

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
CIVIL MINUTES**

Case Title : Lynda Rochelle Ziviello-Howell and Brenda Troylene Ziviello-Howell **Case No :** 11-22706 - A - 7
Date : 5/31/11
Time : 10:00

Matter : [9] - Motion/Application to Dismiss Case/Proceeding [UST-1] Filed by Creditor August B. Landis (swas) **OPPOSED**

Judge : Michael S. McManus
Courtroom Deputy : Sarah Head
Reporter : Diamond Reporters
Department : A

APPEARANCES for :

Movant(s) : U.S. Trustee's Attorney - Antonia Darling

Respondent(s) :
(by phone) Debtor(s) Attorney - Joseph Feist

MOTION was :
Denied
See final ruling below.

The court will issue a minute order.

Final Ruling: The motion will be denied and the case will remain pending.

On June 17, 2008, the debtors were issued a valid marriage license by the clerk of Sacramento County and they were married. See Docket #17. On February 2, 2011, the debtors filed a joint chapter 7 petition, pursuant to 11 U.S.C. § 302(a). See Docket #1.

The United States Trustee now moves to dismiss the joint petition pursuant to 11 U.S.C. § 707(a), arguing the debtors' joint petition is improper and unauthorized under 11 U.S.C. § 302 because the term "spouse," as defined in 1 U.S.C. § 7, the Defense of Marriage Act (DOMA), is limited to a person of the opposite sex.

The debtors oppose the motion, contending (1) they qualify under section 302 to file a joint petition; (2) no cause exists to dismiss under section 707(a); and (3) DOMA is unconstitutional.

On April 4, 2011, the debtors filed a motion asking the district court to withdraw the reference in connection with the dismissal motion. See Docket #24. Although the pending withdrawal of the reference motion did not require the U.S. Trustee to stay the prosecution of his motion to dismiss the case, on April 11, 2011 and again, on April 13, 2011, the U.S. Trustee continued the hearing on the dismissal motion. See Docket #24, #26; Fed. R. Bankr. P. 5011(c). The district court denied the debtors' motion on May 31, 2011. See In re Ziviello-Howell, No. CIV 2:11-00916 (E.D. Cal. May 31, 2011), ECF No. 5.

On March 30, 2011, the debtors' meeting of creditors was conducted. See Docket The trustee filed a report of no distribution and the anticipated last day to oppose the debtors' discharge was May 31, 2011. No objections to discharge or complaints seeking to except debts from discharge were filed.

11 U.S.C. § 302 provides that "[a] joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such

chapter and such individual's spouse. The commencement of a joint case under a chapter of this title constitutes an order for relief under such chapter."

11 U.S.C. § 707(a) provides that the court may dismiss a case, after notice and hearing, and for cause, which includes (1) unreasonable delay by debtor(s) that is pre-judicial to creditors; (2) nonpayment of required fees and charges; and (3) failure of the debtor to file, within the prescribed amount of time, the information required by section 521(a), but only on a motion by the U.S. Trustee. The grounds that section 707(a) lists as providing "cause" for dismissal are illustrative, not exhaustive, and section 707(a) does not require dismissal of cases. Dismissal is left to the sound discretion of the court. See *In re Padilla*, 222 F.3d 1184, 1191 (9th Cir. 2000); *In re Green*, 64 B.R. 530 (B.A.P. 9th Cir. 1986).

Factors influencing a court's decision to dismiss or not to dismiss a case include: 1) whether all of the creditors have consented; 2) whether the debtor is acting in good faith; 3) whether an objection to discharge, an objection to exemptions, or a preference claim is pending. See *In re Turpen*, 244 B.R. 431, 434 (B.A.P. 8th Cir. 2000). "In its simplest terms, the test turns on whether or not the dismissal is in the best interests of the debtor and the creditors of the estate, with particular emphasis on whether the dismissal would be prejudicial to creditors." *In re Aupperle*, 352 B.R. 43, 46 (Bankr. D.N.J. 2005).

The bankruptcy court has subject matter jurisdiction over all cases filed under the Bankruptcy Code, regardless of whether party filing petition is eligible to be bankruptcy debtor. Eligibility for relief under the Bankruptcy Code is not jurisdictional. See 11 U.S.C.A. § 109; *In re Automotive Professionals, Inc.*, 370 B.R. 161 (Bankr. N.D. Ill. 2007); see also *In re Wenberg*, 902 F.2d 768 (9th Cir. 1990) aff'g 94 B.R. 631 (B.A.P. 9th Cir. Cal. 1988); *In re Manalad*, 360 B.R. 288 (Bankr. C.D. Cal. 2007) (debtor ineligibility does not strip bankruptcy court of jurisdiction to consider other issues or enter orders); *Warren v. Wirum*, 378 B.R. 640 (N.D. Cal. 2007) (credit counseling briefing requirement of section 109(h) is not jurisdictional). Hence, when an ineligible debtor files a petition, if no party in interest timely seeks dismissal of the petition, the petition may stand.

Here, the movant does not argue that one of the enumerated causes for dismissal exists. Instead, the movant argues that 1 U.S.C. § 7, the Defense of Marriage Act, defines spouse as "a person of the opposite sex who is a husband or a wife." Therefore, the movant asserts that the case should be dismissed because the debtors, although legally married, are two women and thus, cannot be deemed spouses under federal law.

