UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

PAUL LASNER,

Debtor.

BK. NO. 92-20805

DECISION AND ORDER

On March 25, 1992 Paul Lasner (the "Debtor") filed a voluntary petition initiating a Chapter 13 case. The petition was signed by him and his attorney, Peter Scribner on March 20, 1992. This matter is before the Court on two motions to dismiss the Chapter 13 case which has been designated Number 92-20805. The first motion is by the Chapter 13 Trustee, George M. Reiber, Esq. originally returnable on April 15, 1992, which was adjourned to April 20, 1992. The Trustee's motion to dismiss is pursuant to 11 U.S.C. §1307 for cause. The cause being that the Debtor is not eligible for Chapter 13 since he does not meet the requirements of 11 U.S.C. §109(e) in that he did not owe on the date of the filing of the petition non-contingent liquidated unsecured debts of less than $100,000. The Trustee notes in his motion that a previous Chapter 13 case filed by the Debtor (case designated No. 91-22569) was dismissed in accordance with the provisions of an Order of this Court dated December 30, 1991 which stated: "It is the decision of this Court that the Debtor was not an is not eligible to be a debtor under Chapter 13 of the Bankruptcy Code for the reasons that his unsecured debt exceeds $300,000."

The second motion to dismiss is also pursuant to 11 U.S.C. §1307 for cause. It is the motion of Robert Brainard and Gertha Feeley Cole, who are the first mortgage holders of property owned by the Debtor located at 123 Main Street in Penn Yan, New York. The motion to dismiss on behalf of the mortgage holders appears to be based on three grounds for cause: (1) the ineligibility of the Debtor under Section 109(e) as alleged in the Chapter 13 Trustee's motion; (2) the ineligibility of the Debtor under Section 109(g); and (3) that the filing was in bad faith - its sole and clear purpose being to frustrate the efforts of the mortgage holder to foreclose its mortgage by a sale scheduled for March 27, 1992, two days after the Debtor's filing. These matters were initially heard by the Court

on April 20, 1992 and adjourned to today, April 22, 1992, to allow the Court to more fully consider these matters and to read the affirmation of Mr. Scribner in opposition to the motions to dismiss. That affirmation was filed with the Court just before its calendar on April 20, 1992 so that the Court was unable to review it in detail.

The Debtor and his attorney argue that the Debtor is not ineligible to file a bankruptcy case by reason of the provisions of 11 U.S.C. §109(g) because the Debtor's prior case was not dismissed by the Court for willful failure of the Debtor to abide by orders of the Court, or to appear before the Court in proper prosecution of the case and that the Debtor had not requested and obtained a voluntary dismissal of the case following the filing of a request for relief from the automatic stay. This Court has reviewed the Court's file in connection with the Debtor's prior Chapter 13 case and agrees that the Debtor is not ineligible to file a bankruptcy case by reason of the provisions of 11 U.S.C. §109(g).

In connection with the eligibility of the Debtor under Section 109(e), the Debtor's petition and supporting papers list only one unsecured creditor in the amount of $505,000. That creditor is Lawrence Rosenblatt listed as having a liable claim incurred in 1989. The Debtor scheduled this claim as disputed. It appears from Mr. Scribner's affirmation, however, that a judgment in favor of Mr. Rosenblatt was entered by default in the Supreme Court, Westchester County on June 9, 1989 and later transcripted to Yates County on October 3, 1991. The Debtor claims that this was the first time that he became aware of the default judgment.

Mr. Scribner acknowledges that the default judgment which has not been reopened and which is more than a year old is ***res judicata*** as to the amount of the creditor's claim, as established by extensive authority including the Second Circuit in Kelleran v. Andrijevic, 825 F.2d 692 (1987). Even though no apparent effort has been made to do so since October 1991 or before, nevertheless, Mr. Scribner and the Debtor assert that since they intend to move in State Court to reopen the disputed judgment, the Court should not dismiss this case and allow them time to do so and should

ignore the clear provisions of 11 U.S.C. §109(e) and extensive case law holding that non-contingent and liquidated debts, such as those reduced to judgment, even though disputed, are not to be excluded for purposes of determining whether the Debtor has non-contingent liquidated unsecured debts of less than $100,000. In this regard, the Court cites In re Albano, 55 B.R. 363 (D.C.Ill. 1985) and In re Crescenzi, 69 B.R. 64 (Bankruptcy Court S.D.N.Y. 1986).

Of great concern to the Court is the fact that the Debtor and presumably Mr. Scribner who both signed the petition indicating that there was a prior case filed with this Court in 1991, knew or should have known of Judge Hayes' December 28, 1991 Order in that case deciding that the Debtor was ineligible for Chapter 13 because he failed to meet the requirements of 11 U.S.C. §109(e) with regard to unsecured debt, and that nothing had changed with respect to the Debtor situation since the Court's December 28, 1991 Order.

Judge Hayes' previous decision, which could arguably be considered law of the case although this is a different case, is ***res judicata*** on these issues. Since there is no evidence that anything has changed in Mr. Lasner's situation regarding his unsecured debts, this Court finds that Mr. Lasner is ineligible for Chapter 13 pursuant to the provisions of 11 U.S.C. §109(e).

The Debtor and Mr. Scribner have requested that the Court rather than grant the motions of the Trustee and first mortgage holder to dismiss, convert this case to a Chapter 7 case pursuant to 11 U.S.C. §1307(c). The Debtor argues that he is entitled to file bankruptcy case, having not violated the provisions of 11 U.S.C. §109(g) and in addition the Debtor believes that he may have a claim to a homestead exemption in the 123 Main Street, Penn Yan property which he may be able to take advantage of in a Chapter 7 case by making a motion pursuant to 11 U.S.C. §522(f) to avoid the Rosenblatt judgment lien on the property to the extent that it impairs the Debtor's alleged exemption.

Although the parties have already expressed some concern as to whether the Debtor may be able to claim such an exemption in connection with the 123 Main Street property, which is at least

partially commercial, the Court does not have before it sufficient facts at this time to address the issue.

11 U.S.C. §1307(c) allows the Court to convert a case unto a case under Chapter 7 of this title or to dismiss a case, whichever is in the best interests of the creditors and the estate. In this case the Court does not find that the conversion to a Chapter 7 case would be in the best interests of creditors or the Chapter 7 estate. Therefore this Court will not convert the case to a Chapter 7 case, but will grant the motions of the Chapter 13 Trustee and the first mortgage holder to dismiss this case. The dismissal will, however, be effective at 4:30 p.m. on Friday, April 24, 1992 unless prior to that time the Debtor has filed a conversion to Chapter 7 pursuant to the provisions of 11 U.S.C. §1307(a).

Since this Court feels that the filing of this Debtor's Chapter 13 case in view of the provisions of 11 U.S.C. §109(e), this Court's prior December 28, 1991 Order, and the overwhelming case law on the issue of debts reduced to judgment being non-contingent and liquidated for purposes of 11 U.S.C. §109(e), even though they may be in dispute or even on appeal, I believe that sanctions should be awarded against Mr. Scribner and the Debtor pursuant to Rule 9011 of the Rules of Bankruptcy Procedure. In this regard, it is the Court's intention to set the matter of sanctions down for a hearing unless the parties can otherwise agree on appropriate sanctions. This Court believes that appropriate sanctions may be the reasonable costs and attorneys' fees incurred by the first mortgage holder to bring and prosecute its motion to dismiss.

/s/
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY COURT JUDGE

Dated: April 22, 1992