

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF )  
 )  
DAN & DARCY CAVANAUGH, ) CASE NO. BK92-82208  
 ) CH. 13  
DEBTOR(S) ) Filing No. 4, 24

MEMORANDUM

Hearing was held on May 3, 1993, on the Chapter 13 Plan and Resistance by Trustee. Appearing on behalf of debtors was Richard Register of Fremont, Nebraska. Kathleen Laughlin, appeared as Trustee. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(L).

Dan Cavanaugh, one of the debtors in this Chapter 13 case, is employed by Valmont Industries in Valley, Nebraska. He participates in a retirement savings program which permits him to have withheld from his annual pay up to 6%. That amount plus a matching amount goes into an account which is administered for his benefit. The contributions made by him are tax deductible and the contributions made by the company are not treated as income to him until he begins to draw on the retirement fund. This type of plan enables an employee to contribute to his own retirement with pre-tax dollars and receive the benefit of his employer contributing a significant portion to his retirement without him having to pay taxes during his employment.

Dan and his wife have filed this Chapter 13 bankruptcy and desire to continue to have withheld from his pay the amount of \$115.00 per month which is his contribution to the retirement plan. The Chapter 13 Trustee has objected on the grounds that retirement plan contributions are not necessary for the maintenance or the support of the debtors or dependents of the debtors, at least on a current basis. That being the case, it is the position of the Chapter 13 Trustee that the net amount after taxes which is being contributed to the retirement plan is disposable income under 11 U.S.C. § 1325(b)(2) which should be required to be paid through the trustee for the benefit of the creditors.

After a review of the materials submitted by the debtor, the Court agrees with the trustee. The debtor is twenty-eight years old and has been employed by Valmont for approximately nine years. He has contributed to the retirement plan for several years and his contributions plus matching contributions by the

employer, plus interest earned, equal approximately \$15,000.00. Although his retirement fund would increase on a monthly basis if he were permitted to continue to deposit part of his monthly income into the fund, such a deposit, although wonderful for he and his family at the date of his retirement more than thirty years from now, is harmful to his creditors. He has approximately \$24,000.00 in unsecured claims, which, pursuant to the current plan, will receive only a small proportion of the amount due.

The Court finds from the evidence presented that there is no extraordinary reason for Dan Cavanaugh to be able to continue to keep a retirement savings account with contributions on a current basis when his creditors are not being paid. The law does allow him to keep the principal that has been previously earned, because it is arguably exempt. However, to permit him to keep monthly income, which by definition, is disposable income, which should be paid to creditors, is unfair.

The trustee has also objected to the debtors' plan because it does not propose to pay all other disposable income through the plan. The debtor was ordered by Journal Entry of May 4, 1993, to file amended schedules within thirty days. There is no record that the schedules have been amended, although an amended plan is on file which increases payments. The order of May 4, 1993, is still in effect. The debtors are ordered to file amended schedules showing their actual income and expenses and to do so by September 20, 1993. Failure to do so may result in a dismissal upon the request of the trustee.

The debtors are further ordered to make whatever arrangements are required with the retirement fund trustees so that Dan Cavanaugh will no longer be contributing to the retirement fund on a regular basis. If, as suggested by counsel in argument and in the affidavit submitted in support of the debtor's position, a change in the withholding can only take place in January of 1994, the plan should be amended to provide for such change and the contribution of the net amount after taxes for the benefit of the unsecured creditors. If, however, the termination of withholding from wages may occur prior to January of 1994, such action should be taken and the plan amended immediately to provide for immediate payment of the net disposable income.

Any plan amendments required by this order do not need to be served upon all parties in interest. They simply need to be filed and served upon the trustee who is granted fifteen days to object. If no objection is filed, a confirmation order may be submitted.

Separate journal entry to be filed.

DATED: September 3, 1993.

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
DAN & DARCY CAVANAUGH,	)	CASE NO. BK92-82208
	)	A
<u>DEBTOR(S)</u>	)	
	)	CH. 13
	)	Filing No. 4, 24
Plaintiff(s)	)	
vs.	)	<u>JOURNAL ENTRY</u>
	)	
	)	DATE: September 3, 1993
<u>Defendant(s)</u>	)	HEARING DATE: May 3,
	)	1993

Before a United States Bankruptcy Judge for the District of Nebraska regarding Chapter 13 Plan; Resistance by Trustee.

APPEARANCES

Kathleen Laughlin, Trustee  
Richard Register, Attorney for debtors

IT IS ORDERED:

Confirmation denied. Plan shall be amended by September 20, 1993, or case will be dismissed upon the request of trustee.

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge