

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
JUDITH K. ROGAN,) CASE NO. 08-23221 JPK
) Chapter 13
Debtor.)

ORDER CONCERNING FURTHER PROCEEDINGS ON MOTION
TO DISMISS OR CONVERT CASE PURSUANT TO
11 U.S.C. 109(e) ("MOTION")

The Motion was filed by the United States of America, on behalf of its agency the Internal Revenue Service, by Assistant United States Attorney Robin W. Morlock, on April 16, 2009. A preliminary hearing on the Motion was held on June 1, 2009. Assistant United States Attorney Robin W. Morlock appeared on behalf of the movant; Gordon E. Gouveia appeared on behalf of the debtor; Gabriel Aizenberg appeared on behalf of Dexia Credit Local; Assistant United States Attorney Joseph A. Stewart appeared on behalf of the United States of America, Department of Justice.

The United States of America, on behalf of its agency the Internal Revenue Service, contends that the debtor is ineligible for relief under Chapter 13 by operation of the debt limitation for non-contingent, liquidated unsecured debt stated in 11 U.S.C. § 109(e). The premise for this contention is that the Internal Revenue Service has issued an audit examination deficiency notice with respect to federal income taxes of the debtor for the years 2006 and 2007. The debtor's response to the Motion, filed on May 29, 2009, includes an affidavit of the debtor's accountant which states that the proposed audit deficiency assessment has been appealed.

Let's first discuss how well prepared the parties were to address their respective positions at the June 1, 2009 hearing: The filing of the motion to dismiss initiated a contested matter under Fed.R.Bankr.P. 9014. The hearing held on June 1, 2009 constituted a preliminary

pre-trial conference pursuant to Fed.R.Civ.P. 16, as expressly stated in the court's order entered on April 22, 2009 (docket entry #133). Fed.R.Civ.P. 16(f)(B) by inference requires an attorney who participates in a pre-trial conference to be substantially prepared to address the issues subject to that conference, especially when he/she is the attorney for the party initiating the subject contested matter. Assistant United States Attorney Robin Morlock could not provide the court with the audit examination reports of the Internal Revenue Service – somewhat understandable. On the other hand, neither could the debtor – which is less forgivable. Neither party could advise the court of the date of the appeal, nor of the office within the Internal Revenue Service in which the appeal had been docketed. Neither party could advise the court of the issues addressed in the audit examination report, or of the issues addressed by the debtor in response to that report. The court is fully cognizant of the law applicable to proceedings in bankruptcy cases involving assessments made by the Internal Revenue Service. It is absolutely the law that an actual assessment by the Internal Revenue Service is entitled to a presumption of validity, and that the burden of rebutting the assessment is upon the debtor. However, the court is unaware of any law which addresses the presumption of validity of a proposed audit examination deficiency assessment, and AUSA Morlock could not provide the court with any law on this issue (there may be none). The sole material facts gleaned from the hearing were that the Internal Revenue Service has apparently proposed assessments based upon audit examinations of the debtor's 2006 and 2007 federal income tax returns, and that the debtor has apparently exercised her statutory rights to appeal those assessments to some appellate mechanism of the Internal Revenue Service.

In commenting upon the Motion, Assistant United States Attorney Morlock stated the government's position that the debts asserted against the debtor in the most recent IRS proof

of claim are “liquidated” for the purposes of 11 U.S.C. § 109(e).¹ Yet, as stated, AUSA Morlock could provide no authority for this position. Assistant United States Attorney Stewart – representing separate interests of the United States of America, Department of Justice, derived from a judgment obtained by the United States against Peter Rogan, the debtor’s husband – stated the position that because the amount of the indebtedness owed by Peter Rogan to the United States Department of Justice had been determined in legal proceedings, the government’s assertion in its proof of claim filed in this case based upon actions pending in the United States District Court for the Northern District of Illinois which have not in any manner resulted in a judgment against Judith Rogan – constitute “liquidated debt” for the purpose of 11 U.S.C. § 109(e). The court entered into a dialogue with AUSA Stewart about his contentions, in the course of which he cited to a United States Court of Appeals for the Seventh Circuit case which he designated as “Knight”. AUSA Morlock joined in the United States’ chorus of invoking “Knight”. However, neither AUSA Stewart nor AUSA Morlock could provide the court with the citation for the case, and neither could recite the facts of the case. The court, vaguely remembering having read *Knight*, took a stab at the facts, which were not entirely accurate as recited by the court, but which were pretty darn close. In point of fact, the case relied upon by AUSAs Stewart and Morlock is *In re Knight*, 55 F.3d 231 (7th Cir. 1995). It may be of interest to both of the counsel for the United States – and the other attendees at the June 1, 2009 hearing – to recognize that this court has extensively addressed its interpretation of *Knight* in *In re Arcella-Coffman*, 318 B.R. 463 (Bankr. N.D.Ind. 2004).

The court’s construction of *Knight, supra.*, as stated in *Arcella-Coffman, supra.*, controls this case. As the court stated at the hearing held on June 1, the determination of whether the

¹ The court finds as a matter of law that any indebtedness asserted by the Internal Revenue Service against the debtor is not “contingent” for the purposes of 11 U.S.C. § 109(e): all events which might lead to determination of the debtor’s liability for federal income taxes have already occurred.

asserted federal income tax indebtedness of the debtor is a “liquidated” debt under 11 U.S.C. § 109(e) requires review of matters relating to the proposed audit examination deficiency assessments against the debtor for the years 2006 and 2007.

The court assumes that the Internal Revenue Service, being the creature of due process that it is, has provided the debtor with a detailed explanation of the audit examination results upon which the proposed assessments are based. That report is readily available to both the debtor and to the United States, as the movant in this contested matter. The debtor’s response to the proposed assessment is also equally available to the debtor and to the United States. The present status of the case before the Internal Revenue Service with respect to the appeal is also equally available to the debtor and to the United States. At the next hearing, the court expects both the debtor and the United States of America, Internal Revenue Service, to present to it the following:

1. The federal income tax returns filed by the debtor for the years 2006 and 2007;
2. The audit examination reports with respect to proposed deficiency assessments provided to the debtor by the Internal Revenue Service with respect to both tax years;
3. All documents which relate to the debtor’s appeal to the Internal Revenue Service of the proposed audit deficiency assessments; and
4. The exact status of the appeal before the Internal Revenue Service, including the division of the Internal Revenue Service before which any appeal is now pending.

The court will then determine the course of further proceedings on the motion to dismiss after review of the submitted documentation.

IT IS ORDERED that a preliminary pre-trial conference on the Motion of the United States filed on April 16, 2009 will be held on **August 3, 2009, at 3:15 P.M.**

Dated at Hammond, Indiana on July 15, 2009.

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

Distribution:

Debtor, Attorney for Debtor,
Trustee, US Trustee
AUSA Robin Morlock
AUSA Joseph Stewart
Attorney Gabriel Aizenberg