

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of :
ROBERT D. WILSON, : Case No. 89-0805-C H
Debtor. : Chapter 7
----- :
WESLEY B. HUISINGA, :
Plaintiff, : Adv. No. 89-00098
v. :
ROBERT D. WILSON. :
Defendant. :

ORDER--COMPLAINT OBJECTING TO DEBTOR'S DISCHARGE

On September 11, 1989, a pretrial conference on the complaint objecting to Debtor's discharge was held. The following attorneys appeared on behalf of their respective clients: Terry L. Gibson as Assistant U.S. Trustee and Michael P. Mallaney for Debtor. In said pretrial conference, the parties agreed to submit the issues in this adversary proceeding by stipulation of fact and proposed findings of fact with conclusions of law. The stipulation of fact and proposed findings of fact with conclusions of law 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)(J). The Court, upon review of the stipulation of facts and proposed findings of fact with conclusions of law, now enters its findings and conclusions pursuant to

FINDINGS OF FACT

1. On February 6, 1985, Robert D. Wilson and Edna M. Wilson filed a voluntary petition under Chapter 11 of the Bankruptcy Code.

2. The Wilsons were at the time of filing engaged in the business of farming with their primary obligation owing to the Farmers Home Administration ("FmHA") and Peoples National Bank of Albia.

3. On April 15, 1985, the Court entered an order authorizing the Wilsons to borrow from the FmHA certain operating monies, granting to the FmHA a lien in their 1985 crops and a priority claim pursuant to 11 U.S.C. § 364(c)(1).

4. On August 21, 1985, the Wilsons filed a Disclosure Statement and Plan of Reorganization. On March 31, 1986, the Wilsons filed a First Amendment to Plan of Reorganization and First Amendment to Disclosure Statement.

5. The Disclosure Statement and Amendment thereto specifically provided that there were certain special risk factors peculiar to the case, particularly the Wilsons' ability to make payments as proposed under the Plan was subject to the risk that prices for livestock and grain would fall below the levels projected by the Wilsons.

6. The Plan and Amendment thereto provided in Article X, Effect of Confirmation and Discharge, ¶ 9.01, that the

Order of Confirmation would not operate as a discharge pursuant to 11 U.S.C. § 1141(d)(1) until thirty-six months after the Order of Confirmation.

7. The Plan, as amended, further provided in Article X, ¶ 10.2, that the Court retained jurisdiction to, among other things, determine and resolve any defaults under the Plan, to make such orders as were necessary to carry out the Plan, and to modify the Plan pursuant to 11 U.S.C. § 1127(b).

8. The Plan and Amendment thereto further provided that all claims were to be filed within five days of the confirmation date or be forever barred.

9. The Plan as amended further provided that the Class IX unsecured creditors were to receive a pro rata share of proceeds realized from the liquidation of ten (10) acres which was to be paid no later than December 1, 1986, and a pro rata share of a \$5,000.00 payment which was to be made by the Wilsons on December 1, 1988. Article VII of Debtors' Plan, as amended, provided that the source of funds from which payments were to be made by the Wilsons under their confirmed Plan included the liquidation of the ten (10) acre parcel, certain monies which were to be advanced by FmHA, and proceeds realized by the Wilsons from their continued farming operation.

10. On April 8, 1986, the Court entered an order approving the Disclosure Statement and Amendment thereto and fixing a date for filing Acceptances or Rejections of the Plan

and to file complaints objecting to discharge and/or dischargeability.

11. On May 5, 1986, the Court entered an Order Confirming the Plan. The Order of Confirmation specifically provided that the Wilsons would not receive a discharge until thirty-six months after the entry of the Order of Confirmation.

12. The purpose of this provision in the Plan, and as set forth in the Order of Confirmation, was to afford the Wilsons the opportunity to seek further protection of the Court in the event that the farm economy did not remain at the level as projected for payments in the Plan.

13. Pursuant to the Plan of Reorganization as amended, the Wilsons refinanced their obligation to the FmHA and borrowed the sum of One Hundred Three Thousand Dollars (\$103,000.00) from the FmHA to pay the claim of the Peoples National Bank of Albia, Iowa.

14. On August 28, 1987, as amended October 1, 1987, the Wilsons filed a Report of Distribution of Payment to unsecured creditors under the Plan. The Wilsons' Report concerns the Wilsons' proposed distribution of proceeds from the liquidation of ten acres which was to be paid to the Class 9 unsecured claimants no later than December 1, 1986, pursuant to the Wilsons' confirmed Chapter 11 Plan as amended.

