# In the United States Bankruptcy Court

## for the Northern District of Iowa

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| ROBERT SWEET and<br>SHAWN SWEET | Bankruptcy No. 97-03829M |
| *Debtor(s).* | Chapter 7 |

## DECISION RE: DEBTORS' MOTION TO DISMISS

Debtors move to dismiss their chapter 7 case. The trustee objects. Hearing was held May 19, 1998 in Mason City. Timothy L. Lapointe represented the debtors. Larry S. Eide, the trustee, appeared on his own behalf. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

Robert and Shawn Sweet, husband and wife, filed their joint petition under chapter 7 on December 16, 1997. Their schedules showed ownership of Lots 3 and 4, Block 3 in the Village of Freeport, Winneshiek County, Iowa. The property was scheduled as having a value of $75,000.00. It was scheduled as encumbered by a secured claim of $20,900.00. Robert Sweet testified that it was a mistake to schedule the lots. The lots described had been sold by debtors prior to their filing bankruptcy (Exhibit A), and the money was spent.

Other real property owned by Robert Sweet at the time of filing was not scheduled by him. At the time of filing, he owned a remainder interest in Lots 7, 8, 9 and 10 in Block 15 of the Dahly & Fannon Addition to the City of Freeport. The interest was deeded to Sweet by his grandparents in 1992 (Exhibit E). He says he was unaware of the transfer until after he filed his bankruptcy petition. It is not necessary for me to decide at this time whether this is so.

This is not the first time Sweet held an interest in this real estate. In May 1989, Harriet and Lester Leidahl, Sweet's grandparents, gave him a warranty deed to lots 7, 8, 9 and 10. The deed was recorded. Sometime after the transfer, probably in early 1990, Sweet was involved in a fight, and thereafter he feared the other participant might sue him. Because of this fear, he transferred the lots back to his grandparents in April 1990. Sweet testified that unbeknownst to him, his grandparents, in November 1992, executed and filed a warranty deed to him of the remainder. Despite Sweet's lack of knowledge of his interest, he says the value of the lots is $75,000.00, the same as the value listed for the two lots sold prior to bankruptcy, and that there is a mortgage against the property for about $20,900.00, the same amount as listed against the lots that had been sold.

Sweet's property interest and any rights of his spouse were discovered by the trustee. Sweets ask now that their case be dismissed. They say that they would not have filed bankruptcy had they known of the existence of the property interest and that the ownership of the interest would allow them to pay their creditors through the sale of the property or by mortgaging it to raise money. Sweets say that if the case is not dismissed, they will be severely prejudiced because they will lose the property.

Although a debtor may voluntarily initiate a chapter 7 case, the debtor does not have absolute discretion in having the case dismissed. Matter of Blackmon, 3 B.R. 167, 169 (Bankr. S.D. Ohio 1980); In re Klein, 39 B.R. 530, 532 (Bankr. E.D. N.Y. 1984). A debtor may move to dismiss under 11 U.S.C. § 707(a), although this proposition is not free from doubt. Matter of Jennings, 31 B.R. 378, 380 (Bankr. S.D. Ohio 1983)(a debtor's voluntary dismissal controlled by equitable principles, not under § 707(a)). Section 707(a) states that the "court may dismiss a case ... only for cause." I see nothing in the language of § 707(a) which prevents dismissal on the request of a debtor. Moreover, the application of § 707 does not preclude the application of equitable principles. Peterson v. Atlas Supply Corp. (Matter of Atlas Supply Corp.), 857 F.2d 1061, 1063 (5th Cir. 1988). The determination of whether cause exists is within the discretion

of the court. Id.

If dismissal would prejudice creditors, the motion should be denied. Matter of Williams, 15 B.R. 655, 658 (E.D. Mo. 1981), *aff'd* 696 F.2d 999 (8th Cir. 1982). This is so unless there is affirmative assent to dismissal from all creditors. In re Astin, 77 B.R. 537, 538 (Bankr. W.D. Va. 1987). A creditor's failure to object to dismissal does not constitute consent to dismissal. Penick v. Tice (In re Penick), 732 F.2d 1211, 1213 (4th Cir. 1984). The trustee may resist dismissal on any ground on behalf of unsecured creditors who do not affirmatively consent to dismissal of the case. Id. at 1214.

The debtors did not cite the provision of the Code through which they seek dismissal. It may be that dismissal is sought under § 305(a). If that is so, the debtors must show that "the interests of creditors and the debtor would be better served by such dismissal...." 11 U.S.C. § 305(a)(1); Eastman v. Eastman (In re Eastman), 188 B.R. 621, 624 (9th Cir. BAP 1995).

The trustee contends that dismissal of Sweets' bankruptcy would prejudice creditors. He says sale of the property would provide a significant basis for a distribution to creditors while there is no certainty that creditors would receive anything if the case were dismissed. He points out that once before Robert Sweet transferred this property because of his fear of a claim by a potential creditor.

I agree with the trustee that dismissal of this case is not in the best interest of creditors. Although the value of the remainder interest was not calculated by the parties, and the age of each grandparent was not offered in evidence, it appears there is substantial value to the lots above the alleged mortgage. It is not likely the remainder interest is exempt under Iowa law. Sale of the interest may provide a significant dividend to the creditors. Debtors do not argue otherwise, and in fact, they contend that the interest would provide the basis for their settling with creditors without the need for bankruptcy. However, there is no certainty that debtors' use of their interest as a settlement vehicle would provide better treatment of creditors than administration of the asset by a trustee. This is especially so where the debtor once before has transferred the property to avoid a potential claim. I conclude that dismissal would prejudice creditors, that creditors' interests are not better served by dismissal, and that cause for dismissal has not been shown. Accordingly,

IT IS ORDERED that debtors' motion to dismiss their chapter 7 case is denied. Judgment shall enter accordingly.

SO ORDERED THIS DAY OF MAY 1998.

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 Timothy Lapointe, Larry Eide, and U.S. Trustee.