UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:	) Bankr. No. 01-50397
	) Chapter 7
WILLIAM G. BARNES	)
Soc. Sec. No. 477-16-8549	) DECISION RE: TRUSTEE'S
	) OBJECTION TO CLAIM NO. 4
Debtor.	)
	)

The matter before the Court is Trustee Dennis C. Whetzal's objection to a proof of claim (number 4) filed by Gail Sohler and St. Onge Livestock Company, Ltd. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision and accompanying Order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, the Court concludes that the Trustee's objection to the claim will be sustained.

I.

William G. Barnes ("Debtor") filed a Chapter 7 petition. Creditor Gail Sohler[1] filed a proof of claim for $187,172.46.[2] Sohler described the claim as an unsecured claim incurred between

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[1] The proof of claim indicated it was filed by "Gail Sohler dba St. Onge Livestock Co., LTD." Though Sohler may be the majority or sole shareholder in St. Onge Livestock Company, Ltd., the corporation is a separate legal entity and is not merely a business pseudonym for Sohler as the claim would suggest. Accordingly, while this decision will refer to the claim holder as Gail Sohler, the Court takes no position on whether Sohler or St. Onge Livestock Company, Ltd., actually owns the claim.

[2] Sohler filed another proof of claim, number 3, which was for an unsecured claim for $80,002.06. Trustee Whetzal has not objected to that claim.

1994 and 2001 for "Partnership Business Losses."

Dennis C. Whetzal, the case trustee, objected to Sohler's claim because his investigation revealed that Debtor had been Sohler's employee but never his partner. Sohler responded to the Trustee's objection and stated that his partnership with Debtor was based only on a handshake, not on any paper work.

At the hearing held June 3, 2003, Debtor testified that he had been Sohler's employee at the St. Onge, South Dakota, livestock market and later at the Bowman, North Dakota, livestock market. Debtor said he managed the Bowman livestock market for Sohler from 1994 until 2001, when the business there ceased. Debtor acknowledged that he had encouraged Sohler to lease and operate the livestock market in Bowman, which Sohler agreed to do. Debtor said he only received wages for his work in Bowman, that he never signed any documents establishing a partnership with Sohler to operate the Bowman livestock market, and that he never received or filed any federal tax documents indicating he had a partnership interest in the Bowman livestock market.

Debtor further testified that he had previously had some joint business ventures with Sohler involving a locker plant in 1992 and livestock in 1994, but he said he had no other such deals or partnerships with Sohler after 1994.

Debtor acknowledged that his schedule of liabilities included an unsecured claim by Sohler for $176,543.81. He stated that Sohler's accountant had told him that he owed Sohler this money. Debtor stated that he included the claim in his bankruptcy schedules because his attorney had advised him to do so.

Sohler testified that he agreed to operate the Bowman livestock market only with the understanding that it was a partnership effort between he and Debtor and that Debtor would be the managing partner. Sohler stated that the Bowman livestock market was never profitable but that he continued to operate it for longer than he thought wise because Debtor was confident that he could turn the business around.

Sohler testified that he and Debtor had an oral understanding that they would split any profits or losses from the Bowman livestock market. Sohler acknowledged that formal partnership papers were never prepared, that the partnership never maintained a bank account, that the Bowman livestock market was treated as a division of the incorporated St. Onge livestock market for accounting and tax purposes, and, to the best of his knowledge, that a partnership was never reflected in any tax documents that he filed or that he gave to Debtor. Sohler further acknowledged that only he or the incorporated St. Onge livestock market, not Debtor, used for tax purposes some of the net losses that the Bowman

livestock market generated. Sohler also acknowledged that only he, not Debtor, ever took a draw from the income the Bowman livestock market generated and that Debtor only received wages for his work there.

Sohler testified that formal partnership documents were never created because Debtor was prohibited by the federal Packers and Stockyards Act, or its enforcement entity, from holding an ownership interest in a livestock market and because Debtor could not be bonded. Sohler, who deemed himself an expert on the Packers and Stockyards Act, said the prohibition arose from Debtor's prior relationship with another livestock market owner who was found guilty of criminal charges related to the operation of the market. Sohler had no documentation to support this claimed prohibition.

Sohler did not have any documentary evidence that he had a partnership with Debtor in the Bowman livestock market. He did, however, produce copies of checks from two other business ventures that he had with Debtor. One set of checks, one to Sohler and one to Debtor for equal sums, was dated March 10, 1992. Debtor's check indicated it was for the "Olson cow deal." The second set of checks, again one to Sohler and one to Debtor for equal sums, was dated April 15, 1994, but there was no notation of them regarding their purpose. Sohler thought this money might have come from a sheep and wool transaction that he and Debtor had made.

