

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

IN RE:

**PETER J. MAIRA, EXECUTOR OF
ESTATE OF ALPHONSE MAIRA,
DECEASED,
Debtor.**

BK. NO. 92-23273

DECISION AND ORDER

BACKGROUND

On March 4, 1992, after a prior June 14, 1989 Chapter 13 case (No. 89-21081) was dismissed in March 1991 for failure to make payments, Peter J. Maira ("Maira") filed a petition initiating a Chapter 13 case (No. 92-20597).

The only creditor scheduled by Maira was First Federal Savings and Loan Association of Rochester ("First Federal") as having a first mortgage with arrearages of in excess of \$16,000 against his residence valued at \$75,000.

Maira's Chapter 13 plan as initially filed provided for payments of \$300 per month for 60 months which he believed would pay the arrearages on the First Federal mortgage and the Chapter 13 Trustee's fees over the term of the plan.

On August 8, 1992 an Order Terminating the Automatic Stay was entered in favor of First Federal permitting it to proceed with fore-closure on Maira's residence.

Notwithstanding the entry of the Order Terminating the Automatic Stay in favor of First Federal, on September 9, 1992 at an adjourned confirmation hearing Maira agreed with the Chapter 13 Trustee to amend his plan to provide for payments of \$400 per month, the actual amount determined to be required to pay the First Federal arrearages and Trustee's fees over a term of five years.

On September 9, 1992 the Court confirmed the modified plan subject to the filing of a written consent by First Federal to the Plan's proposed treatment and payment of its mortgage arrearages.

No order of confirmation was ever submitted to the Court and on December 8, 1992 Maira, by a new attorney, filed an amended Petition and Schedule A of real property. In addition to Maira's residence, the amended schedule of real property lists Estate of Alphonse Maira, 604 Scio Street, Rochester, New York and indicates Maira's interest as 1/3 of such real property with a total value of \$25,000. Maira's interest is valued at \$3,105 subject to a \$4,000 secured claim.

On the same date, December 8, 1992, a petition and schedules were filed initiating a Chapter 7 case. These documents list the debtor as Peter J. Maira, Executor of the Estate of Alphonse Maira, Deceased. The Chapter 7 filing was designated as case No. 92-23273. In the schedules the related chapter 13 case of Maira was acknowledged and the only asset listed was 604 Scio Street, Rochester, New York valued at \$25,000. The property was listed as being owned by the decedent, subject to real estate tax liens of in excess of \$13,800 and further described as being in foreclosure.

A motion was made by the Court to strike the petition as void *ab initio* in that the debtor was not eligible to be a debtor under Chapter 7.

DISCUSSION

The obvious purpose for the filing of the Chapter 7 petition in question was to bring the Estate of Alphonse Maira within the jurisdiction of this Court and thereby attempt to obtain a stay of the pending real estate tax foreclosure proceeding and perhaps gain time to sell the property or otherwise provide for the payment of the tax liens. However, the cases and decisions are numerous and clear that a decedent's estate is not eligible for relief under Chapter 7 of the Bankruptcy Code. 11 U.S.C. § 109(b) provides that only a "person" may file under Chapter 7. Section 101(41) of the Bankruptcy Code defines "person" and states "'person' includes [an] individual, partnership and corporation, but does not include [a] governmental unit." Bankruptcy courts have refused to extend this definition to decedent's estates

which are to be administered under applicable state law. Matter of Jarrett, 19 B.R. 413, 414 (Bankr. M.D.N.C. 1982); In re Estate of Brown, 16 B.R. 128, 128 (Bankr. D.C. 1981).

Styling the pleadings in the name of the executor, who already has a Chapter 13 case pending in this Court, does not change the substance of the filing which was to file the estate in bankruptcy. An executor, in that fiduciary capacity alone, is not a separate person for purposes of Sections 101(41) or 109(b).

CONCLUSION

The petition is stricken *ab initio* since the Debtor, the Estate of Alphonse Maira, is not eligible for relief under Chapter 7 of the Bankruptcy Code.

IT IS SO ORDERED.

/s/

HON. JOHN C. NINFO, II
UNITED STATES BANKRUPTCY JUDGE

Dated: January 15, 1993