

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
PAUL REULAND,) CASE NO. BK94-80235
)
)
DEBTOR) CH. 7

MEMORANDUM

Hearing was held on November 15, 1994. Appearing on behalf of debtor was William Peters of Gering, Nebraska. Appearing on behalf of Mary Reuland was G. Kirk Meade of Nichols, Douglas, Kelly, and Meade of Scottsbluff, 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)(B).

Background

Trial was held on November 15, 1994, to determine the extent and validity of an exemption in a Burlington Northern Railroad thrift and profit sharing plan.

The debtor and the objecting party, Mary Reuland, his former spouse, were divorced by a dissolution of marriage decree that was entered in November, 1993. The divorce court divided the property between the parties, provided for periodic alimony for a period of sixty months to be paid by the debtor to Mary Reuland, provided for the debtor to pay certain child support to Mary Reuland, awarded custody of two minor children to Mary Reuland, and granted a money judgment in favor of Mary Reuland in the amount of \$20,000.00, to equalize the property division. By a separate order and journal entry in adversary A94-8054, this Court has determined that the \$20,000.00 money judgment is not "in the nature of support" and is, therefore, dischargeable in this Chapter 7 case.

The debtor filed a Chapter 7 bankruptcy in February of 1994. He asserted that the value of his interest in the Burlington Northern profit sharing plan (hereafter 401K plan) was approximately \$62,000.00. At trial, however, it appears from the evidence that the value as of the petition date was closer to \$77,000.00. The debtor listed the 401K plan in his bankruptcy schedules as an asset of the estate. The debtor has claimed all of the funds in the 401K plan as exempt.

Shortly after the petition, the debtor borrowed from the 401K plan the amount of \$20,000.00. He used the \$20,000.00 to pay off a pre-existing 401K plan note in the amount of \$6,600.00,

to pay a prepetition debt to his attorney in the amount of \$3,000.00 and to pay approximately \$5,000.00 to the Chapter 7 trustee, an amount which represented his equity in his homestead, over and above the homestead exemption, and the non-exempt value of his vehicle and the non-exempt cash on hand at petition date. The balance of the loan was either spent on living expenses or still remains in a savings or checking account held by the debtor.

He testified that from 1983 through early 1993 he contributed approximately 8% of his gross salary, on an annual basis, to the plan. The Burlington Northern Railroad, his employer, contributed a matching amount up to 6% of his gross annual income.

On the date the bankruptcy petition was filed, the debtor has a prepetition loan obligation to the 401K plan of approximately \$7,000.00. That obligation was not shown as a debt on his bankruptcy schedules. The schedules did show a first mortgage obligation of approximately \$85,000.00, a debt to Sears in the amount of \$1,345.00, an amount owed as a deficiency on a vehicle which was returned to the seller, in the amount of \$7,000.00, minor debts of approximately \$800.00, a credit card in the amount of \$4,500.00 and a debt to Mary J. Reuland for \$20,000.00 plus prepetition attorney fees of \$2,719.00. Post petition, he reaffirmed the Sears debt, the Penneys debt and paid off the attorney fee obligation and the 401K plan debt. Those payments were made, as mentioned above, from a 401K plan post-petition loan. Therefore, his actual dischargeable obligations are approximately \$32,000.00, \$20,000.00 of which is a money judgment owed to his former spouse pursuant to the dissolution of marriage decree.

Applicable Law

Nebraska Revised Statute Section 25-1563.01 provides in pertinent part:

[T]he following benefits shall be exempt from attachment, garnishment, or other legal or equitable process. . . : To the extent reasonably necessary for the support of the debtor and any dependent of the debtor, an interest held under a stock bonus, pension, profit sharing, or similar plan or contract payable on account of illness, disability, death, age, or length of service unless:

(1) within two years prior to bankruptcy. . . such plan was established or was amended. . . by or under the auspices of the individual or of an insider. . . .

NEB. REV. STAT. § 25-1563.01 (Reissue 1988).

The parties have stipulated that the Burlington-Northern Thrift and Profit Sharing Plan is an Internal Revenue Service Code Section 401K Tax Exempt Plan, and that this plan falls within the provisions of the exemption allowed under Section 25-1563.01 of the Nebraska Revised Statutes, as a stock bonus, pension, profit sharing, or similar plan or contract payable on account of illness, disability, death, age, or length of service.

