UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

LEON E. PARKER — CASE NO. 9l-00520

Debtor — Chapter 13

APPEARANCES:

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

This contested matter comes before the Court as Objections to the Confirmation of the Debtor's Second Amended Chapter l3 Plan dated August 7, l99l and filed with the Court on August l2,l99l.

The Objections were filed by the Farmers Home Administration ("FmHA"), the Internal Revenue Service ("IRS"), the Chapter l3 Trustee ("Trustee") and Marine Midland Bank ("MMB").

A confirmation hearing was held before the Court on September 25, l99l and was thereafter adjourned to October 30, l99l, at which point the Court reserved decision on the Objections and requested the submission of memoranda of

law by November 27, l992.[1]

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this core contested matter pursuant to 11 U.S.C. §§1334(b), l57(a), (b)(l) and (b)(2)(L).

DISCUSSION

Debtor filed his Second Amended Plan as indicated following denial of confirmation of an earlier amended plan by Order of this Court dated July l2, l99l ("July Order").

The July Order required the filing of a third plan within thirty days of its date and was premised upon a failure of the amended plan to comply with §§109(e) and 1322(a)(2) of the Bankruptcy Code. (ll U.S.C. §§10l-l330) ("Code").

Upon the filing of the Second Amended Plan on August l2, l99l, the aforementioned Objections were interposed. The Objections filed by FmHA, IRS and the Trustee all object to the confirmation of the Second Amended Plan on the basis that Debtor does not meet the requirements of Code §109(e) in that the Debtor's petition lists priority tax claims in the total sum of $350,000 and secured claims in the amount of $767,200.[2]

Code §109(e) provides that

> Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $l00,000 and noncontingent liquidated, secured debts of less than $350,000 ... may be a debtor under Chapter l3 of this

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[1] Initially Debtor alleged a conflict of interest on the part of the United States Attorney in representing both the FmHA and IRS herein, but by letter dated November l, l99l, Debtor's counsel withdrew that allegation.

[2] At the hearing on confirmation held on October 30, l99l, the Debtor alleged, without opposition, that the Trustee had withdrawn his Objection to Debtor's Plan.

title.

Thus, FmHA and the IRS assert that Debtor is not eligible to be a debtor under Chapter l3 and, therefore, he is incapable of confirming his Second Amended Plan. (See Code §1325(a)(l)).

There does not appear to be any dispute between the Debtor and the objectants as to the applicability of Code §109(e) to this case. Rather, the singular issue presented is whether the requirements of Code §109(e) merely define eligibility for Chapter l3 or whether they constitute a basis of subject matter jurisdiction. The Court does note that the Debtor lists the aforementioned tax claims in his Schedule A-1 as priority claims, while listing the same tax claims in his Schedule A-2 as secured claims. If,however, the tax claims are omitted from either schedule, ineligibility under Code §l09(e) remains the central issue.

It has been held by the majority of courts who have considered Code §l09(e) that it was intended by Congress to be a standard of eligibility capable of being waived if not objected to by parties in interest, rather than a basis of subject matter jurisdiction incapable of being waived. See Rudd v. Loughlin, 866 F.2d l040, l042 (8th Cir. l989); Matter of Phillips, 844 F.2d 230, 235 (5th Cir. l988) n.2 (dicta); In re Edmonston, 99 B.R. 995, 998 (E.D.Cal. l989); In re Wenberg, 94 B.R. 63l, 637 (9th Cir. BAP l988); In re Jones, l29 B.R. l003, l007-09 (Bankr. N.D.Ill. l99l); In re Tatsis, 72 B.R. 908 (Bankr. W.D.N.C. l987); contra In re Koehler, 62 B.R. 70 (Bankr. D.Neb. l986); Matter of Wulf, 62 B.R. l55 (Bankr. D.Neb. l986).

With the exception of the secured debt owed to FmHA, none of the debts listed by Debtor are characterized as contingent, unliquidated or disputed. Deletion of the FmHA debt from consideration would still leave $432,200 in secured debt, well in excess of the §l09(e) "cap".

Conversely, if the Debtor were to argue that his secured debt was limited to $l6l,000 (the alleged market value of the collateral), the prevailing case authority would require the undersecured portion of the undisputed secured debt ($27l,200) to be bifurcated and treated as unsecured debt, thus, exceeding the Code §109(e) limitation. See In re Edmonston, supra, 99 B.R. 999; In re Jerome, ll2 B.R. 563, 566 (Bankr. S.D.N.Y. l990).

Thus, it must be concluded that Code §l09(e) is an eligibility requirement rather than a jurisdictional basis and is capable of being waived by a party in interest. The Debtor's scheduled noncontingent liquidated, undisputed debts, however, clearly exceed those eligibility requirements.

As observed by counsel for the IRS and FmHA, however, the distinction between eligibility and jurisdiction herein vis-a-vis Code §l09(e) is irrelevant since both creditors have in fact raised the eligibility requirement prior to confirmation of any plan.

The remaining issue that must be considered by the Court is procedural in nature. While it is clear that Debtor is ineligible for Chapter l3, the Objections presently before the Court deal only with the confirmability of the Debtor's Second Amended Plan. There is no motion to dismiss or convert Debtor's case pursuant to Code §1307(c).

To simply sustain the Objections to the Plan and permit an ineligible debtor to continue to languish in Chapter l3 pending the inevitable creditor motion to dismiss, is not in the best interest of the creditors.

While the power of the Court to dismiss or convert a Chapter l3 case sua sponte pursuant to Code §l307(c) has been the subject of some dispute, since that section would appear to require the motion to be made by "a party in interest", the amendment to Code §l05(a) in l986 would seem to resolve that dispute in the Court's favor.

Code §l05(a), as amended in l986, provides that

> No provision of this title providing for raising of an issue by a party in interest shall be construed to preclude the court from sua sponte taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules or to prevent an abuse of process.

since l986, bankruptcy courts have generally concluded that they have the authority to dismiss or convert a Chapter l3 case sua sponte. See In re Greene, l27 B.R. 805, 807-08 (Bankr. N.D.Ohio l99l); In re Fricker, ll6 B.R. 43l, 442 (Bankr. E.D.Pa. l990); Matter of Welling , l02 B.R. 720, 72l-22 (Bankr. S.D.Iowa l989).

Thus, the Objections of the IRS and FmHA are sustained, and the Court, in the exercise of its inherent power pursuant to Code §105(a), dismisses

the Chapter l3 case pursuant to Code §l307(c)(l).

IT IS SO ORDERED.

Dated at Utica, New York

this day of March, l992

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STEPHEN D. GERLING
U.S. Bankruptcy Judge