

#2537

signed 9-14-00

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

In Re:

**WALTER S. HITTLE,
CYNTHIA L. HITTLE,**

DEBTORS.

**CASE NO. 95-42280-7
CHAPTER 7**

**SOUTHWESTERN SAVINGS AND LOAN
ASSOCIATION,**

PLAINTIFF,

v.

ADV. NO. 96-7044

**WALTER S. HITTLE,
CYNTHIA L. HITTLE,**

DEFENDANTS.

ORDER DENYING MOTION TO DISMISS

This proceeding is before the Court on the defendant-debtors' motion to dismiss. The debtors appear by counsel William E. Metcalf. Plaintiff Southwestern Savings and Loan Association appears by counsel John H. Stauffer, Jr., and Anne M. Kindling. The Court has reviewed the relevant pleadings and is now ready to rule.

FACTS

The debtors filed for bankruptcy on November 24, 1995. In their schedules, they indicated that they jointly owed a debt to Southwest Savings & Loan, 631 S. Main, Hugoton, Kansas, that was secured by their home, and that Mr. Hittle alone owed the savings and loan another debt that was

secured by irrigation engines and government payments. The home mortgage debt does not appear to be involved in this proceeding. Southwestern Savings and Loan Association (“Southwestern”) has never filed a proof of claim in the debtors’ bankruptcy case, but did file a complaint alleging that a \$47,987.29 debt to it was nondischargeable under 11 U.S.C.A. §523(a)(2)(A) and (B), and that the debtors should be denied a discharge pursuant to §727(a)(5) for failing to explain a loss of or deficiency in their assets. Attachments to the complaint indicate that Southwestern’s address is 631 Main, Box B, Hugoton, Kansas. Despite the minor differences in the name and address, it seems clear that the debts listed in the schedules were owed to Southwestern.

The debtors suggest in their motion to dismiss that Southwestern sold its note and that Southwest National Bank is now the real party in interest in this action; however, they have not presented or pointed to any evidence supporting this assertion. They also do not appear to seek any relief based on this assertion, and Southwestern has not responded to it. The Court will not attempt to resolve this matter in this order.

Southwestern attached to its complaint twelve documents that appear to include a promissory note and a security agreement in each. Debtor Walter Hittle is identified as the borrower on and signed these documents during 1993, 1994, and 1995. Debtor Cynthia Hittle’s name appears as a borrower on only one of the documents, and it does not appear that she signed it (an exhibit sticker partially obscures the spot where she would have been expected to sign, so it is somewhat difficult to tell whether she signed it). Her name does not appear at all on the other eleven documents and she did not sign any of them. Nevertheless, the debtors admitted in their answer to Southwestern’s complaint that they were in the farming business and took out a series of loans for the purpose of operating their farm

during the time between January 1, 1993, and December 31, 1995. Southwestern alleged that, to secure these loans, the debtors assigned various feed grain and wheat deficiency payments and disaster payments to it on ten occasions during 1993 through 1995. It attached to its complaint a list showing the dates the assignments were signed, the amount of the payments assigned by each, and certain other information, but did not include copies of the assignments themselves. It alleged the debtors represented that the amounts being assigned were the amounts of the payments they were entitled to receive. Southwestern also alleged, and the debtors admitted in their answer, that due to Mr. Hittle's job, the debtors were well-versed in the workings and procedures of the government programs that would be providing the payments to them. However, Southwestern continued, the amounts it actually received through the assignments were substantially less than the amounts the debtors had assigned. Based on these allegations and as Count I of its complaint, Southwestern alleged the debtors' debt to it should be nondischargeable under 11 U.S.C.A. §523(a)(2)(A).

In Count II of its complaint, Southwestern alleged the debtors supplied it an agricultural financial statement on April 29, 1994, a copy of which was attached. The financial statement lists Mr. Hittle as the applicant and Mrs. Hittle as the co-applicant, but only Mr. Hittle signed it. The statement allegedly substantially overstated the value of the debtors' assets and substantially understated their liabilities, showing their net worth to be over \$130,000 when in fact they had a negative net worth. Southwestern alleged that Mr. Hittle caused this financial statement to be published with the intent to deceive Southwestern, and that his debt to it should be nondischargeable under §523(a)(2)(B).

Southwestern again relied on the financial statement in Count III of its complaint, asserting that the debtors had a net worth of \$138,087 in April 1994, but showed a net worth of negative \$387,889

when they filed for bankruptcy on November 24, 1995. The debtors' tax returns allegedly show losses of less than \$150,000, and Southwestern asserts the debtors have failed satisfactorily to explain the \$525,976 loss in net worth over that time period. As a result, it asserts, the debtors should be denied a discharge under §727(a)(5).

