In the United States Bankruptcy Court

for the Northern District of Iowa

WILBERT H. WUEBKER and MELVINA M. WUEBKER *Debtor(s).*	Bankruptcy No. X87-00488F Chapter 12

MEMORANDUM OF DECISION AND ORDER RE: DEBTORS' MOTION FOR RELIEF FROM ORDER DISMISSING CASE AND MOTION TO REINSTATE CASE

Debtors seek relief from this court's order dismissing their chapter 12 case. They ask that the case be reinstated. The motion was resisted by Farm Credit Bank of Omaha (FCBO). Hearing was held on September 13, 1990 in Fort Dodge, Iowa. The court now issues its findings of fact and conclusions of law as required by Bankr. R. 7052. This is a core proceeding under 28 U.S.C. § 157(b) (2) (A).

FINDINGS OF FACT

Wilbert and Melvina Wuebker (WUEBKERS) filed their chapter 12 case on February 27, 1987.[(1)] In September, 1987, they filed their First Amended and Substituted Plan. The plan included treatment of the Calhoun County, Iowa Treasurer, one of Wuebkers' creditors. The treasurer's claim was for real estate taxes on Wuebkers' 560-acre farm. The plan proposed to pay interest on the treasurer's claim from confirmation to December 31, 1987 and thereafter to pay the balance of the claim in six equal installments over six years. Wuebkers filed two amendments to the plan (October 13, 1987 and October 19, 1987). Neither amendment dealt with the treatment of the county treasurer's claim. The plan provided also for payment to the case trustee of $5,000.00 per year for three years for distribution among unsecured creditors. The plan was confirmed on October 19, 1987.

In May of 1988, debtors sought to modify the plan treatment of the Calhoun County Treasurer. Initially debtors had thought that the county's tax claim was $38,730.35. However, the debtors later agreed with the county treasurer that the claim was $42,965.62. The difference involved delinquent taxes. Debtors' modification sought to treat the additional delinquent taxes as part of the county's treatment under the plan. Modification was noticed to all creditors and parties-in-interest. There were no objections, and the motion to modify the plan was granted on June 17, 1988.

Wuebkers were represented in the bankruptcy case by the firm of Dumbaugh & Childers of Cedar Rapids. Although Wuebkers testified that their lawyer was R. Fred Dumbaugh,[(2)] there is no evidence that Dumbaugh personally involved himself with Wuebkers' case. Other members of the firm aided Wuebkers in obtaining the confirmed plan. Attorney Dan Childers represented Wuebkers in obtaining the post-confirmation modification.

After the modification had been approved, an attorney with the firm advised Wuebkers that they no longer needed legal counsel because the only remaining aspect of the reorganization was to make plan payments. Wuebkers were making payments to the trustee and unimpaired creditors in accordance with written directions provided to them by the firm. (Debtors' exhibits 2 and 3.) On August 19, 1988, Dan Childers, on behalf of Dan Childers, P.C., filed a withdrawal as counsel for the debtors. His withdrawal was approved by the court on September 19, 1988. Thereafter, debtors acted pro se and without advice of counsel.

As a result of the modification of the plan, the 1988 and 1989 payments to the county treasurer were to be increased from $8,892.78 to $9,778.17. Wuebkers paid the treasurer $8,892.78 in January of 1989 in satisfaction of the plan's

December 31, 1988 obligation, since the modification, the county treasurer has refused two attempts by Wuebkers to pay the additional 1988 money required under the modified plan. The 1989 payment to the treasurer under the modified plan has not been paid. Mr. Wuebker testified that he has the money needed to make tax payments under the plan. Because of the tax delinquency, the trustee filed a motion to dismiss on November 1, 1989. The trustee alleged that the debtors had defaulted in their performance of the plan by not making the additional payment to the treasurer in the amount of $885.39 due on December 31, 1988. The trustee alleged that she and her staff had made repeated unsuccessful attempts to collect the delinquent payment. The trustee further alleged that all other payments under the plan were current. Notice of the motion to dismiss was served on all creditors and parties-in-interest by the case trustee on November 3, 1989. The notice provided that hearing on the motion to dismiss and any objections or resistances would come before the court on December 14, 1989. At the appointed date and time, Carol Dunbar appeared in support of her motion to dismiss. Debtors did not appear, and no one appeared on their behalf. Because of the absence of the debtors and because of the size of the delinquency in comparison with total completed payments under the plan, the court ordered the hearing on dismissal continued to January, 1990. A copy of the court's order was served by the clerk on the case trustee, the U. S. Trustee and Dan Childers, but not upon the debtors.

