United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

In re Perry V. Elsemore and Marcy A. Elsemore, Debtors
Bankruptcy Case No. 10-15229-7

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

April 14, 2011

Jerome R. Kerkman and Evan P. Schmit, Kerkman & Dunn, Milwaukee, WI, for Chapter 7 Trustee
Kevin E. Wolf and Jeremy M. Welch, Ruder Ware, L.L.S.C., , Wausau, WI, for River Valley Bank

Thomas S. Utschig, United States Bankruptcy Judge

DECISION AND ORDER

The chapter 7 trustee sought to revoke the report of no distribution which had been filed in this case. River Valley Bank objected to the request. The matter was briefed and submitted to the Court on stipulated facts. The Court conducted a telephonic hearing on the matter on March 14, 2011. Attorneys Jerome R. Kerkman and Evan P. Schmit appeared on behalf of the trustee, and Attorneys Kevin E. Wolf and Jeremy M. Welch appeared on behalf of River Valley Bank.

This bankruptcy case was filed July 9, 2010. The meeting of creditors was conducted on September 2, 2010, and the trustee filed a report of no distribution shortly thereafter. The trustee filed a revocation of the no distribution report on November 23, 2010, and River Valley Bank objected to the revocation, arguing that the trustee had abandoned any interest in assets and that the abandonment was irrevocable. Essentially, the bank believes that the trustee had sufficient knowledge of any possible fraudulent transfer claims prior to filing the no distribution report, and the trustee should not be able to "unabandon" those claims.

As the Seventh Circuit has ruled, "[A]bandonment orders are ordinarily irrevocable." In re Lintz West Side Lumber, Inc., 655 F.2d 786, 789 (7th Cir. 1981). But the Lintz court also noted that this general rule is designed to protect the rights of innocent parties who would otherwise be unduly prejudiced by revocation of an abandonment order. Id. at 790-91. An exception may be made to this rule if the trustee can demonstrate that a mistake was made in the original abandonment and other parties have not been "unfairly prejudiced," and in such cases the bankruptcy court is not precluded from setting aside an abandonment order. Id. at 791; see also Randi L.

Osberg, Trustee, v. Bank of New York, et al., Adv. No. 09-344 (Bankr. W.D. Wis. March 2, 2011).

This case is factually similar to Rameker v. Berning Garage, Inc. (In re Alt), 39 B.R. 902, 904 (Bankr. W.D. Wis. 1984). In Alt, the court followed Lintz in permitting a trustee to revoke a report of no distribution to pursue a possible preferential transfer. The Alt court observed that in the Seventh Circuit there are two controlling factors when considering a possible exception to the general rule that abandonment is irrevocable. Put simply, "The abandonment must have been an inadvertent error and the parties must not have been unduly prejudiced." Id. In the present case, the bank suggests that in the no distribution report the trustee certified that he made a "diligent" inquiry into the debtors' financial affairs, and that information about the possible preference claims was sufficiently disclosed prior to the meeting of creditors such that the trustee cannot argue that the filing of the report was an "inadvertent error." But the trustee's certification is not the only consideration, nor does it preclude a consideration of the relevant facts of a particular case.

In both Lintz and Alt, the assets were scheduled and the trustee had access to information about them. In Lintz, the trustee subsequently concluded that the creditor's financing statement was deficient because it had been filed under the names of the company's principals rather than the debtor itself. In Alt, the trustee apparently overlooked a possible preference action. As the court observed in Alt, "Though possibly due to carelessness (in both instances the information was available to the trustee before the abandonment), the abandonment was mistaken." 39 B.R. at 904. Clearly, in both of those cases the trustee appears to have had information about the possible assets and certified that the abandonment determination was based upon an appropriate examination. In each instance, however, the trustee was permitted to revoke the abandonment because other facts justified doing so.

In this case, the trustee notes that the debtors' schedules and statement of financial affairs did not disclose the transfer of assets, and that their testimony at the meeting of creditors led him to believe that there were no assets to be recovered. He also acknowledges that the filing of the no distribution report prior to the resolution of another creditor's request for examination of the debtors under Fed. R. Bankr. P. 2004 constituted an "inattentive" and "inadvertent" error. See Trustee's Reply Brief at 2. Had he waited, of course, he might have gleaned enough information to cause him to doubt the debtors' testimony, and he might never have filed the no distribution report at all. All of which highlights the problem with the bank's position: notwithstanding the certification contained in the no distribution report, there *were* possible assets available in the bankruptcy estate.

Even if the Court assumes that there was sufficient information available to the trustee prior to the meeting of creditors to indicate the existence of possible preference claims, under Lintz and Alt the trustee's abandonment certainly qualifies as an "inadvertent error." 39 B.R. at 904. The trustee is simply attempting to rectify an

oversight. The only question is whether the bank may genuinely claim to have been "unduly" prejudiced by the revocation. In that regard, there is no suggestion that the trustee is attempting to unjustly reclaim an asset at the expense of an "innocent" party after the abandonment of the property. If the bank were the beneficiary of a preferential transfer, the delay of a few months does not itself justify a finding of prejudice. Rather, other creditors are prejudiced by the possible inequitable distribution of the debtors' assets.

The only prejudice the creditor can articulate is that Outdoors Extreme Corp., the entity to which the debtors apparently transferred assets, subsequently filed its own bankruptcy proceeding. According to the bank, it no longer has the ability to acquire those assets from Outdoor Extreme Corp. However, the trustee's revocation of the no distribution report occurred in November of 2010, and the Outdoor Extreme bankruptcy was filed on January 28, 2011. The bank certainly had ample opportunity to protect its interests during that interim period, as it was on notice that the trustee in this case intended to pursue the transfer claims. While the Seventh Circuit did not clearly articulate what might constitute "unfair prejudice," this Court cannot find that the creditor significantly altered its position in reliance upon the abandonment order, or that it is an innocent party who might suffer harm unjustly if the abandonment order is revoked. The objection to the revocation of the no distribution report is overruled.

Accordingly,

IT IS ORDERED that River Valley Bank's objection to the revocation of the no distribution report is overruled.