UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	:	
RICHARD V. WEIGEL and NORMA J. WEIGEL,	:	Case No. 90-979-C
Debtors.	:	Chapter 13

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RULING ON CREDITOR'S MOTIONS TO DISMISS AND FOR RELIEF FROM STAY

A hearing was held on June 4, 1990, on the creditor's motions for relief from stay and to dismiss. Present were trustee Joe Warford, Debtors' attorney Michael L. Jankins, and Creditor's attorney Michael P. Mallaney. At the conclusion of the hearing, the Court took the matter under advisement and now considers it fully submitted.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (G). The Court, upon review of the motions, Debtors' resistance, the briefs submitted and the arguments of counsel, now enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. On March 14, 1990, a Judgment For Possession was entered in the Iowa District Court for Warren County. Listed as plaintiff on the judgment was Creditor Home Plan Savings & Loan Association ("Home Plan"), and Debtors were listed as defendants.

2. Signed by Judge Goodhue, Debtors, Debtors' attorney and Home Plan's attorney, the judgment provided that the Debtors were in default on two notes owed to Home Plan. The current aggregate sum owed under both notes was $170,895.27. The judgment further provided that the nine pieces of equipment serving as collateral for the notes were valued at $65,000.00.

3. On April 10, 1990, Debtors filed a petition seeking Chapter 13 relief.

4. Home Plan filed a motion for relief from stay on April 11, 1990, which was resisted by Debtors.

5. Debtors filed their Chapter 13 statement and listed Home Plan as a Secured Creditor with a claim of $287,000.00. The statement specified that Debtors disputed the amount of this claim and admitted liability for only $120,000.00 of the debt.

6. On May 1, 1990, Home Plan filed a motion to dismiss Debtors' Chapter 13 petition. Home Plan's motion alleged Debtors had not filed their schedules, statements and plan in compliance with Fed.R.Bankr.P. 1007 and 3015.

7. Debtors filed a resistance to Home Plan's motion to dismiss on May 4, 1990. The resistance alleged Debtors had timely filed all necessary filings.

8. On June 4, 1990, Home Plan amended its motion to dismiss. The amendment alleged that Debtors had in excess of

$100,000.00 in noncontingent, liquidated unsecured debt and were ineligible for Chapter 13 relief.

DISCUSSION

Eligibility for Chapter 13 relief is governed by 11 U.S.C. §109(e) which provides in relevant part:

> Only an ... individual with regular income and such individual's spouse ... that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000 may be a debtor under chapter 13 of this title.

The Eighth Circuit recently decided that undersecured debt should be treated as unsecured debt for the purpose of determining Chapter 13 eligibility. Miller v. United States, 907 F.2d 80, 82 (8th Cir. 1990). The Miller court held courts are to examine the true value of collateral securing a debt when evaluating a debtor's Chapter 13 eligibility and the test of 11 U.S.C. §506(a) should be used to determine the character of debts for purposes of 11 U.S.C. §109(e). Id.

The Eighth Circuit declined to decide whether the applicability of the debt limitation is to be determined by a debtor's good faith filings or whether a factual issue could be raised as to the debtor's evaluation of his secured and unsecured debts and the property serving as security. Id. Of major concern with regard to the latter option is whether a case will have substantially progressed towards reorganization

before a formal determination of secured status and Chapter 13 eligibility will be made. Id. This Court finds it does not have to resolve the question left open by the Eighth Circuit because application of the doctrine of judicial estoppel to the filings contained in this court record reveals the debtors' unsecured debt exceeds $100,000.00.

The doctrine of judicial estoppel precludes a party from asserting inconsistent positions in separate legal proceedings. Judicial estoppel looks to the connection between the litigant and the judicial system, unlike equitable estoppel, which focuses on the relationship between the parties to prior litigation. In re Hoffman, 99 B.R. 929, 935 (N.D. Iowa 1989).

Judicial estoppel lies when a party, after assuming a certain position in a legal proceeding, attempts to assume a contrary position. Id. Judicial estoppel is invoked to prevent a party from "playing fast and loose" with the courts, and to protect the essential integrity of the judicial process. Id.

Judicial estoppel has been invoked in various bankruptcy court proceedings to prevent parties from adopting positions inconsistent with those they have taken in prior state court actions. See generally, Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208 (1st Cir. 1987); Allen v. Zurich Ins. Co., 667 F.2d 1162 (4th Cir. 1982); In re International

Club Enterprises, Inc., 109 B.R. 562 (Bankr. D.R.I. 1990); In re Kessel, 108 B.R. 281 (Bankr. D. Col. 1989). Judicial estoppel may apply to a stipulated agreement reached by parties and approved by a court in a subsequent minute order. See In re Haynes, 97 B.R. 1007, 1011-1012 (9th Cir. 1989). A court, on its own motion, may invoke the doctrine of judicial estoppel in an appropriate case. Matter of Cassidy, 892 F.2d 637, 641 (7th Cir. 1990).

The Eighth Circuit has indicated some reservations about the application of judicial estoppel. Total Petroleum, Inc. v. Davis, 822 F.2d 734, 737 n.6 (8th Cir. 1987). The court's main concern about the doctrine is its perceived conflict with the rule allowing parties to plead alternative legal theories. Id.

