UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

HOWARD D. MILLER
RUTH J. MILLER

CASE NO. 97-64915

Chapter 7

Debtors

CAROLYN J. COOLEY, Trustee

Plaintiff

vs.

ADV. PRO. NO. 00-80182A

HOWARD D. MILLER, RUTH J. MILLER
SVEN E. MILLER and JANTZI
DEVELOPMENT CORPORATION

Defendants

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

Presently before the Court is a motion to approve a compromise, filed January 19, 2001, amended March 16, 2001, by Carolyn J. Cooley ("Trustee"), pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."), in satisfaction of the pending adversary proceeding commenced by Trustee on September 11, 2000, against Howard D. Miller ("H. Miller"), Ruth J. Miller (hereinafter jointly referred to as the "Debtors"), Sven E. Miller ("Debtors' son") and Jantzi Development Corporation ("JDC")[1]. Trustee makes application for an order granting authorization to compromise the adversary proceeding by accepting the sum of $42,500 in satisfaction of all causes of action therein. Affidavits in support of Trustee's motion were filed on behalf of Debtors' son and JDC on March 7, 2001, and by Debtors on March 22, 2001. An affidavit in opposition to Trustee's motion was also filed on March 22, 2001, by creditor Remington Investments Inc. ("Remington"), alleging insufficient consideration for the proposed compromise. *See* Jeffery Owen's affidavit, sworn to on March 21, 2001.

The motion was scheduled to be heard by the Court at its regular motion term on February

[1] It is alleged that JDC was formed in October 1995 and that H. Miller is the president of JDC and Debtors' son is the sole director and shareholder.

27, 2001, in Utica, New York, however, it was consensually adjourned to March 27, 2001, for oral argument and then submitted for decision.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1) and (b)(2)(A). (E), (H), (J) and (O).

FACTS

The Debtors filed a voluntary petition pursuant to chapter 13 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code") on August 14, 1997. The case was converted to chapter 7 on February 17, 1998, and the Trustee was appointed Interim Trustee on February 20, 1998.

On September 11, 2000, Trustee commenced an adversary proceeding against Debtors, their son and JDC, seeking to avoid the alleged transfer of an interest in real properties to JDC under Code §§ 544 and 548. *See* Trustee's First Cause of Action. According to the Trustee, the Debtors "conveyed their interests in all of said rental real properties, as well as their residence,[2] to 'Jantzi Development Corporation' on or about October 1996" for no consideration. *See* Trustee's Complaint at ¶¶ 6 and 7. It is also the Trustee's contention that sometime thereafter the

[2] According to the Debtors' petition, they transferred their interest in their residence to JDC by deed dated October 6, 1995, which was recorded in the Lewis County Clerk's Office on October 10, 1996. A corrective deed was recorded on November 12, 1996. On August 11, 1997, just three days prior to filing their bankruptcy petition, JDC conveyed the residence back to the Debtors by deed signed by H. Miller as president of JDC.

"debtor or debtors" transferred all of their interest in JDC to their son without consideration. *See id.* at ¶ 8 and Trustee's Second Cause of Action. Trustee further seeks to revoke Debtors' discharge that was granted on July 6, 1998, based on allegations that the Debtors, along with JDC, acquired property of the estate and knowingly and fraudulently failed to surrender it to the Trustee. *See* Trustee's Sixth Cause of Action.

The properties which are the subject of the Trustee's complaint consist of four income properties. According to the deeds accompanying the appraisals performed at the Trustee's request by Sunderhaft Real Estate on or about November 30, 2000, the following conveyances occurred with respect to each property:

7527 South State Street, Lowville, New York

> Conveyed to H. Miller and Homer Myers (Myers) by deed dated June 23, 1978. On September 13, 1995, the property was transferred to Martin W. Daley ("Daley") by Myers and JDC. On September 16, 1996, Daley transferred the property back to Myers, d/b/a Myler Apartments, and JDC.
>
> Appraised for $60,000 - Sales Comparison Approach[3]
> Appraised for $58,500 - Income Approach

