

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

CHARLES A. NORENBERG
d/b/a Holstein Builders, Ltd.
d/b/a Midwest Tectonics
Debtor.

Bankruptcy No. 96-52422XS

Chapter 13

MEMORANDUM OF DECISION RE: CONFIRMATION OF DEBTOR'S PLAN

The matter before the court is confirmation of debtor's proposed plan. Hearing was held April 2, 1997 in Sioux City. Charles A. Norenberg appeared pro se. Jeffrey L. Poulson, Esq. appeared for the Estate of Ray Grashoff and also for Janice Grashoff, Doug Glienke and Kris Glienke. Donna K. Webb, Esq. appeared on behalf of the United States for the Internal Revenue Service. Michael Dunbar, Esq. appeared for Carol F. Dunbar, the standing trustee. This is a core proceeding under 28 U.S.C. 157(b)(2)(L).

Charles A. Norenberg filed his chapter 13 petition on September 23, 1996. He is in the construction business. At one time, he conducted his business through a corporation named Holstein Builders, Ltd. The corporation ceased to exist sometime between April and June of 1995. Norenberg filed personal bankruptcy in July 1995, and he received a chapter 7 discharge on November 2, 1995.

In the chapter 7 case, he listed as an asset a claim against Ray Grashoff or the Ray Grashoff Estate. There was no evidence of precisely when Mr. Grashoff died. The claim arose out of a 1994 agreement by the corporation to construct hog confinement facilities. Norenberg says Ray Grashoff ran out of money, so Norenberg stopped construction. The corporation filed a mechanic's lien against Grashoff's property. The claim against Grashoff for contract damages was abandoned by the chapter 7 trustee. Sometime during the chapter 7 proceedings, Norenberg says Grashoff refused to release from the building site some of Norenberg's equipment and building inventory. He says he learned then, for the first time, that Grashoff made some sort of claim against him. Norenberg amended his schedules to list Grashoff as a creditor, but he did not serve him with notice of the bankruptcy. He assumed the clerk of the bankruptcy court served such notice, but he does not know this as a fact.

The amendment adding Grashoff was not filed until after Norenberg received his discharge. According to the attorney for the Grashoff Estate, Grashoff did not receive notice of the filing.

In the pending case, Norenberg has listed accounts receivable of \$115,000 among his assets. Of this, \$108,682 is a claim against the Grashoff Estate for the alleged contract damages. He lists also a claim against the Grashoff Estate in the amount of \$21,945. Norenberg says this claim is for damages arising out of Grashoff's alleged wrongful retention of his equipment and inventory.

In addition to these claims, Norenberg scheduled \$6,321 in other accounts receivables. Most of Norenberg's tangible property was claimed exempt.

The claims deadline has passed, and five claims have been filed. Nearly all appear to be general unsecured claims. The United States, on behalf of the Internal Revenue Service, has filed a claim of \$3,306.14. The United States claims that \$2,832.15 of this amount is entitled to priority treatment.

Norenberg filed a proposed plan on October 7, 1996 (docket no. 8), and he amended it on December 5, 1996 (docket no. 25). The plan, as amended, agrees to submit to the trustee any disposable income, including all collected funds from the accounts receivable. The projected disposable income, not including the accounts, is \$51.95 per month for the 60-month duration of the plan. He proposes to pay a continuing child support obligation directly. Delinquent support is payable to the Child Support Recovery Unit in Sioux City. Its claim is treated as unsecured.

The United States, the Grashoff Estate and the standing trustee filed objections to the plan. The United States objected that the plan is not feasible, but it withdrew its objection at the hearing. The trustee contends that the plan is not feasible and that the debtor has already defaulted on the plan because he did not turn over a collected account. The Grashoff Estate says that the plan should not be confirmed because it was filed in bad faith.

In support of her argument that the plan is not feasible, the standing trustee says that the total of the monthly payments are insufficient to pay the Internal Revenue Service's priority claim and her statutory fees. Norenberg proposes to pay the trustee \$3,117 over 60 months. The trustee says she is entitled to 10 per cent of that amount as a statutory fee and that the Internal Revenue Service has a priority claim of \$2,832.15, which must be paid pursuant to 11 U.S.C. 1322(a)(2). She points out that these two mandatory payments total \$3,143.85, a sum exceeding the debtor's proposed plan payments of \$3,117. Because of this, she says the plan does not meet the requirements of 11 U.S.C.

