

11 USC § 521(e)(2)(A)
11 USC § 521(e)(2)(B)
FRBP 1008
FRBP 4002(b)(3)

In re Larry M. Salyers
January 31, 2013

Case # 13-60140-tmr7
TMR (not intended for publication) 2013 WL __

Debtor filed a Ch. 7 petition. Approximately five weeks before his first scheduled § 341(a) meeting of creditors he filed a motion for an order waiving § 521(e)(2)(A)'s requirement that on pain of possible dismissal, he provide the Trustee, at least 7 days before the date first set for the meeting, with the federal tax return or transcript for the most recent tax year ending immediately before the case's commencement and for which a Federal tax return was filed. Debtor represented in his motion that he had no such return or transcript because he was not required to file a return, or alternatively that any required return or transcript was unavailable.

The court denied the motion as premature, and more in the nature of an affirmative defense to a yet-to-be-filed motion to dismiss for failure to provide the return or transcript. The court held that such a motion was not mandatory and indeed its filing was at the Trustee's discretion. The court however directed the Debtor, pursuant to FRBP 4002(b)(3), to provide the Trustee with a written statement, verified or containing an appropriate declaration, that the tax return or transcript did not exist or was not available, and the reasons therefore, at least 7 days before the scheduled § 341(a) meeting. Then, should the Trustee subsequently move to dismiss based on failure to provide the return or transcript, Debtor was at liberty to argue under § 521(e)(2)(B), that his failure was due to circumstances beyond his control.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

IN RE)
LARRY MICHAEL SALYERS,) Bankruptcy Case
) No. 13-60140-tmr7
Debtor.) MEMORANDUM OPINION¹

Debtor Larry Michael Salyers has filed a Motion for Order to Waive Requirement to Provide Tax Returns Pursuant to 11 U.S.C. § 521.² Debtor’s motion alleges that he “has not been required to file income tax returns within the past ten years” and, thus, has no access to tax return transcripts from the IRS. Although not stated in the motion, I assume Debtor has not filed a federal income tax return for at least ten years and has no tax return or transcript to provide. Debtor seeks a waiver of the requirement to provide copies of his federal tax returns to the trustee. Based on my review of the motion, the documents filed in this case, and applicable law, I hereby DENY the motion as premature.

Facts

Debtor filed his petition for relief under chapter 7 of the Code on January 17, 2013. The original § 341(a) first meeting of creditors is scheduled for February 25, 2013, and, by notice generated on January 17, 2013, the court informed Debtor and his attorney of that meeting. The court’s letter to Debtor

¹This Memorandum Opinion is not intended for publication.

² Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 accompanying that notice reinforced that Debtor is required to provide a copy of his most recently filed
2 federal income tax return (or a transcript of such return) to the case trustee seven days before the meeting of
3 creditors. On January 18, 2013, Debtor filed a motion to waive compliance with § 521(e)(2) and does not
4 appear to be able to provide a copy of any federal tax return or transcript. The deadline for complying with §
5 521(e)(2) by providing a tax return or transcript has not yet passed.

6 Discussion

7 Code § 521(e)(2) requires debtors to deliver tax returns as follows:

8 (A) The debtor shall provide—

9 (I) not later than 7 days before the date first set for the first meeting of creditors, to
10 the trustee a copy of the Federal income tax return required under applicable law (or at the
11 election of the debtor, a transcript of such return) for the most recent tax year ending
immediately before the commencement of the case and for which a Federal income tax return
was filed; and

12 (ii) at the same time the debtor complies with clause (I), a copy of such return (or if
13 elected under clause (I), such transcript) to any creditor that timely requests such copy.

14 (B) If the debtor fails to comply with clause (I) or (ii) of subparagraph (A), the court shall
15 dismiss the case unless the debtor demonstrates that the failure to so comply is due to
circumstances beyond the control of the debtor.

16 Rule 4002(b)(3) states that debtors must provide their tax returns to the trustee “at least 7 days before
17 the first date set for the meeting of creditors” If debtors are unable to provide the required returns, the
18 Rule allows debtors to “provide a written statement that the documentation does not exist.” Rule 4002(b)(3).
19 The Advisory Committee Note to that Rule states that “[a]ny written statement that the debtor provides
20 indicating either that documents do not exist or are not in the debtor’s possession must be verified or contain
21 an unsworn declaration as required under Rule 1008.” 2008 Advisory Committee Note to Interim
22 Bankruptcy Rule 4002. The requirement to provide tax returns does not appear to be optional in that the
23 Code states “the court shall dismiss the case” unless the debtor proves circumstances excusing compliance.
24 Code § 521(e)(2)(B) (emphasis added). The dismissal, however, is not automatic like in § 521(i)(1) (“the
25 case shall be automatically dismissed effective on the 46th day”), and it requires the filing of a motion to
26 dismiss. See In re Duffus, 339 B.R. 746, 748 (Bankr. D. Or. 2006).

1 Here, Debtor seeks essentially a “comfort” order protecting him in advance of any motion to dismiss
2 based on his failure to provide a tax return or transcript as required by § 521(e)(2)(B). I decline to provide
3 such an unnecessary order. As the Maine bankruptcy court wrote in a similar situation: “Ruling on what are
4 essentially affirmative defenses before motions are filed may comfort potential respondents, but is not a wise
5 devotion of court resources and likely would run afoul a jurisdictional essential: that a ‘case or controversy’
6 exist.” In re Ring, 341 BR 387, 391 (Bankr. D. Me. 2006) (announcing that it would no longer entertain such
7 motions).

8 Pursuant to Rule 4002(b)(3), Debtor should provide to the case trustee a written statement, verified or
9 containing an appropriate declaration, that the tax returns or transcripts do not exist or are not available and
10 the reasons for that assertion. Debtor should provide that written statement “not later than 7 days before” the
11 February 25, 2013 first meeting date. Should the trustee, in the trustee’s “prosecutorial discretion,” decide to
12 seek dismissal of this case based on Debtor’s failure to provide tax returns, we can address in a subsequent
13 hearing whether Debtor’s failure to comply is due to circumstances beyond his control. See Duffus, 339 B.R.
14 at 748 (trustee has authority to waive requirement by declining to file a motion).

15 Conclusion

16 Because the motion is unnecessary as described above, Debtor’s motion is denied. This memorandum
17 constitutes my findings of fact and conclusions of law. A separate order denying the motion will be entered.
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21 THOMAS M. RENN
22 Bankruptcy Judge
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