

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:) Bankr. Case No. 93-40002
) Chapter 13
JOANNE HEIKES)
Social Security No. 503-32-0009) MEMORANDUM OF DECISION RE:
) MOTION TO SHOW CAUSE FOR
Debtor.) VIOLATION OF CONFIRMED PLAN
)

The matter before the Court is the Motion to Show Cause for Violation of Confirmed Plan filed by Debtor on October 11, 1994, and the responses thereto filed by Russell Heikes on December 8, 1994. The matter was submitted to the Court on briefs. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of 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 Russell Heikes is bound by Debtor's confirmed plan for all debts that still existed as of Debtor's petition date.

I.

Debtor Joanne Heikes filed *pro se* a Chapter 13 petition on January 4, 1993.¹ The Bankruptcy Court Clerk served notice of the case; the date, time and location of the meeting of creditors; and the date, time, and place of the confirmation hearing to all parties listed on Debtor's mailing list of creditors. This mailing

¹ Debtor has had several bankruptcy cases. The first of record in this District was a Chapter 12 filed on March 27, 1987. That case was converted to a Chapter 7 on August 18, 1987 and a discharge was entered December 16, 1987. Debtor filed a Chapter 13 on October 05, 1990. That case was dismissed August 30, 1991. Debtor filed a third Chapter 13 petition on September 17, 1991. That case was dismissed on December 4, 1992.

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list included Russell Heikes at R.R. 1, Vermillion, South Dakota 57069. The notice also stated that creditors needed to file a proof of claim to share in any payment from the estate and that the deadline for filing a proof of claim was May 27, 1993.

Debtor filed her schedules and statement of financial affairs on January 25, 1993. Included on her schedule of creditors holding secured claims was Russ Heikes at R.R. 2, Box 167, Vermillion, South Dakota 57069. Debtor stated on her schedules that Russ Heikes had a claim for a personal loan secured by jewelry. She stated that the value of the secured property was \$1,500.00 and that the "amount of [the] claim without deducting [the] value of [the] collateral" was \$1,500.00 but that the "unsecured portion, if any" was \$2,000.00.

Russell Heikes did not file a proof of claim by the May 27, 1993 deadline. Debtor did not file a proof of claim on Russell Heikes' behalf within thirty days of May 27, 1993 as provided by F.R.Bankr.P. 3004.²

Debtor filed her plan on March 11, 1993. The plan provided that Russ Heikes was a secured claim holder. The treatment of his claim as stated in the plan was:

This creditor holds a secured claim of \$1,500.00. This claim is secured by debtor's jewelry, silver, quilts, and buttons. Debtor proposes to pay this claim

² Debtor filed a proof of claim on Russell Heikes' behalf on April 3, 1995. The filing, however, was late under F.R.Bankr.P. 3004 and does not affect this decision. Pursuant to the Court's direction, the Clerk will still comply with Rule 3004 by serving a notice of the filing on Russell Heikes, Debtor, and Trustee A. Thomas Pokela.

by making ten (10) equal semi-annual payments of \$150.00. The first semi-annual payment shall be made on September 10, 1993 and each six (6) months thereafter until the claim is fully paid. Request items be delivered in hand to trustee for safe-keeping. After this claim is paid, the collateral will be surrendered immediately to the debtor. The debtor retains the right to prepay this claim at any time. This claim shall be paid through the Chapter 13 Trustee.

Payments through the trustee, including those to Russell Heikes, were to commence September 10, 1993. Debtor filed a Notice of Continued First Meeting of Creditors and Confirmation Hearing on March 24, 1993. The Notice stated that the confirmation hearing would be held May 5, 1993, and that the last day to file an objection was April 30, 1993. Debtor filed with the Notice a certificate of mailing that stated she had served the Notice and her plan on "all affected parties."

Several objections to the plan were filed. Russell Heikes did not file an objection. The confirmation hearing was held May 5, 1993. By Order entered June 14, 1993, Debtor's plan was confirmed.

