 521(a)(1) provides that a debtor shall file a list of creditors and § 521(a)(1)(B) provides that "unless the court orders otherwise" the debtor shall file certain documents including "(iv) copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor."

Debtors concede that they did not file all of the payment advices required by § 521(a)(1)(B)(iv). Attached to the Motion to Reconsider is the Affidavit in Support signed by William W. Taylor ("Taylor Affidavit"), as counsel for Debtors. The Taylor Affidavit states that a paralegal for the United States Trustee sent an e-mail to Mr. Taylor on or about March 7, 2006, indicating that certain dates were missing from the Employee Income Records filed on March 1, 2006. "Further review indicated that this was the case." (Taylor Affidavit, ¶ 3.) The Taylor Affidavit goes on to state that "Debtors brought the missing information, along with actual copies of all of the pay checks from the appropriate period, to the § 341 Meeting of the Creditors." (Taylor Affidavit, ¶ 6.) Debtors contend that they provided all of the relevant information to the Chapter 7 Trustee, Richard Zellers, who "read into the record the fact that he received the proof of income from the Debtors, along with copies of the required tax returns." (Taylor Affidavit, ¶¶ 7 and 8.)

Debtors do not contend in either the Motion to Reconsider or the Taylor Affidavit that they satisfied the requirement in § 521(a)(1)(B)(iv) to **file** all payment advices for the relevant period. Providing pay records to the Chapter 7 Trustee at the meeting of creditors is not the same as filing the documents with the Court. The docket in this case does not reflect the filing of any payment advices except for the filing of Employee Income Records on March 1, 2006, which Debtors concede did not contain records for the entire sixty (60) day period prior to filing their petition.

The Motion Requesting Dismissal Order is based on this failure to "file all pay advices or other evidence of payment

received for the sixty (60) days prior to the filing of the petition as required under 11 U.S.C. Section 521(a)(1)(B)(iv)." (Motion Requesting Dismissal Order, ¶ 2.) The United States Trustee contends that "failure of a debtor to comply with this provision within 45 days after the date the petition is filed results in an automatic dismissal effective on the 46th day after the petition is filed." The United States Trustee relies on 11 U.S.C. § 521(i)(1) and *In re Young*, No. 05-76857 (Bankr. N.D. Ohio filed January 4, 2006). (Motion Requesting Dismissal Order, ¶ 6.) The United States Trustee calculated that the forty-five (45) day period ended on March 25, 2006; the Motion Requesting Dismissal Order was filed March 27, 2006 (*i.e.*, 47th day after the petition was filed).

In *In re Bartholomew*, 2005 Bankr. Lexis 2648 (Bankr. W.D.N.Y. Dec. 30, 2005) the debtor filed an application to waive submission of some of the payment advices that he received during the sixty (60) days prior to filing his bankruptcy petition. The debtor urged the court to grant the motion on the basis that he had filed the most recent pay stub, which debtor alleged showed year to date income and withholdings. As a consequence, debtor contended that submission of prior pay stubs would be of no value. The court denied the motion, stating:

This Court has no authority to disregard a mandate that Congress has inserted into the Bankruptcy Code. For this reason, I cannot authorize a debtor to avoid this unambiguous statutory direction to file payment advices received during the sixty days prior to bankruptcy filing. . . . Although section 521(a)(1)(B)(iv) requires the filing of all such advices, section 521(i)(1) compels dismissal only upon a failure to file "all of the information" contained in the documents that the debtor must provide.

Id. at *3. Thus, the court permitted the debtor to move for a determination that the case was not subject to dismissal despite failure to file all of the required payment advices.

Here, Debtors concede that the employee payment records for Mrs. Spencer were not complete. Unlike the *Bartholomew* case, there is no argument that Mrs. Spencer's employee pay records, as filed, contain all of the information required by § 521(a)(1)(B)(i). The Debtors argue instead that they presented all of the payment information for Mrs. Spencer to the Chapter 7 Trustee at the meeting of creditors. Debtors understood the requirement to file payment advices or other evidence of payment when they filed the Employee Income Records on March 1, 2006. Despite understanding the filing requirement in § 521(a)(1)(B)(iv), Debtors failed to file the additional information they provided at the meeting of creditors.

