

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

BETTY A. NEISIUS
Debtor(s).

Bankruptcy No. 93-51657XS
Chapter 7

ORDER RE: DEBTOR'S MOTION FOR CEASE AND DESIST ORDER

The matter before the court is the debtor's Motion for Cease and Desist Order. The motion was filed May 27, 1994. Debtor Betty A. Neisius (DEBTOR or NEISIUS) requests the court to order Donald H. Molstad, the case trustee, "to cease and desist" from holding a public auction of some of the assets of the estate. A sale by public auction has been scheduled for Tuesday, May 31, 1994, at 6:00 o'clock p.m. in or near Spencer, Iowa.

Debtor requested an emergency hearing on her motion, but in the event such hearing could not be held prior to the sale, she asked that the court enter the "cease and desist order" ex parte.

The court, upon examining the motion on May 27, 1994, orally requested that Al Sturgeon, who is debtor's counsel, and Molstad appear in court at 3:30 P.M. on May 27, 1994. Mr. Sturgeon and Mr. Molstad appeared, and the court held hearing on the debtor's motion.

The court first informed debtor's counsel that the debtor's request had been improperly filed as a motion, rather than as an adversary proceeding pursuant to Fed.R.Bankr.P. 7001(7). Debtor seeks to enjoin the trustee from selling certain items of estate property. Fed.R.Civ.P. 65. Notwithstanding the procedural flaws in the form and sufficiency of the debtor's request, the court heard the motion on its substantive merits.

Molstad, as trustee of debtor's bankruptcy estate, has scheduled a public auction of various property of the estate. Debtor seeks to enjoin the sale on three grounds. First, on May 26, 1994, debtor filed a motion to dismiss her bankruptcy case (docket no. 73). Dismissal, according to debtor's motion, would be in the best interest of the debtor and general creditors because it would enable debtor to pursue claims against two creditors. These claims allegedly arose before and after the petition was filed. Debtor believes that she would be successful in recovering claims against Farmers Savings Bank of Remsen and James Bauler, an officer of the bank and debtor's former husband. Debtor argues that if successful, her claim would likely exceed the two creditors' claims and she would be in an advantageous position to pay other creditors voluntarily and yet keep her assets.

Second, debtor's counsel argues that he made a "deal" with the trustee to purchase for \$6,000.00 all of the personalty assets which trustee now proposes to auction. The trustee denies such an agreement was made.

Third, debtor's counsel argues that it would be inequitable to permit the trustee to conduct the sale, thereby extinguishing debtor's right to claim household goods exemptions under Iowa law. See Iowa Code 627.6(5).

Discussion

At the close of the hearing, the court stated to the parties its oral ruling and an explanation of that ruling. The court determined not to restrain the trustee, but to afford the debtor some relief in protecting her "claim" to an exemption in household goods. The court believes that there should be a brief explication of its rationale. Because the effect of the debtor's motion is to enjoin the trustee from conducting the sale until she can either dismiss her case, claim certain property as exempt, or enforce the alleged purchase agreement with the trustee, the court will treat debtor's motion as a request for a preliminary injunction.

In considering debtor's request for a preliminary injunction, the court must consider (1) the threat of irreparable harm to debtor from trustee's sale of the estate property, (2) the balance between any harm to debtor and the harm which would be caused the estate from an injunction, (3) the probability the debtor will succeed on the merits, and (4) the public interest. Roberts v. Van Buren Public Schools, 731 F.2d 523, 526 (8th Cir. 1984). The court has a great deal of discretion in determining whether to grant a preliminary injunction. American Home Inv. Co. v. Bedel, 525 F.2d 1022, 1023 (8th Cir. 1975). Lack of an adequate legal remedy is an important element of irreparable harm. Ainslie Corp. v. Middendorf, 381 F.Supp. 305, 306-07 (D.Mass. 1974).

Argument 1: The Motion to Dismiss

Debtor wants the sale enjoined pending hearing on her motion to dismiss the chapter 7 case. Debtor failed to show a likelihood of success on the merits. Debtor's voluntary case has been pending since October 8, 1993. It appears obvious from her motion to dismiss and from argument by debtor's counsel that debtor knew she had claims against Bank and Bauler at the time of filing. Debtor has a substantial number of other unsecured creditors. There are assets in this case. Any claims against Bank and Bauler are assets of the estate which the trustee could liquidate for the benefit of creditors. Debtor must show absence of prejudice to her creditors if dismissal is granted. She has not done so. The court will not grant debtor injunctive relief on this ground.

Argument 2: The Agreement with Trustee

Debtor has not shown a likelihood of success on the merits on her claim that the trustee agreed to sell to her the property which he now attempts to auction. The trustee states that at one time he had agreed to sell to the debtor household and other items on the condition that the money was paid by a date certain. She did not make the payment, thus no sale agreement was reached, as acceptance of the trustee's offer of sale was to be by the payment of the money.

