

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

CHESTER J. DZIADOSZ and
JENNIFER A. DZIADOSZ

Case No. 97-11056 K

Debtors

PROCEDURAL HISTORY

On June 13, 1997, this Court conducted an evidentiary hearing on its own Order to Show Cause why, under 11 U.S.C. § 707(b), the Debtors' case should not be dismissed for "substantial abuse." The Court raised this issue *sua sponte* after reviewing the Debtors' schedules and statements in connection with the Trustee's Motion to Compel Turnover of Certain Non-exempt Property of the Estate.¹ The Motion and the Debtors' bankruptcy attorney's response thereto alerted the Court of the fact that in 1995 Mrs. Dziadosz plead guilty to embezzling \$389,155.92 from her employer, Grosso Door & Hardware ("Grosso"), and was ordered to pay restitution in that amount. Upon complete review of the Debtors' schedules and statements, however, neither the criminal proceedings or the restitution obligation were apparent. It was the paucity of reference to Mrs. Dziadosz's criminal restitution obligation in the schedules

¹ The Trustee sought turnover of an Anniversary Ring (estimated value of \$5,000), a Wedding Ring (estimated value of \$10,000), and 1996 New York State and Federal tax refunds (estimated value of \$1,000). The Debtors had the rings, but were reluctant to turn them over to the Trustee because they specifically were made the subject of a state court restitution order which followed Mrs. Dziadosz's 1995 conviction for embezzlement and confession of judgment in the amount of \$389,155.92. *See infra* note 4.

and statements,² the unexplained disappearance of the embezzled funds, and the Court's questions about the existence of over \$63,000.00 in unsecured credit card debt, which led the Court to order an evidentiary hearing under § 707(b).

FACTS

From March 25, 1992 through April 8, 1995, Mrs. Dziadosz embezzled \$389,155.92 from Grosso Door & Hardware. Apparently, Mrs. Dziadosz made accounts receivable deposits into Grosso's account without acknowledging the deposit in the company's check register. Mrs. Dziadosz then wrote checks to herself, her husband (Chester Dziadosz), or her sister-in-law (Vicki Nigro) and recovered the undocumented deposit for her own benefit. Over three years, Mrs. Dziadosz wrote from Grosso's account, twenty-eight checks to herself totaling \$314,505.59, three checks to her husband totaling \$31,150.00, and three checks to her sister-in-law totaling \$43,500.00.

In October of 1995, Mrs. Dziadosz pled guilty, signed a confession of judgment for the full \$389,155.92, and was ordered to pay restitution to Grosso in that amount. At the time

² The Petition mentions the restitution obligation in only two places. First, in the Statement of Financial Affairs under "Lawsuits involving non-creditors," the Debtors reveal that "Judgment was filed against Jennifer in October, 1995 for criminal charges of embezzlement." Second, in Schedule J (Current Expenditures of Individual Debtors), the Debtors listed "Restitution" as a \$100 monthly expense. No further explanation was given. Restitution payments (made within 90 days of the filing) were not listed in the Statement of Financial Affairs, nor was Grosso Door & Hardware listed as a creditor in Schedule F.

of sentencing, Mrs. Dziadosz, through her criminal attorney, paid to Grosso \$55,157.88 towards the restitution obligation.³ Because Mr. Dziadosz would not sign the confession of judgment, Grosso is pursuing Mr. Dziadosz in a civil action seeking to recover a portion of the misappropriated funds, or at least gain the right to attach a judgment lien to Mr. Dziadosz's one-half interest in the Debtors' real property.

Mrs. Dziadosz currently owes over \$330,000.00 plus accruing interest in nondischargeable restitution. As of the petition date, the Debtors' combined gross income was \$26,984.04. Mrs. Dziadosz currently pays \$100 per month towards restitution and now wants to discharge her credit card debts so that she can devote a larger share of her income to repaying the embezzled funds.

At the section 707(b) hearing, Mrs. Dziadosz answered questions about how the embezzled and other legally borrowed⁴ funds were spent, and also about the manner in which over \$63,000 in credit card debt was incurred.⁵ Her testimony revealed that a large portion of the

³ In addition, the presiding Supreme Court judge ordered that three rings, believed to be valued at \$15,250.00, be turned over to Mrs. Dziadosz's criminal attorney and liquidated, with the cash to be paid over to Grosso towards the restitution obligation. The rings were turned over to counsel but were subsequently returned to Mrs. Dziadosz with hopes that she would be able to sell at least one of the rings to a neighbor who recently became engaged. Apparently, no sale occurred and Mrs. Dziadosz still has the rings which she keeps locked in a safe deposit box. Two of these rings are the subject of the Trustee's Motion to Compel Turnover of Non-exempt Property of the Estate.

