

United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Charles K. Smilgys

Bankruptcy No. 98 B 11404

Date of Issuance: June 21, 1999

Judge: John H. Squires

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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE:)	
CHARLES K. SMILGYS,)	Chapter 13
)	Bankruptcy No. 98 B 11404
Debtor.)	Judge John H. Squires

MEMORANDUM OPINION

This matter comes before the Court on the objection of Charles K. Smilgys (the “Debtor”) to the claims filed by the Illinois Department of Revenue (“IDOR”) and on the motions of the Chapter 13 Standing Trustee, Jack McCullough (the “Trustee”), and IDOR to dismiss the bankruptcy case pursuant to 11 U.S.C. § 1307(c). For the reasons set forth herein, the Court grants the motions of the Trustee and IDOR and dismisses the bankruptcy case under 11 U.S.C. § 1307(c)(5). The dismissal of the bankruptcy case moots the Debtor’s objection to IDOR’s claims.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and General Rule 2.33(A) of the United States District Court for the Northern District of Illinois. This matter constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B) and (O).

II. FACTS AND BACKGROUND

_____The Debtor filed a Chapter 13 petition on April 14, 1998. The Debtor listed two creditors on his Schedules D and E: Maple Park Mortgage Co. (“Maple Mortgage”) and IDOR. See Exhibits F and G to IDOR’s Motion to Dismiss. IDOR’s unsecured priority

claim was scheduled as disputed and in an “unknown” amount, with the following statement: “Debtor is not responsible for tax in that he was not a responsible officer and he did not participate in the nonpayment.” See Exhibit G to IDOR’s Motion to Dismiss. Maple Mortgage’s secured claim was listed in the sum of \$110,000.00.¹ See Exhibit F to IDOR’s Motion to Dismiss. Maple Mortgage has not filed an arrearage claim, but Dovenmuehle Mortgage, Inc. (“Dovenmuehle”) has filed a secured claim for a principal balance of \$115,634.03. IDOR filed three claims in this case: (1) sales tax claim (“ROT/UT”) in the sum of \$64,309.93; (2) withholding tax claim (“WIT”) in the amount of \$71,982.30; and (3) a personal income tax claim (“IL-1040”) in the amount of \$1,213.70. See Exhibits A, B and C to IDOR’s Motion to Dismiss. The ROT/UT claim is based upon a Notice of Liability (“NPL”) No. 6800, which was issued against the Debtor for his alleged willful failure to pay sales taxes as a responsible officer of an entity known as McKee Door, Inc. (“McKee”). See Exhibit D to IDOR’s Motion to Dismiss. The WIT claim is based upon a Notice of Deficiency (“NOD”) No. 3227, which was issued against the Debtor for his alleged failure to pay withholding taxes as a responsible officer of McKee. See Exhibit E to IDOR’s Motion to Dismiss. The IL-1040 claim is for the Debtor’s personal income tax liability arising for the taxable year 1991. The issuance of NPL No. 6800 and NOD No. 3227 gave the Debtor notice of the proposed assessments of responsible officer liability and of his rights to challenge the liability under 35 ILCS 735/3-7. The Debtor filed the instant case prior to

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On his Schedule G, the Debtor scheduled an obligation to GMAC on a car lease. No distribution, however, will be made by the Trustee to GMAC. Pursuant to the Debtor’s Schedule J, the Debtor seeks to pay directly to GMAC the lease payment as an ongoing monthly expense.

the expiration of the protest period provided for under the applicable Illinois statute.

The Debtor filed a plan of reorganization proposing to pay to the Trustee \$250.00 per month for up to sixty months to satisfy priority secured and general unsecured claims for an estimated 100% distribution on their claims. The claim of Maple Mortgage, however, would not be paid by the Trustee through the plan. The plan provided that current mortgage payments to Maple Mortgage were to be directly disbursed by the Debtor and his wife. On September 4, 1998, the Court denied confirmation of the Debtor's plan.

The Trustee seeks to dismiss the bankruptcy case under 11 U.S.C. § 1307(c)(5) because confirmation of the Debtor's plan was denied. IDOR filed its motion to dismiss the case on the basis that it allegedly is the only creditor in this bankruptcy case and that the Debtor has filed the case for the sole purpose of disputing his tax debt owed to IDOR. IDOR contends that the filing of this case constitutes improper forum shopping, bad faith and cause for dismissal pursuant to § 1307(c).