Since the Eighth Circuit rendered its decision in Total Petroleum at least two district courts within the circuit have proceeded to apply the doctrine of judicial estoppel. Pako Corp. v. Citytrust, 109 B.R. 368, 377 (D. Minn. 1989); Hoffman, 99 B.R. at 935; see also In re Air One, Inc., 75 B.R. 998, 1002 (Bankr. E.D. Mo. 1987) (noting the Eighth Circuit's reservations about the doctrine, court appeared to apply judicial estoppel while declining to label it as such). This Court similarly concludes that absent concerns regarding alternative pleading, application of judicial estoppel is not precluded.

Hearing on Home Plan's replevin action was scheduled for March 14, 1990. On March 13th, both parties approved the entry of a judgment for possession. Iowa district courts have the authority to enter consent judgments. McCarthy v. Iowa District Court, 386 N.W.2d 122, 126 (Iowa App. 1986); see also Iowa R.Civ.P. 226 ("clerk shall forthwith enter any judgment upon which all parties agree in open court, or by writing filed with the clerk").

A judgment by consent is, in substance, a contract of record made by the parties and approved by the court. World Teacher Seminar v. Iowa District Court, 406 N.W.2d 173, 176 (Iowa 1987); Timmons v. Holmes, 249 Iowa 888, 890, 89 N.W.2d 371, 372 (1958); see also McCarthy, 386 N.W.2d at 126 (judgments by consent are contractual in nature and are in effect, contracts of parties acknowledged in court); Iowa Water Pollution Control Comm'n v. Town of Paton, 207 N.W.2d 755, 760 (Iowa 1973) (same). While consent judgments are not judicial determinations of any litigated right, World Teacher Seminar, 406 N.W.2d at 176; Timmons, 249 Iowa at 890, 89 N.W.2d at 372, the judgments are, nevertheless, entered by sanction and order of a court exercising a judicial function and power, and therefore are not to be treated as mere contracts, but, to the contrary as adverse judgments. McCarthy, 386 N.W.2d at 126; Iowa Water Pollution Control Comm'n, 207 N.W.2d at 760.

"[I]t is well-settled that a judgment or decree, though entered by consent or agreement of the parties, is res adjudicata to the same extent as if entered after contest." City of Chariton v. J. C. Blunk Construction Co., 253 Iowa 805, 813, 112 N.W.2d 829, 833 (1962). A consent judgment has substantially the same effect as any other judgment and is equally conclusive as to matters adjudicated. Id. Once entered, a consent judgment has the binding effect of any other judgment. Van Donselaar v. Van Donselaar, 249 Iowa 504, 509, 87 N.W.2d 311, 314 (1958).

A judgment does not become a judgment by consent even though the parties have added their consent to an adjudication of the court. City of Chariton, 253 Iowa at 812, 112 N.W.2d at 833. An adjudication by a court, after due consideration and investigation and following a verdict or findings in an adversary proceeding, will not become a judgment by consent even though the parties have superadded their consent to the adjudication of the court. 49 C.J.S. Judgments §173 (1947).

While the introductory paragraphs to the state court judgment indicate the court heard evidence and arguments in an adversary proceeding, this court is convinced the judgment for possession was in fact a consent judgment. The judgment contains each party's signature below the caption "Approved as to Form and Consent." Each signature bears the date March 13, 1990, indicating consent to the judgment was given prior to

the time of the scheduled hearing. Furthermore, Debtor's post-hearing brief refers to the judgment as a "consent order" and clarifies that the creditor's action did not result in a trial or hearing because the parties signed off on the consent order prior to the time the court was to hold its trial. Any language in the judgment indicating a hearing was held and evidence taken was probably inadvertently included as part of a proposed judgment which would have been submitted to the court should the matter have resulted in an actual hearing and adjudication by the court.

The debtors in this case agreed to entry of a consent judgment which stipulated they owed Home Plan $170,895.27 on two promissory notes and that the equipment securing those notes was valued at $65,000.00. This judgment alone indicates the debtors had over $100,000.00 in unsecured debt. Nothing in Debtors' schedules indicates these notes were paid down between the time the consent judgment was entered on March 14, 1990, and the date they filed their Chapter 13 bankruptcy petition on April 10, 1990. Debtors are judicially estopped from denying in this Court that their obligations to Home Plan under those two notes exceeded $100,000.00 in unsecured debt. Furthermore, in their schedules Debtors admit the existence of an additional $24,590.51 of undisputed unsecured debt claimed by other creditors.

Since Debtors do not meet the eligibility requirements of

11 U.S.C. §109(e), it is appropriate to grant the Trustee's motion to dismiss. Our decision with regard to Home Plan's motion to dismiss renders moot its motion for relief from stay.

ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes sufficient reasons exist for granting the Trustee's motion to dismiss.

IT IS ACCORDINGLY ORDERED that Debtor's case is dismissed due to their ineligibility for Chapter 13 relief. Dismissal of this action renders moot Home Plan's motion for relief from stay.

LET JUDGMENT ENTER ACCORDINGLY.

Dated this 9th day of October, 1990.

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Russell J. Hill
U.S. Bankruptcy Judge