

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
VENNETTA MITCHELL,	)	CASE NO. BK94-81772
	)	
DEBTOR	)	CH. 13

MEMORANDUM

Hearing was held on February 13, 1995, on Motion to Dismiss Case and for Sanctions by Chrysler Credit Corp; Resistance by Debtor; Resistance by Debtor to Chrysler Credit Motion to Dismiss and Request for Sanctions. Appearing on behalf of debtor was Oliver Pollak of Pollak & Hicks, P.C., Omaha, Nebraska. Appearing on behalf of Chrysler Credit Corporation was Kirk Brumbaugh of Brumbaugh & Quandahl, P.C., Omaha, Nebraska. 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).

**Background**

The debtor, Vennetta Mitchell, filed a petition for Chapter 13 bankruptcy relief on November 17, 1994. At the time the debtor filed her petition for bankruptcy relief, a secured creditor, Chrysler Credit Corporation (Chrysler) had repossessed the debtor's 1989 Plymouth Voyager (Voyager). The Voyager was returned to the debtor, but at a hearing held on February 13, 1995, the Court sustained Chrysler's objection to the plan and found that the value of Chrysler's security interest was \$6,355.00.

At the same hearing on February 13, 1995, Chrysler also moved this Court to dismiss the debtor's Chapter 13 case for cause and impose sanctions on the debtor and her attorney. Chrysler alleges that the debtor had a prior Chapter 13 case which was dismissed for cause on September 19, 1994 (BK93-81589). Therefore, the debtor's current Chapter 13 case was filed less than 180 days after the involuntary dismissal of the prior Chapter 13 case in violation of 11 U.S.C. § 109(g)(1).

**Decision**

The motion to dismiss the debtor's Chapter 13 case is denied, and the motion to impose sanctions on the debtor and her attorney

is denied. The debtor is now ordered to amend her Chapter 13 plan within thirty (30) days to provide for the full value of Chrysler's security interest pursuant to the Journal Entry entered by the Court on February 13, 1995 (filing no. 28).

### **Discussion**

Chrysler has moved to have this case dismissed and sanctions imposed on the debtor and her attorney pursuant to Section 109(g)(1) of the Bankruptcy Code, which states:

Notwithstanding any other provisions 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;

11 U.S.C. § 109(g)(1).

The debtor's first case was dismissed within 180 days of the petition date of the debtor's current Chapter 13 case. However, the Court did not specifically dismiss the debtor's case "for cause," and therefore, the question remains open as to whether the case was dismissed for a "willful failure" to abide by orders of the Court.

To find willfulness pursuant to Section 109(g)(1), the Court may evaluate the debtor's conduct in the prior case at the time the sanction under Section 109(g)(1) is requested in the second case. Montgomery v. Ryan (In re Montgomery), 37 F.3d 413 (8th Cir. 1994). It is the burden of the debtor to show that the dismissal was not willful. Id.

In the prior Chapter 13 case, the trustee moved to dismiss the case because the debtor was delinquent in making payments on her confirmed plan (BK 93-81589, filing nos. 68, 74). In the debtor's resistance to the motion to dismiss, the debtor acknowledged that she was behind in plan payments and stated that she intended to file an amended plan (BK 93-81589, filing no. 71). No amended plan was filed, and the Court dismissed this case by Journal Entry on September 19, 1994 (BK 93-81589, filing no. 77).

The debtor has shown this Court that her inability to make plan payments under the prior plan was due to unfortunate circumstances. The debtor became seriously ill and required

surgery in February, 1994. As result of this illness and the slow recovery after the surgery, the debtor was not able to maintain her self employed status, nor earn an income. In October of 1994, the debtor was finally able to reenter her profession as a day care provider. The circumstances of the debtor's illness caused the debtor to become delinquent under her plan, and such circumstances do not constitute a "willful failure" of the debtor to comply with the prior Chapter 13 plan.

The debtor uses the Voyager in her day care business, and the debtor has insured the vehicle. The debtor has also represented to the Court that as of February 2, 1995, she was current on her payments to the Chapter 13 trustee.

The motion to dismiss the Chapter 13 case is denied. The debtor's prior Chapter 13 case was not dismissed "for cause," and therefore, the debtor is entitled to file another Chapter 13 case. The debtor has been current on all payments under the Chapter 13 plan, and the Court will permit her to amend the Chapter 13 plan to provide for payment of Chrysler's full secured claim.

Separate journal entry shall be filed.

DATED: March 7, 1995

BY THE COURT:

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

Copies faxed by the Court to:

BRUMBAUGH, KIRK 554-0339

Copies mailed by the Court to:

Oliver Pollak, 1823 Harney Street, #203, Omaha, NE 68102  
Kathleen Laughlin, Trustee

Movant (\*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
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VENNETTA MITCHELL,	)	CASE NO. BK94-81772
	)	A
<u>DEBTOR(S)</u>	)	
	)	CH. 13
	)	Filing No. 10, 19, 25
Plaintiff(s)	)	
vs.	)	<u>JOURNAL ENTRY</u>
	)	
	)	DATE: March 7, 1995
<u>Defendant(s)</u>	)	HEARING DATE: February
	)	13, 1995

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion to Dismiss Case and for Sanctions by Chrysler Credit Corp; Resistance by Debtor; Resistance by Debtor to Chrysler Credit Motion to Dismiss and Request for Sanctions.

APPEARANCES

Oliver Pollak, Attorney for debtor  
Kirk Brumbaugh, Attorney for Chrysler Credit Corp.

IT IS ORDERED:

The motion to dismiss filed by Chrysler Credit Corporation is denied. See memorandum this date.

BY THE COURT:

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

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