On October 6, 1998, the Debtor filed an objection to the claims of IDOR. The Debtor contends that he does not meet the requirements under applicable law for the ROT/UT claim, and therefore, should not be liable as a responsible officer of McKee for its unpaid sales taxes. Further, the Debtor objects to the IL-1040 claim on the basis that he is unaware of any grounds for owing income taxes for that year and he has no knowledge of receiving a notice and demand for the 1991 income taxes within the time period prescribed by Illinois law. The Debtor has not objected to the WIT claim of IDOR. With agreement of counsel for the Trustee, the Debtor and IDOR, the Court took both motions under advisement. If one of the motion is granted, the claims objection would be effectively moot.

If the motions are denied, the claims objection would then be set for evidentiary hearing.

III. DISCUSSION

A. Motions to Dismiss

IDOR argues that the Debtor has used this bankruptcy case for the sole purpose of determining the tax dispute with IDOR. IDOR contends that this constitutes improper forum shopping and that no bankruptcy purpose is served by the filing of this case. The Debtor, on the other hand, maintains that dismissal is not in his best interest because he needs the protection of the automatic stay to prevent IDOR's collection efforts; that IDOR's arguments are weak; and the case law supports his position that the bankruptcy court is the appropriate forum to litigate his tax assessment with IDOR. The Trustee seeks dismissal of the case pursuant to § 1307(c)(5) because confirmation of the proposed plan was denied.

Pursuant to 11 U.S.C. § 1307(c), the Court has the power to dismiss a bankruptcy case for cause. Section 1307(c) provides in relevant part:

(c) Except as provided in subsection (e) of this section, *on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including--*
(5) *denial of confirmation of a plan under section 1325 of this title. . . .*

11 U.S.C. § 1307(c)(5) (emphasis supplied). These listed "causes" are not exhaustive, nor is the Court limited to this list. See Ekeke v. United States, 133 B.R. 450, 452 (S.D. Ill. 1991).

Lack of good faith in filing a bankruptcy case constitutes "cause" under § 1307(c) to

dismiss the case. See In re Love, 957 F.2d 1350, 1354 (7th Cir. 1992); Eisen v. Curry (In re Eisen), 14 F.3d 469, 470 (9th Cir. 1994); Gier v. Farmers State Bank of Lucas, Kansas (In re Gier), 986 F.2d 1326, 1329 (10th Cir. 1993); In re Klevorn, 181 B.R. 8, 10 (Bankr. N.D. N.Y. 1995). IDOR has the burden of proof on a challenge to the Debtor's good faith in filing. See 11 U.S.C. § 1307(c); Love, 957 F.2d at 1355. The Debtor has the burden of proof to meet the plan good faith requirements of 11 U.S.C. § 1325(a)(3). Id. In the Seventh Circuit, bankruptcy courts must look at the totality of the circumstances, including several factors when determining if a Chapter 13 petition and/or plan was filed in good faith: (1) the nature of the proceedings; (2) the timing of the petition; (3) how the debt arose; (4) the debtor's motive in filing the petition; (5) how the debtor's actions affected creditors; (6) the debtor's treatment of creditors both before and after the petition was filed; and (7) whether the debtor was forthcoming with the bankruptcy court and the creditors. Id. Love stated that the focus of the good faith inquiry is often whether the filing is fundamentally fair to the creditors, and whether it complies with the spirit of the Bankruptcy Code's provisions. 957 F.2d at 1357.

IDOR seeks dismissal of the Debtor's case under § 1307(c) and the rationale of In re Brooks, 216 B.R. 838 (Bankr. N.D. Okla. 1998) that dismissal is appropriate when a bankruptcy case was filed solely for the purpose of litigating a disputed tax claim. In Brooks, the debtor listed only one creditor--the IRS. The Brooks court noted that the Chapter 13 case existed solely as a forum to be used by the debtor to dispute his debt to the IRS. Id. at 840. The court dismissed the case and concluded that "Congress did not establish the bankruptcy court system for the purpose of giving debtors an alternate forum for

litigating issues with taxing authorities.” Id. at 843. See also In re Gossman, 206 B.R. 264, 267 (Bankr. N.D. Ga. 1997) (“Bankruptcy courts do not and should not constitute a ‘second tax court system.’”) (quotation omitted).

