

In the United States Bankruptcy Court

for the Northern District of Iowa

HARVEY R. AUSBORN and MILDRED L.
AUSBORN
Debtors.

Bankruptcy No. X89-01802M

Chapter 7
Contested No. 5166

ORDER RE: MOTION FOR RELIEF FROM STAY FILED BY FARMERS COOPERATIVE SOCIETY OF GARNER, IOWA

Farmers Cooperative Society of Garner, Iowa (COOP) moves for relief from the automatic stay so it may offset its obligation to pay patronage dividends to one of the debtors against its prepetition claim against that debtor. This motion has been resisted by Mildred L. Ausborn and the estate of Harvey R. Ausborn, who died after the initial closure of this case. Preliminary hearing on the motion was conducted by telephone on December 6, 1991. Appearing were David Mansheim as attorney for Mildred L. Ausborn and the estate of Harvey R. Ausborn; Anita L. Shodeen on behalf of Coop; and Larry S. Eide as trustee. At that time, only debtors had resisted the motion for relief. The trustee has not filed a resistance. Following the preliminary hearing, the parties filed a stipulation of relevant facts, agreeing that trial of the matter was not necessary. The court canceled the final hearing on the motion for relief and set a deadline of January 29, 1992 for the filing of briefs. Only Coop has submitted a brief to the court. Based on the stipulation submitted by the parties, the court makes the following findings of fact:

1. That the above referenced Debtors filed for voluntary relief under Chapter 7 of the Code on or about November 29, 1989.
2. That the Farmers Cooperative, Garner, Iowa (hereinafter referred to as "Garner Coop") was listed as an unsecured creditor on Schedule A-3.
3. That the Garner Coop had received a judgment in the principal amount of \$3,056.10, and held this claim in addition to interest on the date of the above referenced filing.
4. That claims were not opened in the original bankruptcy proceeding.
5. That the Debtors received a discharge on March 16 1990 and a final decree was entered on November 15, 1990.

6. That the Debtors held some interest in patronage dividends in the Garner Coop on the date of filing, November 29, 1989, but inadvertently did not list this asset in the original filing.

6.(sic) That Mr. Harvey Ausborn died on February 13, 1991 and a probate proceeding was commenced.

7. That demand was made by Mr. Ausborn's probate estate, to Garner Coop, for payment of the value of the patronage dividends.

8. That on September 25, 1991 the bankruptcy proceeding was reopened to amend the schedules at B-2(t) to include "patronage stock", which the surviving spouse valued at \$0.00 as of November 29, 1989.

9. That the records of Garner Coop indicate a value of \$2,479.50 in patronage dividends as of November 29, 1989.

10. On or about October 23, 1991, the Garner Coop filed a Motion for Relief from Stay to exercise set-off against the patronage dividends. A proof of claim was also filed by the Garner Coop which set forth an amount owing after set-off of the dividends.

11. That the Garner Coop is organized and operates under Iowa Code Chapter 499.

12. A telephonic hearing was held and it was agreed that the issue of relief from the stay could be submitted on briefs and these stipulated facts.

DISCUSSION

Debtors, in their resistance to the motion for relief, raised two issues. First, that rather than terminate the stay and permit set off by Coop, the court should order patronage dividends to be abandoned by the trustee to the benefit of Mildred Ausborn and the estate of Harvey R. Ausborn. It is their contention that at the time of the filing of the case, the patronage dividends had no value, and that this court should consider the abandonment issue in light of the value at the time of filing. Second, debtor and the probate estate argue that the discharge of the debtors prevents the set-off, and that if abandonment is not ordered, the patronage dividends would remain property of the estate available for pro rata distribution among all claimants.

At the preliminary hearing conducted by telephone, trustee Larry S. Eide agreed that had the patronage dividends been listed at the time of filing, he likely would have sought to abandon them. He indicates his uncertainty as to whether the increase in the asset's value, due to Mr. Ausborn's post-petition death, should inure to the debtors or to the estate. To the extent that the dividends would remain property of the estate and not now be ordered abandoned, Eide concedes that Coop should have the right to offset under 11 U.S.C. 553.

Neither the trustee nor debtors have submitted briefs stating their legal arguments with cited authorities. A brief has been filed by Coop which attempts to deal with issues raised at the preliminary hearing and issues which might be raised in the briefs. The court will not, as Ms. Shodeen has, try to anticipate and rule on potential but unarticulated legal defenses to the motion for relief.

For the following reasons, the court concludes that the patronage dividends remain property of the estate, that their post-petition increase in value inures to the benefit of the estate, and that discharge does not prevent set off by Coop. There presently is no stay under 11 U.S.C. 362 which protects the debtor, and set off after the entry of the discharge order is not a violation of the discharge order or of 11 U.S.C. S 524 of the Code. Trustee has raised no defenses under 11 U.S.C. 362.

Debtors did not list the patronage dividends on their schedule of property at the time of filing. Property scheduled by the debtor, and not administered by the estate, is abandoned by operation of law at the time of the closing of the case. 11 U.S.C. 554(c). Because the patronage dividends were never listed on debtors' schedules, even though the omission was inadvertent, they cannot be abandoned by operation of law. See, In re Harris, 32 B.R. 125, 127 (Bankr. S.D. Fla. 1983).

Debtors argue that although the patronage dividends may be property of estate, they should presently be considered to have a value of zero, the debtors' estimated value at the time of filing. Debtors offer no legal support for this position. Assuming that the patronage dividends had a value of zero at the time of filing, their value has now increased on account of the death of Harvey Ausborn. Absent any argument or citation of authority, this court cannot find that abandonments must be determined in accordance with circumstances which existed at the time of filing, rather than at the time the abandonment is requested. Appreciation of estate assets may well be grounds for retaining them in the estate even though they might have been burdensome or without value at the instant of filing. The court will not deny the motion for relief on the ground that the stock might have been abandoned at the time of filing and should thus be abandoned at this time.

Debtors' remaining issue is whether relief from the stay should be granted to permit set off. As to the debtors, there is no stay. The stay arising out of 11 U.S.C. 362 which protects the debtor from actions of his creditors was dissolved in this case at the time of the entry of discharge. 11 U.S.C. 362 (c) (2) (C) . Nor is the effort of Coop to achieve set off a violation of 11 U.S.C. 524. Under 11 U.S.C. 524(a) (2), a discharge granted in the case "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or set off any such debt as a personal liability of the debtor. . . ." Coop does not seek set off as a collection opportunity from the debtors, but rather seeks to assert common law right of set off against property of the estate. The trustee in this case concedes that if the patronage dividend shares remain property of the estate that Coop has the right of set off. The trustee has not resisted the motion for relief.

ORDER

IT IS ORDERED that the motion for relief from stay filed by Farmers Cooperative Society of Garner, Iowa is granted.

SO ORDERED ON THIS 3rd DAY OF FEBRUARY, 1992.

William L. Edmonds
Bankruptcy Judge