

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

In the matter of:

DAN LOUIS HIERS
SHIRLEY DAVIS HIERS
(Chapter 13 Case 87-40150)

Debtors

DAN LOUIS HIERS
SHIRLEY DAVIS HIERS

Plaintiffs

v.

INTERNAL REVENUE SERVICE
and
UNITED STATES OF AMERICA

Defendants

Adversary Proceeding

Number 93-4096

FILED

at 3 O'clock & 40 min P.M

Date 5-16-94

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



MEMORANDUM AND ORDER AND ORDER ON MOTION TO DISMISS

Pursuant to Rule 7012 of the Federal Rules of Bankruptcy Procedure,

Defendant, United States of America, filed a Motion to Dismiss this proceeding on the grounds that Plaintiffs failed to state a claim upon which relief can be granted. Based upon the record in the file and the applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

This matter coming before the court on Defendant's motion to dismiss, all averments within Plaintiffs' complaint must be taken as true. Plaintiffs filed a joint petition under Chapter 13 of the Bankruptcy Code on February 12, 1987. The Internal Revenue Service ("IRS") filed a proof of claim in the case on or about July 6, 1987, for tax obligations stemming from the years 1978 and 1983 through 1986. Plaintiffs received a discharge in their Chapter 13 case on September 2, 1992.

In January of 1993, the IRS issued a levy against the wages of Plaintiff, Shirley Hiers. After numerous contacts by Mrs. Hiers and her attorney, the levy was lifted approximately one week after it was issued. Thereafter, on or about March 29, 1993, the Plaintiffs received notice that the IRS intended to offset their 1992 tax refund against a 1984 tax liability.

On June 15, 1993, Debtors initiated this adversary proceeding alleging that the IRS' actions in levying upon Plaintiff's wages and attempting to offset Plaintiffs' tax refund violated the automatic stay of section 362 of the Bankruptcy Code, as well as the permanent discharge injunction imposed under section 524(a)(2) of the Code. Plaintiff's seek compensatory damages in an amount not less than \$100,000.00 and punitive damages in an amount not less than \$1,000,000.00.

The United States responded to the Plaintiffs' complaint with the instant motion to dismiss. In support of their Motion, the United States contends that jurisdiction is lacking over the IRS as a named Defendant, that Plaintiffs have failed to state a claim for relief because the IRS did not violate the automatic stay provisions of section 362 and because the United States has not waived sovereign immunity with regard to Plaintiffs' claim under section 524(a)(2).

On September 3, 1993, this court entered a Scheduling Order requiring the parties to complete all discovery by December 2, 1993, and to submit a joint pre-trial order to the court within fifteen days thereafter. Two consent orders were subsequently entered extending the deadlines, the second order extending the discovery deadline to February 15, 1994, and extending the deadline for submission of the joint

pre-trial order to fifteen days thereafter. This consent order was signed by counsel for both Plaintiffs and Defendants. On March 1, 1994, the court received Defendants' portion of the pre-trial order along with a copy of a letter, dated February 24, 1993, and addressed to Plaintiffs' counsel noting that the pre-trial order was due in this court on the second day of March, 1994. The Court still awaits Plaintiffs' portion of the pre-trial order.

CONCLUSIONS OF LAW

Plaintiff's counsel's failure to comply with the terms of the scheduling order constitutes a lack of prosecution of this case, and is alone grounds for dismissing Plaintiffs' complaint. Moreover, the substantive grounds upon which the United States bases its motion to dismiss require dismissal of Plaintiffs' complaint.

The United States' motion raises two issues. The first is whether the IRS' actions violated the automatic stay imposed by section 362 of the Bankruptcy Code. The second issue is whether the United States has waived sovereign immunity with respect to Plaintiffs' claim that the IRS violated the discharge injunction of section 524(a)(2).

As to the first issue, it is undisputed that Plaintiffs' Chapter 13 case was concluded prior to the IRS' actions in levying upon Mrs. Hiers' wages and attempting to offset Plaintiffs' tax refund. As a result, Mrs. Hiers' wages and the Plaintiffs' tax refund were no longer property of a bankruptcy estate. Consequently, there was no automatic stay in place for the IRS to violate when it took these alleged actions. *See* 11 U.S.C. § 362(c).

The alleged actions of the IRS' would, however, violate the permanent injunction established by issuance of the discharge order under 11 U.S.C. Section 524(a)(2). This provision provides, in pertinent part:

(a) A discharge in a case under this title--

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any [discharged] debt as a personal liability of the debtor, whether or not discharge of such debt is waived;

11 U.S.C. §524(a)(2). The United States has not, however, waived sovereign immunity with regard to any damages which Plaintiffs might have for the IRS' violation of the

permanent injunction. This precise issue was recently dealt with by the Honorable John S. Dalis in In re Brown, 159 B.R. 1014 (Bankr. S.D.Ga. 1993). In Brown, Judge Dalis concluded that none of the provisions of section 106 of the Bankruptcy Code were effective in waiving the United States' sovereign immunity with respect to monetary damages for violation of Section 524(a)(2). I find the analysis and reasoning of Judge Dalis in that opinion persuasive and dispositive on this issue. Therefore, I conclude that the United States is absolutely immune from the relief sought by Plaintiff.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Plaintiffs' complaint be DISMISSED.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 13th day of May, 1994.