UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF WISCONSIN

In re: Case Number:

LEWIS E. LYON
JACQUELINE E. LYON LM7-82-02021

Debtors.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND
ORDER DENYING APPLICATION TO REOPEN ESTATE

Debtors Lewis E. Lyon, Jr., and Jacqueline E. Lyon, by Attorney Melvyn L. Hoffman of McArdle, Hoffman & McArdle, having filed an Application to Re-open Estate; and a hearing having been held; and the Debtors appearing in person and by counsel; and Creditor Borg-Warner Leasing, by Attorney Bruce Brovold of Kostner, Ward & Koslo, appearing to object to said Application; and Dahl Leasing Co., by Attorney Ann Moriarity of Cameron, Nix, Collins & Quillin, Ltd., appearing to object to said Application; and First Bank, LaCrosse, by Attorney Paul Henke of Moen, Sheehan, Meyer & Henke, Ltd., appearing to object to said Application; the Court, having considered the argument of counsel and the complete record and file herein, FINDS THAT:

1. On November 16, 1982, Debtors Lewis E. Lyon, Jr. and Jacqueline E. Lyon, filed for relief under Chapter 7 of the Bankruptcy Code.

2. On May 4, 1983, the Debtors were granted a discharge under 11 U.S.C. sec. 727.

3. On May 25, 1983, this Court approved several reaffirmation agreements, including:

(A) $7,242.34 owed to Dahl Leasing Corporation under the terms of a truck tractor lease,

(B) $1,493.19 owed to Dahl Ford LaCrosse, Inc., under the terms of the Dahl Leasing Corporation truck tractor lease,

(C) $11,294.77 owed to First Bank (NA), under a promissory note secured by a utility van and a pick-up truck,

(D) $29,832.16 owed to Borg-Warner Acceptance Corporation under the terms of an equipment lease.

4. On June 28, 1983, the bankruptcy estate in this proceeding was closed as a no asset case.

5. On March 2, 1984, the Debtors applied to this Court to re-open the above captioned proceeding.

6. The Debtors' Application provides, in pertinent part:

> 8. That at the time the aforementioned Reaffirmation Agreements were entered into, and at the time the same were approved, the debtors were engaged in the business of over-the-road trucking which was their sole source of income.
>
> 9. That each of these Reaffirmation Agreements was entered into under duress and out of the immediate fear that a loss of such secured equipment would render the continued survival of the debtors literally impossible.
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> 10. At the time these Agreements were approved, the debtors had each been working in excess of 110 hours per week in an effort to bring the defaults current, and by such heroic efforts, were able so to do.

11. Thereafter, for most of 1983, the debtors were able to make regular payments on these Agreements.

12. However, it became physically impossible for the debtors to continue the pace of their efforts later in 1983, and as a result, several of the Agreements went into default.

13. As a result of such defaults, the following has occurred:

a. First Bank repossessed its security. . .

b. Dahl Leasing Corporation recovered a default judgment against the debtors. . .

c. Borg-Warner Acceptance Corporation has commenced an action to recover possession of its security and for a money judgment against the debtors. . .

14. That the debtors are no longer in the business of over-the-road trucking and are presently unemployed. . .

. . .

16. The debtors have neither assets nor income sufficient to pay damages assessed or which may be assessed against them as indicated in Paragraph 13 above.

17. The debtors attempted in good faith to pay their honest debts by entering into the aforementioned Reaffirmation Agreements and by making payments thereon. As such, equity demands that these debtors be given a "fresh start" with respect to any excess liability over the value of the security of these creditors.

18. In the event this matter is re-opened for the purpose of extending the debtor's discharge to any such excess liability, not only will these creditors not be in a worse position than had the debtors not entered into these Reaffirmation Agreements, but due to the curing of defaults and monthly payments made by the debtors since the date of discharge, these creditors will be in a significantly better position with respect to their security interests.

WHEREFORE, the Applicant-Debtors pray that the above-captioned case be re-opened for the purpose of extending the discharge granted these debtors. . .

Discussion

7. The objections to the Debtors' Application at this stage of the proceedings is in the nature of a motion to dismiss on the pleadings. Cf. Bankr. R. 7012 (Fed.R.Civ.P. 12(b)(6): failure to state a claim upon which relief can be granted). All allegations of the Application will be treated as true. Miree v. DeKalb County, 433 U.S. 25, 27, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977).

8. Under 11 U.S.C. sec. 350(b) a bankruptcy court may reopen a closed case for cause, including asset administration or debtor relief.

