

In the United States Bankruptcy Court

for the Northern District of Iowa

MARY ANN PIERCE
Debtor(s).

Bankruptcy No. 94-60737KW
Chapter 13

ORDER

ORDER

On July 6, 1993, the above-captioned matter came on for hearing pursuant to assignment. The matter before the Court was Confirmation of Debtor's Chapter 13 Plan with objections thereto. Present at the hearing were Charles Nadler and Steve Swift for Debtor Mary Ann Pierce. Carol Dunbar appeared as case trustee. The Internal Revenue Service ("IRS") filed an objection to the plan but was not represented at the hearing.

STATEMENT OF THE CASE

There are significant issues to be resolved on the actual Plan and its feasibility. Debtor agrees there will have to be a rework of the Plan to resolve these matters. Therefore, feasibility will not be addressed at this time. The two issues which are ripe for determination are 1) whether Debtor may maintain the Chapter 13 proceeding in light of the reopening of an earlier Chapter 7 case filed by Debtor and her husband, and 2) Debtor's eligibility for Chapter 13 as "an individual with regular income" under 11 U.S.C. § 109(d).

Debtor filed her Chapter 13 petition on May 3, 1994. Her previous Chapter 7 case was closed on April 13, 1994, discharge having been granted on March 9, 1994. Debtor and her husband moved to reopen the case and the motion was granted on April 26, 1994. The purpose of reopening the case was to allow Debtor and her husband to seek a determination of the dischargeability of certain taxes owed to the IRS, including income taxes for 1978 through 1982 and 1986, FICA and FUTA taxes for 1980 through 1982, and related penalties and interest. Debtor and her husband now have an adversary complaint on file relating to those dischargeability issues.

The IRS's objection to confirmation of Debtor's Chapter 13 plan asserts that Debtor may not maintain this Chapter 13 proceeding while her previous Chapter 7 case remains open and pending. It states that a debtor cannot be involved in two bankruptcies at the same time, particularly where the issue of dischargeability has not been resolved in the former proceeding. It requests that the Court dismiss this case under § 105(a).

The Trustee asserts that Debtor does not qualify as a debtor under Chapter 13 because Schedule I shows that she has no regular income. Debtor proposes to fund her plan through payments made by her husband, Donald Pierce.

This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L).

SIMULTANEOUS "CHAPTER 20"

There is no prohibition in the Bankruptcy Code against serial filings under Chapter 7 and Chapter 13. Johnson v. Home State Bank, 501 U.S. 78, ___, 111 S. Ct. 2150, 2156 (1991). Congress did not intend to foreclose Chapter 13 proceedings to a debtor who has previously filed for Chapter 7 relief. Id. Such serial filings are referred to in bankruptcy parlance as "Chapter 20" proceedings.

Since Johnson, it has become increasingly common for debtors to seek Chapter 13 protection to deal with mortgage liens and other nondischargeable debts that survive Chapter 7. In re Hodurski, 156 B.R. 353, 354 (Bankr. D. Mass. 1993). Filing a Chapter 13 proceeding after receiving a Chapter 7 discharge is not per se impermissible. Id. Courts have allowed debtors to file a Chapter 13 petition after receiving a Chapter 7 discharge but while the Chapter 7 case is still pending awaiting the final report or other developments which preclude closing the case. Id. Although filing the Chapter 13 case while the prior case remains open may indicate bad faith, there is no per se rule prohibiting it. In re Cormier, 147 B.R. 285, 288 (Bankr. D. Me. 1992). Cases may be open yet inactive for a significant period of time which could unjustifiably preclude a debtor from seeking Chapter 13 relief. Id. See also In re Saylor, 869 F.2d 1434, 1437 (11th Cir. 1989) (filing Chapter 13 after discharge in Chapter 7 but before Chapter 7 final report is not dispositive of good faith in proposing Chapter 13 plan); In re Kosenka, 104 B.R. 40, 51 (Bankr. N.D. Ind. 1989) (after discharge in Chapter 7, debtor may file Chapter 13 prior to closing of the Chapter 7 case).

Some courts have taken a strict approach. In re Standfield, 152 B.R. 528, 538 (Bankr. N.D. Ill. 1993), held that although there is no specific prohibition against a simultaneous Chapter 20, it is indicative of manipulation of the bankruptcy process. However, the earlier split in the courts on the issue was essentially resolved by the conclusion in Johnson that serial filings under Chapter 7 and Chapter 13 are permissible. In re Hornlein, 130 B.R. 600, 602 (Bankr. M.D. Fla. 1991). The ultimate question becomes whether the Chapter 13 plan is proposed in good faith under § 1325. Id. at 603.