⁴ In 1994, the Debtors took a second mortgage on their home in the amount of \$76,112.00.

⁵ Mrs. Dziadosz testified at the June 13, 1997 hearing that the entire \$63,000 was not incurred after her guilty plea was entered, and that there were previous balances on some of the

money was spent on home improvements and home furnishings, some was spent on repaying college student loans, some was lost in depreciation on motor vehicles, \$50,000 went towards costs of the Debtors' wedding, and \$60,000 was used to repay a mortgage that Mr. Dziadosz's mother held on the Debtors' home. She testified that she did not give any large cash or other gifts to relatives or friends. In the end, Mrs. Dziadosz was able to roughly account for all but about \$150,000.

Mrs. Dziadosz explained that the credit card debt incurred from 1994 through 1996 was all necessary to sustain her family after she lost her job with Grosso and was incarcerated for six months. After she was released from prison, she was only able to obtain a minimum wage job and the expenses of maintaining her family (the Debtors have two children) far exceeded her and her husband's income. Mrs. Dziadosz testified that none of the restitution payments were made with funds obtained by credit card.⁶

On June 6, 1997, the Debtors' bankruptcy counsel filed an amendment to the Debtors' schedules. Counsel claims that this amendment was not prompted by the Court's Order to Show Cause.⁷ In defense of her clients, Counsel represented to the Court that the Debtors fully disclosed the circumstances of their restitution obligation on a worksheet prepared by the Debtors

credit cards. Mrs. Dziadosz did not say what those previous balances were. At the hearing, the Court assumed, for the sake of argument, that only half of those balances were incurred after Mrs. Dziadosz's criminal conviction.

⁶ In addition to the \$55,157.88 paid at sentencing, Mrs. Dziadosz has paid approximately \$1,000 towards her restitution obligation.

⁷ The Court issued its Order to Show Cause on May 30, 1997.

in Counsel's office, and that it was the petition preparer in Counsel's office who chose to represent the Debtors' circumstances as they were presented in the original schedules and statements. Counsel's only explanation for the paucity of reference to these special circumstances was that the Debtors always knew that the restitution obligation was nondischargeable and that since it was nondischargeable that it need not be listed on Schedule F.

The amendments submitted by Debtors' counsel: (1) explain the circumstances of Mrs. Dziadosz's possession of three rings (which were the subject of the Trustee's original motion, *see supra* notes 1, 4); (2) disclose on Schedule B that the Debtors own a hot tub valued at \$2,500; (3) clarify which of two real estate properties to which the Debtors wish to apply their exemption;⁸ (4) include the restitution obligation (\$331,000.00) in Schedule F.

HOLDING

In a § 707(b) "substantial abuse" proceeding "[t]here shall be a presumption in favor of granting the relief requested by the debtor." 11 U.S.C. § 707(b) (1994). The Debtors here request that their case be allowed to proceed so that they can discharge the various credit card obligations which were incurred in order to support their family following Mrs. Dziadosz's embezzlement conviction.

In light of (1) the statutory presumption in favor of the Debtors, and (2) the fact

⁸ In addition to their homestead, the Debtors own a one-third interest in real property in Stockton, New York. The Debtors' one-third interest is valued at \$40,000.

that the Court raised the issue of substantial abuse primarily because of the somewhat cryptic reference to the restitution obligation in the Debtors' petition, and (3) the fact that the Debtors did disclose the details of the criminal restitution obligations to their attorney, and (4) it was the Debtors' attorney who chose to prepare and submit the schedules and statements in the form in which they were submitted, this case will not be dismissed under section 707(b) as against either Debtor. The Debtors' schedules shall be further amended to disclose the civil action pending against Mr. Dziadosz by Grosso Door & Hardware. The § 341 meeting shall be reopened on special notice to all creditors. Such notice will contain an explanation of why the Debtors' schedules needed to be amended, why the restitution obligation was not properly scheduled the first time, and exactly how they were amended. All applicable bar dates are extended and shall begin to run anew from the date set for the reopened § 341 meeting.

SO ORDERED.

Dated: Buffalo, New York
June 23, 1997

Michael J. Kaplan, U.S.B.J.