

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
EVA MAE WALKER,) CASE NO. BK94-81092
)
DEBTOR) CH. 13

MEMORANDUM

Hearing was held on January 23, 1995, on Confirmation of Amended Plan. Appearing on behalf of debtor was Radley Clemens of Omaha, Nebraska. Appearing on behalf of Rosen Auto Leasing was Richard Rosenblatt of Omaha, Nebraska. Appearing on behalf of First Nebraska Credit Union was Donald Roberts of Lustgarten & Roberts, P.C., Omaha, Nebraska. Appearing as trustee was Kathleen Laughlin of Omaha, Nebraska. 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)(A) and (L).

Background

The debtor, Eva Mae Walker, filed a petition for relief under Chapter 13 of the Bankruptcy Code on July 12, 1994. On January 24, 1994, a hearing was held on two issues: (1) the confirmation of the Second Amended Chapter 13 Plan (the Plan), and (2) review of the Application for Compensation filed by the debtor's attorney, Radley Clemens.

Facts

(1) Confirmation of the Plan

The Chapter 13 Trustee (the trustee) and two creditors of the debtor, First Nebraska Credit Union (FNCU) and Rosen Auto Leasing, Inc. (Rosen), filed objections to the Plan. The Plan proposes to pay \$60.00 every two weeks for 24 months to Mr. Clemens as a priority administrative expense for attorney fees; to pay an administrative fee to the trustee, to pay \$406.40 directly to First Nebraska Credit Union in satisfaction of a deed of trust on the debtor's residence in the amount of \$48,481.51; to make payments on a second deed of trust directly to the Department of Housing and Urban Development (HUD); to treat the surrender of the debtor's vehicle, a 1987 Cadillac DeVille, to Rosen Auto Leasing as full

satisfaction of the original debt; and finally, to pay \$15.00 per month to unsecured creditors for three years.

(a) The trustee's objections

The trustee objected to the Plan on three grounds. First, the trustee objected to the debtor's failure to commit all of the debtor's disposable income to the Plan. The Plan proposes to pay \$15.00 per month for three (3) years to unsecured creditors, but is paying approximately \$120.00 per month directly to Mr. Clemens for attorney fees for only two (2) years. The trustee takes the position that after the payments Mr. Clemens are concluded, the debtor should commit the extra \$120.00 per month towards the unsecured creditors during the third year of the Plan.

The second objection by the trustee addresses the feasibility of the Plan. Originally, the debtor's income was not sufficient to cover expenses under the first amended Plan. Since the debtor's daughter and two grandchildren live with the debtor, the debtor included part of her daughter's income as disposable income which may be contributed towards the Plan. The trustee does not believe that the daughter is legally obligated to contribute to the Plan, but asserts that if she is allowed to contribute, then all of the daughter's disposable income should be required to be included, so that the total amount of disposable income contributed to the Plan is \$1,299.00 per month, instead of the \$145.00 currently being paid each month.

(b) FNCU's objection

The trustee's third objection ties into the objection raised by FNCU, which is that it is not clear what obligations exist between the debtor and FNCU. FNCU asserts that it has two deeds of trust against the debtor's home, but that the debtor has only proposed to pay one of the secured claims of FNCU.

Before this case was filed, Commercial Federal Savings and Loan (Commercial) held the first deed of trust on the debtor's home securing the amount of \$49,500.00, and FNCU held a second deed of trust securing the amount of \$9,327.30 and a third deed of trust securing a debt of \$11,692.94. [hereinafter each deed of trust shall be named by its original priority, i.e. first deed of trust, second deed of trust, and third deed of trust]. The debt secured by the second deed of trust was apparently guaranteed by HUD, and after the debtor defaulted on the underlying debt, FNCU was reimbursed in full by HUD for such debt. HUD did not file a claim and has not objected to the plan.

