UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

In Re:	Case No. C-B-89-31178
	Chapter 13
AARON C. BLUMENTHAL,	
Debtor.	
	JUDGMENT ENTERED ON DEC 15 1989

MEMORANDUM OPINION AND ORDER

This matter is before the court on the Chapter 13 Standing Trustee's objection to the claim of Branch Banking and Trust Co. ("BB&T") in the amount of $1,020.69, and BB&T's request for hearing on the Trustee's objection. The court has determined that the Trustee's objection should be overruled, and that the claim of BB&T should be included in the debtor's Chapter 13 Plan.

Findings of Fact

In March 1987, Aaron C. Blumenthal, the debtor in this proceeding, and his wife, Connie I. Chandler Blumenthal, executed an application for a BB&T Visa/BB&T 24 Card. Under the terms of the card agreement with BB&T, both Blumenthal and his wife were liable for repayment of any debt incurred by the card's use.

In April 1989, the Blumenthals obtained a divorce. In conjunction with the divorce, the debtor and his ex-wife, now Connie I. Chandler, executed a separation agreement under which Chandler agreed to assume sole responsibility for repayment of the BB&T Visa/BB&T 24 Card debt.

On September 29, 1989, the debtor filed his petition in bankruptcy. BB&T filed a proof of claim in the debtor's case for an unsecured debt in the amount of $1,020.69, the outstanding

balance owed to it under the BB&T Visa/BB&T 24 Card agreement. The Trustee objected to BB&T's claim, seeking to prevent BB&T from receiving payment under the debtor's Chapter 13 plan.

Conclusions of Law

The Trustee argues that it is proper for this court to disallow the claim of BB&T and force it to attempt collection on its debt from Chandler, the debtor's ex-wife. The Trustee bases his argument on the theory that 11 U.S.C. § 1322(b)(1), which allows for the separate classification of unsecured claims, would support such a treatment of BB&T's claim. Under the Trustee's theory, since Chandler has agreed to pay the BB&T Visa/BB&T 24 Card debt, BB&T's position is analogous to that of a secured creditor. The analogy is that Chandler's promise to repay is, in effect, BB&T's "collateral." Therefore, the Trustee asserts that BB&T's unsecured debt should be separately classified under § 1322(b)(1) and paid nothing until BB&T has exhausted its "collateral," i.e., shown it cannot collect its debt from Chandler.

The court rejects the Trustee's argument. The fact which the Trustee's theory fails to overcome is that BB&T has an undisputed right under the credit card agreement to collect its debt from either Blumenthal or Chandler. This right of choice on the part of BB&T is not modified by either the filing of Blumenthal's bankruptcy or the separation agreement executed between the debtor and Chandler.

Admittedly, 11 U.S.C. § 1322(b)(1) allows unsecured consumer debts of the debtor for which a co-debtor is also liable to be treated differently than other unsecured debts. Section 1322(b)(1) provides:

> (b) Subject to subsections (a) and (c) of this section, the plan may -
>
> > (1) designate a class or classes of unsecured claims,... but may not discriminate unfairly against any class so designated; however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims;....

Typically, the above language is used to justify an attempt by a debtor to pay more on an unsecured co-signed debt than on an unsecured debt where only the debtor is liable. In such an instance, the co-debtor is often a friend or relative, and the debtor is simply attempting to protect that co-debtor from collection efforts by the unsecured creditor. See Matter of Gonzalez, 73 B.R. 259 (Bankr. D. Puerto Rico 1987); In re Bowles, 48 B.R. 502 (Bankr. E.D. Va. 1985); In re Giraudeau, 35 B.R. 9 (Bankr. S.C. 1983); 5 Collier on Bankruptcy, Para. 1322.05[1] (15th ed. 1989); 3 Norton's Bankruptcy Law and Practice, § 76.05 (1981). In the present case, the Trustee suggests that § 1322(b)(1) be used to pay less on Blumenthal's unsecured co-signed obligation. Payment of BB&T's unsecured claim would occur, if at all, only after BB&T first attempts collection from Chandler. Such a position finds no support in the case law.

In the case of In re Davis, 101 B.R. 505 (Bankr. S.D. Ohio 1989), Huntington National Bank ("HNB") objected to confirmation of the debtor's Chapter 13 Plan. HNB was the holder of a note signed by both the debtor and her husband, and secured by a boat owned solely by the husband. The balance on the note at the time of HNB's objection greatly exceeded the boat's value. During the pendency of the debtor's Chapter 13 bankruptcy, her husband filed his own Chapter 7 petition indicating his intention to surrender the boat to HNB. The wife's Chapter 13 Plan proposed a fifty percent dividend to all of her unsecured creditors with the exception of HNB, to whom she proposed only a five percent dividend. The court determined that such a treatment of HNB's claim was unwarranted stating:

> According to the debtor, the use of the word "differently" [in § 1322(b)(1)] permits discriminatory treatment of co-signed debts.
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> * * * *
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> This court rejects the debtor's argument. Neither the legislative history nor the reported case law interpreting § 1322(b)(1) supports the debtor's position. The legislative purpose of the co-signer provision contained in § 1322 is to permit preferential treatment of co-signed claims under certain circumstances.

Davis, 101 B.R. at 507 (emphasis added). Thus, the court in Davis required that HNB receive at least as much as the rest of the debtor's unsecured creditors, even though there was a possibility that HNB would receive some payment from the liquidation of the boat.

