# In the United States Bankruptcy Court

## for the Northern District of Iowa

### Western Division

WILLIAM STEWART DIBLE — Bankruptcy No. X89-01008S
*Debtor(s).* — Chapter 7

## MEMORANDUM OF DECISION RE: TRUSTEE'S NOTICE OF SALE

The matter before the court is the trustee's notice of sale and the debtor's objection. The trustee desires to sell debtor's claims against third parties. Debtor contends that the claims arose after his bankruptcy filing so they are not property of the estate.

Hearing was held by telephone on March 16, 1993. Habbo Fokkena appeared as trustee; Robert L. Sikma appeared for the debtor, William Stewart Dible (DIBLE). These findings and conclusions are issued pursuant to the requirements of Fed.R.Bankr.P. 7052.

Dible filed his chapter 7 petition on July 10, 1989. The schedules of assets which he filed with his petition showed no unliquidated or contingent claims held by the debtor at the time of filing. (Schedule B-2-q.) He listed certain liquidated claims, but none was relevant to the present dispute. Dible did not schedule any record collections among his assets. The trustee, Wil L. Forker, reported the bankruptcy as a "no-asset case." (Trustee's report, August 8, 1990.) A Final Decree entered September 24, 1990, closing the case.

On May 4, 1992, Dible filed a Motion to Reopen Case. He stated that "during the pendency of this case" he had filed several pro se cases. Dible acknowledged that he should have listed the cases in his schedules but had not. He identified the cases as follows:

> William S. Dible v. Diane Shuminsky, et al
> District Court for Woodbury County, # 100620
> Amount Unknown
>
> William S. Dible v. Diane Shuminsky
> District Court for Woodbury County, # 102772C.

Debtor alleged in his Motion that during the "pendency of this case" he had approximately 2,000 record albums which had not been scheduled as assets and which had been in the possession of another person. He also identified a previously omitted creditor. Debtor asked that the case be reopened so he could amend his schedules accordingly. The court reopened the case on May 4, 1992. (Order, docket no. 2.) Because of a conflict of interest, Forker, who had been reappointed trustee, resigned; Habbo G. Fokkena was appointed trustee. Dible amended his schedules adding as assets the record collection and the two lawsuits pending in state court.

During September, 1992, Fokkena served a notice of sale of the claims held against third parties. A Notice filed September 11, 1992, indicated that the trustee intended to sell Dible's claims against various state court defendants to Dr. James Snowden and Parkview Psychological Services (PARKVIEW). According to the Notice, these claims were the subjects of a civil action pending in Woodbury County District Court as No. 100620-C. The defendants in the action were Snowden, Parkview, Diane Shuminsky, Tim Shuminsky, and Wholistic Health Center. The sale price was $1,500.00.

On September 24, 1992, the trustee gave notice of his intended sale of claims against Michael Hobart. According to the Notice, these claims were the subject of two civil actions, one pending in the United States District Court for the Northern District of Iowa as C91-04067, and one pending in Woodbury County District Court as Law No. 102421-C. In each action, there were several other defendants. In the federal case, the named defendants are: Michael Hobart, Tom Mullin, Mark Campbell, Colleen Goodwin, Charles Thoman, Marty (sic) Reilly, Officer Post, and the Sioux City Police Department. In the state case, the defendants are Hobart, Thomas Mullen (sic), Mark Campbell, Colleen Goodwin, Gary Wenell, Marti Reilly, Robert Sorenson, Michael Post, Lucy Swalve, and Siouxland Mental Health Center.

Dible did not object to the trustee's sale of the estate's claims against Hobart. He did object to the trustee's proposed sale to Snowden and Parkview of claims pending against the various defendants in Woodbury County case number 100620-C.

Dible objected to the sale for two reasons. First, he said that he erred in including the claims in his amended schedules, as they are not property of the estate. Second, he said that the $1,500.00 offer from Snowden and Parkview was too low. If a sale is permitted, Dible asked that it be delayed pending the outcome of certain criminal proceedings which might enhance the value of the claims. Better alternatives, he said, were for the trustee to pursue the claims or abandon them.