15. The Wilsons failed to timely tender the December 1, 1986, payment owing to the Class IX unsecured creditors or to

make the \$5,000.00 payment owing to said creditors on December 1, 1988, as required by the Wilsons' Plan as amended.

16. The Wilsons' failure to make the payments to the Class IX unsecured creditors as required by the Wilsons' confirmed Chapter 11 Plan constituted a default under the Plan as set forth in Article VII, ¶ 7.01(A) of the Plan.

17. On January 14, 1988, the Court entered an Order and Final Decree closing the Chapter 11 case.

18. At no time during the eighteen (18) month period, from May of 1986 when the Wilsons' Plan was confirmed by the Court until January of 1988 when the Court entered its order closing the Wilsons' Chapter 11 case did the Wilsons seek to modify their confirmed Plan as provided for by 11 U.S.C. § 1127(b), nor did the Wilsons seek to convert their Chapter 11 proceeding to a Chapter 7 proceeding as provided for by 11 U.S.C. § 1112(b). Since January 14, 1988, Robert D. Wilson has not sought to reopen the Chapter 11 bankruptcy proceeding so as to modify the confirmed Chapter 11 Plan or the Order of Confirmation as it relates to the entry of a discharge therein, or otherwise seek to convert his prior Chapter 11 proceeding to a proceeding under Chapter 7 of the Bankruptcy Code.

19. Subsequent to the confirmation of the Plan, Edna Wilson passed away and Robert Wilson was not successful in his farming operations.

20. As a result of the foregoing, in January of 1989, he

entered into an agreement with the FmHA to voluntarily sign over to the FmHA all of the property used to secure his loan.

This included all of his machinery, equipment, livestock, and real estate with the proceeds being applied to the obligation leaving a balance of approximately \$70,000.00.

21. A portion of the assets, the machinery and equipment were sold to his son and wife who assumed the obligation on the same with the FmHA and the real estate was deeded to the FmHA for a credit on the loans of \$113,000.00.

22. Mr. Wilson would testify that he voluntarily deeded the assets to the FmHA after recommendation by an FmHA representative that the remainder of the obligation be discharged in a Chapter 7 bankruptcy proceeding.

23. On April 13, 1989, Wilson filed a voluntary petition under Chapter 7 of the Bankruptcy Code.

24. FmHA, Agri Fluids, South Ottumwa Savings Bank, and the Federal Deposit Insurance Corporation (successor to Peoples National Bank of Albia), creditors in the Chapter 7 proceeding, were also creditors in the Chapter 11 proceeding.

John Deere and Alex and Robert Osborne, creditors in the Chapter 7 proceeding, were not creditors in the Chapter 11 proceeding.

25. On July 11, 1989, the United States Trustee filed the complaint herein alleging that the Debtor's discharge in the Chapter 7 proceeding was barred by virtue of 11 U.S.C. § 727(a)(8). Specifically, the complaint asserts that the Order

of Confirmation granting the Debtor a discharge in the Chapter 11 proceeding effective on May 5, 1989, is a bar to the Debtor receiving a discharge in the Debtor's subsequent Chapter 7 proceeding.

26. The Debtor filed an Answer thereto denying the United States Trustee's legal proposition and asserting a counterclaim alleging and requesting the Court to enter a declaratory ruling that the filing of the Chapter 7 petition modified the Chapter 11 Order of Confirmation or in the alternative that the Chapter 7 petition modified the Chapter 11 Plan of Reorganization so as not to bar an entry of discharge in the Chapter 7 petition proceeding.

DISCUSSION

An action brought under 11 U.S.C. § 727(a) objecting to a debtor's discharge is the most serious non-criminal action a party can bring against a debtor in bankruptcy. In re Schermer, 59 B.R. 924 (Bankr. W.D. Ky. 1986). Objections to discharge are to be construed liberally in favor of debtors and strictly against the objecting party. In re Schmit, 71 B.R. 587, 590 (Bankr. D. Minn. 1987); In re Usoskin, 56 B.R. 805, 813 (Bankr. E.D.N.Y. 1985). However, the debtor's right to receive a discharge of indebtedness in a bankruptcy proceeding is not an unqualified right, but depends upon the compliance by the debtor with the requirements imposed by the statute authorizing the discharge. Holmes v. Davidson, 84

F.2d 111 (9th Cir. 1936).

