UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Elizabeth E. Brown

In re: JOHN J. FRANK, JESSICA R. FRANK, Debtors.	Bankruptcy Case No. 18-12812 EEB Chapter 13

ORDER DENYING MOTION TO DISMISS

THIS MATTER is before the Court on a Motion to Dismiss, filed by the chapter 13 trustee ("Trustee"), which the Debtors have opposed. In his motion, the Trustee asserts that the Court should dismiss this case, rather than enter the discharge, due to the Debtors' bad faith conduct. However, the Trustee filed his motion after the Debtors had completed payments under their plan. This raises the question of whether the existence of grounds for dismissal under § 1307 trumps the mandatory requirement of entry of discharge upon completion of the plan set forth in § 1328(a).

I. FACTS

Debtor Jessica Frank was injured in a car accident on June 10, 2017. She and her husband filed their chapter 13 bankruptcy case less than one year later, on April 8, 2018. In their original schedules, the Debtors did not include any claims or causes of action among their assets, but in amended schedules filed shortly thereafter, they listed the "wife's potential wrongful firing claim against previous employer" with an "unknown" value. However, the Debtors did not list a potential claim related to the car accident and they did not disclose the accident to the Trustee at the § 341[1] meeting of creditors.

As below-median income Debtors, the Debtors proposed a plan with a term of only thirty-nine months. It provided that they would make their first payment on May 7, 2018. Because the plan did not obligate the Debtors to make any direct payments to secured creditors, the last payment "under the plan" was the thirty-ninth trustee payment due on July 7, 2021. Under this plan, they committed to pay a total of $10,490 to the Trustee. After payment of the Debtors' attorney fees, $4,400 in priority taxes, the Trustee's fee, and a small secured claim, the plan paid nothing to Class IV unsecured creditors. Nevertheless, absent any objections, the Court confirmed their chapter 13 plan.

The plan also contained a "non-standard" provision requiring the Debtors to "report any settlement or judgment as to the wrongful firing claim within 30 days and turnover any non-exempt portion of the proceeds for the benefit of Class IV creditors." However, like the

[1] All references to "section" or "§" shall refer to Title 11, United States Code, unless expressly stated otherwise.

schedules, the plan made no mention of the wife's personal injury claim. It did not even include the value of that claim in the chapter 7 reconciliation section, comparing what creditors would receive in a chapter 7 liquidation to what they would receive under the plan.

About one year later, Ms. Frank received $67,000 in settlement of her personal injury claim. Receipt of the proceeds did not prompt her to amend the schedules or to otherwise advise the Trustee of the settlement. Instead, the Debtors simply continued to make their regularly scheduled payments under the plan.

In June 2021, in anticipation of the July 2021 ending of the Debtors' plan, the Trustee requested information as to whether the Debtors had complied with the plan provision concerning their receipt of any proceeds from the wrongful termination claim. In response to that inquiry, the Debtors disclosed to the Trustee -- for the first time, and perhaps inadvertently -- that they had received $67,000 in proceeds from the settlement of the personal injury claim related to wife's car accident. On July 20, 2021, *after* the Debtors made their final plan payment earlier in the month, the Trustee filed a motion to dismiss due to the Debtors non-disclosure of this asset.

In response, the Debtors argue that their failure to disclose the accident claim was unintentional. They say that they always believed that any proceeds they might receive as a result of the wife's personal injuries were fully exempt and, as such, were not property of the bankruptcy estate or subject to distribution to their creditors. They point out that they would not have disclosed their potential wrongful termination claim if they intended to hide all such assets from the Trustee and creditors. The Trustee argues that, regardless of whether the personal injury damages were exempt, the Debtors failure to schedule or disclose their right to receive them denied the Trustee the opportunity to argue that the funds were "disposable income" and to file a motion to modify the plan to distribute some portion of the settlement to their nonpriority, unsecured creditors.