Trustee responded to the debtor's objection by saying that although he believed that Dible's lawsuits appeared to be without merit, he would sell them by public auction rather than by private sale. (Docket no. 15.) The trustee says the sale will be of pre-petition claims only; he proposes that the state court later sort out whether any particular claim is post-petition and owned by Dible or pre-petition and owned by the trustee's assignee. Attached to the trustee's response was a draft of a form of notice for the proposed public sale. (Docket no. 15.)

The proposed notice of public sale lists those claims which trustee intends to sell. All claims appear to be or to have been the subject of legal actions. The claims to be sold are those held against:

1. Diane Shuminsky, Tim Shuminsky, Dr. James Snowden, Wholistic Health Center, Parkview Psychological Services -- Law No. 100620-C;
2. Diane Shuminsky -- No. 102772C;
3. State of Iowa -- Law No. 101667;
4. State of Iowa -- Law No. 99842;
5. Donald Kvam, Jean Kvam -- Law No. 103747C;
6. J. K. Roach, John Doe -- Law No. 103232C;
7. Diane Shuminsky -- Law No. 102812C; and
8. Michael Hobart, Thomas Mullin, Mark Campbell, Colleen Goodwin, Gary Wenell, Charles Thoman, Marty Reilly, Thomas Post, Officer Sorensen Law No. 102421C.

Dible objected to the trustee's new proposal. (Docket no. 17.) He again argues that the trustee is attempting to sell claims which are not property of the bankruptcy estate and that a public sale will not yield the true value of the claims. Dible wants any claims which are property of the estate abandoned.

Dible's objection to the trustee's amended notice was directed to the trustee's proposal to sell claims contained in Woodbury County lawsuits 100620, 102421 and 10227-C. However, at the hearing on the notice of sale and objection, debtor's counsel limited the objection to the trustee's effort to sell Dible's claims against Snowden and Parkview. Because of the narrowing of Dible's objection, and because of the great number of claims against others as contained in numerous suits, the court will limit its findings of fact to those relevant to the claims against Snowden and Parkview. Exhibits 1 through 18 are admitted.

**Findings**

In May, 1988, Dible was arrested in Woodbury County, Iowa on a charge of criminal mischief in the second degree (criminal matter no. 42959), (exhibit 1); he pleaded not guilty. In December, 1988, Dible was arrested and charged with two counts of burglary in the second degree, assault while participating in a felony and theft in the second degree

(criminal matter no. 43178). (Exhibit 2.) As to these charges, Diane Shuminsky was the complaining witness. Dible pleaded not guilty to the four charges. On the latter charges, bail was set at $150,000.00 with a surcharge of $22,500.00.

In December, 1988, the State of Iowa filed a Trial Information in the District Court for Woodbury County, accusing Dible of suborning perjury, a class D felony, and with tampering with a witness, an aggravated misdemeanor. (Exhibit 3.) The accusations involved alleged attempts by Dible to affect the testimony of Diane Shuminsky in connection with criminal matter number 43178. The perjury and tampering charges were identified as Woodbury County criminal matter number 43187. Bail was set at $100,000.00. (Exhibit 5, page 3, lines 8-10.)

A bond reduction hearing was held December 20, 1988 in state court. (Exhibit 6.) At that hearing, assistant Woodbury County Attorney Mark Campbell offered into evidence a letter written to him by Dr. Snowden. Snowden had been subpoenaed by the State to testify in a previous bail hearing, but he was unable to attend. Instead, he sent the letter to Campbell. (Exhibit 6, page 30, lines 18-25.) Campbell offered the letter in the December 20 hearing. Dible's counsel objected to its admission for the reason that it contained hearsay. (Exhibit 6, page 31, lines 2-13.) The court overruled the objection on the basis of Iowa R. Evid. 1101(c)(4) which makes the Iowa evidentiary rules inapplicable to proceedings with respect to release on bail. (Exhibit 6, page 31, lines 14-25 to page 31, lines 1-6.)

