

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:)	
)	Bankr. No. 91-40509
ARDEN LOREN STERN)	Chapter 12
Social Security No. [REDACTED]-1524)	
)	
and)	MEMORANDUM OF DECISION
)	RE: MOTION TO
ARLENE ELSIE STERN)	DISCHARGE JUDGEMENTS
Social Security No. [REDACTED]-8929)	
)	
Debtors.)	

The matter before the Court is Debtors' MOTION FOR ORDER DIRECTING CLERK OF COURTS TO DISCHARGE JUDGMENTS DISCHARGED IN BANKRUPTCY and First National Bank of Freeman's response. This is a core proceeding under 28 U.S.C. § 157(b)(2). This MEMORANDUM OF DECISION and subsequent order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that the MOTION must be granted in part.

I.

Debtors' confirmed plan provided that the First National Bank of Freeman (Bank) had a secured claim for \$21,565.00 and an unsecured claim for \$57,358.00. Debtors agreed to directly pay the Bank its secured claim over ten years with nine percent interest. The first payment to the Bank was scheduled for May 1, 1993. The unsecured claim holders, including the Bank, were given disposable income and four small annual payments beginning December 30, 1993, to be divided *pro rata*.

Several motions to dismiss and motions to modify the confirmed plan followed. Under Debtors' final motion to modify, which was approved August 14, 1996, Debtors agreed to pay the Bank its secured claim of \$21,565.00 on November 1, 1996 or Debtors would

liquidate the Bank's collateral at a chattel auction. A deadline for any auction sale was not set. Under the final modification, unsecured claim holders were to be paid \$3,100.00 and any disposable income on December 30, 1996.

On August 8, 1997, Debtors filed their FINAL ACCOUNT AND REPORT. No one timely sought dismissal of the case for failure to complete plan payments. Therefore, pursuant to Local Bankr. R. 3072-1, a discharge order was entered October 1, 1997.

On November 14, 1997, Debtors filed a MOTION FOR ORDER DIRECTING CLERK OF COURTS TO DISCHARGE JUDGMENTS DISCHARGED IN BANKRUPTCY.¹ Among the judgments that Debtors wanted to be discharged by the county clerk of court was one held by the Bank for \$65,582.78 plus costs of \$65.00. The Bank objected on December 1, 1997 to Debtors' discharge as well as to Debtors' motion to discharge judgments. It argued that contrary to the confirmed plan [and final modification], Debtors had not timely paid the Bank the value of its secured claim nor held the chattel auction to liquidate the collateral. The Bank stated that Debtors' counsel had assured the Bank's counsel that the property would be liquidated and that any deficiency would be paid. The Bank also stated that Debtors' counsel had failed to draft a stipulation to that effect, as previously agreed.

A hearing was held January 6, 1998. Appearances included Chan B. Masselink for Debtors and Glenn L. Roth for the Bank. Debtors' counsel acknowledged that he had advised the Bank's

¹ An earlier motion was denied because it did not follow Local Bankr. R. 4072-1.

counsel that Debtors would sell the secured property at auction within thirty days but he further stated that he had not agreed Debtors would pay any deficiency not contemplated by the confirmed plan.

The Bank's counsel argued Debtors had agreed to pay the entire deficiency. The Bank put into evidence a letter from its attorney to Debtors' attorney dated September 5, 1997, which stated in part:

This is to confirm our telephone conversation this date regarding whether your clients will voluntarily agree to liquidate their farm personal property that is secured by [the Bank] in lieu of having [the Bank] bringing on a motion to dismiss.

The second letter the Bank offered was from Debtors' counsel to Debtors' accountant, who works in the same law firm as Debtors' attorney. Therein, the Bank's attorney enclosed the September 5, 1997 letter and stated:

During our telephone conversation, [Debtors' attorney] had agreed that he will draft an agreement whereby the Sterns' would voluntarily sell their farm machinery and equipment in November and have the proceeds used to pay [the Bank.] Furthermore, [Debtors] would agree to be responsible for any deficiency to [the Bank]. [Debtors' attorney] had told me that this agreement would be sent to my office shortly after our conversation, however, as of this date, we have not received anything.

The letter further explained that the Bank would object to Debtors' MOTION FOR ORDER DIRECTING CLERK OF COURTS TO DISCHARGE JUDGMENTS DISCHARGED IN BANKRUPTCY if the agreement was not received by November 3, 1997.

II.

DISCHARGE OF JUDGMENTS. Section 524(a)(1) of the Bankruptcy Code voids any pre-petition judgments to the extent of the debtor's personal liability if the underlying debt was discharged under the Bankruptcy Code. It is a key part of a debtor's bankruptcy

privilege.

