

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

IN RE:) CHAPTER 13
)
)
OLGA YANKE,) CASE NO. 03-60982
)
Debtor.) JUDGE RUSS KENDIG
)
)
) **MEMORANDUM OF DECISION**
)

This case is before the court upon a motion to dismiss filed by the Chapter 13 trustee, objection to dismissal and a motion for hardship discharge, or in the alternative to convert to Chapter 7, filed by Olga Yanke (“debtor”), and responses thereto filed by Henry Weaver (“Weaver”) and the trustee. For the reasons that follow, the trustee’s motion to dismiss is **DENIED**, debtor’s motion for a hardship discharge is **DENIED**, and debtor’s request to convert the case to a proceeding under Chapter 7 is **GRANTED**.

I. JURISDICTION AND VENUE

The court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334(b) and the General Order of Reference entered in this district on July 16, 1984. This is a core proceeding over which the court has jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(A) and (J). Venue is proper in this judicial district pursuant to 28 U.S.C. § 1409(a).

II. SUMMARY OF THE CASE

Debtor filed her Chapter 13 case on March 7, 2003. The schedules accompanying debtor’s petition disclose that she is single, lives with her three adult children, and has monthly net income of \$3,250 consisting of \$2,736 Social Security and \$514 net business income from debtor’s prosthetics/orthotics business which also employs one of her adult daughters. Debtor scheduled secured debts of \$245,995.08 and unsecured debts of \$22,335.81.

Weaver holds a judgment lien against debtor’s residence that he obtained when debtor defaulted on a state court settlement for repayment of various personal loans. Weaver filed a \$45,000 secured claim against debtor’s bankruptcy estate. On May 2, 2003, debtor moved for a determination of the value of seven secured claims against her residence. See Dkt. #18. By

way of an order entered July 8, 2003, the court reduced the value of six secured claims from \$242,934.49 to \$140,000.00 based upon the appraised value of the property. See Dkt. #36. Weaver's claim was found to be entirely unsecured, as the value of the residence was found to be less than the sum of real estate taxes and the first mortgage. Debtor's plan was confirmed on July 10, 2003, requires monthly payments of \$1,920.00, and will pay a dividend of 14.1% to unsecured creditors if completed. See Dkt. # 37.

On September 23, 2004, the trustee filed a motion to dismiss because debtor had not made a Chapter 13 plan payment since May 2004. Debtor responded by filing an objection to the motion to dismiss and asking this court to grant her a hardship discharge pursuant to 11 U.S.C. § 1328(b). The trustee and Weaver both objected to debtor's motion for hardship discharge. On October 20, 2004, the court heard arguments from debtor, Weaver, and the trustee, and instructed the parties to file memoranda in support of their positions. Debtor filed a memorandum in support on November 15, 2004 that included a notice of conversion to Chapter 7 in the event the hardship discharge was denied. The trustee responded on November 24, 2004. Weaver has not filed a memorandum.

III. ARGUMENTS PRESENTED

Debtor states that she cannot be held accountable for her failure to make payments to her Chapter 13 plan, that the amount paid to date under the plan is greater than the Chapter 7 distribution value, and that modification of her plan is not feasible. In an affidavit attached to her memorandum in support of hardship discharge, debtor stated that she suffers from osteoarthritis and is unable to walk. Debtor alleges that the combined effect of a forced relocation of her business and delay in receipt of insurance proceeds for revenue generated from that business severely reduced cash flows. Though debtor assists her adult daughter in the operation of debtor's business, their best efforts to rehabilitate that business have failed. Two of debtor's adult children who live in her home have medical problems. Both children receive Social Security and all of that income is contributed to debtor's household income. Debtor alleges that she received \$6,000 in settlement of a personal injury case during the Chapter 13 plan, and devoted all proceeds to payments under the plan. Debtor's plan already requires a payment period of sixty months and debtor avers that payments cannot be increased to restore feasibility because she has no ability to increase either cash flows from the business or the Social Security received by herself and her children. Based upon these facts, debtor argues she has met the requirements of 11 U.S.C. § 1328(b), and is entitled to a hardship discharge. See Dkt. ##49, 59.

Weaver's grounds for objecting to the discharge were stated at the hearing. Weaver does not believe there have been good faith efforts to generate income from the prosthetics/orthotics business because based upon his personal observation, the shop is not regularly open for business. Weaver also believes that debtor and her family devote their income to gambling rather than to paying debtor's Chapter 13 plan.