The Court finds that the instant bankruptcy case was filed for the sole purpose of litigating the Debtor’s tax assessment with IDOR. The Debtor does not dispute this contention. The Debtor scheduled only three creditors--IDOR, GMAC and Maple Mortgage. Maple Mortgage did not file an arrearage claim and current payments to Maple Mortgage are to be made by the Debtor and his wife outside of the plan.² Thus, IDOR is the only creditor that is scheduled to receive payments under the plan. The plan does not make any provisions for Dovenmuehle’s claim, if it is separate and distinct from Maple Mortgage’s claim.

The plan provided for a payment of \$250.00 per month to the Trustee to pay allowed priority secured and general unsecured claims a 100% distribution. If the plan term was the maximum sixty months proposed, only \$15,000.00 would be available to pay the Trustee’s statutory fees, the deemed allowed secured claim filed by Dovenmuehle of \$115,634.03 and IDOR’s claims. Resolution of the objection to IDOR’s claims in the Debtor’s favor would produce the result that no creditor would exist to collect the \$250.00 monthly dividend under the plan from the Trustee. If, on the other hand, the objection to IDOR’s claims was resolved in favor of IDOR, the proposed monthly payment of \$250.00 would be insufficient to satisfy IDOR’s claims, which total approximately \$137,505.00. Under either scenario, the filing of the instant case is not fundamentally fair to IDOR, and does not comply with the spirit of the

² Whether Maple Mortgage assigned its secured claim to Dovenmuehle is unknown, but certainly possible.

Bankruptcy Code's provisions. The plan is not feasible and will not pay the administrative claims of the Trustee, the Debtor's attorney's fees, the secured claim of Dovenmuehle or IDOR's claims.

In addition, the totality of the circumstances demonstrate that the plan was not filed in good faith, which, in part, led to the Court's prior denial of confirmation. In a different context, this matter is analogous to the point made so eloquently in In re Jackson, 91 B.R. 473 (Bankr. N.D. Ill. 1988) that "[g]ood faith is not synonymous with honesty and bad faith is not synonymous with dishonesty." Id. at 475. Clearly, the Debtor's motive in filing the case was to litigate his tax dispute with IDOR in the bankruptcy forum. As previously stated, if IDOR's claims are disallowed, then no creditor, except Dovenmuehle, exists to receive the \$250.00 monthly dividend. If IDOR's claims are allowed, however, that same dividend would be insufficient to satisfy both Dovenmuehle's and IDOR's claims.

Hence, the Court concludes that this case was filed for the sole purpose of litigating the Debtor's tax dispute with IDOR. Under the rationale of the Brooks case, which this Court adopts and follows, dismissal of the instant bankruptcy case is warranted. Denial of confirmation of the plan, when coupled with the fact that IDOR is the only creditor in this case warrants the dismissal of the bankruptcy case and constitutes cause for the Court to dismiss the case. Consequently, the Court grants the motions of IDOR and the Trustee and dismisses this bankruptcy case for cause under § 1307(c)(5).

The Debtor argues that IDOR's motion to dismiss is barred by the doctrine of laches.

The Court has explained the doctrine of laches as follows:

The doctrine of laches arises due to a change in the conditions of the parties. Lingenfelter v. Keystone Consol. Indus., Inc.,

691 F.2d 339, 340 (7th Cir. 1982). If a plaintiff unjustifiably delays in pursuing a cause of action and the defendant is prejudiced by the delay, the laches doctrine bars the plaintiff from proceeding. See Hawxhurst v. Pettibone Corp., 40 F.3d 175, 181 (7th Cir. 1994); Herman v. City of Chicago, 870 F.2d 400, 401 (7th Cir. 1989); Smith v. City of Chicago, 769 F.2d 408, 410 (7th Cir. 1985); Moriarty v. Glueckert Funeral Home, Ltd., 925 F. Supp. 1389, 1397 (N.D. Ill. 1996). Laches is an affirmative defense which is required to be proved by the party raising it. Hawxhurst, 40 F.3d at 181. Whether to employ the doctrine rests within the sound discretion of the Court. Baker Mfg. Co. v. Whitewater Mfg. Co., 430 F.2d 1008, 1011-1015 (7th Cir. 1970), cert. denied, 401 U.S. 956 (1971). The plaintiff bears the burden of explaining the reason for the delay in pursuing the action. Zelazny v. Lyng, 853 F.2d 540, 541 (7th Cir. 1988). Moreover, if "the delay is inexcusable, then the defendant must show prejudice." Lingenfelter, 691 F.2d at 340. . . . The mere passage of time cannot constitute laches. Smith, 769 F.2d at 410.

