

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:)
EDWARD H. TUBBS, JR.) Bankr. Case No. 93-50246
Social Security No. [REDACTED]-9567) Chapter 7
Debtor.)
VIRGINIA CARLSON)
Plaintiffs,)
vs.) Adversary No. 94-5001
EDWARD H. TUBBS)
Defendant.)
MARY MCCUSKER)
VIRGINIA CARLSON)
Plaintiffs,)
vs.) Adversary No. 94-5002
EDWARD H. TUBBS)
Defendant.)

MEMORANDUM OF DECISION RE:
DISCHARGE AND DISCHARGEABILITY COMPLAINTS

The matters before the Court are the discharge and dischargeability complaints filed by Plaintiffs Mary McCusker and Virginia Carlson. These are core proceedings under 28 U.S.C. § 157(b)(2). This Memorandum and accompanying Order shall constitute findings and conclusions under F.R.Bankr.P. 7052.

I.

Edward H. Tubbs, Jr., and Virginia Carlson were divorced by

judgment and decree entered August 23, 1993 by the Circuit Court for the Seventh Judicial Circuit for the State of South Dakota.¹ The divorce decree, among other things, divided certain personal and real property between the parties and provided that Edward would make certain alimony payments to Virginia. The decree provided that Edward would pay \$9,000.00 for Virginia's attorney's fees within thirty days of entry of the decree.

On October 1, 1993, Edward filed a Chapter 7 petition. In his schedules, Debtor stated he had one secured creditor for \$6,700.00 who held an interest in his home and surrounding land, one priority creditor for \$650.00 for 1993 real estate taxes, and seven unsecured creditors holding claims totalling \$34,420.00. The unsecured claims included:

Mary McCusker, \$9,000.00 for "Wife's attorneys fees in divorce action";

Master Card, \$3,600.00;

New York Life Insurance, \$2,120.00 for "Loan on life insurance";

Pat Ginsbach, \$5,000.00 for "Attorneys fees";

Amber Tubbs [daughter], \$2,100.00 for 1993 "Wages and proceeds from sale of livestock";

Brian Tubbs [son], amount not stated, for "Wages & proceeds form sale of livestock";

Ed Tubbs, Sr., \$3,300.00 for 1993 "Personal loan"; and

Virginia Tubbs [Carlson], \$9,300.00 for "Property Settlement."

Debtor stated that he would reaffirm the secured debt covering his

¹ The Hon. John E. Fitzgerald, Circuit Court Judge.

real property.

On his schedules, Debtor stated he had monthly income of \$3,373.00 and monthly expenses of \$2,670.75. Debtor's scheduled personal property was valued at \$13,472.06² and his scheduled real property was valued at \$10,000.00. He claimed exempt \$9,869.19 in property.

Debtor filed an amendment to his schedule of personal property on January 6, 1994. He added \$1,288.96 in assets.

Plaintiffs Mary McCusker and Virginia Carlson filed a dischargeability complaint on January 3, 1994. They claimed that certain debts owed to them by Debtor should not be discharged under 11 U.S.C. § 523(a)(6) because the debts were in the nature of family support obligations imposed by the divorce decree.

On January 10, 1994³, Plaintiffs Mary McCusker and Virginia Carlson filed a discharge complaint. They claimed Debtor should be denied a discharge because he had failed to disclose assets and because he had filed inaccurate schedules.

² Debtor's summary sheet says he has \$15,244.93 in personal property but the final page of his personal property schedule says the total is \$12,472.06. When the value of items on schedule B are added, the total is \$13,472.06.

³ Plaintiffs originally filed a joint discharge and dischargeability complaint on January 3, 1994. At that time a local bankruptcy rule existed that required discharge and dischargeability complaints to be filed separately. The Court so informed Plaintiffs' counsel and she filed a separate discharge complaint. The discharge complaint was filed late. The Court accepted it, however, since it subsequently determined that the local rule was contrary to F.R.Bankr.P. 7008 and F.R.Civ.P. 8(a) and, therefore, Plaintiffs should have been allowed to file a joint complaint. The local rule has since been deleted.

An evidentiary hearing was held May 3 and 4, 1994. Appearances included Mary McCusker and Robert M. Nash for Plaintiffs and John H. Mairose for Defendant-Debtor. A video tape of the Tubb's family home taken when the parties first separated and when Debtor later received possession of the home under the divorce decree was viewed by the Court after the hearing. The matter was taken under advisement upon receipt of written closing arguments and proposed findings of fact and conclusions of law.

II.

Non dischargeability of a family support debt. Under 11 U.S.C. § 523(a)(5), a debt to a former spouse for alimony, maintenance, or support made in connection with a divorce decree by a state court is non dischargeable. When deciding whether an award was intended as support, "the crucial issue is the function the award was intended to serve." *Williams v. Williams (In re Williams)*, 703 F.2d 1055, 1057 (8th Cir. 1983)(quoted in *Adams v. Zentz*, 963 F.2d 197, 200 (8th Cir. 1992)). It is a question of fact to be decided by the Bankruptcy Court "in light of all the facts and circumstances relevant to the intention of the parties." *Williams*, 703 F.2d at 1057-58.