9768 Main Street, Croghan, New York

> Conveyed to H. Miller and Myers by deed dated September 4, 1980. On September 13, 1995, the property was transferred to Daley by Myers and JDC. On September 16, 1996, Daley transferred the property back to Myers, d/b/a Myler Apartments and JDC.
>
> Appraised for $32,000 - Sales Comparison Approach
> Appraised for $55,000 - Income Approach

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[3] The appraiser opined that the sales comparison approach was more reliable than the income approach. It was also noted that the comparables used in the appraisals had not sold within the preceding 12 months of their posted sale. However, according to Sunderhaft, the market time for selling real property in the Lowville area generally ranges from 3-6 months "if appropriately priced and marketed."

7746 North State Street, Lowville, New York

> Conveyed by Gail Spink to Daley by deed dated July 16, 1996. On September 16, 1996, Daley transferred the property to Myers, d/b/a Myler Apartments and JDC.
>
> Appraised for $52,000 - Sales Comparison Approach
> Appraised for $45,500 - Income Approach

7525 South Sate Street, Lowville, New York

> Conveyed by Daley to Myers, d/b/a Myler Apartments and JDC by deed dated September 16, 1996.[4]
>
> Appraised for $54,000 - Sales Comparison Approach
> Appraised for 66,000 - Income Approach

Eric Sunderhaft ("Sunderhaft") determined the combined value of the four properties to be $198,000 based on the Sales Comparison Approach. *See* Sunderhaft appraisals, filed on December 27, 2000. Appraisers employed by Remington estimated the value of the properties to be $45,000 for 7527 South State Street, 9768 Main Street and 7525 South State Street and $75,000 for 7746 North State Street for a total of $210,000, based on drive-by appraisals. *See* Elaine Burns affidavit at ¶¶ 1-10; Thomas Guignard affidavit at ¶¶ 3-8. According to the Trustee, the properties are assessed for $49,850, $4,900, $53,300 and $51,500, respectively, or a total assessed value of approximately $160,000.

It is the Trustee's position that H. Miller continued to act as Myers' partner after the creation of JDC and that JDC is actually the "alter ego" of the Debtor/Debtors. The Trustee contends that JDC is only a sham created to avoid the rightful claims of creditors. Accordingly,

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[4] No further information concerning previous conveyances is available from the deed included with the appraisal. It appears that the property description in the deed is missing a page on which is set forth the "being" clause.

she sought to have it declared a non-entity and any property owned by JDC be declared to be the property of the Debtors's estate.[5] *See* Trustee's Third Cause of Action.

In her Fourth Cause of Action, the Trustee alleges a breach of contract between herself and both of the Debtors and their son whereby it is alleged that promises were made to execute certain documents transferring ownership in the rental properties to the Trustee in exchange for her not commencing an adversary proceeding.[6] Her Fifth Cause of Action seeks enforcement of promises of the Debtors and their son/son's attorney, to execute said documents.

On January 19, 2001, Trustee filed a motion to compromise the adversary proceeding by accepting the sum of $40,000 in satisfaction of all causes of action therein. The settlement consists of $20,000 in funds currently held by the Trustee following foreclosure on the Debtors' residence and claimed by the Debtors as exempt and an additional $20,000 held in escrow by Debtors' attorney, Edward J. Fintel. *See* Trustee's Motion to Approve Compromise at ¶ 6. On March 16, 2001, Trustee filed a supplemental affidavit modifying the initial settlement offer of $40,000 to $42,500, with the additional $2,500 to be paid by Debtors in monthly installments. *See* Trustee's Supplemental Affidavit at ¶ 3.

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[5] The motion papers provide little, if any, insight into the alleged partnership between Myers and H. Miller. Nor do the real estate transfers in question make any reference to a partnership.