On October 11, 1994, Debtor filed a MOTION TO SHOW CAUSE WHY RUSSELL HEIKES, A PLAN CREDITOR, SHOULD NOT BE HELD IN CONTEMPT OF COURT FOR VIOLATING THE CONFIRMED PLAN.³ Therein, Debtor stated that Russell Heikes is her brother, that he lent her money during the past several years and took personal property as security, that pursuant to written agreements the secured jewelry was to be placed in a safe deposit box, that he did not object to the plan, and that he

³ The pleading actually was captioned CERTIFICATE OF SERVICE OF MOTION TO SHOW CAUSE WHY RUSSELL HEIKES, A PLAN CREDITOR, SHOULD NOT BE HELD IN CONTEMPT OF COURT FOR VIOLATING THE CONFIRMED PLAN. The contents indicate that it is a motion, however, not a certificate of service.

has refused a \$150.00 plan payment from the Trustee. According to copies of correspondence attached to Debtor's Motion, Russell Heikes acknowledged that he lent Debtor money and that he took jewelry as security but Russell Heikes further stated that Debtor defaulted on those loans and he now has ownership of the secured goods.

Russell Heikes filed an objection to Debtor's Motion to Show Cause on December 8, 1994 and stated that he is not a creditor in this case because Debtor no longer owes him any money or property. He concedes that Debtor borrowed money from him and that he took jewelry as security but he states the time for her to redeem the property expired before the current Chapter 13 was filed. He says written agreements were executed in 1988 and 1989. He also says that dismissal of Debtor's previous Chapter 13 case re-vested the secured property, which includes family heirlooms, with him. With the Objection, Russell Heikes filed a lengthy affidavit. He states therein that his position is based on three written agreements attached to the Objection. [No agreements were attached to the affidavit filed with the Court.] The affidavit includes a litany of personal problems between Debtor and Russell Heikes and his wife, in addition to a recitation of his belief that he has title to the secured property. Russell Heikes acknowledges in his affidavit that he did not file a proof of claim nor object timely to Debtor's plan. He also acknowledges that he returned the \$150.00 plan payment sent to him by Trustee Pokela. He finally states, presuming he is a plan creditor, that the \$150.00 payment

was late and that he has not received other payments timely.

A hearing on the Motion to Show Cause was not held promptly. The Court first had to resolve a conflict of interest question regarding Russell Heikes' attorney raised by Debtor and a jurisdiction question regarding the Court's contempt powers raised by Russell Heikes. Jurisdiction was found and on January 30, 1995, the Court ordered the parties to file briefs regarding Debtor's Motion to Show Cause. The parties were directed to specifically address whether Debtor's confirmed plan is binding on a creditor who did not file a proof of claim.

Debtor argues Russell Heikes had a claim against her estate as defined by 11 U.S.C. § 101(5) and that Russell Heikes is bound by the confirmed plan pursuant to 11 U.S.C. § 1327(a). Russell Heikes argues that the written agreements between the parties were "sales" contracts that divested Debtor of title to the property when she failed to pay him the stated sums by the due dates.

To her brief, Debtor attached several written agreements between her and her brother that may be summarized as follows:

1. October 10, 1988: "In lieu of [a] loan of \$530.00," Debtor "left" with Russell Heikes a ring. The loan was to be paid within two years of October 10, 1988. The ring was to be kept in Russell Heikes' safe deposit box. The agreement was signed by both parties.
2. November 18, 1988: "In lieu of a loan of \$500.00," Debtor "left" with Russell Heikes a ring. The loan was to be paid within one year of November 18, 1988, "at which time the ring will be returned to JoAnne Heikes." The ring was to be kept in Russell Heikes' safe deposit box. The agreement was signed by both parties.

3. July 7, 1989: "On this date Russ loaned me \$200.00 on my Hamilton diamond watch. I have one year to reclaim for \$200.00." The agreement was signed by both parties.

4. April 19, 1992: Debtor "left" with Russell Heikes some silverware in a wooden box to be "held in trust by Russ Heikes as security on a loan of \$150.00 . . . for a period of six months. Can be reclaimed by JoAnne Heikes anytime by repaying Russ Heikes \$150.00." The agreement was signed by both parties. Several lines above their signatures were crossed out.

5. Undated note signed only by Russell Heikes: "In exchange for \$215.00, I'm keeping until such time a [sic] blue & white ½ diamond quilt is wanted back. [Signature.] Same (\$200.00) on patchwork wheel [sic?] quilt. [Signature.] \$100.00 on pi[...] basket quilt. [Signature]."

The funds Debtor received from Russell Heikes under these agreements totaled \$1,895.00.

Attached to his brief, Russell Heikes had the same July 17, 1989, the October 10, 1988, and the November 18, 1988 written agreements.

