

In the United States Bankruptcy Court

for the Northern District of Iowa

KHALID EL KHABBAZ
MICHELLE EL KHABBAZ

Debtor(s).

Bankruptcy No. 95-22466KD

Chapter 13

ORDER RE REQUEST FOR DETERMINATION OF IRS CLAIM and MOTION TO DISMISS DEBTORS' REQUEST FOR DETERMINATION OF IRS CLAIM

On March 6, 1996, the above-captioned matter came on for hearing pursuant to assignment. A telephone hearing was held by agreement of the parties. Debtors appeared by Attorney Brian Peters. The IRS appeared by Assistant U.S. Attorney Kristin Tolvstad.

Two matters are set for hearing. The first is a Request for Determination of IRS Claim filed by Debtors. The IRS has filed a Motion to Dismiss this request asserting that it should be filed either in the form of an adversary proceeding under Bankruptcy Rule 7001 or as an objection to a claim under Rule 3007.

At the confirmation hearing January 31, 1996, the Court gave Debtors until February 14, 1996 to amend their plan to address IRS objections concerning its secured and priority claims. Debtors filed a Request for Determination of IRS Claim on February 13, 1996. They assert that the IRS is secured only to the extent of "the red-titled automobile owned by Mr. El Kabbaz, since that is the extent of his property upon filing." They argue that the IRS lien does not extend to property of Mrs. El Kabbaz and therefore the IRS secured claim is overstated on the proof of claim. Debtors request that they be excused from filing their amended plan until determination of the IRS claim is made.

The IRS filed a Motion to Dismiss Debtors' Request for Determination of IRS Claim. It argues that this matter should have been brought as an adversary proceeding pursuant to Rule 7001(2) as Debtors seek to "determine the validity, priority, or extent of a lien or other interest in property" under that rule. Alternatively, the IRS asserts that Rule 3007 may apply. That Rule requires 30-day notice on hearings on objections to claims. The IRS has not received 30 days' notice of this hearing.

The court in In re Jones, 152 B.R. 155, 160 (Bankr. E.D. Mich. 1993), discusses "a few points on procedure" in a similar situation. In Jones, the Chapter 13 debtors sought to bifurcate residential mortgages pursuant to § 506(a). In other words, they asserted that the creditors' claims were secured only to the extent of the value of the property and the liens were void under § 506(d) to the extent they were undersecured. Id. The court discusses three potential means of bringing such a matter before the court: (1) an adversary proceeding, (2) a motion to avoid a lien or (3) an objection to a proof of claim. Id. at 161. It concludes that Rule 3012 which expressly permits § 506 valuations to be requested by motion is applicable and, therefore, debtors need not file an adversary complaint. Id.

[T]he appropriate tool for seeking a determination that a lien is (or is not) void pursuant to § 506(d) is a motion to that effect under Rule 3012. This appears to be the procedure contemplated by the federal rules and, in contrast to claims objections, such a motion does not blur the fundamentally different roles which are generally played by § 502 (governing the allowance of claims) and § 506 (defining the extent to which allowed claims are secured).

Id. at 162 (citations omitted).

This conclusion was also reached in In re Terranova, 152 B.R. 20, 22 n.2 (Bankr. D. Conn. 1993), which noted that as

the debtor had challenged the value of the property by which the creditor's note is secured, not the amount or validity of the creditor's claim, a motion to determine value under Rule 3012 is procedurally sufficient. In In re Crestwood Co., 127 B.R. 213, 214 (Bankr. E.D. Ark. 1991), a creditor filed a motion to dismiss the Chapter 11 debtor's motion for valuation, asserting that the matter should be brought by adversary proceeding. The Court stated that the debtor was seeking a determination of the value of the collateral, not objecting to the amount or the validity of the lien. Id. It held that the debtor did not need to file an adversary proceeding. Id. at 215.

Debtors herein are not challenging the validity or amount of the IRS claim. As in Jones, they are requesting that the Court determine the extent to which the claim is secured by determining which property constitutes security for the claim. Rule 3012 provides that this type of matter is properly brought by motion after a hearing on notice to the secured party. This procedure has appropriately been followed by Debtors. As such, it is the conclusion of this Court that the IRS's Motion to Dismiss Debtors' Request for Determination of IRS Claim should be denied.

The parties agree that Debtors' evidentiary presentation can be done by an affidavit. The IRS informs the Court that it will have no separate evidence to present. Based upon these conditions, the Court finds that Debtors should be granted a reasonable time within which to complete and file a copy of their evidentiary affidavit. Thereafter, the parties shall have a reasonable period of time within which to file simultaneous briefs.

WHEREFORE, Debtors' Request for Determination of the IRS Claim is properly brought under Rule 3012 of the Bankruptcy Rules of Procedure and the IRS' Motion to Dismiss is DENIED.

FURTHER, the evidentiary record shall be submitted by affidavit and Debtors shall have until March 18, 1996 within which to file their evidentiary affidavit and submit a copy to Ms. Tolvstad at the U.S. Attorney's Office.

FURTHER, thereafter, the parties shall have until March 29, 1996 within which to submit simultaneous briefs after which the Court will consider the matter submitted.

FURTHER, Debtors shall be excused from filing an amended plan until the Court has made a final ruling in this matter. Debtors are directed to continue to make interim payments of \$90 per month to the Trustee until that time.

SO ORDERED this 6th day of March, 1996.

Paul J. Kilburg
U.S. Bankruptcy Judge