UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of INDRU T. HINGORANI,aka Jerry Hingorani, and DIANNA SUE HINGORANI, fdba Jerry Hingo, Master Tailor, and The Executive Closet, Debtors.	Case No. 86-3354-C Chapter 7

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ORDER ON MOTION FOR NEW TRIAL AND MOTION FOR TAKING OF ADDITIONAL TESTIMONY, AMENDMENT OF FINDINGS OF FACTS AND CONCLUSIONS OF LAW

On March 18, 1988 the debtors filed a motion seeking a new trial and requesting the court to take additional testimony and amend its findings of fact and conclusions of law contained in the court's February 19, 1988 order on debtors' previous motion to reconsider. The debtors rely to Bankruptcy Rule 9023 which incorporates Federal Rule of Civil Procedure 59 in support of their motions and submit the affidavits of attorneys Nick and Lylea Critelli for the court's consideration.

Factual Background

On November 30, 1987 this court entered an order on the trustee's objection to debtors' claim of exempt property which found that additional evidence was necessary to determine whether the trust agreement at issue is an enforceable spendthrift trust under applicable nonbankruptcy law

and, accordingly, whether the trust fund is not property of the estate. Of central concern to the court was whether the beneficiary, Dianna Sue Hingorani, gave consideration for the conveyance upon a trust. Accordingly, the court continued the trustee's objection to exemptions for an evidentiary hearing.

On December 9, 1987 the debtors filed a motion to reconsider the above order. The debtors agreed to submit the settlement agreement entered between the parties to the state court action and stated that the agreement "will provide the court with the information it requires to make a final decision in this matter." The settlement agreement was received by the court on January 21, 1988.

On February 19, 1988 the court entered an order on the debtors' motion to reconsider. As was requested by the debtors the court reconsidered its November 30, 1987 order in light of the settlement agreement and without an evidentiary hearing. Upon consideration of the settlement agreement, however, the court concluded that the debtor had given consideration for the creation of the trust of which she is a beneficiary. Accordingly, the court ruled that the debtors' interest in the spendthrift trust was not enforceable under state law and thus not excluded from the property of the estate pursuant to 11 U.S.C. section 541(c)(2).

On March 18, 1988 the debtors filed the instant motions. In Division I the debtors contend that the court's February 19, 1988 order is based on error of fact and, therefore,

resulted in an error of law. The affidavit of attorneys Nick and Lylea Critelli are attached for the purpose of disclosing the factual background leading to the creation of the spendthrift trust. Division I asks the court to grant a new trial on the question of whether the trust is exempt or excluded from the estate. In Division II the debtors assert that without an opportunity to present additional testimony and obtain amended findings of facts and conclusions of law the debtors' ability to pursue an appeal will be prejudiced.

Analysis

Bankruptcy Rule 9023 incorporates Federal Rule of Civil Procedure 59 which provides in part:

> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

There are three possible grounds for a new trial or to alter or amend a judgment in a court-tried action: manifest error of law; manifest

error of fact; or newly discovered evidence. In re Mitchell, 70 B.R. 524, 525-26 (Bankr. N.D. Ill. 1987);

In re Crozier Bros., Inc., 60 B.R. 683, 688 (Bankr. S.D. N.Y. 1986). A motion based on manifest error of law or fact will not be granted except on a showing of some substantial reason. In re Crozier Bros., Inc., 60 B.R. at 688. Such a motion cannot be used to raise arguments that could and should have been made before the judgment issued, or to argue a case under a new legal theory. In re Mitchell, 70 B.R. at 526.

The debtors' assertion that the court's order is based on error of fact is not persuasive. The court's order found that the debtor gave consideration for the creation of the trust of which she is a beneficiary by dismissing her cause of action in state court. This finding is supported by legal authority, DeRousse v. Williams, 181 Iowa 379, 164 N.W.896 (1917); Restatement of the Law, Second, Trusts § 56 at pp. 326-27 (1959), as well as the facts presented by way of the settlement agreement. The affidavits of attorneys which set forth the factual background leading to the settlement and creation of the trust do not establish an error of fact or alter the conclusion reached by the court. The debtors chose to submit the settlement agreement to permit the court to make a final decision on the issue. They cannot now seek to raise new facts and arguments that could have been asserted before the entry of the order. Accordingly, the debtors' motion for new trial must be denied.

The authority for amending the court's findings or for making additional findings is contained in Bankruptcy Rule

7052(b) which incorporates Federal Rule of Civil Procedure 52(b) which-provides:

> (b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

Such a motion is intended to enable an appellate court to obtain a correct understanding of the facts determined by the trial court which resulted in the trial court's conclusions of law and its judgment. In re Crozier Bros., Inc., 60 B.R. at 689. It is not intended as a vehicle for securing a rehearing on the merits. "A party who failed to prove his strongest case is not entitled to a second opportunity by moving to amend a finding a fact and conclusion of law." Id. citing 9 C. Wright & A. Miller, Federal Practice and Procedure § 2582 at p. 722 (1985 ed.).

The debtors' motion for taking additional testimony, and for amending the findings of fact and conclusions of law is likewise unpersuasive in light of the above standards. The existing record is sufficient to enable an appellate court to obtain a correct understanding of the facts determined by this court which resulted in

the court's ruling. The debtor's motion seeks to supplement the
record which the

debtors previously agreed was sufficient to allow the court to make a final decision and to obtain a rehearing on the merits. Accordingly the debtors' motion for taking additional testimony and amending findings of fact and conclusions of law must be denied.

WHEREFORE, based on the foregoing analysis, the debtors have failed to demonstrate their entitlement to the post-order relief requested.

THEREFORE, the debtors' motion for new trial and motion for taking of additional testimony, amendment of findings of facts and conclusions of law is hereby denied.

Signed and filed this 7th day of April, 1988.

LEE M. JACKWIG

CHIEF U.S. BANKRUPTCY JUDGE