

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
2001 OCT -5 PM 4:24
U.S. BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:

Cynthia A. Andrews,

Debtor.

C/A No. 01-03532-W

JUDGMENT

Chapter 13

ENTERED
OCT 09 2001
V.L.D.

Based upon the Conclusions of Law as recited in the attached Order of the Court, the Court orders that the Seaboard Trust Credit Union savings account and the 1994 Ford Explorer are to be treated as part of Debtor's Chapter 13 estate for purposes of confirmation and orders that the vehicle is valued at \$4,900.00 and that, after deductions allowed by the Trustee, the value attributable to the vehicle to be included in the plan is \$2,700.00.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
October 5, 2001.

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

OCT 9 2001
via mail

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE *jgmt Index*

VANNA L. DANIEL

Deputy Clerk

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ORDER

Chapter 13

THIS MATTER comes before the Court for hearing on confirmation of the Chapter 13

Plan filed by Cynthia A. Andrews ("Debtor"). The Chapter 13 Trustee objects to confirmation unless the value of Debtor's three Seaboard Trust Credit Union bank accounts in existence at the time of the bankruptcy petition (\$9,531.01) less Debtor's exemptions is paid to creditors through the plan. Debtor agreed that the value of two of the accounts should be included in the plan but argued that the value of one account, a savings account ("savings account") worth \$3,529.71, which has been set aside by Debtor for payment of estimated income taxes, should not be paid through the plan for two reasons. First, Debtor alleges that the Chapter 7 Trustee in this case prior to its conversion to Chapter 13 abandoned the savings account. Debtor also argues that the Chapter 7 Trustee made a decision not to collect the savings account thus meeting the hypothetical liquidation test under 11 U.S.C. §1325(a)(4)¹; consequently, its value should not be included in the plan. Additionally, the Chapter 13 Trustee and Debtor dispute the valuation of Debtor's vehicle, a 1994 Ford Explorer as the Trustee values the vehicle at \$5150.00, less an exemption of \$1,200.00 and less costs to repair hail damage of \$1,000.00, for a total of \$2,950.00 equity in the vehicle and Debtor claims the vehicle has a value as of the confirmation hearing of

¹ Further references to the Bankruptcy Code shall be by section number only.

\$2,790.00, from which the same deductions should be made. In addition, Debtor also claims that the Chapter 7 Trustee abandoned the vehicle to Debtor because of the Chapter 7 Trustee's decision not to pursue the vehicle for liquidation. After hearing counsels' arguments, the Court makes the following conclusions of law.

I. Abandonment of Savings Account and Vehicle

Section 554(a) permits a trustee, after notice and a hearing, to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate. Federal Rule of Bankruptcy Procedure 6007 governs the procedure for abandonment. To abandon property, the trustee or debtor in possession shall give notice of a proposed abandonment "to the United States trustee, all creditors, indenture trustees and committees elected pursuant to §705 or appointed pursuant to §1102 of the Code." Fed. R. Bankr. P. 6007(a). After the trustee or debtor in possession provides notice, parties in interest have fifteen days to file an objection, and, if an objection is timely, the court will set a hearing to resolve the proposed abandonment. See id. If there are no objections, the court may dispense with a hearing, and a court order approving the abandonment is not necessary. See Lawrence P. King, 5 Collier on Bankruptcy ¶554.02[6] (15th ed. 2001). However, to abandon property of the estate, the trustee must follow the procedure set forth in Federal Rule of Bankruptcy Procedure 6007(a). See King, 5 Collier at ¶554.02[6]; see also Wissman v. Pittsburgh Nat'l Bank, 942 F.2d 867, 873 (4th Cir. 1991) (noting that a debtor's informal request to the Chapter 7 trustee to abandon a tort cause of action is insufficient to permit the debtor to pursue the cause of action and remanding the case to allow the debtor to give official notice of its request for abandonment pursuant to Federal Rule of Bankruptcy Procedure 6007(a)).

Debtor alleges the Chapter 7 Trustee either expressly abandoned the savings account and the vehicle or effectively abandoned them for purposes of §1325(a)(4) by electing not to pursue them for liquidation. The record of this case shows no separate notice of a proposed abandonment of this specific property and no court order approving the abandonment. The minute sheet demonstrating action taken by the Trustee at the §341 meeting does not indicate an abandonment of any property pursuant to the notice provisions contained in the notice of the commencement of the case. It is Debtor's burden to demonstrate an actual abandonment by the Chapter 7 Trustee, and she has failed to present evidence that the requirements of Federal Rule of Bankruptcy Procedure 6007 have been met.

Likewise, the Court is not convinced that the Chapter 7 Trustee's failure to liquidate the account or the vehicle before the case was converted is conclusive that the liquidation test pursuant to §1325(a)(4) is met. At the confirmation hearing, Debtor introduced a letter from an attorney for the Chapter 7 Trustee that requests the turnover of some property but does not mention the savings account or the vehicle. While Debtor argues that the letter stands as proof that the Chapter 7 Trustee was not going to collect this property, the Court cannot accept that conclusion. The letter does not waive the Trustee's right to demand, collect, and liquidate the subject property and therefore should not be read to bind the Chapter 13 Trustee or to conclude the Court's determination of §1325(a)(4) to the plan before it. Therefore, the Court rules that these properties were not abandoned and remain part of the bankruptcy estate and that their values should be included under the Chapter 13 Plan.

