

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
RANDOLPH W. BUTLER,) CASE NO. BK00-80373
)
DEBTOR.) CH. 13

MEMORANDUM

Hearing was held on Motion to Dismiss or in the Alternative to Convert this Case to Chapter 7 on August 10, 2000. Appearances: Karen Falcone Givens for the debtor and Francis Duda and Fortis Lawder for Mary Jo Butler. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A).

Introduction

This case is before the court on Mary Jo Butler's Motion to Dismiss or in the Alternative Convert this Case to Chapter 7 and a Resistance by the debtor. Ms. Butler, an unsecured creditor and former spouse of the debtor, alleges that the Chapter 13 case was not filed in good faith.

Applicable Law

In Handeen v. Lemaire (In re LeMaire), 898 F.2d 1346 (8th Cir. 1990), the Eighth Circuit Court of Appeals held that "good faith" is to be determined by the totality of the circumstances. Lemaire, 898 F.2d at 1348. Included in this determination is a consideration of "the type of debts to be discharged, whether the debt is dischargeable in Chapter 7, and the debtor's motivation and sincerity in seeking Chapter 13 relief." Id. at 1349. Another consideration is whether the debtor has "unfairly manipulated" the Bankruptcy Code. Id.; Education Assistance Corp. v. Zellner, 827 F.2d 1222, 1227 (8th Cir. 1987); Banks v. Vandiver (In re Banks), 248 B.R. 799, 803 (8th Cir. BAP 2000). Although pre-filing conduct is not determinative, it is indicative of the debtor's good faith. Id. at 1352; See also Neufield v. Freeman, 794 F.2d 149, 153 (4th Cir. 1986).

Facts

This Motion to Dismiss is another step in the ongoing litigation relating to the dissolution of the parties' marriage. On April 18, 1997, a final Decree of Dissolution ("Decree") was entered. One of Mr. Butler's obligations under the Decree is the obligation to liquidate and share the proceeds of corporate stock which is to result from the exercise of certain options owned by Mr. Butler. Upon request by Ms. Butler, he is to exercise the stock options, give notice to Ms. Butler that he is doing so and notify her of the purchase price, taxes and gains. He is then to split any taxes and profits with her. Mr. Butler, prior to the bankruptcy case being filed, violated the Decree by taking for himself all of the proceeds after exercising certain options.

As a result of Mr. Butler's actions, Mrs. Butler filed, on January 26, 2000, a "Motion to Punish for Contempt for Disobedience of Amended Judgment Decree of Dissolution and Entry of a Monetary Judgment." The motion was filed in Missouri State Court and hearing was scheduled for February 28, 2000.

On February 23, 2000, Randall Butler filed for relief under Chapter 7 of the Bankruptcy Code in this court. On the same day, but after the Chapter 7 filing, Mr. Butler filed a cross-motion for contempt in Missouri State Court against Ms. Butler for her failure to pay child support as required under the dissolution decree. On March 9, 2000, the debtor converted from Chapter 7 to Chapter 13.

In response to Mr. Butler's bankruptcy filing, Ms. Butler filed a Motion for Relief from the Automatic Stay which was granted by this court in an Amended Order issued on May 2, 2000. The automatic stay was lifted with the limited purpose of allowing the parties to complete the litigation concerning the contempt motion in Missouri State Court. The stay was lifted to allow a determination of contempt and punishment therefor, but the stay remained in effect to protect property of the estate from being used to purge any contempt citation.

On August 9, 2000, the Missouri State Court entered an order holding Mr. Butler in contempt for willfully and intentionally violating the Decree and ordered him incarcerated until purged of the contempt. The Missouri State Court ruled that, in violation of the Decree and the request of Ms. Butler, the debtor first refused to exercise the option for 4,834 shares damaging her in the amount of at least

\$151,107.00 minus her share of the taxes. Further, the court held that the debtor, without notice to Mrs. Butler, did exercise some options but did not pay the net after-tax proceeds to his ex-wife although he was required to do so by the Decree. The debtor was found in contempt for violation of the Decree and for intentionally breaching a fiduciary duty to Mrs. Butler. The court found that Mr. Butler held the proceeds of the stock sales in constructive trust for Mrs. Butler. The debtor is not yet incarcerated because the Missouri State Court is awaiting direction from this court before enforcing its contempt ruling.