II. DISCUSSION

Debtors' counsel could not be more mistaken in his assertion that a debtor has no need to disclose an asset that he or she believes is fully exempt. If that were the case, then a debtor could omit any disclosure of ownership of a home simply because no non-exempt equity in the home existed. The bankruptcy schedules are clear. A debtor must disclose all assets and then separately claim any exemptions pertinent to those assets on Schedule C. *Eastman v. Union Pacific R.R. Co.*, 493 F.3d 1151, 1159 (10th Cir. 2007); *Gillman v. Ford (In re Ford)*, 492 F.3d 1148, 1155 (10th Cir. 2007). Debtors sign their schedules, affirming that they are complete and accurate, under penalty of perjury. Failure to disclose may result in serious civil and criminal consequences. *See, e.g., Eastman v. Union Pacific R.R. Co.*, 493 F.3d at 1159-1160 (applying judicial estoppel to bar debtor from pursuing a claim he failed to list); *In re Ford*, 492 F.3d at 1157 (denying debtor's claim of exemption in unlisted personal injury claim); *Job v. Calder (In re Calder),* 907 F.2d 953, 956 (10th Cir. 1990) (denying chapter 7 discharge); *United States v. McIntosh*, 124 F.3d 1330 (10th Cir. 1997) (upholding bankruptcy fraud conviction for failure to disclose asset). There is no "no harm, no foul" defense on the basis that disclosure would not have resulted in a greater creditor recovery. *United States Trustee v. Garland (In re Garland)*, 417 B.R. 805, 815 (10th Cir. BAP 2009); *Chalik v. Moorefield (In re Chalik),* 748 F.2d 616, 618 (11th Cir. 1984); *May v. Jamison (In re Jamison)*, 329 B.R. 743, 753 (Bankr. D. Kan. 2005).

Section 1307(c) provides in pertinent part that a court "may dismiss a [chapter 13] case for cause, including . . . . " It then provides eleven grounds for cause. None of these eleven specific grounds pertains to the failure to disclose assets. But between the statute's general standard for dismissal, "cause," and the eleven examples given, its use of the term "including" signifies that the eleven grounds listed are merely examples of "cause" and do not purport to set forth an exclusive list. *Armstrong v. Rushton (In re Armstrong)*, 303 B.R. 213, 221 (10th Cir. BAP 2004); *In re Lanham*, 346 B.R. 211, 214 (Bankr. D. Colo. 2006).

It is well established that a debtor's failure to fully disclose assets is a sufficient ground for "cause" to dismiss despite the lack of any express statutory reference. *See, e.g., Alexander v. Hardeman (In re Alexander)*, 363 B.R. 917 (10th Cir. BAP 2007) (affirming dismissal for cause where debtor failed to list several properties and vehicles); *Glassman v. Feldman (In re Feldman)*, 597 B.R. 448 (Bankr. E.D.N.Y. 2019) (debtor misstated income in statement of financial affairs and omitted assets from schedules); *In re Ciarcia*, 578 B.R. 495 (Bankr. D. Conn. 2017) (bad faith conduct included failure to list two personal injury lawsuits and several creditors); *In re Bouchard*, 560 B.R. 385 (Bankr. D. R.I. 2016) (numerous inaccuracies in schedules, including failure to list bank account, watch, security deposit, and electrician's license constituted grounds for dismissal). *See also Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 373 (2007) (debtor's misleading and inaccurate statements in schedules about value and prepetition transfer of house would justify dismissal or conversion under § 1307(c)).

In addition, § 1307 does not impose any time deadline on the filing of a dismissal motion. Among the eleven examples of "cause" given, some cover pre-confirmation situations. § 1307(c)(3)-(5), (9), (10). Others apply only to post-confirmation events. 11 U.S.C. § 1307(c)(6)-(8). The remainder could arise either pre- or post-confirmation. Moreover, the statute contains no outside limit, such as a requirement that the motion be filed "prior to completion of all payments under the plan."

By way of contrast, other sanctions for debtor misconduct have express statutory time limitations. In § 1330, a party in interest may request revocation of a confirmation order "if such order was procured by fraud." 11 U.S.C. § 1330(a). Such a request, however, must be filed "within 180 days after the date of the entry of an order of confirmation . . . ." *Id.* Thus, parties have only six months in which to discover the fraud. This limitation undoubtedly reflects a balancing of interests. While it is important that chapter 13 trustees and other parties expose fraudulent debtor conduct, and that an offending debtor faces the consequences for such conduct, this statute places a burden on the reporting parties to be diligent in this regard. After six months, a countervailing policy of promoting finality takes greater precedence.