The plan itself was established in 1982 and was not established or amended by or under the auspices of the debtor.

In determining whether property within the scope of Section 25-1563.01 is actually exempt, the Court must determine if the property "is reasonably necessary for the support of the debtor and any dependent of the debtor." The Court will consider:

1. the debtor's present and anticipated living expenses;
2. the debtor's present and anticipated income from all sources;
3. the age of the debtor and dependent;
4. the health of the debtor and dependent;
5. debtor's ability to work and earn a living;
6. debtor's job skills, training and education;
7. debtor's other assets, including exempt assets;
8. liquidity of other assets;
9. debtor's ability to save for retirement;
10. special needs of the debtor and dependents;
11. debtor's financial obligations, e.g., alimony or support payment.

See Matter of Weaver, 98 B.R. 497, 500 (Bankr. D. Neb. 1990) and citations contained therein.

Mary Reuland, the former spouse, as a creditor, has filed an objection to the claim of exemption with regard to the 401K plan. It is her position that the funds in the plan are not exempt, at least to the amount of her claim. The case was presented to the Court and will be decided upon the limited issue of whether or not that vested portion of the 401K plan which is the equivalent of the obligation owed to Mary Reuland pursuant to the

dissolution of marriage decree, approximately \$20,000.00 less is reasonably necessary for the support of the debtor and any dependent of the debtor.

Facts

The debtor, on the petition date, was forty-six years of age and on the trial date is forty-seven years of age. His only dependent child is seventeen and one-half years of age and he is obligated to make child support payments in the amount of \$436.00 per month until that child reaches age nineteen, in the summer of 1996. The debtor testified that his health is good, and he has no health problems. He further testified that the health of his dependent child is good and she has no health problems.

The debtor's present net monthly income, after deduction of regular railroad retirement payments and state and federal tax deductions, but without deduction for any contribution to the 401K plan, is approximately \$2,300.00 per month. His current living expenses are approximately equal to the net income. Those living expenses include a payment of \$400.00 per month alimony which will continue for forty-eight more months and a payment of \$436.00 child support which will continue for approximately nineteen months. The expenses also include a life insurance premium on his life of more than \$100.00 per month. No evidence was submitted concerning the present cash value of the life insurance or the identity of the beneficiary.

The debtor has, during the last several years, received annual wage increases of approximately 3% per year. He has been employed by the railroad for approximately twenty-seven years. He has a Bachelor's Degree in Business Administration. He has a "car man's card," which represents a certificate of skill for unionized railroad workers which would permit him, if jobs were available, to work for any United States railroad in the skilled position of car repair or car inspector. He currently, and for the last fourteen years, has been in the management level of the railroad supervising car repair and inspection employees.

He has served seventeen years in active and reserve military duty and has reached the rank of major in the United States Army Reserve. Because of a lack of positions in the Reserve, he has been unable to complete his twenty years of service which is required before he is eligible for a military pension. He has attempted to find a position in the Reserve and/or Army National Guard, but has been unsuccessful.

The debtor, in addition to the 401K plan, had, on the petition date, a ten-year old vehicle and a house with a value, in 1993, of \$99,000.00 subject to a mortgage of less than \$85,000.00.

Debtor testified that his normal retirement date would be at age sixty-five. He did not anticipate any factual circumstance which would enable him to retire prior to age sixty-five, and he intended to stay employed by the railroad until normal retirement date. This means that he will have eighteen years of earnings at more than \$46,000.00 per year. During that time, he will be required, as he has in the past, to contribute to Federal Railroad Retirement, the equivalent of Social Security. He will also have the ability, once his alimony and child support payments are completed, to contribute further to the 401K plan. During that eighteen-year period, he will have the right to borrow from the 401K plan up to 50% of the net balance remaining in the plan. Such loan provisions require repayment on a monthly basis over a five-year period at a specified rate of interest. This ability to borrow from the 401K plan makes the plan significantly liquid and usable for his benefit prior to retirement.

The debtor testified that neither he nor his dependent has any special needs for which the 401K plan may be necessary.

During the past several years, two older children of the Reulands have entered college. The debtor has not paid any of the college related expenses of the two children, except that he is providing a place to live without charging rent to one of the children while that child attends a local community college.

