

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FILED
DISTRICT OF NEBRASKA
AT _____ M
FEB - 7 1985
William L. Olson, Clerk
By _____ Deputy
ORDER

IN RE:)
)
DONALD EUGENE THADEN,)
)
Debtor.)

BK 84-00653
CV 84-0-590

This matter is before the Court on appeal from an order of the United States Bankruptcy Court for the District of Nebraska dismissing appellant's Chapter 13 petition.

Appellant, Donald Eugene Thaden, filed a Chapter 13 petition on April 2, 1984. On April 19, 1984, he filed a Chapter 13 statement and Chapter 13 plan. On June 19, 1984, appellee, the City National Bank and Trust Company of Hastings, Nebraska, filed a motion to dismiss appellant's petition alleging that he was not an "individual with regular income" within the meaning of 11 U.S.C. § 109(e). The Bankruptcy Court held a hearing on August 28, 1984. The Bankruptcy Court, after hearing oral argument from the parties, sustained appellee's motion to dismiss, thereby dismissing appellant's Chapter 13 petition.

Appellant argues on appeal that the Bankruptcy Court erred in refusing to permit any evidence to be entered at the hearing on the motion to dismiss. The issue before the Bankruptcy Court was whether appellant was an "individual with regular income," which is a requirement for Chapter 13 relief. 11 U.S.C. § 109(e). Appellant contends that he would have introduced evidence that he had successfully operated a bar/restaurant beginning in 1976.

This evidence, according to appellant, would have shown that his financial difficulties which led to the Chapter 13 petition were largely beyond his control. These troubles had abated and the restaurant reopened at the time of the hearing. Appellant contends that he does, therefore, meet the "individual with regular income" requirement. The Bankruptcy Court, however, refused to consider this evidence.

Appellee's position is that the pleadings, as well as the parties' oral argument, justified the Bankruptcy Court's decision, despite its failure to hear any evidence. According to appellee, the pleadings showed that appellant had no income at the time of filing of his petition, and that the bulk of appellant's debts were related to the business he was reopening and contending would now sustain a Chapter 13 plan. Under these circumstances, appellee argues that the Bankruptcy Court was entitled to conclude that appellant's business would not sustain a Chapter 13 plan and that he was not, then, an "individual with regular income."

The Court agrees with appellant that the Bankruptcy Court erred in refusing to allow the introduction of evidence. The motion to dismiss was filed pursuant to 11 U.S.C. § 1307(c) which provides in part that "on request of a party in interest and after notice and a hearing, the Court may . . . dismiss a case under this chapter" As the court in In Re Ratmansky, 7 B.R. 829 (Bankr. E.D. Pa. 1980), noted, although such a motion to dismiss is not an adversary proceeding under the Rules of Bankruptcy Procedure, "it is a contested matter involving two


posing parties, with many of the features of a true adversary proceeding." Id. at 832. In Ratmansky the court held that it was improper to consider evidence not introduced at the hearing. See also, In Re Aughenbaugh, 125 F.2d 887 (3rd Cir. 1942). Likewise in this case, it violates the fundamental concept of procedural due process for appellant to have been prohibited from introducing any evidence at the hearing on the motion to dismiss.

The Bankruptcy Court needed to hear appellant's evidence, because if credible and persuasive, that evidence would have justified a denial of appellee's motion to dismiss. In deciding whether a debtor is an "individual with regular income," the court's concern is whether the debtor will have reliable income sufficient to fund the proposed Chapter 13 plan. Courts generally consider the debtor's income prospectively, that is, one need not have regular income at the time of filing the Chapter 13 petition as long as the future prospects for income will support the proposed plan. See In Re Troyer, 24 B.R. 727 (Bankr. N.D. Ohio 1982); In Re Bradley, 18 B.R. 105 (Bankr. D. Vt. 1982) and In Re Mozer, 1 B.R. 350 (Bankr. D. Colo. 1979). Appellant wished to present evidence that his past financial problems were due to factors beyond his control and that he would have a regular flow of income in the future. Appellant was entitled to introduce such evidence and the Bankruptcy Court erred in refusing to admit it. Accordingly,

IT IS ORDERED that the judgment of the Bankruptcy Court dismissing appellant's Chapter 13 petition is reversed and remanded for further proceedings consistent with this order.

DATED this 7th day of February, 1985.

BY THE COURT:


C. ARLEN BEAM
UNITED STATES DISTRICT JUDGE