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UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:
James T. Theodore,
Debtor.

Chapter 11
Case # 10-10233

Appearances: *Heather Z. Cooper, Esq.*
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ORDER ON REMAND

GRANTING, IN PART, DEBTOR'S MOTION FOR ENTRY OF DISCHARGE AT THIS TIME AND SUSTAINING AFF'S LIMITED OBJECTION TO ENTRY OF DEBTOR'S DISCHARGE

On January 26, 2018, the District Court (Reiss, J.) issued an order (doc. # 452, the "Remand Order") vacating this Court's December 22, 2016 order granting Debtor's motion for entry of discharge (doc. ## 430, 431). The District Court found the Debtor's personal obligation to American First Federal, Inc. ("AFF") under the modified mortgage notes was part of the confirmed 2016 Modified Plan (doc. # 405, the "Modified Plan") and remained enforceable, notwithstanding the lack of any reaffirmation agreement. The District Court also found this Court had not made findings of fact or sufficiently explained its basis for granting the Debtor a discharge in this case (doc. # 452). Based upon these findings, the District Court remanded the case for proceedings consistent with its opinion, stating this Court "must affirmatively determine Debtor's eligibility for discharge under 11 U.S.C. § 1141(d)(5)" (doc. # 452 at 15).

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, and the Amended Order of Reference entered in this District on June 22, 2012. The Court declares the claims presented by this motion and objection are core matters under 28 U.S.C. §§ 157(b)(2)(I) and (O), over which this Court has constitutional authority to enter a final judgment.

In his motion for entry of discharge (doc. # 413, the "Discharge Motion") the Debtor did not specify whether he was moving for relief under § 1141(d)(5)(A) or (B) and averred he had made all payments under the confirmed plan. In order for this Court to (i) determine whether the Debtor was eligible for a discharge under § 1141(d)(5) and (ii) understand why the Debtor had asserted, and his attorney has affirmed, he had completed all payments under the Modified Plan, when the long-term mortgage claims had several years of remaining payments, the Court entered an order (doc. # 458) directing the parties to appear at a hearing on March 30, 2018, and offering counsel an opportunity to file supplemental memoranda of law, to address these two questions. At the March 30th hearing, the Court read into the record its assessment of the legal issues presented by the Remand Order and the pertinent jurisprudence, to help frame the issues still under consideration. It also offered counsel an opportunity to file additional memos of law in support of their position on these more finely tuned issues. After hearing counsel's arguments at that hearing, however, the Court determined the record was sufficient for the Court to make the determinations required under the Remand Order without further briefing.

The statute controlling entry of discharge in an individual's chapter 11 case states:

> (d) …
> (5) In a case in which the debtor is an individual—
> (A) unless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan;
> (B) at any time after the confirmation of the plan, and after notice and a hearing, the court may grant a discharge to the debtor who has not completed payments under the plan if—
> (i) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 on such date;
> (ii) modification of the plan under section 1127 is not practicable; and
> (iii) subparagraph (C) permits the court to grant a discharge; and
> (C) the court may grant a discharge if, after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge, the court finds that there is no reasonable cause to believe that—
> (i) section 522(q)(1) may be applicable to the debtor; and
> (ii) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B);
> and if the requirements of subparagraph (A) or (B) are met.

11 U.S.C. § 1141(d)(5).

With respect to the basis of the Debtor's statement, and his attorney's affirmation, that the Debtor has completed all payments under the Plan, the Debtor explained he "did not intend for his plan to be interpreted as calling for payments for 27 years or 40 years" (doc. # 461). He underscored his belief that the parties had had a meeting of the minds on this point, and all parties in the case had understood the plan term was actually five years, and he would make the long-term payments outside the plan thereafter – as would happen in an individual chapter 13 case. But, neither the original plan, the confirmation order, the Debtor's memorandum in support of the original plan, the motion for approval of mortgage modification (doc. # 395), nor the amended confirmation order (doc. # 405) state the term of the Plan[1] nor indicate the mortgage payments to the mortgagees were to be paid outside of the plan. There was also no language limiting the meaning of "all payments under the Plan," to exclude the payments due to the mortgagees after the five-year period of payments to all other creditors were completed. Moreover, in the Remand Order, Judge Reiss observed, "Debtor concedes [his statement that all payments under the plan had been made] should be interpreted to mean that he was current with his payments under the 2016 Modified Plan, not that he had actually made all of the payments due thereunder" (doc. # 452 at 3). For all of these reasons, THE COURT FINDS the Debtor has not made all payments required under the Plan. Therefore, this Court cannot grant the Debtor a discharge pursuant to § 1141(d)(5)(A), under the general rule that an individual chapter 11 debtor is discharged upon completion of all payments under the plan.

