

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
SOUTHERN DISTRICT OF MISSISSIPPI  
JACKSON DIVISION**

**IN RE:**

**CHAPTER 7**

**WAYNE STEWART, SR. AND  
MARILYNN STEWART**

**CASE NO. 05-00081JEE**

**UNITED STATES TRUSTEE**

**PLAINTIFF**

**VS.**

**ADVERSARY NO. 05-0054JEE**

**WAYNE STEWART, SR. AND  
MARILYNN STEWART**

**DEFENDANTS**

Hon. Ronald H. McAlpin  
100 West Capitol Street, Ste. 706  
Jackson, Mississippi 39269

Attorney for United States Trustee

Wayne Stewart, Sr.  
Marilynn Stewart  
5371 Keele Street  
Jackson, Mississippi 39206

Pro Se Debtors

Edward Ellington, Judge

**ORDER GRANTING  
MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court on the *Motion for Summary Judgment* filed by the United States Trustee and the *Response* thereto filed by Wayne and Marilynn Stewart. The Court, having considered the motion and legal memorandum in support, as well as the response and the exhibits thereto, finds for the following reasons that the motion is well taken and should be granted.

On May 26, 2000, Wayne and Marilyn Stewart (Debtors) filed a voluntary petition for relief pursuant to Chapter 13 of the Bankruptcy Code.<sup>1</sup> The Debtors were granted a discharge in that Chapter 13 case on June 2, 2003.

Less than two years later, on January 5, 2005, the Debtors, pro se, filed a voluntary petition for relief pursuant to Chapter 7 of the Bankruptcy Code. On March 31, 2005, the United States Trustee (UST) initiated this adversary proceeding by filing a complaint objecting to the Debtors' discharge under Chapter 7. The UST alleges in the complaint that the Debtors are barred from receiving a discharge pursuant to 11 U.S.C. § 727(a)(9) because they previously received a discharge in the Chapter 13 case which was filed within six (6) years of the filing of their Chapter 7 petition and because they paid less than 70% of allowed unsecured claims in the Chapter 13 case. Wayne Stewart, Sr. filed a response to the complaint wherein he maintains that the Debtors should be granted a discharge.<sup>2</sup> Thereafter, the UST filed the motion for summary judgment presently before the Court to which the Debtors filed a response.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **I.**

This Court has jurisdiction of the subject matter and the parties to this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. §157. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(J).

---

<sup>1</sup> In re Wayne and Marilyn Stewart, No. 00-02496, S.D. Miss., May 26, 2000.

<sup>2</sup> The Court notes that the response filed on April 5, 2005, was signed by only one of the Debtors, Wayne Stewart, Sr. The UST has filed an application for an entry of default against the other Debtor, Marilyn Stewart, for her failure to respond. However, since the Court is ruling on the substantive issues, the Court will deny the application for a default and accept the answer as filed on behalf of both Debtors.

## II.

Federal Rule of Civil Procedure 56, made applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7056, states that summary judgment is properly granted only when, viewing the evidence in the light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Bankr. P. 7056(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The nonmoving party must then go beyond the pleadings and by its own affidavits or by depositions, answers to interrogatories, and admissions on file designate specific facts showing a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. at 324, 106 S.Ct. at 2553. An issue is genuine if “there is sufficient evidence favoring the nonmoving party for a fact finder to find for that party” and material if it would “affect the outcome of the lawsuit under the governing substantive law.” Phillips v. OKC Corp., 813 F.2d 265, 272-73 (5<sup>th</sup> Cir. 1987).

## III.

Section 727(a)(9) of the Bankruptcy Code<sup>3</sup> provides:

(a) The court shall grant the debtor a discharge, unless - -

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, . . . in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least - -

(A) 100 percent of the allowed unsecured claims in such case; or

(B) (i) 70 percent of such claims; and

---

<sup>3</sup> Hereinafter all code sections refer to the United States Bankruptcy Code found at Title 11 of the United States Code unless otherwise noted.

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; . . . .