1325(a)(6) which requires a debtor to be able to make all payments under the plan.

The success of the trustee's argument depends on whether she has properly calculated her fee. In a recent case under chapter 12, the Eighth Circuit Court of Appeals interpreted 28 U.S.C.

586(e) to require the standing trustee to calculate the percentage fee on the amount the trustee distributes to creditors under the plan, not on the amount the trustee receives from the debtor.

Pelofsky v. Wallace, 102 F.3d 350 (8th Cir. 1996). The court's conclusion was that the trustee should not be collecting a fee on a fee. Id. at 355. The statute applies both to chapter 12 and to chapter 13 cases, and I find nothing in it which would make the Circuit's holding inapplicable in chapter 13 cases.

As Norenberg proposes periodic payments totaling \$3,117, the trustee's fee can be calculated by dividing the total payments by 1.1 to obtain the payments to creditors under the plan. The resulting figure is multiplied by .10 to obtain the trustee's fee. Under this method, plan payments to creditors would be \$2,833.64. The trustee's fee is \$283.36. The United States' priority claim is deemed allowed in the amount of \$2,832.15. Norenberg's periodic payments are just sufficient to pay the mandatory payments.

The trustee is correct that Norenberg has already breached his proposed plan. The plan commits to creditors any recoveries on the accounts. Norenberg has compromised one such claim and used the proceeds for living expenses. He received approximately \$200 in settlement of a \$455 claim, but he

did not turn it over to the trustee. This breach can be fixed by requiring Norenberg to repay the money to the trustee over a reasonable period. He should be able to do so because he was optimistic that his gross income would improve somewhat over his projection.

The remaining issue is whether the Grashoff Estate's objection prevents confirmation. The Grashoff Estate claims that Ray Grashoff was treated in bad faith in the chapter 7 case and that bad faith carries into the chapter 13 case. The Estate claims that Norenberg did not timely schedule Ray Grashoff (or the Estate) as a creditor in the chapter 7 case, and he did not give it notice of the filing. As a result, Norenberg retained his alleged claim against Grashoff, but Grashoff did not have the opportunity to participate in the chapter 7 case. Counsel argues that Grashoff's participation might have included purchasing the bankruptcy estate's claim against him. The Grashoff objection appears to rest on the assumption that the Grashoff claim was discharged for all purposes in the chapter 7. Nonetheless, the Estate has filed a claim in the chapter 13.

If the plan is confirmed, Norenberg intends to pursue his claim against the Grashoff Estate. Any recovery would go to the trustee. I do not perceive how the Estate or the beneficiaries are prejudiced by the plan or why there is any implication of bad faith. Either the Estate's claim was discharged in Norenberg's chapter 7 case, or it was not. If it were, that does not prevent Grashoff's Estate from raising its claim as a matter of recoupment. "Recoupment" has been defined as "[t]he right of the defendant to have the plaintiff's monetary claim reduced by reason of some claim the defendant has against the plaintiff arising out of the very contract giving rise to plaintiff's claim." Aetna Life & Casualty Co. v. LaPierre (In re LaPierre), 180 B.R. 95, 99 (Bankr. D. S.C. 1994) ((citing Black's Law Dictionary (6th ed. 1990)). The defendant may not use recoupment to recover damages from the plaintiff. American Central Airlines, Inc. v. Department of Transportation (In re American Central Airlines, Inc.), 60 B.R. 587, 590 (Bankr. N.D. Iowa 1986). The recoupment claim is not barred by debtor's discharge. Siouxland Beef Processing Co. v. Knight (In re Siouxland Beef Processing Co.), 55 B.R. 95, 100-102 (Bankr. N.D. Iowa 1985). Thus, even if Norenberg's scheduling of Grashoff in the chapter 7 was legally sufficient to discharge the Grashoff claim, the Grashoff Estate may still recoup the claim against Norenberg in any suit by the debtor to collect on the account receivable to the extent that the claims arose out of the same transaction.