On December 19, 1989, the court served notice of the continued hearing on the case trustee, the U. S. Trustee and upon the debtors. (Exhibit 8.) The hearing was scheduled for January 18, 1990 in Fort Dodge. Debtors assert in their motion for relief and reinstatement and their attorneys argue that they did not receive a copy of the December 19 notice. Debtors maintained a black folder in which they placed their bankruptcy documents. A copy of the December 19 order is not in the black folder. Mr. and Mrs. Wuebker each testified that they do not know whether they received a copy of the notice of the continued hearing on the motion to dismiss. The notice bears the statement of the clerk that a copy of the notice of continued hearing was mailed to Wuebkers on December 19, 1989. This statement is sufficient to create a presumption of receipt by Wuebkers. This presumption is rebuttable. In order for the presumption to be rebutted, the debtors must introduce evidence which would support a finding of the non-existence of the presumed fact. In re Dodd, 82 B.R. 924, 928-929 (D. Ill. 1987). The absence of the notice of hearing in the black folder is insufficient alone to rebut the presumption. Id. at 929. Debtors must also present testimony of the procedures used in creating and maintaining the black folder. The testimony is insufficient in this regard. Moreover, debtors' claim of non-receipt is not supported by their testimony. The court, therefore, finds that the notice of continued hearing on the case trustee's motion to dismiss was received by the debtors. It is undisputed that the debtors received the trustee's motion to dismiss accompanied by the notice of the initial hearing on the motion.

On January 18, 1990, the continued hearing came before the court, and based on the representation of the trustee that the debtors had failed to pay the additional payment of $885.39 to the county treasurer, the case was dismissed. The case trustee filed a final report on February, 1990, and final decree closing the case was entered on April 17, 1990. Debtors' motion for relief and motion to reinstate was filed on July 26, 1990 and was resisted by FCBO.

Wilbert Wuebker is 69 years old; Melvina Wuebker is 65. Both have eighth grade educations. They have been farming for more than 40 years. They do not understand why the treasurer would not accept the delinquent payment on the taxes. When they received the trustee,s motion to dismiss, they believed it was part of the normal termination of the bankruptcy case or at least that part of the case involving the trustee. It was their understanding that they were to make all remaining payments under the plan directly to creditors. Although a final $5,000.00 payment to the trustee was due, they did not make that payment because they believed that a dismissal would relieve them of that obligation. Since the dismissal of the case, the $5,000.00 payment has been made by Wuebkers to their present attorneys Halbur and Werden, and the attorneys have paid it to the trustee. Plan performance is delinquent only in the failure to pay the Calhoun County Treasurer.

When the motion to dismiss arrived, Wuebkers did not discuss it with Carol Dunbar or any attorney. They discussed it with each other, and were pleased that the bankruptcy case was finally coming to conclusion.

Under the confirmed plan of reorganization, FCBO retained its lien on debtors, real estate which was valued at confirmation at $600,000.00. According to the testimony of David Appleby, an FCBO senior loan officer, the real estate has risen in value since confirmation by $405,000.00. For the purposes of this motion, the court finds that the property has increased in value since confirmation by $405,000.00.

Because of the dismissal, Appleby contacted Wuebkers in June of 1990 regarding the dismissal of their bankruptcy case and its effect on the Wuebkers' loan with FCBO. Appleby told Wuebkers that because of the dismissal, the interest rate on their loan would revert to the pre-bankruptcy rate. Appleby also told debtors that unless they paid the delinquent taxes, Farm Credit Bank would advance them to the county and the loan would be in default. Receipt of this letter was, according to Wuebkers, their first indication that a problem existed. They contacted attorney John C. Werden for advice. Attorneys Werden and Halbur filed the pending motion.

After and as a result of the dismissal, Appleby has spent approximately 31 hours in working with the loan file. His supervisor and in-house attorneys have spent approximately three or four hours, and FCBO secretaries have expended approximately six hours. FCBO has expended approximately $1,031.00 on legal fees since the dismissal. This includes discussions with counsel regarding foreclosure and resistance to the motion to reinstate. FCBO has also notified Wuebkers of their right to restructure under the Agricultural Credit Act and has filed a request for mediation.

DISCUSSION

FCBO resists debtors' motions. FCBO contends that because of the delinquency in the tax payments, and because the failure to pay the $5,000.00 to the case trustee for unsecured creditors, the debtors are delinquent in performance of the plan. Further, Farm Credit argues that the debtors are not entitled to relief under Fed. R.Civ. P. 60(b) because the dismissal was not the result of mistake, inadvertence or excusable neglect. Nor does FCBO believe that debtors are entitled to relief on other grounds.

Debtors are delinquent in their performance under the plan as modified. For unidentified reasons, the treasurer has refused attempts by the debtors to clear up delinquencies in the plan payments on real estate taxes. Also, debtors had failed to pay the 1989 payment to the trustee for distribution to unsecured creditors. This default, according to the evidence, has been remedied.

The essence of debtors' motion is that they did not understand the significance of the trustee's motion to dismiss. They argue, therefore, that the case and plan should be reinstated pursuant to Fed. R.Civ. P. 60(b). That Rule is incorporated into bankruptcy practice by Bankr. R. 9024. It permits the court to relieve a party from final judgment or order where there has been "mistake, inadvertence, surprise, or excusable neglect" or for "any other reason justifying relief from the operation of the judgment." Fed. R.Civ. P. 60(b) (1) (6).

