

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

IN RE:)
) CASE NO. 186-00286-INH
) ADVERSARY NO. 90-1012-INH
GERALD LEE SWANSON and)
CHERYL MARIE SWANSON,)
) CHAPTER 12
)
Debtors,)
)
UNITED STATES OF AMERICA)
and A. THOMAS POKELA,)
CHAPTER 12 TRUSTEE,)
)
Plaintiffs,)
)
vs.)
)
GERALD LEE SWANSON and)
CHERYL MARIE SWANSON,)
)
Defendants.)

MEMORANDUM OF DECISION RE: COMPLAINT TO REVOKE
DISCHARGE AND MOTION FOR CLARIFICATION OF
CHAPTER 12 PLAN

The matters before the Court are the Motion for Clarification of Chapter 12 Plan filed by Debtors Gerald L. and Cheryl M. Swanson and the Complaint to Revoke Discharge filed by Farmers Home Administration and Chapter 12 Trustee A. Thomas Pokela. These are core proceedings under 28 U.S.C. § 157(b)(2). This ruling shall constitute Findings and Conclusions as required by Bankr. R. 7052.

I.

Debtors Gerald L. and Cheryl M. Swanson's (Debtors) amended plan of reorganization was confirmed by Order entered November 17, 1987. The plan provided that Debtors would pay Chapter 12 Trustee A. Thomas Pokela (Trustee) \$15,925.00 each January 1 of three

consecutive years beginning January 1, 1988. After completion of these payments, the plan provided that Trustee would be discharged and that Debtors "shall then make the remaining payments to each creditor directly." The plan also provided that "[a]ll of the projected disposable income of [Debtors], to be realized in the three-year period, shall be applied pursuant to the Amended Plan to make all of the payments set forth herein." The plan further stated, "All of the disposable income of [Debtors], anticipated to be received, shall be devoted to payment to the undersecured creditors." There were no unsecured claims except the unsecured portion of Farmers Home Administration's (FmHA) claim of \$175,812.00. Debtors made the payments to Trustee as proposed by the plan.

Debtors ceased active farming the spring of 1989 when they put their land into the federal Conservation Reserve Program. During the summer and fall of 1989 Debtors sold unneeded machinery with FmHA's knowledge. Part of the machinery sale proceeds were applied to that portion of FmHA's claim that was secured by Debtors' chattels and the remainder was used toward Debtors' January 1, 1990 payment to Trustee. That fall, Debtors first contemplated selling their land.

On February 13, 1990, Debtors listed their real property with a broker. At the broker's recommendation, Debtors solicited the services of their present counsel to secure the discharge so that clear title could be given upon sale. On February 16, 1990,

Debtors filed a Motion for Entry of Order of Discharge and noticed the same for hearing. The Motion and notice of hearing were served on FmHA, Assistant U.S. Attorney Thomas A. Lloyd, the United States Trustee, and two other creditors but were **not** served on Trustee Pokela. No objections to the Motion were filed and a discharge Order was entered March 30, 1990. The Order was served on all parties, including Trustee Pokela.

Interested buyers for the real property were soon found. FmHA learned about the proposed land sale on April 10, 1990. FmHA told Debtors that FmHA would not satisfy the mortgage because it argued that any sale proceeds should be applied to FmHA's unsecured claim as disposable income under the plan.

On June 28, 1990, Debtors filed a Motion for Clarification of Chapter 12 Plan of Reorganization. They asked the Court to determine the date through which Debtors were obligated to commit disposable income to unsecured claims. It was Debtors' contention that Debtors were entitled to discharge upon completion of the three annual payments to Trustee on January 1, 1990.

FmHA objected to the Motion. It argued that disposable income payments began on January 1, 1988 -- the date of the first payment under the plan -- and ended three years later on January 1, 1991. FmHA further argued that the sale proceeds would constitute disposable income.

On July 9, 1990, Trustee and FmHA filed a Complaint to Revoke Discharge. They argued that Debtors' failure to disclose the

proposed land sale prior to entry of the discharge was fraudulent.

A hearing on the Motion for Clarification of Chapter 12 Plan and the Pre-trial hearing on the Complaint to Revoke Discharge were held September 25, 1990. The parties agreed that both matters could be submitted to the Court based on the undisputed facts set forth in the parties' Pre-trial Statement.

Post-hearing briefs were filed by FmHA and Debtors. FmHA argued that Debtors' actions in securing a buyer for their property and then obtaining discharge before consummation of the sale so that Debtors could avoid payment of disposable income constituted constructive fraud upon which the discharge should be revoked.