Johnson recognized that § 1325 protects Chapter 13 creditors and that good faith could be implicated by serial filings. 11 S. Ct. at 2156. The focus of the good faith requirement of § 1325(b) depends upon whether the debtor has 1) stated debts and expenses accurately, 2) made any fraudulent misrepresentation to mislead the bankruptcy court or 3) unfairly manipulated the Bankruptcy Code. Education Assistance Corp. v. Zellner, 827 F.2d 1222, 1227 (8th Cir. 1987). The traditional "totality of circumstances" approach is preserved regarding good faith factors not addressed in § 1325(b), such as the type of debt sought to be discharged and whether the debt is nondischargeable in Chapter 7, and the debtor's motivation and sincerity in seeking Chapter 13 relief. In re LeMaire, 898 F.2d 1346, 1349 (8th Cir. 1990).

In light of the foregoing, the Court concludes that Debtor's Chapter 13 proceeding is not impermissible. There is no per se rule prohibiting a Chapter 13 filing following the receipt of a Chapter 7 discharge. Debtor's Chapter 7 case had already been closed prior to the filing of her Chapter 13 petition. The fact that it was reopened to determine dischargeability of certain taxes does not preclude Debtor from seeking Chapter 13 relief. In order to comply with § 1322, Debtor's Chapter 13 plan must provide for payment of the taxes in issue in the Chapter 7 adversary proceeding as if they are nondischargeable. If Debtor prevails in the dischargeability action, her plan can be amended accordingly. The fact that Debtor has a "simultaneous Chapter 20" is not determinative of good faith under § 1325. Therefore, the IRS's objection to confirmation based on Debtor's serial filings under Chapter 7 and Chapter 13 will be overruled.

INDIVIDUAL WITH REGULAR INCOME

The second issue for determination is whether the Debtor is eligible for Chapter 13 as an "individual with regular income". In this case, the Debtor is an unemployed, married debtor who proposes to use a portion of her spouse's income to fund her proposed Chapter 13 Plan.

The Bankruptcy Code provides:

Only an individual with regular income that owes, on the date of filing of the petition, noncontingent, liquidated, unsecured debts of less than \$100,000 and noncontingent, liquidated, secured debts of less than \$350,000 . . . may be a debtor under chapter 13 of this title.

11 U.S.C. § 109(e). The Bankruptcy Code also provides that: "An individual with regular income" means: "an individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title". 11 U.S.C. § 101(29).

There does not appear to be a single majority view as to whether an unemployed debtor may fund a plan from payments by a nondebtor spouse. The case law discussing this issue has largely concluded that while there is no specific prohibition, ultimately, it is a question of fact which must be decided on a case-by-case basis. In re Sigfrid, 161 B.R. 220, 223 (Bankr. D. Minn. 1993). Nevertheless, some guidance can be discerned from this statute and existing case law. The definition of regular income in § 101(29) was intended to provide an expansive category of individuals qualified under Chapter 13. The phrase "regular income" has been given a liberal interpretation. In re Varian, 91 B.R. 653, 654 (Bankr. D. Conn. 1988).

Courts considering this issue have determined that three factors are significant: 1) whether the individual helping to fund the plan is jointly liable on the debt; 2) whether the individual helping finance the plan is a close relative of the debtor and therefore, someone who has a direct interest in the success of the plan; and 3) whether the individual helping to finance the plan has factually demonstrated a willingness to assist the debtor in this obligation. Sigfrid, 161 B.R. at 223; In re Campbell, 38 B.R. 193, 196 (Bankr. D. Conn. 1988).

While most courts have given a liberal interpretation to the phrase "regular income", some courts have determined that payments contributed by a nonparty are merely gifts and should be considered too tenuous to constitute regular income. In re Cregut, 69 B.R. 21 (Bankr. D. Arizona 1986); In re Fischel, 103 B.R. 44 (Bankr. N.D.N.Y. 1989). It is the conclusion of this Court that a debtor's reliance on a spouse for payment of the plan, in whole or in part, does not preclude as a matter of law a finding that such payments constitute regular income. The ultimate determination must rest upon the evidence presented and the factual determinations based upon the criteria previously discussed.

In summary, it is the conclusion of this Court that Debtor may propose a plan which relies, in whole or in part, on payments made by a third party to fund her Chapter 13 Plan. However, the Court will examine the factual record and examine all of the circumstances consistent with this opinion to determine if the contributor is able and willing to make this commitment. That is a fact question which cannot be determined as a matter of law at this point.

WHEREFORE, for the reasons set forth herein, Debtor may maintain her present Chapter 13 proceeding despite the reopening of the earlier Chapter 7 case filed by Debtor and her husband.

FURTHER, Debtor is not ineligible for Chapter 13 as "an individual with regular income" under 11 U.S.C. § 109(d) as a matter of law by proposing to fund her Chapter 13 Plan, in whole or in part, from her spouse's income or donations.

FURTHER, Debtor is granted 30 days from the date of this Order to amend her proposed Plan to address matters raised in this opinion as well as outstanding objections.

SO ORDERED this 27th day of July, 1994.

Paul J. Kilburg
U.S. Bankruptcy Judge