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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**In re:**

**RODDY MAC STEWART,  
DEBORAH B. STEWART,**

**DEBTORS.**

**CASE NO. 98-41315-7  
CHAPTER 7**

**MEMORANDUM OF DECISION**

This case is before the Court on the trustee's motion to settle a dispute and a creditor's objection to the motion. The trustee appears by counsel Robert L. Baer of Cosgrove, Webb & Oman. The creditor, the Cadle Company, appears by counsel Thomas J. Fritzlen, Jr., of Martin, Leigh & Laws, P.C. The parties with whom the trustee has proposed to settle appear by counsel Terry L. Malone of Martin, Pringle, Oliver, Wallace & Swartz, L.L.P. A hearing on the motion was held on May 6, 1999. The parties other than the trustee filed supplemental briefs after the hearing. Having considered the relevant materials, the Court is now prepared to rule on the motion.

**FACTS**

Before filing for bankruptcy, debtor Roddy Mac Stewart ("Stewart") participated in a project to build a low-income housing development in Beloit, Kansas. Duane Wadley d/b/a/ the Wadley Company ("Wadley"), Wadley Homes, Inc. ("Wadley Homes"), and Kendrick and Associates, Inc. ("Kendrick"), along with Beloit Development, L.P., and Beloit Industrial Development, Inc.

(collectively “the Beloit Entities”), also participated. The project ran into problems and was not successfully completed as these parties had planned.

Attorney Terry L. Malone (“Malone”) had been representing Wadley and Wadley Homes for some time under a retainer agreement. Stewart, Wadley, Wadley Homes, and Kendrick (“the plaintiffs”) eventually sued the Beloit Entities and a number of individuals for damages under various legal theories, and Malone represented them all in this lawsuit. He considered the plaintiffs to be jointly and severally liable for his fees and expenses, but was aware that they had an agreement among themselves to share his charges. The plaintiffs appear to have agreed to split Malone’s bill three ways, one-third to Stewart, one-third to Wadley and Wadley Homes, and one-third to Kendrick. Their arrangement to divide any recovery is disputed. It appears that the most Stewart would have been entitled to receive was one-third of the total recovery obtained; the evidence did not establish the least portion that he might have been entitled to receive. Kendrick might also be entitled to receive up to one-third of the total recovery.

This suit was tried in January 1998 in a Kansas state court. At the conclusion of the plaintiffs’ evidence, the court dismissed their claims based on promissory estoppel, negligent misrepresentation, and fraud, and all their remaining claims against the individual defendants. The plaintiffs’ claims against the Beloit Entities based on breach of contract and quantum meruit were submitted to a jury for resolution. The jury awarded Stewart, Wadley, and Wadley Homes damages of \$576,072, and Kendrick damages of \$24,834.19. At that time, Malone had been paid about \$5,000 (apparently by Wadley or Wadley Homes) and had billed another \$65,000.

After the judgment was rendered, the plaintiffs appealed the trial court's dismissal of their claims based on promissory estoppel, negligent misrepresentation, and fraud, and of their claims against the individual defendants. The Beloit Entities cross-appealed. At some point, the plaintiffs determined that the Beloit Entities had few or no assets beyond the housing project itself, which was already encumbered for more than its probable value to secure construction loans, so collecting the judgment from them was not likely. The appeal alone would generate additional legal expenses, and if the plaintiffs won, the new trial they were seeking would add even more. If they won a retrial and obtained a judgment against one or more of the individual defendants, the plaintiffs could not be certain of collecting from them either. Because Stewart did not have enough money to pay the legal expenses already incurred and did not want to obligate himself to pay more for the appeal and possible new trial, he approached Wadley between the time the judgment was rendered in January and was reduced to writing in March, and proposed to assign his interest in the suit in exchange for a release of his obligation to pay a share of Malone's fees and expenses. Orally, Wadley, Wadley Homes, and Kendrick agreed to release Stewart from his agreement to contribute to Malone's bill and Stewart assigned his interest in the lawsuit to them. Malone also agreed not to try to collect from Stewart. Thereafter, the other plaintiffs and Malone did not include Stewart in their correspondence about either the appeal or the housing project.

In late April or early May of 1998, a third party took over the housing project. That party contacted Malone, and they began negotiating the possible release of the Wadley-Wadley-Homes-Kendrick judgment because it interfered with his successful completion of the project. Wadley Homes drafted a written assignment for Stewart to sign to make sure a potential settlement could not be

derailed by questions about the oral assignment. Wadley and Kendrick were not mentioned in this document, which stated that Stewart was assigning his interest in the suit only to Wadley Homes in return for its promise to pay his share of the litigation expenses. Stewart was not aware of the settlement negotiations, but on May 6, 1998, he signed the document Wadley Homes had prepared.