Section 15-16-20 of the South Dakota Code establishes the procedure for removing a judgment from the records of a county clerk of courts. Once a debtor receives a discharge, he must file and notice for hearing a motion before the Bankruptcy Court and get an order that lists the judgments to be discharged. When the clerk of courts receives that order, she must indicate on her records that the judgment is deemed discharged or satisfied.

In Chapter 12 cases, a debtor does not receive a discharge until the plan term ends. Further, the only debts discharged are those "provided for by the plan" and those for which the plan payments on them have been completed. 11 U.S.C. § 1228(a). Creditors holding secured claims that will not be paid in full until after the plan term ends are not discharged. 11 U.S.C. § 1228(a)(1) and 1222(b)(5) and (b)(9).²

MODIFICATION OF A CONFIRMED CHAPTER 12 PLAN. Under 11 U.S.C. § 1229(a), a Chapter 12 debtor may seek modification of his confirmed plan to alter a creditor's plan treatment. A Chapter 12 plan modified after confirmation must meet the same requirements as the initial plan because §§ 1222(a), 1222(b), 1223(c), and 1225(a) apply to any modification. 11 U.S.C. § 1229(b).

III.

The Court initially concludes that the Bank's secured claim has not been discharged. Under the August 14, 1996 modification,

² Section 1228(a) has long been recognized to contain a typographical error. The references to § 1222(b)(10) should be to § 1222(b)(9) instead. NORTON BANKRUPTCY LAW AND PRACTICE 2D, v.5, § 112:1 (1993).

the Bank was to receive a single payment on November 1, 1996. The plan term began March 18, 1993, the fourteenth day after confirmation, as provided by the original plan, and ended December 30, 1996, when the last dividend to unsecured creditors was to be paid to the case trustee. If the payment to the Bank had been made November 1, 1996, it would have been discharged. However, the payment was not made and the alternative auction sale provision kicked in. The auction has not yet been held. Accordingly, the forthcoming secured claim payment to the Bank after the auction sale constitutes a payment outside the plan term that is not discharged under § 1228(a)1).

In contrast, the Bank's unsecured claim of \$57,358.00 was discharged. That plan provision, as modified, was fulfilled when Debtors paid the December 1, 1996 dividend and any disposable income.

The final issue is how to treat any deficiency on the Bank's secured claim after the auction sale. The Court concludes that Debtors are liable for the balance. The original plan and subsequent modifications all provided that the Bank's secured claim was \$21,565.00. While the last modification on August 14, 1996 did not clearly state that Debtors would pay the Bank any deficiency on the secured claim, it did not say it would not either. The modification must be interpreted against Debtors, the drafters, and in the Bank's favor. Accordingly, the secured claim must be paid in full.

Based on the letters put in evidence and applicable law, the Court cannot conclude, as the Bank somewhat argues, that Debtors

agreed to pay the entire deficiency on the Bank's state court judgment. The letters do not clearly show that is what the parties agreed. More important, had such a "deal" been proposed as an original plan term or as a post-confirmation plan modification, it would not have been approved because it would have unfairly discriminated against similarly situated unsecured claim holders. See 11 U.S.C. §§ 1222(b)(1) and 1229(b)(1).

When all this is considered in the context of Debtors' MOTION FOR ORDER DIRECTING CLERK OF COURTS TO DISCHARGE JUDGMENTS DISCHARGED IN BANKRUPTCY, it follows that only the portion of the state court judgment which represents the Bank's claim can be discharged by the county clerk of court at this time because that is the only portion that has been discharged in bankruptcy. That portion of the state court judgment represented by the Bank's secured claim of \$21,565.00 can be discharged only after Debtors pay the Bank that amount in full.

Debtors shall submit an appropriate order.

So ordered this 26 day of January 1998.

BY THE COURT:

Irvin N. Hoyt
Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: *Charles L. Nail, Jr.*
Deputy Clerk



CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was served, read, delivered, or in some other manner, as required, and the return receipt is being furnished to the court.

By: _____
Date: 1-27-98

NOTICE OF ENTRY
Under F.R. Bankr.P. 9022(a)
Entered

JAN 27 1998

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

Case: 91-40509 Form id: 122 Ntc Date: 01/27/98 Off: 4 Page : 1
Total notices mailed: 8

Debtor Stern, Arden Loren RR #1, Box 111, Freeman, SD 57029
Debtor Stern, Arlene Elsie RR #1, Box 111, Freeman, SD 57029
Aty Masselink, Chan B. PO Box 495, Sioux Falls, SD 57101
Trustee Yarnall, Rick A. PO Box J, Sioux Falls, SD 57101
Aty Gaumer, Craig Peyton PO Box 5073, Sioux Falls, SD 57117
Aty Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321
Aty Roth, Glenn L. PO Box 137, Olivet, SD 57052
Aty Srstka, Cynthia L. 2320 W. 49th Street, Sioux Falls, SD 57105