After the debtor defaulted on the third deed of trust, FNCU caused a Notice of Trustee's Sale to be published on June 8, 1994, and a sale was scheduled for July 20, 1994. The debtor filed bankruptcy prior to the sale on July 12, 1994, but FNCU did not receive notice from this Court of the bankruptcy until after the sale. Therefore, without notice of the bankruptcy case, FNCU bid the amount of the indebtedness secured by the third deed of trust, \$12,991.01, and received a deed to the property.

After July 20, 1994, FNCU contacted Commercial and requested a pay off letter so that FNCU could pay off Commercial, which would have enabled FNCU to transfer clear title. FNCU paid Commercial \$48,481.51 on August 8, 1994 and assumed the first deed of trust.

FNCU objected to the Plan because it proposes to only pay the debt secured by the first deed of trust, and the Plan does not provide for or acknowledge the interest of FNCU originally represented by the third deed of trust. In addition, FNCU objected because the Plan fails to cure outstanding delinquencies within a reasonable time.

(c) Rosen's objection

Rosen objected to the Plan because the Plan does not provide for Rosen's secured claim. On June 16, 1992, Rosen and the debtor entered into a written lease agreement for the lease of a 1987 Cadillac DeVille automobile. The lease was for three years, and the monthly lease payments were \$262.56. The debtor signed a note for \$9,466.56, which represented the total amount due under the lease agreement, and she granted Rosen a mortgage in her residence for the amount of the note.

Shortly after the debtor filed her petition for relief, she voluntarily returned the vehicle to Rosen. When the vehicle was returned, the debtor had already paid \$5,348.75 to Rosen under the lease agreement, leaving \$4,117.25 still due under the note and lease.

Rosen sold the vehicle at an auction for \$3,190.00. The lease was a net lease, so the debtor would have returned the vehicle at the end of the lease, but the vehicle was sold by Rosen approximately one year before the lease expired.

(d) The debtor's position

The debtor resisted the trustee's, FNCU's and Rosen's objections to the Plan. In response to the trustee's objection, the debtor submitted the affidavit of the debtor's daughter which states that she will contribute funds to the Plan of the debtor.

The debtor denies that FNCU holds a third deed of trust on the property, and takes the position that FNCU was paid off by HUD for all indebtedness, other than the first deed of trust. The debtor claims that the two deeds of trust submitted by FNCU, which represent the second deed of trust paid off by HUD and the third deed of trust still held by FNCU, are identical documents for the same loan.

The debtor also denies that Rosen has a mortgage in the debtor's property. The debtor alleges that an oral contract existed which caused the debt to be extinguished once the vehicle was returned.

The debtor has also asserted a defense to the claim of Rosen by alleging that the transaction falls within the provisions of the Federal Truth in Lending Act. See, e.g., 15 U.S.C. § 1635. This defense was raised after the hearing on the confirmation of the Plan, and therefore, Rosen has not had an opportunity to respond.

(2) Application for Attorney Fees

Mr. Clemens filed his first application for attorney fees on September 21, 1994. Mr. Clemens requested in that application that the Court allow \$698.00 in fees. In his attached time sheet, Mr. Clemens showed that he billed 9.45 hours in this case, and he credited \$247.00 for payments already received from the debtor.

The Chapter 13 trustee objected to this application because Mr. Clemens accepted post-petition payments from the debtor for reimbursement for attorney fees without Court approval and because Mr. Clemens only asked the Court to approve \$698.00, not the total \$945.00 that Mr. Clemens will actually receive. Finally, the trustee objected to the form of the application because it did not comply with the General Order applicable to Chapter 13 proceedings.

On November 18, 1994, Mr. Clemens filed an amended application and requested that he be reimbursed \$3,000.00 for work performed in this Chapter 13 case. Mr. Clemens also, without explanation, changed the total amount of post-petition payments made by the debtor to Mr. Clemens from \$247.00 to \$197.00. He wants the Court to allow the remaining \$2,803.00 and approve the repayment of this amount through the Plan at \$60.00 every two weeks.

