

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

In the matter of:

MURL E. GEARY
SHIRLEY W. GEARY
(Chapter 7 Case 91-41356)

Debtors

WILEY A. WARDEN, III
TRUSTEE

Plaintiff

v.

MURL E. GEARY

Defendant

Adversary Proceeding

Number 92-4127

FILED

at 1 O'clock & 00 min AM

Date 6-27-94

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia

AMENDMENT TO ORDER OF SEPTEMBER 22, 1992

Debtors' Chapter 7 case was filed July 2, 1991. On July 2, 1992, the Chapter 7 Trustee filed the instant adversary proceeding to require turnover by the

Debtor of property of the estate which consisted of the proceeds of Debtor's accounts receivable and work in progress arising out of his professional services to debtors in numerous Chapter 13 cases which were pending as of the date of the petition.¹ Many of these cases had already been confirmed so that Debtor was entitled to future disbursements in payment of those fees from the Chapter 13 Trustee. Other cases had not been confirmed, but Debtor had rendered services for which he was later awarded compensation. By virtue of an order entered on September 22, 1992, I concluded that the total value of the accounts receivable which Debtor is obligated to pay to be \$75,252.50. Thus, this amount was determined to be property of the estate as of the petition date, July 2, 1991. Adjustments in this figure were contemplated at that time to adjust for cases where the Debtor's attorney's fee was never collected because his clients' plans were unsuccessful and all fees were not paid. It was also subject to adjustment to the extent that Debtor had accounts receivable owed him in cases arising in divisions in this District where Chapter 13 cases are administered by another Trustee.

As of the date of entry of that order, it was revealed that in the fifteen months between the filing of the Debtor's case and the entry of the order, Debtor had,

¹ Debtor, Murl E. Geary, is an attorney who frequently represents Chapter 13 debtors in this court.

in fact, collected substantial sums of money from the Chapter 13 Trustee as a result of her regular monthly disbursements. Because there had not been a judicial determination as to which of those funds were property of the Chapter 7 estate, and because Debtor had not been placed under any specific restriction as to the use of those funds, the Debtor did not have in his hands funds sufficient to render a full accounting to the Chapter 7 Trustee of the monies received post-petition which constituted property of the estate. Accordingly, the Court order required from all future disbursements that the Chapter 13 Trustee remit directly to the Chapter 7 Trustee the sum of \$3,000.00 per month, until the full value of estate property was recovered. That sum appeared, based on all of the evidence, to be the maximum amount which could be diverted from the Debtor on a monthly basis in order to retire his obligation to the Chapter 7 estate without impairing or endangering his ability to continue to function, that is, to continue in business and generate the funds out of which the funds due the estate could be recovered. That order reads in relevant part:

The Chapter 13 Trustee is ORDERED to continue to remit the sum of \$3,000.00 per month to the Chapter 7 Trustee until such time as the value of Debtor's work in process as calculated herein has been paid to the Chapter 7 Trustee unless otherwise directed by subsequent order of this court.

The Chapter 13 Trustee has, in accordance with the terms of that order, remitted funds, and, as of this date, Debtor's obligation for the interim amount is almost satisfied. However, the accounting for funds owed to the Chapter 7 estate arising out of cases under the jurisdiction of the other Chapter 13 Trustee in this District has recently been completed. It appears that the parties are in accord that an additional \$35,912.00 must be paid over to the Chapter 7 Trustee in order to fully satisfy the duty to account for the full value of accounts receivable owed to the Debtor as of the date of his Chapter 7 petition, July 2, 1991. The Chapter 7 Trustee has proposed that this court entered a supplemental order continuing the monthly remittances from the Chapter 13 Trustee until the total of \$111,164.50 (\$75,252.50 + \$35,912.00) is recovered.

In the interim, however, the Debtor filed a Chapter 13 case on April 1, 1994. In the schedules of this case, the Debtor revealed a priority unsecured obligation to the Internal Revenue Service in an unknown amount.² The Internal Revenue Service filed a notice of levy with the Chapter 13 Trustee on or about March 30, 1994, attempting to levy on any attorney's fees payable to the Debtor on Chapter

² The IRS has subsequently filed a proof of claim indicating that it has a claim totalling \$174,614.39, including secured, priority and unsecured elements.

13 bankruptcy cases filed after July 2, 1991 (the Chapter 7 petition date). The purpose of the levy was to recover for the Internal Revenue Service taxes which had accrued and had not been paid by the Debtor post-petition in his Chapter 7 case. The Chapter 13 plan provides for payment in full of these Internal Revenue Service obligations, proposing to pay \$500.00 per month for 10 months with an increase to \$3,000.00 per month thereafter. The proposed payment amount and the adjustment contemplates that \$3,000.00 per month would continue to be remitted by the Chapter 13 Trustee to the Chapter 7 Trustee until the obligation to the Chapter 7 estate is extinguished. Thereafter, Debtor wishes to redirect most of those earnings to the Chapter 13 estate so that his Chapter 13 plan obligations, including the current debt to the Internal Revenue Service, can be fully funded.