Snowden's letter was not offered into evidence in this bankruptcy hearing. However, significant portions of the letter were read into the record in state court at the December 20 hearing. These portions are set out hereafter. The court is unable to determine how much other information the letter contained or in what order the following excerpts appeared in the letter.

> Mr. Dible displayed increasing evidence of poor emotional control, repeatedly displayed threatening behavior, and was verbally and physically abusive of Ms. Shuminsky. Due to my growing concern for Ms. Shuminsky's physical safety I informed Mr. Dible he must stay away from Mrs. Shuminsky as a condition of further therapy with me.
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> * * *
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> Within a very few days another violent incident was reported by Ms. Shuminsky. She reported on 8/17/88 that Mr. Dible had thrown a phone at her in her kitchen and "grabbed me and pushed me down on the floor and had his foot on my abdomen."
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> * * *
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> Mr. Dible is a poor candidate for outpatient psychotherapeutic assistance and he would be best dealt with by the legal system.
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> * * *
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> Ms. Shuminsky has been frightened to seek legal protection from this harassment due to her fear of Mr. Dible's retaliation. In my opinion her fear of Mr. Dible is accurate and based on her direct experiences with him over time.
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> * * *
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> In my initial evaluation of Mr. Dible I felt that his threat to Ms. Shuminsky was very significant. Mr. Dible has demonstrated several factors associated with violent recidivism.
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> * * *
>
> If he is released and manages to confront her I believe she would be in danger.

(Exhibit 6, pages 35-37).

Snowden's analysis of Dible's behavior and his propensity for violent behavior were based on therapy sessions involving Dible or Shuminsky. Shuminsky, Dible's one-time girl friend, had been treated by Snowden, and she asked Dible to become involved. Snowden had therapy sessions with Shuminsky alone, Dible alone and with Shuminsky and Dible together. (Exhibit 6, page 32, lines 15-25; page 33, lines 1-5; page 34, lines 17-25; and page 35, lines 1-4.)

In January, 1989, Dible was arraigned in case 43187 on the perjury and witness tampering charges. The court considered bail for those charges and a bail reduction request in the four-count burglary and assault case. (No. 43178.) The prosecutor again offered into evidence the letter from Dr. Snowden. (Exhibit 5, page 30, lines 13-22.) This time, Dible's counsel objected to its admission on the ground that its admission would violate Dible's physician-patient privilege. (Exhibit 5, page 30, line 23 to page 32, line 17.) After a colloquy with counsel, the court sustained the objection. (Exhibit 5, pages 31-34.) On a renewal of the offer, admission was again denied. (Exhibit 5, page 37, line 22.) The prosecutor then called Diane Shuminsky in an effort to establish that the information contained in Snowden's letter came from therapy sessions in which she participated or from information given to Snowden by her. This testimony was apparently to establish either that she provided the information or to establish an exception to privilege on the basis that a third party was present when Dible gave it. (Exhibit 5, pages 38-42.) The state again offered Snowden's letter; Dible's counsel objected, again relying on privilege. (Exhibit 5, page 43, line 1.) The letter was admitted. (Exhibit 5, page 43, line 2.) An effort by Dible's counsel to have the exhibit stricken failed. (Exhibit 5, page 44, lines 15-25; page 45, line 1.)

The court, the Hon. Dewie J. Gaul, issued his ruling in January, 1989, and declined to reduce the amount of bail necessary to permit Dible's release pending trial (exhibit 5, last page). The ruling in part stated:

> The evidence, **leaving aside entirely Exhibit 1**, shows that the defendant's release might result in danger to the victim, or alleged victim, of these offenses. There are no safeguards demonstrated which will
>
> adequately prevent her being in jeopardy. The court therefore concludes the bond heretofore fixed in these cases should not be reduced.

