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Can a Consumer Debtor Voluntarily Dismiss Own Chapter 7 Bankruptcy Case?

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Introduction

Under Section 707(a) of title 11 of the United States Code (the "Bankruptcy Code"), a court may dismiss a chapter 7 bankruptcy case for cause.[1] Section 707(a) provides a list of examples of conduct that constitutes cause to guide the court in making its determination.[2] A chapter 7 consumer debtor has the right to voluntarily dismiss his own chapter 7 case, however, that right is not absolute.[3] When a consumer debtor seeks to voluntarily dismiss his chapter 7 case he must establish cause for dismissal under section 707(a).[4] The court will determine whether the debtor's voluntary motion to dismiss should be granted by determining whether dismissal would be in the best interest of all the parties involved.[5] One may think that when a debtor attempts to voluntarily dismiss his own chapter 7 case the court should simply grant the motion, but that is not the case. It is important for the court to determine the reason a debtor

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[1] *See* 11 U.S.C 707(a).
[2] *See* COLLIER ON BANKRUPTCY § 707.03 (15th ed. 2015).
[3] *See In re Segal*, 527 B.R. 85, 90 (Bankr. E.D.N.Y. 2015).
[4] *See id.*
[5] *See id.*

would elect to withdraw from bankruptcy after voluntarily filing for such protection by looking at the facts and circumstances of each individual case.

This article discusses why the court's ability to determine whether cause exists for voluntary dismissal of a consumer debtor's bankruptcy case ensures that individuals cannot enjoy the benefits of bankruptcy without fulfilling their obligations to creditors. Part I of this article discusses the factors set forth in Section 707(a) of the Bankruptcy Code that are considered by the bankruptcy court in determining if cause exists for dismissal of a chapter 7 case. Part II discusses the court's use of discretion in determining what is in the best interest of the parties as well as the court's consideration of the facts and circumstances of the case in reaching its conclusion. Part III discusses how "bad faith" is considered a relevant factor by bankruptcy courts when determining whether to dismiss a case.

I. General Factors That Show Cause Under 11 U.S.C § 707(a)

Section 707(a) of the Bankruptcy Code lists the following three examples of cause justifying dismissal of a chapter 7 case:[6] (1) unreasonable delay by the debtor that is prejudicial to creditors; (2) nonpayment of any fees or charges required under chapter 123 of title 28; and (3) failure of the debtor in a voluntary case to file, within 15 days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by section 521(a)(1), but only on a motion filed by the United States trustee.[7]

First, unreasonable delay by the debtor occurs when the debtor files for chapter 7 bankruptcy for the purpose of enjoying the protections of bankruptcy by forestalling creditors.[8] This practice is evident when the debtor fails to appear for court proceedings or file the necessary

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[6] *See* 11 U.S.C. 707(a).
[7] *See* COLLIER ON BANKRUPTCY § 707.03 (15th ed. 2015) (stating the list of examples provided by section 707(a) are "illustrative, not exhaustive").
[8] *See id.*

Schedules after filing for bankruptcy. In *In re Segal*, the debtor had his attorney file a chapter 7 petition to avoid the imminent foreclosure sale of his co-operative apartment.[9] After filing the chapter 7 petition both the debtor and his attorney failed to appear at various court proceedings for the next four months until the Trustee moved for authorization to sell the co-operative apartment.[10]

Second, the court may dismiss a debtor's chapter 7 case if the debtor fails to pay the required fees and charges.[11] Each chapter 7 case is accompanied by a filing fee of $245 dollars which may be paid in installments.[12] Under Bankruptcy Rule 1006, if "the debtor has not paid a fee installment within the time fixed by the court, the court may dismiss the case after the required notice and hearing."[13]

Third, the debtor is required under section 521(a)(1) to file various documents relating to his financial affairs including a list of creditors and a schedule of assets and liabilities.[14] If the debtor fails to file these documents in a timely manner and the trustee files a motion to dismiss, the court may dismiss the debtor's case.[15] For example, In *In re Moses*, the court addressed the issue of whether the debtor's refusal to provide financial information by invoking her Fifth Amendment right constitutes cause for dismissal of her chapter 7 case.[16] There, the court held

