

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
TERREL BECKWITH,) CASE NO. BK00-81205
)
DEBTOR.) CH. 13

MEMORANDUM

Hearing was held on First Amended Plan, Resistance by Trustee & Resistance by First Union Securities, Inc. Appearances: Patrick Griffin as Attorney for debtor, John Jay Jolley as Attorney for First Union Securities, Inc. and Kathleen Laughlin as Chapter 13 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)(A) and (L).

Introduction

This matter is before the court on First Union Securities, Inc.'s, f/k/a Everen Securities Inc., ("First Union") objection to confirmation of the debtor's Chapter 13 plan. First Union objects to confirmation alleging, 1.) that the debtor is ineligible for Chapter 13 relief based on 11 U.S.C. § 109(e), 2.) that the plan has not been filed in good faith, 3.) that the plan proposes to distribute property which is valued at less than First Union's claim, and 4.) that the plan fails to dedicate all of the debtor's disposable income to the reorganization plan.

In opposition, the debtor argues that the Chapter 13 debt limit is not exceeded because the claims of First Union are contingent and, therefore, cannot be included when calculating the total of the claims.

Decision

Because the debtor exceeds the debt limits found in Section 109(e), the remaining issues will not be ruled upon. The case is dismissed.

Facts

The debtor was previously employed by First Union at a branch of the company located in Omaha, Nebraska. The

business of the debtor is investment consulting. During his employment at First Union, the debtor signed a promissory note, dated January 9, 1998, with First Union in the amount of \$193,407.96. According to the terms of the note, the debt would become due and payable when, *inter alia*, the debtor's employment was terminated. Additionally, First Union alleges that, on November 30, 1998, the debtor entered into a series of unauthorized trades and was paid unearned commission for these unauthorized trades in the amount of \$10,373.15. The debtor failed to repay the unearned commission. The employment relationship was severed on December 11, 1998.

Subsequently, on January 12, 1999, First Union demanded repayment from the debtor on both the promissory note, with accrued interest, and the unearned commission total. The debtor failed to repay the amount and First Union filed a claim in arbitration with NASD Regulation, Inc., on February 23, 1999. On July 15, 1999, while the arbitration claim was still pending, the debtor requested and received a distribution from the Senior Investment Consultant's Deferred Compensation Plan ("Plan") funded by First Union. The amount of the distribution received by the debtor was \$32,721.53. First Union alleges that the debtor was not entitled to \$21,631.96 of the amount withdrawn because the debtor's interest in the Plan was not yet fully vested.

The debtor filed for relief under Chapter 13 of the United States Bankruptcy Code in May of 2000. The arbitration proceedings, which were pending at the time of the bankruptcy proceeding, were stayed by the bankruptcy filing. The debtor has filed schedules and amended schedules listing his unsecured debt as \$318,487.94 or \$325,692.88 or \$225,692.88. His schedules show differing amounts owed to First Union and list the largest obligation to First Union as either \$270,000.00 or \$170,000.00, contingent and disputed.

First Union has submitted several claims. First, it has filed a claim listing a debt of \$21,631.96 for unauthorized withdrawal of a deferred compensation plan; second, \$229,222.03 for a loan evidenced by a promissory note; lastly, \$10,373.75 for unearned commissions. It appears then that the debtor owes to First Union alone, \$261,227.41. Proofs of claim filed by other parties show \$22,685.37 in additional unsecured debt. The debtor owes a total of \$283,912.78 in unsecured debt.

Law

The Bankruptcy Code at 11 U.S.C. § 109(e) states that "an individual with regular income that owes, on the date of filing of the petition, **noncontingent, liquidated**, unsecured debts of less than \$ 269,250.00. . . may be a debtor under Chapter 13 of this title." (emphasis added) However, the Bankruptcy Code does not define the word "noncontingent." In the present case, the debtor has listed the debt owed to First Union as "disputed" and "contingent."

A debt is not "contingent" if all events giving rise to liability occurred pre-petition. In re Barcal, 213 B.R. at 1013. An example of this type of debt is a contract which is entered into prepetition. Craig Corp. v. Albano (In re Albano), 55 B.R. 363, 366-67 (Bankr. N.D. Ill. 1985). In terms of a prepetition contract, the liability is noncontingent once the contract is made. In re Albano, 55 B.R. at 367. However, this liability is subject to being avoided by some later occurrence such as performance under the contract. Id. A disputed noncontingent, liquidated debt must be included when determining a debtor's eligibility for Chapter 13 relief. Barcal v. Laughlin (In re Barcal), 213 B.R. 1008, 1012 (8th Cir. BAP 1997).

In the present case, the debt owed to First Union is disputed but noncontingent. All events giving rise to the debtor's liability occurred over a year before the debtor filed for bankruptcy. The loan evidenced by the promissory note, the alleged unauthorized trades, and the withdrawal from the plan all occurred prior to the debtor's Chapter 13 filing. Therefore, the debt is noncontingent. However, a debt must also be "liquidated" in order to be included in 109(e) calculation.

A debt is "liquidated" if it is readily determinable, regardless of whether the debtor disputes the obligation. Id. The court in Albano held that a debt is readily determinable if the "process for determining the claim is fixed, certain, or otherwise determined by a specific standard." Id. at 1014. Whether or not a debt is liquidated relates to the amount of the claim. U.S. Verdunn (In re Verdunn), 89 F.3d 799, 802 (11th Cir. 1996); In re McGovern, 122 B.R. 712, 715 (Bankr. N.D. Ind. 1989). In Slack v. Wilshire Insurance Co. (In re Slack), 187 F.3d 1070, 1073 (9th Cir. 1999), the Ninth Circuit Court of Appeals held that a dispute regarding liability will

not render a debt unliquidated as long as at the time of filing the petition the amount of the claim is ascertainable with certainty. In re Slack, 187 F.3d at 1074. The court reasoned that it is the amount of debt, not the liability on the debt, that is the focus of the "readily determinable" inquiry. Id.

In the present case, the debt is liquidated as well as noncontingent. The amount of the claim is readily determinable from the promissory note, the completed form representing the withdrawal of deferred compensation and the unauthorized trading form. Whether or not the debtor is in fact liable, the amount of the claim is readily determinable. Therefore, the debt owed to First Union is liquidated.

Conclusion

All of the claims of First Union must be included when determining the debtor's eligibility for Chapter 13 relief. Those claims in the approximate amount of \$261,000.00 plus others now on file total over \$283,000.00. Because the debtor exceeds the statutory debt limit of \$269,250.00, the plan must be denied confirmation and the debtor's Chapter 13 case is dismissed.

Separate journal entry to be filed.

DATED: December 26, 2000

BY THE COURT:

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

Copies faxed by the Court to:

13 JOLLEY, JOHN JAY
13 GRIFFIN, PATRICK B.
24 ROGERS, CLAY

Copies mailed by the Court to:

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.

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FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
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TERREL BECKWITH,) CASE NO. BK00-81205
) A
DEBTOR(S))
) CH. 13
) Filing No.
Plaintiff(s))
vs.) JOURNAL ENTRY
)
)
)
) DATE: December 26, 2000
Defendant(s)) HEARING DATE:

Before a United States Bankruptcy Judge for the District of Nebraska regarding First Amended Plan, Resistance by Trustee and Resistance by First Union Securities, Inc.

APPEARANCES

Patrick Griffin, Attorney for debtor
John Jay Jolley, Attorney for First Union Securities, Inc.
Kathleen Laughlin, Chapter 13 Trustee

IT IS ORDERED:

Case dismissed. See memorandum filed this date.

BY THE COURT:

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

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