In her written memorandum and at the hearing, the trustee observed that the circumstances alleged as grounds for the hardship discharge existed at the time debtor filed her Chapter 13 case. The trustee argues that debtor's position has not changed to the degree sufficient to justify a hardship discharge, and the case should be converted to a proceeding under Chapter 7. See Dkt. #60.

IV. ISSUES

- 1) Whether Debtor meets the elements set forth in Section 1328(b) and qualifies for a hardship discharge; and
- 2) Whether Debtor's case should be dismissed pursuant to Section 1307(c).

V. LAW AND ANALYSIS

A. Statutory Requirements for Hardship Discharge

The requirements for a hardship discharge are set forth in 11 U.S.C. § 1328(b). The court may grant a discharge to a debtor who has not completed his Chapter 13 plan only if it finds that 1) the debtor's failure to complete payments is due to circumstances for which the debtor should not justly be held accountable; 2) the value of property actually distributed under the plan on account of each unsecured claim is not less than the amount that would have been distributed if debtor's estate had been liquidated on the effective date of the plan; and 3) modification of the plan is not practicable. Debtor bears the burden of proof with respect to each element of the statute, and cannot meet that burden solely by way of unsubstantiated and conclusory statements regarding his inability to fund the plan. In re Dark, 87 B.R. 497 (Bankr. N.D. Ohio 1988). The three-prong test set forth in Section 1328 is conjunctive, and every element of the test must be met. Id. at 499.

B. Case Law

The analysis of an alleged hardship situation is necessarily fact-driven, and focuses on the nature and quality of the intervening event or events upon which the debtor relies. Bandilli v. Boyajian (In re Bandilli), 231 B.R. 836, 841 (1st Cir. BAP 1999). Factors that the court should consider include:

- 1) whether the debtor has presented substantial evidence that he or she had the ability and intention to perform under the plan at the time of confirmation;
- 2) whether the debtor did materially perform under the plan from the date of confirmation until the date of the intervening event or events;
- 3) whether the intervening event or events were reasonably foreseeable at the

- time of confirmation of the Chapter 13 plan;
- 4) whether the intervening event or events are expected to continue in the reasonably foreseeable future;
 - 5) whether the debtor had control, direct or indirect, of the intervening event or events; and
 - 6) whether the intervening event or events constituted a sufficient and proximate cause for the failure to make payments.

Id.

The majority of older reported cases dealing with hardship discharge determined that the requirements of Section 1328(b)(1) are not met unless there has been a catastrophic event which has a direct and profound impact on the debtor's ability to make plan payments. See, generally, In re White, 126 B.R. 542 (Bankr. N.D. Ill. 1991); In re Nelson, 135 B.R. 304 (Bankr. N.D. Ill. 1991), In re Graham, 63 B.R. 95 (Bankr. E.D. Pa. 1986); In re Bond, 36 B.R. 49 (Bankr. E.D. N.C. 1984).

More recently, courts have declined to impose a requirement that does not exist in the plain language of the statute, and focus more closely on the nature of the circumstances surrounding a debtor's failure to complete her plan. See Bandilli, supra, at 839-840; In re Edwards, 207 B.R. 728, 730 (Bankr. N.D. Fla. 1997). These courts are mindful of the fact that a request for discharge under Section 1328(b) warrants special vigilance because creditors enjoy limited participation in the Chapter 13 plan confirmation process, Bandilli, 231 B.R. 836, 840, counterbalanced by the recognition that a discharge under Section 1328(b) does not relieve the debtor of obligations determined to be nondischargeable pursuant to Section 523(a). Edwards, 207 B.R. at 730.

C. Debtor's Circumstances and Plan Modification

The court is sympathetic to debtor's situation and physical ailments, but does not find that these factors present circumstances that entitle her to a hardship discharge, nor does the court believe that a plan modification was impracticable at the time debtor first encountered financial difficulties in early 2004. Accordingly, debtor has not met her burden of proof with respect to Section 1328(b)(1) and (3).

