UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

SIDNEY C. CRANSTON, JR. Case No. 03-17366 K

Debtor

The Court assumes, without deciding, that the facts are as the Debtor's counsel asserts them to be. The Debtor co-owned a business of some sort with one "Raynor." The Debtor suffered some sort of disabling illness or injury and could no longer work. He sold out his interest to his partner Raynor on November 1, 2002 in exchange for a $75,000 promissory note under which the Debtor would receive $1,485.09 per month from his partner until December 1, 2007. The Debtor is otherwise without income or meaningful assets, is unemployed and unemployable, and would become a ward of the state if he lost this income.

He filed under Chapter 7 on October 2, 2003. He schedules about $40,000 in general unsecured debt, including credit cards and some student loan debt.[1]

The Debtor's submissions hint that the terms of sale were intended to provide the Debtor with a regular income for five years. ("Debtor was unable to continue his business relationship with his partner and had no choice but to sell his interest. This note compensates the Debtor for his loss of future earnings from this business. Furthermore, the Debtor has been unable to hold down any other

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[1]This recitation on the Debtor's behalf seems at odds with some of the Debtor's submissions at the time of filing. He apparently owned some real estate in Lockport, which he is surrendering, and scheduled some debt on real estate in Buffalo, but does not otherwise indicate ownership or disposition of such property. Additionally, there appears to be a judgment against him for back rent in Orleans County (the age of that obligation is unknown to the Court). Finally, his Schedule I indicates that he had a job as a commissioned salesman until he lost it in September of 2003.

jobs since the time of this business sale, making this note similar to an annuity." ¶ 14 of Debtor's counsel's Affidavit in Opposition to Motion for Turnover.) The Court will assume this to be true, without so deciding, though there is no evidence at all of any injury or illness.

The question before the Court simply is this: Is this stream of revenue from the former co-owner merely post-petition "income" of the Debtor, or is it a pre-petition "account receivable," collectible by the Trustee for the benefit of the Debtor's creditors?

It is informative to consider how others who have the same intent attempt to achieve their intended result despite the need to resort to bankruptcy. In this writer's experience, sellers of a business are seen to take back non-compete agreements and agreements to remain on the payroll for continuity purposes (sometimes simply to maintain health benefits).

At a larger scale, a spendthrift trust might be established to receive the proceeds and provide the seller with an income. An exempt annuity might be purchased. Some buyouts even contemplate a period of inactivity by the seller before a price is set, so that it can be determined the extent to which his or her active service had enhanced the value of the business.[2] (The Court expresses no opinion regarding the effect of any of such devices in a bankruptcy case.)

Although the promissory note at issue here appears to be professionally prepared (perhaps only an internet down-load) the submissions are silent on the issue of whether the Debtor here did or did not seek, (or reject the opportunity to seek) legal advice. Again, the Court will assume,

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[2] This last is useful where the seller has been a key element of the value of the business, e.g., the top salesperson or "rainmaker."

without deciding, that the Debtor is an unsophisticated seller who did not have counseling about the possible "sheltering" advantages offered by the types of mechanisms noted above, as contrasted with simply taking an installment note. (Also it will be assumed that he did
not reject counseling that might have been available.)

This Debtor asks that despite the simplicity of form, he be found to have achieved a sheltered result - - that as a matter of equity and as an element of his "fresh start," these note payments should be set aside to him. He argues through counsel that the note should be viewed as "income reasonable and necessary for the support of the Debtor," that it be considered "payment in compensation of loss of future earnings and exempt" pursuant to the state law equivalent of 11 U.S.C. § 522(1)(d)(11)(e), that it is "similar to an annuity," and that "this particular asset is so deeply entangled with the Debtor's ability to make an unencumbered fresh start, [that] the Court has the ability to rule in this particular case that said income is exempt under the particular circumstances."

The Trustee points out that the Debtor is not performing any services, nor does the note between him and Raynor call for any performance by the Debtor whatsoever. The payments are the purchase price of the business. They are fully "rooted" in the pre-bankruptcy past. The "fresh start" is not implicated in this case because the Debtor has been discharged, is free to pursue any gainful employment he wishes, and, indeed, had a choice as to whether he wished to file for relief under the Bankruptcy Code in the first place, given the existence of this note.