Solow v. American Airlines, Inc. (In re Midway Airlines, Inc.), 221 B.R. 411, 458-59 (Bankr. N.D. Ill. 1998).

The Debtor has failed to establish the requisite elements to apply the doctrine of laches. The Debtor has not shown that IDOR unjustifiably delayed in pursuing this motion to dismiss and that the Debtor has suffered prejudice as a result of the delay. The Bankruptcy Code does not provide a statute of limitations by which a motion to dismiss a case under § 1307(c) must be brought. IDOR argues that the basis of its motion to dismiss is that the Debtor filed the case solely for the purpose of litigating his tax dispute in the bankruptcy court. IDOR contends that it was not until the Debtor filed his objection to its claims, that it could have known that the Debtor was going to challenge the responsible officer assessment made by IDOR. The Debtor did not file the objection to IDOR's claims until almost seven months after the bankruptcy petition was filed. Hence, there has been no

unjustified delay by IDOR. Moreover, the Debtor has not demonstrated prejudice as a result of the delay. Dismissal of the bankruptcy case does not mean that the Debtor could not litigate his tax dispute with IDOR elsewhere. The proposed responsible officer assessments under the NPL and NOD have not become final and an administrative hearing is still available to the Debtor upon timely application under the applicable Illinois statute.

In addition, the Debtor relies upon In re Edwards, 214 B.R. 613 (B.A.P. 9th Cir. 1997) in support of his position that a one creditor case does not constitute a bad faith filing. The facts and holding of the Edwards case are inapposite and not controlling on this Court. The court in Edwards found that dismissal or abstention under 11 U.S.C. § 305 was not proper because the debtor filed the case for the purpose of paying his debts and facilitating a refinance of his home in order to pay those debts. Id. at 620. That is not the situation at bar. The Court has determined that the purpose behind the instant case is solely to litigate IDOR's tax assessment. Further, the Debtor has not proposed a feasible plan of reorganization.

The Debtor also argues that the case should not be dismissed because he needs the automatic stay to prevent IDOR from instituting collection efforts. IDOR, however, has not engaged in any collection activity because the responsible officer assessments have not become final assessments. IDOR issued NPL No. 6800 and NOD No. 3227, which gave the Debtor notice of the proposed assessments of responsible officer liability and of his rights to challenge the liability under 35 ILCS 735/3-7. The Debtor filed the instant bankruptcy case prior to expiration of the protest period provided for in the statute. Dismissal of the case would not, necessarily, result in IDOR continuing collection efforts because the Debtor

would still have the right to challenge the responsible officer assessments upon timely application.

Finally, the Debtor argues that IDOR filed the motion to dismiss because its position that the Debtor is a responsible officer of McKee is weak. The Court finds this argument irrelevant to the motions to dismiss, and only relevant to the undecided claims objection.

B. Objection to the Claims of IDOR

The Court need not reach the merits of IDOR's claims in light of the dismissal of this bankruptcy case. The general rule is that a matter becomes moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980). As a result of the dismissal of the Debtor's bankruptcy case, the objection to IDOR's claims is hereby moot.

IV. CONCLUSION

For the foregoing reasons, the Court grants the motions of IDOR and the Trustee and dismisses the Debtor's case pursuant to § 1307(c)(5). The Debtor's objection to IDOR's claims is hereby rendered moot as a result of the dismissal of the bankruptcy case.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE:)
CHARLES K. SMILGYS,) Chapter 13
) Bankruptcy No. 98 B 11404
Debtor.) Judge John H. Squires

ORDER

For the reasons set forth in a Memorandum Opinion dated the 21st day of June, 1999, the Court grants the motions of the Chapter 13 Standing Trustee, Jack McCullough, and the Illinois Department of Revenue to dismiss the case pursuant to 11 U.S.C. § 1307(c)(5). The dismissal of the bankruptcy case moots the Debtor's objection to the Illinois Department of Revenues claims.

ENTERED:

DATE: _____

**John H. Squires
United States Bankruptcy Judge**

cc: See attached Service List