In the United States Bankruptcy Court

for the Northern District of Iowa

LELAND RICHARD VINTON *Debtor(s).*	Bankruptcy No. 98-00670M Chapter 7

DECISION RE: DEBTOR'S MOTION TO DISMISS

Debtor moves to dismiss his chapter 7 case. The trustee has filed a resistance. Hearing was held on May 19, 1998 in Mason City. David M. Nelsen appeared for the debtor. Larry S. Eide, the trustee, appeared on his own behalf. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

Unemployed and in financial difficulty, Leland R. Vinton bought a book on how to file his own bankruptcy. He filed his chapter 7 petition, pro se, on March 11, 1998. He scheduled his assets and claimed them all as exempt. Among his assets is an Individual Retirement Account with a scheduled value of $35,700.00. The account is being managed by Putnam Investments located in Boston, Massachusetts. Vinton established the account with money rolled over from a 401(k) plan he had had with his former employer.

The trustee objected to the exemption of the IRA.[(1)] Shortly after being served with the trustee's objection, Vinton filed a motion to dismiss his case (docket no. 10). His reason for dismissal was given as follows:

> 2. Debtor realized that an item of property he thought to be exempt, is not. He does not want to lose this item in bankruptcy.
>
> 3. Debtor would have to litigate this matter, and Debtor does not feel he has the ability to do so on his own nor the funds to hire an attorney to do it for him. Debtor fully intends to pursue other means of taking responsibility for his debts.

"Petition for Voluntary Dismissal" (docket no. 10). Vinton has made an effort to settle with his creditors. He has paid his two scheduled priority, unsecured tax debts. As these were for 1997 income taxes, they were likely not dischargeable. See 11 U.S.C. § 523(a)(1). He has paid one unsecured creditor in full. He has negotiated settlements with five remaining unsecured creditors. One he has promised to pay 100 per cent of the debt over time but with a significant up-front payment. Settlement payments to the other four range from 54 per cent to 66 per cent of the claims. The money needed to accomplish the settlements would come from Vinton's father.

Vinton personally contacted each creditor. He said in agreeing to settle, the creditors took into account that he had filed bankruptcy, and they all understood he was going to dismiss his case.

Vinton is 40 years old. He is divorced. He has two sons; the older lives with him, and the younger lives with his former spouse. Vinton is employed by a construction company.

Although a debtor may voluntarily initiate a chapter 7 case, the debtor does not have 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 may move to dismiss under 11 U.S.C. § 707(a), although this proposition is not free from doubt. Matter of Jennings, 31 B.R. 378, 380 (Bankr. S.D. Ohio 1983)(a debtor's voluntary dismissal controlled by equitable principles, not under § 707(a)). Section 707(a) states that the "court may dismiss a case ... only for cause." I

see nothing in the language of § 707(a) which prevents dismissal on a request of the debtor. Moreover, the application of § 707 does not preclude the application of equitable principles. Peterson v. Atlas Supply Corp. (Matter of Atlas Supply Corp.), 857 F.2d 1061, 1063 (5th Cir. 1988). The determination of whether cause exists is within the discretion of the court. Id.

If dismissal would prejudice creditors, the motion should be denied. Matter of Williams, 15 B.R. 655, 658 (E.D. Mo. 1981), *aff'd* 696 F.2d 999 (8th Cir. 1982). This is so unless there is affirmative assent to dismissal from all creditors. In re Astin, 77 B.R. 537, 538 (Bankr. W.D. Va. 1987). A creditor's failure to object to dismissal does not constitute consent to dismissal. Penick v. Tice (In re Penick), 732 F.2d 1211, 1213 (4th Cir. 1984). The trustee may resist dismissal on any ground on behalf of unsecured creditors who do not affirmatively consent to dismissal of the case. Id. at 1214.

The debtor did not cite the provision of the Code through which he seeks dismissal. It may be that dismissal is sought under § 305(a). If that is so, the debtor must show that "the interests of creditors and the debtor would be better served by such dismissal...." 11 U.S.C. § 305(a)(1); Eastman v. Eastman (In re Eastman), 188 B.R. 621, 624 (9th Cir. BAP 1995).

I find and conclude that there would be prejudice to creditors if this case is dismissed. Based on Vinton's testimony and his schedules, it appears that there are five unsecured creditors who are as yet owed approximately $18,250.00. Vinton has offered to pay them less than 100 per cent of their claims if the bankruptcy is dismissed. It is likely they may receive a 99 per cent dividend if the trustee administers the IRA. If the trustee administers the IRA, the estate would be liable for income taxes and any early withdrawal penalty. The penalty is 10 per cent. 26 U.S.C. §§ 408(d)(1), 72(t). After application of such a penalty, there would be $32,130.00 in IRA proceeds. There is no evidence regarding the estate's tax liability. I will assume federal tax to the estate of $7,597.50 (26 U.S.C. §§ 1398(c), 1(d)) and a state tax of $2,107.04 (Iowa Code §§ 422.6, 422.5(1)(a)-(h)). The trustee would be entitled to maximum compensation of $4,320.00. 11 U.S.C. § 326(a). It is likely, therefore, that the remaining proceeds from the liquidation of the IRA would exceed the $12,000.00 which the debtor proposes to pay his remaining creditors to satisfy their claims.

