UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

RHODA L. SHIRLEY, Case No. 87-1436-C

Debtor. Chapter 13

ORDER ON OBJECTION TO PLAN

On February 2, 1988 a rescheduled hearing on objections to plan was held before this court in Des Moines, Iowa. Objections to the debtor's Chapter 13 plan were filed on behalf of Louis and Helen Galinsky on October 14, 1987, Brenton National Bank on October 29, 1987, Joe W. Warford, the Chapter 13 trustee on October, 30, 1987, Hawkeye Bank and Trust of Des Moines on November 6, 1987, and the Internal Revenue Service on November 113, 1987. At the close of the hearing the court ordered the debtor to amend the plan to satisfy the objection of Brenton National Bank by February 19, 1988. The debtor was further ordered to submit case and statutory authority on the issue of the amendment to the petition adding William G. Shirley as a debtor. The objection filed on behalf of Hawkeye Bank and Trust (Hawkeye) was taken under advisement on the documents submitted. The hearing on confirmation of plan was thereafter continued.

Background

The debtor filed a petition for relief under Chapter 13 on May 28, 1987. The debtor is employed as a nurse by the Shirley Medical Clinic, P.C. The debtor's schedules listed Hawkeye as a secured creditor holding a claim in the amount of $38,500.00. The debtor's amended Chapter 13 plan filed on October 6, 1987 does not include the claim of Hawkeye. The plan states in pertinent part:

> Hawkeye Bank & Trust Company: Shirley Medical Clinic, P.C. is a guarantor on this obligation and the accounts receivable are pledged as security. The creditor filed an action in Polk County District Court to have a receiver appointed and the matter was resolved by agreement between the parties; the clinic is making payments on the obligation and it does not now require being in the plan.

Hawkeye objected to the debtor's plan on November 6, 1987. Hawkeye asserts that the payments by the guarantor, Shirley Medical Clinic, P.C., do not relieve the debtor of the obligations on the debt and that arrangement for payment by the debtor should be contained in the plan in the event of a default by the guarantor. Hawkeye further asserts that the loan to the debtor was secured by means of fraud and the debt is therefore nondischargeable. The affidavit of Thomas B. Hildebrand, a commercial loan officer of Hawkeye, is attached to the objection. The affidavit states that the debtor prepared a personal financial statement that was materially false in order to obtain a loan from Hawkeye. The financial statement failed to detail the extent of liens

on property in which Hawkeye was given a security interest. The court shall address each aspect of Hawkeye's objection to the debtor's plan in turn.

DISCUSSION

The debtor's plan does not provide for payment of Hawkeye's claim for the reason that a guarantor of the obligation is currently making such payment. The proof of claim and attachments filed on behalf of Hawkeye clearly indicate that the debtor and William G. Shirley are the primary obligors on the debt. This court has no information concerning the agreement between the parties arising out of the state court action. Moreover this court has no information concerning the guarantor's ability to pay the obligation.

That the debtor's obligation to pay may be contingent upon non-payment by the guarantor does not detract from the status of the claim. Even contingent obligations are allowable and entitled to estimation under 11 U.S.C. section 502(c). See Matter of Fox, 64 B.R. 148, 153 (Bankr. N.D. Ohio 1986). Based on the evidence now before the court, the claim of Hawkeye is a secured claim to which the debtor has not objected. Accordingly the debt must be treated in the plan. If the debtor can establish that the guarantor is willing and able to satisfy the obligation, the plan must still contain provisions for payment in the event of default. The debtor shall be prepared to present evidence in this regard at the time of the continued hearing on

confirmation of the plan.

Hawkeye's assertion that its debt is nondischargeable is relevant to a determination of good faith under 11 U.S.C. section 1325(a)(3) as is the proposed payment of the debt under the plan. The provisions of Chapter 13 offer the debtor more liberal treatment than those of Chapter 7 which limit the dischargeability of certain debts incurred by fraud or misdealing. In re Brown, 56 B.R. 293, 295 (Bankr. N.D. Ill. 1985). 11 U.S.C. section 1328(a) provides for a discharge of all debts with two exceptions upon completion of all payments under the plan. [1] In exchange for this treatment the debtor must comply with section 1325(a)(3) which requires that "the plan has been proposed in good faith and not by any means forbidden by law."

In making a determination of good faith the court may consider various factors. The amount of the proposed payments is one factor. At this juncture, the debtor's plan proposes no payment to Hawkeye. That a proposed plan discharges a debt which is allegedly nondischargeable in a Chapter 7 proceeding is another of the several factors. In re Estus, 695 F.2d 311, 317 (8th Cir. 1982); In re Brown, 56 B.R. at 296; In re Boyd, 57 B.R. 410, 411-12 (Bankr. N.D. Iowa 1983). The failure to propose a substantial or meaningful effort to repay an obligation that would be

[1] 11 U.S.C. section 1328(b), commonly known as the "hardship discharge", is less generous. Any debt specified in 11 U.S.C. section 523(a) would not be dischargeable.

nondischargeable under Chapter 7 may indicate a lack of good faith. In re Kourtakis, 75 B.R. 183, 188 (Bankr. E.D. Mich. 1987); In re Boyd, 57 B.R. at 412.

Hawkeye has asserted that the loan to the debtor was secured by means of fraud. Essentially, Hawkeye contends that the debt would be nondischargeable pursuant to 11 U.S.C. section 523(a)(2)(B) which provides:

> A discharge under section 727, 1141, 1228(a), 1228(b) or 1328(h) of this title does not discharge an individual debtor from any debt--
>
> ...
>
> (2) for money, property, services, or an extension, renewal, or refinancing or credit, to the extent obtained by--
>
> ...
> (B) use of a statement in writing--
>
> (i) that is materially false;
>
> (ii) respecting the debtor's or an insider's financial condition;
>
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
>
> (i that the debtor caused to be made or published with intent to deceive;

The affidavit and personal financial statement attached to Hawkeye's objection purport to establish the first three

elements of section 523(a)(2)(B). The state of the record is insufficient to allow this court to make a determination as to reasonable reliance and intent to deceive. Accordingly, the parties shall be prepared to present evidence in this regard at the time of the continued hearing on confirmation of the plan.

WHEREFORE, based on the foregoing discussion the court hereby finds that the state of the record is insufficient to make a determination on the objection to plan filed on behalf of Hawkeye Bank and Trust.

THEREFORE, the objection to plan shall be continued for an evidentiary hearing on the matters raised by this court.

Signed and filed this 29th day of February, 1988.

LEE M. JACKWIG

CHIEF U.S. BANKRUPTCY JUDGE