SO ORDERED,

Judge Jamie A. Wilson
United States Bankruptcy Judge
Date Signed: May 2, 2022

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

REBECCA WATSON LINDSEY, **CASE NO. 20-02316-JAW**

DEBTOR. **CHAPTER 13**

ORDER GRANTING DEBTOR'S MOTION FOR ENTRY OF HARDSHIP DISCHARGE PURSUANT TO 11 U.S.C. § 1328(b)

This matter came before the Court for hearing on April 25, 2022 (the "Hearing"), on the Motion for Hardship Discharge (the "Motion") (Dkt. #38) filed by Lori Wallace on behalf of the deceased debtor, Rebecca Watson Lindsey (the "Debtor"); the Trustee's Objection to Debtor's Motion for Hardship Discharge (the "Objection") (Dkt. #43) filed by the chapter 13 trustee, James L. Henley, Jr. (the "Trustee") and the Amended Joinder in Motion for Chapter 13 Hardship Discharge (the "Joinder") (Dkt. #46) filed by Jeremy Wallace, as the administrator of the intestate estate of the Debtor (the "Administrator"). At the Hearing, Rachel Coxwell represented the Debtor, R. Michael Bolen represented the Administrator, and James L. Henley, Jr. represented himself as the Trustee. After fully considering the arguments of counsel and the testimony and evidence presented at the Hearing, the Court finds as follows:[1]

[1] The following findings of fact and conclusions of law are made pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

Jurisdiction

This Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) and (J). Notice of the Hearing was proper under the circumstances.

Facts

1. On September 3, 2020, the Debtor filed a voluntary petition for relief under chapter 13 of the U.S. Bankruptcy Code (the "Code") (Dkt. #1). That same day, the Debtor filed her Chapter 13 Plan (the "Plan") (Dkt. #7) and her Schedules/Statements (Dkt. #5). In Schedule A/B, the Debtor listed her home, valued at $125,000.00 (the "Home"). (Dkt. #5 at 1). Under the Plan, the general unsecured creditors receive no distribution. The Court entered the Order Confirming Chapter 13 Plan (the "Confirmation Order") (Dkt. #31) on December 4, 2020. The Plan provides for ongoing monthly mortgage payments of $524.00 for a term of 60 months. (Dkt. #5 at 2-3).

2. According to the copy of the Certificate of Death attached to the Joinder, the Debtor passed away on February 27, 2022 at the age of seventy-three (73). (Dkt. #46-1).

3. It was undisputed at the Hearing that the Debtor made 18 of the 60 total Plan payments. The Motion and Joinder allege that the Debtor has met all the requirements for a discharge under 11 U.S.C. § 1328. (*See* Dkt. #38; Dkt. #46).

4. On March 28, 2022, the Trustee filed the Objection, stating that the Debtor is not entitled to a hardship discharge because she has failed to prove that "absent a thorough analysis and appraisal [of the home] it cannot be assumed unsecured creditors in a chapter 7 would receive less" and therefore, the Debtor has not met the burden of proof required for a hardship discharge pursuant to 11 U.S.C. § 1328(b). (Dkt. #43 at 1). No other response to the Motion was filed.

5. The parties agree that: (1) the Debtor listed the value of the Home as $125,000.00 on Schedule A/B; (2) NewRez, LLC d/b/a Shellpoint Mortgage Service filed a proof of claim asserting a secured claim against the Home in the amount of $52,585.79 (Cl. No. 5-1); and (3) the Debtor claimed a homestead exemption on Schedule C against the Home in the amount of $70,067.97,[2] pursuant to *Mississippi Code* § 85-3-21. (Dkt. #5 at 9). Based on these amounts, there was only $2,346.24[3] of potential equity in the Home on the date the Plan was confirmed, December 4, 2020.

6. At the Hearing, the parties conceded that the only issue in dispute was the second element of § 1328(b)(2), namely, whether there was available equity in the Home at the time of confirmation to pay unsecured creditors more had the Debtor filed a chapter 7 case than the zero percent of unsecured debt being paid through the Plan.

7. On that limited issue, the Court heard testimony from the Administrator and the Debtor's daughter, Lori Wallace. In support of the Motion, the Administrator introduced three (3) exhibits: Letters of Administration naming Jeremy Wallace as the Administrator of the intestate estate of the Debtor ("Exhibit 1"); the Decree Appointing Administrator, which listed the two (2) heirs of the Debtor ("Exhibit 2"); and nine (9), 8 x 10 inch color photographs[4] of the Home ("Collective Exhibit 3").