In support of this position, the movant cites *In re Jephuneh Lawrence & Assoc. Chartered*, 63 B.R. 318, 321 (Bankr. D. Colo. 1986), where the court ordered dismissal a joint petition filed by a corporation and its sole shareholder because the Bankruptcy Code only permits married persons to file a joint petition. Additionally, the movant cites *In re Malone*, 50 B.R. 2, 3 (Bankr. E.D. Mich. 1985), where the trustee challenged the filing of a joint petition by a heterosexual couple who had never been legally married. The court did not find "cause" for dismissal of that case but instead ordered the debtors to amend their petition to include only one debtor because they were not legally husband and wife as required under section 302(a). *Id.*

The court notes that in each of these cases, the court's reasoning was dependent upon whether or not the parties were legally married. This is not in question in this case. The debtors were legally married in California on June 17, 2008 and the movant does not dispute that fact. Thus, but for the existence of DOMA's definition of spouse, the debtors would qualify under section 302(a) to file a joint petition.

In a pre-DOMA case, *In re Favre*, 186 B.R. 769 (Bankr. N.D. Ga. 1995), the issue of whether a same-sex couple, who were not legally married, qualified to file a joint petition came before the court as an objection to the confirmation of their chapter 13 plan. The court held that "in order to qualify to file a joint petition under section 302 . . . , the parties must be legally married." *Id.* at 774. However, in dicta, the court stated that a legally married same-sex couple recognized by the state "would qualify for relief under section 302." *Id.* at 773.

On the other hand, in a recently decided case from the Second Circuit, a bankruptcy court held that "cause" did not exist to dismiss a case based solely on the provisions of DOMA. *In re Somers*, 2011 WL 1709839 (Bankr. S.D.N.Y. 2011). In that case, the U.S. Trustee moved to dismiss for "cause" under section 707(a) a joint chapter 7 case filed by a same-sex couple who were legally married in Vermont. The U.S. Trustee maintained they were not spouses because they were not spouses under the DOMA definition.

The court declined to dismiss the petition, concluding that "the court has substantial discretion in ruling on a motion to dismiss under section 707(a), and in exercising that discretion must consider any extenuating circumstances, as well as the interests of the various parties." *Id.* at 4. An extenuating circumstance that the court found relevant was that the U.S. Department of Justice, "acting under the instruction of the

Attorney General and the President of the United States," had argued "DOMA may not be constitutionally applied to legally married same-sex couples" and that office would not be defending the law in cases pending in the circuit. *Id.*; see also Docket #19, Ex.3, Letter from Attorney General Eric Holder to Speaker John Boehner.

The Somers court went on: "The mere existence of DOMA is not sufficient to remove the duty imposed on this Court by section 707(a) to find cause' prior to dismissing the case." *Id.*

The facts before this court are substantially similar to those found in Somers. The debtors are a legally married, same-sex couple who filed a joint chapter 7 petition. The movant seeks to dismiss their petition for the sole reason that DOMA does not recognize the debtors as spouses.

Without reaching DOMA's constitutionality, this court is not convinced that dismissal is in the best interest of all parties or that section 707(a) requires dismissal even if DOMA is applicable and constitutional.

First, this joint case has progressed to a near conclusion. The debtors have appeared at the meeting of creditors. The deadline for objecting to the debtors' exemptions has passed. The deadline for moving for dismissal pursuant to 11 U.S.C. § 707(b) has expired. The trustee has filed a report of no distribution. And, the hearing on the dismissal motion came on the last day to object to discharge or to file a dischargeability complaint (and the deadline expired without any such complaints being filed). In essence, but for this motion, this case is over. This motion has been brought before the court for decision much too late.

While the motion was filed on March 18, the parties failed to bring it before the court (the court's law and motion calendar permits the litigants to set their own hearings) for resolution until the end of the case.

Second, dismissing or splitting the case at this juncture would duplicate the work and costs for the debtors, the creditors, the trustee, and the court.

Third, there has been no showing of prejudice to any creditor or unfair advantage to the debtors if this case is permitted to continue. For instance, Form 22 indicates that one of the debtors earns income. That income is below the California median whether the income earning debtor is part of a one or a two-person household. See Form 22, Chapter 7 Statement of Current Monthly Income and Means-Test Calculation.

Fourth, the debtors' scheduled assets are identified as their community property, as are their debts. Hence, even if the cases were filed separately, it would make sense to consolidate them. Cf. Fed. R. Bankr. P. 1015(b); *In re Malone*, 50 B.R. at 3. The only effective difference between a joint petition and two consolidated petitions is that the former requires one filing fee and the latter requires two filing fees.

Therefore, whether or not the debtors are spouses under DOMA, because they are legally married, because their assets and liabilities belong to their community, and because it will not make any practical difference to anyone if this case proceeds as one or two cases, the court concludes that there is no cause for dismissal of this joint case.

This is not the first time a court from within the Ninth Circuit has declined to rule on the constitutionality of DOMA in the context of a federal statutory scheme. In *In re Golinski*, 587 F.3d 956 (9th Cir. 2009), a federal judicial employee was denied health benefits for her spouse because her spouse was a woman and not a man. The court held, in order to avoid difficult constitutional issues, that it should harmonize DOMA with the statutes creating the benefit program as well as the court's commitment to equal employment opportunity. The court then granted the benefits to the legally married same-sex spouse.

In *In re Levenson*, 560 F.3d 1145 (9th Cir. 2009), a federal public defender challenged denial of the benefits, provided under the Federal Employee Health Benefits Act (FEHBA), for his same-sex spouse. The court held that excluding from benefits spouses who have entered into legally binding relationships does not serve the promulgated governmental interests DOMA was meant to advance and thus, no rational basis existed for differential treatment of opposite-sex versus same-sex spouses.

Given the above, the court concludes that dismissal is not in the best interest of the debtors or their creditors and insufficient cause exists to dismiss their joint petition. Thus, the motion will be denied.