DISCUSSION AND CONCLUSIONS

The debtors first argue that, even taking all of Southwestern's allegations as true, the only claim it has against them is one for fraud. This is clearly wrong. Southwestern alleges that the debtors were in the farming business and obtained a series of loans from it to operate their farm. This much the debtors even admitted in their answer to the complaint. Southwestern also alleges that the debtors have not repaid those loans. These facts, if true, establish that the debtors still owe Southwestern on the loans. The remaining question is whether the debtors' alleged fraud should make their loan obligations nondischargeable. Except as to Mrs. Hittle alone, discussed below, the debtors do not question the sufficiency of Southwestern's fraud allegations to support a conclusion that the obligations are nondischargeable. The facts that Southwestern has not sued the debtors in state court for fraud, has obtained no judgment against them, and has filed no proof of claim in their bankruptcy case do not establish that Southwestern has no claim against the debtors. Southwestern's failure to file a proof of claim merely means that it can receive no distribution from the debtors' bankruptcy estate.

The debtors next argue the Court has no jurisdiction of this adversary proceeding because Southwestern did not file a proof of claim, so the Court does not have "related to" jurisdiction of this proceeding because its resolution cannot conceivably have any effect on the bankruptcy estate. This

argument relies in part on the previous assertion that Southwestern's only claim against the debtors is a state law one for fraud. The debtors also suggest that *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), means this Court has no jurisdiction to resolve Southwestern's state law fraud claim. As indicated above, the assertion that Southwestern has only a fraud claim against the debtors is incorrect. *Northern Pipeline v. Marathon* is not applicable here because it involved a debtor's attempt to sue a non-debtor in bankruptcy court on a state law cause of action when the non-debtor did not consent to the bankruptcy court's exercise of jurisdiction over the suit. The plurality in *Marathon* distinguished the situation before it from one involving "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power." 458 U.S. at 71. The case before this Court concerns the bankruptcy discharge, one of the most basic facets of "the restructuring of debtor-creditor relations." The two concurring justices in *Marathon* relied in part on the fact the non-debtor party had not consented to the bankruptcy court's exercise of jurisdiction over the suit. *Id.* at 91. By filing a voluntary bankruptcy petition, the debtors necessarily consented to this Court's jurisdiction to adjudicate questions concerning their right to a discharge. The Court is convinced this proceeding does not involve "related to" jurisdiction but instead this Court's original but not exclusive jurisdiction "of all civil proceedings arising under title 11." 28 U.S.C.A. §1334(b). Southwestern contests here, under 11 U.S.C.A. §523(a)(2)(A) and (B), the debtors' right to discharge their obligations to it and, under §727(a)(5), their right to discharge any of their debts. No matter what court might ultimately decide them, such questions "arise under" title 11, so this Court has original jurisdiction over them.

Building on their first two arguments, the debtors contend Southwestern has no standing to pursue this proceeding because it filed no proof of claim and this Court has no jurisdiction to determine its state law fraud claim. Since the first two arguments failed, this one does, too.

The debtors final argument is that Southwestern cannot pursue its complaint against Mrs. Hittle because nothing attached to the complaint shows that she signed a note, security agreement, or financial statement. This argument also fails. First, the Court notes that Southwestern's cause of action based on an alleged false financial statement covered by §523(a)(2)(B) is asserted against only Mr. Hittle, whose signature does appear to be on the financial statement attached to the complaint. Second, for its claim under §523(a)(2)(A), Southwestern alleges, and the debtors conceded in their answer, that both debtors borrowed money from it. It further alleges that both debtors assigned various deficiency and disaster payments to it to secure those loans, knowingly misrepresenting the anticipated size of the payments. Thus, this claim does not depend on Mrs. Hittle having signed any document, but instead on her having participated in making misrepresentations. Finally, for its claim under §727(a)(5), Southwestern alleges that a financial statement it received showed the debtors had a net worth of \$138,087 in April of 1994, while their bankruptcy schedules showed they had a net worth of negative \$387,889 in November of 1995. Apparently anticipating a possible explanation for the reduced net worth, Southwestern contends the debtors' tax returns (for one or more unspecified years) show they suffered losses in their farming operation of less than \$150,000. In effect, this claim is based on the assumption that both the financial statement and the bankruptcy schedules correctly state the debtors' net worth at the time the documents were executed. Southwestern contends the debtors have failed to satisfactorily explain the loss of over \$500,000 in net worth in the eighteen months between the

execution of the two documents that left them unable to pay their debts. Like the claim under §523(a)(2)(A), this claim does not depend on Mrs. Hittle having signed any document. In short, the debtors' argument here could succeed only against a claim that Mrs. Hittle violated §523(a)(2)(B), a claim that Southwestern has not made.

For these reasons, the debtors' motion to dismiss must be denied.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this ____ day of September, 2000.

JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE