

Appealed 12/19/94; Appeal Withdrawn

# In the United States Bankruptcy Court

for the Northern District of Iowa

DONALD J. PIERCE  
MARY ANN PIERCE

*Debtor(s).*

Bankruptcy No. 94-60737KW

Chapter 7

## ORDER RE: MOTION TO CONSOLIDATE BANKRUPTCIES OR IN THE ALTERNATIVE TO MODIFY AUTOMATIC STAY

On November 30, 1994, the above-captioned matter came on for hearing pursuant to assignment. Attorney John McGuire appeared for the United States. Attorney Charles Nadler appeared for Debtors Mary Ann Pierce and Donald J. Pierce. The matter before the Court is the United States' Motion to Consolidate Bankruptcies, or in the Alternative to Modify Automatic Stay. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A, G, O).

### STATEMENT OF THE CASE

Two bankruptcy cases are currently pending in which Mary Ann Pierce is a debtor. A Chapter 7 petition was filed by Mary Ann Pierce and her husband Donald J. Pierce on September 20, 1993. A discharge was entered and that case was closed until a motion to reopen was granted to allow Debtors to file an adversary proceeding concerning the dischargeability of certain taxes. Thus, the Chapter 7 case is only open pending resolution of the adversary proceeding.

Mary Ann Pierce next filed a Chapter 13 petition on May 3, 1994 in which she is the sole debtor. The United States objected to confirmation and moved to dismiss the case because Ms. Pierce's previous Chapter 7 case remained open and because she proposed to use her husband's income to fund her Chapter 13 plan. The Court denied this motion on July 27, 1994 stating that in these circumstances being a debtor in two simultaneous bankruptcy cases is not per se impermissible.

The United States moves for substantive consolidation of the two cases or, in the alternative, for relief from stay. It characterizes Debtors as tax protesters. Much of their debt is due either to the United States for income taxes or to the County for property taxes. Attempts by the United States to enforce its tax liens against Debtors' homestead have been thwarted more than once by Debtors' bankruptcy filings.

In the adversary proceeding related to Debtors' Chapter 7 case, the issue is dischargeability of income taxes from 1978, 1979, 1982 and 1986 and related prepetition interest. Debtors' complaint asserts that their liability for these taxes is discharged because the taxes are more than three years old. The United States argues in its Motion for Summary Judgment that the taxes and interest are nondischargeable under §523(a)(1)(B)(i) and (C) (actual and constructive fraud). Hearing on the United States' Motion on this issue is set for December 13, 1994. Ms. Pierce recently received permission to extend the time to file her Chapter 13 Plan until one week after a final decision in the adversary proceeding. The United States apparently agreed to this extension of time.

The United States now asks the Court to consolidate Debtors' joint Chapter 7 case with Mary Ann Pierce's separate Chapter 13 case. Debtors assert that consolidation would place them back in the same position as if the Chapter 13 was

not filed which would circumvent the Court's July ruling and the protections provided by the Bankruptcy Code. In the alternative, the United States requests relief from the automatic stay in order to enforce its tax liens against Debtors' homestead. It argues that it is entitled to relief based on Debtors' bad faith in filing their bankruptcy petitions. Debtors argue that the United States has failed to prove it is entitled to relief from the stay under §362(d).

## CONCLUSIONS OF LAW

Under §302(b) and Rule 1015(b), the bankruptcy court may in its equitable discretion order substantive consolidation of cases involving two related debtors. In In re Giller, 962 F.2d 796, 798 (8th Cir. 1992), the Eighth Circuit considered consolidation in the context of corporate debtors.

Factors to be considered when deciding whether substantive consolidation is appropriate include 1) the necessity of consolidation due to the interrelationship among the debtors; 2) whether the benefits of consolidation outweigh the harm to creditors; and 3) prejudice resulting from not consolidating the debtors.

Id. Giller also noted that the court has the power to order less than a complete consolidation. Id.

