

In the United States Bankruptcy Court

for the Northern District of Iowa

DENNIS D. MOSHER and DELORES C. MOSHER

Bankruptcy No. 96-41845XM

Debtors.

Chapter 7

MEMORANDUM DECISION RE: DEBTORS' MOTION TO REVOKE DISCHARGE AND TO DISMISS CASE

Debtors Dennis and Delores Mosher request the court to revoke their discharge and to dismiss their chapter 7 case. The trustee resists. Hearing was held January 14, 1997 in Mason City.

J. Mathew Anderson appeared for debtors; Larry S. Eide appeared as trustee. This is a core proceeding under 28 U.S.C. 157(b)(2)(A).

Findings

Moshers are the self-employed operators of a wholesale marketing business that sells magnetic marketing products. They sell throughout the United States and Canada. By 1996, if not earlier, the debtors were not able to pay their debts as they became due. They experienced personal problems--the serious illness of Dennis Mosher's mother and the financial and time requirements for the care of their infant grandson. They devoted less time to their business, and the business income decreased significantly during the past two years. They filed their joint bankruptcy petition on July 26, 1996. They were granted a discharge on October 30, 1996.

At the time of filing, Dennis Mosher (Mosher) was a representative plaintiff in a state court action to recover damages from a nursing home on account of injuries his mother sustained there. At that time, he was not a plaintiff in his own right. Mosher's mother died in October 1996. Subsequently, the state court petition was amended to add Mosher and his brother as plaintiffs. The defendant sought mediation, and in December 1996, a settlement was reached.

The settlement would provide some money to the estate of Mosher's mother, but it would be sufficient only to cover her burial expenses. Beyond the settlement payment, the mother's estate would have no material assets, and it is unlikely the brothers would receive any distribution from her estate. Probate is not expected. Most of the settlement would be divided equally between Mosher's interest and his brother. Mosher expects that after costs, the settlement would provide \$30,947 on account of his claim.

Unless this case is dismissed, Mosher's settlement interest is a bankruptcy estate asset. Mosher's estate contains few other assets available for distribution to creditors. Nearly all assets of the debtors were owned jointly. All but a small amount of business inventory (\$713.67) has been set aside as exempt.

At filing, Moshers scheduled four creditors as holding secured claims: Fiala Office Products having a lien in debtors' computer; and Fleet Mortgage Group, North Iowa Community Credit Union and TransAmerica Financial Service all having liens against debtors' home. The credit union also has a lien against debtors' automobile. At filing, debtors were delinquent in their mortgage payments to Fleet. However, they borrowed \$9,800.00 from Mrs. Mosher's parents in order to cure the delinquency. They are one payment behind on the TransAmerica mortgage. They are current with their other secured creditors.

In their bankruptcy schedules, Moshers listed \$16,477.89 in priority claims. Of this amount, \$10,470.11 were debts to

taxing authorities. The balance of the total was for commissions or wages. Mosher scheduled 12 unsecured debts in the total amount of \$35,092.54. These include trade creditors. Mr. Mosher says that some of the scheduled claims are not as high as originally thought. For example, Mosher's debt to American Health Service was scheduled as \$6,160.50, but the correct amount is closer to \$4,600.00. Mr. Mosher says that American has agreed to accept \$3,500.00. There is no evidence that Mosher's debts are less than the non-exempt assets of the bankruptcy estate.

Five creditors have written letters consenting to the dismissal of the case. These include North Iowa Community Credit Union, OMS Medical Supplies, Inc., Fiala Office Products, Margaret R. Bonnette and Orville C. Smith. Bonnette and Smith are scheduled as creditors holding priority claims.

Debtors have been negotiating with many of their creditors. Mosher says they have obtained agreements from some to permit them to pay the debt over time at no interest. Such an agreement was reached with Mid-America Marketing, debtors' largest supplier.

But the settlement and debtors' business cash flow, even if it increases, will not permit debtors to pay all of their pre-petition debts immediately upon dismissal of the case. Mosher says they will pay over time and "eventually satisfy all" creditors. Dennis Mosher believes the business is good and it can be profitable. To make it so, he feels he needs only to devote his time to it. They believe that because of the settlement and the business' cash flow, bankruptcy can now be avoided. They would like to dismiss the case and get a good credit rating back again.

The trustee objects to the dismissal on the ground that "[t]here are no assurances that if this case is dismissed that the settlement proceeds will be paid to the Debtors' creditors." The only other objection was by Clear Lake Bank and Trust Company, an unsecured creditor. It has now withdrawn its objection as it has reached a separate settlement with the debtors in the event the case is dismissed.

Discussion

Although a debtor may voluntarily file bankruptcy, a debtor does not enjoy absolute discretion in having the case dismissed. Matter of 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 debtor's motion to dismiss may be granted for cause. 11 U.S.C. 707(a). The determination of cause rests within the sound discretion of the court. In re Heatley, 51 B.R. 518, 519 (Bankr. E.D. Pa. 1985).

A creditor's failure to object to dismissal does not constitute consent. Penick v. Tice (In re Penick), 732 F.2d 1211, 1213 (4th Cir. 1984). Absent affirmative assent from all creditors, a debtor's motion to dismiss should not be granted if dismissal results in legal prejudice to the creditors. In re Astin, 77 B.R. 537, 538 (Bankr. W.D. Va. 1987); In re 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 dismissal on any ground on behalf of creditors who do not affirmatively consent to dismissal. Penick v. Tice (In re Penick), 732 F.2d at 1214.

In this case, none of the debtors' creditors has objected to the dismissal. However, only five have consented, and of those, two have secured claims. They, therefore, are not limited to debtors' efforts or ability to repay them after dismissal. The trustee objects to dismissal for the reason that there is no certainty that debtors will pay their creditors after dismissal.

I agree with the trustee that this is sufficient reason to deny the debtors' motion. I do not doubt debtors' good intentions. Also, their motive for dismissal is understandable and free of bad faith. But if the case is dismissed, there is no certainty that creditors would be paid in full or, even if not in full, that they would be paid on an equal basis. Debtors would be subject to differing pressures from creditors holding different types of claims. It would be understandable if they paid according to their need to ease the greatest pressures. And despite their optimism as to the potential future success of the business, optimism does not guarantee success. I conclude that dismissal in this case prejudices creditors because it creates uncertainty as to the timing and amount of distribution on account of claims. The trustee is better situated to achieve equality and certainty of distribution.

Debtors' motion to dismiss will be denied. The court presumes the debtors' motion to revoke discharge is conditioned on

dismissal. It also will be denied. Accordingly,

IT IS ORDERED that the debtors' motion to dismiss their chapter 7 case is denied.

IT IS FURTHER ORDERED that debtors' motion to revoke discharge is denied. Judgment shall enter accordingly.

SO ORDERED THIS 24th DAY OF JANUARY 1997.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order and a judgment by U.S. mail to: Debtors, J. Mathew Anderson, and U.S. Trustee.