UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

ROSEMOND JOHNSON — Case No. 99-13144 K

Debtor

In this reopened Chapter 7 case, the Debtor believes that some creditors have been paid more than in full and that some monies retained in the Court's registry as "unclaimed dividends" represent monies earmarked for the benefit of particular creditors who he says actually are not entitled to those monies, because they have been paid in full. The Debtor seeks this Court's assistance in obtaining overpayments from creditors that were overpaid, and in substituting the Debtor as the party entitled to recover monies from the "unclaimed dividends." The Chapter 7 Trustee opposes this because he believes that this is not a "surplus money case." That is to say that although the principal amounts of creditors' claims were paid, they were not paid with 9% post-petition interest. Thus, the Trustee argues that if any particular creditors have been paid in full, the amounts of money that would have been their share should instead be marshaled to increase the distribution to the other creditors on the post-petition-interest portion of their claims. The Trustee states that that is what he would do if money were returned with a statement from the creditor saying that the claim has been paid in full. He further argues that even if a case has been long closed, he would reopen the case for the purpose of a supplemental distribution to creditors, if he learned that monies that were sitting as unclaimed dividends had remained unclaimed because the creditor had been satisfied.

The Court finds that this possibly is a surplus money case, but that the Debtor has thusfar failed to demonstrate that fact.

When Mr. Johnson's Chapter 7 Petition was filed on June 2, 1999, Mr. Johnson's declaration under penalty of perjury listed only four unsecured creditors totaling $19,520. Those were Marine Midland Bank, Associates, GE Card Services and GE Capital Consumer Card Company. Among his claimed exemptions was what he labeled a "pension - Dupont Employee Benefit Plan," in an "unevaluated" amount. At the Section 341 meeting on July 1, 1999, the Trustee ascertained that part of the "benefit plan" were Dupont stock or stock options. He required the Debtor to produce information regarding them, as well as the Debtor's previous two year's tax returns. On September 29, 1999, the Debtor filed amended schedules in which he declared ownership of $42,446 in Dupont stock, and added six more unsecured creditors totaling an additional $11,000; at this point, then, the total of scheduled unsecured debt was $30,665, an amount less than the $42,446 in unencumbered, non-exempt stock.

The following unsecured claims were filed:

- Claim # 2, filed by Marine Midland Bank in the amount of $4,494.81, for a "PLUS" loan for Ramona Johnson to attend Niagara University, a debt that was not scheduled at all by Mr. Johnson.

- Claim # 3, filed by "Creditors Interchange, Inc." in the amount that had been scheduled by Mr. Johnson - $1,085.

- Claim # 4, filed by Associates National Bank of Delaware in the amount of $4,927.94, which was only about $300 higher than the amount scheduled by Mr. Johnson.

- Claim # 5, filed by GE Capital in the amount of $4966.19, about $700 less than the amount scheduled by Mr. Johnson.

- Claims #6, #7, #8, #9, # 10 and # 11, were filed by the Trustee under authority of Bankruptcy Rule 3004 on December 1, 1999, for the creditors and in the amounts scheduled by Mr. Johnson. These totaled $15,480.

The total of all unsecured claims thus filed was $30,953.94, close to the $31,750 scheduled by the Debtor in his amended schedules. The cash resulting from the liquidation of the stock was $42,097.57.

From that money the Trustee disbursed $4195 in Federal income tax and $1766 in State income tax. He also disbursed $15.28 as a pro rata expense for his blanket bond premium. These were Chapter 7 administrative expenses. After interest accrued on the amounts in the bank, the Trustee had $37,557.53 on hand at the time that a hearing on allowances occurred, on March 27, 2002.

The Court awarded the Trustee $5,103.38 in statutory commissions and $245 in attorneys fees, and awarded $330 to the Chapter 7 estate's tax accountant. These also were Chapter 7 administrative expenses.

That March 27, 2002 hearing was initiated by a Trustee's "Final Report and Account" which analyzed all of the above information, and proposed a distribution to claims 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11. Because there were funds on hand to pay a slight portion of the post petition interest pursuant to 11 U.S.C. § 726(a)(5), the Trustee's final report and account analyzed the amount that would be necessary to pay those claims with 9% interest for the nearly

three years that the case had been pending. That would have required $39,128.87 plus the commissions and fees that the Court would award. The total necessary to turn the case into a surplus money case was an amount that was more than $7,000 in excess of the balance on hand. Thus, the Trustee disbursed less than payment in full with interest to the unsecured claims, and there was no "surplus" to be paid to the Debtor under 11 U.S.C. § 726(a)(6). In fact, he paid creditors $31,998.29. That constituted payment of 100% of the principal amount of the claims, plus a little bit of post-petition interest.

Thereafter, a $4,481.25 check for claim # 7 was returned to the Trustee for an invalid address, and two checks were not cashed within the sixty days permitted on the face of the checks - those were in the amounts of $4,238.33 paid on claim # 6 and $5,339.26 paid on claim # 10. Those three amounts were paid in to the registry of the Court as "unclaimed dividends" under 11 U.S.C. § 347(a).

The records of the Court are clear that the proposed distribution was printed on the reverse side of the notice of the March 27 hearing, and an affidavit in the file establishes that the notice was sent to the Debtor at 201 Bakos Boulevard, Buffalo, New York 14211. Although the record suggests that Mr. Johnson might not have been living at that address as of that time, he did not file an address change with the Clerk of Court until December11, 2002, and, more importantly, he attended the March 27 meeting in person with his then attorney. Thus, he clearly had notice of the proposed distribution.

