

**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:

**EDWARD W. MORRIS AND
JUNE M. MORRIS,**

CASE NO. 05-00481-NPO

DEBTORS.

CHAPTER 13

ORDER GRANTING TRUSTEE'S MOTION TO DISMISS

On May 4, 2007, this matter came before the Court for hearing (the "Hearing") on the Trustee's Motion to Dismiss (the "Motion") (Dk. No. 47) filed by Harold J. Barkley, Jr., the chapter 13 trustee (the "Trustee"). S. David Pickett represented Edward W. Morris and June M. Morris (the "Debtors"), and the Trustee represented himself. Having considered the pleadings and the evidence presented at the Hearing, the Court concludes as follows:

Facts

1. On February 1, 2005, the Debtors filed their joint petition (the "Joint Petition") pursuant to chapter 13 of the Bankruptcy Code (Dk. No. 1). The Debtors have been represented by counsel throughout the bankruptcy proceeding.

2. On Schedule D of their bankruptcy schedules, the Debtors listed a debt to Countrywide Home Loans, Inc. ("Countrywide") secured by residential real property located at 9 Old Bridge Cove, Jackson, Mississippi, (the "Byram House") (Dk. No. 1). The Debtors have lived in the Byram House since March 2001.

3. At the time of filing, the Debtors also owed a separate debt to Countrywide which was secured by residential real property located at 1421 School Park Drive, Jackson, Mississippi, (the "Jackson House") which they failed to disclose in the chapter 13 schedules or provide for in the

chapter 13 plan.

4. On July 7, 2005, the Court approved an Order Confirming Plan (Dk. No. 24), which provided for the Debtors' on-going monthly home mortgage on the Byram House in the amount of \$999.70, together with an arrearage amount of \$22,956.89, to be paid to Countrywide through the chapter 13 plan.

5. On March 23, 2007, Countrywide filed a Motion for Relief from Automatic Stay and for Abandonment or Alternatively, for Adequate Protection (the "Motion to Lift Stay") (Dk. No. 45) in regard to the Jackson House. The Trustee was provided with notice of the Motion to Lift Stay filed by Countrywide.

6. Upon becoming aware of the Debtors' failure to disclose the Jackson House,¹ the Trustee filed his Motion asserting that the chapter 13 case should be dismissed.

7. On May 4, 2007, an Agreed Order was entered granting the Motion to Lift Stay filed by Countrywide as to the Jackson House (Dk. No. 57).

Discussion

As recently noted by the Supreme Court of the United States, the "principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" Marrama v. Citizens Bank of Massachusetts, 127 S.Ct. 1105, 1107 (2007), quoting Grogan v. Garner, 498 U.S. 279, 286-87, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). Pursuant to 11 U.S.C. § 521(b)(I), a debtor is required to file a schedule of assets and liabilities. *See also* Browning Mfg. v. Mims (In re Coastal Plains, Inc.), 179 F.3d 197, 207-208 (5th Cir. 1999) ("It goes without saying that the Bankruptcy Code and Rules impose upon bankruptcy debtors an express, affirmative duty to disclose all assets,

¹ The Debtors have not moved for leave to amend their bankruptcy schedules in order to list the Jackson House as an asset and to include the separate debt to Countrywide as a liability.

...”). Any “attempt to take advantage of the fresh start offered by bankruptcy by concealing assets is not tolerated and amounts to fraud.” In re Grogan, 300 B.R. 804, 808-09 (Bankr. D. Utah, 2003). “The debtor’s intent to conceal is a question of fact, to be determined by the bankruptcy court.” Id. at 809. When a debtor asserts that the failure to disclose an asset was an inadvertent mistake, the “failure to satisfy [the] statutory duty is ‘inadvertent’ only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment.” Id. at n. 18 (quoting In re Coastal Plains, 179 F.3d at 210).²

The Debtors purchased the Jackson House in August 1998 (Dk. No. 57). The Debtors moved to the Byram House in March 2001 (Dk. No. 1). The Debtors testified that when they moved to the Byram House, a relative (the father of the Debtor wife) moved into the Jackson House and began paying the house note. Although not entirely clear from the testimony, the relative apparently paid the note on the Jackson House from March 2001 through February 2006, when he died. The failure of the Debtors to resume payments on the Jackson House led to Countrywide filing its Motion to Lift Stay in regard to the Jackson House.

At the Hearing, both Debtors admitted that they knew they owned two houses at the time of filing although the Debtor wife testified that she believed the Jackson House had been disclosed in the bankruptcy schedules. The Debtor husband testified that the Debtors never had intended to pay for the Jackson House through the chapter 13 plan. Both Debtors acknowledged receiving correspondence from Countrywide approximately one year ago that Countrywide was going to place the Jackson House in foreclosure, and the Debtor husband testified that he knew at that point that

² Although the In re Coastal Plains case considered a debtor’s “inadvertence” in the context of a judicial estoppel defense, the test nevertheless is applicable to the Trustee’s Motion in that it pertains to the Debtors’ failure to satisfy the statutory duty to disclose assets.

he was going to have to abandon or sell the Jackson House.

Based on the testimony adduced at the Hearing, the Court finds that the chapter 13 case should be dismissed. The Debtors understood they owned two homes at the time of filing and that both the Jackson House and the Byram House were financed through Countrywide when they filed the Joint Petition. Moreover, the Court is not fully persuaded that the Debtors lacked a motive in concealing the Jackson House. If the relative had continued, without interruption, to pay the note on the Jackson House, it is feasible that the Debtors could have completed their chapter 13 plan and paid the arrearage on the Byram House while also retaining the Jackson House. Any equity acquired in the Jackson House during the pendency of the chapter 13 thereby would have been concealed and would not have been available for distribution to creditors, but instead would have inured to the benefit of the Debtors. Furthermore, the Debtors' relative would have continued to enjoy the occupancy of the Jackson House without any interference from the Trustee or the creditors.³

Accordingly, the Court finds that the Trustee's Motion should be and hereby is granted. A separate final judgment consistent with this Order will be entered by this Court in accordance with Federal Rule of Bankruptcy Procedure 9021.

SO ORDERED, this the 14th day of May, 2007.

/s/ Neil P. Olack
NEIL P. OLACK
UNITED STATES BANKRUPTCY JUDGE

³ The Trustee also demonstrated at the Hearing that the wage order for the Debtor wife has been insufficient to fund the chapter 13 plan, providing an additional basis to dismiss the case.