Dismissal of Chapter 7 case filed in bad faith. Cause for dismissing a Chapter 7 case under § 727(a) may include the lack of good faith in filing. *In re Studdard*, 159 B.R. 852, 855-56 (Bankr. E.D. Ark. 1993). Factors indicating a Chapter 7 case has not been filed in good faith include: (1) use of Chapter 7 to discharge a

single debt which the debtor does not wish to pay; (2) the debtor's failure to make significant lifestyle adjustments or efforts to repay; (3) a desire to pay only certain creditors; (4) an effort to tie up significant liquid assets; (5) financial troubles caused by past financial excesses rather than any unforeseen calamity; and (6) the unfairness of the debtor's use of Chapter 7 under the facts of the case. *In re Veenhuis*, 143 B.R. 887, 889 (Bankr. D. Minn. 1992)(1); and *Studdard*, 159 B.R. at 856 (citing *Industrial Insurance Service, Inc., v. Zick (In re Zick)*, 931 F.2d 1124, 1128 (6th Cir. 1991)).

Bad faith may include a debtor's effort to circumvent an order or proceedings of another court, *In re Pioneer Lumber Treating, Inc.*, 127 B.R. 248, 250-51 (Bankr. D. Ha. 1991), *aff'd*, 5 F.3d 539 (9th Cir. 1993), or if the debtor's purpose for filing is to receive the discharge of a single debt that he can, but does not wish, to pay. *In re Busbin*, 95 B.R. 240, 246 (Bankr. N.D. Ga. 1989). See *In re Chandler*, 89 B.R. 1002, 1005 (N.D. Ga. 1988) (a debtor who files a demonstrably frivolous petition, absent any economic reality, is forestalled from invoking the protection of the Bankruptcy Code). *Contra Grasmann v. Grasmann (In re Edwin J. Grasmann)*, 156 B.R. 903, 910 (E.D. N.Y. 1992) (the fact that a debtor resorted to Chapter 7 to discharge his debts to his ex-wife is not alone a ground for dismissing the case as a bad faith filing).

Under 11 U.S.C. § 105(a), the Court may dismiss a Chapter 7 case on its own motion if the case was filed in bad faith. *In re*

Keebler, 106. B.R. 662 (Bankr. D. Ha. 1989); *In re Moog*, 774 F.2d 1073, 1076-77 (11th Cir. 1985). The Court also may dismiss a case *sua sponte* if the debtor is "unwilling to abide by the tenets of the Code." *Finstrom v. Huisinga*, 101 B.R. 997, 999 (Bankr. D. Minn. 1989). This power insures the Court's basic ability to supervise and guarantee orderly administration of the debtor's estate and creditors' interests. *Id.* (cite therein).

III.

The evidence shows that this case was filed in bad faith and must be dismissed. Foremost, Debtor testified that he filed his bankruptcy petition shortly after entry of the divorce decree only to prevent his ex-wife from executing on his assets. There was no evidence that Debtor is unable to meet this obligation. He is just unwilling to pay it. Second, the evidence established that Debtor had scheduled the amount of his Mastercard debt too high. Third, Debtor's assertions that he owed certain debts to his children and that certain property and livestock sale proceeds belonged to the children were contrary to the divorce court's findings. Finally, Debtor failed to schedule some assets and some scheduled assets were undervalued based on the findings of the divorce court.

A petition in bankruptcy is not intended to serve as a substitute for an appeal of a state or federal court judgment with which a party is not satisfied. A disgruntled litigant's recourse lies in a motion to reconsider or for a new trial made to the original court or with an appeal. Why Debtor did not utilize those

options here is not clear. But whatever the reason, a Chapter 7 petition was not the appropriate alternative.

Dismissal of this case is in the best interests of both Debtor and his creditors. See 11 U.S.C. § 305(a); *In re Iowa Trust*, 135 B.R. 615, 622-23 (Bankr. N.D. Iowa 1992). Even if this bankruptcy case had been filed for a legitimate purpose, under 11 U.S.C. § 523(a)(5) Debtor could not discharge the support-related debts to his wife or his wife's attorney. The circuit court's divorce decree clearly indicates that the purpose behind the alimony and attorney fee awards was to support Ms. Carlson. Since Debtor may not discharge those particular debts for which he sought the bankruptcy court's protection, he has nothing to gain if the case continues. Moreover, Debtor clearly testified that he had no desire to deprive his children of money or property owed to them by having their claims discharged.⁴ Debtor's lone secured creditor will not be affected by a dismissal because Debtor intended to reaffirm that debt.

Although the evidence on which the Court relies was presented in the context of a discharge/dischargeability hearing, the Court is satisfied that Debtor is not prejudiced by this *sua sponte* dismissal. Plaintiffs' complaint put Debtor on adequate notice of all issues raised. The Court's findings and conclusions here do not go beyond those issues and the evidence presented. Further, Debtor had adequate time to prepare for the hearings and a full

⁴ No evidence on the nature of Debtor's debt to his father was provided.

opportunity to present evidence and legal argument on those issues.

An order will be entered dismissing the case. The related adversary proceedings will be rendered moot and also dismissed.

Dated this ____ day of June, 1994.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)

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Defendant.)

MARY MCCUSKER)
VIRGINIA CARLSON) Adversary No. 94-5002
Plaintiffs,)
vs.)
EDWARD H. TUBBS) ORDER DISMISSING CASE
Defendant.) AND ADVERSARY PROCEEDINGS

In compliance with and recognition of the Memorandum of Decision Re: Discharge and Dischargeability Complaints entered this day,

IT IS HEREBY ORDERED that the above-captioned Chapter 7 case is DISMISSED; and

IT IS FURTHER ORDERED that the related adversary proceedings captioned above are DISMISSED as moot.

So ordered this ____ day of June, 1994.

BY THE COURT:

ATTEST:
PATRICIA MERRITT, CLERK

By _____
Deputy Clerk
(SEAL)

Irvin N. Hoyt
Chief Bankruptcy Judge