

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

WILLIAM J. SCOTT
JOAN K. SCOTT, f/k/a
Joan Mapes

CASE NO. 88-00057

Chapter 13

Debtors

IN RE:

BERTON W. GUERNSEY
BETTY M. GUERNSEY

CASE NO. 88-01096

Chapter 13

Debtors

APPEARANCES:

CHRISTOPHER J. CHADICK, ESQ.
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MARK W. SWIMELAR, ESQ.
Chapter 13 Trustee
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STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court considers herein two contested matters which have been joined for decision because they implicate a single question of law and have fairly similar factual backgrounds.

On February 18, 1992 the Court heard oral argument on a motion filed by William J. Scott and Joan K. Scott, f/k/a Joan Mapes ("Scotts"), seeking a hardship discharge under §1328(b) of the Bankruptcy Code (11 U.S.A.C. §§101-1330) ("Code"). On the same date, the Court heard argument on a motion seeking the same relief filed by Berton W. Guernsey and Betty M. Guernsey ("Guernseys").

Following the submission of memoranda of law, the contested matters were finally submitted for decision on March 18, 1992.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of these contested matters pursuant to 28 U.S.C. §§1334(b) and 157(a), (b)(1), (2)(J) and (O).

FACTS

I. The Scotts

On January 15, 1988, the Scotts filed a voluntary petition pursuant to Chapter 13 of the Code. On July 31, 1988, Scotts' Chapter 13 Plan was confirmed by Order of this Court.

While at the time of filing, the Scotts were married and residing together, on or about February 25, 1991, they separated. The Scotts do not presently live together and a divorce proceeding has been commenced.

Although Mrs. Scott is presently employed, Mr. Scott is allegedly unemployed.¹ Mrs. Scott has filed a revised Statement of Current Income and Expenses, which reflects an excess monthly income of \$45.00.

To date the Scotts have paid the Trustee \$5,137.00 and an additional \$5,362.00 is needed to comply with the original Plan. There is no dispute that the Scotts have paid more to their creditors through the Chapter 13 Plan than the creditors would have received in a Chapter 7 liquidation.

II. The Guernseys

On July 18, 1988, the Guernseys filed a voluntary petition pursuant to Chapter 13 of the Code. Their Plan was thereafter confirmed by the Court.²

At the time of filing, the Guernseys were apparently married and residing together. At present, however, the Guernseys are separated and contemplating a divorce.

Mr. Guernsey lost his job on January 1, 1992 and was unemployed as

¹ The Trustee asserts that Mr. Scott is receiving unemployment benefits.

² The docket of this case indicates the Plan was confirmed by an order dated October 5, 1988.

of the date of this contested matter. He presently resides with his parents and two children. Mrs. Guernsey is also unemployed.³

The Guernseys have paid the Chapter 13 Trustee \$4,385.20 to the date of this contested matter, with \$4,120.65 still due under the Plan. There is also no dispute that Guernseys have paid their creditors through the Chapter 13 Plan more than they would have received in a Chapter 7 liquidation.

ARGUMENTS

Both the Scotts and the Guernseys contend that they are entitled to "hardship discharges" pursuant to Code §1328(b) because they meet all three criteria set out in the statute.

In both cases, the Debtors' inability to continue payments is allegedly due to a combination of matrimonial discord and loss of employment.

In the Scotts' case, while Mrs. Scott is still employed, she has a net monthly income of \$45.00 which would result in a modified plan providing an "inconsequential" dividend to unsecured creditors.

The Guernseys' moving papers do not indicate what, if any, dividend would be available to creditors, and they simply rely upon their matrimonial difficulties and Mr. Guernsey's "permanent" loss of employment on January 1, 1992.

The Guernseys assert that it is not the nature or the magnitude of the circumstances which prevent completion of the Plan payments that should control, but rather whether the inability to complete the Plan is due to circumstances created by a debtor's breach of some duty.

The Trustee opposes both motions on the grounds that neither termination of a marriage nor temporary loss of income is a basis for a hardship discharge under Code §1328(b).

In the case of the Scotts, the Trustee asserts that Mr. Scott is

³ The Court relies upon the Affirmation of Guernseys' attorney in making findings of fact. It appears, however, that in their subsequent Memorandum of Law, Guernseys assert both contrary and additional facts. A Memorandum of Law, however, is not a pleading and will not be considered by this Court as such.

receiving unemployment insurance that is not included in the revised Statement of Income and Expenses and that the revised Statement includes a payment of \$235.00 per month on unsecured debts which should be included in and paid through the Plan, as well as \$300.00 per month for "transportation".

Additionally, the Trustee opines that the Scotts' motion is tainted since it was filed only after he moved for dismissal of their Chapter 13 case.

DISCUSSION

Code §1328(b) grants a hardship discharge to a debtor who is unable to complete payments under a plan only if:

(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;

(2) the value, as of the effective date of the plan, of property actually distributed under the plan or account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under a Chapter 7 of this title [11 U.S.C. §§101 et seq.] on such date; and

(3) modification of the plan under section 1329 of this title [11 U.S.C. §1329] is not practicable.

In the contested matters sub judice only the first and third conditions set forth in Code §1328(b) are at issue. The Court has concluded, without dispute, that the second condition, the so-called "best interest of creditors test", has been satisfied.

Clearly, a hardship discharge under Code §1328(b) should not be liberally granted. The predecessor of Code §1328(b), §661 of the former Bankruptcy Act of 1898, as amended, 11 U.S.C. §1 et seq. (1976), in fact prohibited application for a hardship discharge upon any grounds until the plan had been in effect at least three years. Code §1328(b), however, permits application "at any time after confirmation of the plan."