Dible and the State later entered into a plea agreement by which Dible would plead guilty to suborning perjury in matter number 43187 and to criminal mischief in the third degree in matter number 42959. All remaining charges would be dismissed. On March 10, 1989, Dible entered his pleas. The court entered judgments on March 10. (See exhibits 7 and 8.) According to the plea agreement and judgments, Dible was given a suspended five-year sentence and probation on the suborning perjury conviction. On the criminal mischief conviction, he was given a one-year sentence in county jail, with credit for time served; however, he received a work release order.

In June, 1990, the State filed an application seeking a revocation of Dible's probation for violation of the conditions of his probation. (Exhibit 9.) A hearing on revocation was held in Woodbury County District Court on July 5, 1990. (Exhibit 10.) At the hearing, Dible admitted violating the conditions of his probation by failing to obey a police officer and by consuming an alcoholic beverage. (Exhibit 10, page 5, lines 13-22.) Probation was revoked, and Dible was immediately imprisoned to serve the five-year sentence on his conviction for suborning perjury. (Exhibit 10, page 7.)

**Discussion**

Dible's claims against Snowden and Parkview are set out in Counts VII, VIII and X of his recast complaint filed November 13, 1991 in Woodbury County law number 100620. (Exhibit 13.) In Count VII, he alleges that he was Snowden's patient from May through September, 1988, and that Snowden negligently or intentionally mistreated and misdiagnosed him. The Count appears to sound in tort, intentional tort and negligence, and in breach of contract. Dible alleges he did not discover Snowden's wrongs until November, 1990.

In Count VIII, Dible alleges that Snowden intentionally or negligently provided Diane Shuminsky with confidential and privileged information about him; that Snowden wrongfully invaded Dible's privacy by the recording of his private phone conversations; and that Snowden conspired with Shuminsky to have him arrested multiple times on the various charges filed against Dible in 1988. According to the petition, Snowden's actions constituted defamation, invasion of privacy, fraud, abuse of process, false arrest and intentional infliction of emotional distress. Again Dible alleged that the actions were not discovered until November, 1990. Count X alleges again that Snowden wrongfully (negligently or

intentionally) acted so as to cause Dible's false arrest and that Parkview was responsible because it breached its duty to properly supervise, manage, and control Snowden's actions.

In his October 2, 1992, pro se objection to the trustee's amended notice, Dible argues that the Woodbury County District Court had found in its ruling on motions for summary judgment that the cases arose out of facts and circumstances which occurred in 1990. Thus, Dible says they are post-petition claims and not property of the estate. Dible's understanding of the state court's ruling is shown in his objection:

> The DEBTOR alleges that Dr. James Snowden and Parkview Psychological Services filed a motion for summary judgment alleging that the statute of limitations had run in lawsuit X00620-C and that the Woodbury District Court overruled their motion affirming that the DEBTOR did not discover the cause of action in lawsuit
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> X00620-C until the Spring of 1990 and exercised due diligence. Therefore the point of discovery has already been adjudicated and is clearly after the DEBTOR filed for bankruptcy and therefore is outside the scope and jurisdiction of the Trustee.

(Objection to Trustee's Notice and Report of Sale . . . , October 2, 1992, docket no. 12.)

Dible did not submit to the court either the motion for summary judgment or the court's ruling, so it is impossible to determine what discovery by Dible took place in 1990 to commence the statute of limitations or whether the state court made any distinctions between the accrual of Dible's cause of action and the commencement of the limitation period. Also, Dible gave no indication of when the motion for summary judgment was filed or ruled upon so it is impossible to determine if the state court's ruling, even if beneficial to Dible, would have any binding effect upon the trustee. To the extent Dible is arguing that his cause of action did not accrue until discovery of injury, the court will attempt to determine ownership of the claims against Snowden and Parkview by examining that issue anew.

Attorney Sikma, Dible's counsel at the hearing, appears to raise the same issue--whether the claims against Snowden and Parkview can be owned by the trustee if the injury resulting from the defendants' actions did not occur until after the bankruptcy. One specific act complained of privileged information obtained from Dible to prevent Dible from obtaining his release on bail. Although attorney Sikma agrees that Snowden divulged the information for the bail hearings through the 1988 letter, he nevertheless contends that the letter did not cause injury until Dible's probation was revoked.