11 U.S.C. § 727(a)(9). Thus, for a debtor to receive a discharge in a Chapter 7 case filed within six years of a previously filed Chapter 13 case, the debtor must have paid 100% of allowed unsecured claims in the Chapter 13 case, or have paid at least 70% of allowed unsecured claims and the debtor's plan must have been proposed in good faith and have been the debtor's best effort.

In support of its motion for summary judgment, the UST presents a certified copy of the Chapter 13 Trustee's *Final Report and Account* from the Debtors' prior Chapter 13 case. The *Final Report and Account* shows that during the course of their Chapter 13 case, the Debtors paid \$10,892.35 to six unsecured creditors with combined allowed claims in the amount of \$21,784.70, or fifty percent of the allowed unsecured claims.

In response, the Debtors present as evidence that they paid at least 70% of the allowed unsecured claims in their Chapter 13 case two reports provided to them by the Chapter 13 Trustee's office during the pendency of the Chapter 13 case. Those two reports, entitled *Plan of Receipts and Payments*, cover the periods of May 12, 2000, to October 13, 2000, and November 27, 2002, to April 30, 2003. The Debtors assert that the two *Plan of Receipts and Payments* reports conflict with the Chapter 13 Trustee's *Final Report and Account* as to the amount paid to allowed unsecured claims and demonstrate that they, in fact, paid at least 70% of allowed unsecured claims.

The Debtors' reliance on the two *Plan of Receipts and Payments* reports is misplaced, however, as those are merely interim reports provided by the Chapter 13 Trustee's office to keep debtors apprised of receipts and distributions being made during the pendency of their bankruptcy cases. Section 704(a)(9), though, requires a trustee to "make a final report and file a final account of the administration of the estate with the court and with the United States trustee." Thus, the *Final*

*Report and Account* is the official, definitive declaration of the claims paid in a Chapter 13 case.<sup>4</sup> Moreover, the *Plan of Receipts and Payments* reports themselves indicate in the upper right hand corner that unsecured claims were paid in the Debtors' Chapter 13 case at the rate of 50%. The Court therefore finds that in the Debtors' Chapter 13 proceeding, the *Final Report and Account* demonstrates that allowed unsecured claims were paid an amount totaling less than 70%.<sup>5</sup>

Having considered the evidence, the Court concludes that the UST has established that the Debtors filed a Chapter 13 case on May 26, 2000, and were granted a discharge under § 1328 on June 2, 2003. The Court further finds that the UST has demonstrated that within six years, the Debtors filed a Chapter 7 case on January 5, 2005. The Court further finds that the UST has established that the Chapter 13 plan payments totaled less than 70% to allowed unsecured creditors in the Debtors' Chapter 13 case. Thus, viewing the evidence in the light most favorable to the Debtors, the Court finds the Debtors have failed to produce sufficient evidence establishing that a genuine issue of material fact remains for trial. Accordingly, the Court finds that the UST's motion for summary judgment is well taken and should be granted, and that pursuant to §727(a)(9), the Debtors are barred from receiving a discharge in this Chapter 7 proceeding.

## CONCLUSION

---

<sup>4</sup> In addition, "The clerk's office . . . relies upon the certifications of the standing chapter 12 and 13 trustees" that the case has been properly and fully administered. L. King, 9 Collier on Bankruptcy, ¶ 5009.01 (15<sup>th</sup> Ed. Rev. 2005).

<sup>5</sup> Based on its finding that the Debtors paid less than 70% of the allowed unsecured claims in their Chapter 13 proceeding, the Court need not determine whether that plan was proposed in good faith and was their "best effort."

Based on the foregoing, the Court finds that the *Motion for Summary Judgment* filed by the United States Trustee is well taken and should be granted.

A separate final judgment will be entered in accordance with Federal Rules of Bankruptcy Procedure 7054 and 9021.

**SO ORDERED** this the 9<sup>th</sup> day of March, 2006.

/s/ Edward Ellington  
**UNITED STATES BANKRUPTCY JUDGE**