[6] On October 6, 2000, Debtors' son and JDC filed a motion to dismiss Trustee's complaint in its entirety pursuant to Fed.R.Bankr.P. 7012. Movants alleged that the two-year statute of limitations set forth in Code § 546(a)(1) barred Trustee's claims as the adversary proceeding was not timely commenced. *See* Motion, filed October 6, 2000, at ¶¶ 10-15. On October 27, 2000, this Court signed an Order denying the motion to dismiss Trustee's complaint in its entirety.

ARGUMENTS

Trustee argues that the proposed compromise of $42,500 should be approved in satisfaction of the pending adversary proceeding that seeks to recover H. Miller's alleged one-half interest in partnership properties. Trustee asserts that the cost and uncertainty of litigating the adversary proceeding through trial necessitates approval of the settlement. In response, Remington argues that $42,500 is inadequate consideration to compromise the adversary proceeding because the Burns and Guignard appraisals collectively value the properties in excess of $200,000. As such, H. Miller's alleged one-half interest in the properties is sufficient to overcome the costs associated with litigation.

Trustee further argues that, even if the bankruptcy estate is successful in acquiring H. Miller's alleged one-half interest in partnership properties, the estate will incur the additional costs of bringing a partition action to sell the four properties allegedly co-owned with Myers. Moreover, Trustee asserts that the estimated $160,000, based on the assessed value of the properties, realized from an expeditious liquidation of the properties would be further reduced by $40,000 of an alleged partnership debt.[7] Thus, the value of the bankruptcy estate's one-half interest in the properties would be approximately $60,000 and the expense of selling the properties would bring the estate's net value close to the $42,500 settlement offer. Remington, however, argues that the Trustee does not consider the income generating potential of the

[7] According to the Trustee, at the 2004 examination of Myers, he indicated that he was obligated on a promissory note for partnership debt in the amount of $40,000 which might have to be offset in any subsequent partition action. *See* Trustee's Supplemental Affidavit, filed March 16, 2001, at ¶ 8.

properties in determining their respective values and further claims that Trustee has not produced any evidence of the outstanding partnership debt she alleges would have to be set off against H. Miller's alleged one-half interest in the properties. Remington finally asserts that once the properties are brought back into the bankruptcy estate, Remington will purchase Trustee's interest in the properties for $50,000 and will then, at its own expense, pursue the partition action to gain H. Miller's alleged one-half interest in the properties. Trustee responds by asserting that $42,500 immediately benefits the estate more so than $50,000 would if there is protracted litigation.

DISCUSSION

A trustee is given broad powers under the Bankruptcy Code to administer the estate. Fed.R.Bankr.P. 9019(a) authorizes a trustee to move the Bankruptcy Court to approve a proposed compromise or settlement. Fed.R.Bankr.P. 9019(a) provides that "on motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." Fed.R.Bankr.P. 9019.

The decision on whether to accept or reject a compromise or settlement lies within the sound discretion of the bankruptcy court. *See In re Ashford Hotels, Ltd.,* 226 B.R. 797, 802 (Bankr. S.D.N.Y. 1998). The Court must determine whether the proposed settlement is fair and equitable and in the best interests of the estate. *Id.* That determination must be based on the "informed independent judgment of the bankruptcy court." *In re Levy,* 89 B.R. 389, 391 (Bankr. S.D.N.Y. 1988). In deciding whether or not the compromise is in the best interests of the estate, courts consider several factors, including:

> (1) The balance between the likelihood of the plaintiff or the defendant's success should the case go to trial as compared with the benefits of the settlement without the expense and delay of a trial;
> (2) The prospect of a complex and protracted litigation if the settlement is not approved;
> (3) The proportion of creditors who do not object to, or who affirmatively support, the proposed settlement;
> (4) The proposed benefits to be received;
> (5) The nature and breadth of releases to be issued as a result of the settlement; and
> (6) The extent to which the settlement is truly the product of arms' length bargaining and not the product of fraud or collusion.

Ashford Hotels, 226 B.R. at 802, citing *In re Best Prods. Co.*, 168 B.R. 35, 50 (Bankr.S.D.N.Y.1994); *In re Fugazy*, 150 B.R. 103, 106 (Bankr.S.D.N.Y.1993).

