

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF )  
 )  
WILBUR E. MULLETT, ) CASE NO. 09-35790 HCD  
 ) CHAPTER 7  
 )  
DEBTOR. )

ORDER

At South Bend, Indiana, on April 7, 2010.

The continued hearing on the Motion to Reconsider Dismissal of the chapter 7 voluntary petition of Wilbur E. Mullett (“debtor”) was held April 5, 2010. Appearing at the hearing were the debtor, his attorney Joseph C. Lehman, Esq. (“attorney”), Chapter 7 Trustee Jacqueline Homann, Esq., and Assistant United States Trustee Alex L. Edgar, Esq. This was the third scheduled hearing which required attorney Lehman’s attendance. The attorney did not appear at the hearing on March 16, 2010, despite the court order directing him to appear in person. *See* R. 15, Order to Set Hearing. Nor did he notify the court that he would not or could not be present. The attorney’s client did appear. The attorney then requested another continuance when the rescheduled hearing conflicted with his family vacation. At the April 5, 2010 hearing, the court asked the attorney to explain his nonappearance at the March 16, 2010 hearing and to respond to the allegations in the debtor’s letter, which the court had construed as a Motion to Reconsider the Dismissal of his case.

The undisputed background facts show that, on January 27, 2010, the court dismissed the debtor’s chapter 7 case for failure to pay the filing fee. *See* R. 11. In its Order Dismissing Case, the court stated: “The unpaid filing fee of \$299 remains due and owing notwithstanding the dismissal of the case.” *Id.* It also directed the Clerk of the Court to refuse any future case that was filed without the payment of all past filing fees.

On February 8, 2010, the court received a letter from the debtor and treated it as a request to reconsider the court's dismissal of his bankruptcy case. The debtor explained that attorney Lehman had agreed to file his bankruptcy petition for \$800, of which \$500 was the attorney fee and \$300 was the filing fee. The attorney, when paid, gave the debtor a receipt on which he wrote "No filing fee." In his letter, Mr. Mullett explained his understanding of what the \$800 payment covered:

So I went and borrowed \$800 from my relatives. . . . When I came back to Joe Lehman he said he can probably throw the court fees off. Then I said I don't care what you do but I'm not gonna come up with another \$300. We . . . went through this, and he said no he is responsible for this. And I told him he'd better wright it on the reciept. I am already up \$300 from his first offer [he originally said he'd do the bankruptcy for \$500] and I didn't get it in writeing so he wrote it on this receipt. I don't know why the finger is pointed at me. I paid all my fees. I'm still trien' to figure this out. Why would someone file without the fileing fee covered? I know other people who filed bankruptcy.

R. 15 (letter of February 8, 2010). At the bottom of the letter was a copy of the receipt for \$800, signed by "Joe Lehman" with the notation "for no filing fee." *Id.* Upon receipt of this letter, the court set a hearing on the reconsideration of the dismissal of the case for March 16, 2010. It directed the debtor and his attorney to attend.

On March 16, 2010, however, the debtor's attorney did not attend the hearing. The chapter 7 Trustee presented to the court a fax transmission she had received from Mr. Lehman the afternoon before; it asked her to pass to the court a Motion to Continue the hearing because he was scheduled to appear in the Elkhart Circuit Court at the same time. The court then took testimony from the debtor, the chapter 7 Trustee, and the United States Trustee concerning the dismissal of Mr. Mullett's case. Based on the record in this matter, the court reopened the debtor's case, vacated the Order dismissing the bankruptcy case, and reinstated the automatic stay.

The court then continued the hearing to March 25, 2010, and ordered the debtor and his attorney to appear. However, it granted the attorney's request for another continuance, when notified of his vacation; the attorney appeared at this hearing, held April 5, 2010. He was required to demonstrate good cause for his

nonappearance at the court's March 16, 2010 hearing and for the failure to pay the filing fee when he filed this debtor's petition.

The attorney offered two justifications for his nonattendance. He first stated that he was required to be present at a state court hearing that day and that he had faxed that information to the chapter 7 trustee. The court responded that such notification was insufficient notice to the court; by not filing a notice or contacting the court concerning his state court commitment, the attorney simply ignored the Order of this court. The attorney also admitted that he perhaps did not read the court's Order in its entirety and did not realize that he was required to attend the hearing. The court found that admission to be no excuse whatsoever for any attorney who has graduated from law school and passed a bar exam. With respect to his filing Mr. Mullett's petition without the filing fee, the attorney disputed the debtor's story and asserted that they had agreed, when he wrote "no filing fee" on the receipt, that the \$800 payment did not cover the filing fee. The court recognized the ambiguity in the notation but found that the debtor was the more credible witness and that the circumstances supported Mr. Mullett's explanation. It determined that the debtor's \$800 payment was meant to pay for the attorney's fee and the filing fee.

Assistant United States Trustee Edgar reviewed another case recently filed by this attorney in which the filing fee was not submitted; he noted that other cases had followed that pattern. The court listed numerous additional cases on the court's docket that were filed by Mr. Lehman and were dismissed, for failure to pay the filing fee, or were closed without entry of the debtor's discharge because essential documents had not been filed or because mishandling of the cases had occurred. Mr. Edgar noted that debtors have suffered and should be made whole. The court found that Mr. Mullett's bankruptcy case could proceed once Mr. Lehman paid the filing fee. The attorney offered to pay the fee within five days of the hearing.

As it found in open court, the court now states its determination that the attorney's excuses for nonpayment of the filing fee and for nonattendance at the court hearing were unacceptable; the attorney has not demonstrated good cause for his failures, which border on malfeasance and/or incompetence. It certainly

is within the court's discretion to dismiss an action for failure to pay the required filing fee. *See In re Davis*, 278 B.R. 429, 431 (Bankr. W.D. Mich. 2002); *In re Griffith*, 209 B.R. 823, 826 (Bankr. N.D.N.Y. 1996). However, such a dismissal would be unfairly punitive to the chapter 7 debtor, who was not culpable in this case. Given the facts and circumstances of the case, the court finds that dismissal is inappropriate.

The court therefore directs the attorney Joseph C. Lehman to pay the remaining filing fee of \$299 no later than Friday, April 9, 2010, at or before 4:00 p.m., the close of the courthouse's business day. The court advises the attorney that any further ignoring of the court's Orders or nonpayment of filing fees will not be tolerated. Finally, the court orders the attorney to register for and to attend a refresher Court Management and Electronic Case Filing (CM/ECF) course in the next available class, being held June 11, 2010, at 9 a.m., in South Bend, Indiana. Information concerning that class can be found at [www.innb.uscourts.gov](http://www.innb.uscourts.gov), the court website, at the ECF link. No excuses for nonattendance will be accepted. The attorney is required to provide proof of his successful completion of the course by letter to the undersigned within five (5) days of his completion of the course.

SO ORDERED.

/s/ HARRY C. DEES, JR.  
Harry C. Dees, Jr., Judge  
United States Bankruptcy Court