In the United States Bankruptcy Court

for the Northern District of Iowa

ROBBINS W. FISCHER *Debtor(s).*	Bankruptcy No. 96-61088-W Chapter 7
MICHAEL C. DUNBAR *Plaintiff(s)* vs. MARTHA DENTON, DOROTHY FISCHER, BARBARA FISCHER *Defendant(s)*	Adversary No. 98-9132-W

ORDER RE TRUSTEE'S SETTLEMENT AGREEMENT

This matter came before the undersigned on October 14, 1998 pursuant to assignment. Chapter 7 Trustee Michael Dunbar appeared as Plaintiff. Attorney Aaron Bixby represented Defendants Martha Denton, Dorothy Fischer and Barbara Fischer. Attorney Kay Dull represented Creditor Elmer Schettler. The matter before the Court is Trustee's proposed Settlement Agreement with Defendants and Objection thereto by Mr. Schettler. After the presentation of argument by counsel, the Court took the matter under advisement. The time for filing briefs has now passed and this matter is ready for resolution. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(F).

ISSUES

Trustee filed this action to avoid preferences, seeking to recover Debtor Robbins Fischer's payments of $6,000 to each of his three daughters, the Defendants herein. Trustee and Defendants entered into an agreement, subject to court approval, settling the controversy by payment of $800 by Defendants. Creditor Elmer Schettler objects to the settlement agreement.

STATEMENT OF FACTS

Debtor filed his Chapter 7 petition on May 3, 1996. On January 29, 1996, Debtor made payments of $6,000 to his daughters, Martha Denton and Barbara Fischer. On April 5, 1996, Debtor paid his daughter Dorothy Fischer $6,000. Debtor characterizes these as loan repayments. He states he borrowed $6,000 from each Defendant on June 29, 1995 to pay amounts due on a mortgage in order to avoid foreclosure on his farm real estate. He sold the property in January 1996 and, from the sale proceeds, he repaid the $6,000 borrowed from each of his daughters.

Creditor Schettler filed an adversary proceeding, Adv. No. 96-61088-W, asserting, among other things, that these payments are avoidable preferences under §547. In a final ruling filed June 27, 1997, this Court concluded that Schettler could not maintain a §547 action, which is available only to

trustees. At that time, Trustee had applied for approval of employment of an attorney to pursue such an action. Trustee did not file his complaint under §547, however, until July 21, 1998.

After final disposition of Mr. Schettler's adversary proceeding, Mr. Schettler communicated with Trustee regarding the potential §547 action against Debtor's daughters. Apparently, Trustee offered the claims to Defendants for $800 sometime prior to April 1, 1998. Mr. Schettler states he then offered Trustee $900. Trustee did not respond to that offer.

APPROVAL OF SETTLEMENT

Rule 9019(a) provides that the Court may approve a compromise or settlement after notice to interested parties. Drexel v. Loomis, 35 F.2d 800 (8th Cir. 1929), is the leading case establishing four primary criteria to consider in determining whether to approve a settlement agreement. These criteria are: a) the probability of success in the litigation; b) the difficulties, if any, to be encountered in the matter of collection; c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and d) the paramount interests of the creditors and a proper deference to their reasonable views in the premises. Id. at 806. "In considering these factors, the bankruptcy court should canvass the issues and determine whether the proposed settlement falls within the range of reasonableness in the case, but without trying the case or otherwise deciding the issues of law and fact presented." In re Media Cent., Inc., 190 B.R. 316, 320 (E.D. Tenn. 1994).

"The benchmark for determining the propriety of a bankruptcy settlement is whether the settlement is in the best interests of the estate". In re Energy Coop., 886 F.2d 921, 927 (7th Cir. 1989). The decision whether to approve a settlement is committed to the sound discretion of the Bankruptcy Court. In exercising its discretion, the Court must make an informed and independent judgment. In re Flight Transp. Corp. Sec. Litig., 730 F.2d 1128, 1135 (8th Cir. 1984), cert. denied, 469 U.S. 1207 (1985). The Court should approve the settlement unless it falls below the lowest point in the range of reasonableness. In re New Concept Hous., Inc., 951 F.2d 932, 938 (8th Cir. 1991). The Court may approve a settlement over the objections of some parties so long as it is in the best interests of the estate as a whole. Flight Transp. Corp., 730 F.2d at 1138.