Plaintiff has objected to Debtor's discharge in Debtor's Chapter 7 case, asserting that the discharge is barred by 11 U.S.C. § 727(a)(8). 11 U.S.C. § 727(a)(8) provides:
The court shall grant the debtor a discharge, unless--

(8) the debtor has been granted a discharge under this section, under 11 U.S.C. § 1141, or under §§ 14, 371, or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition.

If a Chapter 7 debtor has been granted a discharge under 11 U.S.C. § 1141 in a case commenced within six years before the date of the filing of the Chapter 7 case, the Chapter 7 debtor must be denied a discharge pursuant to 11 U.S.C. § 727(a)(8).

In re Bishop, 74 B.R. 677, 679 (Bankr. M.D. Ga. 1987); In re Smith, 95 B.R. 468, 469 (Bankr. W.D. Ky. 1988).

In the instant case, there is no dispute that the Debtor's Chapter 7 case filed April 13, 1989, was filed within six years of the February 6, 1985 commencement of Debtor's prior Chapter 11 case. However, Debtor asserts that 11 U.S.C. § 727(a)(8) is not a bar to Debtor's discharge in this Chapter 7 proceeding because he filed his Chapter 7 petition on April 13, 1989, prior to the May 5, 1989 Chapter 11 discharge effective date set forth in the May 5, 1986 order confirming the Chapter 11 Plan. As support for this assertion, Debtor cites caselaw for the proposition that a debtor's rights and/or liabilities are fixed as of the date of the filing of

the petition. However, this case law is not applicable to the Bankruptcy Court's grant or denial of discharge in a Chapter 7 case. As an example, the Court notes that grounds for denial of a discharge pursuant to 11 U.S.C. § 727(a)(4) and 11 U.S.C. § 727(a)(6) involve post-petition conduct by the debtor, thus making it difficult for the Court to treat the petition date as the operative date in its determination of whether to grant or deny a discharge under these subsections. Debtor offers no further support for his assertion. Therefore because Debtor "has been granted a discharge" under 11 U.S.C. § 1141 effective May 5, 1989, in a case commenced within six years before the date of the filing of the Chapter 7 petition, the Court must deny the discharge under 11 U.S.C. § 727(a)(8). See Bishop, 74 B.R. at 679.

In the alternative, Defendant asks the Court to exercise its equitable powers and declare the filing of the Chapter 7 petition a modification of the Chapter 11 Plan of Reorganization and Order of Confirmation so as not to be a bar to the entry of a discharge in this Chapter 7 proceeding. A fundamental principle of equity jurisprudence is that equity follows the law. In re Central Steel Tube Company, Case No. 83-856-D, Adv. No. 87-213 (Bankr. S.D. Iowa June 29, 1988), citing In re Shoreline Concrete Company, Inc., 831 F.2d 903, 905 (9th Cir. 1987). Although 11 U.S.C. § 105 is phrased in broad, general terms, these broad powers of a bankruptcy court are not without limits, and must be applied consistently with

the Code and Rules. Johnson v. First Nat. Bank of Montevideo, Minn., 719 F.2d 270, 273 (8th Cir. 1983), cert. den. 465 U.S. 1012 (1984).

11 U.S.C. § 1127 sets forth the requirements for modification of a Chapter 11 Plan. Modification of a confirmed Chapter 11 Plan pursuant to 11 U.S.C. § 1127 requires the filing of a motion and notice to those creditors affected by such proposed modification. See Fed.R.Bankr.P. 2002(a)(C) and 9014. Debtor has filed no such motion. The Court is constrained in its use of its equitable powers to circumvent the express provisions of 11 U.S.C. § 1127 and treat the filing of the Chapter 7 petition as a modification of the Chapter 11 Plan and Order of Confirmation so as not to bar the entry of the discharge in Debtor's Chapter 7 proceeding.

Debtor received the benefit of a discharge in his prior Chapter 11 proceeding (albeit a delayed benefit by the Debtor's own choice) and is not eligible for a subsequent discharge in a Chapter 7 case filed within six years of the commencement of the prior Chapter 11 case.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes that the Plaintiff has met its burden of proof in objecting to the Debtor's discharge under 11 U.S.C. § 727(a)(8), and further that a declaratory ruling that the

filing of the Chapter 7 serves as a modification of the Order of Confirmation, as prayed in the counterclaim, should not be entered.

