

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
KENNETH & LINDA EHRESMANN,)	CASE NO. BK92-81294
)	CH. 13
DEBTOR(S))	Filing No. 55, 57

MEMORANDUM

Hearing was held on Notice of Intent to Sell and Objection by Kathleen Laughlin, Trustee, on October 2, 1995. Appearances: Thomas Lund, Attorney for debtors, and Kathleen Laughlin, 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), (E) and (N).

Background

When this Chapter 13 case was filed, the debtors listed certain real property as an asset. The trustee reviewed the schedules and determined that there was equity in the real estate which was not being used for the benefit of the unsecured creditors. Therefore, the trustee objected to confirmation on the grounds that the unsecured creditors would not receive in the Chapter 13 case at least as much as they would have received in a Chapter 7 liquidation.

The debtors resisted and presented to the court and the trustee a written opinion of value from a local real estate agent. That value was between \$12,000 and \$13,000. Since the mortgage was approximately the same amount, the trustee abandoned the objection and moved for entry of a confirmation order, Filing No. 21.

The plan was confirmed. It proposed a payment of \$325 per month to be distributed by the trustee. It also provided that all projected disposable income to be received in the three-year period beginning on the date the first payment was due would be applied to make payments under the plan. The income and expense schedules showed that the debtors had approximately \$325 as disposable income available to make plan payments.

Three years after the plan was confirmed, the debtors filed a Notice of Intent to Sell the property for \$30,000. The trustee objected because apparently the trustee does not believe that the property could have increased from \$13,000 in value to \$30,000 in a three-year period. It is apparently the trustee's position

that the property must have been worth considerably more than \$13,000 at the time of confirmation and so the plan was improperly confirmed without providing for the best interests of creditors. 11 U.S.C. § 1325(a)(4). The trustee wants the net proceeds of the sale turned over to be distributed to the unsecured creditors.

The debtors have presented evidence that during the three-year period the property has been improved and the neighborhood has improved.

Decision

The objection of the trustee and the trustee's request for a turnover of the net proceeds is denied.

Discussion

(1) Best interest of creditors.

This plan was confirmed over three years ago. The confirmation order was not appealed. The confirmation order was entered on the application of the trustee after the trustee apparently made a determination that the value of the property did not exceed the obligation against it. The creditors in this Chapter 13 case were, therefore, determined to be receiving what they would have received in a Chapter 7 liquidation. The fact that the property may have increased in value, for whatever reason, does not give the trustee, on behalf of the unsecured creditors, the right to suggest that that appreciation in value accrues to the benefit of the unsecured creditors.

There is no evidence of fraud in this case. The trustee, by innuendo, but without evidence, suggests that there must have been something wrong with the valuation evidence three years ago. As mentioned, there is no evidence of fraud and there is evidence that the property has been improved and the neighborhood has improved during the past three years.

Valuation of assets for the purpose of determining the best interest of creditors occurs at confirmation. Valuation for that purpose is not a moving target. If the value increases post confirmation, the creditors do not receive the benefit of the appreciation in value. Conversely, if the value decreases post confirmation, the debtors are still bound by the determination made at confirmation.

(2) Disposable income.

Alternately, the trustee suggests that the net proceeds of the sale of an asset is the equivalent of disposable income which must be provided to the trustee for distribution. The Eighth Circuit Court of Appeals in Education Assistance Corp. v. Zellner, 827 F.2d 1222, 1226 (8th Cir. 1987) made it very clear that the value of an asset which was included in the calculation required to determine the best interest of creditors is not the equivalent of disposable income as defined in Section 1325(b)(1)(B).

In addition, the Bankruptcy Code does not appear to require all increases in income to be used to fund the plan. The statute requires, if an objection to the plan is filed, that the plan cannot be confirmed unless it provides that all of the debtors' projected disposable income to be applied to make payments under the plan. 11 U.S.C. § 1325(b)(1)(B). In this case, the debtors' projected disposable income was approximately \$325 per month. The plan provided that all of such projected disposable income would be used to fund the plan. The debtors have delivered to the trustee, on a regular basis, \$325 per month. They have complied with both the statute and the plan. There is no requirement that they turn over the net proceeds of the sale of any asset for distribution as "disposable income."

Miscellaneous

By prior order, the net proceeds were to be held in the trust account of counsel for the debtors. Counsel for the debtors is now permitted to distribute the net proceeds to the debtors. Counsel is not authorized to deduct an attorney fee from such proceeds without first filing the appropriate supplemental attorney fee application and obtaining approval of the court. In addition, because the net proceeds are property of the estate in a Chapter 13 case, if the attorney is to be paid from such net proceeds, the amount of the attorney fee, plus the trustee percentage, will need to be paid to the trustee for distribution after the attorney fee is allowed.

Separate journal entry to be filed.

DATED: November 2, 1995

BY THE COURT:

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

Copies faxed by the Court to:

LUND, THOMAS

341-3434

Copies mailed by the Court to:

Kathleen Laughlin, Trustee
United States Trustee

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
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KENNETH & LINDA EHRESMANN,)	CASE NO. BK92-81294
)	A
<u>DEBTOR(S)</u>)	
)	CH. 13
)	Filing No. 55, 57
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	
)	DATE: November 2, 1995
<u>Defendant(s)</u>)	HEARING DATE: October 2, 1995

Before a United States Bankruptcy Judge for the District of Nebraska regarding Notice of Intent to Sell and Objection by Kathleen Laughlin, Trustee.

APPEARANCES

Thomas Lund, Attorney for debtors
Kathleen Laughlin, Chapter 13 trustee

IT IS ORDERED:

The objection of the trustee and the trustee's request for a turnover of the net proceeds is denied. See memorandum entered this date.

BY THE COURT:

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

Copies faxed by the Court to:
LUND, THOMAS 341-3434

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.