PROBABILITY OF SUCCESS IN THE LITIGATION

As an initial matter, the Court notes that Trustee filed his §547(b) adversary complaint more than two years after Debtor commenced his Chapter 7 case. Debtor filed his Chapter 7 petition on May 3, 1996. The commencement of a voluntary case constitutes the order for relief. 11 U.S.C. §301. An action under §547 may not be commenced later than two years after the entry of the order for relief. 11 U.S.C. §546(a)(1)(A). Trustee commenced this adversary proceeding on July 21, 1998. Under the Code, Defendants have a facially valid statute of limitations defense.

According to Fed. R. Civ. P. 8(c), Defendants must raise the statute of limitations as an affirmative defense in a pleading. An agreement to extend the limitations period will estop a party from later raising the defense. In re Shape, Inc., 138 B.R. 334, 338 (Bankr. D. Me. 1992). If not promptly pleaded, a statute of limitations defense may be considered waived. In re Wedtech Corp., 187 B.R. 105, 111 (S.D.N.Y. 1995). Affirmative defenses may be raised later in proceedings when there is no prejudice or surprise to the opposing party. Cooperative Fin. Ass'n v. Garst, 917 F. Supp. 1356, 1385 (N.D. Iowa 1996). There is an implied waiver of a defense only where a party's conduct is so indicative of an intent to relinquish the defense that no other reasonable explanation for the conduct is possible. Zotos v. Lindbergh Sch. Dist., 121 F.3d 356, 361 (8th Cir. 1997).

From the existing record, it is difficult to discern what impact the statute of limitations might have in this case. Defendants did not raise the affirmative defense in their Answer. There is no evidence, however, that they have waived the defense, other than the fact that they have offered $800 to settle a claim which has obviously expired under §547. Even if Defendants have waived the statute of limitations defense in this action by the Trustee, they could, arguably, assert it against Creditor Schettler if Trustee accepted his offer of $900 for the ability to pursue the §547 action. Also, if this settlement is rejected by the Court, Defendants in this adversary may now attempt to assert this defense. Without determining the effect of the statute of limitations, the Court concludes it has a significant impact on the probability of the success of litigation.

As to the merits of the underlying §547(b) claim, Trustee would be required to prove the following elements as they relate to Debtor's payments to his three daughters:

> The transfer must be made 1) to or for the benefit of a creditor; 2) for or on account of antecedent debt; 3) while the debtor was insolvent; 4) to a noninsider on or within ninety days of the filing of the bankruptcy case [or to an insider on or within one year of the filing]; and, such transfer must 5) result in the creditor receiving more than the creditor would have received in a hypothetical liquidation in a Chapter 7 case.

In re Wade, 219 B.R. 815, 818-19 (B.A.P. 8th Cir. 1998).

Defendants' answer asserts the payments were in the ordinary course of Debtor's business or financial affairs. Defendants also assert Debtor's payments did not dilute the assets of the estate, which resembles the defense that the payments constituted contemporaneous exchanges for new value. Defendants bear the burden of proof on both the "ordinary course of business" and the "contemporaneous exchange" defenses. 11 U.S.C. § 547(g).

Under §547(c)(1), the issues are whether the parties intended the payment to be a contemporaneous exchange for new value and whether the transfer was in fact a substantially contemporaneous exchange. In re Mason, 189 B.R. 932, 936 (Bankr. N.D. Iowa 1995). Under §547(c)(2), a trustee may not avoid under § 547(b) a transfer that was (1) in payment of a debt incurred in the ordinary course of business of both parties, (2) made in the ordinary course of business of both parties and (3) made according to ordinary business terms. 11 U.S.C. §547(c)(2). The "ordinary course of business" determination requires a peculiarly factual analysis. Lovett v. St. Johnsbury Trucking, 931 F.2d 494, 497 (8th Cir. 1991). The "cornerstone" of this defense is that the creditor needs to demonstrate some consistency with other business transactions between the debtor and the creditor. Id.