9. The threshold question is whether there is sufficient "cause" to reopen. Cf. Paragraph 20 infra. Or, tailored to the facts of this case: whether, in the absence of fraud, mistake or newly discovered evidence, a bankruptcy proceeding may be reopened to reconsider the propriety of reaffirmation agreements.[1]

10. Cause to reopen has been found in cases involving, inter alia, lien avoidance, e.g. Hawkins v. Landmark Finance Co., 727 F.2d 324 (4th Cir. 1984), and amendment of schedules to add a creditor, e.g., In re Stark, 717 F.2d 322 (7th Cir. 1983). However, neither counsel nor this Court have discovered any cases involving reaffirmation agreements and the operation of sec. 350(b). (In re Long, 22 B.R. 152 (Bankr. D.Maine 1982), cited by the

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[1] Under 11 U.S.C. sec. 524(c) the "extension" of discharge requested by the Debtors would be meaningless if the reaffirmation agreements are not voided.

Debtors, appears to involve post-discharge, pre-closing consideration of an untimely reaffirmation agreement.)

11. Thus, this Court appears to face a question of first impression.

12. Section 524 of the Bankruptcy Code provides, in pertinent part:

> (c) An agreement between a holder of a claim and the debtor, . . . is enforceable only to any extent enforceable under applicable nonbankruptcy law, . . . only if—
>
> (1) such agreement was made before the granting of the discharge. . .;
>
> (2) the debtor has not rescinded such agreement within 30 days after such agreement becomes enforceable;
>
> (3) the provisions of subsection (d) of this section have been compiled with;[2] and
>
> (4) in a case concerning. . .a consumer debt. . . the court approves such agreement as—
>
> (A)(i) not imposing an undue hardship. . .
>
> (ii) in the best interest of the debtor;

13. With the exception of section 524(c)(4), there is no provision for a bankruptcy court to determine whether a reaffirmation agreement is enforceable.

14. Under 11 U.S.C. sec. 524(d) a bankruptcy court is to determine whether a consumer reaffirmation agreement complies with section 524(c)(4) at a hearing held "when the Court has determined whether to grant or not to grant a discharge. . ."

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[2] (By the Court:) Section 524(d) requires the Court to instruct debtors in the law of reaffirmation agreements and to make section 524(c)(4) determinations.

15. Accordingly, events or occurrences subsequent to the section 524(d) hearing do not affect the validity of that reaffirmation agreement under section 524(c)(4). That the Debtors made a "heroic" good faith attempt to meet the terms of their reaffirmation agreements, that it is now physically impossible for them to continue to do so and that it would be inequitable to hold them personally liable for the reaffirmed debts, are nonbankruptcy arguments to be made before the court called upon to enforce said agreements. Cf. In re McNeil, 13 B.R. 743, 747-748 (Bankr. S.D.N.Y. 1981) (dischargeability of debt) ("that debtors . . . now prefer to litigate . . . in the bankruptcy forum . . . is insufficient to constitute 'cause' under sec. 350(b)".)

16. Assuming that the reaffirmation agreements sub judice are based on consumer debt, but see 11 U.S.C. sec. 101(7), they are valid only if approved as provided in section 524(c)(4).

17. As this Court did so approve, Paragraph 3 supra, the Debtors' application to reopen is in the nature of a motion for relief from order. See Fed.R.Civ.P. 60(b).

18. The Debtors have not alleged that there is newly discovered evidence or that, at the time of the section 524(d) hearing, there was fraud, mistake or creditor overreaching--the alleged duress was not imposed by the holders of the reaffirmed debts, cf. French v. Shoemaker, 81 U.S. (14 Wall.) 314, 333, 20 L.Ed. 852 (1872) ("straitened circumstances" do not render

contractual assent involuntary). Accordingly, there are no grounds to reopen these proceedings to reconsider this Court's section 524(c)(4) approval. Cf. Fed.R.Civ.P. 60(b).

19. In summary, the Debtors have received the full benefit of their Chapter 7 "fresh start". That they chose to continue business operations under Chapter 7 rather than Chapter 11 and that they subsequently failed was unfortunate. However, having made their decision, they are statutorily barred from further relief from this Court. See generally 11 U.S.C. sec. 727(a)(8) (six year prohibition of subsequent discharge).

20. Having found insufficient cause to reopen the above captioned proceeding, this Court has no authority to weigh the equities involved or to exercise its discretion in regard to those equities.

21. This Court expresses no opinion and makes no findings regarding the enforeceability of the reaffirmation agreements sub judice under 11 U.S.C. sec. 524(c)(1), (2) & (3), or under applicable nonbankruptcy law. See Paragraph 13 supra.

CONCLUSION OF LAW

This Court has no jurisdiction to reopen the above captioned proceeding to extend the discharge granted to Lewis E. Lyon, Jr., and Jacquelyn E. Lyon.

ORDER

IT IS ORDERED THAT the Application to Re-Open Estate of Lewis E. Lyon, Jr., and Jacqueline E. Lyon be, and the same hereby is, DENIED, without costs.

Dated: May 17, 1984.

BY THE COURT:

William H. Frawley
Bankruptcy Judge