In the United States Bankruptcy Court

for the Northern District of Iowa

MARY L. HANSEN
Debtor(s).

Bankruptcy No. 96-11108-C
Chapter 7

ORDER RE MOTION TO REOPEN CASE

On January 27, 1999, the above-captioned matter came on for hearing on a Motion to Reopen Case filed by Creditor Larry Brown. Debtor Mary L. Hansen (Hansen) appeared with her attorney, Todd Forsythe. Larry Brown (Brown) did not appear but appeared by his attorney, Joseph Peiffer. Evidence was presented and the Court took the matter under advisement.

STATEMENT OF THE CASE

Hansen filed a voluntary Chapter 7 petition on May 7, 1996. Brown was listed in the matrix as a creditor as well as in Schedule F as a creditor holding an unsecured nonpriority claim in the amount of $1,000. The nature of this claim was described in Schedule F as possible liability in a case then pending in Linn County Court as Small Claim 092186. Brown was also listed under Schedule F as an unsecured creditor in the amount of $6,600. No explanation is provided in the Schedules as to the nature of this claim. Additionally, Brown was listed as a landlord of Hansen and the Schedules reflect that Brown was allegedly holding a $1,100 rent deposit which Hansen claimed as exempt. The Statement of Affairs filed by Hansen reflected that Brown had sued Hansen on two separate occasions in Linn County Small Claims Court.

A potential asset of the estate was a "harassment lawsuit against Larry Brown". This asset was not listed in the Schedules when filed. However, within days of the filing of the petition, counsel for Hansen communicated to the Chapter 7 Trustee the basis for this asset in a letter. The record is conclusive that, at all times, the Chapter 7 Trustee was aware of this asset and was able to administer it during the course of administration. Subsequent to the filing of the Chapter 7 petition, Brown became an active participant in the administration of this Chapter 7 petition. Numerous matters were raised by Brown which were all eventually resolved.

On March 11, 1997, the Chapter 7 Trustee filed a Notice of Motion to Compromise and Settlement of Controversy. A part of this motion to compromise involved personal property of the estate. However, the motion to compromise also proposes:

> A compromise and settlement of the possible claim of harassment which could arise out of a certain lease agreement prior to the bankruptcy as well as a continuation of action vs. Larry Brown... Further, Trustee does not believe the possible claim of harassment will generate funds for the bankruptcy estate sufficient to offset the cost of litigation...

This motion was noticed to all creditors pursuant to Bankruptcy Rule 9019. On March 31, 1997, Brown filed the sole objection. While much of his objection related to certain personal property of the estate, he did address the settlement of the harassment lawsuit as follows: "1. Harassment claim was dismissed and is noted in case #SCSC0093719 in the Iowa District Court of Linn County."

Hearing was held on the Motion to Compromise and Settlement of Controversy on May 6, 1997. At that time, Hansen appeared with Attorney Todd Forsythe. Also present was the Chapter 7 Trustee Harry Terpstra, now deceased, and Objector Brown, pro se. After all parties were offered an opportunity to make a complete record, the Court concluded that the objection filed by Brown was without merit and that the Motion to Compromise and Settlement of Controversy should be approved. The file reflects that the Motion to Compromise was consummated and Hansen purchased this lawsuit as well as personal property for $600. A discharge had previously been granted on August 8, 1996 and Trustee filed a Final Report. A final decree was entered in December of 1997 and the case was closed.

On November 25, 1998, a Motion to Reopen was filed by Brown. In this motion, Brown alleges that after the compromise was approved Hansen filed a lawsuit against Brown, captioned Mary L. Hansen vs. Larry Brown, in the Iowa District Court, In and For Linn County. He asserts that Hansen is seeking damages for incidents which occurred prior to the filing of the Chapter 7 petition. He further states in the motion that he has communicated with the Office of the United States Trustee his desire to purchase this cause of action for $1,000. He requests that the estate be reopened so this asset can be administered and the creditors can receive a distribution.