In applying its discretion, the Court "must act 'with regard to what is right and equitable under the circumstances and the law, and dictated by the reason and conscience of the judge to a just result.'" *Ashford Hotels,* 226 B.R. at 802, quoting *Langnes v. Green,* 282 U.S. 531, 541 (1931). The Court simply may not "rubberstamp" the Trustee's proposal. *Ashford Hotels,* 226 B.R. at 803, citing *In re Energy Co-op, Inc.,* 886 F.2d 921, 924 (7th Cir. 1989); *In re Ionosphere Clubs, Inc.,* 156 B.R. 414, 426 (S.D.N.Y. 1993), *aff'd*, 17 F.3d 600 (2d Cir. 1994). In addition, although the Court must consider a creditor's objection to the proposed compromise, the objection is not controlling and will not prevent approval by the Court. *See Ashford Hotels,* 226 B.R. at 803 (citation omitted). A court in deciding to approve a settlement must "see whether the settlement falls below the lowest point in the range of reasonableness." *Id.* at 802, quoting *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983). In making that determination, "the judge should form an educated estimate of the complexity, expense and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and

all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 424 (1968).

In applying the factors discussed above in its analysis of the settlement proposed by the Trustee, the Court notes the following:

The Trustee was previously successful in having a motion to dismiss the complaint based on her alleged failure to comply with the statute of limitations set forth in Code § 546(a) denied. The standard applied by the Court in considering the motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), incorporated by reference in Fed.R.Bankr.P. 7012, requires the Court to dismiss a complaint based on the running of the statute of limitations period "'only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled.'" *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999), quoting *Vaughan v. Grijalva*, 927 F.2d 476, 478 (9th Cir. 1991) (citation omitted). Thus, the Court accepted the Trustee's allegations set forth in the complaint as true for purposes of the motion.[8] At trial the Trustee would be required to establish that the doctrine of equitable tolling should be applied to those causes of action seeking to avoid certain alleged fraudulent transfers since she commenced the adversary proceeding more than two years after the case was filed and more than a year after her appointment pursuant to Code § 546(a). *See In re Bodenstein*, 253 B.R. 46, 50 (8th Cir. BAP 2000); *In re Pomaville*, 190 B.R. 632, 636-37 (Bankr. D.Minn. 1995). Whether or not the Trustee would be successful is not for the Court to decide at this time. Rather,

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[8] The Trustee's Fourth and Fifth causes of action alleged that promises were made to her in exchange for her not commencing the adversary proceeding. She alleges that she relied on those promises, thus delaying the commencement of the adversary proceeding.

it is one factor to be considered in deciding whether to approve the compromise.

There is also the very substance of the relief sought by the Trustee, namely the avoidance of alleged transfers by the Debtor(s) of an interest in the four rental properties to JDC in October 1996. According to the deeds attached to Sunderhaft's appraisals, the last transfer to occur with respect to the properties was by Daley to both Myers and JDC in September 1996. There is no reference to any transfers involving the Debtor(s) thereafter. The Court, of course, is not privy to information the Trustee may have gleaned at the 2004 examinations conducted by her in this case. However, based on the information presently before the Court, it believes any litigation will involve addressing a variety of complex issues with respect to not only the legal title to the four properties but also the nature of the corporate structure of JDC, which implicates possibly having to "pierce the coprorate veil" of JDC, as well as the alleged partnership between H. Miller and Myers. Allowing the litigation to go forward will result in inconvenience and delay for the parties, as well as for the creditors of the estate. It will also result in additional expense to the estate.

