

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In Re:

CHAPTER

11

Laxman Sundae,
Debtor.

Bky. 3-90-2945

Pam Wichern,
Plaintiff,
v.

ADV. NO. 3-92-199

ORDER

Laxman Sundae,
Defendant.

This matter was heard on February 4, 1993, on Plaintiff's motion for summary judgment that Defendant is not entitled to any discharge as a result of confirmation of a creditors' plan in the Debtor's case. Appearances are as noted in the record. Based on the moving papers, arguments of counsel, and upon all the records and files herein, the Court being fully advised in the matter, now makes this ORDER pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I.

Defendant filed for relief under 11 U.S.C. Chapter 11 on July 2, 1990. Prior to filing, and during pendency of the case, he was in the residential real estate investment and landlord business. On April 30, 1992, Plaintiff and certain other creditors filed a plan of reorganization which provides for the Debtor to surrender all of his real property to a Court appointed trustee to be managed for the benefit of the Debtor's creditors. The plan is a 100% payment plan.

Article V(g) of the plan provides that "Debtor shall not be entitled to a discharge of any of his obligations unless the Bankruptcy Court decides that he is entitled to a discharge notwithstanding this provision". The plan was confirmed on July 30, 1992. Three days earlier, this adversary proceeding was commenced by Plaintiff seeking judgment that "Debtor... be denied the discharge on the grounds set forth in 11 U.S.C. Section 727(a)(2), (3), (4), and (5)." Plaintiff has now moved for summary judgment that, pursuant to 11 U.S.C. Section 1141(d)(1), the Debtor's debts were not discharged in his bankruptcy case because Article V(g) of the confirmed plan provided otherwise.

Defendant responds to the motion with the assertion that he is

entitled to summary judgment. 11 U.S.C. Section 727 discharge exceptions do not apply, he argues, and Article V(g) of the plan should not be administered to "deny the Debtor his discharge by reason of the affirmative votes of creditors".

II.

11 U.S.C. Section 1141(d) provides:

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the plan-

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not-

(i) a proof of claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if-

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

Plaintiff asserts that Article V(g) of the plan satisfies the exception to discharge in Section 1141(d)(1), and entitles her to summary judgment. The Article provides that "Debtor is not entitled to a discharge...unless the Bankruptcy Court decides that he is entitled to a discharge...." While the Court has made no decision on the matter, certainly the Defendant seeks his discharge in this proceeding. Apparently, Plaintiff's argument rests on the Debtor is entitled to a discharge because of the statement in Article V(g) that "Debtor is not entitled to a discharge". The

language, then, "unless the Bankruptcy Court decides that he is entitled to a discharge" is, presumably, superfluous. The argument is specious. A more reasonable interpretation of Article V(g), is that it would result in denial of discharge upon judgment for cause in this adversary proceeding, rather than from arbitrary vote of Debtor's creditors.(FN1)

Defendant insists that he is entitled to his discharge as a matter of law. First, he argues, the plan cannot constitutionally deprive Debtor of his "right" to discharge on the arbitrary vote of hostile creditors pursuant to a creditor plan that strips him of his property.(FN2) Second, Defendant claims, 11 U.S.C. Section 727 exceptions to discharge cannot be applied against him because of 11 U.S.C. Section 1141(d)(3)(B). Apparently, Debtor continues to engage in business. The arguments are specious.

Denial of discharge resulting from Article V(g) of the plan would be pursuant to judgment based on cause. Such a plan

(FN1) Debtor is not popular among his creditors, who apparently believe that he has lied to, cheated and defrauded them prepetition. They also think that Debtor engaged in similar reprehensible conduct with respect to the Court and the bankruptcy case. That accounts for inclusion in the plan of Article V(g). The Court, seeking to avoid having the confirmation hearing turn into a protracted trial on the conduct of Laxman Sundae, severed the issue by directing that the matter be determined in the context of this adversary proceeding, which was pending at the time of the confirmation hearing.

(FN2) The plan provides for Debtor's real estate to be controlled, managed, and ultimately disposed of by a trustee in full payment of creditors.

provision can operate to prevent discharge under 11 U.S.C. Section 1141(d)(1). Conduct of a debtor of the type that would bar discharge under 11 U.S.C. Section 727 can constitute cause for denial of discharge under 11 U.S.C. Section 1141(d)(1), pursuant to a plan that provides for denial of discharge for cause.

III.

The question of denial of discharge pursuant to Article V(g) of the plan is only the threshold issue to the ultimate dispute here. The obligations of Defendant Debtor are not discharged, regardless of Article V(g). Creditors obtained confirmation of a 100% payment plan. A confirmed plan binds a debtor and his creditors, except with respect to limited situations. See: 11 U.S.C. Sections 1141(a) and (d)(1). Accordingly, Debtor remains liable for 100% of his obligations.(FN3)

Plaintiff apparently believes that a separate denial of discharge under Article V(g) of the plan would allow creditors to pursue Debtor for payment outside the confirmed plan even absent default under the plan. The basis for this belief has not been articulated. Article V(g) does not provide creditors with such a right. Neither, it seems, does the Code. Laxman Sundae is the Debtor, he is not a prepetition guarantor. Again, see: 11 U.S.C. Section 1141(a).

IV.

(FN3) Indeed, it is difficult to identify a justiciable controversy in this adversary proceeding in light of confirmation of the creditors' 100% plan.

In any event, Plaintiff's motion for summary judgment that Defendant has been denied a discharge by operation of Article V(g) of the creditors' confirmed plan in the bankruptcy case should be denied.

Accordingly, it is hereby ordered, the motion is in all respects denied.

Dated: February 5, 1993.

By The Court:

DENNIS. D. O'BRIEN

U.S. BANKRUPTCY JUDGE