In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

RANDAL J. STALEY and
PATRICIA A. STALEY
Debtor(s).

Bankruptcy No. 95-52448XS

Chapter 7

RULING RE: DEBTORS' MOTION FOR NEW TRIAL

Debtors Randal and Patricia Staley move for a new trial on the trustee's objection to Patricia Staley's claim of exemption in a life insurance policy. Trustee has resisted. The motion will be denied without hearing.

The debtors listed the cash values of three life insurance policies in their schedule of personal property. They claimed the cash value of all three policies as exempt life insurance interests under Iowa Code § 627.6(6). Trustee Wil L. Forker objected to the exemption to the extent that any interests in the policies acquired within two years preceding the debtors' bankruptcy exceeded $10,000.00. At the time of their filing, debtors did not have possession of a policy purchased from North American Company for Health and Life Insurance (NORTH AMERICAN). At the time he filed the objection, Forker had not seen the policy. The trustee's objection eventually involved only that policy, not the two others. Trial was set for April 23, 1996.

At trial, John Harmelink represented the debtors. Wil L. Forker appeared *pro se*. The parties presented evidence and arguments. In addition to his objection regarding the statutory limit on value created within two years preceding bankruptcy, Mr. Forker also contended that the policy was not issued prior to bankruptcy and thus was not "life insurance" within the meaning of the exemption statute at the time of the debtors' filing. Neither debtors nor their counsel raised any objection to the trustee's assertion of this ground of objection.

At the close of hearing, I took the matter under advisement and permitted the parties until April 30, 1996 to file briefs. This deadline was noted on the court's proceeding memo (docket no 24). Despite the briefing deadline, I commenced my own research and began drafting a decision. I concluded my research, and on April 29, 1996, I completed a final draft of my decision. I had forgotten about the briefing deadline. I issued the decision on April 29, 1996, sustaining the trustee's objection to Patricia Staley's claim of exemption in the North American insurance. I determined that she had made arrangements to purchase two policies in December 1995, just prior to filing bankruptcy. One policy was an annuity policy paid for by a single premium. The annuity payments were to be made to North American to pay life insurance premiums on a life insurance policy issued at the same time by that company. I concluded that the annuity policy was not insurance and that the life insurance policy was not effective on the date of filing. Judgment entered on April 29, 1996. The decision (docket no. 30) and the judgment (docket no. 31) were served by mail on attorney Harmelink and trustee Forker on April 29, 1996. On the following day, Mr. Harmelink called my law clerk stating that he had wanted to file a brief. Because the brief was due the day that call was made and because Mr. Harmelink's office is in Yankton, South Dakota, I had some reservations as to whether, absent knowledge of the outcome, a timely brief would have been filed. Nonetheless, because I had inadvertently issued a decision without waiting for briefs, I vacated the judgment and stated that I would consider debtors' brief, which was filed May 1 (Order Vacating Judgment, docket no. 34, May 6, 1996). Mr. Harmelink also filed an affidavit of the insurance agent for North American. I stated in my order that I would not consider the affidavit in my reconsideration as it contained factual matters not presented at trial (Id.). The debtors' motion for new trial was filed May 15, 1996 (docket no. 37). The essence of the motion is that Mr. Harmelink and Mr. Forker met on March 29, 1996 to discuss settlement of Mr. Forker's objection, and that sometime

subsequently, if not that day, counsel agreed that "insurance proceeds of $10,000.00 would be exempt from any claim of the Trustee," (Motion for New Trial, docket no. 37, ¶ 4) and that objections to insurance proceeds in excess of that amount would be preserved. Mr. Harmelink states that he learned approximately 10 minutes prior to trial that the trustee intended to object to the exemption of the North American policy on the ground that no policy of insurance was effective on the date of bankruptcy (Id., ¶ 6). Mr. Harmelink contends that because the trial started within minutes of his learning trustee's position, he did not have time to call the insurance agent as a witness or to obtain his affidavit. The debtors' legal basis for a new trial is cited as Iowa R.Civ.P 244(a),(b),(c),(f),(g) and (h). I will consider the motion as made under Fed.R.Bankr.P. 9023 which incorporates Fed.R.Civ.P. 59, a federal court motion for new trial.

Mr. Harmelink's reference to the Iowa rule characterizes the facts as irregularity in the proceedings which prevented a fair trial (subsection (a)), misconduct of the prevailing party (subsection (b)), surprise (subsection (c)), the decision is not supported by the evidence or is contrary to law (subsection (f)), newly discovered evidence (subsection (g)), and errors of law or mistake of fact by the court (subsection (h)). The only factual assertions in the motion relate to the alleged last-minute notification by the trustee that he would not honor a settlement and was going to trial on all issues.

I have set out in a detailed manner the procedural history of the case because Mr. Harmelink has included in his motion allegations regarding the court's issuing a decision prior to the briefing deadline. But because I vacated the judgment and said I would reconsider my decision in light of the debtors' brief, I consider those circumstances irrelevant to the motion for new trial.

The crux of the motion is that debtors' counsel was surprised by the trustee's last minute change of position and, therefore, did not have a crucial witness at trial. The motion by rule reference characterizes the trustee's action as misconduct.

If counsel was surprised and prejudiced by the trustee's alleged change of position, he should have asked for a continuance so that he could adequately prepare for all the issues and call necessary witnesses. Instead, he chose to proceed with trial, without bringing to the court's attention the last minute change in circumstances. Now he is concerned that the decision, on reconsideration, might remain adverse to debtors and he seeks a new trial on their behalf. A litigant should not be able to voluntarily proceed to trial, and if the matter does not turn out well, raise as grounds for a new trial matters known prior to trial which might have supported a motion to continue. See Moylan v. Siciliano, 292 F.2d 704, 705 (9th Cir. 1961)(movant must assert existence of newly discovered evidence not discoverable by due diligence). Counsel seeks a no-risk situation where if he tries the case and wins, there is no harm, but if he loses, he would be able to try the case a second time. Because he did not seek a continuance, the motion for new trial should be denied.

IT IS ORDERED that the debtors' motion for a new trial on the trustee's objection to claim of exemption is denied.

SO ORDERED THIS 7th DAY OF JUNE 1996.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order by U.S. mail to: John Harmelink, Debtors, John Moeller, Wil Forker, Cynthia Moser and U. S. Trustee.