[2] The Administrator argues that the Debtor's homestead exemption could be amended to the statutory cap of $75,000.00, thereby subsuming any equity in the home. Miss Code Ann. § 85-3-21. The fact that Debtor did not use the entire exemption amount seems to indicate that she did not believe there was additional equity in the Home for the exemption to apply.

[3] $125,000.00 (Home value) – $52,585.79 (mortgage) – $70,067.97 (exemption claimed) = $2,346.24 of potential equity.

[4] The Administrator testified that he took the photographs approximately two (2) weeks prior to the Hearing.

Discussion

Generally, a chapter 13 debtor may receive a discharge upon completion of her chapter 13 plan pursuant to § 1328(a) of the Code.[5] *See* 11 U.S.C. § 1328(a). If a debtor fails to complete the chapter 13 plan successfully, she may be entitled to a "hardship discharge" under § 1328(b). A hardship discharge under § 1328(b) discharges the debtor from all unsecured debts provided for by the plan or disallowed under § 502, except for certain long-term debt and any debt of a kind specified in § 523(a). 11 U.S.C. § 1328(c)(2). Section 1328(b) provides that, subject to certain exclusions, at any time post-confirmation and after notice and a hearing:

> [T]he court may grant a discharge to a debtor that has not completed plan payments under the plan only if—
>
> (1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
>
> (2) the value, as of the effective date of the plan, of the property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor has been liquidated under chapter 7 of this title on such date; and
>
> (3) modification of the plan under section 1329 of this title is not practicable.

11 U.S.C. § 1328(b). The burden of proof in satisfying the three, independent conditions precedent to the grant of a hardship discharge lies with the debtor. *In re Elvira*, No. 05-81841-G3-13, 2009 WL 4824001, at *2 (Bankr. S.D. Tex. Dec. 9, 2009). It is well settled that the burden of proof in dischargeability actions is a preponderance of the evidence. *See Grogan v. Garner,* 498 U.S. 279 (1991); *Beauboeuf v. Beauboeuf (In re Beauboeuf),* 966 F.2d 174, 178 (5th Cir. 1992). The failure to satisfy any subsection of § 1328(b) could result in a denial. *In re Schleppi*, 103 B.R. 901, 904 (Bankr. S.D. Ohio 1989). If a debtor does satisfy all three elements, then it is within the discretion of the court to grant a hardship discharge after notice and a hearing. *In re Bacon*, No. 02-40665,

[5] Hereinafter, all references to code sections are to the Code found at title 11 of the Code.

2003 WL 26098322, at *1 (Bankr. S.D. Ga. Aug. 20, 2003); *In re Quintyne*, 610 B.R. 462, 466 (Bankr. S.D. N.Y. 2020) (citation omitted).

As a preliminary matter, the Court notes that the Trustee does not dispute that a deceased debtor can pursue administration of the case or that Lori Wallace and the Administrator are proper representatives of the deceased Debtor. *See* FED. R. BANKR. P. 1016.

A. Section 1328(b)(1) and (3)

Section 1328(b)(1) provides that a debtor is entitled to a hardship discharge where a "debtor's failure to complete [plan] payments is due to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1328(b)(1). This is a fact-driven analysis, "with an emphasis properly focused on the nature and quality of the intervening event or events upon which the debtor relies." *In re Wilson*, No. 2:10-bk-20883, 2016 WL 699553, at *2 (Bankr. S.D. W. Va. Feb. 22, 2016) (internal citation omitted). The parties do not dispute that the death of the Debtor satisfies this element.

Section 1328(b)(3) requires the Debtor to prove that modification of the plan under § 1329 is not practicable. 11 U.S.C. § 1328(b)(3). The parties do not dispute that due to the Debtor's death, modification of the Plan under § 1329 is not practicable because the source for Plan payments is no longer available.

B. Section 1328(b)(2)

Section 1328 (b)(2) is the only element in dispute, and reads as follows:

> [T]he value, as of the effective date of the plan, of the property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date;

11 U.S.C. § 1328(b)(2). At the onset, the Court notes that if the Debtor had claimed the maximum exemption amount of $75,000.00, pursuant to section 85-3-21 of the *Mississippi Code*, there would

have been no question that there was no equity in the Home on the confirmation date. *See* Miss. Code § 85-3-21. There was no testimony as to how or why the Debtor valued the Home as $125,000.00 on her Schedule A/B, other than the general statement provided in Schedule A/B that the "[c]urrent value is derived from purchase price, appraisal, internet, tax assessed value, age, condition and repairs needed, cost of comparable properties, prevailing market and availability." [6] (Dkt. #5 at 1).

