

In the United States Bankruptcy Court

for the Northern District of Iowa

DARRELL L. WESSELS and
ELAINE JOYCE WESSELS

Bankruptcy No. 83-02297

Debtors.

Chapter 7

PACKARD ELEVATOR COMPANY INC. and
SHELL ROCK ELEVATOR COMPANY

Adversary No. 84-027OW

UNITED STATES OF AMERICA and
COMMODITY CREDIT CORPORATION

Adversary No. 84-0312W

PARKERSBURG STATE BANK

Adversary No. 84-0272W

FIRST NATIONAL BANK OF WAVERLY
IOWA

Adversary No. 84-0273W

Plaintiffs

vs.

DARRELL L. WESSELS and
ELAINE JOYCE WESSELS

Defendants

ORDER RE: APPLICATION FOR APPROVAL OF DISMISSAL OF PENDING SECTION 523 and 727 COMPLAINT UPON CERTAIN CONDITIONS

The matter before the Court is an "Application for Approval of Dismissal of Pending Section 523 and 727 Complaint Upon Certain Conditions" filed by Debtor-Defendant Darrell L. Wessels in the above-captioned case and adversaries on January 19, 1988. The Court now enters its findings of fact and conclusion of law as required by Bankr. R. 7052. This is a core proceeding pursuant to 28 U.S.C. § § 157(b)(2)(I) and (J).

I.

The Court¹ entered summary judgment denying Debtors-Defendants' discharge under 11 U.S.C. § 727 (a)(4)(A) on September 12, 1986. Debtors-Defendants appealed that decision to the District Court for the Northern District of Iowa. On September 2, 1987, the District Court² affirmed the judgment against Debtor-Defendant Darrell L. Wessels and reversed the judgment against Debtor-defendant Elaine J. Wessels and remanded. Debtor-Defendant Darrell L. Wessels filed his Notice of Appeal to the Eighth Circuit Court of Appeals on September 30, 1987.

¹ The Hon. Thomas Wood, United States Bankruptcy Judge, sitting by designation for the Northern District of Iowa.

² The Hon. Donald E. O'Brien, United States District Chief Judge for the Northern District of Iowa.

On January 19, 1983 Debtors-Defendants³ filed an "Application for Approval of Dismissal of Pending Section 523 and 727 Complaint Upon Certain Conditions" with this Court. Notice was given to all creditors and parties-in-interest and a bar date for objections was set. No objections were filed. A hearing was held April 14, 1988 and the matter was submitted to the undersigned for consideration. On April 27, 1988, this Court ruled that it had no jurisdiction to rule on the application since the issue was under consideration by the United States Court of Appeals for the Eighth Circuit. On May 16, 1988, the Court of Appeals remanded the appeal before them to the United States District Court for the Northern District of Iowa with directions to remand the case to the Court for further proceedings concerning the proposed settlement. The District Court remanded to this Court on May 24, 1988. (fn.4)

3 The Court notes that a stipulation of dismissal under Bankr. R. 7041 should be signed by all parties. A motion to compromise under Bankr. R. 9019 should be filed by the trustee. See Samore v. First Bank of South Dakota (In re Smith), Bankr. No. 36-02138S, Adversary No. 86-0469S (Bankr. N.D. Iowa, August 6, 1987). Neither procedure was followed here.

4 Notice to all creditors will not be required again. Bankr. R. 2002(a)(3).

II.

Dismissal of an adversary proceeding is governed by Bankr. R. 7041. This rule incorporates Fed.R.Civ.P. 41 but further provides that

a complaint objecting to the debtor's discharge shall not be dismissed at the plaintiff's instance without notice to the trustee and only on order of the court containing terms and conditions which the court deems proper.

Bankr. R. 7041 (emphasis added). Fed.R.Civ.P. 41(a)(1) governs voluntary dismissals by stipulation:

Subject to the provisions of Rule 23(e) [which governs class actions] of Rule 66 [which deals with receiverships and is not applicable in bankruptcy], and of any statute of the United States, an action may be dismissed by the plaintiff without order of court . . . (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.

Fed.R.Civ.P. 41(a)(1) (in pertinent part).