Ultimately, after certain tax advantages were obtained for the housing project, the third party agreed to pay Wadley, Wadley Homes, and Kendrick \$150,000 in return for their dismissal of their lawsuit and release of any claim they might have against the project or any entity involved with it. Malone's bill was to be paid from the \$150,000 and the balance was to be divided among Wadley, Wadley Homes, and Kendrick.

On May 15, 1998, Stewart and his wife filed a joint chapter 7 bankruptcy petition. The chapter 7 trustee asserted that Stewart's assignment to Wadley, Wadley Homes, and Kendrick of his interest in the lawsuit constituted a transfer for less than reasonably equivalent value that could be avoided under 11 U.S.C.A. §548, and claimed the bankruptcy estate was entitled to a share of the \$150,000 settlement. The trustee agreed to accept \$7,000 from them to settle this claim and provided notice of the intended settlement to the debtors' creditors. The Cadle Company ("Cadle") is the only creditor that objected. Cadle does not object to settlement of the state court lawsuit for the \$150,000 paid by the third party in exchange for the release of the claims against the housing project and other entities, but does object to the estate's receipt of only \$7,000 from that amount.

## DISCUSSION

The trustee seeks to have his settlement with Wadley, Wadley Homes, and Kendrick approved pursuant to Federal Rule of Bankruptcy Procedure 9019. He claims \$7,000 is a reasonable amount for the bankruptcy estate to receive considering the circumstances existing at the time Stewart assigned his interest in the lawsuit and judgment, and the risk the estate would obtain little or no net recovery if the trustee pursued a larger amount through litigation. In deciding whether to approve a proposed settlement, the Court must objectively evaluate the facts surrounding the estate's claim. *Reiss v. Hagmann*, 881 F.2d 890, 892 (10th Cir. 1989). The Court must consider: (1) the probability the estate will succeed in litigation; (2) the collectability of any judgment the estate could obtain; (3) the complexity of the required litigation; (4) the expenses, inconvenience, and delay that would be caused by the litigation; and (5) the reasonable views of the debtors' creditors. *Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.)*, 898 F.2d 1544 (11th Cir. 1990); *In re Flight Transp. Corp. Securities Litigation*, 730 F.2d 1128, 1135 (8th Cir. 1984) (same factors must be considered in approving compromise of bankruptcy dispute and class action lawsuit); *see also Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., v. Anderson*, 390 U.S. 414, 424-25 (1968) (identifying similar factors for approval of compromise under Bankruptcy Act).

In reaching its decision, the Court need not decide what factual assertions would be accepted or what legal theories would prevail at a trial on the merits of the estate's claim, but only needs to consider what the possible results of a trial might be and how likely each result appears to be. Since Cadle does not object to the settlement of the state court litigation for \$150,000, question Malone's right to be paid \$65,000 from that amount, or contend Stewart was entitled to more than one-third of the settlement, it appears the most the estate could possibly receive through litigation with Wadley,

Wadley Homes, and Kendrick is one-third of \$85,000, or \$28,333. Stewart's share in the lawsuit is not evidenced by any writing and his fellow plaintiffs contend his share was something less than one-third. At the time of the assignments, Stewart did not have the ability to pay his share of Malone's current fees and expenses, and wanted to avoid incurring liability for future ones. The trustee proposes settling for about one-quarter of the maximum amount that might have been Stewart's share. The value of Stewart's share would have increased between the time of his oral assignment and his written one because any benefit to be gained from the appeal was uncertain and the existing judgment appeared to be uncollectible before the third party took over the project and agreed, before Stewart executed the written assignment but still contingent on obtaining tax advantages, to pay \$150,000 to resolve the suit. Therefore, the trustee's chance of setting aside Stewart's assignment as one for less than reasonably equivalent value would be slim if the oral assignment was effective, but greatly improved if it was not. In this regard, Cadle contends that the oral assignment was void because it violated the Statute of Frauds, and that the parol evidence rule would preclude presenting evidence of the oral assignment to change the effective date of the written assignment. Even if the trustee could get the assignments set aside, the litigation required to do so would generate expenses that would reduce the estate's net recovery. Given all these circumstances and uncertainties, the Court is inclined to believe the trustee's proposed resolution of the matter is reasonable.

