

IT IS SO ORDERED.

Dated: 09:52 AM May 15 2007



MARILYN SHEA-STONUM *JS*
U.S. Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

| | | |
|----------------------|---|---------------------------------|
| IN RE: |) | CASE NO.: 05-81104 |
| |) | |
| Attilio Otty Garrett |) | CHAPTER 13 |
| |) | |
| DEBTOR(S) |) | JUDGE MARILYN SHEA-STONUM |
| |) | |
| |) | DENIAL OF DEBTOR'S MOTION |
| |) | FOR DISCHARGE UNDER 11 U.S.C. § |
| |) | 1328 |

This matter is before the Court on the Motion (the “Motion”) of Attilio Otty Garrett (the “Debtor”) for a discharge under 11 U.S.C. § 1328(b) because, as the result of his post-petition incarceration, the Debtor is not able to continue making his plan payments. The Court held a hearing on the Motion. Appearing at the hearing were Chris Manos, counsel for the Debtor, and Keith Rucinski, staff counsel for the Chapter 13 Trustee. Although the Chapter 13 Trustee did not file a written objection, at the hearing, staff counsel stated that the Chapter 13 Trustee does

not support the Debtor's Motion. The court authorized the submission of post-hearing briefs to allow counsel the opportunity to bring any relevant legal authority to the Court's attention. No post-hearing briefs were submitted.

JURISDICTION

This matter is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (O). This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b), 157(a) and (b)(1) and by the Standing Order of Reference entered in this District on July 16, 1984.

UNDISPUTED FACTS

The Debtor filed a voluntary petition for relief on October 16, 2005. The Debtor's chapter 13 Plan was confirmed on February 28, 2006. The Debtor has made payments on his confirmed plan. On November 27, 2006 the Trustee filed a motion to dismiss for failure to pay as ordered. According to the Trustee's motion the last payment was received on July 12, 2006. On January 25, 2007, the Debtor filed his Motion. The Trustee's Motion to Dismiss was withdrawn following the filing of the Debtor's Motion.

According to counsel's statements during the hearing, the Debtor is now incarcerated as the result of a felony domestic violence conviction, and will be for a five year period. As a result, the Debtor can no longer continue to make his plan payments.

DISCUSSION

Section 1328(b) provides, in part,

[A]fter the confirmation of the plan ..., the court may grant a discharge to a debtor that has not completed payments under the 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.

A debtor's eligibility for a hardship driven is driven by the facts and circumstances of the case

at hand. *Bandilli v. Boyajian (In re Bandilli)*, 231 B.R. 836, 841 (1 Cir. BAP 1999). The Debtor bears the burden of proving each element of § 1328(b). Unsubstantiated and conclusory statements do not satisfy that burden. *In re Dark*, 87 B.R. 497 (Bankr.N.D.Ohio 1988).

In evaluating the facts and circumstances, a court should consider, *inter alia*, whether the debtor had control, direct or indirect, of the intervening event or events. *In re Bandilli*, 231 B.R. at 841. It appears that acts over which the Debtor had control resulted in his incarceration. Therefore, the Court finds that in this circumstance, the Debtor had control over the intervening event which makes him unable to complete the plan payments and counsel has failed to prove otherwise. Therefore, the Debtor's motion is denied.

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cc: Chris Manos (via electronic mail)
Attilio O. Garrett (via U.S. mail)
Jerome Holub (via electronic mail)
all creditors