From the date of the dissolution decree in November, 1993, to the date of the bankruptcy petition and thereafter, the debtor made no attempt to make any payment to Mary Reuland on the money judgment. Instead, he has used the liquidity of the 401K plan to pay other prepetition obligations, including his prepetition attorney fees.

The debtor failed to schedule a debt owed to his son in the amount of \$1,500.00. At trial, he testified that although he was informed by his attorney that he should list all debts, he decided that since the debt was to his son and since he intended to pay the debt, he would intentionally omit that debt from the schedules.

During this proceeding, the debtor has been requested, by formal request for production of documents submitted to his attorney and apparently served upon him, to provide to counsel for Mary Reuland copies of checks, savings account statements, checking account statements, 401K plan statement, and other documentation which would show his financial condition, his income and his expenditures during the past three years. Except for a limited amount of documentation provided prior to trial, he has failed to comply with the request for production of documents. In the last few days prior to trial, he did deliver to his attorney a few pages of documents. Some of those

documents were turned over to counsel for Mary Reuland on the day before trial and some were not delivered until the day of trial. The debtor testified under oath that he was not aware, until the last few days, that he was required to obtain and provide copies of documents to counsel for Mary Reuland.

Based upon the above findings concerning those matters that the Court must consider when determining whether an asset is exempt, the Court finds as a fact that the 401K plan is not exempt, to the extent necessary to pay the obligation to Mary Reuland in full. The debtor certainly does not need the total amount in his 401K plan at this time to support him or a dependent during retirement. There is no evidence that he will spend one dime to support his children, once they become an adult, and he no longer has the legal obligation to pay child support. All of the evidence points to the fact that the debtor is an able-bodied educated skilled male with a well-paying job and a secure future. He has the ability to earn significant amounts of money for the next eighteen years prior to normal retirement age and to contribute to his own retirement, with significant contribution being received on behalf of his retirement fund from his employer.

He has misused the bankruptcy process by failing to schedule all of his debts, favoring some creditors over others, both before and after bankruptcy, using his ability to borrow money from his so-called exempt 401K plan to pay obligations to some prepetition creditors while absolutely refusing to use the same funds to pay Mary Reuland.

Decision

The objection by Mary Reuland to the exemption in the 401K plan is sustained to the extent of the obligation owed the objector.

Collection Procedure

The Court is aware that there is the possibility under the Internal Revenue Code that if an ERISA qualified plan such as this 401K plan is determined not to be exempt and is required to be turned over to a trustee or other creditor of a participant in the plan, dire financial and tax results can occur with regard to the plan and/or the participants in the plan. Therefore, although this Court has found that a portion of the plan is not exempt as to the interest of Mary Reuland, the Court will not permit a garnishment or execution against the plan assets, unless all other attempts by Mary Reuland to obtain payment are fruitless. From the evidence, the Court finds that the debtor has the right to take out a second 401K plan loan and borrow approximately \$17,000.00 from the plan as of April 1, 1995. However, the debtor may have an inability to pay the monthly

installment payments required to amortize such a loan until his obligation to pay child support has terminated.

Therefore, although this Court would have denied a discharge to this debtor for intentionally omitting a debt from the bankruptcy schedules, had a complaint been timely filed, the Court will grant the discharge to the debtor for all dischargeable debts, but retain jurisdiction over the debtor until ninety days after the child support obligation terminates, approximately October 1, 1996. This case will remain open during that time period or until debtor pays the claim of Mary Reuland in full if such payment occurs prior to such date. Once the debtor completes his child support obligation, he is ordered to obtain funds, from whatever source he desires, to pay the balance of the money judgment due Mary Reuland with accrued interest.

A separate judgment for the net amount payable shall be entered and effective December 1, 1994. Counsel for the trustee, the debtor and the objector shall agree upon the net amount due after application of all payments from the estate and inform the Court prior to December 1, 1994. The judgment entry will be the final order denying the exemption as to the claim of Mary Reuland and specifying the amount due and the last date for paying such amount, with interest, to avoid garnishment of the plan balance.

DATED: November 17, 1994

BY THE COURT:

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

Copies faxed by the Court to:

PETERS, WILLIAM	8-308-436-4690
MEADE, KIRK	8-308-635-1387

Copies mailed by the Court to:

Ron Sanchez, P.O. Box 1005, North Platte, NE 69103-1005
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.