Limited research into Cadle's assertion of the Statute of Frauds only strengthens the Court's view of the trustee's position. The Kansas Statute of Frauds provides in pertinent part:

No action shall be brought whereby to charge a party upon any special promise to answer for the debt . . . of another person . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the

party to be charged therewith, or some other person thereunto by him or her lawfully authorized in writing.

K.S.A. 33-106. In this case, Wadley, Wadley Homes, and Kendrick are the parties who allegedly orally promised to pay Stewart's debt to Malone. Under 33-106, they—not a stranger to the transaction like Cadle—would be the parties entitled to claim the protection of the Statute of Frauds, which would protect them from being forced to honor their promise. Of course, they *want* to fulfill their promise, not avoid it. The wording of 33-106 indicates Cadle is not a proper party to raise the Statute of Frauds in this case. Even if it were, the Court doubts that the Statute is applicable here in any case. Cadle has not contested Malone's assertion that the plaintiffs in the state court lawsuit were jointly and severally liable for his bill. Although the plaintiffs had agreed to split that bill three ways, Malone had not agreed to be bound by that split. Thus, under the oral assignment, Wadley, Wadley Homes, and Kendrick simply agreed to release Stewart from his obligation to contribute to Malone's bill, not to pay a debt of Stewart's that they themselves did not owe. In fact, if the oral assignment was not effective, the written assignment does not appear to release Stewart from his contribution obligation to Wadley or to Kendrick; only Stewart and Wadley Homes were parties to it. The written assignment does express Wadley Homes' promise to pay Stewart's contribution obligation, so it might conceivably qualify as a promise to pay the debt of another even though Wadley Homes was already liable to Malone for his full bill. Considering all these circumstances, the Court believes that the applicability of the Statute of Frauds is at least highly questionable in this case. Consequently, although the Court is not resolving the Statute of Frauds dispute, the Court is convinced it should consider evidence of the alleged oral assignment and its impact on the trustee's decision to settle.

When Stewart made the oral assignment, the plaintiffs did not believe they could collect their judgment against the Beloit Entities because the Entities did not have unencumbered assets. The plaintiffs believed they had valid claims against the individual defendants, but would have to win their appeal before they could have the chance to try those claims. The outcome of their appeal was, of course, unknown, and the Beloit Entities' cross-appeal at least made it possible the judgment the plaintiffs had already obtained could be lost as well. The appeal was generating additional attorney fees and expenses, as would the new trial that would follow if the appeal succeeded. Such a new trial could be lost, and even if it were won, the plaintiffs did not know whether they could collect a judgment from the individual defendants. Stewart did not have the money to pay his share of Malone's bill to that time, or to pay additional charges in the future. Stewart's share of the \$70,000 already incurred was one-third. He thought he would also receive one-third of any recovery, but Wadley contends Stewart's share would be less than that. When Stewart signed the written assignment, none of these circumstances had changed except that a third party had become involved who might pay the plaintiffs some money to settle the claims they were making in the lawsuit. However, at that time, the third party's payment was still contingent on securing tax advantages for the project, an event that occurred later.

If the trustee were to pursue litigation against Wadley, Wadley Homes, and Kendrick, the most he could recover would be \$28,333. The third party has now paid the \$150,000, and the maximum recovery available to the estate has been reserved. The trustee has already incurred some litigation expenses and would undoubtedly incur more if he had to continue to litigate. The Court is convinced that the probability of a successful maximum recovery is less than 50%, and that there is a substantial

possibility of no recovery. The trustee will be entitled to a trustee fee from whatever amount he receives, and would probably incur a substantial attorney's fee in further litigation, successful or not. Although all the debtors' unsecured creditors would share in the fruits of the litigation, only one of them has objected. Cadle's claim is a substantial one and its opinion is entitled to some deference, but the Court notes Cadle's view is apparently not shared by the other unsecured creditors.

Having carefully considered all the circumstances, the Court concludes that the trustee has met his burden of proof, and that the settlement should be approved.

The foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based on this ruling will be entered on a separate document as required by FRBP 9021 and FRCP 58.

Dated at Topeka, Kansas, this \_\_\_\_ day of July, 1999.

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JAMES A. PUSATERI  
CHIEF BANKRUPTCY JUDGE

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**JUDGMENT ON DECISION**

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For the reasons stated in that Memorandum, judgment is hereby entered approving the trustee's settlement.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this \_\_\_\_\_ day of July, 1999.

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JAMES A. PUSATERI  
CHIEF BANKRUPTCY JUDGE