UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Northern Division

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| In re: | Bankr. Case No. 87-10052 |
| HERBERT WARREN ALLEN, III<br>Social Security No. 503-46-6617 | Chapter 12 |
| and | MEMORANDUM OF DECISION RE: EUREKA STATE BANK'S AND FIRST NATIONAL BANK'S MOTIONS TO DETERMINE UNSECURED CLAIMS |
| DONNA MAE ALLEN<br>Social Security No. 504-48-2131 | |
| Debtors. | |

The matters before the Court are the two Motions to Determine Unsecured Claim Status filed by Eureka State Bank and the First National Bank of Eden. These are core proceedings under 28 U.S.C. § 157(b)(2). This Memorandum Decision and accompanying Order shall constitute findings and conclusions under F.R.Bankr.P. 7052. As set forth below more fully, the Court concludes that Eureka State Bank and the First National Bank of Eden are no longer unsecured claimholders who are entitled to receive disposable income payments.

I.

On October 20, 1987, Debtors filed an amended plan.[1] In the first part of the plan where claimholders are listed, two *un*secured claimholders were listed: Richard Bjerk and Hoysler Associates. Their claims totaled $61,637.84. The amended plan further listed First National Bank of Eden and Eureka State Bank as *under*secured claimholders for a total of $154,612.00.

In the second party of the amended plan that sets forth the treatment of claims, the amended plan stated how the Eden Bank's

[1] The plan was dated July 23, 1987.

secured claim would be repaid and when the Bank's lien would be released. This portion of the plan did not recognize any under or unsecured claim for the Eden Bank.

This part of the amended plan further stated that Debtors and the Eureka State Bank had not reached an agreement on the value, length of payments, and interest rate but stated they would do so later.

Finally, the treatment portion of the amended plan for "Unsecured Creditors / Undersecured Creditors" stated unsecured claimholders Richard Bjerk and Hoysler Associates would not receive a dividend. That paragraph further acknowledged that Eureka State Bank may have an undersecured claim but stated the amount, if any, had not been determined, yet. The next paragraph stated Debtors would devote disposable income to under and unsecured claims.

Debtors' plan was confirmed by Order entered November 20, 1987 under the proviso that Debtors and Eureka State Bank would continue to negotiate treatment of the Bank's claim. The confirmation order did not alter the plan. No one appealed the confirmation order.

The plan was modified by a stipulation between Debtors and Eureka State Bank that was approved December 27, 1988. The stipulation did not state that the Bank had an under or unsecured claim or that any unsecured portion of the Bank's claim would be paid from disposable income. Both the stipulation and order approving it stated that the stipulation would not adversely effect any other creditor in the plan.

Debtors filed their final report and account on November 15,

1991. Objections to discharge were filed by the Farmers Home Administration (now the Farm Service Agency) and Trustee A. Thomas Pokela. Trustee Pokela objected on the grounds that disposable income may exist. Hearings on the objections were continued several times to allow the probate of Debtor Herbert Allen's mother's estate. When inactivity in the probate estate continued to delay the administration of the bankruptcy estate, Trustee Pokela filed a Motion for Removal of Debtor as Debtor-in-possession. The Trustee's motion and Debtors' discharge were held in abeyance for almost a year as the probate of Mrs. Allen's estate continued.

An evidentiary hearing on Debtors' discharge and the Trustee's Motion for Removal of Debtor as Debtor-in-possession was held August 23, 1994 and a decision was entered January 13, 1995. The Court held that the real property that Debtors had inherited from Mrs. Allen did not constitute disposable income but must be recognized in a new best interest of creditors test under a modified plan. In reaching this decision, this Court also concluded that the only unsecured creditors were Richard Bjerk and Hoysler Associates. Based on the earlier stipulation and a statement by Debtor's counsel, the Court found that Eureka State Bank had waived its unsecured claim in exchange for a larger secured claim. The January 13, 1995 decision did not address whether the First National Bank of Eden retained an unsecured claim. In its order, the Court directed Debtors to file amended property schedules and it set a deadline for filing a motion to

modify the confirmed plan. The memorandum of decision and order were served on counsel for Eureka State Bank and the Eden Bank although neither bank had participated directly in the disposable income hearing. No one requested a new hearing nor filed an appeal.

Debtors' counsel reported that Debtor Herbert Allen passed away January 27, 1995.

Debtor Donna Allen filed an amended schedule A on January 31, 1995 to include the real property she and her late husband had inherited from his mother. Debtor, however, did not file a motion to modify her plan.

John S. Lovald was appointed to replace Trustee Pokela on April 5, 1995. At a status hearing on May 2, 1995, Trustee Lovald advised the Court that he would file the necessary motion to modify Debtor's confirmed plan. That motion was filed June 2, 1995. Therein, Trustee Lovald sought modification of the plan and its liquidation analysis to include the real property Debtors had inherited. Based on the value of the inheritance and the encumbrances against it, Trustee Lovald said the property had a liquidation value of $143,071.00 that should be recognized under the best interest of creditors test. Trustee Lovald identified Richard Bjerk and Hostler Associates as the two remaining unsecured creditors and he proposed a payment schedule.