The central issue is whether Dible's claims against Parkview and Snowden became property of the estate upon the filing of Dible's chapter 7 petition. The commencement of a bankruptcy case creates an estate which includes all of a debtor's legal and equitable interests. 11 U.S.C. § 541(a)(1). The estate includes all causes of action which have accrued as of the bankruptcy filing. In re Bell & Beckwith, 64 B.R. 144, 147 (Bankr. N.D. Ohio 1986). In Iowa,

> [t]he general rule is that a cause of action accrues when the aggrieved party has a right to institute and maintain a suit. Chrischilles v. Griswold, 260 Iowa 453, 461, 150 N.W.2d 94, 99 (1967). Such a right exists when "events have developed to a point where the injured party is entitled to a legal remedy." Stoller Fisheries, Inc. v. American Title Ins. Co., 258 N.W.2d 336, 341 (Iowa 1977). Furthermore, the discovery doctrine provides that a cause of action does not accrue until plaintiff has in fact discovered that he or she has suffered injury or by the exercise of reasonable diligence should have discovered it. Chrischilles, 260 Iowa at 463, 150 N.W.2d at 100.

Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457, 462 (Iowa 1984).

Dible now argues that there was no injury or no discovery of injury until the revocation of probation. Yet Dible has proven no facts to substantiate this position. Dible was aware in December, 1988, and January, 1989, of Snowden's letter to the prosecutor. Dible's counsel objected to its use in the two bail reduction hearings. If the publishing of the information contained in the letter injured Dible, it did so by no later than January 6, 1989, the date of the second bail hearing. At that time, the court refused to reduce Dible's bail, and Dible remained incarcerated. Sikma argues also that Snowden's report was given to the probation office, and its use affected the revocation proceeding, but there is no evidence to support this contention. The only evidence before the court is that Dible's probation was revoked because he

failed to obey a police officer and because he consumed alcohol. Both violations were admitted by Dible at the revocation proceeding. There is nothing to indicate that the Snowden letter was admitted by the court in the revocation proceeding or that it was considered as part of the revocation proceeding. No evidence has been introduced to show that the Snowden letter played any part in the revocation proceeding. Nor has Dible shown that the Snowden letter played any part in filing of the original charges against him or in his decision to plead guilty to some of them. To the extent that they had, however, these would have been pre-bankruptcy injuries.

To the extent that any of Snowden's or Parkview's actions constituted wrongs against Dible, there is no evidence that the actions and the injuries occurred other than before Dible filed bankruptcy on July 10, 1989. This is so not only as to the Snowden letter, but also as to Dible's allegations that Snowden committed malpractice and intentionally sought to defame him, invade his privacy and to have him incarcerated.

In summary, the court concludes that any claims for relief which Dible may have had as a result of Dr. James Snowden's letter to the county prosecutor or as a result of Snowden's actions relating to the filing and prosecution of criminal charges against Dible accrued prior to July 10, 1989, and became property of Dible's bankruptcy estate upon his filing his chapter 7 petition. The estate's claims against Snowden and Parkview, if any, may be sold or settled by the trustee. Because Dible also no longer disputes the trustee's rights to sell the other claims specified in the amended notice, including the claim against Shuminsky, the trustee may also sell any such claims which may exist.

The trustee acknowledges that he must serve new notice upon creditors and parties to accomplish his sale. The trustee should be aware that sale of the claims against Snowden and Parkview to Snowden or Parkview will be treated at any further hearing as compromises, and the trustee will be required to support the compromises by consideration of factors such as the likelihood of recovery, complexity of the claim, expense and delay of continuing the suits, and the interests of creditors.

**ORDER**

IT IS ORDERED that the debtor's objection to the trustee's authority to sell is overruled. The trustee may take further action to sell those claims identified in his amended notice. Further objections, if any, will be set for hearing.

SO ORDERED ON THIS 31st DAY OF AUGUST, 1993.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order and a judgment by U. S. mail to: Habbo Fokkena, Robert Sikma and U. S. Trustee.