UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

CHARLES WEAVER and
DEBORAH WEAVER

Case No. 03-18731 K

Debtors

This case presents an interesting question of "fundamental fairness" and Due Process in the Chapter 13 context. Specifically, the question is whether a Chapter 13 debtor who knows or should have known that he has been sued by one of his creditors and knows the name and address of the attorney prosecuting the civil action for the creditor, must place the name and address of the attorney on the Chapter 13 mailing matrix required by Local Rule 1007-2.

Here, the Debtors did not do so, listing only the creditor itself - M & T Bank - - at three different addresses.[1] Consequently, M & T Bank had the usual notice of the Chapter 13 filing and of the opportunity for M & T Bank to participate at the § 341 meeting and to be heard regarding the valuation of the assets of the Debtors that constituted collateral for the loan, and to be heard in connection with the plan confirmation. However, the attorneys representing M & T Bank in the civil action did not receive such notice directly from the Court or the Debtors in time to effectively participate, as described below.

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[1]The Debtors filed their Chapter 13 petition on November 24, 2003. The Debtors' initial section 341(a) meeting was held on January 13, 2004; the final meeting was held on February 10, 2004. The order confirming the Chapter 13 Plan was entered by this Court on February 12, 2004. (M & T Mortgage Corporation is also a creditor in this case; its claim was filed on January 12, 2004.) The Notice allowing or disallowing claims was entered on June 17, 2004. The claim of the M & T Bank was allowed as secured in the amount of $1,500 and as unsecured in the amount of $18,813.51. Under the Debtors' plan, as approved, unsecured claims received a dividend of 5%. On January 26, 2005, the M & T Bank filed a motion seeking to dismiss the Debtors' Chapter 13 case that is the subject of decision here.

The Debtors' attorney did engage in the very good practice of sending a specific letter to M & T Bank at three addresses on the very date that he filed the Petition for the Debtors, advising M & T of the stay and of M & T's opportunity to participate in the Chapter 13 case. But it is not clear that any of the addresses were "correct" or whether M & T Bank forwarded any such information to the particular law firm representing it in the civil action against the Debtors. (The firm denies any notice from anyone.)

It seems clear that the Debtors' bankruptcy attorney was unaware of the lawsuit when he filed the Petition. The applicable portions of the Statement of Financial Affairs recited that there were no pending lawsuits. Moreover, the Debtors' attorney followed the usual good practice in this case of listing successive "duplicate" mailing addresses and attorney contacts for each creditor for which the attorney had such information; but there was no such "duplicate" entry for M & T. Had he been aware of the suit, he certainly would have "scheduled" the bank's counsel as a "duplicate" creditor.

The Debtors' attorney knew of the creditor's law firm a couple of months later and sent a specific letter to that firm on February 6, 2004. That letter, however, did not inform the firm that a continuation of the § 341 meeting and the hearing on confirmation was to occur on February 10, 2004. Nor did it inform them that at that date and time the Debtors and the Chapter 13 Trustee would decide on a value of M & T's collateral whether or not there was any participation by M & T, and that they would present their valuation to the Court for confirmation. In fact, those events transpired, and no one from M & T had appeared. And so a "secured claim" of only $1500 was proposed in the Plan.

The firm responded to Debtors' counsel's February 6 letter one day after the confirmation hearing was held. It filed a Proof of Claim and a "Notice of Appearance and Request for Notice." And one day after that, the Order confirming the Chapter 13 Plan was entered.

The Proof of Claim was a $20,313.51 secured claim, specifying that the collateral included "all business assets," and that the assets had "unknown" value. (The Debtors owned a janitorial service.) The Proof of Claim was a timely filed claim, and though it was not filed until one day after the occurrence of the valuation at the § 341 meeting and Confirmation Hearing, it is not customary in this Division of the District to file objections to such claims. Rather, this Division of the District has historically relied upon the generalized notice language that is contained in every § 341 meeting notice in a Chapter 13 case:

> PLEASE TAKE FURTHER NOTICE THAT ALL CLAIMS, INCLUDING THOSE CLAIMS PURPORTING TO BE A LIEN ON REAL PROPERTY, MAY BE DEEMED TO BE UNSECURED UNLESS PROOF OF THE DEBT, THE PERFECTION OF THE LIEN AND THE VALUE OF THE SECURITY IS FILED WITH THE COURT AT OR BEFORE THE ABOVE MEETING OF CREDITORS.
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> A HEARING TO DETERMINE THE VALIDITY AND THE VALUE OF ANY CLAIMED SECURITY INTEREST IN PROPERTY OF THE DEBTOR, AND A HEARING TO DETERMINE THE VALIDITY OF ANY LIEN OR SECURITY INTEREST CLAIMED AGAINST EXEMPT PROPERTY COVERED BY § 522(F), U.S.C. WILL BE HELD AT THE HEARING ON CONFIRMATION.

