UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

GENESER IMPLEMENT STORE, INC.,: Case No. 86-818-C

Debtor. Adv.Pro.No. 86-0184

FIRST INTERSTATE BANK OF URBANDALE f/k/a PLAZA STATE BANK,

Plaintiff,

v.

ROBERT D. TAHA, Trustee of GENESER IMPLEMENT STORE, INC., Debtor,

Defendant,

GENESER IMPLEMENT STORE, INC.,:

Intervenor.

ORDER ON OBJECTION TO APPLICATION TO COMPROMISE AND SETTLE ADVERSARY PROCEEDING

On May 20, 1987 a hearing on objection to the trustee's application to compromise and settle filed on behalf of the debtor/intervenor was held before this court in Des Moines, Iowa. Robert D. Taha appeared in his capacity as the Chapter 7 trustee, as attorney for the trustee and as the named

defendant in the adversary proceeding. T. James McDonough appeared on behalf of the plaintiff, First Interstate Bank of Urbandale. Ronald L. Suthphin and Elizabeth A. Nelson appeared on behalf of the debtor/intervenor in the adversary proceeding. The parties were given until June 3, 1987 to brief the various issues raised at the hearing. The matter is fully submitted.

A brief outline of the case history is appropriate. The debtor filed its petition for relief under Chapter 7 on March 26, 1986. The trustee, Robert Taha, gave notice on May 2, 1986 to all creditors of an intent to sell property of the debtor on may 31, 1986. The sale was conducted on that date and proceeds of approximately $40,095.00 were generated. On August 11, 1986 the plaintiff, First Interstate Bank of Urbandale (Bank), filed a complaint to determine the validity, priority and extent of lien. The Bank asserts that it has a valid, perfected security interest in all of the property sold by the trustee on May 31, 1986 and thus seeks an order directing the trustee to turn over the proceeds of said sale. The trustee filed his answer on August 21, 1986. On September 22, 1986 the debtor filed a motion to intervene asserting that its interest was not substantially the same as that of the trustee and that the debtor would not be adequately represented by the trustee in defense of the action.

On March 16, 1987 the trustee filed an application to compromise and settle the pending adversary proceeding. The application recited that the trustee and counsel for the Bank had conducted discussions to determine the validity and enforceability of the security interest under which the Bank made its claim against the property. The trustee stated his opinion that the Bank has a valid, perfected and enforceable security interest against the property and that the payment of $27,000.00 to the Bank would be in the best interests of the estate.

On March 25, 1987 the debtor amended its motion to intervene to assert that the items included in the sale conducted by the trustee were not covered by the lien of the Bank. An order granting the debtor's motion to intervene was entered on April 3, 1987. An objection to the application to compromise claim was filed by the debtor/intervenor on April 10, 1987. For its objection the debtor asserts that the items sold by the trustee consisted of shop or office equipment and that the Bank's security interest in inventory did not cover these items. The debtor thus claims that the trustee's assumption that the Bank has a valid security interest in the items and is entitled to $27,000.00 in

settlement of its claim is in error. The debtor further argues that the application to compromise is inequitable because if the Bank's interest is found not to cover the assets sold, the estate and the officers of the debtor would stand to benefit as the proceeds would be available to pay priority indebtedness.

At the close of the hearing on the objection to the trustee's application to compromise and settle, the parties were directed to brief not only the issue of the reasonableness of the compromise but also the issue of a potential conflict of interest stemming from the debtor's counsel representing both the debtor and an officer of the debtor and the issue of parol evidence.

The issue of a potential conflict of interest on the part of the debtor's counsel has been addressed in the brief filed by the debtor. The court is convinced that there is no conflict of interest by virtue of the debtor's counsel's representation of the debtor and of John Geneser, an officer of the debtor corporation. In a Chapter 7 case as opposed to a Chapter 11 case an attorney need not be disinterested or obtain approval from the court to represent the debtor. See In re Hoffman, 53 B.R. 564, 565 (Bankr. W.D. Ark. 1985); In re Roberts, 46 B.R. 815, 822 (Bankr. N.D. Ga. 1985). Moreover, the Bank's assertion that the debtor has no standing to object to the proposed compromise is without merit. See, In re Mobile Air Drilling Co., Inc., 53 B.R. 605, 609 (Bankr. N.D. Ohio 1985) (holding that a debtor does have standing to object to the trustee's proposed compromise).

In considering the application to compromise and settle the adversary proceeding, the court is guided by Bankruptcy Rule 9019 and standards enunciated by case law. Bankruptcy Rule 9019(a) provides:

> On motion by the trustee and after a hearing on notice to creditors, the debtor and indenture trustees as provided in Rule 2002(a) and to such others as the court may designate the court may approve a compromise or settlement.