Debtor's counsel argues that a subsequent deal was made. There is no written evidence of such an agreement, only one attorney's word against another attorney's word. The court will not enjoin the sale of estate property on the basis of this claim.

Argument 3: Debtor's Right to Claim Exemptions

Debtor argues that it would be inequitable for the trustee to sell the personalty at issue because such sale would extinguish the debtor's right to claim the property as exempt. She is most concerned about

household goods. Included in such goods are items which allegedly have sentimental value to debtor (debtor did not testify, or even appear at the hearing).

Clearly, when an individual files a chapter 7 case he or she is entitled to claim as exempt from property of the estate, items which are exempt under Iowa law on the date of the filing of the bankruptcy petition. See 11 U.S.C. § 522(b)(2). Indeed, under federal and Iowa law, debtor may claim as exempt only items which would be exempt in Iowa. See 11 U.S.C. § 522(b)(1) and Iowa Code § 627.10.

Property which an individual may exempt includes household goods and appliances held for personal use not exceeding in value \$2,000.00 in the aggregate. Iowa Code § 627.6(5). Debtor claimed household goods as exempt when she initially filed her bankruptcy, but trustee's objection to the claim in household goods was sustained due to the debtor's insufficient description of household goods in her Schedule C. The insufficiency prevented trustee from determining if the value limitation had been exceeded. Court order, docket no. 70, March 29, 1994. The court was concerned that debtor not lose her right to claim household goods exempt by the trustee's then-pending effort to sell all non-exempt personalty. In its March 29 order, the court gave the debtor approximately two weeks to amend her claims of exemption to more specifically identify household goods. In the meantime, the trustee would not be permitted to sell estate property. The court's order effectively prevented trustee from selling any estate personalty, as he desired to sell all non-exempt property at one time. Clearly, there were items of personalty which would not be exempt. The court ordered that if debtor failed to amend her Schedule C to claim household goods as exempt, the trustee could then sell all non-exempt property in his possession.

Debtor, at that time acting pro se, did not amend. The trustee has organized an auction sale for May 31, 1994, using the services of a court-appointed auctioneer. Time and money has been expended by the estate to set up the sale. If the sale is enjoined, it will have to be readvertised. Also, the estate will incur storage fees while issues of dismissal and exemption are raised and litigated. There will be financial harm to the estate if the sale is stayed. However, if it is not, there will be irreparable harm to the debtor by the loss of her exemption opportunity in household goods. There would be no adequate legal remedy to the debtor to the extent that items sold would be of great sentimental value or unique. However, at the hearing, there was no attempt by debtor's counsel to point out exactly which items she would claim as exempt. That indeed is the problem. Debtor, after retaining Mr. Sturgeon in early April, 1994, has even now failed to file amended claims of exemption to specify household goods. Much of what she now perceives as a tragedy is to a great extent one of her own making. Moreover, to correct the problem, she would have the trustee enjoined from selling other estate property which she presumably has no interest in claiming as exempt. She desires an equitable remedy, but she has not acted with any diligence.

The court will digress somewhat to discuss two other issues relating to debtor's desire to claim her household goods as exempt. Both bear on the issue of what claims she may make. On October 15, 1993, Farmers Savings Bank filed a motion for relief from stay (contested matter no. 7196, docket no. 6) asking for leave to enforce its security interest in personalty owned by the debtor and located in a building in Remsen, Iowa. Debtor resisted the motion (docket no. 12) claiming that a majority of the items against which the Bank desired to proceed were household goods which the debtor claimed as exempt and regarding which she might file a lien avoidance motion. Bank objected to debtor's claim of exemptions in household goods (docket no. 13), and debtor filed a lien avoidance motion against the Bank (contested no. 7221, docket no. 20).

Debtor and Bank settled both contested matter proceedings by submitting to the court an "Agreed Order Lifting Stay" (docket no. 28). The settlement gave debtor the opportunity to regain from Bank possession of 19 items or groups of items of household goods which she claimed as exempt so long as the total value did not exceed \$2,000.00. If she did not reclaim, the Bank would use its best efforts to set aside the listed items. If the parties could not agree, they could bring the issue of the items selected to the court's attention for resolution. There is no evidence as to whether debtor took possession of any of the listed items.

There were other items of household goods located in a trailer owned by the debtor at the outset of the case. When the trustee took possession of some items of personalty located in the trailer, he made an effort to leave those items which he thought debtor had initially claimed as exempt on her Schedule C. Neither Molstad nor Sturgeon knows what happened to these items.

It seems, therefore, that there are items of personalty at at least three locations from which debtor might select her exempt goods if she properly filed her amended claim. If debtor had timely filed her claim, she would have been limited to \$2,000.00 worth of household goods held for personal use. There is some dispute as to what goods were held by her for personal use as opposed to being held for purpose of sale. To summarize this digression, debtor seeks equity, but it would not be equitable for her to prevent the trustee's sale, while it is uncertain what goods she may claim exempt.

Based on the foregoing, the trustee's sale shall not be enjoined. However, the court will grant the debtor some relief so that she might protect her claims of exemption in household goods. The court recognizes the public policy favoring exemptions and the often unique aspect of personal, household goods.

