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**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

IN RE:

COY N. HARAWAY,

CASE NO. 90-25092

DEBTOR

CHAPTER 13

**MEMORANDUM OPINION AND ORDER RE
WILLIAM BURNETT'S MOTION FOR DISMISSAL
OF CASE NUNC PRO TUNC TO APRIL 15, 1994, AND
DEBTOR'S MOTION SEEKING A FINDING OF FACTS**

As a result of debtor's failure to make his chapter 13 plan payments, this case was dismissed on April 15, 1994. Upon debtor's motion, Haraway's case was reinstated by the bankruptcy court on June 21, 1994. One of Haraway's unsecured creditors, William C. Burnett, subsequently appealed such reinstatement to the District Court for the Western District of Tennessee. On July 31, 1996, the district court reversed the bankruptcy court's reinstatement of Haraway's case. Burnett then filed a motion for dismissal of Haraway's chapter 13 case nunc pro tunc to the original dismissal date of April 15, 1994.

This Court conducted a hearing on this matter on February 11, 1997, pursuant to FED. R. BANKR. P. 9014. This is a core proceeding. 28 U.S.C. § 152(b)(2). After reviewing the testimony from the hearing and reviewing the record as a whole, the Court makes the following findings of fact and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACTS

The debtor in this case, Coy N. Haraway ("Haraway"), filed his chapter 13 petition on June 13, 1990. Prior to this filing, Haraway had entered into a contract with William C. Burnett ("Burnett") for the purchase of Redwing Technical Systems, Inc. ("Redwing") on December 30, 1989. The contract specified that Burnett would sell to Haraway all one thousand (1000) outstanding shares of Redwing's stock as well as ownership of several patents related to Redwing's operations. In exchange for this sale, Haraway was to make payments to Burnett out of the on-going sales of Redwing. The purchase price for the stock and patents was set at

\$35,000.00. In addition to this payment, Burnett was to receive royalties on the sales of Redwing's dust control nozzles until such time as the entire \$35,000 purchase price had been paid. At the time of filing bankruptcy, Haraway had not made any payments to Burnett. Despite this delinquency, however, the debtor did not list Burnett as a creditor in either his bankruptcy petition or his chapter 13 plan. The debtor's plan was confirmed on August 14, 1990, and provided for a 5% payment to unsecured creditors.

Still unaware of the pending bankruptcy case, Burnett made demand on Haraway for payment under the contract in June of 1992. In response, on June 20, 1992, the debtor paid Burnett \$2000.00. A dispute then arose between the parties as to the remaining balance due Burnett under the Redwing contract. As a result of this disagreement, Haraway refused to make any further payments to Burnett. Burnett responded by taking possession of some of Redwing's equipment and inventory and allegedly attempting to repudiate the contract.

Subsequently, on August 24, 1992, Haraway filed a breach of contract action against Burnett in Shelby County Chancery Court seeking to enforce the terms of the purchase agreement. Haraway's complaint also asked for the issuance of a temporary restraining order, which the chancery court granted, against any further interference by Burnett with Redwing's business operations. At the time of filing the breach of contract action, Haraway deposited \$48,273.00 with the clerk of chancery court as the undisputed amount owed to Burnett.

After learning of Haraway's chapter 13 case, Burnett filed a proof of claim with the chapter 13 trustee's office on July 13, 1992. Both this document and the attached copy of the purchase agreement list the creditor as "William C. Burnett" and not "Redwing Technical Systems, Inc.," Additionally, Burnett signed the proof of claim "William C. Burnett." He did not file a proof of claim in Redwing's name. In fact, there was no proof of claim filed in Redwing's name at any time during debtor's case.

On October 8, 1992, Burnett filed a motion with the bankruptcy court seeking relief from the automatic stay and permission to file a late claim. On July 21, 1993, the bankruptcy court issued an administrative order allowing Burnett's claim in the amount of \$49,761.00. This claim

was classified as a general unsecured debt.¹ Additionally, on September 23, 1993, the bankruptcy court granted Burnett relief from the automatic stay to file a counter complaint against Haraway in the chancery court breach of contract action.

On April 15, 1994, Haraway's chapter 13 case was dismissed for failure to make monthly plan payments, which were then three months in arrears. Approximately two weeks later, on April 28, 1994, the debtor filed a motion to reinstate his case. On May 23, 1993, Burnett filed an objection to this motion on the grounds that the debtor had been in bankruptcy almost continually since 1987² and the instant case had already been dismissed for non-payment once before.³

The bankruptcy court held a hearing on debtor's motion on June 7, 1993. On June 16, 1993, Burnett filed a motion for a new trial. This motion alleged (1) that the order of dismissal became a final order ten days after its issuance on April 15, 1994, (2) that the debtor did not file his motion for reinstatement within this ten day time period, and (3) that debtor's motion did not set forth any of the grounds found in FED. R. BANKR. P. 9024⁴ which provides relief from final judgments in limited circumstances.

On June 21, 1994, the bankruptcy court issued an order reinstating debtor's chapter 13 case. The bankruptcy court's order did not state the grounds for reinstatement; however, on October 17, 1994, the bankruptcy court issued an order denying Burnett's motion for a new trial. In this order, the court stated that the debtor's motion to reinstate was governed by 11 U.S.C. § 350(b). On October 25, 1994, Burnett filed a notice of appeal of both of these judgments to the

¹ On August 12, 1993, Burnett filed a motion to have this claim treated as a secured one; however, the court never issued a ruling on this motion.

