

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)	BK98-40929
)	A99-4067
WILLIAM MARK OLSEN,)	
)	
Debtor.)	CHAPTER 13
_____)	
)	FILING NO. 1
JONI SUE OLSEN,)	
)	
Plaintiff,)	
)	
vs.)	
)	
WILLIAM MARK OLSEN,)	
)	
Defendant.)	

MEMORANDUM

Trial was held on April 24, 2003, in North Platte, Nebraska. Robert M. Brenner appeared for the plaintiff, James R. Nisley appeared for the defendant, and Susan Williams appeared for Grace Olsen and WilliamMark Olsen. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A).

ISSUE

The matter before the court concerns whether or not the debtor, Mark Olsen, has the ability to pay an amount ordered by the divorce court to be paid to his former spouse Joni. The issue comes under 11 U.S.C. § 523(a)(15)(A).

DISCUSSION

The debtor farmed for a number of years while married to the plaintiff. He owned some land which he purchased from his father by the assumption of debt, but in 1986 or in 1992 he and his wife borrowed money from his mother, Grace Olsen, and quitclaimed to her the real estate that he owned. He continued to farm that real estate on an oral lease arrangement. In addition, he inherited a one-third remainder interest in certain real property from his grandmother. The remainder was subject to the life estate of his father.

During the late '80s and early '90s, he and his father got into a number of legal disputes and filed

lawsuits against one another. At least one of the lawsuits ended with a judgment against Mark Olsen in favor of his father for \$35,000. At or about the time the judgment was entered, he and his wife made the conveyance to his mother referred to above. His father eventually died, and Mark inherited his full one-third interest in a parcel of real estate inherited from his grandmother. He farmed that real estate in addition to the real estate then owned by his mother.

In 1994, allegedly in consideration for money that he owed his mother, he executed a bill of sale to personal property which, although not specifically identifying the personal property, purported to include all vehicles and equipment used in the farming operation. He had farmed both under his own name and in a corporate capacity, W.M. Olsen Farms, Inc. The bill of sale included the corporation as a seller.

That purported sale was not reflected on income tax returns of Mark and Joni Olsen with regard to a necessary reduction in farming assets, changes in depreciation schedules, or indications of lease arrangements. He and his mother testified that once the equipment was transferred, he leased it back. There is no evidence in the record concerning the annual lease fee, either for the real estate purportedly leased by him from his mother or for the equipment which was the subject of the bill of sale.

From the 1980s on, Mark granted his mother a power of attorney to deal with the federal government farm program agencies. She used that power of attorney to sign up farms she owned, land she owned, land Mark owned, and land owned or operated by Mark's corporation and her corporation in the various federal government farm programs. One of those programs is a conservation reserve program (CRP). Several long-term contracts in the CRP program were executed on behalf of Mark and his corporation, either as owner or operator of certain lands. Those contracts provided annual financial payments from the federal government.

In 1995, Joni filed for divorce. The divorce proceeding was hotly contested. A trial was held in late February of 1996, and a decree of dissolution which dealt with child custody, child support, and property division was entered by the district court in the summer of 1996. In the meantime, after the trial but before the decree was entered, Mark executed a mortgage in favor of his mother on the real estate that he had inherited from his grandmother. The mortgage was for \$92,000. There is a note representing the obligation recited in the mortgage document. The mortgage itself recites that Mark is a single person although he was actually a married person at the time the mortgage was executed and recorded. The testimony of Mark and his mother is that the mortgage was given in consideration for monies that she had loaned him to continue his farm operations. There is no evidence in the record showing how much money he had obtained from her in the form of loans from and after the delivery of the bill of sale in 1994 which, according to the testimony, represented full consideration for the amounts owed as of that date.

During the divorce case, the debtor presented documents to the divorce court which were relied upon by the divorce court when determining the property division issues. Those documents showed his unencumbered ownership of the real property inherited from his grandmother, and showed him as the owner of all of the personal property assets, including equipment and vehicles, which allegedly were the

subject matter of the bill of sale delivered to his mother in 1994. In other words, although he and his mother now testify that the 1994 bill of sale transferred his ownership interest in all of the farming vehicles and equipment to his mother, he represented to the divorce court that he owned the property free and clear of any claims of his mother or anyone else. He also represented to the divorce court that he owned the real estate free and clear of any liens.

The judgment in the divorce case was appealed to the Nebraska Court of Appeals, which affirmed. Both the trial court and the Nebraska Court of Appeals ordered the debtor to pay specific amounts and attorney fees. Those amounts have not been paid, but are only peripheral to the subject matter of this lawsuit because attorney fees awarded as part of a dissolution decree which authorizes payment of support and property division are generally deemed to be support and therefore non-dischargeable under 11 U.S.C. § 523(a)(5).