On April 20, 1995, counsel for Debtor filed a letter that corrected a date set forth in Russell Heikes' brief.

II.

Determining Whether a Party Holds a Claim. The Bankruptcy Code defines a claim as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured" or a right to an equitable remedy for a breach of performance. 11 U.S.C. § 101(5). By this language, Congress intended to adopt the broadest possible definition of "claim." *Johnson v. Home State Bank*, 111 S.Ct. 2150,

2154 (1991) (cites therein). A claim may be considered in a Chapter 13 case if it is enforceable against either the debtor or the debtor's property. *Id.* at 2155. Application of the definition of "claim" should not be used to police a Chapter 13 case for abuse. *Id.* at 2156.

For Russell Heikes to hold a claim against Debtor, the Court must consider the several written agreements between the parties and determine their validity under state law or other applicable nonbankruptcy law. *Grogan v. Garner*, 111 S.Ct. 654, 657-58 (1991) (cites therein). These written agreements supersede all oral negotiations or stipulations concerning the transactions which preceded or accompanied their execution. S.D.C.L. § 53-8-5; *In re Gridley*, 149 B.R. 128, 134 (Bankr. D.S.D. 1992) (cites therein). Where no time is specified for the performance of an act, a "reasonable" time is allowed. S.D.C.L. § 53-10-2. Time is never considered of the essence unless expressly provided in the contract. S.D.C.L. § 53-10-3.

Necessity of Filing a Proof of Claim. The Bankruptcy Code and Federal Rules of Bankruptcy Procedure are *not* helpful in answering whether the lack of a timely proof of claim precludes Russell Heikes' claim from being treated in Debtor's plan. Section 501 of the Code says a creditor or the debtor "may" file a proof of claim. Federal Rule of Bankruptcy Procedure 3002(a) says an *unsecured* creditor *must* file a proof of claim to be an allowed claim. What then must a secured claim holder do? The Code and Rules give conflicting advice.

The Code and Rules generally assume that only holders of "allowed" claims will be paid under a Chapter 13 plan. See, e.g., Rule 3021. Further, only a secured creditor who holds an "allowed" secured claim is protected by § 1325(a)(5). That section insures that a secured creditor will retain his lien and get at least the present value of his claim. For an "allowed" secured claim to exist, either the secured creditor must file a proof of claim and it is deemed allowed, 11 U.S.C. §§ 501 and 502(a), or the debtor must litigate the validity of the claim. 11 U.S.C. § 502(b). Unfortunately, F.R.Bankr.P. 3002(a) -- by stating that only unsecured creditors must file proofs of claim -- may misguide secured claim holders into thinking that a proof of claim is not necessary. However, a secured creditor should file a proof of claim to insure that he has an "allowed" secured claim that is protected by § 1325(a)(5). Most important, the Code does not imply that a secured creditor's deliberate decision not to file a proof of claim "excuses" that creditor from participating in the Chapter 13 process.

Effect of Confirmation. The Code is quite clear on the effect of the confirmation of a Chapter 13 plan. Section 1327(a) provides that the

provisions of a confirmed plan bind 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.

Further, confirmation vests all property of the bankruptcy estate in the debtor. 11 U.S.C. § 1327(b). Unless otherwise provided in

the plan or confirmation order, the property is revested in debtor free of any claim or interest of a creditor provided for by the plan. 11 U.S.C. § 1327(c).

III.

Similar issues have been addressed in other Chapter 13 cases. The most pertinent case is *Boyd v. United States (In re Boyd)*, 11 F.3d 59 (5th Cir. 1994), where the court held that a confirmed plan could not reinstate a mortgage where the default could no longer be cured under state law, even if the creditor did not object to the plan. In essence, the court in *Boyd* said that a confirmed plan cannot revest the debtor with property that was never property of the estate. That caveat applies equally here. Debtor's confirmed plan cannot recreate a debt that did not exist when Debtor filed her petition, even if Russell Heikes never objected to the plan where neither party timely filed a proof of claim. Accordingly, each of the five agreements must be examined to determine whether each constituted a claim at the time Debtor filed her petition on January 4, 1993.

The October 10, 1988 and November 18, 1988 agreements clearly provide that Debtor got loans from Russell Heikes, that she gave him rings as security, and that the loans were to be paid by a date certain. Both repayment dates had expired at the time Debtor filed her last petition. The agreements do not state what, if any, actions Russell Heikes must take to obtain title to the rings. State law fills that gap.

Under S.D.C.L. § 57A-9-203, Russell Heikes had an enforceable secured interest in the rings described in the October 10, 1988 and November 18, 1988 agreements. He had possession of the rings, value had been given, and debtor had rights in the collateral given. When Debtor defaulted on the agreements by not repaying the loan timely, Russell Heikes could accept the collateral as a discharge of Debtor's obligation pursuant to S.D.C.L. § 57A-9-505(2). However, before doing so, Russell Heikes had to give notice to Debtor as required by § 57A-9-505(2). Since Russell

Heikes has never given Debtor the notice required by § 57A-9-505(2), then S.D.C.L. § 57A-9-506 provides that she may still cure the default. Thus, the debts created by the October 10, 1988 and November 18, 1988 agreements still existed on Debtor's petition date and may be treated in her plan. Russell Heikes is bound by that plan treatment. 11 U.S.C. § 1327(a).

The July 7, 1989 agreement, where Debtor received money from Russell Heikes and she gave him a watch in return, is clearer on what action he had to take to obtain title to the watch. He did not have to do anything. Under the agreement, Debtor had one year to "reclaim" the watch upon payment of the money borrowed. Thus, the language indicates the parties intended Russell Heikes would have title upon possession. Debtor did not "reclaim" the watch timely and title is still properly held by Russell Heikes. No claim existed at the time of Debtor's petition and the watch was never property of the estate which could be treated in Debtor's confirmed plan.

In contrast, the April 19, 1992 agreement states Debtor may reclaim the silverware in a wooden box "anytime" by repaying that loan. Although the agreement said the note was to be repaid within six months, the reclamation provision was not so narrow. Therefore, Debtor's interest in this security still existed at the time of Debtor's petition and may be treated through the confirmed plan.

Similarly, the undated notes signed only by Russell Heikes allow Debtor to get back some quilts upon repayment of those loans. Since there is no time deadline and since Russell Heikes did not give Debtor any notice under S.D.C.L. § 57A-9-505(2), those claims existed at the time of her petition and could be treated in the confirmed plan.

Finally, in Debtor's previous Chapter 7 case, the discharge was entered December 16, 1987. The discharge pre-dates all the dated agreements discussed above and has no impact on them. Debtor did not receive a discharge in the other cases so the other cases

do not affect any of the dated agreements.

An Order will be entered directing Russell Heikes to comply with the confirmed plan except as modified herein. He will be considered paid in full when he receives \$1,500.00 from her through the plan. All items held by Russell Heikes as security, excluding the watch described in the July 7, 1989 agreement, shall be returned to Debtor upon full payment of the \$1,500.00.

The claims that Debtor says Russell Heikes has against her total \$1,695.00, excluding the \$200.00 that is no longer owed under the July 7, 1989 agreement. The plan only provides for payment of \$1,500.00. Debtor and Russell Heikes are still bound by that \$1,500.00 provision although this Memorandum Decision and accompanying Order reduce his claims by \$200.00. Had Debtor appropriately provided for repayment of \$1,895.00 in her plan, the Court would have reduced the sum due under the plan to \$1,695.00 under this Decision.

If Debtor defaults under the plan, Russell Heikes may seek relief from the automatic stay so that he may proceed to give notice to Debtor under S.D.C.L. § 57A-9-505(2) and obtain title to the secured property.

Dated this 27 day of May, 1995.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was mailed, hand delivered, or faxed to all parties in interest and to the attached service list.

U.S. Bankruptcy Clerk
District of South Dakota

By: [Signature]
Date: 5-30-95

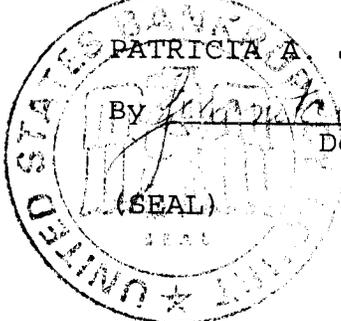
BY THE COURT:

[Signature]
Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA A. JOHNSON, ACTING CLERK

By: [Signature]
Deputy Clerk



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

MAY 30 1995

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

Case: 93-40002 Form id: 122 Ntc Date: 05/30/95 Off: 4 Page : 1
Total notices mailed: 12

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