The Eleventh Circuit has more recently considered substantive consolidation of estates of debtors who are spouses. In re Reider, 31 F.3d 1102, 1103 (11th Cir. 1994). The court noted that the 11th Circuit test for consolidation of corporate debtors is similar to the Giller test. Id. at 1108. It adopted a modified test in the spousal context.

In assessing the propriety of substantive consolidation, a court must determine: (1) whether there is a substantial identity between the assets, liabilities, and handling of financial affairs between the debtor spouses; and (2) whether harm will result from permitting or denying consolidation. . . . The burden is upon the proponent of the motion for consolidation and is exacting. Ultimately, the court must be persuaded that "the creditors will suffer greater prejudice in the absence of consolidation than the debtors (and any objecting creditors) will suffer from its imposition. Substantive consolidation should be invoked "sparingly" where any creditor or debtor objects to its use.

Reider, 31 F.3d at 1108-09 (citations omitted).

Unlike joint administration which is a procedural tool designed for ease of administration and joint handling of ministerial matters, substantive consolidation is a merger of assets and liabilities of two estates, creating a common fund of assets and a single body of creditors. Id.; In re Cooper, 147 B.R. 678, 682 (Bankr. D.N.J. 1992). Its purpose is to ensure equal treatment of all creditors. Cooper, 147 B.R. at 682. In the context of simultaneous "Chapter 20" filings, it is appropriate for a court to consider whether the cases should be consolidated and whether the debtors should proceed under Chapter 7 or Chapter 13. In re Hodurski, 156 B.R. 353, 356 (Bankr. D. Mass. 1993). In Hodurski, substantive consolidation was not appropriate as the discharge in the Chapter 7 was imminent and no property was available to the Chapter 7 creditors. Id.

Granting relief from the automatic stay because a petition is filed in bad faith is likewise within the equitable discretion of the bankruptcy court. In re Dixie Broadcasting, Inc., 871 F.2d 1023, 1026 (11th Cir.), cert. denied 493 U.S. 853 (1989). Such relief could be warranted where consideration of certain factors indicates an intent to abuse the judicial process. Id. In In re Weatherley, 169 B.R. 555, 557 (Bankr. E.D. Pa. 1994), the court considered granting the IRS relief from the automatic stay where the debtor had protested imposition of income taxes. The court stated that the IRS was not automatically entitled to relief from the stay simply because the tax was probably nondischargeable. Id. at 561. The stay would remain in place for only a limited time and the IRS had presented no evidence supporting an immediate need to collect from the debtor. Id. at 563. Therefore, the court refused to lift the stay. Id.

As to Debtors herein, the Court determines in its discretion that neither substantive consolidation nor relief from stay is warranted in the circumstances. The schedules filed in the Chapter 7 and Chapter 13 cases show that there is substantial if not complete identity between the Debtors' assets and liabilities. However, the Court is unable to determine that harm will result from denying consolidation. The discharge has already been entered in the Chapter 7 case; no Chapter 7 estate currently exists. At this time, the Chapter 13 case is essentially suspended until the conclusion of Debtors' dischargeability action. Ms. Pierce has been making payments to the Chapter 13 Trustee. Allowing the Chapter 13 case

to continue separate from the Chapter 7 case does not cause the United States any harm.

There is some appeal to the United States' argument that its tax liens are enforceable even if Debtors are successful in their adversary proceeding. However, the United States did agree to the extension of time for filing Ms. Pierce's Chapter 13 plan until after final judgment in the adversary proceeding. As was the case in Weatherley, the Court is not convinced that the United States has an immediate need to collect from Debtors. Therefore, the Court will not grant the United States relief from the automatic stay.

**WHEREFORE**, the United States' Motion to Consolidate Bankruptcies, or in the Alternative to Modify Automatic Stay is DENIED.

**SO ORDERED** this 9th day of December, 1994.

Paul J. Kilburg

Paul J. Kilburg  
U.S. Bankruptcy Judge