

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)
)
DAVID ALLEN SMITH and) CASE NO. 08-32549 HCD
RAINEE VITALL SMITH,) CHAPTER 7
)
DEBTORS.)

ORDER

At South Bend, Indiana, on January 21, 2009.

On August 7, 2008, the court ordered the debtor David Allen Smith (“debtor”) and his attorney, Stephen G. Drendall, Esq., to show cause why 11 U.S.C. § 727(a)(8) does not prevent a discharge from being entered in this case. Following a hearing, the court gave the debtor 60 days to file a brief in support of his argument that § 727(a)(8) does not apply to this case. No brief was filed. The court took the matter under advisement on December 12, 2008.

Section 727(a)(8) prevents the discharge of a chapter 7 debtor who received a discharge in a chapter 7 case that was commenced within the 8-year period prior to the filing of his next petition. The debtor in this case had filed a chapter 7 bankruptcy case previously, on November 17, 2004, and had received a discharge in that case on February 28, 2005. He then filed this chapter 7 petition on August 4, 2008, less than 4 years later. The court directed the debtor and his counsel to show cause why § 727(a)(8) does not bar a discharge in this case.

At the hearing on the matter, held on September 30, 2008, the debtor, by counsel, asserted that the bar under § 727(a)(8) does not apply in this case. He admitted that, in the previous case, the debtor’s discharge had been entered. However, after the debtor received his discharge, he stated, the court granted the Trustee’s motion to dismiss the case without prejudice. In counsel’s view, and in the view of the debtor and some creditors, the entry of the dismissal meant that the discharge had been vacated. On that understanding, the debtor made payments to those creditors. Now, less than 4 years later, the debtor and his wife filed a joint voluntary chapter 7 petition. The debtor claimed that, because the discharge in the prior chapter 7 case had been vacated by the

subsequent order dismissing the case, there was no discharge. For that reason, he contended, the debtor did not violate § 727(a)(8). The court, having considered the record herein in light of the statute, determines that § 727(a)(8) is applicable to this case and prevents a discharge from being entered for the debtor herein.

Discussion

The facts are clear. The debtor filed his first chapter 7 case on November 17, 2004. The § 341 meeting of creditors was set to be held on December 22, 2004. However, it was continued because the debtor did not appear. The debtor's discharge was entered on February 28, 2005. The court finds, first, that the grant of the discharge, governed by Federal Rule of Bankruptcy Procedure 4004, was proper. Because no complaint objecting to the debtor's discharge had been filed within the "60 days after the first date set for the meeting of creditors" under Bankruptcy Rule 4004(a); no extension of time for filing was requested under Rule 4004(b); no motion to dismiss was pending, and no other impediment to the granting of a discharge was present under Rule 4004(c), the court did "forthwith grant the discharge" as it was required to do under that rule.

More than a month after the discharge had been entered, the chapter 7 Trustee filed a motion to dismiss the case, on the ground that the debtor had missed four § 341 meetings. The court held a hearing on the issue and granted the Trustee's dismissal motion, but without prejudice. The court's Order further stated that the case would be closed at the statutorily permitted time. No response or objection by any party was filed; the case thus was closed on June 14, 2005. Thereafter, no party filed a motion to revoke the discharge within one year from the date of discharge, *see* § 727(e). The court finds no error, procedural or legal, in the entry of the debtor's discharge and the subsequent dismissal and closing of the debtor's 2004 chapter 7 case.

Nevertheless, the debtor claimed that the dismissal order, if it meant anything, must have vacated the previous discharge order. It is reasonable to believe that "a dismissal motion serves little, if any, valid purpose if filed after the entry of a chapter 7 discharge, unless the discharge can otherwise be revoked." *In re Russo*, __B.R. __, 2008 WL 5412106, at *4 (Bankr. E.D. Pa. 2008). However, the dismissal of a bankruptcy case does