² Debtor had previously filed for chapter 13 protection in 1987, case no. 87-27694. In that case, the chapter 13 trustee moved four times for a dismissal of the case as a result of debtor's failure to pay into the plan. The case was eventually dismissed on May 25, 1990.

³ Debtor's present case was dismissed on November 3, 1992, and subsequently reinstated on December 29, 1992.

⁴ This bankruptcy rule incorporates Federal Rule of Civil Procedure 60 as providing guidance for appeals of final judgments.

United States District Court for the Western District of Tennessee, Western Division.⁵

While the bankruptcy litigation described herein was pending, the breach of contract action filed in the Chancery Court of Shelby County had been tried and resolved. This adjudication, however, was appealed to the Tennessee Court of Appeals for the Western Section of Tennessee. As a result of this appeal and the one in district court, Burnett filed a motion in the bankruptcy court on July 3, 1995, for a stay of Haraway's chapter 13 case pending the outcome of the appeals. On September 8, 1995, the bankruptcy court issued an agreed order granting his motion which read as follows:

It is, therefore, ordered, adjudged and decreed:

1. That further action in this debtor's chapter 13 case, *including the granting of a discharge, [and] the closing of this case[,]* is stayed as is contemplated by Bankruptcy Rule 8005 pending a final resolution of the appeal of the matter from the Chancery Court of Shelby County, Tennessee and final resolution of the appeal taken from this Court to the United States District Court for the Western District of Tennessee.

(emphasis added). This order also mandated that counsel was to immediately notify the bankruptcy court of final resolution of either of these appeals.

On July 31, 1996, the district court issued an order reversing the bankruptcy court's reinstatement of Haraway's chapter 13 case. The district court order stated that only "closed" cases, and not "dismissed" ones, were subject to being "reopened" under 11 U.S.C. § 350(b). The district court further stated that "closed" cases are ones in which the estate has been completely administered. "Dismissed cases", however, are ones in which the bankruptcy proceeding is terminated without complete administration. As a separate ground for reversing the reinstatement, the district court held that Haraway had not established any of the criteria in FED. R. BANKR. P. 9024 for relief from a final judgment. To the best of this Court's knowledge, Haraway has not appealed the district court's order.

⁵ The docket number for this district court appeal was 94-3054-MLBRO.

In complete compliance with the bankruptcy court's order staying Haraway's case, Burnett filed a notice with the bankruptcy court on August 12, 1996, that the district court appeal had been resolved. Included within this notice was a motion for dismissal of the debtor's case nunc pro tunc to April 15, 1994.

In response to a request by the chancery court in the breach of contract action, the debtor filed a motion seeking a finding of facts on September 20, 1996. This motion requests a determination by the bankruptcy court as to whether funds paid to Burnett through the debtor's plan were paid to Burnett in his individual capacity or in his capacity as owner of Redwing. On January 27, 1997, Burnett filed an objection to this motion asserting that the bankruptcy court did not have jurisdiction to decide this issue due to the district court's order of dismissal.

This Court held a hearing on Burnett's motion and debtor's motion on February 11, 1997. A day after the hearing, on February 12, this Court issued an order scheduling a settlement conference in these matters. Three settlement conferences were conducted with no resolution of the case. On April 29, 1997, Burnett filed a renewed motion for dismissal of the case nunc pro tunc to April 15, 1994.

As of the date of this opinion, the stay pending appeals granted on September 8, 1995, has not been lifted by this Court. As a result, the debtor's chapter 13 case has not been discharged or closed. While the various appeals were pending, however, the debtor made voluntary payments into his chapter 13 plan. According to the chapter 13 trustee's office, Haraway's plan was fully funded and administered by July 26, 1995. Additionally, Burnett was paid a total of \$2488.05, or 5%, of his unsecured claim through the chapter 13 plan pursuant to the proof of claim filed in the name of "William C. Burnett".⁶

⁶ Haraway's confirmed plan set the percentage to be paid to unsecured creditors at 5%. Although Burnett filed a motion to have his claim treated as a secured one, the court never ordered such a change.

II. CONCLUSIONS OF LAW

Despite the rather complicated factual background of this case, there is little for this Court to do regarding the matter today. The July 31, 1996, district court order reversing Judge Donald's reinstatement of Haraway's chapter 13 bankruptcy is a binding decision on this Court. It is as if the reinstatement was never granted. As a result, the case stands effectively dismissed to April 15, 1994.

Under the Bankruptcy Code, any property that is still in the chapter 13 trustee's possession when a case is dismissed is to be revested "in the entity in which such property was vested immediately before the commencement of the case." 11 U.S.C. § 349(b)(3) (1994). When a debtor voluntarily pays into his plan and the creditors voluntarily accept such payments, however, the directive of § 349 is avoided. The trustee is obligated though to revest any property still in his possession at the time of dismissal in the correct entity.

With regards to the debtor's motion, this Court made a determination as to how Burnett was paid his money under the plan in the "Findings of Fact" section of this opinion. This Court is unsure of the effect this finding has on a state court. That is a matter for the chancery court to decide.

III. ORDER

It is therefore ORDERED that the debtor's case is dismissed nunc pro tunc to April 15, 1994. It is FURTHER ORDERED that any funds the chapter 13 trustee is still in possession of are to be revested in the proper entity according to 11 U.S.C. § 349(b).

IT IS SO ORDERED.

G. Harvey Boswell
Date: June 30, 1997