[9] *See In re Segal*, 527 B.R. 85, 88 (Bankr. E.D.N.Y. 2015).
[10] *See id.* For example, the debtor did not respond to the Trustee's Motion for Authorization to Conduct a 2004 Examination of the Debtor and the Debtor's wife and the Motion to Compel the Debtor to Perform His Duties Under § 521(a) and rule 4002 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rule(s)").
[11] *See* COLLIER ON BANKRUPTCY § 707.03 (15th ed. 2015).
[12] *See id.*
[13] *See id.* (stating that although Bankruptcy Rule 1006 does not allow the court to extend the debtor's allotted time to pay installments over 180 days after the case has commenced, dismissal is not required if the debtor makes payments shortly after the allotted period of time has expired).
[14] *See id.*
[15] *See id.*
[16] *See In re Moses*, 792 F. Supp 529, 530 (E.D. Mich. 1992).

that the debtor's refusal to provide financial information constituted cause because without this information the trustee would be unable to correctly administer the debtor's estate.[17]

The foregoing are examples of when a court can generally dismiss a consumer debtor's chapter 7 case for cause; the court is also free to consider other factors that constitute cause for dismissal. The court may also consider whether the debtor can secure an "effective fresh start" outside of bankruptcy, if dismissal would be in the best interest of the creditors involved, and whether the debtor acted in "bad faith." These factors are especially important when a consumer debtor attempts to voluntarily dismiss his own chapter 7 case.

II. Other Factors to Determine Cause for Dismissal

The most important factor that the bankruptcy court takes into account in considering the debtor's voluntary motion to dismiss his own bankruptcy case is "whether the debtor is able to secure an effective fresh start" outside of bankruptcy.[18] Another important factor the bankruptcy court weighs in reaching its decision is whether dismissal would be prejudicial to the creditors of the debtor.[19] The court's determination as to whether the two factors listed above support or oppose voluntary dismissal depend on the individual facts and circumstances of each case.

A. Facts and Circumstances That Support Dismissal of a Chapter 7 Bankruptcy Case

The ability of the debtor to pay his or her creditors outside of bankruptcy supports the general view that the debtor can "secure a fresh start outside of bankruptcy" and that dismissal would not be prejudicial to the creditors.[20] The ability of the debtor to pay creditors outside of bankruptcy may constitute cause for dismissal because "the debtor's best interest also lies in the

[17] *See id*. at 539 (stating that the court may dismiss the bankruptcy case because the debtor's conduct constituted cause).
[18] *See Smith v. Geltzer* (*In re Smith*), 507 F.3d 64, 72 (2d. Cir. 2007).
[19] *See id*.
[20] *See generally id.*

‘reduction of administrative expenses’” associated with bankruptcy.[21] Administrative expenses in bankruptcy generally refer to expenses including compensating trustees, attorney’s fees, and other expenses of preserving the bankruptcy estate. The debtor’s best interest also lies in the reduction of administrative expenses because the debtor will have more “resources to work out his debts.”[22]

1. *The Debtor’s Ability to Pay Creditors Outside of Bankruptcy*

In *In re Aupperle*, the bankruptcy court granted the debtor’s motion to voluntarily dismiss her chapter 7 case.[23] There, the debtor informed the court that she would be able to pay her creditors outside of bankruptcy because her adult son, a mortgage broker, would be moving in and would contribute financially to help her pay her debts.[24] The debtor also stated that she believed that dismissal would not be prejudicial to her creditors because the creditors would be returned to the position they held prior to the bankruptcy filing.[25] The court took into consideration whether all the creditors consented to dismissal, whether dismissal would prejudice her creditors, and whether her request for dismissal was in bad faith. [26] The court in *In re Aupperle* granted the debtor’s motion to voluntarily dismiss her chapter 7 case because it was the debtor’s first time filing for bankruptcy, her creditors made no prepetition collection efforts, and the debtor had an additional source of income to assist in paying her debts.[27]

Many consumer debtors attempt to voluntarily dismiss their bankruptcy cases for the wrong reasons. Initially, debtors enter into bankruptcy because they recognize a need for

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[21] *See id.* at 75.
[22] *See In re Dinova,* 212 B.R. 437, 441 (B.A.P. 2d Cir. 1997).
[23] *See In re Aupperle,* 352 B.R. 43, 48 (Bankr. D.N.J. 2005).
[24] See *id.* at 44.
[25] *See id.*
[26] *See id.* at 48.
[27] *See id.*

protection under the Bankruptcy Code. Thus, it is unlikely that debtors would decide to enter bankruptcy and subsequently attempt to get out of bankruptcy because of a new found ability to pay their creditors without the assistance of the bankruptcy court.

