

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
TANYA COLLEEN ANDERSON,) CASE NO. 04-66297 JPK
) Chapter 13
Debtor.)

ORDER REGARDING OBJECTION TO AFFIDAVIT OF DEFAULT
AND MOTION TO SET ASIDE ORDER OF DISMISSAL ("MOTION")

On December 12, 2007, the Chapter 13 Trustee filed a motion to dismiss this case. The sole ground asserted for dismissal was the debtor's default in payments to the Trustee, a default stated in the motion to be in the amount of \$1,086.86. A hearing was set on the motion by the Court's order entered on December 14, 2007; the record establishes that notice of the hearing – scheduled for January 28, 2008 at 1:00 P.M. – was provided to both the debtor and the debtor's counsel, and there is no indication in the record that either failed to receive that notice. Neither the debtor nor the debtor's counsel appeared at the January 28, 2008 hearing, and based upon the record made at that hearing, the Court entered its order dismissing this Chapter 13 case on January 31, 2008. The record was in main part established by the Affidavit and Status Report of Trustee, which stated that as of January 28, 2008, the debtor's default to the Trustee was in the amount of \$1,226.26. The sole basis stated in the Trustee's affidavit for dismissal of the case was the default in payments to the Trustee.

The Motion was filed on February 23, 2008. A notice, in the form provided for by N.D.Ind.L.B.R. B-2002-2, was also filed on that date; however, this notice is entirely ineffective for any purpose, as a proceeding seeking to set aside a final order is not subject in any manner to the provisions of the foregoing rule. Paragraph 1 of the Motion states that "on the 12th day of November, 2007 the chapter 13 trustee filed an Affidavit of Default stating the debtor failed to comply with the parties agreed order by failing to execute and forward the agreed order". The record establishes that nothing was filed in this case on November 12, 2007, and that no

document pertinent to the Motion was ever filed by the Trustee which asserted anything about a failure to execute and forward an agreed order. In fact, the first three paragraphs of the Motion are devoted to a discussion of this phantom agreed order. Paragraphs 4 and 5 of the Motion state that the debtor has, or is able to, make payments for the months of January and February in the amount of \$223.00 each. However, there is nothing in the Motion that relates to any cure of the default established by the record, or any assertion that the default did not in fact occur. Paragraph 6 of the Motion states that the Court's January 31, 2008 order of dismissal was based on the filing of the Affidavit of Default; while this is in part true, as stated above, the affidavit submitted by the Trustee at the hearing established the amount of the monetary default and stated nothing about the subject matter of the first three paragraphs of the Motion. Paragraph 7 states that "pursuant to Trial Rule a mistake and excusable neglect so as to allow debtor relief from the Order of Dismissal", apparently asserting that the order should be set aside pursuant to some unknown Trial Rule – none of the federal rules applicable to this proceeding is designated as a "Trial Rule".

The Motion fails to comply with Fed.R.Bankr.P. 9013, which requires that a motion "state with particularity the grounds therefor, and shall set forth the relief or order sought". The Motion does not state in any particularity the grounds upon which it is based, in reference to any statute or rule which might be applied with respect to the relief which it seeks. Additionally, N.D.Ind.L.B.R. B-9023-1(a) requires the submission of a separate supporting brief with respect to any motion filed under the provisions of Fed.R.Bankr.P. 9023 or 9024, which presumably the Motion seeks to be. Finally, the Motion was not accompanied by a proposed form of order, as required by N.D.Ind.L.B.R. B-9013-1(c).

The record made at the hearing held on January 28, 2008 – including the Trustee's Affidavit – conclusively establish grounds for dismissal of the case pursuant to 11 U.S.C. § 1307(c), including the ground provided by § 1307(c)(6) of "material default by the debtor with

respect to a term of a confirmed plan". The Motion, apart from its deficiencies as designated above, states nothing whatsoever with respect to the debtor's payment default, and there is therefore nothing in the motion which establishes any grounds for its presumed premise for relief under Fed.R.Bankr.P. 9024.

IT IS ORDERED that the Motion is denied, without prejudice.

Dated at Hammond, Indiana on March 11, 2008.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Debtor, Attorney for Debtor
Trustee, US Trustee