SO ORDERED.

SIGNED this 31 day of July, 2006.

ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
LEO J. SCHWARTZ,	)	**Case No. 03-16197**
SHARON J. SCHWARTZ,	)	**Chapter 11**
	)	
Debtors.	)	
	)	

ORDER DENYING MOTION TO REQUIRE SALE OF ASSETS AND MOTION FOR REVOCATION OF CONFIRMATION

On November 9, 2005, approximately three months after the entry of a confirmation order in this case, Frontier Farm Credit ("Frontier") filed its Motion for an order requiring the sale of debtor Leo Schwartz's interest in certain real property. Frontier alleges that this property was not disclosed in the bankruptcy and argues that the proceeds of such sale should be paid to the unsecured creditors. (Dkt. 214). Debtor Schwartz objected, pointing out that Frontier's motion lacks a legal basis and that whatever interest Debtor may now have in the land was not property of the estate because Schwartz did not receive the property until after 180 days after the

date of the commencement of the case, thus excluding the property from the estate under 11 U.S.C. § 541(a)(5).[1] The following are the Court's findings of fact and conclusions of law made according to Fed. R. Bank. P. 7052 which makes Fed. R. Civ. P. 52 applicable to adversary proceedings and contested matters in bankruptcy.

The Court convened an evidentiary hearing on this motion on June 14, 2006. No witnesses testified at the hearing and the sole evidentiary record upon which this matter may be decided consists of a copy of a deed, the debtor's plan, the confirmation order, and the obituary of Mary Kay Schwartz who apparently died on October 5, 2005. From this paltry record, and after taking judicial notice of various pleadings in the Court's file, the Court gleans the following facts.

On April 18, 1992, Leo Schwartz's mother, Mary Kay Schwartz, made a warranty deed conveying certain real estate located in Washington County, Kansas ("the property") to Leo and his five siblings, "in equal shares as tenants in common" for the "sum of One Dollar and other valuable consideration and for estate planning purposes; except and subject to a Life Estate [in Mary Schwartz], for her life." The described property consisted of two quarter sections with excepted tracts and two town lots in Hanover, Kansas. This warranty deed was filed for record in the Register of Deeds of Washington County, Kansas on December 28, 1992.

On November 12, 2003, Debtors filed their Chapter 11 petition. Debtors did not list Leo's one-sixth remainder interest in the property on their schedules. According to their objection, Debtors deny any knowledge of the existence of Leo's remainder interest in the

[1] Unless otherwise noted, all future statutory references are to the Bankruptcy Code, 11 U.S.C. §101, et seq.

property when they filed bankruptcy. The Court confirmed debtors' Joint Plan of Reorganization on August 15, 2005.

Mary Kay Schwartz died on October 9, 2005.

On November 9, 2005, Frontier filed its motion. After the June 14, 2006 hearing, the Court took the matter under advisement. Thereafter, Frontier filed two supplemental memoranda. In its first supplement, Frontier asserts a new claim that the confirmation order should be revoked as being procured by fraud under 11 U.S.C. § 1144.[2] This supplement prompted a response from the debtors. Frontier then filed an addendum to its supplemental brief in reply, and "offers" $30,000 for the debtor's undivided fee interest in the land and asserts that this "offer" fixes the value of the land for the purpose of deciding this motion.[3]

In the motion, Frontier asks the Court to order the sale of Leo's undivided one-sixth fee interest in the property. Now that Leo's mother has died, his remainder interest has presumably ripened into a fee.

Frontier asserts that the Court retained jurisdiction of this matter under the broad

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[2] Dkt. 235.

[3] The Court reminds Frontier's counsel to check the local rules concerning appropriate briefing practice in this District. Generally, the movant and respondent are each permitted one brief with the movant being permitted a reply where one is proper. *See* D.Kan.R. 7.1(c). Uninvited supplemental briefing and surreplies are discouraged, if not prohibited by L.B.R. 9013.1. The courts in this district generally grant leave to file a surreply only in "rare circumstances" as "where a movant improperly raises new arguments in a reply." "Such rules are not only fair and reasonable, but they assist the court in defining when briefed matters are finally submitted and in minimizing the battles over which side should have the last word." *See Humphries v. Williams Natural Gas Co.*, Case No. 96-4196-SAC, 1998 WL 982903, at *1 (D.Kan. Sept. 23, 1998).

retention language contained in Article 10 of the debtors' plan.[4] Frontier then argues that because this asset was "omitted" and accordingly not "dealt with by the plan," the property is not "free and clear" of the interests of the creditors and may be reached by them for payment of claims.[5] Indeed, in argument, Frontier's counsel urged that notwithstanding this Court's determination of this motion, Frontier would be entitled to pursue this land in state court even though Frontier admittedly had no lien on the remainder and has none now on the fee. Finally, Frontier says that the proceeds of the sale of the property should be distributed to the unsecured creditors.

At the evidentiary hearing, Frontier's counsel *expressly stated* that Frontier did not seek to revoke the confirmation order and did not allege that the Schwartz debtors had committed fraud in its procurement. Only after the record was closed did Frontier file its supplemental brief that contained a "motion" to revoke for fraud, in direct contradiction of counsel's avowed position at trial.

As a matter of Kansas law, Leo received a vested remainder in an undivided one-sixth of the deeded property when Mary Kay Schwartz executed the deed.[6] When she caused the deed to be recorded, that operated as constructive delivery and, in the absence of an express disclaimer of interest, the grantee's acceptance is presumed.[7] There can be no question that the vested

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[4] Article 10, subsection F, states that the Court retains jurisdiction to "correct any defect, to cure any omission, or to reconcile any inconsistency in the Plan or Order of Confirmation, as may be necessary to carry out the purposes and intent of the Plan." Dkt. 131, p. 10.