However, there is an exception to that general rule, set out in subparagraph § 1141(d)(5)(A), allowing a discharge prior to completion of all plan payments, if the Court finds "cause" to do so and the Debtor timely requests this relief. The Courts are divided over whether a motion seeking early discharge under this provision, "for cause," must be made at or before plan confirmation, or can be made at the time all payments other than those for long-term obligations have been made. In this regard, some bankruptcy courts have held a motion seeking an early discharge "for cause" must be made at the time of plan confirmation and if the debtor does not file the motion until after confirmation, the debtor is ineligible for an early discharge under § 1141(d)(5)(A). See, e.g., In re Necaise, 443 B.R. 483, 488 (Bankr. S.D. Miss. 2010).

However, this Court disagrees with that conclusion and line of cases. It finds more persuasive, and more consistent with the purpose of individual bankruptcy relief, the rationale that a "for cause" early discharge is potentially available any time from plan confirmation to before the completion of plan payments. See, e.g., In re Lilly, 2013 Bankr. LEXIS 3462 (Bankr. D.D.C. 2013); In re Detweiler, 2012

[1] Section 1.42 of the Modified Plan merely states, "Term of the Plan means a period beginning on the effective date of the Plan and ending when all payment and other acts required of the Debtor under the Plan have been made" (doc. # 403).

Bankr. LEXIS 5501 (Bankr. N.D. Ohio 2012); In re Clymer, 2012 WL 1252978 (Bankr. N.D. Ohio 2012); In re Belcher, 410 B.R. 206 (Bankr. W.D. Va. 2009); In re Ball, 2008 WL 2223865 (Bankr. N.D. W. Va. 2008). In each of these cases, the individual chapter 11 debtor interposed a request for early discharge under § 1141(d)(5)(A) after discharge but prior to completion of plan payments. It is worth noting that as of 2017, more courts had taken the position that "§ 1141(d)(5)(A) allows them to grant an early discharge for 'cause' upon completion of payments to administrative, priority, and general unsecured creditors." Richard Hynes, Anne Lawton & Margaret Howard, National Study of Individual Chapter 11 Bankruptcies, 25 AM. BANKR. INST. L. REV. 61, 139 (2017). One such case held, "more in keeping with the intent of [§1141(d)(5)(A)] would be determination of 'cause' for granting a discharge after payment of the sixty payments to the Distribution Fund to satisfy the obligation of the Plan to general unsecured creditors with dischargeable claims against the debtor, but prior to completion of payments due on . . . the Debtor's long-term mortgage obligations." Belcher, 410 B.R. at 217-18. The Detweiler court's rationale is likewise persuasive in its interpretation of this language, determining that "if a debtor wants a discharge before plan payments are complete, the debtor must establish cause [and] [u]nder this reading, a request for early discharge could occur any time from plan confirmation to before completion of payments." Detweiler, 2012 Bankr. LEXIS 5501 at *6.

Here, the Debtor presents four bases to support his assertion of "cause" for an early discharge under § 1141(d)(5)(A): (i) the high degree of certainty that the Debtor will make the remaining plan payments; (ii) the availability of adequate collateral to ensure the mortgage holders' claims will be fully satisfied, even if the Debtor were to default in his remaining plan payments; (iii) the Debtor's need for a discharge in order to obtain the refinancing he needs to fulfill his obligations under the confirmed plan; and (iv) the absence of objections from any of the long-term secured creditors, other than AFF, after notice and hearing on the Discharge Motion.