Here the compromise and settlement nature of Debtors-Defendants' Application also brings Bankr. R. 9019(a) into consideration.⁵

5 See 9 Collier on Bankruptcy, para. 7041-03 (1987).

It provides:

On motion by the trustee and after a hearing on notice to creditors, the debtor and indenture trustees as provided in Rule 2002(a) and to such other entities as the court may designate, the court may approve a compromise or settlement.

Bankr. R. 9019(a).

Four factors are usually considered when a motion to compromise under Bankr. R. 9019 is presented: the probability of success in the litigation; the difficulties, if any, to be encountered in collections the complexity of the litigation and the attendant expense, delay, and inconvenience involved; and the

paramount interests of the creditors with proper deference to their reasonable views. Drexel v. Loomis, 35 F.2d 800, 806 (8th Cir. 1929); see also Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-25 (1968); Lindquist v. First Northtown National Bank (In re Lakeland Development Corp.), 48 B.R. 85, 85-92 (Bankr. Minn.) afield, 782 F.2d 1048 (8th Cir. 1985), cert. denied, 476 U.S. 1130 (1986). Ultimately, a compromise should only be approved when it is in the best interest of the estate. Lindquist, 48 B.R. at 89. Even when creditors are silent, the court on its own initiative must act for the benefit of all creditors. United States v. Aweco, Inc., 725 F.2d 293, 299 (5th Cir. 1984).

This application for dismissal contains several conditions. The agreement essentially provides that Debtors-Defendants shall pay directly to the several Plaintiffs between \$30,000 and 240,000 by December 31, 1988. Once the designated payments are made, Plaintiffs⁶ agree to dismiss their § 523 and § 727 complaints with prejudice and the Court is to enter an order granting discharge.

6 First National Bank of Waverly is also to dismiss with prejudice its collection suit pending in District Court for Mitchell County.

A supplemental filing by Debtors-Defendants on April 20, 1988 indicate that under the proposed dismissal, six creditors--Plaintiffs in the above-captioned adversaries--will divide the \$30,000 to \$40,000 to be paid under the agreement and

[t]hat the majority of the other creditors . . . have either been paid in full or substantially paid since the date of the filing of the bankruptcy or in the case of the Security State Bank wrote off their claim four or five years before this bankruptcy was filed or have had their claims disallowed.

They further stated that the twenty creditors not falling under the above categories hold claims totaling \$38,831.68 but that upon a distribution of \$30,000 under the settlement to all claims, these twenty creditors would receive approximately \$1,928.00.

II.

Upon consideration of the rules and decisions delineated above, the Court concludes that approval of Debtors-Defendants' Application shall be denied.

Of the four factors in Drexel, two factors are readily considered. Since two courts have already determined that Debtor-defendant Darrell Wessels should be denied discharge under § 727, he first factor--the probability of success--is apparent. Moreover, consideration of the third factor--the complexity of the litigation and attendant expense, inconvenience, and delay--highlights the fact that considerable time and money have already been invested by the several Plaintiffs and Debtors-Defendants in litigating discharge. Resolution by settlement or by appeal will not diminish those investments. The second factor--difficulty in collection--has not been identified as a concern. Therefore, the fourth factor--paramount interest to creditors--becomes an important consideration here.

Under the settlement proposed by Debtors-Defendants, completion of the scheduled payments to the several Plaintiff-Creditors will entitle Debtors-Defendants to a discharge. All creditors will relinquish their right to pursue their claims. However, only a few creditors will be compensated for that relinquishment. Obviously, this settlement is not in the best interest of the estate or of all creditors and the Application for Approval of Dismissal cannot be approved where all creditors who are barred by

the discharge do not participate in a distribution through the estate of the settlement payments. The preferred course would be payment of the settlement to the estate and an appropriate distribution to all creditors.⁷

⁷ Proponents of this settlement have argued that PlaintiffsCreditors would receive sums approximating their attorneys' fees and costs of litigation. Even though this settlement will not be approved, Plaintiffs may not be without remedy. See U.S.C. § 503.

ORDER

Debtors-Defendants Darrell L. Wessels and Elaine Joyce Wessels' "Application for Approval of Dismissal of Pending Section 523 and 727 Complaint Upon Certain Conditions" is denied.

SO ORDERED THIS 27th DAY OF MAY, 1988.

William L. Edmonds
Chief Bankruptcy Judge