

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
STEVEN AND MELODY WALLS,) CASE NO. BK86-1708
)
DEBTOR) CH. 13

MEMORANDUM

Hearing was held on February 14, 1994, on the Application for Discharge by Debtors; Proposed Limited Discharge and Objection to Proposed Limited Discharge by IRS and Motion to Dismiss filed by the trustee. Appearing on behalf of debtors was Mary Powers of Omaha, Nebraska. Appearing on behalf of Internal Revenue Service (IRS) was Lisa Hartnett of Omaha, Nebraska. Kathleen Laughlin of Omaha, Nebraska, appeared as trustee. 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), (I) and (J).

Background

On June 11, 1986, the debtors, Steven and Melody Walls, filed a Chapter 13 bankruptcy petition. Shortly thereafter, the debtors proposed a repayment plan providing for monthly payments of \$100.00 for sixty months. The plan was confirmed on August 7, 1986. The IRS filed a proof of claim which was allowed. Because the allowed claim of the IRS was higher than the plan proposed to pay, the debtors should have, but did not, amend the plan to provide higher monthly payments. The full amount of the IRS claim has not yet been paid, although debtor did pay \$100.00 per month for sixty months as required by the plan.

On July 16, 1993, the debtors filed an application for discharge. On July 20, 1993, the Chapter 13 trustee filed a resistance to the application for discharge, which stated that the debtors were not entitled to discharge until the priority claims of the IRS under 11 U.S.C. § 507(a)(7) was paid in full as required by the confirmed plan. The Chapter 13 trustee also brought a separate motion to dismiss under Section 1322(c) based upon the plan exceeding five years in length and under Section 1307 for cause.

In response to the trustee's position, the debtors filed a notice of proposed "limited" discharge. The debtors requested that they be discharged from all claims, except the balance owing

to the IRS on its priority claim in the amount of \$1,472.00. Debtors apparently want the IRS claim to be locked in or frozen at the remaining balance due the IRS as if the plan had been properly completed.

The IRS filed an objection to the proposed limited discharge. The IRS argues that the debtors are not entitled to a discharge of any claim under Section 1328(a) of the Bankruptcy Code, because the debtors have not completed the payments as required by their plan. The IRS also argues that the court may not freeze its claim if the balance due the IRS will be paid outside of bankruptcy. It asserts that any post-petition penalties and interest which were accruing on the claim, but were uncollectible because of the bankruptcy, continue to exist and are not discharged if the total priority claim is not paid during the case.

DISCUSSION

Although it is conceded by all parties that a Chapter 13 plan must provide for full payment of priority tax claims because those priority tax claims are not dischargeable in a Chapter 13 case, U.S. v. Reynolds, 38 B.R. 725 (D.C. 1984) affirmed 764 F.2d 1004 (4th Cir. 1985), the parties disagree on how to deal with the balance of the priority claim under the facts of this case. The debtor proposes a limited discharge with a lock on the remaining portion of the IRS's priority claim, while the Chapter 13 trustee proposes a dismissal of the case based on Section 1322(c) and 1307.

Discharge in a Chapter 13 case is governed by Bankruptcy Code Section 1328. 11 U.S.C. § 1328(a) states:

As soon as practicable after completion by the debtor of all payments under the plan. . .the court shall grant the debtor a discharge of all debts provided for by the plan. . .

Priority debts under Section 507 are not dischargeable since Section 1322(a)(2) requires that the plan provide for payment in full of such debts. The debtors have not completed the payments owed to the IRS for the priority tax claim as required by their plan and Section 1322(a). Therefore, a discharge cannot be granted under Section 1328(a). The Bankruptcy Code does not contain a provision providing for a lock on any unpaid portion of a priority claim upon a limited discharge or dismissal. The debtors' motion for a limited discharge and lock on the priority claim must be denied.

The debtors are not entitled to a discharge of the IRS's priority claim under Section 1328(b), because Section 1328(c) provides that a discharge under (b) excepts those debts specified

in Section 523(a), including taxes given priority under Section 507(a)(7). In re Putnam, 131 B.R. 52, 53 (Bankr. W.D. Va. 1991). Thus, discharge of the priority claim must also be denied under Section 1328(b).

Motion to Dismiss

A. Section 1322(c)

The trustee argues that pursuant to Bankruptcy Code Section 1322(c), the debtors' case should be dismissed. The content of a Chapter 13 plan is governed by Section 1322. 11 U.S.C. Section 1322(c) provides:

The plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years.

