

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
UNPUBLISHED OPINION

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In re) Bankruptcy Case No. 83C-03017
)
CURTIS P. GARFIELD and)
DIANNE E. GARFIELD,)
)
Debtors.) MEMORANDUM OPINION AND ORDER

APPEARANCES

Gregory M. Warner of Aldrich, Nelson, Weight & Esplin, Provo, Utah, attorneys for debtors; and Joseph P. McCarthy, Assistant Attorney General for the State of Utah, for the Loan Servicing Corporation of Utah.

CASE SUMMARY

This matter comes before the Court on the debtors' request for a ruling on an uncalendared motion to discharge student loans in a Chapter 7 case. For the reasons set forth below, the motion must be denied. In reaching this conclusion, the Court does not reach the substantive merits of the motion, but denies it on procedural grounds.

JURISDICTION

The Court determines that it has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

FACTS

On November 14, 1983, the debtors, Curtis P. and Dianne E. Garfield, filed a joint petition for relief under Chapter 7 of the Bankruptcy Code. They received a discharge on February 13, 1984. On February 23, 1984, the debtors submitted a verified motion requesting that the Court discharge Dianne Garfield's individual debt arising from student loans she had acquired between April, 1981 and September, 1982. The motion contained factual averments concerning her health and employability, which sought to bring the debt within the "undue hardship" exception of Section 523(a)(8)(B).¹

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The pertinent portions of this section are as follows:

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt . . .

(8) for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a non-profit institution of higher education, unless . . .

Loan Servicing Corporation of Utah filed a response to the motion through the Utah Attorney General. The response stated that the creditor had no information leading it to believe that any of the facts stated in the motion were false "as to debtor's present financial and medical conditions."² The response further stated that the parties had agreed that the debtors would file with the Court a letter from Dianne Garfield's physician and that the parties would allow the Court to determine dischargeability of the student loans without further proceedings based on the letter and the verified motion.

The debtors filed copies of two letters and one lab report describing Dianne Garfield's medical condition,³ and formally

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

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The Attorney General's response mentions only a single debtor, Dianne Garfield. The Court assumes without deciding, however, that in the event it were to examine this matter on the merits, it would consider all relevant facts tending to prove undue hardship, including the present and prospective earning power and medical conditions of both spouses. The Attorney General's admission as to the present condition of Dianne Garfield alone would not necessarily establish that the debtors had sufficiently carried their burden. Similarly, the bare assertion that her spouse is unemployable, even if such allegations were unopposed, might not suffice without more to establish undue hardship.

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The Court notes with concern that the letters and lab report were not verified affirmations or affidavits. If it were reaching the substantive issues of the debtors' motion, the Court might question the probative sufficiency of these items.

requested the Court to rule on their uncalendared motion pursuant to Local Rule 5(i).⁴

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Local Rule 5(i) provides:

(i) Disposition of Uncalendared Motions.

The court will not rule on any motion in a case or civil proceeding which has not been set for a hearing, other than ex parte and stipulated motions, unless a party first files with the court and serves upon all parties entitled to notice of the motion a pleading entitled REQUEST FOR RULING ON UNCALENDARED MOTION. Such a request shall not be filed until after the time when all responsive pleadings have been filed or the time for filing responses and applicable notice periods shall have expired. A request shall be captioned properly and shall contain the following information:

(1) the title of the motion for which a ruling is requested,

(2) the date the motion was filed with the court,

(3) a statement that no hearing is required and that all applicable notice and response periods have expired or that all responsive pleadings have been filed, and

(4) a request for a ruling on the motion.

Two copies of requests shall be filed with the court. If no objections are filed within 10 days from the date of the filing of a request, the court will then consider the motion. If the motion is not opposed and if the movant is entitled to the relief requested, the motion will be granted.

DISCUSSION

Part VII of the Bankruptcy Rules is entitled, "Adversary Proceedings." Bankruptcy Rule 7001 lists several categories of adversary proceedings. The sixth category includes proceedings "to determine the dischargeability of a debt." The debtors' motion requests the Court to determine the dischargeability of a debt, namely, Dianne Garfield's student loans; the motion, therefore, is an attempt to initiate an adversary proceeding.

Rule 7003 governs the commencement of adversary proceedings. It reads: "Rule 3 F. R. Civ. P. applies in adversary proceedings." Rule 3 of the Federal Rules of Civil Procedure is entitled, "Commencement of Action" and provides: "A civil action is commenced by filing a complaint with the court." These rules clearly require that an adversary proceeding be commenced by a complaint. The rules contain no language from which the Court can infer that another form of pleading, such as a motion, might suffice. In order to make such an inference, the Court would have to ignore substantial portions of Part VII of the Bankruptcy Rules.

A brief perusal of Rule 7001 et seq. alerts one that there is an entire procedural scheme setting adversary proceedings apart from motion practice. This Court discusses the practical differences and the underlying policies of these two procedural

formats in In re Riding, ____ B.R. ____ (Bky. D. Utah 1984). In brief, an adversary proceeding generally involves more complex issues better suited to a proceeding apart from the main bankruptcy case. More complete relief, appeal as of right, trial by jury, the possibility of pleading affirmative defenses or counterclaims, motions for summary judgment, and an opportunity for more thorough discovery and trial preparation are among the advantages in an adversary proceeding usually not available in motion practice.

The Court recognizes that this ruling may put the debtors to the added expense of commencing an adversary proceeding, and the Court encourages economy. The parties should note, however, that Chapter 7 debtors may file complaints in adversary proceedings without a fee.

The parties should also observe that whatever economic or legal advantage they hoped to gain by bringing this matter as an uncalendared motion to be decided without a hearing under Local Rule 5(i), is largely available in an adversary proceeding as well. Adversary proceedings, like other civil actions, do not always end in trial. Settlements, stipulations, motions for summary judgment and other less expensive and abbreviated procedures are commonly invoked. In fact, the debtors could even submit a motion for summary judgment in regard to a previously

filed complaint and request that it be decided without a hearing under Local Rule 5(i).

Due to its present improper procedural posture, the debtors' motion for discharge of student loans is denied.

IT IS SO ORDERED.

DATED this 8 day of Dec. 1984.

BY THE COURT:



GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE

Rule 5003(c) Designation

- The Clerk is directed to enter a copy of this order into the Court's Order Book.
 Entry into Order Book not necessary.