Debtor testified that Sohler had told him and other employees that if they worked hard, they could someday be Sohler's partner. He said Sohler never made him a partner, though. Sohler acknowledged making the statement but said it was meant only for other employees at the St. Onge livestock market, not Debtor.

Sohler's accountant, Robert Burbach, testified at trial that Sohler did not have a written agreement with Debtor establishing the operation of the Bowman livestock market as a partnership. He confirmed that for accounting and tax purposes the Bowman livestock market was treated as a division of the incorporated St. Onge livestock market, which Sohler solely owned. He said Debtor was not able to use for tax purposes any of the net losses the Bowman livestock market generated because he (Debtor) had not "paid in," apparently meaning that Debtor had not made a capital contribution to the business entity. Burbach also confirmed that only Sohler had taken a draw from the Bowman livestock market's income and that Debtor had received only wages for his manager services there.

II.

Proofs of claim. A proof of claim filed in a bankruptcy proceeding constitutes *prima facie* evidence of its validity and amount, Fed.R.Bankr.P. 3001(f), and the claim is deemed allowed when timely filed unless a party in interest objects. 11 U.S.C. § 502(a); *Brown v. I.R.S. (In re Brown)*, 82 F.3d 801, 805 (8th Cir.

1996)(quoting therein *In re Hemingway Transport, Inc.*, 993 F.2d 915, 925 (1st Cir. 1993)). If an objection to a claim is filed, the Court must hold a hearing to determine the amount of the claim and also to determine whether the claim is allowable.

The objector has the initial burden of overcoming, with substantial evidence, the *prima facie* evidence of the proof of claim itself. *Brown*, 82 F.3d at 805; *McDaniel v. Riverside County Department of Child Support Services (In re McDaniel)*, 264 B.R. 531, 533 (B.A.P. 8th Cir. 2001). Once that burden is met, the claim holder, who bears the ultimate burden of persuasion, must go forward to present evidence substantiating his claim. *Brown*, 82 F.3d at 805 (quoted in *Waterman v. Ditto (In re Waterman)*, 248 B.R. 567, 570 (B.A.P. 8th Cir. 2000)). As to the weight of evidence and the burden of persuasion, the claimant must satisfy the requirements of any nonbankruptcy law that originally governed the claim. *In re Sendmygift.com, Inc.*, 280 B.R. 667, 673-74 (Bankr. D.Minn 2002)(citing *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15 (2000)).

Formation of a partnership. Unless there is overriding federal law, a bankruptcy court looks to state law to determine the existence and magnitude of a valid claim. *Exec Tech Partners v. Resolution Trust Corp. (In re Exec Tech Partners)*, 107 F.3d 677, 680 (8th Cir. 1997). Neither party, however, presented evidence or

argument on whether the laws of South Dakota, where Sohler resided, or North Dakota, where the Bowman livestock market was located, applied when determining whether Sohler and Debtor had formed a partnership to operate the Bowman livestock market. Fortunately, the states' laws in 1994, when Sohler claimed the partnership was formed, were similar. Under S.D.C.L. § 48-1-2, a partnership is "an association of two or more persons to carry on as co-owners a business for profit[.]" In determining whether a partnership exists, the South Dakota Code directs that the sharing of profits, not gross proceeds, is *prima facie* evidence that a person is a partner in a business unless the profits received were in payment of a debt, wages or rent, an annuity, interest on a loan, or consideration for the sale of the good will of a business or other property. S.D.C.L. §§ 48-1-4, -5, -6, -7, and -8. Under North Dakota law in 1994, these provisions were essentially the same. N.D. Cent. Code §§ 45-05-05 and -06. The South Dakota Supreme Court has further stated,

> There is no arbitrary test for determining the existence of a partnership; therefore, each case is governed by its individual facts and the existence of the relationship is a question for the trier of fact, except when the evidence is conclusive. *Widdoss v. Donahue*, 331 N.W.2d 831 (S.D.1983); *Munce v. Munce*, 77 S.D. 594, 96 N.W.2d 661 (1959). The existence and scope of a partnership may

> be evidenced by a written or an oral agreement, or implied by conduct of the parties. *Lewis v. Gallemore*, 173 Neb. 211, 113 N.W.2d 54 (1962); *Gangl v. Gangl*, 281 N.W.2d 574 (N.D.1979).

Temple v. Temple, 365 N.W.2d 561, 566 (S.D. 1985).

III.

This matter has been one of the most spurious proceedings of recent memory for the undersigned. The Court is incredulous that this claim was filed at all. There is absolutely no credible evidence that Debtor and Sohler operated the Bowman livestock market as a partnership. There was no sharing of profits to establish *prima facie* evidence of a partnership. There was no written partnership agreement. There was no conduct by either party that implied a partnership existed. Though Sohler testified he and Debtor had an oral partnership agreement, there was no other evidence to support Sohler's testimony. In fact, virtually all the other evidence presented, including Debtor's testimony and the tax and accounting records (or lack thereof) for the Bowman livestock market, indicate a partnership did *not* exist. That Debtor and Sohler had earlier joint livestock-related or small business ventures was no evidence that they had another of a different nature and magnitude. The checks Sohler presented were merely evidence of those business transactions. Likewise, that Debtor included this claim on his schedules is no evidence that the claim

is valid. In the context of a bankruptcy case, it only means that Debtor complied with the requirements set forth on the official form to list "all entities holding unsecured claims without priority" and to mark them, if appropriate, as contingent, unliquidated, or disputed, which Debtor did. He declared Sohler's claim to be all three: contingent, unliquidated, and disputed. Moreover, though in the ordinary course of business a voluntarily acknowledgment of a debt may imply a promise to pay it,

> [n]o such inference can be drawn when the very purpose of listing the debt, as in a bankruptcy proceeding, is to secure the discharge of that very debt.

Biggs v. Mays, 125 F.2d 693, 697-98 (8th Cir. 1942)(cite therein); *see The Cadle Co. v. King (In re King)*, 272 B.R. 281, 299 (Bankr. N.D. Okla. 2002)(discussing a debtor's duty to list all claims on their schedules). Accordingly, the Court concludes that no partnership between Debtor and Sohler existed for running the Bowman livestock market and, thus, Sohler has no claim against Debtor's bankruptcy estate for any losses that he, Sohler, incurred while he operated the Bowman livestock market.

Even if Debtor and Sohler had a "handshake" partnership that could be established by sufficient evidence, Sohler's claim arising from that partnership would, at best,[3] be subordinated to all other

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[3] Section 510(c)(1) applies only to the subordination of *allowed* claims. 11 U.S.C. § 510(c)(1). The Code section "is silent with regard to whether a claim may be disallowed on

creditors' claims. 11 U.S.C. § 510(c)(1); *BankWest, Inc. v. United States*, 102 B.R. 738, 741 (D.S.D. 1989)(to equitably subordinate a claim, the Court must find that the claimant engaged in inequitable conduct, the misconduct must have conferred an unfair advantage on the claimant or benefitted him to the detriment of other creditors, and the subordination must be consistent with other Bankruptcy Code provisions)(cite therein); *Pokela v. Red Owl Stores, Inc. (In re Dakota Country Store Foods, Inc.)*, 107 B.R. 977, 994-95 (Bankr. D.S.D. 1989). An alleged partnership that was deliberately hidden from federal stockyards regulators, deliberately hidden from the Internal Revenue Service, and intentionally masked as a division of the incorporated St. Onge market would not be validated by this Court through this bankruptcy proceeding. This is especially true where only Sohler took a draw from proceeds that the Bowman livestock market generated and where only he (or the incorporated St. Onge livestock market that he owned) benefitted on federal taxes from the net losses that the Bowman livestock market generated. Debtor, and in turn his creditors, received neither of

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equitable principles...." *In re Outdoor Sports Headquarters, Inc.*, 168 B.R. 177, 181 (Bankr. S.D. Ohio 1994). The legislative history for § 510(b), referencing *Pepper v. Litton*, 308 U.S. 295 (1939), provides that this Code section is not intended to "preclude a bankruptcy court from completely disallowing a claim in appropriate circumstances." H.R.Rep.No. 595, 95th Cong., 2nd Sess. 359 (1977), U.S.Code Cong. & Admin.News 1978, pp. 5787, 6315 (cited in *Outdoor Sports Headquarters*, 168 B.R. at 181-82).

these benefits. *Compare In re Wegener*, 186 B.R. 692 (Bankr. D. Neb. 1995)(claim for gambling debt would be recognized because it arose from a legal gambling transaction and because the claim did not affront public policy).

An order disallowing Sohler's claim no. 4 will be entered.

Dated this 11th day of July, 2003.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:

Charles L. Nail, Jr., Clerk

By: Deputy Clerk

(SEAL)

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

JUL 11 2003

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

JUL 11 2003

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
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