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DISTRICT OF NEBRASKA	
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FEB 20 1987	
William L. Olson, C.	
By	Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEBRASKA

RECEIVED

IN THE MATTER OF

BRETT AARON NELSON,

Debtor.

FEB 25 1987

UNITED STATES BANKRUPTCY CLERK  
FOR THE DISTRICT OF NEBRASKA  
OMAHA

CV. 85-0-572

BK. 84-2540

ORDER

This matter is pending on appeal from a bankruptcy court order denying the debtor discharge of his debts. The bankruptcy court ruled Brett Nelson waived his right to discharge when he failed to obey a court order. Upon careful consideration of the record on appeal and the arguments presented by counsel, this Court finds the bankruptcy court order should be reversed.

On December 31, 1984, an order for relief was entered on a petition filed by the debtor. A Section 341 (11 U.S.C. § 341) first meeting of creditors was scheduled for February 5, 1985. The date of the meeting was subsequently changed due to the fact that Mr. Nelson was in Richard Young mental hospital and would be unable to appear. The rescheduled first meeting of creditors was set for March 19, 1985. The debtor failed to appear at the rescheduled meeting.

On March 25, 1985, the bankruptcy trustee filed an application for determination of waiver of discharge. A hearing on the application took place on May 20, 1985, with both the debtor and trustee in attendance. At the hearing, the bankruptcy court ruled Mr. Nelson waived discharge of his debts when he failed to comply with the bankruptcy court order requiring him to appear at the rescheduled meeting. The hearing proceedings were

not transcribed and no findings of fact or conclusions of law were issued by the bankruptcy court. A journal entry sustaining the trustee's application for determination of waiver of discharge was filed May 21, 1985.

Before this Court addresses the merits of the appeal, it is prudent to state the general standard of review that guides the Court in matters such as this. On appeal, a district court is not bound by the bankruptcy judge's conclusions of law; however, the bankruptcy judge's findings of fact are entitled to stand unless clearly erroneous. In re American Beef Packers, Inc., 457 F.Supp. 314 (D.Neb. 1978); see also Bankruptcy Rule of Procedure 8013.

The bankruptcy court apparently based its ruling upon the old bankruptcy rule of procedure 406. Rule 406 read in pertinent part:

If the bankrupt fails to attend and submit himself to examination at the first meeting of creditors \* \* \* the court on motion shall, or on its own initiative may, set a time for hearing to determine whether the bankrupt shall be deemed to have waived his right to a discharge \* \* \*.

Rule 406 outlined the procedural steps a bankruptcy court was required to take when it declared a waiver of discharge under Section 14(e) of the former bankruptcy act. In re Harper, CV. 82-0-228, slip op. (D.Neb. 1983). Section 14(e) of the former bankruptcy act stated in part:

If \* \* \* the court finds after hearing upon notice that the bankrupt has failed without sufficient excuse to appear and submit himself to examination at the first meeting of creditors or at any meeting especially called for his

examination, he shall be deemed to have waived his right to a discharge, and the court shall enter an order to that effect.

That section, however, was repealed with the rest of the old bankruptcy act in 1978 when the Bankruptcy Reform act of 1978 became effective.

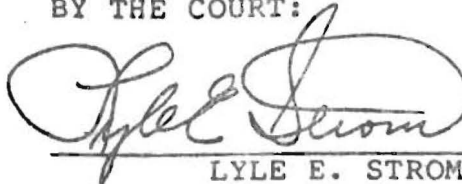
Section 14(e) was not included as grounds for waiver or denial of discharge under the new bankruptcy code. Thus, the debtor's failure to appear at the first meeting of creditors no longer amounts to an implied waiver of his right to discharge and the bankruptcy court erred in so ruling.

If, on the other hand, the bankruptcy court ruled as it did based upon 11 U.S.C. § 727(a)(6)(A), it abused its discretion. Section 727(a)(6)(A) states that a discharge may be denied if the debtor has refused to obey any lawful order. The denial of discharge rights for failure to obey lawful orders is left to the bankruptcy court's sound discretion. In re Devers, 759 F.2d 751, 754-55 (9th Cir. 1985). Even though the denial of discharge rights is discretionary, the sanction is so severe that the court should take a close look at the operative facts before such punishment is leveled against a debtor. Preferably, the Court should conduct an adversary proceeding before this sanction is imposed. See generally Bankruptcy Rule of Procedure 7001, et seq. Here, the bankruptcy court failed to conduct such proceeding. Indeed no findings of fact or conclusions of law were made on the matter. Accordingly,

IT IS HEREBY ORDERED that the bankruptcy court's order denying Brett Aaron Nelson discharge of his debts is reversed and this matter is remanded for further proceedings consistent herewith.

DATED this 20<sup>th</sup> day of February, 1987.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Lyle E. Strom", is written over a horizontal line.

LYLE E. STROM  
UNITED STATES DISTRICT JUDGE