Debtor suffers from various physical ailments as outlined in two affidavits filed with her supplemental memorandum on November 15, 2004. See Dkt. #59. Debtor's two adult disabled children live with her, and she depends in part upon their Social Security income to fund her own household expenses and her Chapter 13 plan. Without further explanation or supporting documentation, debtor insists that her business known as Yanke Orthotic Prosthetics has suffered a decline and that revenues cannot be increased. An examination of schedules attached to debtor's petition indicates that all of these circumstances existed when debtor filed her petition

in March 2003, and cannot be characterized as intervening events. Schedule I lists debtor's three adult children as her dependents, and in the Statement of Financial Affairs, Section 1, debtor stated that she received no income from employment or operation of a business in the two years preceding the filing of the case. Therefore, the circumstances which debtor cites to support her request for a hardship discharge indicate she lacked the ability to perform her Chapter 13 plan at the time it was filed. Those circumstances were reasonably foreseeable at the time the plan was confirmed, and are likely to continue in the future. The court also finds that debtor's physical ailments are not new and unanticipated hurdles to payment of her Chapter 13 plan. They existed when the plan was filed and continued when it was confirmed.

Debtor also insists that all household income is devoted to payment of her Chapter 13 plan, and that she contributed the entire sum of \$6,000 net personal injury proceeds to her plan. Once again, debtor offers only conclusory statements to support this assertion, and the record of payments to the plan suggest otherwise. Debtor's plan was confirmed in July 2003 and requires monthly payments of \$1,920.00. Even though debtor received the rough equivalent of three additional monthly payments as a result of the personal injury settlement, she paid only \$1,500.00 in December 2003, missed the April 2004 payment, and has not paid anything into her plan since May 2004. The income available to debtor from the Social Security payments that she relied on when she formulated her plan is regular; debtor's payments to her plan are not. The court also finds that debtor has not materially performed under the plan from the date of confirmation, given the complete absence of payments while debtor continues to receive at least \$2,736 monthly Social Security for herself and her dependent adult children. Debtor has not cited this court to any intervening event that did not already exist when the plan was confirmed which excuses the failure to make payments.

Debtor states that it is impossible for her to modify her plan because the dividend paid to unsecured creditors is only ten percent and the duration of the plan is sixty months, already the maximum permitted by statute. See Dkt. #49. The court notes that the plan, as confirmed, is designed to pay 14.1% of allowed unsecured claims. There is nothing in debtor's statements nor in the record presented to this court which proves that modification is impossible. Unsecured creditors would receive less than originally anticipated under the plan if debtor lowered her monthly payments so that she could successfully complete the plan, but this fact standing alone does not establish that modification is impracticable. Rather than seek a modification, debtor chose to do nothing and instead waited until the trustee moved for dismissal of this case to ask the court for assistance. In Nelson, the court determined that a debtor could not meet his burden of proof under Section 1328(b)(3) by waiting until modification became impracticable, then seeking a hardship discharge. Nelson, 135 B.R. 304, 308. This court agrees.

D. Conversion to Chapter 7

Section 1307(a) states that a debtor may convert a case under Chapter 13 to a case under Chapter 7 at any time. Recently, a bankruptcy appellate panel of the Sixth Circuit Court of

Appeals adopted the position that a debtor's right to convert is not absolute, and can be denied in extreme circumstances. See In re Cooper, 314 B.R. 628, 635 (BAP 6th Cir. 2004). The Cooper court agreed with the reasoning of a line of cases which finds an exception to the right to convert in situations of bad faith. Id.

Debtor moved for conversion of her case to Chapter 7 following the hearing on her motion for discharge. At the hearing and in her memorandum in support, the trustee advocated conversion to Chapter 7. Neither Weaver nor the trustee have alleged bad faith, and the court cannot conclude that debtor's actions constitute bad faith, even though it disagrees that debtor is entitled to a hardship discharge. Therefore, debtor's notice to convert her case to a proceeding under Chapter 7, whether construed as a motion or as a notice of right, is granted.

V. CONCLUSION

Finding that debtor has not sustained her burden of proof in proving all three elements necessary for a hardship discharge, the court **DENIES** debtor's motion for a hardship discharge, **DENIES** the trustee's motion to dismiss, and **GRANTS** debtor's request to convert this case to a proceeding under Chapter 7.

An appropriate order shall enter.

/s/ Russ Kendig

DEC 13 2004

**Judge Russ Kendig
U.S. Bankruptcy Judge**

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