Section 1330 is pertinent to the question before the Court in this matter. But not because the Trustee could have invoked its remedy in this case. He did not discover the fraudulent nondisclosure of assets – if indeed it was fraudulent – in time to request revocation of the confirmation order. Yet this statute lends weight to the view that the Court should consider the overall statutory scheme of chapter 13 in answering the question at hand. If Congress saw fit to limit actions to expose fraud to six months, then can a party merely circumvent this statutory prohibition by filing a dismissal motion instead?

It is certainly true that dismissal motions are not limited to the six-month period post-confirmation. Section 1307(c)(6) allows for dismissal due to a material default under a confirmed plan and that could occur in any month up to the full sixty months of a hypothetical plan's term. But is there really *no* limit to the time for seeking dismissal in chapter 13?

Other provisions of chapter 13 invoke a principle of finality once the debtor has completed all required payments under a confirmed plan. At that point, post-confirmation plan modification is no longer an option. "At any time after confirmation of the plan *but before the completion of payments under such plan,* the plan may be modified. . . ." 11 U.S.C. § 1329(a) (emphasis added). After the last payment, neither the debtor, the chapter 13 trustee, nor any other party may request a modification for any purpose. *In re Zisumbo*, 519 B.R. 851, 859 (Bankr. D. Utah 2014). The final payment is the trigger for the next phase of the case. That next step is the entry of discharge.

Section 1328(a) of the Bankruptcy Code provides that "as soon as practicable *after completion by the debtor of payments under the plan*, . . . the court shall grant the debtor a discharge. . . ." 11 U.S.C. § 1328(a) (emphasis added). Once again, Congress has indicated that the final plan payment heralds a change in status. With that payment, entry of the discharge becomes mandatory. The scope of the discharge will vary depending on whether the debtor has any nondischargeable debts of the types listed in § 1328. But however broad it may be in a particular case, that discharge must enter following the final plan payment, absent the specific exceptions listed in the statute. None of the exceptions apply to the present case. And there is no exception listed for fraud or bad faith conduct.

However, subsection (e) of § 1328 provides for the revocation of the discharge order in the case of a debtor's fraud. It provides that a court may revoke the discharge "only if" the discharge was obtained through fraud "and the requesting party did not know of such fraud until after such discharge was granted." It also imposes a time deadline for revocation motions. It expressly limits discharge revocation to requests made "before one year after a discharge . . . is granted." Thus, we have two chapter 13 statutes that deal with debtor fraud. Section 1330 revokes the confirmation order if the fraud is discovered within six months after the confirmation order. And § 1328(e) revokes the discharge order but only if the fraud is discovered within a window of time that begins with the entry of discharge and ends by the one-year anniversary of the discharge.

As illustrated by the present case, the combination of these two revocation statutes leaves a pretty wide loophole for the dishonest debtor. If the chapter 13 trustee or other interested party learns of a debtor's fraud during the gap that is more than six months after the confirmation order but before the entry of the discharge order, which may not occur for many months or even years later, then neither form of revocation is possible. Did Congress not realize that it was creating this wide window of opportunity for mischief? Whether or not this gap was intentional, these two statures signal that Congress has determined that, after a certain period of time, the principle of finality must outweigh the policy of rooting out abusers of the bankruptcy system. From this vantage point, we next consider the interplay of § 1307(c)'s dismissal provision with the mandatory command of § 1328(a) to enter the discharge upon completion of plan payments.

The Tenth Circuit recently observed that chapter 13 bankruptcy cases end in only one of three ways: discharge, dismissal, or conversion to another chapter. The court recognized and emphasized the compulsory language in § 1328(a), saying under § 1328(a) "[t]he term 'shall' means that discharges are mandatory if debtors complete the payments under their plans." *Kinney v. HSBC Bank USA, N.A. (In re Kinney)*, 5 F. 4th 1136, 1141-42 (10th Cir. 2021). Other courts have held similarly. For example, in *Meza v. Truman* (*In re Meza)*, 467 F.3d 874 (5th Cir. 2006), the court explained that "it is largely undisputed," that a plan cannot be modified after a debtor makes all his plan payments, noting that, "if a trustee could amend a chapter 13 plan *after* the debtor completes his or her payments to the trustee, the mandatory nature of the discharge provision [11 U.S.C. § 1328] would be eviscerated. " *Id.* at 878 (emphasis in original) (quoting *In re Casper,* 154 B.R. 243, 247 (N.D.Ill.1993)). *See also In re Okrepka*, 533 B.R. 327, 333 (Bankr. Kan. 2015) ("under § 1328(a) a debtor is entitled to discharge after full compliance with his or her chapter 13 plan"); *In re Fridley*, 2007 WL 2848383, at *2 (Bankr. W.D. Wash. July 2, 2007) (§ 1328(a) is a "mandatory provision that provides no discretion to the bankruptcy court").