BB&T should be accorded the same type of treatment as the bank in Davis. BB&T certainly has the possibility of payment

from Chandler, but it may or may not receive that payment. The court recognizes that if Chandler does follow through with payment to BB&T at a later time, or that for some other reason yet undiscovered, Chandler would afford a better avenue for BB&T to receive the amount it is owed, BB&T's right to payment under this debtor's Chapter 13 Plan could be refused. For the time being, however, BB&T still has the right to go against Blumenthal to receive at least partial payment of its debt through his bankruptcy Plan.

The reasoning in Davis finds further support in an earlier ruling by the court in In re Dondero, 58 B.R. 847 (Bankr. D. Or. 1986). In that case, Provo Railroad Credit Union ("PRCU") objected to confirmation when it discovered that the debtors (husband and wife) proposed only a ten percent dividend on PRCU's unsecured co-signed claim, while the remaining general unsecured creditors were to receive one hundred percent payment. PRCU's claim was based upon a note on which the primary obligor was the debtors' son, and the debtors were to make payment only if the son defaulted. The court upheld PRCU's objection. In the court's opinion § 1322(b)(1) "[did] not permit the debtor to pay [unsecured co-signed] claims at a lower composition" than other unsecured claims. Dondero, 58 B.R. at 848. The court went on to state:

> A more practical reason for interpreting § 1322(b)(1) not to permit a debtor to pay less on a co-signed consumer debt is that the code does not provide either the court or the trustee with a mechanism to allow them to confirm that the non-debtor co-signor is paying the obligation. As the assumption that the creditor will

> be paid by a third party is the basis for the Debtor's argument for a lower percentage of payments through the plan, this court believes that to eliminate the possibility of unfair discrimination, before granting the Debtor his discharge the court would need to confirm the third party payments had been made. As the third party is not within the court's jurisdiction, it has no authority to assure this precondition has been met.

Id. at 849. See also In re Diaz, 97 B.R. 903 (Bankr. S.D. Ohio 2989) (adopting the Dondero court's reasoning).

This court concurs with the rationale and the holding of the Dondero decision. BB&T should not be prevented from exercising its valid right to collect its debt from Blumenthal, and the Trustee's objection must be denied.

In re Guignard, C-B-84-447 (Bankr. W.D.N.C. November 13, 1987), cited by the Trustee, is inapposite to the present facts. The court's holding in Guignard was based on a settlement agreement that had been executed between the creditor, Deutsche, and Columbus, the corporate non-bankrupt co-debtor. The settlement agreement which bound Deutsche with regard to Columbus also bound Deutsche with regard to the debtor Guignard. Here the separation agreement is between Blumenthal and Chandler. BB&T, the creditor, is in no way a party to that separation agreement . Consequently, its rights remain unaffected.

The Trustee asserts that because this court has the authority under the co-debtor stay to protect non-bankrupt co-debtors where a debt is to be paid under the Plan, it must also have the authority to protect a debtor when a debt is to be paid by a non-bankrupt third party. This position is without merit. The separation agreement, which is the basis for the debt being paid

solely by Chandler outside of bankruptcy, affects only the rights of Chandler and Blumenthal. Notwithstanding the terms of the separation agreement, BB&T still has the right to go against either Chandler or Blumenthal. To require BB&T to first attempt collection from Chandler would be to abridge that right. In contrast, the debtor will suffer little or no hardship. Once payment is made to BB&T, Blumenthal is free to assert his rights under the separation agreement and be reimbursed by Chandler.

The Trustee has expressed concern that he should not be required to be BB&T's "free lawyer" and sue Chandler to collect that portion of BB&T's debt. This concern is unwarranted. The Trustee has no obligation to sue Chandler, and his only duty to BB&T is to ensure it receives proper payment through the Plan. It is the debtor's responsibility, not the Trustee's, to see that he is reimbursed.

The final argument by the Trustee is that the present case is one which calls for a marshalling of assets. "Traditionally, the equitable doctrine of marshalling has been used by secured creditors, but has not been available to unsecured creditors." The Edith, 94 U.S. 518 (1877). For the doctrine to apply there must be at least two secured creditors of the same debtor, two funds which are in the hands of that debtor, with one of the creditors having access to only one of the funds. In re J.H.B. Corp., 85 B.R. 192 (Bankr. D. Mass. 1988); Matter of Dealer Support Servs., 73 B.R. 763 (Bankr. E.D. Mich. 1987). Clearly the facts in the present case do not meet these requirements.

The two "creditors" at odds are the Trustee, who represents the remaining unsecured creditors, and BB&T. Neither of these "creditors" has the requisite secured status. Moreover, only one of the funds belongs to the debtor -- his estate property. The other "fund" is BB&T's right to collect from Chandler. Accordingly, marshalling would be in appropriate.

For all of the reasons stated above, the court concludes that the Trustee's Objection to BB&T's claim should be denied.

It is therefore **ORDERED** that:

1. The Trustee's objection is overruled;

2. The claim of BB&T in the amount of $1,020.69 is allowed to be paid through the debtor's Chapter 13 Plan, along with those of the remaining general unsecured creditors.

This the 15th day of December, 1989.

George R. Hodges
United States Bankruptcy Judge