2. *Courts will Dismiss a Bankruptcy Case upon the Debtor's Request If Dismissal Would Not Prejudice Creditors*

In *In re Hull*, the Bankruptcy Court for the Eastern District of New York granted the debtor's motion to dismiss her voluntary chapter 7 case because dismissal would not be prejudicial to her creditors.[28] The court stated that, "creditors may be prejudiced where a substantial amount of time has passed, or the debtor has engaged in wrongdoing or inequitable conduct."[29] First, the debtor's conduct did not result in unreasonable delay because she sought to dismiss her bankruptcy case only two months after filing her original petition.[30] Second, if the debtor's case remained in bankruptcy the trustee would be delayed in distributing the bankruptcy estate to the creditors because the debtor's estate consisted of a single asset – a personal injury claim.[31] The trustee would be delayed because there was no indication of what the value of the personal injury claim would be, or whether an action on that claim had been commenced.[32] Finally, there was no indication that the debtor was attempting to abuse the bankruptcy process.[33] Based on the facts and circumstances of Hull's bankruptcy case, the court held that the debtor established cause to dismiss her chapter 7 bankruptcy case.[34]

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[28] *See In re Hull*, 339 B.R. 304, 308-309 (Bankr. E.D.N.Y. 2006).
[29] *See id.* at 308.
[30] *See id.* at 309 (discussing that the debtor also attended her section 341 meeting of creditors prior to seeking dismissal).
[31] *See id.*
[32] *See id.*
[33] *See id.* (stating that the debtor honestly accounted for her assets and was honest when questioned by the trustee).
[34] *See id.*

B. Facts and Circumstances in Support of Denying Dismissal of a Consumer Debtor's Bankruptcy Case

There is no absolute bar to dismissing a voluntary chapter 7 case based upon a debtor's request, however, courts are generally reluctant to grant the request. Generally, courts will deny a debtor's motion to dismiss his or her voluntary chapter 7 case when a debtor would be unable to secure "an effective fresh start" outside or bankruptcy, and dismissal would be prejudicial to creditors.[35]

1. Courts May Find that a Debtor is Equitably Estopped from Having His Chapter 7 Case Dismissed

When a debtor "enjoys the benefits, and none of the detriments" of bankruptcy, a court may find that the debtor is equitably estopped from attempting to have his voluntary chapter 7 case dismissed.[36] Under New York law, equitable estoppel requires: (1) an act constituting a concealment of facts or a false misrepresentation; (2) an intention or expectation that such acts will be relied upon; (3) actual or constructive knowledge of the true facts by the wrongdoers; and (4) reliance upon the misrepresentation which cause the innocent party to change its position to its substantial detriment.[37] An example of when a debtor may be equitably estopped from dismissing his voluntary chapter 7 case is when a considerable amount of time has passed from the time the debtor filed his bankruptcy petition.[38]

In *In re Segal*, the Bankruptcy Court for the Eastern District of New York denied a debtor's motion to dismiss a case where the debtor waited four months before asserting that his chapter 7

[35] *See generally In re Segal*, 527 B.R. 85 (Bankr. E.D.N.Y. 2015); *Willis v. Rice* (*In re* Willis), 345 B.R. 647 (8th Cir. BAP 2006); *In re Scotto,* No. 8-09-75956-REG, 2010 WL 1688743 (Bankr. E.D.N.Y. Apr. 26, 2010).
[36] *See In re Willis*, 345 B.R. 647, 651 (8th Cir. BAP 2006).
[37] *See Gen. Elec. Capital Corp. v. Armadora, S.A.*, 37 F.3d 41, 45 (2d Cir. 1994) (citing *Broadworth Realty Assocs. v. Chock 336 B'way Operating, Inc.*, 168 A.D.2d 299, 301, 562 N.Y.S.2d 630 (1990)).
[38] *See In re Segal*, 527 B.R. 85, 91-92 (Bankr. E.D.N.Y. 2015).

case should be dismissed because his original petition lacked his signature. According to the court, the debtor was equitably estopped from having his case dismissed because he enjoyed "the benefits of the automatic stay, to the detriment of creditors and the estate."[39] Similarly, in *In re Willis*, the debtor requested dismissal of his case after waiting six weeks to inform the court that his original petition lacked his signature.[40] In both cases the debtors were found to be acting prejudicially towards their creditors because the debtors had a duty to inform the court of the lack of their signatures on their original petitions but instead waited to inform the court for the purpose of forestalling their creditors.[41]

2. *Courts May Deny Dismissal if Dismissal is Not in the "Best Interest" of the Debtors and Creditors*

When a consumer debtor fails to account for his financial affairs it is prejudicial to creditors and raises the belief that the debtor will be unable to secure an "effective fresh start" outside of bankruptcy.[42] A court may deny a debtor's motion to dismiss a chapter 7 case if the debtor had previously refused to produce documents requested by the court.[43] In *In re Segal*, when the debtor was required by the bankruptcy court to file necessary documents including a list of creditors, schedules of assets and liabilities, schedule of current income and a statement of financial affairs the debtor repeatedly invoked his Fifth Amendment right to refuse to file the documents.[44] Even in the debtor's original petition the only creditor he listed was the cooperative