Only three published decisions have dealt directly with the question posed by the present case. In each case, the court held that the mandatory language in § 1328(a) precludes a court from dismissing a chapter 13 case after the debtor has completed all plan payments – even if the debtor's bad faith would otherwise constitute "cause" for dismissal under § 1307(c). In *In re Parffrey,* 264 B.R. 409 (Bankr. S.D. Tex. 2001), the debtor failed to file post-petition tax returns and to pay post-petition taxes. The IRS filed a motion to dismiss and, while the motion was pending, the debtor paid off his remaining plan payments about six months early. The court said, "if [it] had discretion in the matter," it would deny the debtor's discharge and dismiss the case for the debtor's willful failure to file tax returns and his failure to perform his obligations as a debtor in good faith. *Id.* at 414. But the court held that the word "shall" in § 1328 made it clear that Congress did not intend to permit bankruptcy courts discretion to deny discharge after the debtor completes his plan payments.

In *In re Holman*, 567 B.R. 599 (Bankr. D. Kan. 2017), the court followed *Parffrey*. It found that the debtors had violated provisions of the order confirming their plan by failing to pay post-petition taxes, incurring new debt, acquiring and disposing of assets, and concealing their actions from the chapter 13 trustee. The court described their conduct throughout the case as bad faith that was abusive of the bankruptcy system. Notwithstanding the debtors' conduct, the court determined that it could not grant the trustee's motion to dismiss because the debtors had completed payments under their plan and § 1328(a) mandated the entry of discharge. It said:

> Despite being deeply troubled by the debtors' artful dodging of their duties, the Code's express language cannot be dodged. There is no discretion for the Court to "equitably" deny their discharge, and, to some degree, that is consistent with chapter 13's underlying theme that "rewards" plan completion with a much more expansive discharge. Like all challenging cases, this one offers several lessons. First, the bankruptcy system runs on debtor credibility. Debtors need to present information that is complete, timely, and factually accurate. Second, the bankruptcy system runs fast. Motions like these must be investigated, filed, and

> prosecuted more quickly than this one was. Third, the bankruptcy system runs on finality.

Id. at 614 (footnote omitted).

In its later order denying a stay pending appeal, the *Holman* court again stressed the mandatory nature of § 1328(a) and specifically contrasted it with the discretionary language of § 1307(c). *In re Holman*, 2017 WL 3025929, at *3 (Bankr. D. Kan. July 14, 2017). It also said that exercising discretion to dismiss the debtors' case after they paid the full amount that their plan required and "deny[ing] them the discharge to which § 1328(a) unequivocally entitles them would effect a penalty that the Bankruptcy Code simply does not contemplate." *Id.* The District Court affirmed the bankruptcy court's decision in *Davis v. Holman* (*In re Holman)*, 594 B.R. 769 (D. Kan. 2018). It also emphasized the mandatory language in § 1328(a), declaring that the Supreme Court and the Tenth Circuit "have made clear that when a statute uses the word 'shall,' Congress has imposed a mandatory duty upon the subject of the command." *Id.* at 777 (quoting *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999)).

In a third case, *Forbes v. Forbes (In re Forbes)*, 218 B.R. 48 (8th Cir. BAP 1998), the court did not expressly state that the debtor acted in bad faith, but it also ruled that entry of a completion discharge mooted the creditor's motion to dismiss. In *Forbes*, the debtor's ex-spouse moved to dismiss the debtor's case or, in the alternative, to declare her marital property claim nondischargeable. The bankruptcy court ordered the debtor to list the marital property for sale and the parties agreed to an indefinite continuance of the motion to dismiss. Two years passed, during which the debtor completed his plan payments, and the court entered his discharge and closed the case. The ex-spouse moved to vacate the discharge and reopen the case. The bankruptcy appellate panel affirmed the bankruptcy court's refusal to vacate the discharge, noting that the entry of discharge mooted the creditor's motion to dismiss and that § 1328(a) "specifically compels the entry of a discharge once the debtor has made all payments under the plan." *Id.* at 50.