To determine whether the Home had any equity available to unsecured creditors on December 4, 2020, the date of confirmation, the Administrator provided testimony. He testified that he was the son-in-law of the Debtor and had been going to the house for 25-27 years and was familiar with the condition of the Home, which sits on seven (7) acres of land. In addition to his primary occupation as a firefighter, he testified that, while unlicensed as a general contractor, he had remodeled approximately thirty (30) homes and regularly purchases materials for remodeling.[7] The Administrator testified that while the Home sits on seven (7) acres, only the half acre where the Home is situated is useable. In addition, a four-wheel drive vehicle is needed to get to the Home because of the damaged asphalt drive.[8] To illustrate his testimony that the home was in serious disrepair, the Administrator introduced Collective Exhibit 3, which consisted of nine (9), 8 x 10 inch color photographs. The photographs show: (1) the badly damaged asphalt road, which limits access to the home; (2) foundation issues; (3) damaged plywood flooring and carpet; and (4) damaged exterior siding and steps. In summation, he testified that he estimated repairs to the Home

[6] The Debtor used the same value of $125,000.00 for the Home in her schedules in her two (2) prior bankruptcy cases, which indicates that she did not update the value from petition to petition. *See In re Rebecca Watson Lindsey*, No. 17-03221 (Dkt. 4 at 1); *In re Rebecca Watson Lindsey*, No. 18-01825 (Dkt. 4 at 1).

[7] (Hr'g at 11:23:09-11:24:15 (Apr. 25, 2022)). The Hearing was not transcribed. References to the discussions at the Hearing are cited by the timestamp of the audio recording.

[8] The Administrator testified that he and his wife, Lori Wallace, installed the asphalt drive approximately eighteen (18) years ago at a cost of $15,000.00. He further testified that his Suburban truck "bottomed out" on the badly eroded driveway when driving up to the Home. Likewise, Lori Wallace testified that a four-wheel drive vehicle is needed to get to the Home.

to cost: $5,000.00 for flooring; $6,000.00 for paint; $6,500.00 for the roof; $6,000.00 for the HVAC system[9]; $3,000.00 to $4,000.00 to replace rotten wood; $10,000.00 to repair the asphalt driveway; $12,000.00 to $15,000.00 to repair a retaining wall; and $10,000.00 for foundation work.[10] The total of his repair estimations is between $58,500.00 and $62,500.00, and did not include repairs to a burst water line going to the Home. The Court finds that the testimony of the Administrator was credible and that the photographs convincingly show that the Home's need for significant repairs, in all probability, existed at the time of confirmation, in an amount well in excess of the possible $2,346.24 in equity, when using the Debtor's value of $125,000.00 for the Home.

Lori Wallace, the Debtor's daughter, testified that she had been going to the Home for years and that, because of all the needed repairs, she believed the value of the Home to be only $50,000.00.[11] The photographs in Collective Exhibit 3 show a property that appears to have been in disrepair for several years, and this conclusion is supported by Lori Wallace's testimony that her mother was unable to maintain the Home after her father's death in 2010. In other words, the problems with the Home did not begin post-confirmation but appear to be the result of the Debtor's inability to maintain the Home for many years. Given the undisputed testimony and accompanying photographs showing the poor condition of the Home, the Court is convinced that, as of December 4, 2020, the Home was worth significantly less than the $125,000.00 value listed on Schedule A/B and that there was no equity that could have been distributed to creditors in a chapter 7 as of that date.

[9] The house does not have a working HVAC system.
[10] (Hr'g at 11:29:03-11:30:16 (Apr. 25, 2022)).
[11] (Hr'g at 11:40:38-11:40:46 (Apr. 25, 2022)).

Having considered the entirety of the record and the arguments of counsel, the Court finds that the Debtor, through the Administrator and Lori Wallace, has presented more than sufficient evidence to support a finding that the value, as of the effective date of the Plan, of the property actually distributed under the Plan to each unsecured creditor is not less than the amount that would have been paid to those creditors if the estate of the Debtor had been liquidated under chapter 7 on that date. Therefore, the Debtor, through the Administrator and Lori Wallace, has met her burden and proved by a preponderance of the evidence that the second prong of the three conditions precedent to the granting of a hardship discharge pursuant to § 1328(b)(2) has been satisfied.

Conclusion

For the above reasons, the Court finds that the Debtor is entitled to a hardship discharge under § 1328(b). Accordingly, the Court concludes that the Motion should be granted.

IT IS, THEREFORE, ORDERED that the Motion is hereby granted, and the Debtor is excused from complying with the requirement under § 1328(g)(1) to complete a course on financial management.

IT IS FURTHER ORDERED THAT pursuant to Federal Rule of Bankruptcy Procedure 4007(d), creditors have until sixty (60) days from the date of this Order to file a complaint to determine the dischargeability of a debt under § 523(a)(6).

##END OF ORDER##