UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of
THOMAS WAYNE NOBLE, Jr.,

Debtor.

Case No. 86-860-D

JOHN W. ACKERMAN,
SUSAN J. NOBLE,

Plaintiffs,

v.

THOMAS WAYNE NOBLE, Jr.

Defendant.

Adv.Pro.No. 86-0120

Chapter 7

ORDER

On November 13, 1987 a rescheduled pretrial conference on complaint to determine dischargeability of debt was held before this court in Davenport, Iowa. Ronald A. May appeared on behalf of the defendant. Neither the plaintiffs nor the plaintiffs' attorney appeared. The attorney for the defendant did submit a pretrial order which indicated that the motion to dismiss filed on July 17, 1986 should be dispositive of the proceeding. The court continued the pretrial conference pending a determination of the motion to dismiss. Now after a review of the entire court file the court finds that dismissal for want of prosecution is warranted.

The history of this case mandates its own conclusion and serves as an example to practitioners before this court.

The debtor filed a voluntary petition for relief under Chapter 7 on March 28, 1986. Attorney Ronald A. May certified that he was the attorney for the debtor. On May 28, 1986 the plaintiffs, by their attorney John W. Ackerman, filed a complaint to determine discharqeability of debts. The complaint does not delineate the subsections of 11 U.S.C. section 523(a) upon which the plaintiffs rely. Rather the complaint alleges that the debts arise out of a decree of dissolution of marriage and that the defendant committed a fraudulent act. The bankruptcy cover sheet accompanying the complaint indicates that the nature of the suit falls within the provisions of 523(a)(2) and describes the cause of action as "Defendant (Debtor) forged wife's name to federal and state income tax refund checks and refused to turn over the assets contrary to order of court".

On June 4, 1986 the defendant by his attorney, Ronald A. May, filed an answer to the plaintiffs' complaint. A summons and notice of pretrial conference was filed on June 12, 1986 by this court's predecessor, Richard Staqeman, setting a pretrial conference for July 31, 1986 at 1:00 p.m. in Davenport, Iowa.

On July 17, 1986 an entry of appearance and request for notice was filed by attorney Thomas J. Yeggy on behalf of the debtor-defendant. A motion to dismiss complaint was filed on the same date by Mr. Yeggy on the defendant's behalf.

The pretrial conference was held on July 31, 1986 before the Honorable Richard Stageman. The court's minute order indicates that only Mr. Yeggy appeared on behalf of the defendant. The court's note states that a pretrial order is to be submitted and the matter would then be set for trial. On October 30, 1986 the court file reflects a phone call to the plaintiff's attorney, Mr. Ackerman, with reference to a pretrial order. Nothing further was received.

On December 19, 1986, shortly after the undersigned came to the bench, an order for hearing and notice scheduling the motion to dismiss filed on behalf of the defendant was sent to parties in interest. This court's minute order of January 15, 1987 indicated that the matter had been settled and that attorney John W. Ackerman was to submit a dismissal within ten days. Thereafter, the court file reflects two phone calls to Mr. Ackerman's office with reference to the dismissal.

Again on August 20, 1987 counsel for both the plaintiffs and defendant were contacted by the bankruptcy clerk's office regarding the status of the case. Only attorney Thomas Yeggy responded on behalf of the debtor-defendant. Thereafter, on October 5, 1987 Mr. Yeggy made application to withdraw as attorney for the defendant and an order granting the application was entered by this court on October 19, 1987 .

Finally on October 26, 1987 this court entered an order and notice setting a rescheduled pretrial conference on the plaintiffs' complaint for November 13, 1987 at 10:00 o'clock a.m. in Davenport, Iowa. The notice gave counsel the opportunity to submit a form scheduling order in lieu of attendance at the conference. No pretrial order was submitted prior to the hearing and, as noted at the outset, only attorney Ronald A. May appeared on behalf of the defendant.

This case has languished for over 20 months on the court's already crowded docket. In that time counsel for the plaintiffs has not appeared at a single court hearing. To add to the confusion the defendant has been represented by two different attorneys. The first attorney's answer to the complaint was followed by the second attorney's motion to dismiss. Moreover, the motion to dismiss is not, as was argued by the first attorney after replacing the second attorney, dispositive of the proceedings. The motion to dismiss asserts that the adversary complaint is not a core proceeding. However, proceedings to determine the dischargeability of particular debts are designated as core proceedings by 28 U.S.C. section 157(b)(2)(I). The motion to dismiss also seems to assert that the complaint fails to state a claim upon which relief can be granted by virtue of the complaint's failure to identify a particular subsection of 11 U.S.C. section 523(a). While the court agrees that the complaint is not an example of clarity, a motion to dismiss on this ground is an extreme remedy in view of the

liberal federal pleading policy. See 5 C. Wright & A. Miller, Federal Practice and Procedure, § 1357 at pp. 593-594 (1969).

Given the history of this proceeding, however, the court finds that dismissal for want of prosecution is warranted. Bankruptcy Rule 7041 provides that Federal Rule of Civil Procedure 41 applies in adversary proceedings. Rule 41(b) provides that "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action." Although rule 41(b) refers to a dismissal on the defendant's motion, a court has inherent power to dismiss a case for want of prosecution. See 9 C. Wright & A. Miller, Federal Practice and Procedure, § 2370 at pp. 199-217 (1971) citing Link v. Wabash Railroad Co., 370 U.S. 626, 630-31 (1962). Dismissal for failure of the plaintiff to prosecute is discretionary with the court upon consideration of all the circumstances.

Here, the only apparent activity of the plaintiffs was the filing of a complaint that fails even to identify a particular code provision in support of a claim of nondischargeability. Pretrial conferences were not attended by counsel nor the plaintiffs individually. Phone calls urging compliance with court directives were unanswered or ignored. Forecasted settlements were never carried through. No excuse or even the courtesy of an explanation was ever

tendered by plaintiffs or their counsel for this inaction. This court will not tolerate such conduct.

THEREFORE, based on the foregoing analysis, the court herebv finds that the above complaint filed on May 28, 1986 is dismissed with prejudice. This prohibition against refiling extends to any and all subsections of 11 U.S.C. section 523(a), not merely to the subsections barred by time as delineated in Bankruptcy Rule 4007(c).

Signed and filed this 9th day of February, 1988.

LEE M. JACKWIG

CHIEF U.S. BANKRUPTCY JUDGE