Granting a discharge to a debtor that has completed plan payments but has failed to disclose income or assets or otherwise acted in bad faith is a difficult pill to swallow. Some courts have addressed these circumstances by simply ignoring the mandatory language in § 1328(a) and addressing the bad conduct. For example, in *In re Wheeler*, 503 B.R. 694 (Bankr. N.D. Ind. 2013), the debtors failed to disclose that they received a significant social security disability award after the court confirmed their plan. The trustee did not learn of it until shortly after the debtors had completed their plan payments. He then moved to dismiss the case for "cause" under § 1307(c). Without analyzing § 1328(a) at all, the *Wheeler* court held that the debtors' failure to disclose material information concerning their income and financial circumstances constituted "cause" under § 1307(c), and it granted the trustee's motion to dismiss.

In *Dunlap v. Nat'l Bank of Alaska (In re Dunlap*), 107 F.3d 15 (Table), 1997 WL 43119 (9th Cir. 1997), an unpublished decision by the Ninth Circuit Court of Appeals, the court adopted an interesting interpretation of the language in § 1328(a). There, the debtor confirmed a plan that stripped the lien of a mortgage creditor. The creditor appealed the confirmation order but did not seek a stay pending appeal. After the Supreme Court's decision in *Nobelman v. American Sav.*

Bank, 508 U.S. 324 (1993), the bankruptcy court modified the debtor's plan and reinstated the creditor's secured claim to its full amount. The debtor then appealed the modification order and argued that, because he had already completed his plan payments and the bankruptcy court should have entered his discharge, the creditor's appeal of the original strip-off plan was moot. The court rejected his argument, saying that because of the ongoing litigation between the debtor and mortgage lender, "it was not practicable to grant [the debtor] a discharge as soon as he completed his payments." *Id.* at *1.

Other courts have encountered situations in which the debtor tried to pay off the entire plan's monetary obligation in a lump sum prior to the required thirty-six month minimum plan term and then argued that the full payment prevented the trustee or any creditor from seeking modification and mandated the court's entry of discharge. Faced with such facts, these courts have circumvented § 1328's mandate by holding the plan had a temporal requirement that had not been completed. *See, e.g., In re Wimpee,* 343 B.R. 845 (Bankr. W.D. Ky. 2006); *In re Delmonte*, 237 B.R. 132 (Bankr. E.D. Tex. 1999). Fortunately, this Court does not have to address this circumstance because, in the present case, the debtors did not pay off their plan early. They made the final plan payment in the month it was due.

In addressing the question that is squarely before it, this Court finds that it cannot ignore the clear mandate laid out in § 1328(a). In reaching this conclusion, the Court acknowledges that what the Debtors did was wrong and that the Trustee acted diligently as soon as he discovered the true facts. It further acknowledges that § 1307(c) contains no deadline for filing a dismissal motion and that "bad faith" conduct gives rise to "cause" for dismissal. But the latter statute is a more general chapter 13 statute. It exists to cover a myriad of circumstances that might occur throughout the course of a chapter 13 case. With no express deadlines, with the permissive language "may" instead of "shall," and the non-exclusive language of "including," Congress signaled its intent that courts should be permitted a great deal of flexibility in determining whether to dismiss a case. Nevertheless, this more general statute must give way to other more specific statutes. "But if two statutes conflict, the general statute must yield to the specific statute involving the same subject . . . ." 2B Norman Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* § 51:5 (7th ed. November 2021 update).

Here there are four specific statutes relevant to this inquiry: §§ 1328(a), 1328(e), 1329(a), and 1330(a). Both §§ 1328(a) and 1329(a) make explicit that the final plan payment cuts off any further plan modifications and mandates the entry of discharge, with only a few express exceptions not applicable here. Sections 1330(a) and 1328(e) demonstrate that a party may seek revocation based on the debtor's fraud, but only if the requesting party acts within the narrow time periods permitted. After that, Congress favors finality over the need to address bad conduct.

III. CONCLUSION

For the foregoing reasons, the Court hereby DENIES the Trustee's motion to dismiss. The Court will enter the Debtors' discharge upon the filing of their Certifications to Obtain Discharge.

DATED this 30th day of March, 2022.

BY THE COURT:

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Elizabeth E. Brown, Bankruptcy Judge