As to real estate, the above is not completely accurate. When real estate is involved, the Court almost always requires a specific notice (usually a Notice of Motion) to

lienholders whose liens on the real estate are being affected by a Chapter 13 plan; this is largely to avoid needless future "title" problems. But the lending community that takes collateral in the form of cars and trucks, motorcycles, manufactured homes, household goods, and recreational vehicles, actively and vigorously honors that generalized notice, and deals with the valuation of their collateral either by communicating with the Debtors' attorney or by sending a representative to the § 341 meeting and the confirmation hearing. This process works extremely well and has relatively few transaction costs. M & T has regularly participated in this process in many other cases, year after year, for at least two decades. M & T did not partake of the process in this particular case. The Court does not know whether the individuals who received notices of this Chapter 13 filing at three different locations for M & T simply *presumed* that the law firm handling the collection activity as to this particular business loan also received notice; or whether they did not so presume, and instead asked this or a different firm to participate in the Chapter 13 case, but the matter fell through the seams somehow; or some other factual scenario. We do have an express representation by this firm that "on or about February 10, 2004, M & T's attorneys received notice of the pendency of the Chapter 13 case from the Debtors' attorney by letter dated February [6], 2004" and that "prior to the correspondence received on February 10, 2004, neither M & T nor M & T's attorneys received notice that the Debtors had commenced a Chapter 13 case."[2]

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[2]The Court does not yet credit the representation that M & T did not receive notice. We have an insufficient evidentiary basis for such a conclusion, at this time. (Counsel's claim that his client did not receive notice is not "evidence."

The present Motion raises three theories by which M & T argues that this Chapter 13 case should be dismissed. One argument is that the $1500 in value ascribed to M & T's collateral in the Confirmation Order was so inconsistent with their Proof of Claim that the Plan did not meet the statutory requirements of 11 U.S.C. § 1325, and that, consequently, the Confirmation Order did not have *res judicata* effect on what M & T calls "subsequent creditor actions." In essence, the argument is that although the Debtors' Plan was confirmed, it was not "**properly** confirmed by the Court," and so M & T is not barred from challenging the Confirmation Order now, more than a year later.

Another argument forwarded is that the confirmation process did not comply with fundamental requirements of Due Process because M & T was not given adequate notice of the confirmation proceedings. In this regard, it is argued by the bank that the Debtors failed to list the correct address for the M & T division responsible for servicing their loan obligations even though the Debtors supposedly had knowledge of the correct address through "numerous prior dealings with M & T."

Lastly, it is argued by the bank that the Debtors failed to provide notice of the filing to the specific M & T's attorneys that were pursuing an action then pending in State Court between the filing date in November 2003 and the February 6, 2004 letter sent by the Debtors' attorney. That letter, it is argued, was received on the same day that the hearing on confirmation was held. And so it is argued that the notice was not adequate to permit M & T to participate.

Though there can be no doubt about the February 2004 notice to the firm, there is no explanation as to why M & T took no action between February of 2004 and January of 2005

to revisit what had been decided while M & T's attorneys were supposedly unaware of the Chapter 13 case.

Nonetheless, the Court finds that the confluence of a number of factors compels the Court to command a threshold inquiry. The Court *sua sponte* finds cause to reconsider the bank's claim under 11 U.S.C. § 502(j), which states, in pertinent part, that "a claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case."

If the inquiry discloses inequitable conduct by either side, the Court will rule appropriately.

The factors that lead to this ruling are these:

1. The Debtors do not deny knowledge, at the petition date, of the lawsuit and of the attorneys suing them for M & T, but the Debtors did <u>not</u> schedule those attorneys as "duplicates" of the M & T claims.

2. The Debtors' attorney's letter of February 6 inadvertently might have misled M & T's counsel into believing that there would <u>not</u> be a strip down of the M & T "secured claim." The letter said that the Debtors "duly listed their debt with M & T . . . M & T will be paid per plan payments." It never mentioned the Debtors' intent to strip the claim down in proceedings that were planned to occur on February 10.

3. M & T's counsel now demonstrates that Debtors may have procured Confirmation in "bad faith" because (A) $14,650 of the M & T loans went to the purchase of a riding Sweeper in June of 2002, but (B) at confirmation the Debtors claimed that <u>all</u> their

business property had a mere $1500 total value, including the sweeper, and (C) sometime in 2003 the Debtors sold the sweeper in violation of the terms of the M & T lien, and used up the proceeds, and (D) the sale price was $4000 - - more than twice what they had told the Court was the total value of all of their business personally.

An evidentiary hearing to establish all of the facts could be more expensive than the amount in controversy. Therefore, the Court will conduct a threshold inquiry - - (1) what was the real value of the assets as of February 10, 2003 and (2) what has happened to the $14,000 sweeper. The first matter would have been the subject of inquiry on February 10, 2003 if M & T's litigation counsel had been properly scheduled and informed. The second would be the inquiry if the present Motion were a motion to lift stay as to the sweeper.

When the Court has the answers to these questions, it will decide (in the absence of settlement) whether cause exists under 11 U.S.C. § 502(j) to reconsider the $1500 value of "all" the business property, and what the "equities of the case "requires by way of further hearings; if any.

This is somewhat of a reversed procedure. "Cause" to reconsider the claim arguably requires inquiry into "who knew what, when?" In this Court's view, to proceed that way would be to conduct an inquiry for inquiry's sake. The Court chooses to quantify the amount in controversy first.

This hearing will be held on **April 19, 2005 at 2:00 p.m.** at U.S. Bankruptcy Court, Part I, Olympic Towers, 300 Pearl Street, Buffalo, New York 14202. The Debtors shall appear with counsel, and shall bring their business records, for 2002, 2003, and 2004. M & T's

counsel shall also appear.

SO ORDERED.

Dated: Buffalo, New York
March 31, 2005

U.S.B.J.

FILED
MAR 31 2005
BANKRUPTCY COURT
BUFFALO, N.Y.