Debtors stated they would not have contemplated a sale of the land if a discharge could not be obtained and if the sale proceeds had to be applied toward FmHA's claim as disposable income. They argued that they thought they were entitled to a discharge upon completion of the payments to Trustee and that the proposed sale was not a fraudulent effort to avoid payment of disposable income. Debtors also stated that the proposed sale had been aborted but that they had sufficient funds available to complete direct plan payments to FmHA. Finally, Debtors conceded in their brief that the term for disposable income payments commenced January 1, 1988 and ended January 1, 1991. They also agreed with FmHA that FmHA's Complaint could be construed as a request for relief from a judgment or order under Bankr. R. 9024 (Fed.R.Civ.P. 60) so that the Court may revoke the discharge Order on the grounds of mistake.

II.

Bankruptcy Rule 9024 incorporates, with limited exceptions that do not apply here, Fed.R.Civ.P. 60, which provides

[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for ... mistake ... or any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for [the reason of mistake] not more than one year after the judgment, order, or proceeding was entered or taken.

Fed.R.Civ.P. 60(b) (in pertinent part).

III.

The Court agrees with the parties that Fed.R.Civ.P. 60 is appropriately applied here to vacate the discharge Orders entered March 30, 1990. Debtors have acknowledged that they were in error when they thought they were entitled to discharge upon completion of payments to Trustee rather than upon completion of the three year term from the date of the first payment under the plan, as required by 11 U.S.C. § 1225(b)(1)(B). Further cause for vacating the discharge Order is the fact that Trustee was not served with Debtors' Motion for Entry of Order of Discharge. All parties and the Court were hampered by the skeletal Code provisions and a lack of federal or local bankruptcy rules on the appropriate procedure for obtaining a Chapter 12 discharge. Finally, since FmHA is the only unsecured claim holder, there are no other known parties that may have relied on the discharge Order. Accordingly, an order

vacating the Order Allowing for Entry of Discharge and the Order Discharging Chapter 12 Debtor entered March 30, 1990 shall be entered.

The Court declines to rule on whether a post-discharge sale of Debtors' real property to buyers found pre-discharge is fraudulent. The issue is not ripe for decision. "The ripeness doctrine is invoked to determine whether a dispute has yet matured to a point that warrants decision." Automotive Petroleum & Allied Industries Employees Union v. Gelco Corp., 758 F.2d 1272, 1275 (8th Cir. 1985). Two issues must be considered: the fitness of the issue for judicial resolution and the hardship to the parties if the court withholds consideration. Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 580 (1985); Automotive Petroleum, 758 F.2d at 1275. A sale of Debtors' real property to buyers secured prior discharge may or may not occur and any decision rendered on that contingency would be advisory at best. Further, no hardship to the parties can be gleaned if a decision is not rendered at this time. If a post-discharge sale occurs which a party in interest deems fraudulent, they may seek revocation of discharge. However, since the new Local Bankr. R. 309 now adequately establishes a Chapter 12 discharge procedure, creditors can litigate disposable income issues, if necessary, before entry of discharge. Ripeness is peculiarly a question of timing. Thomas, 473 U.S. at 580. Since no sale has occurred and since the discharge orders will be vacated, now is not the time to determine

whether a sale of Debtors' property would be fraudulent.

Dated this 18th day of March, 1991.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)

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Defendants.)

ORDER DISMISSING COMPLAINT TO REVOKE
DISCHARGE, VACATING ORDER OF DISCHARGE,
AND
DENYING MOTION FOR CLARIFICATION OF
CHAPTER 12 PLAN

In recognition of and compliance with the Memorandum of
Decision Re: Complaint to Revoke Discharge and Motion for
Clarification of Chapter 12 Plan entered this day,

IT IS HEREBY ORDERED that Motion for Clarification of Chapter
12 Plan filed by Debtors Gerald L. and Cheryl M. Swanson is DENIED;
and,

IT IS FURTHER ORDERED that the Complaint to Revoke Discharge
filed by Farmers Home Administration and Chapter 12 Trustee A.
Thomas Pokela is DISMISSED; and,

IT IS FURTHER ORDERED that the Order Allowing for Entry of Discharge and the Order Discharging Chapter 12 Debtor entered March 30, 1990 are VACATED pursuant to Bankr. R. 9024 and the consent of interested parties.

So ordered this _____ day of March, 1991.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)