Debtors make no representation about payment records for Mr. Spencer. Although Schedule I indicates that Mr. Spencer was not employed at the time the petition was filed, there is no evidence that he was not employed during some or all of the sixty (60) days prior to filing the bankruptcy petition.

In *In re Fawson*, 2006 Bankr. Lexis 205 (Bankr. D. Utah Feb. 16, 2006), the court joined two bankruptcy cases (Fawson and Webster). In response to a § 704(b)(1)(A) request by the United States Trustee, the court issued orders to appear and show cause and ordered the debtors to file a written explanation of the failure to timely file the documents required by § 521(a)(1)(B)(iv). Mrs. Webster filed an affidavit stating that she was not employed during this sixty (60) day period. Mr. Webster's affidavit stated that he provided the information to his attorney and the attorney

filed an affidavit giving reasons why the payment advices had not been filed. The court held that Mrs. Webster's case could not be dismissed pursuant to § 521(i)(1) because she did not have any payment advices to file. The court dismissed Mr. Webster's case, however, on the grounds that the court could not enlarge the time to file the payment advices. "The Court has no discretion to enlarge the time to file § 521(a)(1) documents after the 45-day period has expired because by operation of the statute, the case is already automatically dismissed." *Id.* at *10. The court in *Fawson* stated that "[s]ection 521(i)(2) requires entry of the dismissal order but only if the Court has determined that § 521(i)(1) is applicable. If all the requirements of § 521(i)(1) are not present, the Court would not enter the order even if requested." *Id.* at *11. The court noted that the five day period in § 521(i)(1) is a very short time for a court to determine if a case meets all of the requirements of § 521(a)(1), particularly where a required paper is filed but is incomplete.

In the instant case, it is not clear whether Mr. Spencer was employed at any time during the sixty (60) day period prior to filing the petition on February 8, 2006. As a consequence, it is appropriate to grant the Motion to Reconsider as to Mr. Spencer and permit the Debtor to present evidence regarding this issue.

Regarding Mrs. Spencer, the argument is not that the documents filed were sufficient to provide all of the information required by § 521(a)(1)(B)(iv), but rather that this information was presented at the meeting of creditors. Providing the information at the meeting of creditors, however, does not comport with the

requirement that payment advices for the sixty (60) day period must be filed with the Court. Although Debtors do not articulate this argument, to the extent they rely on FED. R. BANKR. P. 5005(c) to excuse the failure to file all of the payment advices, this Court holds that the rule is not applicable here. Rule 5005(c) provides that:

A paper intended to be filed with the clerk but erroneously delivered to the United States trustee, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the clerk of the bankruptcy court.

Here, there is no indication that Debtors thought that, by providing the information at the meeting of creditors, they were filing the documents with the Court. "At a minimum however, the party who incorrectly filed the paper must have actually intended that the paper be filed with the clerk. . . . Rule 5005(c) cannot be used to prevent automatic dismissal for failure to file all papers required by § 521(a)(1)." *In re Fawson* at *17.

As a consequence, since Debtors concede that they did not comply with § 521(a)(1)(B)(iv) regarding payment advices for Mrs. Spencer, there is no reason to grant the Motion to Reconsider regarding dismissal of her bankruptcy case.

Conclusion

For the reasons set forth above, this Court grants the Motion to Reconsider as to the dismissal of the bankruptcy case of James G. Spencer and denies the Motion to Reconsider as to the dismissal of the bankruptcy case of Jeanette B. Spencer. The Court sets a hearing on whether to vacate the dismissal of the bankruptcy

case of James G. Spencer for April 27, 2006 at 9:15 a.m.

IT IS SO ORDERED.

**HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE**