

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

KITTY JO TOWNER

Debtor(s).

Bankruptcy No. X90-01539S

Chapter 7

DECISION RE: DEBTOR'S MOTION TO DISMISS

The matter before the court is the debtor's motion to dismiss her chapter 7 case. The case trustee has objected. Hearing was held on January 18, 1991 in Sioux City, Iowa. The court now issues its decision which includes findings of fact and conclusions of law as required by Fed.R.Bank.P. 7052. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

FINDINGS OF FACT

Kitty Jo Towner filed her voluntary chapter 7 case on September 4, 1990. Her father died on September 25, 1990. Her late father left a will in which she is named as the primary, if not the sole, beneficiary. The will was not introduced into evidence. Ms. Towner is the executor of the estate and has been working on a probate inventory to submit to the state court. However, a probate inventory was not introduced into evidence. Through the will, Ms. Towner expects to receive an 80-acre parcel of ground east of Castana, Iowa. This land produces income of approximately \$3,200.00 per year. Debtor opines that the property is worth between \$20,000.00 and \$24,000.00. Debtor expects to receive also two acres with a house near Soldier, Iowa. She believes the property is worth approximately \$15,000.00. She also anticipates receiving a 120-acre farm property located near Castana; the land, without reference to buildings, in debtor's opinion, is worth between \$36,000.00 and \$48,000.00. The probate estate also includes a house in Onawa with a value of approximately \$24,000.00 and a house in Castana with a value between \$15,000.00 and \$20,000.00. A partnership interest in land is also part of the probate estate.

Debtor thinks that these assets are free and clear from encumbrances and that her father had few, if any, debts. There is no evidence as to the estate taxes or other administrative expenses for which the probate estate might be liable. In her schedules, Ms. Towner listed no priority creditors, two secured creditors, and 73 unsecured creditors. The unsecured creditors' claims, as listed by the debtor, total \$33,341.55. It is likely that the value of the property which the debtor would receive from her late father would exceed the amount of her unsecured debts.

Ms. Towner wants to dismiss her bankruptcy case, to keep the bequested real estate, and hopefully to make arrangements with her creditors to pay them over time. Her motion was served on all creditors and parties-in-interest. Only the trustee objected. Debtor offers to pay all administrative expenses including trustee's fees based on the estimated value of the bankruptcy estate. The trustee argues that payment of creditors should be made through administration and distribution of the bankruptcy estate's interest in the probate estate.

DISCUSSION

Although a debtor may voluntarily file a chapter 7 bankruptcy case, a debtor does not possess sole discretion in having the case dismissed. *In re Blackmon*, 3 B.R. 167, 169 (Bankr. S.D. Ohio 1980); *In re Klein*, 39 B.R. 530, 532 (Bankr. E.D. N.Y. 1984). A motion to dismiss a chapter 7 case may be granted for cause. 11 U.S.C. § 707. The determination of whether such cause exists lies within the discretion of the bankruptcy court. *In re Heatley*, 51 B.R. 518, 519 (Bankr. E.D. Pa. 1985). The debtor points out that no creditors have resisted the motion to dismiss. But a creditor's failure to

resist does not constitute consent to dismissal. Penick v. Tice (In re Penick), 732 F.2d 1211, 1213 (4th Cir. 1984). Absent affirmative assent from all creditors, a debtor should not be able to dismiss a case if the dismissal would cause legal prejudice to the creditors. In re Astin, 77 B.R. 537, 538 (Bankr. W.D. Va. 1987); Klein, 39 B.R. at 532; Matter of Williams, 15 B.R. 655, 658 (E.D. Mo. 1981) aff'd. 696 F.2d 999 (8th Cir. 1982). The trustee may resist a dismissal on any ground on behalf of unsecured creditors who do not affirmatively consent to the dismissal of the case. Penick v. Tice, 732 F.2d at 1214.

The trustee believes that the creditors in this case would be better off if the property received through state probate proceedings were administered in bankruptcy. The court agrees.

Any bequests to which the debtor would be entitled would be property of the bankruptcy estate. 11 U.S.C. § 541(a)(5) (A). Even with probate and bankruptcy costs of administration, it is likely the creditors would be paid 100% of their unsecured claims. It would be the trustee's duty to liquidate the estate and pay such claims as expeditiously as possible. 11 U.S.C. § 704(1). Because of the bequests, debtor believes she no longer needs to rely on the Bankruptcy Code for a "fresh start." She wants to keep the parcels of real estate and work out agreements to pay her creditors over time. She has approximately 73 unsecured creditors. If the case remains in bankruptcy, creditors filing claims are very likely to be paid their claims in full and in an expeditious manner. There is no such guarantee if the case is dismissed. Then to receive payment, the creditors would have to rely on either the good intentions of the debtor or on individual suits to collect the claims. The court concludes that the unsecured creditors would be prejudiced by a dismissal of the case. This prejudice would result from the uncertainty in the prospect and timing of payment of their claims. It is also wasteful of creditor resources if a multiplicity of suits would be necessary for the collection of claims.

Although the court is not required to be concerned with prejudice to the debtor if the motion to dismiss is denied, the court can see little such prejudice. With the payment of all creditors, any surplus would be turned over to the debtor. 11 U.S.C. § 726(a)(6). Moreover, if the debtor desires to control the liquidation of the parcels or wishes to keep some or all of the parcels, while paying her creditors over time, she has the option, if she qualifies, of proceeding under chapter 13.

CONCLUSIONS OF LAW

Good cause has not been shown to warrant dismissal of this chapter 7 case.

ORDER

IT IS ORDERED that debtor's motion to dismiss her chapter 7 petition is denied.

SO ORDERED ON THIS 22nd DAY OF JANUARY, 1991.

William L. Edmonds
Chief Bankruptcy Judge