In the United States Bankruptcy Court

for the Northern District of Iowa

HERMAN LOUIS DEBNER
ELLEN FRANCES DEBNER
Debtor(s).

Bankruptcy No. L92-00616-W

Chapter 13

ORDER RE DISMISSAL

This matter came on for hearing before the undersigned on February 25, 1998 on the Court's own motion to determine the status of this case and whether it should be dismissed based on the expiration of the five-year statutory period for completion of a Chapter 13 plan. Debtor Ellen Debner appeared with attorney Bart Schwieger. Attorney Tim Dunbar appeared on behalf of Chapter 13 Trustee Carol Dunbar.

Attorney Schwieger expressed some interest in seeking a hardship discharge and/or conversion to Chapter 7. The Court allowed the parties time to brief those issues if they wished, as well as the issue which the Court set for hearing sua sponte. Neither party elected to file briefs.

The Court took the matter under advisement and directed Trustee to submit a payment record as part of the record in this matter. This payment record has been supplied. This matter is ready for resolution. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A).

STATEMENT OF THE CASE

The Court's notice to commence plan payments was filed March 30, 1992. The five-year plan was confirmed June 8, 1992 with payments of $100 per month. On May 2, 1995, the Court confirmed an amended plan reducing the amount of payments to $50 per month. The amended plan did not, however, reduce the total amount of payments of $6,000 for the "Base Plan".

The record reflects that Debtors paid $3,050 toward the plan and $2,950 remains unpaid. Of the unpaid amounts, $730 is owing to the Iowa Department of Revenue; $1,547.20 toward secured claims; and the remainder to unsecured creditors. As of the date of hearing, the Chapter 13 Trustee held $10.16 in her trust account. Trustee's Report shows Debtors made payments totaling $225 in January, 1998. Trustee currently holds a balance of $11.90.

Trustee filed a Status Report on December 6, 1997, pursuant to a request from the Court. The report states Debtors were making sincere efforts to complete the plan and Trustee had received no complaints from creditors.

CONCLUSIONS OF LAW

Courts generally consider the time limit of §1322(d) at three different stages of the Chapter 13 process: at confirmation, when debtors request modification, and when trustees or other interested parties request dismissal. The law is relatively well settled as to the application of §1322(d) to confirmations and plan modifications. Most Courts hold that a Chapter 13 payment period that is longer than five years may not be approved. 11 U.S.C. §1322(d). To be confirmed, a plan must propose that payments be completed within the life of the plan, which may not exceed five years. Sapos v. Provident Institution of Savs., 967 F.2d 918, 928 (3d Cir. 1992). The five-year limit applies to confirmation of the original plan, as well as to plan modifications. Cornelison v. Wallace, 202 B.R. 991, 994 (D. Kan. 1996). A plan in violation of the five-year limit cannot be confirmed. In re Richardson, 192 B.R. 224, 227 (Bankr. S.D. Cal. 1996).

The five-year period is computed from the date the order to commence payments is issued. In re Woodall, 81 B.R. 17, 18 (Bankr. E.D. Ark. 1987); In re Jackson, 189 B.R. 213, 214 (Bankr. M.D. Ala. 1995). The notice to commence payments in this case was filed March30, 1992. As the parties concede, the five-year period for plan payments expired on March 30, 1997.

In In re Robinson, 196 B.R. 454, 458 (Bankr. E.D. Ark. 1996), Judge Scott described one Chapter 13 case as

> clearly subject to dismissal: the debtor . . . was significantly in arrears on a plan that would take sixty months to complete. Since a plan must be completed within sixty months or the case is subject to dismissal for lack of subject matter jurisdiction, 11 U.S.C. section 1322(d), the Court was giving to the debtor a generous opportunity to complete his bankruptcy case.

The court allowed the debtor an opportunity to make plan payments in full and on time after he was delinquent on payments and trustee had pressed for dismissal. Id.at 457. Another court has stated that the language of the Code is clear, "no Chapter 13 plan can run for more than five years" under §1322(d). In re Jackson, 189 B.R. 213, 214 (Bankr. M.D. Ala. 1995). The court granted the trustee's motion to dismiss. Id.

In In re Woodall, 81 B.R. 17, 18 (Bankr. E.D. Ark. 1987), the court dismissed a Chapter 13 case on a motion to dismiss filed by the IRS because more than five years had lapsed since the order to commence payments. The court noted that unless the case is dismissed after five years, debtors may repose in Chapter 13 for life, extending the automatic stay against actions by postpetition creditors and making debtors "wage slaves" contrary to legislative history. Id.; see H.R. Rep. No. 595, 95th Cong., 1st Sess. 117 (1977) (stating inadequate supervision of debtors performing under wager earner plans led to plans for seven to ten years, becoming close to involuntary servitude); see also 3 Collier Bankruptcy Manual ¶1322.17(1) (Lawrence P. King ed., 3d ed. 1997) (hereinafter "Collier").