In deciding whether to approve a settlement, the court must determine whether the proposed settlement is in the best interest of the estate. In re Neshaminy Office Bldg. Assoc., 62 B.R. 798, 803 (E.D. Pa. 1986). The trustee carries the burden of showing that the compromise is in the estate's best interest. Id.

The criteria the court must consider in determining the reasonableness of a compromise are well established. They are: (1) the probability of success in the litigation; (2) the difficulties, if any, to be encountered in the matter of collections; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors and the proper deference to their reasonable views in the premises. Drexel v. Loomis, 35 F.2d 800, 806 (8th Cir. 1929); In re Heissinger Resources Ltd., 67 B.R. 378, 383 (C.D. Ill. 1986); Matter of Carla Leather, Inc., 44 B.R. 457, 466 (Bankr. S.D. N.Y. 1984). It is important to remember that the bankruptcy judge's responsibility is not to decide the numerous questions of law and fact raised by the objections but rather is to canvas the issues to see whether the settlement "falls below the lowest point in the range of reasonableness". In re W.T. Grant Co., 699 F.2d 599, 608 (2nd Cir. 1983). The court's review is sufficient if after apprising itself of all the facts necessary for an intelligent and objective opinion concerning the claim's validity, the court determines either (1) the claim has a substantial foundation and is not clearly invalid as a matter of law or (2) the outcome of the litigation is "doubtful". Matter of Walsh Constr. Inc., 669 F.2d 1325 1328 (9th Cir. 1982); In re Mobile Air Drilling Co., Inc., 53 B.R. 605, 608 (Bankr. N.D. Ohio 1985).

At the outset the court notes that the application to compromise was served upon the Bank and the debtor's attorney. The order setting a hearing on the objection to the application was served on only the trustee, the debtor, debtor's counsel and counsel for the Bank. Rule 9019 refers to Bankruptcy Rule 2002(a) which requires at least a 20 day notice to all creditors and indenture trustees of a hearing on approval of a compromise or settlement of a controversy. Absent compliance with these requirements of notice, hearing and court approval, a purported settlement or compromise is unenforceable. In re Bramham, 38 B.R. 459, 465 (Bankr. D. Nev. 1984). While failure to comply with notice provisions is a sufficient ground to deny an application to compromise, the court will address the merits of the intervenor's objection at this juncture rather than require the trustee to refile the application and ensure proper notice of a hearing.

Review of the four criteria set forth above lead the court to conclude that the proposed settlement is not reasonable. The Bank and the debtor have each submitted briefs on the merits of the complaint to

determine validity, priority and extent of lien. Without deciding or indicating an opinion as to the merits of the complaint and the alleqations of the debtor's objection, the court finds that the outcome of the litigation is doubtful. The parties have each interpreted the language of the Bank's security agreement to support their respective positions. Likewise the parties dispute the application of parol evidence to the writing at issue. In that regard the court finds that the testimony of Dan Geneser and Jack Geneser would be admissible in shedding light on the situation of the parties, the antecedent negotiations, the attendant circumstances and the objects they were striving to attain. See Kroblin v. R.D.R. Motels, Inc., 347 N.W.2d 430, 433 (Iowa 1984). Given these considerations the court cannot find that the Bank's probability of success would be so great as to warrant the trustee's agreement to compromise.

The factors of complexity, expense, inconvenience and delay were addressed by the trustee in support of his application to compromise. The court does not find the issue presented by the complaint to be prohibitively complex. Rather, as outlined in the briefs submitted, the issue is simply one of interpretation. The trustee's concerns over expense and delay are well taken. However, in comparison to the potential return for the estate the court cannot find those factors unduly burdensome.

Finally, consideration of the interests of creditors likewise demonstrates that the proposed settlement falls below the range of reasonableness. The debtor's schedules indicate priority debts in the amount of $46,102.12, secured debts in the amount of $709,374.54 and unsecured debts in the amount of $2,897,153.00. The Bank's secured claim is in the amount of $207,554.98. Recovery by the trustee would undoubtedly benefit the priority creditors, including taxing authorities and former employees of the debtor. The court recognizes that if the Bank is successful on its complaint, the estate will have lost the use of approximately $13,000.00 now remaining after the proposed settlement. However the potential gain of an additional $27,000.00 outweighs that risk.

WHEREFORE, based on the foregoing analysis, it is hereby found that the proposed compromise and settlement of the adversary proceeding fails to meet the standards for acceptance by the court.

THEREFORE, the court hereby sustains the debtor's objection to the trustee's application to compromise and settle the adversary proceeding.

Signed and filed this lst day of October, 1987.

LEE M. JACKWIG

U .S. BANKRUPTCY JUDGE