The Debtor points to his exemplary conduct as a chapter 11 debtor as evidence of the reliability of future plan payments, asserting "he is current on his long-term mortgage obligations[,] [] has satisfied the payments to unsecured creditors under the Modified Plan in full[,] [and] is current on the filing of his operating reports and payment of US Trustee's fees" (doc. # 461 at ¶ 19). Second, the Debtor argues the Modified Plan shows cause because it "provides for the mortgage holders to retain their security interests in the various properties[,]" meaning "all mortgage holders have the assurance that they will receive the

amount they have been promised even if the plan payments are not made" (doc. # 461 at ¶ 19).[2] The Debtor also reiterates his need for a discharge so he will qualify for the financing he needs to fulfill the terms of the confirmed plan (which requires him to refinance certain loan obligations by 2021, in order to satisfy the remaining balance due to AFF). Finally, the Debtor urges the Court to interpret the lack of objection to his Discharge Motion by all of the non-AFF long-term creditors as (a) evidence those long-term creditors understood the mortgage payments due beyond the five-year term would be made outside the plan, and (b) their consent to entry of a discharge now, prior to their receipt of the remaining payments due under the confirmed plan.

This Court echoes the finding of Detweiler that "[c]ause [under § 1141(d)(5)(A)] must be determined . . . upon the facts and circumstances of each case." Detweiler, 2012 Bankr. LEXIS 5501, *13 (Bankr. N.D. Ohio 2012). Case law supports entry of early discharge for each of the grounds the Debtor articulates.

First, in discerning whether there was "cause" for an early discharge, several cases, including In re Grogan, 2013 WL 4854313, *27 (Bankr. D. Or. 2013), and In re Sheridan, 391 B.R. 287, 291 (Bankr. E.D.N.C. 2008), focus on how likely it is that all creditors will be paid in accordance with the confirmed plan. Other courts, such as In re Detweiler, 2012 Bankr. LEXIS 5501, *6, and In re Beyer, 433 B.R. 884, 888 (Bankr. M.D. Fla. 2009), have further defined that factor, requiring that, "at a minimum, a debtor must show the ability to make plan payments with 'a high degree of certainty'" to qualify for an early discharge under subparagraph (A). See also In re Grogan, 2013 Bankr. LEXIS 3796, at *27.

Second, courts have also specifically considered whether there is "assurance, in the form of collateral, that creditors will receive the amount they have been promised even if plan payments are not made" in determining whether to grant an early discharge. See Sheridan, 391 B.R. at 291. In granting early discharge to the debtor there, the Sheridan court found that, in the event of non-payment to the impaired creditors, "the trustee [could] foreclose the collateral and there should be sufficient equity in that property to pay the amount that the plan provides." Id.

Third, jurisprudence addressing the role of a refinance in the early discharge analysis indicates the need to obtain refinancing can constitute "cause" for early discharge. For example, though finding the

[2] The Court has verified the factual accuracy of this argument by comparing the Debtor's Final Report (doc. # 412) to the Modified Plan (doc. # 403), Amended Schedule D (doc. # 105), and Order Granting Motion to Determine Value of City National Bank Collateral (doc. # 156). The comparison shows that, after subtracting the payments the Debtor has made to the secured creditors from the amount due to each secured creditor on their allowed secured claims under the Modified Plan, the value of the collateral securing each allowed secured claim exceeds the remaining unpaid balance on those secured claims. Additionally, the Debtor has paid each of these creditors the full amount of its allowed unsecured claim, pursuant to Section 5.21 of the Modified Plan (doc. # 403).

record was "simply not developed to an extent to allow the court to determine whether cause exists," the Detweiler court implicitly recognized that a sufficiently demonstrated need to refinance could constitute cause for early discharge under § 1141(d)(5)(A). In re Detweiler, 2012 Bankr. LEXIS 5501, *14 (Bankr. N.D. Ohio 2012). Additionally, in their thoughtful law review article, Bankruptcy Judges Ahart and Wallace argue debtors are entitled to an early discharge "for cause" when they demonstrate the discharge is essential to a refinance that will enable them to complete their obligations under the confirmed plan. Alan Ahart & Mark Wallace, Whether to Grant an Individual Chapter 11 Debtor an 'Early' Discharge, 31 EMORY BANKR. DEV. J. 277, 289–90 (2015). Similarly, another scholarly law review article observes the delay in discharge of an individual chapter 11 debtor, which may be decades, can have a severely negative impact on the ability of debtors to secure refinancing essential to successful reorganization. See Alan Ahart & Lisa Meadows, Deferring Discharge in Chapter 11, 70 AM. BANKR. L.J. 127 (1996). In writing about the possible downsides to deferred discharges in chapter 11 cases generally, Ahart & Meadows write, "[if a discharge is deferred], the debtor's liabilities may also impair the debtor's ability to obtain financing from an institutional lender, trade vendor or other source . . . [and] a new lender may not be willing to extend unsecured credit knowing that it will have the same repayment priority as all of the debtor's pre-confirmation, unsecured debt." Id. at 155.