DISCUSSION

In analyzing this case, it is important to recollect all the matters above that have been "assumed arguendo." So many, in fact, that if one were to pretend that sound policy were to be the only guide, they present one reason why the Debtor's arguments must be rejected. Any determination would be immensely fact-intensive, in this or any other particular case. If the Trustee were to call Raynor or any other witness to the stand and if the Court were to find as a matter of fact that Raynor or someone else told this Debtor that he should find out from a lawyer whether there are ways to structure this buy-out to protect the proceeds from the Debtor's creditors, that would be important. If the Debtor responded that he would take his chances, then "equity" would not serve the Debtor. Similarly, if it were to be found as fact that the underlying consideration for much of the debt that the Debtor is discharging here found its way into the business that he sold under circumstances that convince the Court that in essence these note payments are simply a conduit for post-petition recovery by the Debtor of the proceeds of debt that he is discharging, equity would not avail him.[3] Perhaps the Debtor did not suffer the illness or injury that has been represented to the Court to have rendered him unable to work. What if he simply chose an "easy way out" or, worse still, were to have come into Court "with unclean hands." Whether he would prevail would depend on "situation ethics" which is, of course, a system of judgment different from "rule of law."

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[3]Efforts to "park" assets and recover them later are not unknown to this Court. Such efforts are criminal and are punished by the criminal process on referral from the Court.

The Court is not, in each instance in which a Debtor has yet to receive all of the proceeds of a buy-out when such a debtor comes to Court, to conduct an extensive evidentiary hearing, to be paid for in part by such debtor's creditors in the form of allowances to the Trustee for costs and legal fees, in order that the Court may determine whether equity is in the Debtor's favor or not. Though the Court does not shy away from case-by-case determination where that is what the law requires, what is to be the decisional standard in a case such as this? Is it to be a standard by which a mentally dull debtor receives more relief than a more astute debtor on the theory that a dullard who cannot comprehend creditors' rights is more deserving of equitable relief than a smarter person? What of the choices that a debtor made with regard to incurring debt after the buy-out, and should they cut in favor of the debtor or against him or her? Is the debtor's physical or mental health decisive? What about his or her family circumstances? Where does equity start and end?

Statutes sometimes demand that bankruptcy courts make these kinds of decisions. Will repayment of a student loan constitute an "undue hardship?" Has a Chapter 13 plan been filed in "good faith?" Has there been "substantial abuse" of the provisions of Chapter 7 of the Bankruptcy Code? And so forth. But in such instances the standard for decision is set forth in the statute.

Neither statute nor equity command that the Court disregard the clear legal consequences of what people have done in unambiguous form that has well-settled meaning. Recently this writer had occasion to catalog some of my earlier decisions that enunciated the same principle in two different, but similar, contexts. In *In re Wittmeyer* (copy attached) this writer recounted a number of decisions that established a simple proposition. "In sum, decisions to avail oneself of the protection

of law, or not to do so, have consequences that are not to be avoided (once the rights of innocent third party creditors invoked in the bankruptcy process) simply because the decision has become inconvenient to the parties or because their original intention is going to be defeated. Sometimes what is at issue is the availability of recording statutes. Other times it is the availability of administrative agency review of a transaction for purposes of bringing the transaction within the scope of a statute that is not necessarily a recording statute. And at other times the simple step of signing an 'agreement' might suffice."

That decision focused on two often-recurring fact patterns. (1) ". . . Where there is a recording statute, and a claimant seeks to prove ownership adverse to the public record, and he or she was a party to the decision to establish that public record, that claimant will not be heard to claim that the public record is wrong." (2) ". . . When there exists a way that a claimant could have used a statute or public record to document the property claim that he is now asserting, but he chose not ascertain its existence or to avail himself of it, he may not now be heard to claim that he should be treated here as if he had availed himself of the statute and had done so with flawless documents. (We know that even car dealers, construction companies, and banks sometimes make a mistake that is fatal to <u>their</u> claim of a perfected lien). One may not be heard here to claim that he should be treated as if he were a perfected secured lienholder on a motor vehicle, or inventory, or land, when in fact he chose not to utilize the sometimes-treacherous statutory method to obtain a perfected lien on the asset (or land, or inventory, etc.)."

The case at bar is yet another variation on the theme. Generally speaking, equity is to be utilized where there is no adequate remedy at law. But here we know that few matters of law are as well-settled as is the law governing promissory notes that stand alone, rather than as a part of a more complex set of documents accomplishing a transaction. For this writer to employ "equity" to disregard the law of promissory notes in order to fashion a remedy for a debtor that is akin to an "exemption," or to disregard the well known property interests incident to a promissory note in order that the proceeds of the note be placed outside the "property of the estate" under 11 U.S.C. § 541, would not "do" equity, even if all of the facts that have been "assumed arguendo" above were to be made a matter of record and found to be fact at evidentiary hearing. The Debtor's creditors deserve more, as do the debtors in other cases who expend the money or effort to "get it right."

CONCLUSION

The note proceeds are not "income" to this Debtor for purposes of 11 U.S.C. § 541, nor are they exempt. They are "property of the estate."

The Trustee's motion for turnover of the post-petition payments under this promissory note is granted over the objection of the Debtor.

SO ORDERED.

Dated: Buffalo, New York
May 17, 2004

s/ Michael J. Kaplan

U.S.B.J.