A close reading of the statute indicates that a Chapter 13 plan, when proposed for confirmation, should ideally be thirty-six months in duration and under some circumstances may be extended for cause at a court's discretion to a maximum of sixty months. The majority of cases decided under 1322(c) have involved situations in which the debtor has tried at the confirmation hearing to propose or extend plans beyond the thirty-six month preferred duration. In re Thomas, 123 B.R. 552 (Bankr. W.D. Tex. 1991); In re Price, 20 B.R. 253 (Bankr. W.D. Ky. 1981); In re Pierce, 82 B.R. 874 (Bankr. S.D. Ohio 1987).

Although the statute and these cases are illuminating, they are not necessarily dispositive of the circumstances in the present case. Those cases may be differentiated from the present situation on the ground that the debtors in this case complied with the statute by proposing a plan which did not exceed the sixty-month limit. The debtor's plan was accordingly confirmed by the court, as it did not violate the mandate of Section 1322(c).

The present situation calls for a determination of a proper resolution when a confirmed plan exceeds its expected duration. The court in In re Black, 78 B.R. 840 (Bankr. S.D. Ohio 1987), was confronted with the same situation. In that case the debtors proposed a sixty-month plan which inadvertently extended beyond the proposed sixty months due to several missed payments during the pendency of the plan. The trustee moved for dismissal under Section 1322(c). The bankruptcy court concluded that although "1322(c) instructs the court on the maximum length which it may approve for payments under a Chapter 13 plan, 1322(c) contains no provision for dismissal of a Chapter 13 plan whose payments extend past a five-year period, but which otherwise complied with

the duration limitations at the time of confirmation." Id. at 842.

The Black court acknowledged that the longer a case persists, the greater the likelihood that the debtor will default in repayment due to changed circumstances such as the increased cost of living coupled with the difficulty of adhering to a tight budget for long periods of time. In re Festa, 65 B.R. 85 (Bankr. S.D. Ohio 1986). The concern is a valid one and the longer the case continues, the greater the concern becomes. This case is no exception. However, the statute deals with requirements for confirmation, not grounds for dismissal. Therefore, the motion to dismiss on Section 1322(c) grounds must be denied.

B. Section 1307

By the statute and the plan terms, the debtors were required to pay the IRS allowed priority claim in full. Although they paid \$100.00 per month for sixty months, such amount has not paid the claim in full. Technically, such failure to pay the full balance can be considered a material default in a confirmed plan, giving cause for dismissal under 11 U.S.C. § 1307(c)(6) and can be considered an unreasonable delay which is prejudicial to creditors, giving cause for dismissal under 11 U.S.C. § 1307(c)(1). Since dismissal is not mandatory, this Court, considering the efforts debtors have made over all those years, the harm to the debtors if the case is immediately dismissed and the benefit to them if full payment can be made during the case, shall grant debtors additional time to complete the payment of the IRS claim.

The motion to dismiss on Section 1307 grounds is deferred.

Debtors must complete all payments by July 15, 1994, or this case will be dismissed upon declaration by trustee that full payment has not been made.

Separate journal entry to be entered.

DATED: March 7, 1994.

BY THE COURT:

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

CC: Movant, Debtor(s) Atty. and all parties appearing at hearing
[] Chapter 13 Trustee [] Chapter 12 Trustee [] U.S.Trustee
Movant is responsible for giving notice of this journal entry to any parties in interest not listed above.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
STEVEN AND MELODY WALLS,)
)
DEBTOR(S))
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Plaintiff(s))
vs.)
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)
Defendant(s))
_____)

CASE NO. BK86-1708
A

CH. 13
Filing No. 42, 53, 54

JOURNAL ENTRY

DATE: March 7, 1994
HEARING DATE: February
14, 1994

Before a United States Bankruptcy Judge for the District of Nebraska regarding Application for Discharge by Debtors; Proposed Limited Discharge ad Objection to Proposed Limited Discharge by USA-IRS.

APPEARANCES

Mary Powers, Attorney
Kathleen Laughlin, Trustee
Lisa Hartnett

IT IS ORDERED:

This case will be dismissed on or after July 15, 1994, upon declaration by trustee that full payment has not been made. See memorandum this date.

BY THE COURT:

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

CC: Movant, Objector/Resistor (if any), Debtor(s) Atty. and all parties appearing at hearing
[] Chapter 13 Trustee [] Chapter 12 Trustee [] U.S.Trustee

Movant is responsible for giving notice of this journal entry to all other parties if required by rule or statute.