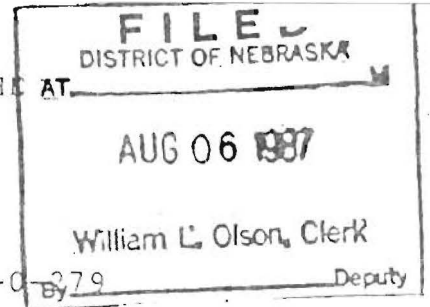


IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA



IN THE MATTER OF:)
LOWELL & OPAL BEHNKE,)
Debtors.)

CV. 86-0-279
BK. 86-284

IN THE MATTER OF:)
LOWELL & OPAL BEHNKE,)
Debtors.)

CV. 86-0-358
BK. 86-284

This matter is before the Court on appeal from an April 7, 1986, bankruptcy court order overruling appellants' motion to vacate the automatic stay. The motion requested that the stay be lifted for cause pursuant to 11 U.S.C. § 362^(d)(1) because Lowell and Opal Behnke were ineligible to be debtors under the provisions of 11 U.S.C. § 109(f)(1). The Bankruptcy Court ruled that § 109(f)(1) was inapplicable to the case at bar and the stay should remain in effect. Upon careful consideration of the record on appeal and the arguments raised by the parties, this Court finds the Bankruptcy Court should be affirmed.

The undisputed facts are these. Debtors Lowell and Opal Behnke conduct a farming operation in Pierce, Nebraska. Madison Building & Loan Association (Madison) holds a first mortgage on all five quarters of land owned by the Behnkes. Commercial State Bank (Commercial) is a creditor holding a first lien on the Behnkes' equipment, inventory, crops, livestock, etc., and also holds a second mortgage on two of the five quarters of farm land owned by the Behnkes.

The Behnkes filed a Chapter 13 bankruptcy petition on January 8, 1985. On January 22, 1985, they filed a Chapter 13 plan. Both Madison and Commercial objected to confirmation of the plan. Madison's objection was sustained by the Bankruptcy Court through a journal entry filed April 16, 1985, in which the Court ruled the case would be dismissed unless an amended plan was filed within fourteen days. In response to the Court's order, the debtors filed an amended Chapter 13 plan on April 25, 1985.

Appellants objected to the amended Chapter 13 plan and their objections were set for trial on separate dates in the fall of 1985. Prior to the trials, Don Swanson, debtors' attorney, withdrew as counsel for the debtors effective September 13, 1985. Mr. Swanson cited his inability to contact and communicate with the debtors as support for his motion to withdraw.

Commercial's objection to confirmation of the plan was heard and sustained by the Bankruptcy Court on November 7, 1985. The Behnkes failed to appear at the trial. In its journal entry sustaining Commercial's objection, the Bankruptcy Court stated: "Debtors have thirty days to file amended plan, if Debtors fail to do so, this case will automatically be dismissed." The debtors did not file an amended plan.

On January 30, 1986, the Behnkes filed a Chapter 11 bankruptcy petition. Appellants moved for relief from the automatic stay on the ground that § 109(f)(1) prevented the debtors from refiling within thirty days of the dismissal of their Chapter 13 action. During the hearing on appellants'

motion for relief, the debtors submitted an affidavit explaining that lack of legal counsel and lack of knowledge of bankruptcy proceedings were the primary reasons for their failure to act. The Bankruptcy Court overruled appellants' motion on April 7, 1986.

Before this Court addresses the merits of the appeal, it is prudent to state the general standard of review which guides the Court in matters such as this. On Appeal, a district court is not bound by the Bankruptcy Court's conclusions of law. However, the Bankruptcy Court's findings of fact are entitled to stand unless clearly erroneous. In re Martin, 761 F.2d 472, 474 (8th Cir. 1985); see also, Bankruptcy Rule of Procedure 8013.

Section 362(d)(1) allows the Bankruptcy Court to grant relief from the automatic stay for "cause." In this case, the appellants argued § 109(f)(1) supplied cause for lifting the automatic stay which was imposed upon the Behnkes' Chapter 11 filing. At all times pertinent to this dispute,^{1/} § 109(f)(1) provided:

(f) Notwithstanding any other provision of this section, no individual may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if
--

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case.
* * *

^{1/} 11 U.S.C. § 109 was amended, effective November 26, 1986. Under the amendment, former subsection (f) is now subsection (g).

The specific issue addressed by the parties below was whether the Behnkes' failure to submit a second amended Chapter 13 plan constituted a "willful failure" to abide by the Bankruptcy Court's November 7, 1985, order. The Bankruptcy Court, ruling from the bench, found that such conduct did not fall within § 109(f)(1) and accordingly denied relief from the stay.

The Bankruptcy Code does not define the term "willful." Courts construing § 109(f)(1), however, conclude that the term should be given its usual legal meaning. In re Krattiger, 52 B.R. 383, 385 (W.D.Wisc. 1985); In re Zahniser, 58 B.R. 530, 534 (Bankr. D.Colo. 1986); In re Correa, 58 B.R. 88, 90 (Bankr. N.D.Ill. 1986); In re Ellis, 48 B.R. 178, 179 (Bankr. E.D.N.Y. 1985). The Ellis court held:

Willful is generally used to describe conduct which is intentional, knowing and voluntary, as opposed to conduct which is accidental or beyond the person's control. * * * A willful failure to do a required act necessitates a showing that the person, with notice of their responsibility, intentionally disregarded it or demonstrated "plain indifference." (citations omitted).

In re Ellis, 48 B.R. at 179. A bankruptcy court's finding regarding willful behavior is a finding of fact which will not be disturbed on appeal unless shown to be clearly erroneous.


While this Court may have ruled differently, it does not conclude the Bankruptcy Court's determination was clearly erroneous. The Bankruptcy Court had before it an affidavit signed by the debtors which stated that they failed to submit an

amended plan because they did not have an attorney at the time the order was issued, the order did not specifically direct them to file a plan, and they were uncertain as to how to proceed due to their inexperience in legal matters. The Bankruptcy Judge chose to believe the Behnkes' explanation and found their failure to file an amended plan was not willful. His finding will not be reversed on appeal. Accordingly.

IT IS ORDERED that the Bankruptcy Court's decision is affirmed.

DATED this 6th day of August, 1987.

BY THE COURT:



LYLE E. STROM
UNITED STATES DISTRICT JUDGE