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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

IN RE: ) CHAPTER 13  
)  
) CASE NO. 02-64983  
PAUL K. MILLER AND )  
SHARI L. MILLER, ) JUDGE RUSS KENDIG  
)  
Debtors. )  
) **MEMORANDUM OF DECISION**  
) **(WRITTEN OPINION)**  
)

Two matters are pending before the court: a motion for hardship discharge filed by debtors on February 1, 2006 and a motion to vacate the trustee's order of dismissal filed on April 27, 2006. The court conducted a hearing on May 24, 2006. Debtors were instructed to file a brief in support of their position and have complied with the instruction.

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)(A). Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1408 and 1409(a).

**BACKGROUND**

Debtors filed a chapter 13 petition on October 16, 2002. Through the plan, Debtors proposed to cure the mortgage arrearage on their residence. The return to unsecured creditors was estimated to be forty percent (40%). The forty-eight (48) month plan was confirmed on May 1, 2003.

Upon review of the docket, it appears Debtors have struggled with the plan. The case was dismissed on August 7, 2003 but Debtors and the trustee reached an agreed order (hereafter "Agreed Order") on September 26, 2003 which reinstated the case following dismissal. The Agreed Order contained a procedure for notification and cure of future delinquencies. Pursuant to the order, if a delinquency was not cured, the case was subject to dismissal. The trustee filed several motions to dismiss and notices of payment delinquencies during the pendency of the case.

On February 1, 2006, Debtors filed a "Second Motion for Hardship Discharge"<sup>1</sup> and sought discharge pursuant to 11 U.S.C. § 1328(b). Through the motion, debtors allege that they are no longer able to make payments under the plan as a result of their divorce. Debtors state that unsecured creditors have received, as of the effective date of the plan, an amount equal to or greater than the amount which would have been distributed in a chapter 7 liquidation case and also state that modification of the plan is not practicable. No objections to the motion for hardship discharge were filed.

Prior to the motion for hardship discharge, and in accordance with the Agreed Order, the trustee filed a notice of delinquency. On March 9, 2006, the trustee submitted an affidavit attesting that a delinquency notice had been mailed to debtors and the delinquency had not been cured. Thereafter, the trustee submitted an order of dismissal which was entered on March 14, 2006. On April 27, 2006, Debtors filed a motion to vacate the March 14, 2006 order of dismissal because prior to the dismissal, Debtors filed the motion for hardship discharge and requested a hearing. Hearing on the motion to vacate and the motion for hardship discharge was held on May 24, 2006. At the hearing, the court requested Debtors file a post-hearing supplement to their motion for hardship discharge. Debtors filed the supplement on June 7, 2006 and it contains the following facts:

1. Debtor, Paul Miller, suffers from epilepsy and has a chronic condition of breakthrough seizures. He is unable to work, cannot drive a car and is not permitted by his physician to even bathe himself. He has been unemployed since August 2005. He is a candidate for brain surgery at the Cleveland Clinic. He has not yet been accepted for social security disability.
2. The Debtors have divorced and have three (3) small children. Debtor Shari Miller is the sole means of support.
3. The Debtors have substantially completed the Plan payments and as a result of the foregoing, modification of their plan was not practicable. Creditors received payment on their claims far in excess of the amount they would have received on their claims had the Debtors' estate been liquidated under Chapter 7.
4. The Debtors have met the three part test required by 11 U.S.C. § 1328(b).
5. No objections were filed to the Motion for Hardship Discharge.

Debtors did not presents any case law citations or legal support in conjunction with either the motion for hardship discharge or the motion to vacate the dismissal.

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<sup>1</sup> Although titled "second" motion, the filing appears to be a second amended motion which cured a deficiency noted by the clerk's office related to the motion for hardship discharge originally filed on January 30, 2006.

## DISCUSSION

### *I. Motion for hardship discharge*

#### **A. Procedural Requirements for Hardship Discharge**

Federal Rule of Bankruptcy Procedure 4007(d) sets forth the procedural steps to be taken following a debtor's motion for discharge pursuant to 11 U.S.C. § 1328(b). The rule states:

- (d) *Time for Filing Complaint Under § 523(c) in a Chapter 13 Individual's Debt Adjustment Case; Notice of Time Fixed.* On motion by a debtor for a discharge under § 1328(b), the court shall enter an order fixing the time to file a complaint to determine the dischargeability of any debt under § 523(c) and shall give no less than 30 days' notice of the time fixed to all creditors in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

In this case, creditors were never provided notice of a time to file dischargeability complaints. Thus, a procedural deficiency exists which must be cured before the court will further consider the motion for hardship discharge.

#### **B. 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 Chapter 13 plan payments 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.

#### **C. 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 (1<sup>st</sup> 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.

#### **D. Debtors' Circumstances and Plan Modification**

Upon review of the motion for hardship discharge, the court notes that the facts upon which Debtors' motion is based are unsubstantiated. No testimony was offered, nor have any of the facts alleged in the motion or supplement been attested to in any way. Debtors have failed to explain whether Debtor Paul K. Miller's medical problems existed at the time of filing, or whether the problems had a post-petition onset. No new evidence of Debtors' income and expenses was presented which demonstrates an inability to submit a plan modification.

Based on the lack of evidence, the court cannot determine whether Debtors are entitled to a hardship discharge. In light of the procedural deficiency which exists, however, the court

will grant Debtors additional time to support their motion with properly substantiated evidence, *including affidavits and amended schedules signed under the penalty of perjury*. In the event Debtors feel that testimony will be worthwhile, Debtors may request an evidentiary hearing on the motion, but this is not required.

*II. Motion to vacate dismissal*

Also pending is Debtors' motion to vacate the dismissal order entered by the court on March 14, 2006. Upon review of the docket, the court notes that the motion for hardship discharge was pending at the time the trustee dismissed the case. In light of the pending motion for hardship discharge, the court finds that dismissal was improvidently entered. The court will grant Debtors' motion to vacate the dismissal order and will reinstate the case.

**CONCLUSION**

When a debtor files a motion for hardship discharge pursuant to 11 U.S.C. § 1328(b), Federal Rule of Bankruptcy Procedure 4007(d) sets forth the procedure to provide notice to creditors of their right to file a complaint objecting to discharge. In this case, creditors did not receive the required notice. The court finds that the deficiency must be cured before the court can rule on the motion for hardship discharge. The court will therefore enter an order providing appropriate notice to creditors.

Debtors have the burden of proving their eligibility for a hardship discharge. While the procedural deficiency identified above is cured, Debtors shall be granted additional time to submit evidence in support of the motion for hardship discharge. To the extent Debtors find it helpful, Debtors will also be permitted to file a memorandum of law and request an evidentiary hearing.

Debtors' case will be reinstated. Since Debtors' motion for hardship discharge preceded the dismissal, Debtors should have an opportunity for the court to determine the hardship discharge motion.

An appropriate order shall be entered forthwith.

/s/ Russ Kendig  
Russ Kendig  
United States Bankruptcy Judge

SEP 21 2006

**SERVICE LIST**

Paul K. Miller  
Shari L. Miller  
561 High St.  
Doylestown, OH 44230

Chris G. Manos  
2745 Nesbitt Ave.  
Akron, OH 4

Toby L. Rosen  
Charter One Bank Building, 4<sup>th</sup> Floor  
400 W. Tuscarawas St.  
Canton, OH 44702