The Court turns next to the Debtor's fourth basis for entry of discharge at this time, that he gave creditors sufficient notice of his request under § 1141(d)(5) and only AFF objected. It is a well-established tenet of bankruptcy practice that if a debtor provides clear notice of the relief he seeks to all affected creditors, and no creditor objects, then, unless the applicable statute requires a finding of affirmative consent, the Court may grant the relief requested, based upon the lack of objection. See Clear Blue Water, LLC v. Oyster Bay Mgmt. Co., LLC, 476 B.R. 60, 73 (E.D.N.Y. 2012) (citing with approval Morlan v. Univ. Guar. Life Ins. Co., 298 F.3d 609, 618 (7th Cir. 2002) ("[T]he Bankruptcy Code is explicit in defining 'after notice and a hearing' as 'authorizing an act without an actual hearing if such notice is given properly' and no interested party requests a hearing.").

Here, the Debtor's exemplary performance in this case – making every plan payment on time and filing every operating report on time – persuades this Court there is "a high degree of certainty," he will make all payments due on those claims. The schedules, final report, and Modified Plan also indicate the long-term secured creditors other than AFF have sufficient collateral to secure their claims and they did not object to entry of discharge at this time or following the Debtor's initial motion for discharge (doc. # 413). Moreover, the Debtor has represented on numerous occasions that his status as an individual in an active chapter 11 bankruptcy case presents an enormous, if not insurmountable, obstacle to obtaining

necessary refinancing.[3] Finally, there is no dispute as to the adequacy of the Debtor's notice of the Discharge Motion or lack of objection by any creditor other than AFF. Based upon the facts and circumstances of this case, and the pertinent case law and legal scholarship on point, THIS COURT FINDS the Debtor has shown "cause" to justify entry of discharge prior to completion of all payments under the Plan, under § 1141(d)(5)(A).

At the March 30th hearing the Debtor was reluctant to limit the options for relief, and so did not specify whether he was seeking a discharge under subparagraph (A) or (B) of § 1141(d)(5). However since the Court has found the Debtor has satisfied both the temporal and substantive criteria for entry of a discharge prior to completion of all payments under the Plan, the Court need not address subparagraph (B) of § 1141(d)(5).

The final inquiry, with respect to the Debtor's right to a discharge under §1141(d)(5), is whether the record is sufficient for the Court to make the findings required by the final subparagraph of that statute. It provides:

> (C) the court may grant a discharge if, after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge, the court finds that there is no reasonable cause to believe that-
>
> (i) section 522(q)(1) may be applicable to the debtor; and
>
> (ii) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B);
>
> and if the requirements of subparagraph (A) and (B) are met.

11 U.S.C. § 1141(d)(5)(C). In the Discharge Motion, the Debtor addresses each component of this condition precedent for entry of discharge.[4] He afforded creditors the required notice and an opportunity to oppose the Discharge Motion on those grounds, and the Court can therefore make these findings. See, e.g., In re Mbanefo, 2016 Bankr. LEXIS 3230 (Bankr. D.D.C. 2016); In re Lilly, 2013 Bankr. LEXIS 3462 (Bankr. D.D.C. 2013). None of the creditors, including AFF, filed an objection contending the Debtor should be denied a discharge based on § 1141(d)(5)(C). Therefore, THE COURT FINDS the

[3] See, e.g., Debtor's Motion to Modify Plan (doc. # 354) (stating, "as an individual in an active Chapter 11 bankruptcy case, despite talking to multiple lenders (both local and national), it is impossible for the Reorganized Debtors to procure financing to meet the deadline contained within the plan."); Recording of Hearing Held January 22, 2016 (doc. # 359); Debtor's Supplemental Motion for Discharge (doc. # 461).