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[39] *See id.* at 92-93 (finding that the debtor ratified the filing under chapter 7 by voluntarily signing the amended petition and selectively participating in the chapter 7 proceedings).
[40] *See In re Willis*, 345 B.R. 647 (8th Cir. BAP 2006).
[41] *See generally In re Segal*, 527 B.R. 85 (Bankr. E.D.N.Y. 2015); *In re Willis*, 345 B.R. 647 (8th Cir. BAP 2006).
[42] *See generally In re Segal*, 527 B.R. 85 (Bankr. E.D.N.Y. 2015).
[43] *See In re Segal*, 527 B.R. 85, 93.
[44] *See id.* at 89-90.

apartment.[45] Generally, courts will deny a voluntary motion to dismiss a bankruptcy case "after it has appeared that the debtor failed to account honestly for his assets…for such a failure indicates the likelihood of further questionable practices to the detriment of creditors."[46]

A court may also deny a debtor's motion to dismiss a chapter 7 case if dismissal would cause "legal harm or injury" to the debtor's creditors.[47] In *In re Stephenson*, the Bankruptcy Court for the Western District of Oklahoma denied the debtor's motion to dismiss his voluntary chapter 7 case because dismissal would be prejudicial to his creditors.[48] There, the debtor moved to dismiss his chapter 7 case after the Trustee informed the debtor that he would have to turn over his tax refunds.[49] The Trustee argued that dismissing the debtor's bankruptcy case would be prejudicial to creditors because there would be uncertainty as to whether the creditors would receive any distribution of the debtor's tax refunds.[50] The court agreed with the Trustee's argument and found the debtor's argument that he would be able to repay his creditors outside of bankruptcy as unpersuasive and speculative.[51]

III. Courts May Deny a Debtor's Voluntary Motion for Dismissal When the Debtor Is Found to Have Acted in "Bad Faith"

A court may deny a consumer debtor's voluntary motion to dismiss a chapter 7 case where the debtor acted in bad faith. Although the term bad faith has not been explicitly defined by the courts it has been viewed as occurring when the debtor abuses the bankruptcy process.[52]

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[45] *See* id. at 89.
[46] *See In re Schwartz*, 58 B.R. 923, 925 (Bankr. S.D.N.Y. 1986).
[47] *See In re Stephenson*, 262 B.R. 871, 874 (Bankr. W.D. Okla. 2001).
[48] *See id.*
[49] *See id.* at 873 (stating that the debtor was to receive a federal tax refund of $4,000 dollars and a state tax refund of roughly $1,600 dollars).
[50] *See id.* at 874.
[51] *See id.* at 875.
[52] *See generally In re Segal*, 527 B.R. 85 (Bankr. E.D.N.Y. 2015).

In *In re Bruckman*, the court found that "creditors are prejudiced when a debtor acts in bad faith."[53] According to the court, the debtor acted in bad faith by fraudulently conveying property prior to filing his chapter 7 petition thereby preventing him from being unable to pay his creditors outside of bankruptcy.[54] A debtor may also act in bad faith by "abusing or manipulating the bankruptcy process in order to undermine the essential purposes of the Bankruptcy Code."[55] In *In re Segal*, the debtor was found to have acted in bad faith because the only reason he entered into bankruptcy was to obtain the benefit of the automatic stay to avoid the foreclosure of his cooperative apartment.[56]

Conclusion

The ability of the bankruptcy court to determine whether a consumer debtor's voluntary motion to dismiss his chapter 7 case should be granted is an extremely important part of the bankruptcy process. A court will look at a variety of factors in determining whether a bankruptcy case should be dismissed including whether the debtor can secure an "effective fresh start" outside of bankruptcy, whether creditors would be prejudiced, and whether the debtor acted in bad faith. All of these factors revolve around whether dismissal will be in the best interest of all the parties involved. A case-by-case determination made by the court ensures that the cases meant to be in bankruptcy remain there.

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[53] *See In re Bruckman*, 413 B.R. 46, 50 (Bankr. E.D.N.Y. 2009).
[54] *See id.*
[55] *See Marrama v. Citizens Bank of Mass.* (*In re* Marrama), 430 F.3d 474, 480 (1st Cir. 2005).
[56] *See generally In re Segal*, 527 B.R. 85 (Bankr. E.D.N.Y. 2015).