

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
DANIEL & MARGARET MIXAN,) CASE NO. BK00-40949
)
Debtors.) CH. 7

MEMORANDUM

Hearing was held on February 21, 2001, on the following motions:

Trustee's Motion for Turnover (Fil. #11);
Debtors' Resistance to Motion for Turnover (Fil. #37);

Trustee's Objection to Debtors' Claimed Exemptions (Fil. #24);
Resistance by Debtors (Fil. #34);

Trustee's Motion to Avoid Lien (Fil. #35);
Resistance by Debtors (Fil. #44)

Final Hearing on Trustee's Motion for Sanctions (Fil. #17);
Resistance by Debtors (Fil. #29);

Debtors' Motion to Dismiss (Fil. #49); and
Objection by the Chapter 7 Trustee (Fil. #52).

Appearances: Joseph Badami as Trustee and Thomas Petersen as Attorney for Debtor. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A), (B), and (E).

Background and Facts

The Debtors seek to dismiss this case and vacate the discharge they received in August 2000. The motion to dismiss was precipitated by the Trustee's efforts to claim the Debtors' van, avoid an improperly recorded lien on it, and administer it for the benefit of creditors. The van is the primary asset of this bankruptcy estate; the Debtors believe they cannot afford to purchase it from the Trustee, but they do not want to lose it.

By moving to dismiss this case for cause under 11 U.S.C. § 707 and vacate the discharge order, the Debtors want to undo some of their procedural missteps in this case and prevent the Trustee from undertaking any further efforts to liquidate estate property.

The Debtors filed this case in May 2000, with \$14,505.00 in assets and \$55,355.79 in liabilities. Unsecured nonpriority debts totaled approximately \$48,000.00. A portion of this amount was attributable to medical expenses, but the majority of it was credit- or charge-card debt. The Debtors valued the van at \$10,920.00, but did not exempt any portion of its value.

At the § 341 meeting, the Debtors disclosed the existence of a lien on the van, securing a loan of \$18,500.00 by Mrs. Mixan's parents. This lien had not been included in the Debtors' schedules. The Trustee found no record of this lien on the vehicle's certificate of title in the Debtors' county of residence, so he took steps throughout August 2000 to obtain either the van or the value thereof from the Debtors. On August 16, the Debtors caused the lien to be noted on the van's title. In October, the Debtors amended their schedules to claim an exemption of \$4,800.00 in the van.

The Trustee objects to the claimed exemption, asserting that because the schedules indicate that only Mr. Mixan is employed outside the home, the Debtors can claim only one "tool of the trade" exemption under Neb. Rev. Stat. § 25-1556(4).

The Trustee also objects to the lien on the van and has moved to avoid it as a post-petition lien.

Law & Discussion

A. Motion to Dismiss

Section 707 of the Bankruptcy Code permits dismissal of a Chapter 7 case "for cause," but does not define "cause." The statute includes a non-exhaustive list of behavior on the part of the debtor constituting cause, such as unreasonable delay that is prejudicial to creditors; nonpayment of fees and charges; and failure to file schedules. § 707(a).

While § 707 does not specifically refer to a dismissal by

the debtor, courts generally conclude that it does cover such a motion. Turpen v. Eide (In re Turpen), 244 B.R. 431, 434 (B.A.P. 8th Cir. 2000). Unlike a Chapter 13 debtor, who may as a matter of right dismiss his or her case, a Chapter 7 debtor must show cause before a dismissal will be granted. Turpen, id.; In re Haney, 241 B.R. 430, 432 (Bankr. E.D. Ark. 1999). Where a debtor filing in Chapter 7 is represented by counsel and is not incompetent, any possible lack of understanding about the need to schedule all assets and render those assets subject to possible administration for creditors' benefit does not outweigh prejudice to creditors from dismissal. In re Watkins, 229 B.R. 907, 908 (Bankr. N.D. Ill. 1999) (citing In re Martin, 30 B.R. 24 (Bankr. E.D.N.C. 1983)).

To the extent a debtor may read the language of § 707(b) ("There shall be a presumption in favor of granting the relief requested by the debtor.") as favoring approval of a debtor's motion to dismiss, the Court notes that the presumption language is used in the context of determining whether the debtor has substantially abused the protections offered by Chapter 7. The presumption that the relief requested by a debtor should be granted is not applicable when the debtor is the party moving to dismiss the case, rather than attempting to maintain the existence of the case. In re McCullough, 229 B.R. 374, 377 (Bankr. E.D. Va. 1999).

