

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

JOHN D. STOKES,

Case No. 6:09-bk-01126-ABB

Chapter 13

Debtor.

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ORDER

This matter came before the Court on the Motion for Approval of Written Waiver of Chapter 7 Discharge (Doc. No. 76) (“Motion for Waiver”) filed by the Debtor John D. Stokes. A hearing was held on January 24, 2011 at which no one appeared. The Debtor’s Motion for Waiver is due to be denied for the reasons set forth herein.

Event Chronology

The Debtor filed this bankruptcy case on January 31, 2009 (“Petition Date”) as a Chapter 13 case. He owns two parcels of real property: (i) 140 East Bahama Road, Winter Springs, Florida (“Bahama Road Property”); and (ii) 327 Ronald Reagan Boulevard, Longwood, Florida 32750. He listed the Bahama Road Property as his residence in his petition. The Debtor filed a motion to strip off the second-priority mortgage encumbering the Bahama Road Property held by Green Tree Servicing, LLC (Claim No. 21-1) in the amount of \$86,368.94.¹ An Order was entered on June 16, 2009 (Doc. No. 36) treating Claim No. 21-1 as unsecured and avoiding Green Tree’s second mortgage lien upon the entry of a discharge.

The Debtor’s Amended Plan was confirmed by the Confirmation Order entered on September 9, 2009 and was modified by subsequent Orders. He filed a Notice of

¹ This mortgage was formerly held by Countrywide Home Loans Servicing, L.P.

Voluntary Conversion on August 24, 2010 to convert this case to Chapter 7 pursuant to 11 U.S.C. Section 1307(a). The Court entered an Order on September 9, 2010 (Doc. No. 70) converting this case to Chapter 7. The Chapter 7 Trustee filed a Report of No Distribution on November 23, 2010. No Chapter 7 discharge has been entered yet.

Wells Fargo Bank, NA holds a first-priority mortgage on the Bahama Road Property in the amount of approximately \$279,038.86. It was granted relief from the automatic stay on December 17, 2010.

The Debtor filed his Motion for Waiver while Wells Fargo's stay relief motion was pending. He requests in his Motion for Waiver he be allowed to waive his right to a Chapter 7 discharge pursuant to 11 U.S.C. Section 727(a)(10) "in order to be eligible to file and receive a Chapter 13 discharge in a case I will file in the near future." The Debtor states he no longer desires to surrender his home, the Bahama Road Property, and intends to "convert the same into investment property." The Debtor and his counsel signed the Motion for Waiver.

Analysis

The Debtor's pleadings reflect he desires to recharacterize his home as investment property and permanently modify the secured claims of Wells Fargo and Green Tree encumbering that property. He is prohibited from modifying secured claims in a Chapter 7 proceeding. In re Hoffman, Case No. 6:09-bk-18839-KSJ (Bankr. M.D. Fla. July 28, 2010). Chapter 13 allows for the modification secured claims, with certain exceptions, but a Chapter 13 discharge is required to be able to permanently modify such claims. In re Jarvis, 390 B.R. 600, 606 (Bankr. C.D. Ill. 2008). Where a debtor is ineligible to receive a discharge in a Chapter 13, any modifications to the creditor's rights are not

permanent and have no binding effect once the plan ends. In re Lilly, 378 B.R. 232, 236 (Bankr. C.D. Ill. 2007).

Were the Debtor to receive a discharge in this pending case, which was originally filed as a Chapter 13 case, he would be ineligible to receive a discharge in a subsequent Chapter 13 case filed within two years of the Petition Date pursuant to 11 U.S.C. Section 1328(f)(2). Section 1328(f) provides:

(f) Notwithstanding subsections (a) and (b), the court shall not grant a discharge of all debts provided for in the plan or disallowed under section 502, if the debtor has received a discharge—

(1) in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter, or

(2) in a case filed under chapter 13 of this title during the 2-year period preceding the date of such order.

11 U.S.C. §§ 1328(f)(1), (f)(2).² The Debtor seeks to circumvent Section 1328(f)'s discharge prohibition by waiving his discharge in this Chapter 7 case.

Section 727(a)(10) of the Bankruptcy Code allows the Court to approve a written waiver of discharge executed by the debtor post-petition. A waiver “is not self-effectuating,” but requires the approval of the Bankruptcy Court. Asbury v. Alliant Bank (In re Asbury), 423 B.R. 525, 528 (8th Cir. B.A.P. 2010). The Bankruptcy Code does not set forth any standards for approval of a Section 727(a)(10) discharge waiver request. The Courts have held approval of a discharge waiver requires a finding the waiver is a conscious and informed judgment by the debtor as to the consequences thereof. In re Eliscu, 163 B.R. 335, 340 (Bankr. N.D. Ill. 1994). The creditors’ interests are relevant in

² The filing of a petition constitutes an “order for relief” pursuant to 11 U.S.C. Section 301(b). The look-back periods of Section 1328(f) commence on the date of filing of the debtor’s prior case and end upon the filing of the Chapter 13 petition. Carroll v. Sanders (In re Sanders), 551 F.3d 397, 399-400 (6th Cir. 2008); Branigan v. Bateman (In re Bateman), 515 F.3d 272, 277-78 (4th Cir. 2008).

a discharge waiver determination. In re Asbury, 423 B.R. at 529. “[T]he bankruptcy court has a duty to protect their interests as well as the debtor’s.” Id.

Waiver of a discharge has serious, permanent consequences for a debtor. There must be an inquiry by the Court to determine whether the waiver is intentional. Id. Neither the Debtor nor his counsel appeared at the January 24, 2011 hearing. The Court could not conduct an inquiry of the Debtor and assess whether he makes the waiver request voluntarily, if it is the result of conscious and informed judgment, and if he understands he may not later vacate the waiver. The Court will not approve a waiver request without conducting an inquiry of a debtor and evaluating whether the debtor fully comprehends the consequences of a waiver.

The potential prejudice to the Debtor’s creditors in granting a discharge waiver supports denial of his waiver request. The Debtor voluntarily converted this case to Chapter 7 and now has determined, based upon the Court’s recent decisions regarding Section 1328(f), Chapter 7 holds no benefit for him. The benefits he seeks are in Chapter 13, but the Bankruptcy Code does not “provide a simple escape mechanism for a Chapter 7 debtor who decides he wants to abandon his case prior to discharge.” In re Asbury, 423 B.R. at 529. Allowing the Debtor to waive his discharge could lead to an abuse of the bankruptcy system by debtors who seek to avoid the repercussions of Section 1328(f).

The Debtor’s Motion for Waiver pursuant to 11 U.S.C. Section 707(a)(10) is due to be denied.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the Debtor's Motion for Waiver
(Doc. No. 76) is hereby **DENIED**.

Dated this 9th day of February, 2011.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge