



SO ORDERED.

SIGNED this 16 day of November, 2005.

ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:)	
)	
BA VAN LU,)	Case No. 02-11738
NANCY C. LU,)	Chapter 7
Debtors.)	
_____)	
)	
BA VAN LU,)	
NANCY C. LU)	
Plaintiffs,)	
)	
v.)	Adversary No. 04-5358
)	
UNITED STATES OF AMERICA)	
DEPARTMENT OF TREASURY)	
INTERNAL REVENUE SERVICE,)	
)	
Defendant.)	
_____)	

ORDER ON GOVERNMENT'S MOTION TO DISMISS

The United States moves to dismiss this adversary proceeding with prejudice for lack of

prosecution under Fed. R. Civ. P. 41(b) as it applies in bankruptcy by Fed. R. Bankr. P. 7041.¹ Debtors Ba Van Lu and Nancy C. Lu filed this proceeding to determine that their federal income tax obligations for the years 1993 through 1996 are dischargeable under 11 U.S.C. § 523(a)(1) and 523(a)(7). They filed their bankruptcy case on April 18, 2002 and this adversary proceeding has been pending since December 27, 2004.

According to the Court's scheduling order dated April 11, 2005, discovery was to terminate in this case on August 5, 2005 and the final pretrial order was due on September 15, 2005. The United States promptly commenced written discovery, but received only incomplete responses, at least a month past their due date, in June of 2005. In the meantime, the debtors' original counsel withdrew and their current counsel, Stan Kenny, entered his appearance. Upon inquiring of Mr. Kenny concerning the incomplete responses, the Government learned that the Lu's had left the United States for Vietnam where, according to Mr. Kenny's response to this motion, they plan to stay for at least one year. The exact date of their return to this country is unknown.²

Rule 41(b) allows a defendant to seek dismissal of an action when the plaintiff fails to prosecute it or to comply with the federal rules governing procedure. Unless the Court otherwise provides, such a dismissal operates as an adjudication on the merits. Here, according to their response to the motion to dismiss, when the Lu's left the country for Vietnam, they assured their counsel that they would provide more complete responses to discovery by mail. This they have failed to do. Moreover, their counsel states that he is unaware of the Lu's address or other contact information. He has heard nothing from them since their departure from the United States. In his

¹ Dkt. 29.

² The Court notes that the Lu's have not provided a statement of a change of their address in their bankruptcy case as required by Fed. R. Bankr. P. 4002.

response to the motion to dismiss, Lu's counsel does not take issue with the Government's recitation of the procedural history of this adversary proceeding or the inadequacy of the discovery responses.³

In these circumstances, the court can only conclude that the plaintiffs have abandoned the prosecution of this case, justifying its prompt dismissal with prejudice. However, because the plaintiffs seek to discharge a substantial amount of taxes (in excess of \$200,000), the Court will afford them 30 days grace as follows. The plaintiffs shall supply the Government with complete responses to the pending written discovery, including but not limited to a "wet ink" signature page for their responses to the Government's interrogatories within 30 days of the date of this order. They shall also file a certificate of compliance with this Order in this adversary proceeding with proof of service of the same on the Government. If either the responses are not supplied or a certificate is not filed within this time period, this adversary proceeding shall be dismissed under Fed. R. Civ. P. 41(b) and the Government may present an Order of Dismissal which this Court will enter without further notice or hearing.

The Government's motion to dismiss is therefore temporarily DENIED, subject to the conditions and Government's right to submit an order dismissing the adversary proceeding as set out above.

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³ Dkt. 32.