
In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:)
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ALFREDO E. SUAREZ) Adversary Proceeding
(Chapter 11 Case 91-20276)) Number 92-2009
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Debtor)
)
)
ALFREDO E. SUAREZ)
)
Plaintiff)
)
)
)
v.)
)
LIGIA SUAREZ)
)
Defendant)

MEMORANDUM AND ORDER
ON MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

On February 10, 1992, Plaintiff filed a Complaint to Determine Dischargeability regarding his obligations under a divorce decree. Defendant, in the answer to the complaint, alleged that Plaintiff's obligations under the divorce decree were non-dischargeable and that Plaintiff had committed certain acts described in 11 U.S.C. Section 727, which would prevent Plaintiff's discharge. Plaintiff, a Chapter 11 debtor, has since

filed a Motion for Partial Judgment on the Pleadings, alleging that the Section 727 objection to discharge is not applicable in this Chapter 11 proceeding. Upon consideration of the pleadings, briefs filed, and other documentation filed in Debtor's Chapter 11 case, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Plaintiff filed his Chapter 11 bankruptcy petition on April 2, 1991. Plaintiff is an individual debtor and a medical doctor in private practice. Defendant is Plaintiff's ex-wife and a creditor in this Chapter 11 case. Plaintiff is obligated to pay alimony and child support to Defendant pursuant to a divorce decree.

On February 10, 1992, Plaintiff filed a Complaint to Determine Dischargeability of Debt. In the complaint, Plaintiff alleged that part of Defendant's claim in this case should be treated as non-dischargeable support, but that a substantial portion of her claim should be treated as dischargeable property division.

In her answer filed March 10, 1992, Defendant alleged that her entire claim should be treated as a non-dischargeable support obligation and requested relief from the automatic stay. Defendant also alleged that Plaintiff committed various acts under Section 727 of the Bankruptcy Code which should be sufficient to deny Debtor a discharge. Defendant's allegations pursuant to Sections 727(a)(2), 727(a)(3), 727(a)(4), and 727(a)(5) assert essentially that Plaintiff has not been honest with the court or his creditors with

regards to certain assets which allegedly have been omitted from schedules, fraudulently transferred, and/or otherwise unaccounted for by Plaintiff.

At an April 24, 1992, hearing, the court heard evidence and argument on the Section 523(a)(5) alimony and support issues. The court approved the parties agreement to separately schedule a hearing on the Section 727 issues at a later date. Plaintiff has since filed a Motion for Partial Judgment on the Pleadings as to Defendant's Counterclaim, arguing that the portion of Defendant's answer asserting a Section 727(a) objection to discharge should be dismissed in this Chapter 11 proceeding and that judgment should be entered for Plaintiff on the Section 727 objection. Defendant alleges that Plaintiff does not intend to "reorganize" in his Chapter 11 but that Plaintiff intends to liquidate his assets. Whether or not a debtor intends to liquidate his assets is relevant to the discharge provisions of 11 U.S.C. Section 1141(d)(3) which provides:

The confirmation of a plan does not discharge a debtor if--

- (A) the plan provides for the liquidation of all or substantially all of the property of the estate;
- (B) the debtor does not engage in business after consummation of the plan; and
- (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under Chapter 7 of this title.

11 U.S.C. §1141(d)(3). Thus, an examination of Debtor's plan and disclosure statement is required in order to determine if a substantial liquidation is planned and if Debtor intends

to continue his business.

Plaintiff filed his most recent plan of reorganization on February 26, 1992. In Article VI, Execution of the Plan, Debtor states that he "will fund the plan through continued practice of medicine and the sale of substantially all the asset[s] currently owned." (Emphasis provided). The Amended Disclosure Statement also filed February 26, 1992, further explains that Debtor intends to sell all of his real property in order to pay off secured lienholders and pay other creditors, including Defendant, in the order listed in the plan and disclosure statement.

