

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)	
)	CASE NO. BK99-41121-TJM
ROBERT L. SIEMERS and)	
BETTY JOAN SIEMERS,)	CHAPTER 11
)	
Debtor(s).)	

ORDER

Hearing was held on February 23, 2011, on the debtor’s motion to reopen the bankruptcy case (Fil. No. 206) and opposition by Linda Paxton as personal representative of the estate of Ronald Paxton (Fil. No. 208). W. Eric Wood appeared for the debtor and David Pederson appeared for Linda Paxton.

The motion is denied.

The debtor seeks to reopen this case in order to file an adversary proceeding against a secured creditor’s probate estate and a trustee under a deed of trust for recovery of funds allegedly owed to the debtor and for sanctions for willfully violating the discharge injunction. The secured creditor, Ronald Paxton, held a first mortgage interest in 80 acres owned by the debtors.

The debtors¹ filed this Chapter 11 case on June 9, 1999, and obtained confirmation of an amended plan of reorganization in 2001 that provided for Mr. Paxton’s secured claim in the real estate by proposing to pay the claim of approximately \$43,000.00² with an initial \$3,000.00 interest payment in 2001, followed by 20 annual installment payments of \$4,800.00 beginning on May 1, 2002. The amount of the installment payments was amended to \$3,872.27, which in most years from May 2002 to May 2008 was what the debtor paid.

The court entered a final decree and closed the case in December 2001.

The debtor subsequently filed a Chapter 12 case in 2003, with a plan confirmed in 2005 that provided for treatment of Mr. Paxton’s claim in accordance with the terms of the confirmed Chapter 11 plan. The debtor continued to make payments to Mr. Paxton but ran into cash flow and financing difficulties. Ultimately, the Chapter 12 case was dismissed in October 2009 for failure to make plan payments.

Because the debtor did not make the 2009 payment to Mr. Paxton, the trustee under the deed of trust sold the property in April 2010 to Mr. Paxton for a credit bid of \$80,000.00. The balance due

¹Mrs. Siemers has since passed away.

²The parties agreed that the fair market value of the real estate was \$45,000.00, subject to the secured claim of the Hall County Treasurer for real estate taxes of \$2,011.90.

on the secured debt was approximately \$35,500.00 at that time. Mr. Paxton and the trustee refused to remit the difference between the credit bid and the total amount of the remaining secured debt to the debtor or to the junior lienholder on the real estate. The debtor and the junior lienholder filed claims with Mr. Paxton's probate estate³, which were denied for being filed late. The debtor argues that Mr. Paxton and the trustee collected a discharged unsecured debt by keeping the excess proceeds and thus willfully violated the discharge injunction of 11 U.S.C. § 524.

Mr. Paxton's representative asserts that because the confirmed Chapter 11 plan provided for payment of both the secured claim and a pro rata share of the unsecured claim and the plan payments were not completed, Mr. Paxton was entitled to recover the entire amount of his debt, both secured and unsecured.

A closed bankruptcy case "may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b). The decision to grant or deny a request under § 350(b) to reopen a bankruptcy case is within the bankruptcy court's discretion based on each case's particular circumstances and equities. Apex Oil Co. v. Sparks (In re Apex Oil Co.), 406 F.3d 538, 542 (8th Cir. 2005). A motion to reopen a bankruptcy case should be granted "only where a compelling reason for reopening the case is demonstrated." Mid-City Bank v. Skyline Woods Homeowners Ass'n (In re Skyline Woods Country Club, LLC), 431 B.R. 830, 835 (B.A.P. 8th Cir. 2010) (citing In re Borer, 73 B.R. 29, 31 (Bankr. N.D. Ohio 1987)). The availability of relief in an alternative forum is a permissible factor on which to base a decision not to reopen a closed bankruptcy case. Id. (citing Apex Oil, 406 F.3d at 542). The unavailability of effective judicial relief is also a valid reason for not reopening a case. Dworsky v. Canal St. Ltd. P'ship (In re Canal St. Ltd. P'ship), 269 B.R. 375, 381 (B.A.P. 8th Cir. 2001).

The underlying issue here is whether Mr. Paxton was required to pay the difference between his credit bid and the actual amount of his secured claim to the debtor or the second lien holder. That is a question of state law and the state courts are competent to determine the matter. Although the debtor asserts a violation of the discharge injunction by treating the excess as a payment of discharged debt, the discharge provision of Chapter 11 does not provide a private cause of action for a violation of the discharge injunction. See Barrientos v. Wells Fargo Bank, N.A. 2011 WL 451955 (9th Cir. Feb. 10, 2011) and Solow v. Kalikow (In re Kalikow), 602 F.3d 82, 96-97 (2d Cir. 2010).

At the time the Chapter 11 plan was confirmed, § 1141(d)⁴ established that confirmation

³Mr. Paxton passed away in 2010.

⁴That subsection states:

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan —

(A) discharges the debtor from any debt that arose before the date of such

(continued...)

discharges all non-§ 523 debts unless otherwise provided in the plan or confirmation order. The language of the debtors' plan provided that the confirmation order constituted a discharge effective as of the confirmation date. Since debtor acknowledges a junior lien holder has a claim to the excess, if that claim combined with the Paxton debt equals at least \$80,000, the debtor does not have a financial interest in this matter. If the claims total less than \$80,000, the debtor has a financial interest and both may proceed in state court to litigate the state law issue.

IT IS ORDERED: The debtor's motion to reopen the bankruptcy case (Fil. No. 206) is denied

DATED: March 28, 2011

BY THE COURT:

/s/ Timothy J. Mahoney
United States Bankruptcy Judge

Notice given by the Court to:
*W. Eric Wood

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- ⁴(...continued)
- confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not —
- (i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;
 - (ii) such claim is allowed under section 502 of this title; or
 - (iii) the holder of such claim has accepted the plan; and
- (B) terminates all rights and interests of equity security holders and general partners provided for by the plan.
- (2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.
- (3) The confirmation of a plan does not discharge a debtor if —
- (A) the plan provides for the liquidation of all or substantially all of the property of the estate;
 - (B) the debtor does not engage in business after consummation of the plan;
- and
- (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.
- (4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 amended § 1141 to establish that confirmation does not discharge any debt provided for in the plan until the court grants a discharge upon completion of all plan payments.

David Pederson
United States Trustee

Movant (*) is responsible for giving notice to other parties if required by rule or statute.