A motion for relief under Rule 60(b) must be made within a reasonable time, and under subsection (1) must be made within a year of the judgment or order from which relief is sought. The court concludes that debtors' motion for relief from the judgment is timely. It comes six months after the dismissal and less than 60 days after the debtors learned of their mistake.

The granting of motions under Rule 60(b) is within the discretion of the court which rendered the judgment or order. Triplett v. Azordegan, 478 F.Supp. 872, 876 (N.D. Iowa 1977). The power of the trial court to grant relief under the Rule is normally liberally exercised so that cases can be disposed of on their merits. Leong v. Railroad Transfer Service, Inc., 302 F.2d 555, 557 (7th Cir. 1962). It has often been required that for a movant to prevail on a Rule 60(b) motion, he must show a basis for a meritorious claim or defense. Beshear v. Weinzapfel, 474 F.2d 127, 132 (1973).

Normally, relief cannot be afforded to a movant under Rule 60(b) (1) where the movant's mistake is one of law. Clarke v. Burkle, 570 F.2d 824, 831 (8th Cir. 1978). However, relief from default judgment has been provided where the defendant misunderstood the effect that other legal proceedings had upon his responsibility to defend. U.S. v. 96 Cases, More or Less, of Fire Works, 244 F.Supp. 272, 273 (N.D. Ohio 1965).

Having heard the evidence and observed the demeanor of Mr. and Mrs. Wuebker, this court concludes that they are entitled to relief under Bankr. R. 9024 because of their mistake and excusable neglect. The Wuebkers are people of slender intellect. Although the court agrees that the trustee's motion to dismiss set out the tax delinquency as the basis for dismissal, and not the final termination of the plan, the court believes that the debtors did misunderstand the nature of the proceeding against them. They believed that the formal aspects of their bankruptcy were being terminated by a dismissal of the case and that all that remained was their final payments to secured creditors under the plan. At the time,

they were without counsel. Debtors had made substantial payments under the plan. Little was to be gained by their failing to make the delinquent tax payment in the small amount of $895.39. Payments to FCBO were current. FCBO points out that one motivation to the failure to defend the dismissal would have been the debtors' belief that they were saving $5,000.00 in payments to unsecured creditors. While debtors may have believed that was one effect of the dismissal, the court does not believe it was a motivating factor in their failing to defend against the motion. The debtors did not understand the nature of the dismissal proceeding; their failure to defend was a result of mistake and excusable neglect.

Courts should use Rule 60(b) to accomplish justice. Providing relief to debtors will not result in injustice to FCBO. Its asserted motive in resisting relief is to obtain for itself the post-confirmation appreciation in the debtors' farm land. Its payments under the plan are current. If debtors cure the delinquency on taxes, FCBO will be in no way harmed. Its expenditures are those incurred solely to obtain substantial advantage from debtors' error. Truly, its expenses result from the effort to obtain the advantages of dismissal, not from the dismissal itself. The loss of the appreciation in land value, if the case is reinstated, is not a prejudice which should prevent relief to the debtors. The dismissal resulted from debtors' default in resisting. It is appropriate that the motion to dismiss be determined on its merits.

CONCLUSION

Debtors are entitled to relief from judgment under Bankr. R. 9024 as it incorporates Fed. R.Civ. P. 60(b) (1). The order and judgment dismissing this chapter 12 case should be vacated. Notice of reinstatement should be given to all creditors and parties-in-interest. This does not resolve the resurrected motion to dismiss. Debtors have presented evidence and argument as to why they are delinquent in the performance of their plan. This delinquency is blamed on the inability to get the Calhoun County Treasurer to accept payments. The motion to dismiss filed by the case trustee will have to be rescheduled. In the meantime, the debtors should make an effort to resolve their dispute with the county treasurer.

ORDER

IT IS ORDERED that the court's order and judgment dismissing this chapter 12 case are vacated. The clerk shall serve notice of reinstatement on all creditors and parties-in-interest.

The clerk shall reschedule the hearing on the trustee's motion to dismiss for an available date and time in Fort Dodge, Iowa in November, 1990.

SO ORDERED ON THIS 20th DAY OF SEPTEMBER, 1990.

William L. Edmonds
Bankruptcy Judge

1. The chapter 12 case was not Wuebkers' first bankruptcy. They had filed a chapter 11 case in 1984. At least two creditors had moved to dismiss that case-U.S.A./FmHA and Federal Land Bank. The case was dismissed in early 1987.

2. Dumbaugh's license to practice law in the state of Iowa was revoked by the Iowa Supreme Court on February 15, 1989. He was suspended from practice in the U.S. District Court for the Northern District of Iowa an July 17, 1989. He has pleaded guilty to violations of 18 U.S.C. § § 152 and 153 and is presently serving his sentence in a federal correctional institute in Minnesota.