The Disclosure Statement also provides the history of Debtor's medical practice. Dr. Suarez formerly maintained his medical practice in Baxley, Georgia. Debtor testified at the April 24, 1992, hearing that he planned to sell his office in Baxley and to establish a medical practice in Macon, Georgia. Debtor's Disclosure Statement shows the amounts expected from the sale of the office and equipment. The Disclosure Statement also explains that Dr. Suarez is currently living in Macon and working with another doctor pursuant to a one-year contract with an option to buy the practice. However, Plaintiff does return to Baxley to see some patients on Saturdays.

Thus, the first issues to be decided are whether Plaintiff plans a substantial liquidation of his assets and whether Debtor is continuing his business as contemplated in Section 1141(d)(3)(B) of the Bankruptcy Code. If the first two provisions of Section 1141(d)(3) are met, then this court will be compelled to deny the Motion for Partial

Judgment on the Pleadings and proceed to order a hearing on the Section 727 discharge issues. If the first two requirements are not established, then the motion will be granted.

CONCLUSIONS OF LAW

Under Section 1141(d)(3), confirmation of a Chapter 11 plan does not discharge a debtor if substantially all of the property of the estate is liquidated, the debtor does not continue to engage in business, and the debtor would be denied a discharge under Section 727.

According to Debtor's Plan and Disclosure Statement, he plans to sell substantially all of his real property and pay creditors from the proceeds. As noted above Debtor's medical office in Baxley has been sold and his practice there has ended except for Debtor's Saturday appointments. For all practical purposes, Debtor has proposed and has already begun to substantially liquidate his assets in the Baxley area and focus on a new life in Macon. I conclude that Plaintiff's plan is a substantial liquidation pursuant to Section 1141(d)(3)(A).

The second consideration is whether or not Debtor plans to engage in business as contemplated in Section 1141(d)(3)(B). In In re Pfliger, 57 B.R. 467 (Bankr. D.N.D. 1985), a creditor filed a Section 727(a) complaint in debtors' Chapter 11 case. The plan proposed for the debtors to continue their farming and ranch operation over the life of the plan and for them to keep most of their property. The court concluded that the Section

727(a) complaint must be dismissed for failure to meet the prerequisites of Section 1141(d)(3) as debtors did not intend a liquidation, and they were also continuing their current farming business which they maintained at the time of filing.

In this case, Debtor is a licensed physician and plans to continue his medical practice. While he is not continuing his "business" in Baxley, where most of his personal and business debts were incurred, for purposes of Section 1141(d)(3)(B), Debtor will engage in "business" after consummation of the plan, albeit in a different locale. Accordingly, Debtor may discharge his pre-petition debts and substitute the plan provisions for payments to his ex-wife, regardless of the provisions of Section 727(a).

However, the allegations of Section 727 violations are relevant to the good faith issue concerning confirmation of Debtor's plan. *See generally*, Matter of John-Mansville Corp., 68 B.R. 618 (Bankr. S.D.N.Y. 1986); In re Koelbl, 751 F.2d 137, 139 (2nd Cir. 1984) (Chapter 11 plans should be proposed in good faith with honesty, good intentions, and a basis for reorganization). In such cases where Section 1141(d)(3) is not satisfied, any Section 727(a) allegations may still be considered as a basis for objecting to Debtor's plan for lack of good faith and honesty. Although there is authority holding that a debtor's pre-petition behavior should not bear on good faith in proposing a plan,¹ I conclude that any Section 727(a) allegations involving dishonesty and assets allegedly omitted from schedules, transferred, or otherwise unaccounted for should bear on debtor's good faith in filing in his Chapter 11 petition and plan.

¹ *See generally*, In re Texas Extrusion Corp., 68 B.R. 712 (N.D. Tex. 1986).

Therefore, Plaintiff's Motion for Partial Judgment on the Pleadings is granted. Count III of Defendant's Counterclaim asserting that Plaintiff should be denied a discharge under Section 727 is dismissed. Defendant will be permitted to introduce evidence of Section 727 violations at any hearing on confirmation of Debtor's plan.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Plaintiff's Motion for Partial Judgment on the Pleadings is granted.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of _____, 1992.