

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:)	
)	
LIONEL QUINTON DRAKE)	Case No. 03-41379-13
)	
Debtor.)	
_____)	

ORDER DENYING TRUSTEE’S MOTION FOR RECONSIDERATION

This matter is before the Court on the Trustee’s Motion for Reconsideration (Doc. 30) of the Court’s Order of Dismissal dated September 8, 2003. The Trustee is seeking reconsideration of the Court’s ruling that the Debtor could only be barred from refileing for bankruptcy protection for 180 days.

On September 8, 2003, the Court issued a ruling that dismissed the Debtor’s Chapter 13 bankruptcy case with prejudice to refileing for 180 days. The Court placed additional conditions on any refileing, and, under 11 U.S.C. § 349(a)¹, barred Debtor from ever discharging the debts that were or could have been listed in this bankruptcy. Although the Trustee sought dismissal, with prejudice for refileing for one year, the Court ruled that it lacked the authority to bar the Debtor from refileing for longer than 180 days based upon the language in §109(g), as interpreted by the Tenth Circuit Court of Appeals in *In re Frieouf*, 938 F.2d 1099 (10th Cir. 1991).

The Court agreed that this 180 day bar was a hollow victory, in light of the evidence presented that this Debtor was substantially abusing the bankruptcy process, by timing his repeat filings to his extreme advantage when coupled with a local utility company’s “cold weather rule,” which bars utility shutoff during

¹ All statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq., unless otherwise specified.

cold weather. However, the Court did not believe *Frieouf* could be distinguished. In *Frieouf*, the Bankruptcy Court had denied all access to bankruptcy relief for a period of three years, since that was the approximate time period creditors had been prevented from exercising their rights as a result of the automatic stay. That dismissal was based on extraordinary delays, and failure to abide by the Court's orders.

The Tenth Circuit Court of Appeals held that bankruptcy courts could not use their § 105(a) equitable powers, to overrule the specific statutory provisions of § 109(g), which only provides for a maximum bar of 180 days on refiling. The Tenth Circuit's analysis is based on statutory construction, not on the particular facts of the case, and the Circuit was interpreting the very statutes that are at issue here, §§ 349(a) and 109(g).

The Trustee has moved the Court to reconsider its decision, arguing that this Court should decline to follow *Frieouf*. The Trustee notes that several other circuits have declined to follow *Frieouf* and that its holding may be in question. In addition, the Trustee indicates that he intends to appeal this Court's decision, if the motion for reconsideration is not granted, in an effort to persuade the Tenth Circuit Court of Appeals to reverse its decision.

At this time, *Frieouf* is clearly valid, binding law in the Tenth Circuit. The Tenth Circuit Court of Appeals has made no indication that it is likely to reverse that decision if given the opportunity. Until *Frieouf* is reversed by the Tenth Circuit Court of Appeals or the United States Supreme Court, it remains binding on this Court. Therefore, the Court denies the Trustee's request to ignore or distinguish *Frieouf*, so that the Debtor can be barred from refiling for the requested one year. If successful in overturning

Frieouf on appeal, the Trustee will clearly have the opportunity to obtain the sanctions he is seeking before this Court, but not before.

Creditor Westar Energy, Inc. filed a Response to the Trustee's Motion for Reconsideration, as well as a supplement to its response. In the supplement, Westar Energy argued that Chief Judge Nugent recently entered an order barring a bad faith serial filer from refiling for more than 180 days in the *Fox* bankruptcy, Case No. 03-13551-13. The Court has reviewed Judge Nugent's order and finds that it provides no basis for this Court to disregard *Frieouf*.

IT IS, THEREFORE, BY THIS COURT ORDERED that the Trustee's Motion for Reconsideration (Doc. 30) is hereby denied.

IT IS SO ORDERED this _____ day of October, 2003.

JANICE MILLER KARLIN, Bankruptcy Judge
United States Bankruptcy Court
District of Kansas

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the Order Denying Trustee's Motion for Reconsideration was deposited in the United States mail, postage prepaid on this 30th day of October, 2003, to the following:

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