The Final Decree closing the case was entered on August 29, 2002. (Mr. Johnson had received his bankruptcy discharge on November 8, 1999.)

Nearly four months after that (and 8 months after the Court approved the proposed disposition), on December 10, 2002, Mr. Johnson filed a pro se motion to reopen the case, making numerous complaints about his former attorney and the Trustee. He complains that he had paid "a settlement" to GE Capital, which had filed claim # 5; that he had paid "a settlement" to Marine Midland Bank on claim # 10, which the Trustee had filed for the bank; that there was an overpayment of $446.78 on the student loan at HSBC Bank, which overpayment was not accounted for; and a variety of other complaints.

In open court, the Debtor insisted that he receive two forms of relief from the Court; turnover of the monies being held by the Court, on the grounds that "all creditors were paid and that unclaimed funds . . . are being held;" and "written authority to secure $1,085" from a creditor that the Debtor believes should not have been paid.

It was explained to the Debtor in open court that the only way that he would be entitled to any of these funds is to establish that all of his creditors have been paid in full. If only some creditors have been paid in full or otherwise satisfied, without his getting an assignment of the claim, then any amounts not necessary for the payment of those claims must be used to pay the rest of his creditors the balance of the post petition interest to which they were entitled. By the Court's computations noted above, that would have required, as of the date of the hearing on the Trustee's final report, March 27, 2002, approximately $7,000 more.[1]

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[1] Here we bump into the problem of "solving for the unknown." The $7000 figure contemplates more assets, not fewer debts. If some debts drop out, then the amount is less than $7000 because any claim that was satisfied "in fact" would not need to be paid post-petition interest. But how much debt must be shown to have been satisfied, in order to result in full payment of the remaining debts, is "X," an amount that cannot be computed without knowing which debt(s) would not participate in a supplemental distribution.

Thus, if Mr. Johnson could have established, as of that date, that "$ X" of the claims contemplated to be paid by the Trustee had already been paid, this might have become a "surplus money" case to the extent of any additional claims that Mr. Johnson could establish had already been paid or settled.

It is now ten months later, and so interest is still running on the difference between what the creditors received and what would have been full payment 10 months ago. But there is $14,000 in the registry of the Court. If Mr. Johnson could establish that the reason that those checks were returned or uncashed was because those creditors were paid in full by other means, then those unclaimed funds could be used first to make a supplemental distribution to creditors who have not been made whole, and the balance would be surplus funds for the Debtor.

Thus, if the Court's examination of the numbers is correct, then the Court's understanding, at the date of the hearing on Mr. Johnson's motion, that there could be surplus funds for Mr. Johnson only if he could prove that "every" creditor had been paid in full or more than in full, was incorrect.

There are two other ways in which Mr. Johnson could establish a right to "surplus funds." One was explained above - he could establish that of the monies held in unclaimed dividends, some could be used to make a supplemental distribution to all creditors who have not been paid in full with interest. The other is to prove that some creditor was overpaid by the requisite amount to permit a supplemental distribution to all the other claims, and still produce a surplus.

From the Debtor's perspective, then, he cannot "come away" from this bankruptcy

estate with any money for himself unless he can demonstrate that more than "$ X" of the monies disbursed to creditors and/or the monies in the registry of the Court constitute either overpayments, or monies held for creditors who have been paid in full.

As the Trustee argued in Court, the ability of the Debtor to demonstrate that a few hundred dollars "here" or a thousand or two "there" resulted in an overpayment to "this creditor" or "that creditor," or results in the ability to "release" some creditor's share of unclaimed dividends, does not entitle the Debtor himself to any money at all, but rather would demonstrate only that other of his creditors should be receiving somewhat more.

But if the Trustee was arguing, at hearing, that it is "impossible" for the Debtor to demonstrate that he is entitled to any monies from this estate, that is incorrect, as explained above.

This leaves, then, one last question for resolution. That is whether the Debtor has made out a case for receiving some form of "assistance" from the Court, in establishing that in fact more than the threshold "$ X" worth of allowed debts has already been paid by himself or another source. The answer to this question is "no." If Mr. Johnson had already settled some claims prior to the hearing on the Trustee's final report and account ten months ago, or if he wished the opportunity to attempt to settle some claims on which the Trustee was intending to make distribution, he should have raised that matter then, not after all the proposed amounts have been disbursed. Moreover, to the extent that the Debtor did in fact settle any such claims, he should have obtained an assignment of the claim and followed the procedure contained in Bankruptcy Rule 3001(e) dealing with a "transferred claim." And he certainly should not have

been going around paying claims after the Court approved the Trustee's Final Report, almost a year ago.

The Court concludes as follows: This reopened case will be kept open for an additional 30 days. To the extent, if any, that the Debtor is able to provide duly executed "releases" of unclaimed dividends in the registry of the Court, or persuades any overpaid creditors to return the overpayment to the Trustee, then to any such extent the Trustee will administer a supplemental distribution upon the remaining claims; the Trustee may receive commissions on any such supplemental distribution, and if there results a "surplus" he will be empowered to turn it over to the Debtor. If the Debtor does not obtain any refunds or releases, then this case shall be again closed, upon the expiration of 30 days from the date of this Order.

SO ORDERED.

Dated: Buffalo, New York
February 25, 2003

/s/ Michael J. Kaplan

U.S.B.J.