

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of :
 :
CRAIG IRWIN MITCHELL and : Case No. 90-0895-C H
CYNTHIA SUSAN MITCHELL :
a/k/a Cynthia Suzan Richardson, : Chapter 7
 :
Debtors. :
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ORDER--MOTION TO WITHDRAW PETITION

On October 1, 1990, a hearing was held on Debtors' motion to withdraw petition. The following attorneys appeared on behalf of their respective clients: John F. Sprole for Debtors and John Waters as U.S. Trustee. At the conclusion of said hearing, the Court took the matter under advisement upon a briefing deadline. Briefs were timely filed and the Court considers the matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2). The Court, upon review of Debtors' motion, resistance thereto, arguments of counsel, and briefs submitted, now enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. On April 4, 1990, Debtors filed a voluntary Chapter 7 petition.

2. Within four weeks after filing of Debtors' petition, Debtors incurred approximately \$10,000.00 in medical bills beyond Debtors' insurance coverage.

3. As no complaint, waiver or deferment of discharge was filed, a discharge order was entered on July 11, 1990, pursuant to Fed.R.Bankr.P. 4000(c) and 11 U.S.C. §727(a).

4. On July 23, 1990, Debtors filed a motion to withdraw petition praying for an order nullifying their discharge and allowing them to withdraw their petition without prejudice to refiling another petition for Chapter 7 relief in order to discharge the post-petition medical expenses.

DISCUSSION

I. Prayer for Order Nullifying Discharge

11 U.S.C. §727(d) and (e) set forth the standards on revocation of discharge. 11 U.S.C. §727 provides in pertinent part:

- (d) On request of the trustee, a creditor, or the United States Trustee, and after notice and a hearing, the court shall revoke a discharge granted under 11 U.S.C. §727(a) if--
 - (1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;
 - (2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and

fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee; or

- (3) the debtor committed an act specified in 11 U.S.C. §727(a)(6).
- (e) The trustee, a creditor, or the United States Trustee may request a revocation of a discharge--
 - (1) under 11 U.S.C. §727(d)(1) within one year after such discharge is granted; or
 - (2) under 11 U.S.C. §727(d)(2) or (3) before the later of--
 - (A) one year after the granting of such discharge; and
 - (B) the date the case is closed.

The language of 11 U.S.C. §727(d) and (e) is unequivocal.

A bankruptcy court can revoke a discharge only after timely request by a trustee, a creditor or the United States Trustee.

A bankruptcy court cannot revoke a discharge on motion by the debtor. In re Leiter, 109 B.R. 922, 925 (Bankr. N.D. Ind. 1990). In re Morgan, 668 F.2d 261 (7th Cir. 1981) (Act Case); In re Tuan Tan Dinh, 90 B.R. 743 (Bankr. E.D. Pa. 1988); In re Fischer, 72 B.R. 111 (Bankr. D. Minn. 1987); In re Calabretta, 68 B.R. 861 (Bankr. D. Con. 1987); In re Gruber, 22 B.R. 768 (Bankr. N.D. Ohio 1982); In re McQuality, 5 B.R. 302 (Bankr. S.D. Ohio 1980).

11 U.S.C. §727(a)(10) and Fed.R.Bankr.P. 4004(c) provide

a means whereby the debtor may waive his discharge or defer the entry of an order granting a discharge. A debtor must waive his discharge before the discharge order is entered. Leiter, 109 B.R. at p. 926. Fed.R.Bankr.P. 4004(c).

In the instant case, the Debtors and their counsel had an ample opportunity to pursue a waiver or deferment of their discharge. As asserted by the Debtors, Debtors incurred the medical expenses within a four-week period subsequent to the filing of their Chapter 7 petition on April 4, 1990. The discharge order was not entered until July 11, 1990. While the result may be unfortunate, the finality of a discharge order must be given special status and consideration. As stated by the U.S. Bankruptcy Court, N. D. Indiana:

The debtor and his creditors must be diligent in examining the available legal options prior to discharge and if time does not permit the debtor has the remedy under Fed.R.Bankr.P. 4004(c) of obtaining an order on his motion to delay entry of the discharge order or to waive discharge under 11 U.S.C. §727(a)(10). It is thus incumbent on debtor's counsel to ensure that the debtor's interests are protected... There must be a certain minimum degree of finality to a bankruptcy proceeding and the discharge order which is the ultimate goal of the debtor must be accorded a higher degree of dignity than other orders during the course of the administration of a bankruptcy case. As a matter of basic public policy, discharge orders must not be set aside merely because of ignorance of the law or carelessness of the parties by having failed to timely effect a choice of remedy.

Leiter, 109 B.R. at p.925. Debtors' prayer for order nullifying discharge is denied.

II. Withdrawal of Petition

11 U.S.C. §707(a) provides that the court may dismiss a Chapter 7 case only after notice and a hearing and only for cause. Because Debtors' discharge cannot be set aside, no purpose would be served in dismissing this case. Dismissal would not affect the discharge order entered July 11, 1990. See 11 U.S.C. §349. Therefore, Debtors would not receive their desired discharge in a subsequently filed Chapter 7 case. See 11 U.S.C. §727(a)(8). The Court therefore denies Debtors' request for dismissal.

III. Miscellaneous Arguments by Debtors

Debtors assert various reasons why the Court should nullify their discharge and/or dismiss their case. The Court addresses each below.

Debtors ask the Court to use the 11 U.S.C. §105 equitable powers to revoke Debtors' discharge. Whatever equitable powers remain in the Bankruptcy Courts must and can only be exercised within the confines of the Bankruptcy Code. Northwest Bank Worthington v. Ahlers, 108 S.Ct. 963, 968-69 (1988). 11 U.S.C. §105 does not empower a bankruptcy court to create new substantive rights. In re N.W.F.X., Inc., 864 F.2d

593, 595 (8th Cir. 1989). In the instant case, the Court finds no statutory authority for Debtors' request to revoke discharge and refuses to create new rights through 11 U.S.C. §105.

Debtors' brief also contains a discussion of 11 U.S.C. §350(b), which concerns the authority granted to a court to reopen a case to accord relief to a debtor. 11 U.S.C. §350(b) is not applicable to the case at hand in that this proceeding has not been previously closed by the Court.

Debtors' also discuss Fed.R.Civ.P. 41. Fed.R.Bankr.P. 7041 makes Fed.R.Civ.P. 41 applicable to adversary proceedings, and Fed.R.Bankr.P. 9014 makes Fed.R.Bankr.P. 7041 applicable to contested matters. However, the Court finds that Fed.R.Civ.P. 41(a), which concerns voluntary dismissal of an action, does not provide authority for revocation of Debtors' discharge.

Finally, Debtors' refer to Fed.R.Bankr.P. 9024, which makes Fed.R.Civ.P. 60 applicable to bankruptcy proceedings. However, by Debtors' own admission, Fed.R.Bankr.P. 9024 and Fed.R.Civ.P. 60 do not address the issues before the Court and the Court cannot set aside a judgment under said rules unless the requirements of that rule are met. See Leiter, 109 B.R. at 925.

ORDER

IT IS ACCORDINGLY ORDERED that Debtors' motion to withdraw petition is denied.

Dated this 21st day of December, 1990.

Russell J. Hill
U.S. Bankruptcy Judge