It is the burden of the debtor to show either that the dismissal of his case does not prejudice creditors, or that the interests of creditors would be better served by dismissal. He has not carried this burden. What has been presented to the court through Vinton's testimony is not a vote of the creditors supporting dismissal. If all creditors had filed written affirmative assents to the dismissal, I would likely dismiss this case, probably without consideration of what knowledge the creditors had on the IRA when they gave their consents. No creditor has filed a consent to dismissal.

What is before the court is Vinton's argument that dismissal is in the creditors' best interests. He supports the argument with his testimony that each creditor has agreed to settle its claim. He has indicated to the court the amounts of the settlements. In this context, I believe it is appropriate to consider the availability of the IRA for a distribution to creditors, and to consider what knowledge of that availability the creditors might have had when they agreed to settle. There is no evidence that the creditors had any knowledge of the IRA, its amount, or that the exemption of it has been challenged by the trustee. There is likewise no evidence that they had any knowledge of the number of creditors in the case or the amount of potential claims. Vinton says only that the creditors know he is in bankruptcy, that he wants to dismiss his case, and that he is willing to settle with them.

I find that Vinton has failed to show cause for dismissal or that dismissal would better serve the interests of creditors. Accordingly,

IT IS ORDERED that debtor's motion to dismiss is denied. Judgment shall enter accordingly.

SO ORDERED THIS DAY OF MAY 1998.

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 David Nelsen, Larry Eide, and U.S. Trustee.

In the United States Bankruptcy Court

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LELAND RICHARD VINTON *Debtor(s).*	Bankruptcy No. 98-00670M Chapter 7

MEMORANDUM DECISION RE: OBJECTION TO EXEMPTION

The trustee objects to the debtor's claim of exemption in an Individual Retirement Account (IRA). Hearing was held May 19, 1998 in Mason City. David M. Nelsen appeared for the debtor Leland R. Vinton. Larry S. Eide, the trustee, appeared on his own behalf. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

Leland R. Vinton filed his chapter 7 petition on March 11, 1998. He scheduled as an asset an IRA having a value of $35,700.00. It is being administered by Putnam Investments which is located in Boston. Vinton established the IRA with rollover funds from a 401(k) plan established by a former employer. The 401(k) plan had had a value of approximately $40,000.00. Before establishing the IRA, he withdrew $10,000.00, paid penalty and taxes on the early withdrawal and used the balance as a down payment on a house. The remaining 401(k) funds were placed into the IRA account.

Vinton says there is no restriction on his withdrawal of money from the IRA other than the early withdrawal penalty. Withdrawals are at his discretion. The account is labeled as an "Individual Retirement Account." Neither party offered into evidence any account documents.

The debtor has not stated in Schedule C the law under which he claims the IRA as exempt. Presumably, it is Iowa Code § 627.6(8)(e). This Code section permits a debtor to claim as exempt "[a] payment or a portion of a payment under a pension, annuity, or similar plan or contract on account of illness, disability, death, age or length of service." Iowa Code § 627.6(8)(e). There is no evidence that Vinton's access to the IRA funds is restricted to any of these events. The only evidence is that he has unrestricted access to the money, although early withdrawals are subject to a 10 per cent penalty. Where debtor has unrestricted access to the funds in an individual retirement account, the account is not exempt under Iowa law. In re Huebner, 986 F.2d 1222, 1225 (8th Cir. 1993), cert. denied, 114 S.Ct. 272 (1993); In re Wiggins, C97-4027 MWB, slip op. at 6 (N.D. Iowa Sept. 23, 1997); In re Matthews, 65 B.R. 24, 25 (Bankr. N.D. Iowa 1986). Because Vinton has unrestricted access to the funds in the IRA, it is not exempt under Iowa law.

IT IS ORDERED that the trustee's objection to debtor's claim of exemption in an Individual Retirement Account is sustained. Judgment shall enter accordingly.

SO ORDERED THIS DAY OF MAY 1998.

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 David Nelsen, Larry Eide, and U.S. Trustee.

1. The debtor has agreed that for purposes of this motion, the court may assume the IRA is not exempt. However, the court has issued a decision sustaining the trustee's objection to the exemption of the IRA.