

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
ROBERT R. PETERSEN and)
BARBARA PETERSEN,) CASE NO. BK93-80038
)
DEBTOR.) CH. 12

MEMORANDUM

Hearing was held on December 14, 1999, on Trustee's Motion for an Order Directing the Debtors to Either Move for Discharge or, in the Alternative, to Dismiss Case; Motion for Discharge filed by the Debtors; Objection to Motion for Discharge filed by Stanco, Inc.; Objection to Discharge filed by the Trustee; and Motion to Modify Plan to Increase Payments to Unsecured Creditors filed by Stanco, Inc. Appearances: Charles Meyer for the debtors, Richard Lydick as Chapter 12 Trustee, and Howard Duncan for Stanco, Inc. 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) and (O).

Facts

This matter comes before the court on creditor Stanco, Inc.'s, ("Stanco") motion to modify plan payments and the debtors' motion for discharge. Stanco is an unsecured creditor of the debtors.

The debtors filed for Chapter 12 relief on January 1, 1993. The Chapter 12 plan was confirmed on December 14, 1993. The plan stated a three-year period for repayment and the plan payments were completed in 1996. The debtors paid a total of \$195,272.00 into the plan. A discharge was not requested at the end of the plan payments and the case has remained open because of the issue which is the subject of this memorandum.

In 1994, one of the debtors, Mrs. Petersen, received an inheritance resulting from the death of a parent. There were several disbursements to Mrs. Petersen, with the last disbursement received in 1996. These distributions include \$61,000.00 in cash or cash equivalent and an undivided, one-third interest in real property of a presently unknown value.

Although Mrs. Petersen received the disbursements during the plan repayment period, the debtors did not amend their schedules to reflect the inheritance. Rather, in July of 1996, the Trustee and Stanco requested an accounting after being given some notice of the inheritance through the debtors' disclosure of an inheritance of \$25,000.00 on their 1995 operating reports.

Stanco objects to the entry of a discharge and requests that the debtors be required to modify the completed Chapter 12 plan to increase the plan payments. This is "fair", argues Stanco, because the debtors failed to voluntarily disclose the inheritance received during the repayment period. Additionally, it is Stanco's position that the inheritance is property of the estate because the debtor, Mrs. Petersen, received it during the time plan payments were being made, and that, because the inheritance is property of the estate, it should be included in the disposable income calculation and distributed under the plan. Although 11 U.S.C. § 1229 forbids modification of a plan after completion of plan payment, Stanco requests that the court utilize its equitable powers to override the plain language of 11 U.S.C. § 1229 because the inheritance constitutes an extra-ordinary event which permits the use of such equitable powers.

The debtors in turn argue that they did disclose the inheritance when they provided an accounting and that Stanco's motion to modify is out of time. Additionally, the debtors argue that the statutory language of 11 U.S.C. § 1229 prohibits the modification of a plan after completion of plan payments.

Finally, the debtors argue that even if it has been held that, under extraordinary circumstances, a plan may be modified after all plan payments have been completed, this is not such an extraordinary circumstance and that the doctrine of laches bars a motion for modification. The debtors move for a discharge because the plan has been complete for over three years.

Decision

Stanco's motion to modify is denied and the debtors are not eligible for a discharge at this time.

Law

A. Modification

The Bankruptcy Code, at 11 U.S.C. § 1207(a), states that property of the estate includes property acquired by the debtor after commencement of the Chapter 12 case but before the case is closed, dismissed or converted. The debtors received the inheritance after the commencement of the case and prior to any conversion, closure or dismissal. Therefore, according to the statute, the inheritance is property of the estate. See *In re Hart*, 151 B.R. 84, 86 (Bankr. N.D. Tex. 1993); *In re Cook*, 148 B.R. 273, 277 (Bankr. W.D. Mich. 1992); *Cornelius v. Cornell (In re Cornell)*, 95 B.R. 219, 221 (Bankr. W.D. Okla. 1989); *In re Brownlee*, 93 B.R. 662, 665 (Bankr. S.D. Iowa 1988).

Section 1229(a) of the Code provides that at "any time after confirmation but before the completion of payments under such plan, the plan may be modified." (emphasis added) The debtors completed all plan payments in 1996. The motion to modify plan payments was not filed until 1999. This motion according to the plain language of the statute was filed out of time. Therefore, the request for modification is denied.

B. Disposable Income

A motion to modify plan payments is not necessary to enforce the disposable income requirements. *Agribank, FCB, v. Honey (In re Honey)*, 167 B.R. 540, 545n.9 (W.D. Mo. 1994); *In re Kuhlman*, 118 B.R. 731, 738 (Bankr. D.S.D. 1990).

This Chapter 12 plan provided that the debtors would pay to the Chapter 12 Trustee the debtors' disposable income received during the plan period. Disposable income, for the purposes of Chapter 12, is defined in 11 U.S.C. § 1225(b)(2) as "income which is received by the debtor and which is not reasonably necessary to be expended-

(A) for the maintenance or support of the debtor or a dependent of the debtor; or

(B) for the payment of expenditures necessary for the continuation, preservation, and operation of the debtors' business.