[5] See 11 U.S.C. § 1141(c).

[6] *See Baldwin v. Hambleton*, 196 Kan. 353 (1966)(remainder is vested if it is to take effect as to possession and enjoyment when the prior estate is terminated).

[7] *See Fooshee v. Kasenberg*, 152 Kan. 100 (1940)(constructive delivery) and *Hansen v. Walker*, 175 Kan. 121 (1953)(deemed acceptance).

remainder became part of Leo's estate at the date of the petition and remained so at the date of confirmation. Under § 1129(a)(7)(A)(ii), for the purpose of determining whether the creditors will receive less than they would have in a chapter 7 liquidation, the operative date to determine value is the effective date of the plan. The effective date of the Schwartz plan was ten days after the date of the confirmation order, or August 25, 2005. As Mary Kay Schwartz did not die until October of 2005, only the remainder, not the fee, was a part of the debtors' bankruptcy estate at confirmation.

In its motion and pre-hearing brief, Frontier cites no statutory or case law authority that would support ordering the sale of the fee in the wake of confirmation. In its supplemental brief, Frontier suggests that the confirmation order should be revoked. Section 1144 of the Bankruptcy Code expressly contemplates that a confirmation order may be revoked if the plan's proponent procured it by fraud. Revocation is a very serious remedy that courts use sparingly. A party seeking this remedy must convince the Court that some form of fraud was present in the plan confirmation process.[8] As the statute specifies, this remedy must be invoked within 180 days of the entry of the confirmation order. And, as Fed. R. Bank. P. 7001(5) requires, this remedy is sought by filing an adversary proceeding. The binding nature of this 180-day deadline and the need for an adversary proceeding is made clear in Fed. R. Bank. P. 9024(3) which makes Fed. R. Civ. P. 60 applicable in bankruptcy cases except that ". . . a *complaint* to revoke an order confirming a plan may be filed only within the time limit allowed by § 1144 [180 days]. . . ." [9]

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[8] *See* 4 William Norton, Jr., *Norton Bankruptcy Law and Practice 2d*, § 95:11 (2006). *See also In re V&M Management, Inc.*, 215 B.R. 895 (Bankr. D. Mass. 1997)(Revocation only appropriate when fraud apparent in the confirmation process).

[9] Fed. R. Bank. P. 9024(3).

Here, the Court entered the confirmation order on August 15, 2005. Frontier filed this motion on November 9, 2005, well within the 180-day period. The merits notwithstanding, Frontier's failure to properly invoke this Court's jurisdiction by filing an adversary proceeding during that time is fatal to its demand for revocation. In short, whether the plan's jurisdiction retention clause applies to this controversy or not, Frontier has failed to properly invoke this Court's jurisdiction by failing to file an adversary complaint as the Rules expressly require.[10]

Even if this Court's jurisdiction had properly been invoked, the record presented contains absolutely no evidence of fraudulent conduct on the part of the debtors. The bare omission of Leo's remainder interest, in the absence of some corroborative evidence, simply does not suffice to demonstrate that he willfully omitted the property from the schedules with intent to secure the votes of the creditors by deceit or artifice.

Likewise, Frontier presented nothing at trial tending to support its bald allegation that the unsecured creditors were adversely affected by the omission and that Leo has obtained a windfall at the expense of the creditors. This Court's review of the debtors' plan as implemented does not bear that out. Frontier was one of the debtors' principal secured creditors. It filed a claim in excess of $1.1 million. Its allowed secured claim exceeds $480,000. Frontier argues that it also has an unsecured claim. The amount of that claim is unknown to this Court, but the Court notes that Frontier's proofs of claim, filed both in the Schwartz case and its companion filing, Pork Chop Acres, Inc., are for secured claims only, raising the Court's suspicion that Frontier may not have an allowed unsecured claim at all.

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[10] *See In re Genesis Health Ventures, Inc.*, 340 B.R. 729 (Bankr. D.Del. 2006)(180-day deadline strictly construed and enforced even when alleged fraud is discovered after its expiration).

Assuming without deciding that Frontier has an allowed unsecured claim, the Plan provides in Class 8 that the unsecured creditors will be paid in the following manner. The debtors were to transfer nearly all their assets to Schwartz Family Farms, L.L.C. ("the LLC"), a post-confirmation new entity owned by the Schwartz family. The unsecured creditors are to receive 50 per cent of the net income of the LLC, shared pro rata, over a period of years. If Frontier has an allowed unsecured claim, it will receive its ratable share of that amount. Because what the unsecured creditors will receive under the plan is not pegged to the value of debtors' real property, the unsecured creditors' "take" will be the same. While it may be that the debtors' liquidation analysis would have changed had the value of the remainder been considered and that knowledge of this fact might have changed the creditors' votes, the Code only affords aggrieved creditors protection through § 1144 which, as noted above, Frontier failed to properly or timely invoke. In addition, the Court and parties should keep in mind that the chapter 7 liquidation value of an undivided one-sixth remainder interest is unlikely to be substantial. In any event, Frontier produced no valuation evidence whatever.

Because Frontier failed to properly or timely invoke the single remedy open to it in this situation, the Court need not consider the rather dubious merits of Frontier's other arguments. There is simply no legal basis to require that this property be sold, nor would it serve any purpose consistent with the plan. Being devoid of factual or legal merit, Frontier's motion is **DENIED**.

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