On June 5, 2000, this "Motion to Dismiss or Convert on the Basis of a Lack of Good Faith" was filed. No Chapter 13 Plan has yet been confirmed but several plans have been filed. None of the plans propose to pay Ms. Butler her share of the proceeds of the sale of the stock.

To determine if this case has been filed in "good faith," the elements identified in the "Applicable Law" section of this Memorandum must be applied to the facts of this case. The largest debt that the debtor is seeking to discharge in the present case is a debt incurred in a divorce proceeding. Such debt would most likely be nondischargeable in a Chapter 7 proceeding under 11 U.S.C. § 523(a)(4). The Missouri State Court found that the debtor committed fraud against Mrs. Butler and breached his fiduciary duty to her. In addition, the financial injury to Mrs. Butler was caused by an intentional act of the debtor, aimed at Mrs. Butler, with the likelihood of financial harm occurring to her as a direct result of debtor's act. An obligation resulting from such an act is nondischargeable in a Chapter 7 case under 11 U.S.C. § 523(a)(6).

Considering the debtor's motivation and sincerity in seeking relief in bankruptcy, it is clear that he filed the petition only when the looming specter of a contempt proceeding faced him in state court with the possibility of jail time. He made no attempt to comply with the requirements of the Decree. The timing of the bankruptcy filing significantly delayed the inevitable litigation concerning his contemptuous acts.

There is also evidence of the debtor's manipulation of the Bankruptcy Code. The debtor originally filed under Chapter 7 and quickly switched to Chapter 13. Although such

behavior is not conclusive regarding motivation, it certainly can be inferred that the debtor initially sought to discharge all his debts without payment but converted to Chapter 13 upon learning that the obligation to Mrs. Butler would not be dischargeable in Chapter 7 but could be discharged in a Chapter 13 case. In addition, the debtor filed for bankruptcy on the same day but prior to filing a cross motion for contempt against his ex-wife. Thus, before Ms. Butler could proceed with her state court action or even answer in defense of the cross-motion, she was required to get relief from the automatic stay, thus incurring additional expense. These actions are evidence of manipulation of the Bankruptcy Code

The debtor's gross income for each of the past several years exceeded \$120,000.00; he owns a house which he rents out for over \$1,000.00 per month; he filed schedules listing his interest in corporate stock options as worth zero; he proposes no payments to holders of unsecured claims; he does not acknowledge, in the schedules or plan, any special obligation to Ms. Butler, but purports to classify her claim as unsecured; his original plan provides for repayment of a loan to his father and continuing payments on a "loan" received from his 401K plan.

The debtor's pre-filing conduct is indicative of a lack of good faith. The debtor exercised the stock options and either spent or otherwise placed beyond her reach the share of the net proceeds that was the property of Mrs. Butler under the Decree. Banks v. Vandiver (In re Banks), 248 B.R. 799 (8th Cir. BAP 2000). This was a knowing violation of a court's order, a continuing violation that lasted at least two years and continues to this day. Only when Mrs. Butler attempted to enforce her rights did the debtor file for bankruptcy relief.

Considering the factors listed in LeMaire, it is concluded as a finding of fact that the debtor's good faith has not been demonstrated on the record and that this case was not filed in "good faith". It appears that his bankruptcy is just another attempt to thwart execution of the Decree entered in 1997.

The motion to dismiss is granted.

Separate journal entry shall be filed.

DATED: September 13, 2000

BY THE COURT:

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

Copies faxed by the Court to:

DUDA, FRANCIS X. 314-721-3515

Copies mailed by the Court to:

Karen Falcone Givens, 1823 Harney St., Ste. 1008,
Omaha, NE 68102
Kathleen Laughlin, Trustee
United States Trustee

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.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
RANDOLPH W. BUTLER,) CASE NO. BK00-80373
) A
DEBTOR(S))
) CH. 13
) Filing No. 36, 42
Plaintiff(s))
vs.) JOURNAL ENTRY
)
)
) DATE: September 13, 2000
Defendant(s)) HEARING DATE: August 10, 2000

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion to Dismiss or in the Alternative to Convert this Case to Chapter 7.

APPEARANCES

Karen Falcone Givens, Attorney for debtor
Francis Duda and Fortis Lawder, Attorney for Mary Jo Butler

IT IS ORDERED:

The motion to dismiss is granted. See Memorandum entered this date.

BY THE COURT:

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

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