The current case law interpreting Code §1328(b) focuses generally on subsection (1), which requires that a debtor's failure of payment be due to circumstances "for which the debtor should not justly be held accountable."

The Trustee herein relies on the decision in In re Dark, 87 B.R. 497

(Bankr. N.D.Ohio 1988). In that case, while the bankruptcy court acknowledged that the debtor had suffered the termination of her marriage, presumably post-confirmation, the ultimate conclusion of the court actually focused on Code §1328(b)(2), the so-called "best interest of creditors test." Thus, while Dark is of some guidance, it is certainly not controlling in the instant contested matters.

Likewise, in the case of In re Schleppe, 103 B.R. 901, 904 (Bankr. S.D.Ohio 1989), the Debtor relied to some extent on his matrimonial difficulties in seeking a hardship discharge. The bankruptcy court, however, never reached the issue of whether or not those difficulties would form the basis of a hardship discharge from the perspective of Code §1328(b)(1), since the Chapter 13 trustee and the debtor's former in-laws who had objected to the granting of such a discharge, conceded that the debtor's matrimonial difficulties were at least in part "circumstances for which he should not be held accountable." Bankruptcy Judge Cole accepted that concession and held "somewhat reluctantly" that Code §1328(b)(1) had been complied with.

Other bankruptcy courts have interpreted Code §1328(b)(1) to require the "circumstances" referred to in that section to be catastrophic in nature, such as death or debilitating illness of a permanent nature. See In re Nelson, 135 B.R. 304, 307 (Bankr. N.D.Ill. 1991); In re White, 126 B.R. 542, 545 (Bankr. N.D.Ill. 1991).

The Guernseys here contend that the bankruptcy courts in these latter cases misread Code §1328(b)(1) in that the circumstances which cause the debtor to fail to comply with the confirmed plan need only be circumstances "for which the debtor should not justly be held accountable." The Guernseys contend that loss of employment through no fault of a debtor is precisely the type of "circumstances" to which the statute refers.

In support of their position, the Guernseys cite Thompson v. Ford Motor Credit, 475 F.2d 1217 (5th Cir. 1973) a pre-Code case which interpreted §661 of the Bankruptcy Act. In dictum, the Fifth Circuit suggested that "the requisite circumstances include loss of employment because of illness or other reasons beyond the debtor's control." Id. at page 1219.

While the Court believes that the Fifth Circuit's rationale in

Thompson v. Ford Motor Credit, supra, may not be controlling in light of the subsequent enactment of the Bankruptcy Code and the case law interpreting Code §1328(b)(1), it is less clear how the Guernseys meet its criteria.

There is no allegation here that Mr. Guernsey lost his employment due to illness or injury. He simply alleges, through his attorney, that in January 1992 he lost his employment "permanently" and he has attempted to find work but has been unsuccessful. There is no indication in the moving papers of Mrs. Guernsey's employment status. It is alleged that the Debtors are contemplating a divorce.

In the case of Scotts, Mrs. Scott is alleged to be employed, taking home approximately \$2,000 per month. Mr. Scott is apparently unemployed and there is a pending action for divorce of the Scotts in state court.

While marital discord between husband and wife Chapter 13 debtors obviously impacts adversely on their ability to comply with a Chapter 13 plan, as it presumably does on all other aspects of their lives, it can hardly be considered a circumstance for which they should not be held accountable or a circumstance beyond their control.⁴

Stripped of the matrimonial discord, both of these contested matters focus only on loss of employment as the basis for satisfying Code §1328(b)(1) which must be construed as temporary in nature. There is no allegation that any of the Debtors are physically incapable of holding a job.

Turning to the third prong of the "hardship test", Debtors must convince the Court that plan modification is impracticable. Obviously any modification of either of these Plans would be impacted by the fact that they were both confirmed in 1988 and cannot extend beyond 1993 in duration. See Code §1322(c).

While the time limitation imposed by Code §1322(c) might very well result in a significant reduction in dividend to unsecured creditors via a modified plan, there has been no showing that such a modification is impracticable, particularly in the Scotts case where the Trustee has alleged,

⁴ The Court need not and does not consider the question of fundamental fairness that may arise where one of the spouses in a failed marriage continues plan payments, thus providing the non-paying spouse with the benefit of Chapter 13 discharge.

without dispute, that Mrs. Scott has included as an item of expense, payments on debts that should be included in the Plan, as well as excessive expenses for transportation.

As noted in 5 COLLIER ON BANKRUPTCY ¶1328.01(2)(b)(ii) at 1328-20, "[m]odification of the plan is thus a solution to the debtor's problems which is preferred by the Code. It should be attempted whenever it is feasible for the debtor, who could thereby preserve a normal Chapter 13 discharge."

In neither of these contested matters have the Debtors asserted any basis for concluding that a modification of their respective Plans is not practicable other than asserting a loss of income which loss is not shown to be permanent in nature.

To allow a hardship discharge under Code §1328(b) based upon self-created marital discord and temporary loss of employment in difficult economic times, would open a door to a result that Congress neither intended nor this Court can condone.

Based on the foregoing, it is

ORDERED, that the motions filed by William J. Scott and Joan K. Scott, f/k/a Joan Mapes, and Berton W. Guernsey and Betty M. Guernsey seeking a hardship discharge pursuant to Code §1328(b) are denied.

Dated at Utica, New York

this day of June, 1992

STEPHEN D. GERLING
U.S. Bankruptcy Judge