Even though Mr. Clemens requested \$3,000.00 in fees for this case, he also admitted in his application that he has performed only 9.45 hours of work in this case thus far and has, therefore, only earned \$945.00 for work actually done. He did not attach a summary time sheet to the amended fee application, but the total

9.45 hours listed in the amended application as services performed to date appears to be unchanged from the total amount of fees requested in the first application, which included a summary time sheet.

FNCU objected to Mr. Clemens's amended fee application because the fees requested are excessive. FNCU alleges that the excessive fees for this case were caused by Mr. Clemens, himself, and not because the case is unduly complex or because a second amended Plan was filed as Mr. Clemens argues. The trustee objected to those fees requested in excess of \$945.00 because of insufficient information upon which to grant \$3,000.00 in fees to Mr. Clemens. She recommends that the Court allow the \$945.00 in fees as interim compensation and permit Mr. Clemens to apply for additional fees after such services are performed and detailed statements are provided to the Court.

Decision

(1) The Plan is denied confirmation. The debtor is permitted to file a third amended Plan within thirty (30) days. If the debtor decides not to take any action within thirty (30) days, the case will be dismissed. If objections to the third amended Plan are filed, the Clerk of Court is instructed to schedule the matter for trial for one day.

(2) Mr. Clemens is entitled to receive \$698.00 in attorney fees through the Plan. This amount represents the total amount of fees allowed minus the post-petition payments that Mr. Clemens has already received from the debtor. His request for \$3,000.00 in fees is denied without prejudice, and he may file an application for additional attorney fees once those fees are incurred and a detailed summary is provided to the Court in accordance with the Bankruptcy Code, Rules, and local General Order.

Discussion

(1) Confirmation of the Plan

(a) The trustee's objections

The first objection of the trustee, which is that the debtor is not committing all of her disposable income towards the Plan once she ceases paying Mr. Clemens, is sustained. The debtor must apply all of her disposable income towards the Plan, and therefore, once she completes paying Mr. Clemens, she shall continue making those payments to the trustee over the remainder of the life of the Plan to distribute to unsecured creditors in this case. Since it is likely that Mr. Clemens will incur more attorney fees than are

allowed today, the Plan should be amended to reflect that once the attorney fees approved by this Court are paid in full, the debtor will commit those funds to the Plan for distribution to unsecured creditors.

The trustee's next objection relates to the debtor's use of her daughter's income as disposable income under the Plan. This Court has routinely permitted debtors to use other household member's income as part of the disposable income of the debtor, e.g. non-debtor spouses often contribute to the debtor spouse's plan. Since contributions from non-debtor sources increases the amount of money available to creditors, such an arrangement benefits all parties. Therefore, the debtor is permitted to use her daughter's income under the Plan.

However, the debtor's daughter is not legally obligated to commit all of her disposable income to the Plan, and therefore, the daughter must be willing to demonstrate to this Court that she will commit sufficient funds to the Plan to make it feasible. If the trustee objects to the third amended Plan because she is not satisfied that the debtor's daughter will make such a commitment, the debtor's daughter will be required to testify at a trial that she will contribute to the Plan. Based on the debtor's income, it is unlikely that any Plan will be feasible and thus confirmable unless the daughter contributes at least some of her income.

(b) FNCU's objections

Before the Court specifically addresses FNCU's objections, the Court will clarify what FNCU's interest in the estate is since certain actions occurred after the petition for relief was filed. FNCU violated the automatic stay by holding a trustee's sale, bidding on the property, and receiving a trustee's deed to the debtor's property. Actions taken in violation of the automatic stay are void and without legal effect, regardless of whether the creditor had knowledge of the bankruptcy petition or not. 48th St. Steakhouse, Inc. v. Rockefeller Group, Inc. (In re 48th St. Steakhouse, Inc.), 835 F.2d 427, 431 (2d Cir. 1987), cert. denied, 485 U.S. 1035, 108 S. Ct. 1596, 99 L. Ed. 2d 910 (1988); In re Ward, 837 F.2d 124, 126 (3d Cir. 1988); In re Raymark Indus., Inc., 973 F.2d 1125, 1132 (3rd Cir. 1992); Schwartz v. United States (In re Schwartz), 954 F.2d 569, 571 (9th Cir. 1992); Interstate Commerce Comm'n v. Holmes Transp., Inc., 931 F.2d 984, 987-88 (1st Cir. 1991). Therefore, all actions taken by FNCU after July 12, 1994 with respect to enforcing the right of foreclosure under the third deed of trust are void.