The court, although it will not enjoin the sale, will permit the debtor to attend the sale and bid on household items without the necessity of payment in cash for purchases of up to \$2,000.00 ("credit bid").

To the extent she purchases more than \$2,000.00 worth of goods, she must, after the sale, designate the \$2,000.00 worth of household goods and pay cash for the remainder. Debtor shall not disrupt the sale. The trustee shall retain possession of the exempt items purchased on a non-cash basis until debtor files an amended claim of exemption in household goods. Debtor shall serve the amended claim on all creditors and parties-in-interest. The amended claim shall be subject to objection on any ground, including the ground that debtor has taken irrevocable possession of other household goods which are property of the estate.

Debtor will be able to bid at the sale under the foregoing conditions only if she, by no later than 2:00 P.M. on May 31, 1994, posts a cash bond with the clerk of court. The form of the bond will show that the debtor agrees to indemnify the trustee and estate from any loss as a result of the credit bid arrangement, including the payment of auctioneer's commission on up to \$2,000.00 worth of goods purchased on a non-cash basis, and including storage fees on such goods until the issue of exemptions is resolved.

The cash bond shall be in the amount of \$400.00. By "credit bidding" as described in this order, the debtor shall waive her right to claim any items exempt as household goods in derogation of her bid.

ORDER

IT IS ORDERED that debtor's Motion for Cease and Desist Order is DENIED.

IT IS FURTHER ORDERED that debtor, Betty A. Neisius, shall be permitted to "credit bid" at the trustee's auction sale to the extent of \$2,000.00 worth of household goods. To the extent debtor purchases more than \$2,000.00 worth of household goods at the sale, she shall pay cash at the sale as any normal bidder. The goods purchased on "credit" shall be separately designated and itemized by debtor by the close of sale. The trustee shall retain possession of such goods pending debtor's filing of an amended Schedule C, claiming such items as exempt. Debtor shall serve the amended Schedule C on all creditors and parties-in-interest and shall file proof of service with the clerk. Debtor's permission to credit bid shall be conditioned on her filing a cash bond in the amount of \$400.00 in favor of the trustee and the bankruptcy estate promising to indemnify the trustee and bankruptcy estate from any loss as a result of the credit bidding and amendment, including the storage of goods and the sales commission which shall apply to the purchases made under the credit bid. Such bond shall be deposited with the clerk of court in the form of a cashier's check payable to Barbara Everly, Clerk of Court. The bond shall be posted by 2:00 P.M., on May 31, 1994.

IT IS FURTHER ORDERED that any purchases by credit bid shall be in conclusive derogation of any rights by debtor to make competing claims to exempt household goods.

IT IS FURTHER ORDERED that debtor shall provide the trustee with a list of any items of property taken from her trailer house and any items of property taken from Farmers Savings Bank. To the extent that debtor credit bids the full \$2,000.00 permitted under Iowa Code § 627.6(5), she shall immediately surrender to the trustee the household goods taken from the trailer and Bank. Judgment shall enter accordingly.

SO ORDERED THIS 31st DAY OF MAY, 1994.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order by U. S. mail to: Richard Moeller and U. S. Trustee and to Donald Molstad and Al Sturgeon by personal service.

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Western Division

BETTY A. NEISIUS
Debtor.

Bankruptcy No. 93-51657XS
Chapter 7

JUDGMENT

This proceeding having come on for trial before the court, the Honorable William L. Edmonds, United States Bankruptcy Judge presiding, and the issues having been duly tried or heard and a decision having been rendered,

IT IS ORDERED that debtor's Motion for Cease and Desist Order is DENIED.

IT IS FURTHER ORDERED that debtor, Betty A. Neisius, shall be permitted to "credit bid" at the trustee's auction sale to the extent of \$2,000.00 worth of household goods. To the extent debtor purchases more than \$2,000.00 worth of household goods at the sale, she shall pay cash at the sale as any normal bidder. The goods purchased on "credit" shall be separately designated and itemized by debtor by the close of sale. The trustee shall retain possession of such goods pending debtor's filing of an amended Schedule C, claiming such items as exempt. Debtor shall serve the amended Schedule C on all creditors and parties-in-interest and shall file proof of service with the clerk. Debtor's permission to credit bid shall be conditioned on her filing a cash bond in the amount of \$400.00 in favor of the trustee and the bankruptcy estate promising to indemnify the trustee and bankruptcy estate from any loss as a result of the credit bidding and amendment, including the storage of goods and the sales commission which shall apply to the purchases made under the credit bid. Such bond shall be deposited with the clerk of court in the form of a cashier's check payable to Barbara Everly, Clerk of Court. The bond shall be posted by 2:00 P.M., on May 31, 1994.

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BARBARA A. EVERLY
Clerk of Bankruptcy Court
by Deputy Clerk

Seal of U. S. Bankruptcy Court

Date of Issuance: May 31, 1994