Hansen filed a resistance on December 3, 1998 asserting that this asset was administered in the bankruptcy estate and that she purchased this lawsuit after notice to all creditors, including Brown, and after hearing in which the settlement was specifically approved. Hansen asks the Court to deny the Motion to Reopen.

FINDINGS OF FACT

The record, including the evidentiary record, presented on January 27, 1999 reflects that Brown has had a contentious relationship with Hansen for an extended period of time. This resulted in various small claims lawsuits being filed in Iowa State Court as well as other conflicts involving legal process. This carried over into the bankruptcy proceedings. Brown was an active participant in the Chapter 7 administration and filed numerous pleadings throughout the administration of this case. While the schedules, as filed by Hansen, do not reflect a potential harassment lawsuit by Hansen against Brown, Attorney Todd Forsythe fully apprised the Chapter 7 Trustee of a possible harassment suit by Hansen against Brown. (Exhibit 1).

Mr. Forsythe sent the Trustee a first draft of the possible harassment suit against Brown which Mr. Forsythe had prepared. This draft was attached to Exhibit 1. It was denominated as Petition at Law and Application for Temporary Injunction and alleges various facts including allegations that Hansen had rented property from Brown since May of 1995. The petition is in two counts. Count 1 asserts that Brown harassed Hansen including making slanderous statements with the intent to inflict emotional distress. It asserts that Brown entered the rented premises without appropriate notice in violation of Iowa law. It alleges that Brown wrongfully tried to evict Hansen through improper use of forcible entry and detainer actions. It also alleges that Brown's actions were willful and malicious, thereby justifying punitive damages. The second count is an application for a temporary injunction. Hansen alleges that Brown harassed and slandered her in the past and this count seeks to enjoin him from

doing so in the future. By way of relief, Hansen asks that all types of contact between herself and Brown be enjoined.

The Court was presented with a copy of the petition as it was actually filed in Linn County District Court on June 20, 1997. This lawsuit is filed in six counts as follows: Count 1 Libel and Slander; Count 2 Illegal Entry and Trespass; Count 3 Violation of the Covenant of Quiet Enjoyment of the Premises; Count 4 Harassment; Count 5 Intentional Infliction of Emotional Distress; and Count 6 Abuse of Process.

The Court has reviewed the audio-taped record of the hearing held on the Motion to Compromise on May 6, 1997. Mr. Terpstra, at the time of hearing, stated that after evaluating certain items of personal property and the possible harassment suit by Hansen against Brown, he felt that rather than abandon the lawsuit, he would include it in the Motion to Compromise along with the personal property. In his recitation concerning the Motion to Compromise, he stated that he was proposing to sell:

> whatever cause of action might exist which Trustee evaluates at $0 because of the expense of litigation, the difficulty of finding someone to try it, and take it on a contingency basis. But I felt the lawsuit had $0 value to this bankruptcy estate or nominal - we'll say a dollar.

In addition to the foregoing record, Hansen testified that on several occasions, before the compromise was approved, she had an opportunity to discuss this potential lawsuit with the Chapter 7 Trustee, Mr. Terpstra. She testified that she explained to him the background of all of this conduct including her allegations that Brown had provided false information to the Cedar Rapids police department as well as to the Internal Revenue Service, her allegation that he had accused her of prostitution and drug dealing as well as forgery and fraud. She testified that she informed him of Brown's illegal entry and trespass as well as the other allegations which were ultimately included in the six count complaint.

ISSUE

The sole issue presented to this Court is to determine the extent of the Motion to Compromise and subsequent approval order. It is the position of the movant, Brown, that the Motion to Compromise encompassed an "harassment lawsuit" and, therefore, was confined only to harassing conduct. He also asserts that the rough draft presented to Trustee contained only an harassment claim and a claim for injunctive relief whereas the actual lawsuit contains six counts which include causes of action which allege conduct and theories of tort not specified in the Motion to Compromise. He asserts that they were not included in the Motion to Compromise and were not within the contemplation of the Trustee at the time of sale and, therefore, remain property of the estate to the extent that they were not considered by the Court. Hansen takes the position that the term "harassment lawsuit" was merely a shorthand term which everyone understood to include all the various types of conduct which Hansen was asserting against Brown. She states that Mr. Terpstra was aware of the breadth of this conduct and that he intended to sell the lawsuit by Hansen against Brown regardless of the theories ultimately propounded.

CONCLUSIONS

There is no issue raised by Brown concerning the Motion to Compromise. The Motion was properly brought under Rule 9019 and Rule 2002 of the Rules of Bankruptcy Procedure. Notice was provided to all creditors who were provided complete opportunity to object to the Motion to Compromise. In

fact, Brown was provided notice and did have a full opportunity to object and be heard at the time of hearing.

The Court was presented with a complete record by the Trustee as to the reasons for the compromise. Approval of such Motion is committed to the sound discretion of the Bankruptcy Court and, in exercising its discretion, this Court determined that the settlement was fair, reasonable and adequate under all of the circumstances. In making the determination, the Court applied the criteria required in this Circuit. In summary, the Court concluded that the Motion to Compromise was fair and equitable and in the best interests of Debtor's estate. In re Flight Transp. Corp. Sec. Litig., 730 F.2d 1128, 1135 (8th Cir. 1984), cert. denied 469 U.S. 1207 (1985); In re Cox, No. A-86-1718S, slip op. at 14 (Bankr. N.D. Iowa June 8, 1990).

The only issue, therefore, for this Court is to determine whether the Motion to Compromise included any and all claims by Hansen against Brown arising out of the given set of facts. When such a dispute occurs, the terms of a compromise are questions of fact. TCBY Systems, Inc. v. EGB Assoc., Inc., 2 F.3d 288, 291 (8th Cir. 1993); see also Vaugh v. Sexton, 975 F.2d 498, 506 (8th Cir. 1992).

The Court must, therefore, determine whether the record supports the conclusion of Hansen that the Motion to Compromise was intended to include any and all claims arising out of this set of facts against Brown or whether the compromise was limited to one count of harassment and one count of injunctive relief thereby allowing any remaining theories of recovery to remain assets of the estate for possible subsequent administration if an award is returned against Brown. For the reasons set out hereafter, this Court concludes that the Motion to Compromise included all claims arising out of the relationship between Hansen and Brown.

First, Trustee Terpstra used broad language both in the Motion to Compromise as well as his statements to the Court indicating that he intended to dispose of the entire cause of action. In the Notice and Motion to Compromise, he stated that he chose to compromise and settle "the possible claim of harassment which could arise out of a certain lease arrangement prior to the bankruptcy as well as a continuation of action versus Larry Brown." (emphasis added). The language contained in that paragraph concerning a continuation of action leads the Court to conclude that Mr. Terpstra was referring to the entire set of conduct which surrounded the relationship between Hansen and Brown in their relationship beginning with the commencement of the lease. Secondly, at the time of hearing on approval of the Motion to Compromise, Mr. Terpstra unambiguously informed the Court that he was taking a broad interpretation of what was the subject of his Motion to Compromise. In his evaluation to the Court, he stated that he was disposing of "whatever cause of action might exist". This is clearly intended by the Trustee to be more than a partial settlement involving one or two theories of recovery.

Second, there is no doubt that Mr. Terpstra was aware of all of the various possible claims by Hansen against Brown. Hansen testified at the time of trial that she had several discussions with the Trustee concerning the entire range of conduct as previously set forth in these findings of fact. Brown objected to the admission of this testimony by Hansen asserting that it was hearsay. This Court allowed an offer of proof and a complete record was made on this testimony which the Court took under advisement.

The Court has had an opportunity to evaluate this testimony and now concludes that it is admissible for the purposes offered. Rule 801(c) states that: "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." In other words, an offered statement is only hearsay if it is offered to prove the truth of the matter asserted in the content of the statement.

