

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ILLINOIS

In re:)
) In Bankruptcy
IDREES MUHAMMAD,)
) Case No. 98-31996
Debtor.)

O P I N I O N

Before the Court is the Motion to Dismiss filed by Bi-Rite Petroleum, Ltd. ("Bi-Rite") and the Objection thereto filed by Idrees Muhammad ("Debtor"). The Court conducted a hearing on August 25, 1998, at the conclusion of which the matter was taken under advisement. Both parties have since submitted a memorandum in support of their respective positions.

In December 1995, Bi-Rite filed a civil action against Debtor, two other individuals and a corporation in the Circuit Court of the County of St. Louis, State of Missouri, seeking damages for alleged damage to real property owned by Bi-Rite and situated at 1922 Gravois Road, St. Louis, Missouri. The property was leased by Bi-Rite to Asian Oil, Inc., a Missouri corporation owned and operated by Debtor. Bi-Rite asserted that, on September 19, 1995, a line from a storage tank located on the property containing gasoline began to lose pressure and, as a result, an internal leak detector automatically shut down the gasoline pump. However, despite actual knowledge of the leak, Debtor used the pump, which caused

approximately 400 gallons of gasoline to be leaked into the soil of the property. In doing so, Bi-Rite asserts, Debtor breached the lease by intentionally continuing to use the equipment, knowing that damage to the real estate would result. Finally, Bi-Rite contends that Debtor concealed the damage and failed to cooperate with Bi-Rite and authorities.

On June 26, 1998, Debtor filed his Chapter 13 petition. On June 29, 1998, the state court entered a default judgment against two of the defendants and in favor of Bi-Rite in the amount of \$2,019,989.60 in compensatory damages, \$500,000.00 in punitive damages, or a total of \$2,519,989.60 plus costs. However, due to the filing of the petition in bankruptcy by Debtor and one other defendant, the state court judgment entered the order only against the non-bankrupt defendants.

On July 14, 1998, Bi-Rite filed its Motion to Dismiss alleging that pursuant to Section 109(e) of the Bankruptcy Code, Debtor is not eligible to be a debtor under Chapter 13.

Section 109(e) of the Bankruptcy Code states in part as follows:

(e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than \$250,000 and noncontingent, liquidated, secured debts of less than \$750,000. . . may be a debtor under chapter 13 of this title.

11 U.S.C. §109(e).

Bi-Rite argues that because its claim alone exceeds \$250,000, Debtor does not meet the requirements of Section 109(e). Debtor asserts that Bi-Rite's claim against him, if there is one, is contingent and unliquidated and, as a result, Debtor is eligible for relief under Chapter 13 of the Bankruptcy Code.

Contingency relates the nature or origin of a liability whereas liquidation refers to ascertaining the amount due. In re McGovern, 122 B.R. 712, 715 (Bankr. N.D. Ind. 1989). Where all the facts giving rise to liability are in existence at the time of the filing of the petition, and no future occurrence is required in order to establish debtor's liability, the claim is not contingent as to liability. Id. citing In re Dill, 30 B.R. 546, 549 (9th Cir. BAP 1983), *aff'd* 731 F.2d 629 (9th Cir. 1984). This is not to say that the uncertainty that exists over whether a finder of fact will ultimately determine that those events actually occurred and impose liability makes a claim contingent. McGovern, supra, 122 B.R. at 716. Otherwise, every claim, whether in contract or tort, would be contingent until judgment had been entered. Id.

In this case, Bi-Rite's claim is not contingent. All of the events that gave rise to Bi-Rite's claim against Debtor had occurred pre-petition and liability is not dependent on some future event that may never happen. See Dill, supra, 30 B.R. at 549. The fact that the debt may not have been reduced to judgment, at least

not as to this Debtor, does not make the debt contingent. In re Ristic, 142 B.R. 856, 862 (Bankr. E.D. Wis. 1992) *citing* In re Loya, 123 B.R. 338, 340 (9th Cir. BAP 1991).

Liquidation is dependent upon the certainty or uncertainty of the amount due. McGovern, *supra*, 122 B.R. at 716.

It is clear that the value of at least certain elements of Bi-Rite's claim is easily ascertainable and do not involve the use of judgment or discretion. See McGovern, *supra*, 122 B.R. at 717. According to Debtor's schedules, on the date of filing, Debtor owed noncontingent, liquidated, unsecured debts of \$194,894.02. Accordingly, Bi-Rite's noncontingent, liquidated unsecured claim may not exceed \$55,105.98 in order for Debtor to be eligible for relief under Chapter 13 of the Bankruptcy Code.

In addition to its perhaps unliquidated claim for damages to its real estate, attorney fees and costs, the value of certain other components of Bi-Rite's claim is easily ascertainable and the claim is at least partly liquidated. Bi-Rite has a claim against Debtor for unpaid lease payments from November 1995 through the end of the lease of \$122,500.00, simple interest through June 13, 1997 of \$11,911.17, late charges of \$3,500.00, property taxes for 1995 through September, 1998 of \$971.84, and real estate taxes for 1995 through September, 1998 of \$12,648.14. These amounts total \$151,531.15. When added to Debtor's other scheduled noncontingent,

liquidated unsecured debts, the liquidated component of Bi-Rite's claim makes Debtor ineligible for relief under Chapter 13 of the Bankruptcy Code under Section 109(e). The fact that Debtor may dispute these claims is irrelevant; disputed claims are included by a majority of courts in the debt limit calculation of Section 109(e). In re Ekeke, 198 B.R. 315, 317-18 (Bankr. E.D. Mo. 1996) *citing* Matter of Knight, 55 F.3d 231, 235 N. 4 (7th Cir. 1995); In re Sylvester, 19 B.R. 671 (9th Cir. BAP 1982); In re Madison, 168 B.R. 986, 989 (D. Hawaii 1994); In re Jordan, 166 B.R. 201, 202 (Bankr. D. Me. 1994); In re Albano, 55 B.R. 363, 368 (N.D. Ill. 1985). See also In re Ristic, 142 B.R. 856, 861 (Bankr. E.D. Wis. 1992) *citing* Gould v. Gregg, Hart, Farris & Rutledge, 137 B.R. 761 (W.D. Ark. 1992).

As an additional basis for granting Bi-Rite's motion to dismiss, the Court finds that Debtor filed his Chapter 13 petition in bad faith. In In re Love, 957 F.2d 1350, 1357 (7th Cir. 1992), the Seventh Circuit has set forth a nonexclusive list of factors to examine in evaluating whether a Chapter 13 petition was filed in good faith:

1. The nature of the debt, including the question of whether the debt would be dischargeable in a chapter 7 proceeding;
2. The timing of the petition;
3. How the debt arose;

4. The debtor's motive in filing the petition;
5. How the debtor's actions affected creditors;
6. The debtor's treatment of creditors both before and after the petition was filed; and
7. Whether the debtor has been forthcoming with the bankruptcy court and the creditors.

In this case, Debtor has unfairly manipulated the Bankruptcy Code by timing the filing of his petition to obtain jurisdiction under Chapter 13. Debtor's Chapter 13 Plan is not a good faith attempt to pay his creditors; rather, it is an attempt to take advantage of the "super-discharge" provisions of Section _____ to wipe out a debt which might very well be nondischargeable in a Chapter 7 case.

For the reasons set forth above, Bi-Rite's Motion to Dismiss is hereby granted.

This Opinion is to serve as Findings of Fact and Conclusions of Law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure. See written Order.

ENTERED: October 6, 1998

BASIL H. COUTRAKON
UNITED STATES BANKRUPTCY JUDGE