Even if a debtor can demonstrate cause to dismiss the case, the Court must consider a number of factors when deciding whether dismissal is warranted. Primary among those factors is prejudice to the creditors. Turpen, 244 B.R. at 434; Haney, 241 B.R. at 432; McCullough, 229 B.R. at 376; In re Komyathy, 142 B.R. 755, 757 (Bankr. E.D. Va. 1992); In re Baylies, 114 B.R. 324, 325 (Bankr. D.D.C. 1990). "Creditors can incur prejudice if the motion to dismiss is brought after the passage of a considerable amount of time and they have been forestalled from collecting the amounts owed to them." Turpen, 244 B.R. at 434 (citing Watkins, 229 B.R. at 909). Courts in other jurisdictions speak of "plain legal prejudice to creditors." McCullough, 229 B.R. at 376; Komyathy, 142 B.R. at 757. Legal prejudice exists where assets which would otherwise be available to creditors are lost because of the dismissal. Komyathy, 142 B.R. at 757.

Other factors to consider include:

1. whether all of the creditors have consented;
2. whether the debtor is acting in good faith;
3. whether dismissal would result in a prejudicial delay in payment;
4. whether dismissal would result in a reordering of priorities;
5. whether there is another proceeding through which the payment of claims can be handled; and
6. whether an objection to discharge, an objection to exemptions, or a preference claim is pending.

Turpen, 244 B.R. at 434. See also In re Hague, 256 B.R. 352, 354 (Bankr. D. Mass. 2000) (The court's primary consideration is whether dismissal is in the best interest of the creditors and also if those interests will be protected outside bankruptcy.)

In this case, the bankruptcy case has been pending for more than 10 months, and creditors have been under the restrictions of the automatic stay for the duration. These facts, as evidence of potential prejudice to the creditors, weigh against dismissal.

The motion to dismiss was served on all creditors listed on the matrix. The Trustee filed the only objection. This does not constitute consent by the creditors to a dismissal.

A dismissal would result in a prejudicial delay in payment to creditors. The bankruptcy trustee is ready, willing, and able to take possession of the available assets, in this case the van, liquidate it, and distribute the proceeds to creditors. If the case were to be dismissed, the creditors would be disadvantaged by having to file or restart state court proceedings to obtain a judgment and then attempt to execute on the judgment.

Moreover, any avoidance action the Trustee might have in this case may be precluded by the statute of limitations if the Debtors dismissed this case and subsequently refiled.

Finally, it appears from the schedules that at least one creditor filed a state court action against one of the Debtors pre-petition to try to recover on a debt. There appears to be no orderly method, outside of bankruptcy, of paying any amount on the creditors' claims. Here, the only asset to be administered is the van, which is worth approximately

\$10,000.00 before any exemptions are taken into account. This amount, while insufficient to pay a significant portion of the Debtors' liabilities, would nevertheless provide creditors a dividend, which is more than they stand to receive otherwise.

Perhaps the strongest factor militating against dismissal of the case at this point is the fact that a discharge has been entered. Pursuant to § 349(b), a dismissal revests the property of the estate in the Debtors. Nothing in that section, however, revokes a discharge entered prior to the dismissal. Baylies, 114 B.R. at 325. In other words, if a Chapter 7 case is dismissed after discharge, and the discharge is not revoked, the creditors are barred from taking steps to collect their claims and the debtors are free to walk away. This is a windfall for debtors which the authors of the Bankruptcy Code could not have intended, and which the Court cannot condone. As the Baylies court noted, "Ordinarily a motion to dismiss a voluntary petition should be made before the discharge is entered because the discharge is tantamount to a final judgment in the case and establishes the rights of the parties." 114 B.R. at 325 (quoting Matter of Shell, 14 B.R. 1010, 1011 (Bankr. E.D. Wis. 1981)).

The motion to dismiss is denied.

B. Objection to Exemptions

The Debtors amended their schedule of exemptions in October 2000 to claim as exempt \$4,800.00 of the van's value pursuant to Neb. Rev. Stat. § 25-1556(4). That statutory section permits an exemption of

the debtor's interest, not to exceed an aggregate fair market value of two thousand four hundred dollars, in implements, tools, or professional books or supplies held for use in the principal trade or business of such debtor or his or her family, which may include one motor vehicle used by the debtor in connection with his or her principal trade or business or to commute to and from his or her principal place of trade or business[.]

Neb. Rev. Stat. Ann. § 25-1556(4) (Michie Supp. 1999).

The joint debtors each claimed the \$2,400.00 exemption,

for a total of \$4,800.00. The Trustee asserts that Mrs. Mixan is not entitled to a "tool of the trade" exemption because she does not work outside the home and thus has no "principal trade or business" to commute to or in which she uses the vehicle.