In addition, the Court has before it the appraisals submitted by Sunderhaft on behalf of the Trustee that collectively value Debtor's alleged partnership properties at $198,000 (H. Miller's alleged one-half interest equal to $99,000) and the "drive by" appraisals submitted by Burns and Guignard on behalf of Remington that collectively value the properties at $210,000 (H. Miller's alleged one-half interest equal to $105,000). Trustee asks that the Court ignore those values and focus instead on the assessed valuations of $160,000 based on her view that the "appraised values represent values that could likely be obtained only without pressures for a quick sale." *See* Trustee's Supplemental Affidavit at ¶ 9. For purposes of this discussion, if the Court

takes the average of the three values, namely $189,500, H. Miller's alleged one-half interest would amount to $94,750.[9] Thus, the Court must balance the offer of $42,500 against the this amount, keeping in mind the cost of litigation and the probability of success by the Trustee.

Trustee also suggests that the proceeds realized from an expeditious liquidation of the properties would be further reduced by off-setting the alleged partnership debt. While Remington's objections to the offsetting of any alleged partnership debt have been considered, they are not controlling. *See Ashford Hotels,* 226 B.R. at 803. Even though the existence and amount of any such debt is not firmly established, the Court is not required to conduct a full evidentiary hearing or a "mini-trial" before the Court can approve the Trustee's motion. *See id.; In re Drexel Burnham Lambert Group, Inc.,* 134 B.R. 493, 496 (Bankr. S.D.N.Y. 1991). Indeed, the existence of the alleged debt could well be a separate source of contention which would entail additional litigation by the Trustee and further expense to the estate.

In addition, should the Trustee be successful in prosecuting the fraudulent conveyance claim, a partition action would still be necessary because of the alleged one-half interest of Myers. Settlement of the adversary proceeding would eliminate the expense of bringing such an action. The fact that Remington is willing to pay the Trustee $50,000 for the four properties and to prosecute the partition action in the event that the Trustee is successful in seeking to avoid the transactions has little impact on the matter at hand. What is before the Court is the question of whether the proposed compromise is fair and equitable and of benefit to the estate as a whole.

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[9] The Trustee has not indicated whether there are any mortgages or real property taxes constituting liens on the four properties. If there are, the value to the estate if the Trustee were to be successful would be less than the $94,750. However, as the parties have not provided the Court with that information, it is unable to include it in its determination.

See Energy Co-op., 886 F.2d at 927.

In determining the propriety of a settlement,

> [t]he court must examine the terms of the proposed settlement, in light of the risk and rewards of not settling, and determine whether the proverbial bird in the hand is worth two in the bush. While this is not and cannot be the subject of a rigid, mathematical analysis, there must, nonetheless, be some type of correspondence between what is being given in connection with the compromise and what might be received if the dispute was prosecuted to its ultimate conclusion.

In re Krizmanich, 139 B.R. 456, 460 (Bankr. N.D.Ind. 1992). As discussed above, there are very real issues concerning the probability of the Trustee's success with respect to the avoidance causes of action. Considering the inherent delay, costs and uncertainty of litigating the adversary proceeding through trial and the subsequent liquidation of the properties, $42,500 does not fall below the lowest point of reasonableness that would prohibit the Court from approving Trustee's proposed compromise. Despite the fact that the total costs and duration associated with litigation cannot be determined with an exact certainty, the Court can reasonably estimate that they will significantly reduce the value to be received by the estate so as to warrant approval of Trustee's proposed compromise.

Remington should not be allowed to pursue an objection at the expense of the general creditor body. *See id.*. at 459. Rejecting Trustee's proposed compromise would jeopardize the best interest of the bankruptcy estate and could possibly result in zero payment to the estate's creditors. Approving Trustee's $42,500 compromise will serve the best interest of the estate as creditors are certain to realize immediate benefits.

After due consideration of the documents submitted to the Court and the arguments made

by counsel, the Court will grant Trustee's motion to approve the compromise of the pending adversary proceeding based on the finding that it is fair and equitable and in the best interest of the bankruptcy estate.

Based on the forgoing, it is hereby

ORDERED that Trustee's motion to settle the adversary proceeding, as amended on March 16, 2001, for the sum of $42,500 is granted pursuant to Fed.R.Bankr.P 9019.

Dated at Utica, New York

this 27th day of September 2001

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STEPHEN D.GERLING
Chief U.S. Bankruptcy Judge