In this case, Hansen asserts that she made statements to Trustee Terpstra who is now deceased. For present purposes, Ms. Hansen's testimony was not offered to prove the truth of her previous assertions to Mr. Terpstra regarding the merits or content of her claim against Brown. Rather, Ms. Hansen's testimony regarding her previous statements to Mr. Terpstra was offered merely to show that the statements were made, thereby showing that Mr. Terpstra had knowledge. It is clear that if the significance of an offered statement lies only in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. Emich Motor Corp. v. General Motors Corp., 181 F.2d 70 (7th Cir. 1950), rev'd on other grounds 340 U.S. 558 (1951); see also George v. Celotex Corp., 914 F.2d 26, 30 (2d. Cir. 1990); Contreras v. City of Chicago, 920 F. Supp. 1370, 1378 n.2 (N.D. Ill. 1996). Therefore, Hansen's statements to Trustee Terpstra are not hearsay and are admissible as evidence that the Trustee was aware of the full range of possible conduct which could form the basis of this lawsuit.

Ultimately, the record clearly establishes that, prior to the compromise, Mr. Terpstra was aware of all of the facts and allegations which would be made by Hansen against Brown in a lawsuit. This is persuasive in concluding that Mr. Terpstra intended to sell the entire lawsuit and not a portion of it.

Third, independent of any statements made by Hansen to the Trustee, the initial draft petition presented to the Trustee by Hansen's attorney set out much of the same conduct though in a shorthand fashion. Count 1 of the draft petition, though simply denominated harassment, contains multiple allegations of conduct against Brown. The draft petition, in summary fashion, recites the various types of conduct which were ultimately put into the final petition as multiple counts. The record is clear that Mr. Terpstra was provided a copy of the draft petition and was aware of its existence from the inception of the Chapter 7 petition. The final petition as filed as a civil lawsuit in State court is nothing more than an expanded version of the draft petition originally shown to the Trustee by counsel for Hansen. It is fair to conclude that he took this into consideration in formulating his Motion to Compromise.

Finally, the Trustee stated that a reason for disposal of this cause of action was because of the expense of litigation, and the difficulty of finding someone to try it on a contingency basis. It is illogical to conclude, with the knowledge at the Trustee's disposal, that he intended to sell a portion of this lawsuit. Since the estate would not support the expense of litigation of a portion of this lawsuit, it is illogical to conclude that the Trustee would leave the remainder unadministered when he was certainly aware that there were allegations. If the Trustee wished to sell only a portion of the lawsuit, it is reasonable to conclude that he would have so specified.

SUMMARY

The interpretation of a settlement is a factual determination. An examination of this record reveals that any interpretation of the Motion to Compromise which suggests that the Trustee only intended to dispose of a portion of this lawsuit is completely unsupported. The Court concludes, as a fact, that the Trustee was fully apprised at all times of the nature of the allegations which gave rise to this multi-count petition. Trustee had, since the filing of the petition, at his disposal an abbreviated petition which sets out essentially the same allegations. The Trustee was aware that this estate had no money to support the expense of litigation and it is unreasonable to conclude that the Trustee would sell a portion of this lawsuit for a nominal sum and retain other portions which also could not be maintained or financed by the estate. No suggestion is made why a Trustee would choose to do so in this case. The statements made by the Trustee in his Motion and in his statements to the Court at the time of hearing on this Motion convince the Court, without any doubt, that Mr. Terpstra intended to

accomplish precisely what he told the Court; that was to sell back to Hansen whatever cause of action she might have against Brown.

WHEREFORE, for the reasons set forth in the record, the Court concludes that no grounds are shown for reopening this estate.

FURTHER, for the reasons set forth herein, the Motion to Reopen this estate filed by Creditor Larry Brown is DENIED.

SO ORDERED this 3rd day of February, 1999.

PAUL J. KILBURG

Paul J. Kilburg
U.S. Bankruptcy Judge