After the divorce, Mark continued to farm, but had substance abuse problems and ran into difficulties with the law. He was convicted of at least one felony and was imprisoned on one or more occasions. Those problems began in 1997 and continued through calendar year 1998.

During 1998, because Mark had not paid anything on the property division judgment, Joni began execution proceedings against his assets. The sheriff of Banner County executed on two tractors located on Mark's land. The sheriff testified that Mark told him that he, Mark, owned the tractors, but that his mother also had an ownership interest. The sheriff took possession of the tractors and still has possession of the tractors. Joni then provided documents to the sheriff for execution upon a third tractor that was apparently more valuable than the first two seized, and upon receiving notice that the sheriff would be seizing the tractor, Mark filed a Chapter 13 bankruptcy case. That case was filed in May of 1998 and eventually converted to Chapter 7 in 1999.

During the pendency of the Chapter 13 case, Grace Olsen, exercising her rights under the power of attorney granted to her by Mark, changed all of the CRP contracts. She claims that she did so because Mark's corporation was in fact not eligible to receive the CRP payments and she wanted to make sure that the CRP payments were received by the family unit, that being her or him. Thereafter, contracts which provided more than \$15,000 a year to Mark or his corporation actually benefitted Grace and/or her corporation, rather than Mark or his corporation. The records concerning the contracts show that the monies from the contracts were paid to the benefit of Mark, instead of to Mark's farming corporation. Grace controlled Mark's checking account. She deposited the checks into the checking account and then transferred those amounts to her own account. She testifies that she did so because Mark owed her a lot of money and she was actually operating the farms and maintaining the CRP land and so she should naturally receive the funds.

On Mark's bankruptcy schedules, he indicated that he had sole ownership of the stock of his farming corporation, but placed no value upon it. At the time the bankruptcy petition was filed, the farming corporation was a party to the CRP contract and both he and the farming corporation had rights to long-

term payments in the amount of more than \$15,000 per year. The CRP contracts were not mentioned and no value for them was included in the valuation of his corporate stock. There is nothing in the bankruptcy file that indicates that Grace obtained permission of the bankruptcy court or notified the bankruptcy court or the Chapter 13 trustee that the assets of the corporation or of Mark were being diverted for her benefit.

The bankruptcy case was converted to Chapter 7 in 1999. The schedules were not amended to reflect the status of the CRP payments, and the trustee apparently abandoned any interest in the corporation. Grace Olsen, individually or through her solely owned corporation, received the benefits of the CRP payments from 1998 through at least 2002, although those payments represented value to the bankruptcy estate by virtue of the fact that they were either assets of the debtor individually or assets of his solely owned corporation which he had valued at zero on the schedules. Grace testified that she had a right to those payments as a return on her loans. However, Mark's obligation on any loans she had made to him prior to the bankruptcy petition are subject to the discharge in bankruptcy and she had no statutory authority to exercise self-help to collect on her debts to the detriment of the judgment creditor, Joni Olsen.

Neither the debtor nor Grace Olsen has ever provided an accounting of the amounts allegedly due to Grace Olsen from Mark Olsen, whether subject to the "sale" of the farm vehicles and equipment or subject to the mortgage executed in 1996. There are no promissory notes, no written leases and no testimony concerning the annual rental rates of any real estate or personal property. There is no accounting for the total amount that Grace received from the CRP payments which were contractually the property of either Mark or his corporation.

Mark did not file personal or corporate tax returns for the years 1998 through 2002 until March of 2003. On the corporate returns, at least one return shows assets valued at more than \$200,000. Returns for the following years show the assets at less than \$10,000, with no explanation of the difference.

The bankruptcy petition and the tax returns indicate an ownership interest in shares of stock in the American National Bank of Kimball and in Banner County State Bank. The schedules list the value of the shares at approximately \$100 apiece, which may be the par value. However, during the case, the debtor sold the American National Bank shares for more than \$1,900 apiece for a total of approximately \$10,000. Those proceeds were applied to his child support delinquency, but the schedules were never amended to reflect the actual value of the shares. The trustee apparently abandoned any interest in the shares of either bank. The debtor still holds the shares of the Banner County State Bank, but presented no evidence of their value.