The act of paying off Commercial for the first deed of trust is not void because such conduct does not constitute an act

"against" the debtor or an act to gain possession or control over the bankruptcy estate under Section 362(a). 11 U.S.C. § 362(a). Even though the identity of the creditor changed, the debtor-creditor status between the estate and the secured claim holder was not affected by this transaction.

Based on these two conclusions, the Court finds that FNCU holds two claims against the debtor's house and sustains, at least in part, FNCU's objections. The first deed of trust, which is the deed of trust formally held by Commercial, is for approximately \$48,500.00. The Plan sufficiently provides for current payments on this claim, but the debtor must amend the Plan to provide that she will cure any existing defaults within a reasonable time pursuant to 11 U.S.C. § 1322(b)(5). If the parties cannot agree on the amount of the default or on what constitutes a "reasonable time," FNCU may object to the third amended Plan, and the issue will be settled at a trial.

The Plan must be amended to provide for FNCU's other secured claim, which is the third deed of trust. Even though the trustee's sale is void, the underlying deed of trust is still valid, and the Plan must address this claim. The second deed of trust and the third deed of trust were executed on the same date. However, they are clearly not identical loan instruments as the debtor alleges. The two security documents secure different amounts, and the interest rates, maturity dates, and monthly payment amounts are different. The trust deeds are stamped with different page numbers from the county records book. It also appears that only the second deed of trust was guaranteed and paid off by HUD.

FNCU's secured claim represented by the third deed of trust is limited to the amount listed as secured in the trust deed instrument, \$1,161.46. The amount of the security interest is not the identical dollar amount as the original loan, even taking into consideration the possibility of a misplaced decimal point. The amount listed in the trust deed appears to match the amount of the loan which was applied towards "AH INS." Therefore, according to the written trust deed instrument, the only portion of this claim which was secured was \$1,161.46. FNCU's secured claim on the third deed of trust will be allowed in the amount of \$1,161.46, and the remainder will be an unsecured claim. The debtor shall amend the Plan and provide for the secured portion of FNCU's claim accordingly.

Since it is more appropriate to determine the extent or validity of a lien in an adversary proceeding, if either party disputes the amount of the FNCU allowed secured claim represented by the third deed of trust, an adversary proceeding must be filed. See FED. BANKR. R. 7001(2).

(c) Rosen's objection

Rosen's objection that the debtor has not properly dealt with its security interest in the property is sustained. The documents submitted show that Rosen has a properly perfected mortgage in the debtor's residence, and the surrender of the vehicle does not extinguish the mortgage in the residence. The debtor must amend the Plan to provide for Rosen's secured claim.

The Court notes, however, that Rosen's computation of the amount of the remaining debt appears to not accurately reflect the payments and resale benefit that Rosen received. The mortgage was originally \$9,466.96 and has been reduced by the amount of \$5,348.75 to \$4,117.25, which reflects the amount of lease payments that the debtor made. However, Rosen also sold the vehicle one year before it would have been entitled to sell the vehicle if the lease had been fully performed. This resulted in some benefit to Rosen. The third amended Plan may discount Rosen's claim for this benefit. If Rosen objects to the amount the debtor believes that Rosen received as a benefit, the parties may submit evidence of the differences in benefit to Rosen if the sale had been after the termination of the lease according to its terms, rather than in 1994. That evidence may be submitted at trial.

In materials submitted after the hearing, the debtor raised an argument that Rosen's actions with respect to the lease violated the Federal Truth in Lending Act. 11 U.S.C. § 1601, et. al. The debtor may bring this action in the form of an adversary proceeding if the debtor wants to challenge the validity of Rosen's lien or claim. The third amended Plan may provide that the treatment of Rosen's claim will be subject to the outcome of that adversary proceeding.