IT IS ACCORDINGLY ORDERED that the Plaintiff, Wesley B. Huisinga, United States Trustee, shall have judgment against the Defendant, Robert D. Wilson, denying Defendant a discharge of his indebtedness under 11 U.S.C. Chapter 7.

Further, Plaintiff shall have judgment against Defendant dismissing the counterclaim.

Dated this 11th day of April, 1991.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE

United States District Court

SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ROBERT D. WILSON,
Plaintiff,

JUDGMENT IN A CIVIL CASE

vs.

WESLEY B. HUISINGA,

Defendants.

CASE NUMBER: 4:91-cv-80280
Bk # 89-805
Adv. # 89-0098

- Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the decision of the bankruptcy judge denying discharge of the debtor Robert D. Wilson is affirmed.

Aug. 28, 1991 _____
Date

JAMES R. ROSENBAUM _____
Clerk

I. Hibbs _____
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ROBERT D. WILSON,)	
Appellant,)	NO. 4-91-CV-80280
vs.)	APPEAL DECISION
WESLEY B. HUISINGA,)	AFFIRMING DENIAL
Appellee.)	OF DEBTOR'S DISCHARGE

The appellant Robert D. Wilson, debtor in the underlying bankruptcy proceeding, appeals from the order of United States Bankruptcy Judge Russell J. Hill denying his request to be discharged from indebtedness under Title 11 United States Code, chapter 7. Pursuant to this court's order of May 23, 1991, the parties have filed briefs and submitted the issue for final decision without oral argument. On the record made before the bankruptcy court and the briefs of the parties, the court concludes that the bankruptcy judge correctly denied discharge of the debtor's indebtedness. The decision of the bankruptcy judge dated April 11, 1991, is affirmed.

The facts are not in dispute; they are fully set forth in the decision of the bankruptcy judge. The debtor and his wife Edna M. Wilson filed a voluntary petition under chapter 11 of the Bankruptcy Code on February 6, 1985. Their plan of reorganization was approved. The order of confirmation provided that there would be no discharge pursuant to section 114(d)(1) until thirty-six

months after the order of confirmation. The discharge pursuant to that chapter 11 petition was entered on May 5, 1989. In the meantime, however, the debtor on April 13, 1989, filed a voluntary chapter 7 bankruptcy petition. The United States Trustee promptly filed his complaint alleging that the debtor's discharge was barred by 11 United States Code section 727(a)(8) that lists specific grounds on which a discharge may be denied. The bankruptcy court denied discharge on the basis of subsection 8:

The court shall grant the debtor discharge, unless --

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition

The debtor argued before the bankruptcy judge and reargues here that the six-year bar does not apply because the discharge in questions took effect after the second petition was filed. He contends the date of filing the second petition is controlling; and on that date he had not previously "been granted a discharge." While that argument has surface appeal, it does not withstand analysis.

First, section 727(a)(8) does not explicitly state that it applies only to discharges granted before a second bankruptcy petition has been filed. The words of limitation require only that the discharge have been granted in "a case commenced within six years before the date of the filing of the petition."

Moreover, the debtor's position is inconsistent with the plain public policy of this provision of the Bankruptcy Code --

discouraging repetitive use of the bankruptcy to cancel debts. Were debtor's argument accepted, a person could continually file new cases just before the discharge in an earlier case were granted. This plainly would constitute abuse of the bankruptcy process.

The bankrupt argues that the date of filing a bankruptcy petition is controlling for many purposes under the Bankruptcy Code. But the cases cited by the bankrupt are inapposite. In re Marshall, 74 B.R. 185 (N.D.N.Y 1987), for example, did not involve a second petition filed before entry of discharge from an earlier proceeding. The dictum there concerning measurement of the six-year period is not pertinent here.

Legislative bodies are presumed to have intended a reasonable, not an absurd result. Congress certainly did not intend the result the debtor here requests. He failed to persuade the bankruptcy court, and has not persuaded this court, that he should be allowed to avoid the six-year limit on filing a new bankruptcy petition by filing his new petition shortly before the earlier proceeding has resulted in a discharge.

The decision of the bankruptcy judge denying discharge of the debtor Robert D. Wilson is affirmed.

IT IS SO ORDERD.

Dated this 28th day of August, 1991.

CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT