United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

In re Robert P. Fisher and Kathleen S. Fisher, Debtors
Bankruptcy Case No. 96-15255-7

United States Bankruptcy Court
W.D. Wisconsin, Eau Claire Division

February 12, 1999

Chris A. Gramstrup, Superior, WI, for debtors.
Randi L. Osberg, Garvey, Anderson, Johnson, Gabler & Geraci, S.C., Eau Claire, WI, for trustee.

Thomas S. Utschig, United States Bankruptcy Judge.

MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Perhaps in keeping with Cicero's advice to "let war yield to peace," it is generally acknowledged that the law favors compromise. In re Bates, 211 B.R. 338, 343 (Bankr. D. Minn. 1997). Litigation can be costly and inefficient, and lawyers often counsel their clients that a bad settlement may be better than a good verdict. In bankruptcy cases, the sheer number of parties involved -- debtors, trustees, and creditors -- often makes settlement more difficult. Too many cooks spoil the soup, as it were. As a result, the courts have established certain fundamental principles to aid in deciding whether to approve a settlement agreement. The Court's task in this case is to apply those principles and resolve an objection to the chapter 7 trustee's settlement proposal.

The facts are as follows. When Robert and Kathleen Fisher filed bankruptcy, they had a number of non-exempt assets, including a car and a home. They also had one creditor with a very large claim -- Dianne Niemi-Hart, Mr. Fisher's former wife. Ms. Niemi-Hart has filed a proof of claim for approximately $94,000.00 in unpaid child support.(1) This claim represents the bulk of the debt in this case, as the Fishers have only listed another $5,000.00 in debts on their schedules. On a percentage basis, the Niemi-Hart claim constitutes about 95% of the scheduled debt, and it is obvious Ms. Niemi-Hart will be the primary beneficiary of any recovery made by the chapter 7 trustee as he collects and liquidates the debtors' non-exempt assets.

The debtors concede that their home is worth more than the Wisconsin homestead exemption of $40,000.00. For purposes of this dispute, the parties have agreed that the home is worth between $79,000.00 to $83,000.00. As there are no liens against the house, this leaves a non-exempt equity interest of between $39,000.00 to $43,000.00. When the debtors filed bankruptcy, all of their non-exempt assets became "property of the estate" under 11 U.S.C. § 541. In re Turner, 190 B.R. 836 (Bankr. S.D. Ohio 1996). The chapter 7 trustee is the designated representative of the bankruptcy estate, whose duties include the collection and liquidation of these

non-exempt assets for ultimate distribution to creditors. In re Edmonston, 107 F.3d 74 (1st Cir. 1997).

In their schedules, the debtors claimed the home as exempt property under the Wisconsin homestead provisions. Randi Osberg, the chapter 7 trustee, objected to the exemption claim on the basis that the home was only partially exempt. After considerable discussion, the trustee and the debtors agreed to settle the matter. The agreement was that the debtors would essentially "buy back" the trustee's interest in the non-exempt portion of the homestead for $29,000.00, payable over time at a set interest rate. When the settlement was noticed to creditors, Ms. Niemi-Hart objected.(2) She believes that the trustee should simply list the property for sale and have it sold. There are two reasons for her position. First, she contends that the settlement amount is too low. Second, she objects to the notion of payment over time, and believes that a lump sum should be paid instead.

As to the first concern, the parties agree that the top value for the property is probably in the range of $83,000.00. Presuming that the trustee obtained this price at a sale (which is unlikely, given that it would be something of a "fire sale"), there are several deductions which must be made. First, there would be the sale costs, including a broker's commission, which the trustee has estimated at about $6,000.00. Second, there would be the debtors' Wisconsin homestead exemption of $40,000.00. After deducting these amounts from a top-end sales price, there would be a balance of $37,000.00.

Rather than pursue such a sale, the trustee has agreed to accept a $29,000.00 promissory note. He states that he would likely hold the note for a few months, then sell it at a 10% discount. As a result, he would net approximately $26,100.00 from the settlement. There is a net difference of about $11,000.00 between the trustee's settlement proposal and the agreed "best case" scenario. To the extent that the property sold for less (which seems likely), the difference between this hypothetical market sale and the trustee's settlement proposal shrinks dramatically.

While Ms. Niemi-Hart attempts to make the differential sound significant, the dollars at issue do not make the trustee's proposal unreasonable. It is certainly possible that the property would sell for something close to market value, but there is no guarantee of this and it is just as likely to sell for less than the agreed "top dollar" valuation. Indeed, the trustee points out that many prospective purchasers would be discouraged by the bankruptcy court approval process, and even those who remained interested would likely expect a "bargain-basement" price. As a result, the most likely differential between a market sale and the settlement proposal is far less than $11,000.00.