Whether the cash portion of the inheritance and/or the real estate portion of the inheritance must be considered in

the disposable income calculation is the first level of inquiry. The Eighth Circuit Court of Appeals has been relatively consistent with regard to the type of property that is considered for the disposable income calculation.

The Circuit Court appears to conclude that any type of revenue received during the case should be included in the "disposable income" calculation. Under a Chapter 13 analysis, the Circuit determined, in the case of *In re Koch*, 109 F.3d 1285, 1289 (8th Cir. 1997), that Worker's Compensation benefits, even if exempt under state law, are included in "disposable income" and should be considered in calculating whether the debtor's post-petition revenue received is reasonably necessary for support. The definition of "disposable income" in 11 U.S.C. § 1325(b)(2)(B) is similar to the definition of "disposable income" applicable in a Chapter 12 case by virtue of 11 U.S.C. § 1225(b)(2)(B) and it is likely that the analysis by the Eighth Circuit Court of Appeals would be similar in the Chapter 12 context.

In *In re Broken Bow Ranch, Inc.*, 33 F.3d 1005 (8th Cir. 1994), the Circuit Court approved a determination by the bankruptcy court that government program payments "earned" during the period of the plan, but received after the end of the plan, should be included in the disposable income calculation. The Court went on to suggest that the determination of what constitutes disposable income of a Chapter 12 debtor is a fact intensive inquiry as to whether the debtor has income which is in excess of that reasonably required for maintenance and continuation of the farming operation from one year to the next. *In re Broken Bow Ranch*, 33 F.3d at 1008. The Court also agreed that the bankruptcy court, when attempting to determine actual "disposable income," could legitimately make a determination concerning whether the debtor, during the plan period, accumulated an unreasonably large reserve of funds that would provide a windfall at the time of discharge. *Id.*

Finally, in the Chapter 12 case of *In re Hammrick*, 98 F.3d 388 (8th Cir. 1996), the Circuit Court once again acknowledged that it was appropriate for the bankruptcy court to make a determination of the amount of funds necessary to continue the debtors' farming operation after the termination of the plan when considering the amount of excess revenue that should be defined as "disposable income" and be payable to the Chapter 12 Trustee.

In this case, Mrs. Petersen, during the term of the plan, inherited cash and an undivided interest in real estate. The debtors have placed no value on the undivided real property interest and the court has little evidence concerning how such an undivided interest could be liquidated and/or the value of such undivided interest at the time of liquidation. The court does have evidence that Mrs. Petersen did receive, during the plan term, at least \$61,000.00 in cash. The debtors argue that the funds received were used in the ordinary operation of the business and should not be considered as "excess funds" or defined as "disposable income." At the preliminary hearing on this motion, debtors did not present sufficient evidence on this issue. However, following the guidance of the Eighth Circuit Court of Appeals in the above-cited cases, it is appropriate to allow the debtors to present evidence on the issue of the actual value of the undivided interest in the real property, the use of the inherited cash proceeds, and the amount of carryover from the year the plan ended to the next year. Only with such evidence before the court can the "disposable income" calculation actually be performed.

Therefore, the clerk of the bankruptcy court shall schedule a trial for one-half day to permit the debtors, who have the burden concerning whether all disposable income has been transferred to the trustee, to present evidence on that issue.

Separate journal entry shall be entered.

DATED: February 9, 2000

BY THE COURT:

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

Copies faxed by the Court to:

4 LYDICK, RICHARD
20 DUNCAN, HOWARD T.

Copies mailed by the Court to:

Charles Meyer, Esq., P.O. Box 289, Stanton, NE 68779
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.

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IN THE MATTER OF:)
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ROBERT R. PETERSEN and)
BARBARA PETERSEN,) CASE NO. BK93-80038
DEBTOR(S)) CH. 12
) Filing No.
Plaintiff(s))
vs.) JOURNAL ENTRY
) DATE: February 9, 2000
Defendant(s)) HEARING DATE: December 14, 1999

Before a United States Bankruptcy Judge for the District of Nebraska regarding Trustee's Motion for an Order Directing the Debtors to Either Move for Discharge or, in the Alternative, to Dismiss Case; Motion for Discharge filed by the Debtors; Objection to Motion for Discharge filed by Stanco, Inc.; Objection to Discharge filed by the Trustee; and Motion to Modify Plan to Increase Payments to Unsecured Creditors filed by Stanco, Inc.

APPEARANCES

Charles Meyer, Attorney for the debtors
Richard Lydick, Chapter 12 Trustee
Howard Duncan, Attorney for Stanco, Inc.

IT IS ORDERED:

1. Motion to modify denied.
2. Request for discharge deferred.
3. Clerk shall schedule trial as directed in the Memorandum Opinion.

BY THE COURT:

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

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