The debtor appears to be an able-bodied person in his forties. He has a diesel mechanic certificate and works 20 to 40 hours a week as an automobile mechanic for a local repair shop. He earns approximately \$12 per hour. He shares his home with a friend and her children and they share living expenses. From his current net income, it is clear that he would be unable to pay the judgment obligation from the dissolution of marriage decree, which now exceeds \$75,000.

In January of 2003, the debtor conveyed to his mother, by a document entitled “Deed in Lieu of Foreclosure,” all of his interest in the real estate which he inherited from his grandmother and which was the subject of the 1996 mortgage he had granted to his mother. That conveyance occurred even though there was no mortgage foreclosure case pending and Joni Olsen, a judgment creditor, whose interest may or may not have been subject to the mortgage interest held by Grace Olsen, received no notice of the conveyance until after its recording.

The testimony from Grace and Mark was that the deed was conveyed in consideration for all the money that Grace had made available to him over the years and to save litigation expenses in a mortgage foreclosure action. There is no evidence of the amount of the debt, if any, represented by the mortgage held by Grace. There is no evidence of the value of the land which was transferred from Mark to Grace “in lieu of foreclosure.” The result of the conveyance is that judgment creditor Joni Olsen was precluded from participating in a mortgage foreclosure action in representing her own interest. She was precluded from having a court make a determination of the value of the real estate and the amount of the debt, if any, owed to Grace which was the subject of the mortgage. She was precluded from challenging the validity of the mortgage or the amount of the debt secured by the mortgage. She was precluded from bidding at a mortgage foreclosure sale to protect her interest.

In a case such as this under 11 U.S.C. § 523(a)(15)(A), it is the burden of the debtor to prove that he does not have the ability to pay such debt from income or property not reasonably necessary for the payments of expenditures for the continuation, preservation, and operation of his business. Fellner v. Fellner (In re Fellner), 256 B.R. 898, 902-03 (B.A.P. 8th Cir. 2001) (citing Rush v. Rush (In re Rush), 237 B.R. 473 (B.A.P. 8th Cir. 1999)).

To establish his inability to pay, the debtor must show that excepting the debt from discharge would reduce his income to less than the amount necessary for the support of the debtor and his dependents. Whitlach v. Allgor (In re Allgor), 276 B.R. 221, 224 (Bankr. N.D. Iowa 2002). To make such a determination, the court looks at the debtor’s current and future financial status, including potential earnings, and whether his expenses are reasonably necessary. Id.

Mark has failed to meet the burden. He had property, including the real estate inherited from his grandmother, farm equipment and machinery and vehicles, CRP contracts, and stock in two different banks. He has, through dealings with his mother, attempted to eliminate his interest in most, if not all, of that property. He has failed to show that he actually owed his mother anything. He has failed to show that there was any legitimate consideration either for the mortgage executed in 1996 or for the deed executed in 2003. He has failed to show any legitimate basis for transferring the CRP contracts and payment proceeds from his corporation and/or from himself, to his mother or to her corporation. Such transfer permitted Grace to receive payment on alleged debts that are prepetition, in derogation of the rights of all other creditors, including the plaintiff Joni Olsen.

The state court dissolution action, both at the trial level and at the appellate level, dealt with Mark’s

assets as he claimed them to be at the time. During that litigation, he did not suggest to the court that he had transferred his personal property or his farming corporation's personal property to his mother or to anybody else. The state court prohibited him from transferring assets to his mother during the pendency of the dissolution action. Nonetheless, he granted a mortgage on his real estate encumbering it to the extent of approximately \$100,000 during the pendency of the case. He did so by the use of a document that asserts that he was a single person, when he knew for a fact that he was involved in a dissolution of marriage action that had not been completed as of that date. His mother also knew of his dissolution action and its status as of the date of the mortgage.

CONCLUSION

The fact is, based upon all of the evidence presented, and the lack of evidence presented in support of Mark's position, that he is either the actual or constructive owner of sufficient assets to enable him to pay some or all of the judgment entered in 1996 in favor of his former spouse, Joni Olsen. Therefore, the obligation represented by such judgment is deemed non-dischargeable.

Separate judgment shall be entered.

DATED this 24th day of July, 2003.

BY THE COURT:

/s/Timothy J. Mahoney

Chief Judge

Notice given by the court to:

*Robert M. Brenner
James R. Nisley
Susan Williams
U.S. Trustee

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

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JUDGMENT

IT IS ORDERED that judgment is hereby entered in favor of the plaintiff and against the defendant. The judgment entered in 1996 in favor of Joni Sue Olsen is hereby deemed non-dischargeable under 11 U.S.C. § 523(a)(15). See Memorandum entered this date.

DATED this 24th day of July, 2003.

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

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