The issue is really whether the Court should accept the trustee's judgment or defer to the creditor's wishes. The trustee acts for the benefit of the creditors in collecting non-exempt assets, liquidating them, and disbursing the proceeds. Part of that process necessarily contemplates that the trustee will settle claims. Ms. Niemi-Hart believes that as the largest creditor, she should have significant control over the settlement process. In that regard, it is certainly true that the "benchmark" for determining the propriety of a settlement is the best interests of the estate. Matter of Energy Coop., Inc., 886 F.2d 921 (7th Cir. 1989). However, while the Court should consider a creditor's objection when evaluating a settlement, the creditor's views are not controlling. In re American Reserve Corp., 841 F.2d 159 (7th Cir. 1987). The Court should consider the probability of success on the merits; any difficulties which might be encountered; the expense, inconvenience, and delay; and the complexity of

the issue as well as the interests of creditors. In re Bates, 211 B.R. 338 (Bankr. D. Minn. 1997); In re Apex Oil Co., 92 B.R. 847 (Bankr. E.D. Mo. 1988).

The Court is not to substitute its judgment for that of the trustee. Bates, 211 B.R. at 343. Instead, the Court must look to see if the proposed settlement falls below the "lowest point in the realm of reasonableness." Id.; see also Apex Oil, 92 B.R. at 867. Such a review does not permit the Court to merely "rubber stamp" the settlement, of course; the Court must make an independent determination of its reasonableness. American Reserve, 841 F.2d at 162. But it is not for the Court to second-guess a reasonable settlement proposal, and if after considering the issues the settlement appears "fair and equitable," it should be approved. Bates, 211 B.R. at 343.

In this case, it might be possible to obtain a few thousand dollars more if the property were sold on the open market, but there is no guarantee of that result. When considered in light of the possible delay and uncertainty surrounding a brokered sale, the settlement proposal seems fair and equitable. The bankruptcy court should compare the settlement's terms to the probable costs and benefits of the alternative. American Reserve, 841 F.2d at 161. Ms. Niemi-Hart's concerns about the payments over time might have some merit if the trustee did not intend to sell the note in the short term, since otherwise the case would then be held open for a considerable period while the trustee collected a few hundred dollars a month. The trustee's proposal, however, does expect that a "lump sum" payment will be received in a relatively short period of time.

As a result, Ms. Niemi-Hart will receive a sizeable return on her claim, and the amount she might otherwise receive does not make the settlement unreasonable. The trustee's proposal will net 70% of the best possible recovery. Presuming that Ms. Niemi-Hart's claim is reduced to approximately $74,000.00, the net recovery under the trustee's proposal is 35% of the claim amount. Under the best case scenario, the trustee could obtain only 50% of her claim. This, of course, does not contemplate the deduction of a trustee's fee or a pro rata payment to other creditors, both of which will reduce the actual payout on her claim. The Court concludes that the trustee's settlement proposal does not fall below the "lowest point in the realm of reasonableness." Bates, 211 B.R. at 343.

Accordingly, the trustee's motion to approve the settlement agreement is granted, and the settlement agreement is approved.

This decision shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Rule 52 of the Federal Rules of Civil Procedure.

END NOTES:

1. Evidence in the related adversary proceeding styled Robert P. and Kathleen S. Fisher, Plaintiffs v. Dianne Niemi-Hart, Defendant, Adv. No. A98-1023-7, indicates that the actual "support" component of this debt is probably less than $18,000.00. This obligation was apparently incurred as a result of Mr. Fisher's failure to pay child support between 1968 and 1977. Sixteen years after her youngest child reached the age of majority, Ms. Niemi-Hart brought an action against Mr. Fisher in state court. Judgment was ultimately entered against Mr. Fisher for the unpaid support, together with interest at the statutory rate of 18% per year. This Court briefly stayed all actions in this case to allow Mr. Fisher to litigate certain claims that he had actually paid some of the underlying support and not been properly credited. Those issues have now apparently been resolved in state court, and the parties have indicated that a revised judgment for about $74,000.00 will be entered shortly.

2. Ms. Niemi-Hart did not object to the trustee's proposed resolution of a similar proposal concerning the debtor's car, which was also only partially exempt. Therefore, that proposed settlement has already been approved.