It is apparent from a review of the complaint, Defendants' answer and the settlement agreement, the parties will have difficulties in proving their respective positions. It does not appear Defendants and Debtor had consistent business transactions required for an ordinary course of business defense. Further, a repayment seven months after a loan does not at first glance easily fit within a common understanding of the term, a "contemporaneous" exchange. On the other hand, Trustee's claim is problematic considering the §546 statute of limitations. The file fails to indicate Defendants have waived a defense based on that limitation. In these circumstances, the Court cannot find either party is more likely to succeed in litigation of this action.

DIFFICULTIES IN COLLECTION; COMPLEXITY OF THE LITIGATION INCLUDING EXPENSE, INCONVENIENCE AND DELAY

Difficulty in collecting a judgment in this action does not appear to be an issue in this case. As to the complexity of the case, the issues of law and fact appear to be straightforward. Delay is an issue in this case considering Debtor's Chapter 7 case has been pending since May 1996. The expense of litigation would arguably be offset by the substantial recovery sought. None of these factors makes the settlement any more or less reasonable in the circumstances.

PARAMOUNT INTERESTS OF CREDITORS AND DEFERENCE TO THEIR REASONABLE VIEWS

Usually, the paramount interest of creditors is to receive the largest possible payment on their claims. The notice of commencement of case mailed to parties in interest indicates that no assets are available from which payment may be made to unsecured creditors. A recovery of $18,000 in this action would increase payment to unsecured creditors, holding total claims of $255,056, from nothing to at least something. Mr. Schettler's judgment of $149,964 constitutes more than half of the total unsecured claims, as would his share of any recovery.

Mr. Schettler's view is that the §547 action against Defendants is worth pursuing and will result in a recovery greater than the $800 offered for settlement. As discussed above, any recovery in this action is doubtful considering the action was filed outside the time limitations of §546(a). Therefore, Mr. Schettler's view, considering the limitations issue, is not reasonable.

Mr. Schettler offered Trustee $900 for the right to pursue §547 claims against Defendants for his own benefit. As the Court noted in Mr. Schettler's adversary action, a §547 action is available only to trustees. In re Feldhahn, 92 B.R. 834, 836 (Bankr. S.D. Iowa 1988). Furthermore, a trustee cannot assign, sell or otherwise transfer the right to maintain a suit to avoid a preference. In re Vogel Van & Storage, Inc., 210 B.R. 27, 32 (N.D.N.Y. 1997), aff'd per curiam, 142 F.3d 571 (2d Cir. 1998); In re Sun Island Foods, 125 B.R. 615, 618 (Bankr. D. Hawaii 1991); In re Kroh Bros. Dev. Co., 100 B.R. 487, 499 (Bankr. W.D. Mo. 1989). The power to avoid a preference is one which is to be exercised in the interests of securing equality of distribution among creditors, not to create a benefit for one creditor alone. In re Sapolin Paints, Inc., 11 B.R. 930, 937 (Bankr. E.D.N.Y. 1981). Trustee correctly refused to assign his right to bring this §547 action against Defendants to Mr. Schettler.

CONCLUSION

The Court concludes the proposed settlement agreement between Trustee and Defendants should be approved. The Court has considered the interests of all unsecured creditors, and the views of Mr. Schettler, in particular. In light of the statute of limitations, the Court cannot conclude Trustee could succeed in recovering any more than $800 by proceeding with litigation. If Mr. Schettler purchased the §547 claims from the Trustee, the statute of limitations would arguably bar him from litigating the claims. Trustee has no authority to assign the §547 claims to Mr. Schettler. In these circumstances, approving the settlement agreement is in the best interests of the estate.

WHEREFORE, the Objection to Notice of Settlement Agreement filed by Creditor Elmer J. Schettler is DENIED.

FURTHER, the Settlement Agreement filed August 27, 1998 is APPROVED.

SO ORDERED this 4th day of November, 1998.

PAUL J. KILBURG

Paul J. Kilburg
U.S. Bankruptcy Judge