II. Valuation of Vehicle

The only evidence of value submitted by the Trustee and Debtor are valuations provided

by commonly accepted guides N.A.D.A. Official Used Car Guide and Kelley Blue Book. The Trustee and Debtor also use different points in time to value the vehicle and consequently reach different conclusions of the vehicle's value. The Court is persuaded that the N.A.D.A. guide is the more reliable authority in this instance. However, the Court declines to use the valuation as of July 2001, the date the case converted from Chapter 7 to Chapter 13. Instead, the Court will use N.A.D.A. figures from September 2001, the date of the confirmation hearing, as the date on which to value and compare what the unsecured creditors would receive under a Chapter 7 liquidation and what they would receive under the proposed Chapter 13 plan.

In choosing the date of the confirmation hearing as the date for performing the hypothetical liquidation test under §1325(a)(4), the Court recognizes a split of authority in determining when the “effective date of the plan” is for the purposes of the liquidation test. For example, in his treatise, Judge Lundin notes, “Without directly deciding the question, most best-interests-of-creditors test cases perform the hypothetical liquidation as of the date of the Chapter 13 petition.” 2 Keith M. Lundin, Chapter 13 Bankruptcy, §160.1 (3d ed. 2000). Illustrating this point, the court in In re Green interpreted the effective date of the plan as the date the petition was filed. See 169 B.R. 480, 482 (Bankr. S.D. Ga. 1994) (citing Hollytex Carpet Mills v. Tedford, 691 F.2d 392, 393 (8th Cir. 1982)).² This Court, however, believes the better practice is

² The Court is reluctant to rely on Hollytex, cited in King, 8 Collier at ¶1325.05[2][a], as representative of the “majority” approach that the effective date for purposes of the liquidation test is the date of the Chapter 13 petition. Although the Green Court relied on Hollytex for such a proposition, the Eighth Circuit, the author of Hollytex, seems hesitant to vouch for such an interpretation. Indeed, in 1987, five years after Hollytex, the Eighth Circuit entered Education Assistance Corporation v. Zellner, and, in its discussion of the best interests of creditors test, the court does not cite Hollytex but instead offers a citation from Collier for the proposition that the effective date of the plan could not be before the confirmation hearing. See 827 F.2d 1222, 1225 (8th Cir. 1987). A subsequent bankruptcy panel for the Eighth Circuit

to establish valuation for the purposes of the hypothetical liquidation test as of the date of the confirmation hearing, and the Court relies on practical concerns as the basis for this conclusion. First, although the date of the filing of the petition is the date when property of the estate is defined and when a Chapter 7 Trustee may be entitled to take control of estate property, the petition date is not the time at which he or she actually liquidates the estate, as evidenced in Debtor's present case. In addition, as pointed out by the court in In re Musil (a Chapter 12 case concerning §1225(a)(4) applied here by analogy), the effective date of the plan could not mean the date of the bankruptcy petition because "effective" means a quality or state of being operative, and a plan cannot be operative until confirmed. See 99 B.R. 448, 450 (Bankr. D. Kan. 1988). Along the same lines, the court in In re Novak reasoned that the plain language of §1225(a)(4) (again, identical to §1325(a)(4) and applied by analogy) indicates that the value comparison of the Chapter 7 hypothetical liquidation "must be determined no earlier than the date of the confirmation hearing and no later than the date set out in the plan itself." 252 B.R. 487, 491 (Bankr. D. N.D. 2000); see also Educ. Assistance Corp. v. Zellner, 827 F.2d 1222, 1224 (8th Cir. 1987) ("[T]he effective date of the plan cannot be antecedent to the confirmation hearing at which the issues raised by section 1325(a)(4) are heard by the court.").

Guided by this reasoning, the Court will perform the hypothetical liquidation test based on values from the date of the confirmation hearing, and, relying upon the September 2001 N.A.D.A., the Court concludes the vehicle is worth \$4,900.00 less Debtor's \$1,200.00 exemption

acknowledged the tension between Hollytex and Zellner and noted that a majority of Eighth Circuit cases follow the Zellner approach. See Forbes v. Forbes (In re Forbes), 215 B.R. 183, 189 (BAP 8th Cir. 1997). Moreover, a strict reading of Hollytex suggests that the court's holding may be limited to the issue of when exemptions are elected, a separate issue from when values are decided for the liquidation test.

and less \$1,000.00 costs to repair hail damage for a total of \$2,700.00.³

Therefore, it is

ORDERED that the Seaboard Trust Credit Union savings account and the 1994 Ford Explorer are to be treated as part of Debtor's Chapter 13 estate for purposes of confirmation.

IT IS FURTHER ORDERED that the vehicle is valued at \$4,900.00. After deductions allowed by the Trustee, the value attributable to the vehicle to be included in the plan is \$2,700.00.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
October 5, 2001.

³ The Court notes that other factors involved in the hypothetical liquidation test (deductions for the Trustee's commission, prior liens, and costs to liquidate the vehicle) could be included in the computation and alter the total; however, the Court considered only the valuation factors raised by the parties.

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

OCT 9 2001

Seaboard Trust
DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE, jgmt index
VANNA L. DANIEL via mail
Deputy Clerk