The Internal Revenue Service appeared at a hearing scheduled by the Court in response to the Chapter 13 Trustee's Motion for Direction concerning how funds should be remitted in response to the notice of levy. At the hearing, it was revealed that the Chapter 13 Debtor had also filed an adversary proceeding alleging that the issuance by the Internal Revenue Service of the notice of levy constituted a willful violation of the automatic stay, seeking to set the same aside and seeking unspecified damages. On April 21, 1994, this Court entered an order approving a

compromise, settlement and dismissal of that adversary proceeding.

The Internal Revenue Service, while not formally intervening in the adversary proceeding which is the subject of this order, asserted, at the hearing on the Chapter 13 Trustee's Motion, an adverse position with respect to the continued payment of the \$3,000.00 per month to the Chapter 7 Trustee. The Internal Revenue Service contends that the \$3,000.00 now being remitted on a monthly basis to the Chapter 7 Trustee to reimburse the Chapter 7 estate for the value of accounts receivable which Debtor held as of July 2, 1991, in fact, is not property of the Chapter 7 estate, but should be considered property of the Chapter 13 estate created when Debtor filed his Chapter 13 petition. Thus, the government takes the position that the increased payments should be made to the Chapter 13 Trustee immediately rather than deferred to a later time as provided in Debtor's plan. The Chapter 7 Trustee, on the other hand, argues that the Court's existing order should remain in effect until the entire sums owed by the Debtor are remitted to the Chapter 7 estate.

The Court is placed in an extremely difficult position in attempting to resolve this procedural quagmire. It must be observed at this point that this is a matter over which the Court should never have had to preside. The Debtor has,

apparently, utterly failed during the pendency of his Chapter 7 case to fulfill his obligations of paying certain accruing obligations to the Internal Revenue Service. Had he done so, of course, there would be no post-petition Chapter 7 tax claim and the Internal Revenue Service would not be before the Court contesting the proper apportionment of the proceeds of the Debtor's current earnings. On the other hand, the Internal Revenue Service has displaced substantial lack of diligence in not taking any action for a period now approaching three years, either directly against the Debtor, or by coming before this Court to reveal the accrual of substantial tax liabilities by this Debtor. Having been thrust into this situation in which there is more than enough fault to be ascribed to every party, I will attempt to find a proper resolution.

The IRS's contention that Debtor's post-petition earnings are not property of the Chapter 7 estate is based upon section 541(a)(6) of the Code. Section 541(a)(6) provides:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

11 U.S.C. §541(a)(6). The result of this ruling depends on whether the first or the second phrase of subsection (6) is considered the operative section. On the date of Debtor's Chapter 7 filing the estate succeeded to "all legal or equitable interests of the debtor in property as of the commencement of the case" under Section 541(a)(1). This property description is very inclusive and would include the value of accounts receivable held by the Debtor as of that date. The proceeds of those accounts receivable become estate property under Section 541(a)(6) except to the extent that they constitute post-petition earnings. As a result, all monies received by the Debtor after July 2, 1991, which constituted cash payments for pre-petition accounts receivable are property of the Chapter 7 estate. As previously indicated, the Debtor received many of these proceeds before the filing of or a ruling in the adversary proceeding which sought to recover that estate property. As of the time the initial order was entered, these proceeds had been received and consumed by the Debtor or reinvested in his business.

The effect of the earlier order was to give recognition to the fact that the post-petition transfer to the Debtor of the proceeds of his receivables was voidable under 11 U.S.C. Section 549(a)(1). The further effect was to permit the Debtor to

retain that estate property and use it to fund his future operations as contemplated by 11 U.S.C. Section 363. As a condition of adequate protection, however, I granted the Chapter 7 estate an interest in post-petition earnings, thus removing \$3,000.00 per month of the Debtor's post-petition earnings from the reach of 11 U.S.C. Section 541(a)(6). Although the order was not explicit, it is clear that the legal effect of that order was to bring a portion of those earnings into the category of estate property pursuant to 11 U.S.C. Section 541(a)(7) and 11 U.S.C. Section 363(e). That order further provided that it was subject to further adjustment because it was recognized that the precise amount of the pre-petition receivables for which Debtor had to account to the Chapter 7 estate, was unknown.

To the extent that the Internal Revenue Service or any other creditor has permitted the Debtor post-petition to incur further liabilities which remain unpaid, the remedy was available to such entity at all times to seek relief from the automatic stay in order to assert its rights to seek a remedy with respect to a post-petition breach. The Service did not do so and cannot now seek to undo the Court's previous order, and the remedies provided therein, simply because it failed to take more timely action to assert its remedies for a post-petition breach.

Thus, I conclude that the legal effect of the previous order, while not explicit, was to grant the Chapter 7 estate an interest in the Debtor's future earnings which otherwise would not have been property of the estate. To the extent of \$3,000.00 per month, Debtor's future earnings were in fact made a part of the Chapter 7 estate. 11 U.S.C. §541(a)(7). That interest has not been fully satisfied and will not be until the total sum of \$111,164.50 is remitted to the Chapter 7 Trustee.

Accordingly, IT IS ORDERED that the Chapter 13 Trustee continue to remit the sum of \$3,000.00 per month to the Chapter 7 Trustee until such time as the full amount of the Chapter 7 accounts receivable in the amount of \$111,164.50 are remitted. The post-July, 1991 claim of the Internal Revenue Service will be treated in Debtor's Chapter 13 plan and the subject of a hearing to consider confirmation at the same date and time as originally scheduled.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 23rd day of June, 1994.