It may be that the procedural treatment of the Grashoff claim in the chapter 7 was insufficient to discharge the claim. That issue might have been raised in the chapter 7 by a complaint to determine dischargeability under 11 U.S.C. 523(a)(3). That Code section excepts from discharge under certain conditions claims neither listed nor scheduled but only if the creditor did not have actual notice of the case. I express no opinion on whether the Grashoff claim was discharged in the chapter 7 case. But for the stay in this chapter 13, the issue may still be raised, and it may be raised in state court, as state courts have concurrent jurisdiction with the bankruptcy court over dischargeability issues arising under 523(a)(3). If the Grashoff claim was not discharged in the chapter 7 case, the Grashoff Estate would be entitled to an affirmative recovery which would be a claim in the chapter 13 case.

Regardless of whether the claim was discharged or not in the chapter 7, so far as confirmation of the debtor's chapter 13 plan is concerned, I do not find that the Grashoff Estate is prejudiced in this proceeding by the treatment of Grashoff in the chapter 7 case. If Grashoff was treated properly in the chapter 7, the Estate may still use its claim as recoupment against Norenberg's claim. If it was not, and the claim was not discharged, it may use the claim to its full extent, and may participate in this case. I find no evidence to support the fact that Norenberg intentionally concealed the bankruptcy from Grashoff for some wrongful purpose. I do not find that the plan was filed in bad faith.

Counsel for the Grashoff Estate argues that if Grashoff had had timely notice of the chapter 7 case, he might have purchased the claim against him from the trustee. Presumably he could have done so cheaply, as the trustee ultimately abandoned the claim. That may or may not be so. But it does not affect my finding. The issue is whether Grashoff was intentionally prejudiced in the assertion of his claim against Norenberg in the chapter 7 and whether such intentional treatment calls into question the good faith of Norenberg's chapter 13 plan. It is not whether Grashoff might have settled more cheaply with the trustee than with Norenberg. As I do not find bad conduct by Norenberg in the chapter 7 case and because I conclude that the Grashoff Estate is not worse off in the chapter 13 because of Grashoff's chapter 7 treatment, I do not find the plan was proposed in bad faith.

I conclude that the debtor's plan meets the requirements of 11 U.S.C. 1322(a) and 1325(a) and (b) and should be confirmed. However, Norenberg will be required to pay the trustee \$200 for the account receivable which was collected and spent. The payment shall be made over 10 months at the rate of \$20 per month. The first such payment shall be made at the time of the May plan payment and at the time of each monthly plan payment thereafter until the \$200 is fully paid.

As Norenberg intends to pursue his claim against the Grashoff Estate, I consider it equitable and expedient to modify the automatic stay to permit the Grashoff Estate to file a counterclaim in any such state court proceeding for any claims it may have arising out of the construction contract with Norenberg. Such counterclaim may include a claim as to the dischargeability of the Grashoff claim in the chapter 7 case. If the state court determines that the Grashoff Estate is entitled to an affirmative recovery from Norenberg, the Estate may not execute on such judgment, or otherwise obtain a lien, without further relief from the stay in this court.

IT IS ORDERED that judgment shall enter that the plan filed by Charles A. Norenberg on October 7, 1996 and amended on December 5, 1996 will be confirmed by a separate Judgment to be submitted by the standing trustee. The Judgment shall provide for additional monthly payments of \$20 over 10 months beginning May 1997 and made at the same time as the monthly payments called for by the plan as amended.

IT IS FURTHER ORDERED that if Charles A. Norenberg commences suit against the Grashoff Estate and its beneficiaries, the Estate and any beneficiaries named in the suit may assert any claims of the Estate for recoupment arising out of the same construction contract upon which suit is brought by Norenberg. The Estate may seek a state court determination that any of its claims against Norenberg were not discharged in Norenberg's chapter 7 bankruptcy case filed in 1995. If the state court determines that such debts were not discharged and that the Estate is entitled to an affirmative recovery against Norenberg, such claim may be asserted as a claim in the chapter 13 case, but the Estate may not execute on the judgment or obtain any judicial or other lien on said judgment without seeking further relief from the bankruptcy court. The clerk shall enter separate judgment on modification of the stay.

SO ORDERED THIS 7th DAY OF APRIL 1997.

William L. Edmonds
Chief Bankruptcy Judge
April 7, 1997

I certify that on _____ I mailed a copy of this order and a judgment by U.S. mail to: Debtor, Jeffrey Poulson, Carol Dunbar, U.S. Attorney and U.S. Trustee.