The record contains plenty of evidence as to Mrs. Mixan's duties as a mother and homemaker, including transporting her five children to school and other activities and appointments, and purchasing groceries, clothing and other household items for the maintenance and support of the family. However, the statute seems to limit the exemption to a vehicle used by a debtor to work in or commute to a principal trade or business for which the debtor receives compensation in some form. The legislative history of the 1997 amendment to this statutory section reflects a similar understanding by the lawmakers.

Senator David Landis, speaking to the Unicameral in support of amendments to the Nebraska exemption statutes to raise the limit of the homestead exemption and the personal property exemption, noted, in reference to the tool of the trade exemption:

[Raising the tool of the trade exemption to \$2,400] allows the person who has a car that they use to drive to and from work to use this tools of the trade exemption to the maximum of \$2,400 to keep that portion of or some element of a car. In other words, you get to keep a clunker. Without it, I think the chance of being able to keep a job is significantly prejudiced.

* * *

[The amendments to the exemption statutes will] allow people who've gone through bankruptcy or who have had a judgment . . . an execution of judgment against them to continue to survive, hold a job, work, and not become a drain on society because they get to keep enough so that they make a fresh start and don't fall on public support for their livelihood[.]

Transcript prepared by the Clerk of the Legislature of hearings in the Nebraska Legislature, April 10, 1997, at 3802-

03.

Presumably, if the legislators had intended to extend the exemption to any debtor who owned a vehicle, rather than only to those debtors who use a vehicle in connection with their employment, they would have expressed that intention in the language of the statute. See also In re Dempsey, Neb. Bkr. 01:18 (Bankr. D. Neb. 2001) (joint debtors each used same vehicle to commute to their jobs and were each entitled to tool of trade exemption).

C. Motion to Avoid Lien

In Nebraska, a security interest in a motor vehicle is not enforceable against third parties and against the debtors unless the lien is duly noted on the certificate of title. Neb. Rev. Stat. § 60-110; In re Walker, 216 B.R. 275, 277-78 (Bankr. D. Neb. 1997).

The Debtors admit the existence of the lien held by Mrs. Mixan's parents on the van. They also concede that the lien was not perfected via notation on the van's title until after the bankruptcy was commenced. Therefore, as a matter of law, the lien is avoided.

D. Motion for Sanctions

The Trustee's motion for sanctions against the Debtors for failing to relinquish the van to the Trustee is denied. It appears from the arguments of counsel that Debtors had a good faith belief either that the lien was valid or that the case could be dismissed upon their motion. There is no evidence of bad faith on the part of the Debtors in refusing to turn over the property.

E. Motion for Turnover

A decision on the motion for turnover is deferred. Counsel for the Debtors should confer with the Trustee about negotiating a fair price for which the Debtors could purchase the van, and perhaps an installment payment plan to facilitate the purchase. The parties are directed to report to the Court within thirty days as to whether the matter has been resolved.

Conclusion

The Debtors' motion to dismiss is denied. The Trustee's objection to claimed exemptions is granted. The Trustee's motion to avoid lien is granted. The Trustee's motion for sanctions is denied. The Trustee's motion for turnover is deferred.

A separate journal entry will be filed.

DATED: April 2, 2001.

BY THE COURT:

/s/Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

(*)Joseph Badami, Ch. 7 Trustee, 402/437-8558
Thomas Petersen, Atty. for Debtor, 402/393-4848

Copies mailed by the Court to:

United States Trustee
Harry & Helen Bellinger, Lake Wakonda, Lot 217, 4209 Bull Frog
Bay Dr., Union, NE 68455-2600

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
DANIEL & MARGARET MIXAN,) CASE NO. BK00-40949
DEBTOR(S))
) CH. 7
Plaintiff(s)) JOURNAL ENTRY
vs.)
) DATE: April 2, 2001
Defendant(s)) HEARING DATE: February
21, 2001

Before a United States Bankruptcy Judge for the District of Nebraska regarding Trustee's Motion for Turnover (Fil. #11); Debtors' Resistance to Motion for Turnover (Fil. #37); Trustee's Objection to Debtors' Claimed Exemptions (Fil. #24); Resistance by Debtors (Fil. #34); Trustee's Motion to Avoid Lien (Fil. #35); Resistance by Debtors (Fil. #44); Final Hearing on Trustee's Motion for Sanctions (Fil. #17); Resistance by Debtors (Fil. #29); Debtors' Motion to Dismiss (Fil. #49); and Objection by the Chapter 7 Trustee (Fil. #52).

APPEARANCES

Joseph Badami, Trustee
Thomas Petersen, Attorney for Debtor

IT IS ORDERED:

The Debtors' motion to dismiss is denied. The Trustee's objection to claimed exemptions is granted. The Trustee's motion to avoid lien is granted. The Trustee's motion for sanctions is denied. The Trustee's motion for turnover is deferred. See Memorandum entered this date.

BY THE COURT:

/s/Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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