[4] See doc. # 413 at ¶ 5 ("I have no reason to believe that there is any pending investigation or proceeding in which I may be found guilty of: (i) a felony involving the abuse of bankruptcy law; (ii) any violation of federal or state securities law; (iii) fraud, deceit, or manipulation in a fiduciary capacity (where I am responsible for managing someone else's money, property, or affairs) involving the purchase or sale of any securities; (iv) any civil offense under § 1964 of Title 18 U.S. Code (federal criminal laws); or (v) any criminal act, any intentional harm to another or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding five (5) years.").

Debtor has satisfied the requirements for entry of discharge under subparagraph (C) of § 1141(d)(5), as well.[5]

Having determined the Debtor is entitled to an early discharge at this time, this leaves the one salient question underlying AFF's objection to the Debtor's Discharge Motion: whether AFF's debts are encompassed by that discharge. AFF's objection to the Discharge Motion was limited: AFF only objected to the discharge of the Debtor's personal liability under the AFF loan agreements. AFF explicitly stated it had no objection to the Debtor's discharge entering at this time, provided the discharge order "expressly state that any discharge granted does not affect [the Debtor's] liability under the obligations currently held by AFF" (doc. # 418 at ¶ 6). In the Remand Order, Judge Reiss found the Debtor's personal liability on the AFF notes continued post-confirmation, because all of the terms of the modified loan agreements – including personal liability – were incorporated into the confirmed modified plan and remained binding (doc. # 252, p. 6, 11), without need of a reaffirmation agreement:

> [AFF's] mortgage notes are not post-confirmation contracts that seek to revive discharged debt. They are instead pre-petition debts which have been modified and which the Bankruptcy Court approved in its confirmation of the 2016 Modified Plan. … A reaffirmation agreement was not required to render these plan obligations enforceable.

Doc. # 252, p 10.[6] Because the District Court found the confirmed Modified Plan incorporated all terms of the modified AFF loan agreements, and created "recourse obligations to [AFF]" on behalf of the Debtor, which "do not require a reaffirmation agreement for their enforceability" (doc. # 252 at p. 11), it ruled these "recourse obligations" would survive discharge. In light of that analysis and determination, and "because this Court is bound by the mandate and logic underlying the decision of the District Court," Adelphia Communs. Corp. v. Associated Elec. & Gas Ins. Servs., Ltd. (In re Adelphia), 302 B.R. 439, 443 (Bankr. S.D.N.Y. 2003); see also In re Kerwin-White, 129 B.R. 375, 387 (Bankr. D. Vt. 1991) (finding the bankruptcy court is "bound by the District Court's Decision under the 'Law of the Case' doctrine"), this Court may not grant the Debtor a discharge which would encompass the Debtor's obligations to AFF or would convert AFF's long-term recourse notes into non-recourse notes. Thus, THE COURT FINDS any early discharge entered in favor of the Debtor must exclude the Debtor's liability to AFF on the remaining, unpaid obligations.

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[5] Because the Debtor's plan does not provide for the liquidation of all or substantially all of the property of the estate, he need not take the personal financial management course as a prerequisite to receiving a discharge. See In re Sheridan, 391 B.R. 287, 291 n. 5 (Bankr. E.D.N.C. 2008) (citing FED. R. BANKR. P. 1007(b)(7)(Interim)). Nevertheless, the Debtor did complete a personal financial management course and filed a copy of the certification of completion (doc. # 252).

[6] See In re Kramer, 552 B.R. 702, 705 (Bankr. E.D. Mich. 2016) upon which the District Court relied in its analysis of this question.

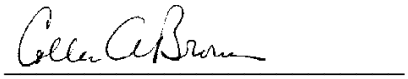
For the reasons set forth above, the Court will grant the Debtor an early discharge, at this time, under § 1141(d)(5), but that discharge will not relieve the Debtor of his personal liability to AFF on the mortgage obligations set out in the confirmed plan.

Accordingly, IT IS HEREBY ORDERED that the Debtor's motion for entry of discharge is granted, in part, as set forth herein, and AFF's limited objection to that discharge is sustained.

The Court will enter a separate order granting the Debtor a discharge on these terms.

This constitutes the Court's findings of fact and conclusions of law, and implementation of the Remand Order.

SO ORDERED.



April 9, 2018
Burlington, Vermont

Colleen A. Brown
United States Bankruptcy Judge