Eureka State Bank and the First National Bank of Eden filed a joint objection on June 28, 1995. Eureka State Bank claimed it had an unsecured claim of $125,000.00. The First National Bank of Eden

claimed it had an unsecured claim of $32,002.95. Both argued that they had not relinquished their unsecured claims during negotiations for plan treatment. However, they acknowledged they had not specifically negotiated and stated the treatment of their respective unsecured claims in the plan or subsequent stipulation. Counsel for the banks advised the Court that he had told Trustee Pokela back on May 17, 1993 that the banks still had unsecured claims.

On July 3, 1995, Debtor objected to the modification and proposed corrections to some numbers used by Trustee Lovald. On July 3, 1995, Debtor also responded to the banks' objection. She stated that the banks' counsel had notice of the earlier disposable income hearing and, therefore, that the banks are bound by the Court's finding that only two unsecured creditors remain.

On July 25, 1995, each bank filed a Motion to Determine Unsecured Status. Therein, they asked for recognition of their respective unsecured claims in a modified plan.

By letter dated July 25, 1995, Trustee Lovald advised the Court that the Banks' motions should be determined before the plan is modified. He indicated that unsecured claims could not be paid in full if Eureka State Bank's unsecured claim was recognized. Trustee Lovald also stated that a new appraisal of the land may be needed. He also said a correction to the post-petition accounts payable figure may be needed.

A hearing on the Trustee's Motion to Modify and the bank's motions regarding their unsecured claims was held August 28, 1995.

Appearances included Curt R. Ewinger and Philip W. Morgan for Debtor, Trustee John S. Lovald, and Carlyle E. Richards for the banks.

Attorney Richards acknowledged that the plan did not include an unsecured claim for the Eden Bank. He also acknowledged that the stipulation did not state that Eureka State Bank retained an unsecured claim. Nonetheless, he argued each bank had retained its unsecured claim. Further, he argued that the banks were not bound by the Court's January 13, 1995 because the issue of their unsecured claims was not before the Court specifically and because the banks had not participated in the matter. Attorney Richards advised the Court that he had no testimony to present on the issue but stated the banks relied on the record and the transcripts from the confirmation hearing on July 23, 1987 and the disposable income hearing on August 23, 1994. Attorney Ewinger argued the banks were bound by the January 13, 1995 decision. The Court took the matter under advisement.

II.

Under 11 U.S.C. § 1227(a), the confirmation of a Chapter 12 plan binds the debtor and each creditor, "whether or not the claim of such creditor . . . is provided for by the plan, and whether or not such creditor . . . has objected to, has accepted, or has rejected the plan." The order confirming the plan is final and subject to appeal because it leaves the Bankruptcy Court with essentially nothing more to do but execute the order, a delay in obtaining review would prevent an aggrieved party from obtaining

effective relief, and a later reversal may require recommencement of the entire proceeding. *See* 28 U.S.C. § 158(a)(1); *Lewis v. United States*, 992 F.2d 767 (8th Cir. 1993).

III.

Assuming that the banks are not bound by the Court's January 15, 1995 findings because they did not participate in the disposable income hearing, the Court still can find nothing in the plan or stipulation that retains an unsecured claim for them. The plan listed only Richard Bjerk and Hoysler Associates as unsecured claim holders in the claim treatment section. Nothing was mentioned at the confirmation hearing about the banks' unsecured claims. Finally, while the amended plan acknowledged that Eureka State Bank might have an undersecured claim, an unsecured claim was omitted from the parties' subsequent stipulation. Consequently, the Court can find no basis on which to conclude that either bank retained its unsecured claim. To make that finding now would be contrary to the plan. Most important, to find that the banks retained undisclosed, unsecured claims would greatly prejudice Debtors and unsecured claimholders Richard Bjerk and Hoysler Associates, who relied on the stated terms in Debtors' confirmed plan and the stipulation between Debtor and Eureka State Bank. Finally, the confirmation order and subsequent order approving the stipulation were binding on all parties. Neither bank appealed these orders on the grounds that their unsecured claim had been omitted.

An order will be entered denying the banks' motion to

determine their unsecured claims. Trustee Lovald shall advise the Court by letter whether he intends to file an amended motion to modify that addresses some of the problems he outlined in his July 25, 1995 letter to the Court.

Dated this 30th day of October, 1995.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: _____
Deputy Clerk

(SEAL)

UNITED STATES BANKRUPTCY COURT
SEAL

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

OCT 30 1995

Clerk
U.S. Bankruptcy Court, District of S.D.

CERTIFICATE OF SERVICE
I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to those creditors and other parties in interest identified on the attached service list.
U.S. Bankruptcy Clerk
District of South Dakota
By: _____
Date: 10-30-95