United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

In re Steven J. Derrick and Margaret M. Derrick, Debtors
Bankruptcy Case No. 93-10404-12

United States Bankruptcy Court
W.D. Wisconsin, Eau Claire Division

October 6, 1994

George Goyke and Guy Fish, for the debtors.
Daniel Freund, the Chapter 12 trustee.

Thomas S. Utschig, United States Bankruptcy Judge.

MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

The issue before the Court in the above matter is whether the dismissal of this Chapter 12 proceeding was appropriate. On September 23, 1994, the debtors, Steven J. Derrick and Margaret M. Derrick, filed an application to dismiss this Chapter 12 case pursuant to 11 U.S.C. § 1208(b). On that date, the Court held a telephone conference with George Goyke, the attorney of record for the debtors, and Guy Fish, the attorney who the debtors intend to substitute as counsel. Based upon the statements of debtors' counsel and the plain language of § 1208(b), this Court granted the debtors' application, and an order of dismissal was entered on September 23, 1994.

Subsequently, on September 27, 1994, the Chapter 12 trustee filed a motion to vacate and modify the order of dismissal. In his motion, the trustee alleges that the debtors may have committed fraud in connection with this case. Accordingly, the trustee believes that the Court should vacate the dismissal order and convert this case to a Chapter 7 proceeding instead. The trustee also argues that the dismissal order should be vacated because he received no notice of the debtors' application, that several adversary proceedings have been initiated which should be pursued, and that it would be in the best interests of the creditors if the dismissal were vacated. Essentially, the trustee argues that the language of § 1208(d) supersedes or modifies the otherwise absolute right to dismiss found in § 1208(b). In support of this contention, the trustee cites In re Graven, 936 F.2d 378 (8th Cir. 1991) and In re Goza, 142 B.R. 766 (Bankr. S.D. Miss. 1992).

In contrast, the debtors argue that the right to dismiss contained in § 1208(b) is absolute, that they did not need to provide notice to the trustee as a result of Rule 1017(a)[(1)], and that the cases cited by the trustee are distinguishable. The debtors also point out that the trustee has never formally claimed that the debtors had committed fraud in connection with this case, even though the trustee has apparently

been aware of the potential claims for some time and has had over a year to investigate. In fact, the trustee has indicated that he still needed additional time to ascertain whether fraud had in fact occurred.

The resolution of this dispute hinges upon the application of two subsections of 11 U.S.C. § 1208. Section 1208(b) provides that:

> On request of the debtor at any time . . . the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable. [Emphasis added].

Despite the arguably clear language of this statute, several courts have found that the "right" of dismissal granted to the debtor is not absolute. The basis for these rulings is the proposition that § 1208(b) is modified by § 1208(d), which permits the court to convert a case to Chapter 7 upon a showing that the debtor has committed "fraud" in connection with the case. The most notable of these decisions is In re Graven, 936 F.2d 378 (8th Cir. 1991), in which the court held that it was appropriate to convert a case to Chapter 7 despite the fact that the debtor had filed a motion to dismiss.

In Graven, the court stated that the overall purpose of the Bankruptcy Code is best served by a statutory interpretation which allows conversion, rather than dismissal, when it can be demonstrated that the debtor committed "fraud" in connection with the case. According to the court, the Bankruptcy Code was intended to provide a fresh start to honest but unfortunate debtors, not to provide a haven for unscrupulous ones. Id. at 385. The court concluded that:

> [O]nce fraud has become an issue in a case, the court may delay action on a section 1208(b) motion for dismissal long enough to allow an investigation of the alleged fraud. If fraud is shown, the court may, under 11 U.S.C. § 1208(d), convert the Chapter 12 case to Chapter 7 despite the debtor's motion to dismiss. Id. at 387.[(2)]

Some courts have apparently authorized delaying the dismissal of a case under § 1208(b) for reasons other than fraud. See Goza, supra, 142 B.R. at 771 (dismissal delayed until debtor filed a report and summary of business); In re Tyndall, 97 B.R. 266 (Bankr. E.D.N.C. 1989) (dismissal delayed to permit creditor to exercise right provided in confirmed plan to have trustee sell property). These courts have apparently justified the postponement of dismissal until after the occurrence of certain events because § 1208(b) does not specify that dismissal must occur within a certain time.

However, the court in In re Cotton, 992 F.2d 311 (11th Cir. 1993), held that a bankruptcy court could not condition the dismissal of a Chapter 12 case upon the implementation of a settlement agreement between the debtor and a creditor. The court held that the debtor has "a right to immediate dismissal, provided the case has not been converted to an involuntary proceeding and the debtor has not engaged in fraud that would make immediate dismissal unjust." Id. at 312. This holding recognizes both the clear language of § 1208(b) and the fact that the only possible limitation upon the debtor's right to dismiss would be a sufficient showing of fraud. Id.

In the present case, the trustee does proffer allegations of fraud to support his motion to vacate the dismissal order. The trustee's motion, however, makes it clear that the trustee does not yet have any substantial evidence of such fraud, despite the fact that the trustee has had more than a year to investigate the matter. Indeed, the

trustee has indicated he needs additional time to further investigate.

This Court believes that the Eleventh Circuit in Cotton correctly analyzed the interplay of §§ 1208(b) and (d). A debtor in Chapter 12 has a right to the immediate dismissal of the case, without notice or a hearing, unless there is evidence that the debtor has engaged in fraud which would render dismissal unjust. Cotton, 992 F.2d at 312. Even if fraud were demonstrated, the authorities cited by the trustee indicate that it remains within the Court's discretion to convert or dismiss the case under § 1208(d). See Graven, 936 F.2d at 387 (once fraud has become an issue, the court "may" delay dismissal to permit an investigation and "may" convert the case if fraud is present).

In the present case, the trustee has had considerable time to conduct an investigation of the purported fraudulent acts, but can offer no concrete evidence of such fraud. Indeed, the trustee indicates that he needs substantially more time to investigate the alleged fraud. Further, it does not appear that any creditors were unfairly prejudiced by the dismissal, as such creditors can pursue appropriate remedies in other forums should they so desire. In sum, the trustee fails to offer sufficient evidence that the dismissal of this case was unfair or unjust, and no good cause exists to vacate or modify the dismissal order. However, given that the trustee has pursued certain adversary proceedings on behalf of the estate, the attorney's fees and expenses incurred in these actions may be allowable expenses.

Accordingly, the trustee's motion to vacate or modify the order of dismissal is denied, except to the extent that the trustee may file a motion for attorney's fees and costs incurred through September 23, 1994, the date of dismissal.

This decision shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Rule 52 of the Federal Rules of Civil Procedure.

END NOTES:

1. In fact, the trustee's argument regarding the alleged deficiencies in notice must fail in light of the clear language of § 1208(b) and Fed. Bankr. R. 1017(a). Unlike the other subsections of § 1208, § 1208(b) does not require either notice or a hearing. Further, under Fed. Bankr. R. 1017(a), a court may not dismiss a case prior to a hearing "except as provided in . . . § 1208(b)." As no notice was required, the trustee cannot complain that notice was deficient.

2. It should be noted that one factor leading to the court's decision in Graven was that Bankruptcy Rule 1017(a) at the time appeared to require a hearing before a § 1208(b) motion could be granted. Graven, 936 F.2d at 386. Subsequently, however, Rule 1017(a) has been modified to reflect that a hearing is not in fact required. This fact, in connection with the plain language of § 1208(b), indicates that the Graven holding should be strictly, rather than liberally, construed.