(2) Application for Attorney Fees

Mr. Clemens's fees are allowed at this time in the amount of \$945.00, which represents the amount of time that Mr. Clemens has actually worked on this case. Even though the entire \$945.00 is allowed, Mr. Clemens is only entitled to receive \$698.00 through the Plan because the debtor has already paid at least \$247.00 to Mr. Clemens through unauthorized post-petition payments. Therefore, the amendments to the Plan should provide that Mr. Clemens shall receive reimbursement only for those attorney fees which are allowed and authorized by the Court, minus any payments already made by the debtor.

Mr. Clemens may apply for additional fees after services are rendered to the debtor. The Court will not consider a \$3,000.00 fee for a Chapter 13 case, unless counsel submits a detailed

statement showing why this amount was incurred and how the service benefitted the estate or the debtor. Thus far, Mr. Clemens has not done any work in this case which would require a \$3,000.00 fee or provided any justification for such a fee. However, Mr. Clemens is not prejudiced from filing an application for compensation later in this case.

Mr. Clemens is further ordered to stop accepting post-petition payments from the debtor until such time as his fees are approved by this Court and the method of payment is established. An attorney for a Chapter 13 debtor should be aware that post-petition fees cannot be paid or received without court approval and that such fees should be paid through the trustee. If Mr. Clemens continues to receive post-petition payments for fees incurred after the date of this Order, but not allowed by this Court, Mr. Clemens will be sanctioned. However, to the extent the debtor has continued to make payments to Mr. Clemens, while the application for fees was pending, Mr. Clemens will not be sanctioned if he fully discloses such payments.

Summary

Confirmation of the Plan is denied.

Total attorney fees of \$945.00, including prior payments, are allowed.

The debtor is granted thirty (30) days to amend the Plan and to substantially conform to the above findings or this case shall be dismissed. To summarize, any amended plan must, at a minimum:

1. Provide that all disposable income is committed to the Plan for the entire length of the Plan.
2. Provide assurances to the trustee that the debtor's daughter will commit her income to towards the debtor's Plan.
3. Provide for the secured claim of FNCU in the amount of \$1,161.46 and the remainder of FNCU's claim as an unsecured claim.
4. Provide for the secured claim of Rosen for the amount of the note, minus the lease payments made by the debtor, minus the benefit received by selling the vehicle one year early.
5. Provide for the curing of any defaults on payments made on secured claims due to FNCU or Rosen within a reasonable time.

6. Provide that counsel for the debtor shall only receive those attorney fees which are approved by this Court, minus any payments already made by the debtor.

7. Otherwise comply with the contents of this Order.

Separate journal entry to be entered.

DATED: March 22, 1995

BY THE COURT:

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

Copies faxed by the Court to:

ROBERTS, DONALD	346-8566
ROSENBLATT, RICHARD	331-6435

Copies mailed by the Court to:

Radley Clemens, 7404 N. 91 Plaza, Omaha, NE 68134
Kathleen Laughlin, Trustee
United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
EVA MAE WALKER,)	CASE NO. BK94-81092
)	A
<u>DEBTOR(S)</u>)	
)	CH. 13
)	Filing No.
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	
)	DATE: March 22, 1995
<u>Defendant(s)</u>)	HEARING DATE: January
)	23, 1995

Before a United States Bankruptcy Judge for the District of Nebraska regarding Confirmation of Amended Plan.

APPEARANCES

Radley Clemens, Attorney for debtor
Richard Rosenblatt, Attorney for Rosen Auto Leasing
Donald Roberts, Attorney for First Nebraska Credit Union
Kathleen Laughlin, Chapter 13 Trustee

IT IS ORDERED:

The plan is denied confirmation. Attorney fees of \$945.00 allowed. See memorandum this date.

BY THE COURT:

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

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ROSENBLATT, RICHARD 331-6435

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