Likewise, courts have refused to allow modification of a plan after the five-year period for payments had expired. In Richardson, 192 B.R. at 225, the debtor sought modification to reduce distribution to unsecured creditors from 100% to 46%, which was the amount she had already paid. The five years had run out before the hearing on the motion to modify the plan. Id.at 226. The court refused to allow the debtor to modify the plan as proposed, and dismissed the case. Id.at 228.

Similarly, the debtor in In re Debing, 202 B.R. 291, 292 (Bankr. D. Minn. 1996), wished to modify at the end of the plan to provide that payments already made constituted payment in full. The court refused to allow the modification which it characterized as retroactively conforming the plan to debtor's actual but incomplete performance. Id.at 293. The trustee had moved for dismissal, noting that several months had passed beyond the longest period the debtor could pay under a modified plan pursuant to §1322(d). Id.at 294. The court allowed the debtor two weeks to consider the options of paying the delinquency or filing for a hardship discharge. Id.; see also In re Cutillo, 181 B.R. 13, 16 (Bankr. N.D.N.Y. 1995) (refusing to permit debtors to increase payments after five-year limit expired, but allowing a reasonable time to apply for hardship discharge).

One court has determined that §1322(d) does not provide for dismissal where payments extend beyond five years. In re Black, 78 B.R. 840, 852 (Bankr. S.D. Ohio 1987). This section states the court may not confirm plans longer than five years. Id.at 841. The standards for dismissal are set out in §1307(c), including dismissal for material default in plan payments. Id.at 842. The question whether material default supports dismissal must be made on a case-by-case basis. Id.at 843. In Black, the court concluded that cause for dismissal did not exist as the debtors were only a few months short of completing their 100% payout plan. Id. Commentators agree:

> [T]he fact that a debtor does not actually conclude the payments within the stated period does not constitute a violation of §1322(d). The subsection focuses on the payments provided for by the plan. If payments are late, but the debtor is substantially complying with the plan, the court should allow the plan to be completed within a reasonable time after the stated term.

Collier ¶1322.17(2).

While a substantial number of courts have concluded Chapter 13 cases may not continue past the five-year limit as a matter of subject matter jurisdiction, a few have concluded that a failure to complete payments during the plan, in violation of §1322(d), is not in itself grounds for dismissal. These courts hold that a failure to timely complete payments may be considered, along with all other factors, to determine whether dismissal is appropriate under §1307(c). In re Black, 78 B.R. 840, 852 (Bankr. N.D. Ohio 1987). Because §1322(d) does not specifically provide for dismissal, this Court elects to take the more narrow interpretation and not dismiss this case based solely on the fact that payments have extended beyond five years. Nevertheless, legislative history and common sense dictate that allowing the acceptance of payments beyond the five-year limit of §1322(d) must be closely scrutinized. The expiration of the plan period must be considered a significant factor in determining whether dismissal is appropriate under §1307(c). Only under the most extreme circumstances should payment beyond the plan period be allowed and then only after review and approval by the court.

SUA SPONTE CONSIDERATION

In interpreting prior Code language, some courts held that a bankruptcy court could not dismiss a case sua sponte under §1307(c). In re Terry, 630 F.2d 634, 636 n.5 (8th Cir. 1980). The 1986 amendment to §105(a), however, has been construed as clarifying the court's power to act sua sponte to dismiss a Chapter 13 case. In re Bayer, 210 B.R. 794, 799 (B.A.P. 8th Cir. 1997) (Scott, J., dissenting) (stating it is well settled that the bankruptcy court has the authority to dismiss a case sua sponte, in the context of considering good faith of Chapter 13 plan); In re Greene, 127 B.R. 805, 807-08 (Bankr. N.D. Ohio 1991) (dismissing Chapter 13 case for failure to timely file schedules and plan); In re Welling, 102 B.R. 720, 722 (Bankr. S.D. Iowa 1989) (concluding willful failure to file schedules warranted dismissal of Chapter 13 case).

In considering sua sponte whether cause exists to dismiss a bankruptcy case, the court is exercising its inherent power to manage its own proceedings. Finstrom v. Huisinga, 101 B.R. 997, 999 (D. Minn. 1989). The Eighth Circuit in In re Toibb, 902 F.2d 14 (8th Cir. 1990), rev'd on other grounds sub nom. Toibb v. Radloff, 501 U.S. 157 (1991), held that the bankruptcy court has the authority to dismiss a Chapter 11 case sua sponte.

The Court recognizes that ordinarily the filing of a Motion to Dismiss is the responsibility of the Chapter 13 Trustee. The duties of a Chapter 13 trustee under §1302 include ensuring that the debtor makes timely payments. See In re Jennings, 190 B.R. 863, 865 (Bankr. W.D. Mo. 1995) (discussing Chapter 12 trustee duties under §1202, similar to §1302). A Chapter 13 trustee is not a mere disbursing agent. In re Gorski, 766 F.2d 723, 726 (2d Cir. 1985). The trustee has the duty to oversee debtor's compliance with the plan, including the duty to take appropriate action when the debtor does not make the required plan payments. Id.; In re Cutillo, 181 B.R. 13, 15 (Bankr. N.D.N.Y. 1995); see also Collier ¶1302.03(1)(m). While the Court has inherent authority to raise this issue on its own motion, it is clearly preferable to have the trustee keep the Court apprised of the status of the case and file appropriate motions when a plan has expired.

Although the issue is not completely beyond debate, this Court finds it has inherent power, reinforced by the language of §105(a), to consider dismissal sua sponte under §1307(c) after notice and an opportunity for a hearing. To hold otherwise would grant to the Chapter 13 trustee the authority to unilaterally extend a plan indefinitely as long as the creditors remained passive. This is not the result intended by the drafters of the Code. The Court gave notice in its order setting hearing filed February 12, 1998 that the issue at hearing would be whether the case should be dismissed because of the expiration of the 5-year statutory period. The Court finds all interested parties have been adequately notified of the issue and it is properly postured for resolution.

CONVERSION OR DISMISSAL

The Court may convert or dismiss a case, whichever is in the best interests of creditors and the estate, for cause under §1307(c). Included in the non-exhaustive list of possible causes under this section are: unreasonable, prejudicial delay by the debtor, material default by the debtor and termination of the plan by reason of the occurrence of a condition in the plan. 11 U.S.C. §§1307(c)(1), (6), (8).

Based on this record, the Court concludes cause exists to convert or dismiss. More than five years have passed since Debtors began making plan payments. Debtors paid $3,050 toward the plan, leaving $2,950 unpaid. Having almost one-half of the plan unpaid after more than five years constitutes a material default in plan payments. Furthermore, the plan has terminated by reason of the occurrence of a condition in the plan, i.e. that it would be completed within five years.

The Court concludes that dismissal, rather than conversion to Chapter 7, is in the best interests of creditors and the estate. In considering "best interests" under §1307(c), courts inquire into whether the bankruptcy estate contains property which could inure to the benefit of creditors by liquidation in Chapter 7. In re Lindsey, 183 B.R. 624, 629 (Bankr. D. Idaho 1995). Another consideration is whether creditors will be prejudiced by allowing dismissal rather than granting conversion. In re Gaudet, 132 B.R. 670, 676 (D.R.I. 1991).

It is inappropriate to allow Debtors to repose in Chapter 13 longer than the time allowed by statute. It is also inappropriate for the Trustee to continue accepting payments from Debtors when it is apparent that they are unable to attain a Chapter 13 discharge. The Court, as well as the parties, have the right to expect that Chapter 13 cases will come to a natural end as required by §1322(d).

According to Trustee's Report of Receipts and Disbursements filed March 3, 1998, Debtors paid a total of $1,150 after March 30, 1997, the date the plan should have been completed. This constitutes more than one-third of Debtors' total payments since March 30, 1992. From this amount, Trustee took $103.85 in fees. The balance now held by Trustee is $11.90 and the remainder of the total payments was disbursed to Iowa Department of Revenue on its priority claim.

Creditors have been precluded by the Chapter 13 automatic stay for more than five years from pursuing their claims against Debtors. Unsecured creditors would have received nothing in a liquidation based on Debtors' original schedules, compared to receiving 1% of their claims if Debtors completed their plan. Debtors' plan payments have been disbursed for Trustee fees, Debtors' attorney's fees, to secured creditor Overton Funeral Home and priority creditor Iowa Department of Revenue. Of Overton's secured claim of $2,664.97, a total of $1,117.77 was paid through the plan. Since March 30, 1997, $1,150 has been paid by Debtors with apparently none of these payments going to unsecured creditors. It is difficult to find a justification for continuing this case when unsecured creditors are not receiving payments, the stay has been in place for six years, and there is no reasonable likelihood Debtors would ever complete the plan payments.

For these reasons, the Court concludes that dismissal is in the best interests of creditors and the estate. Hearing was held on February 25, 1998 at which time conversion and hardship

discharge were discussed. As of the time of this Order, no request for conversion or hardship discharge has been filed. The Court concludes Debtors have elected not to seek either alternative. Additionally, conversion would further delay secured creditors from enforcing their rights in collateral. Unsecured creditors will no more be prejudiced by dismissal than they would be by conversion.

WHEREFORE, this Chapter 13 proceeding is DISMISSED.

SO ORDERED this 3rd day of April, 1998.

Paul J. Kilburg
U.S. Bankruptcy Judge