

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

In re)	Case No. 04-60729-B-13
Deon P. McCracken,)	DC No. JES-1
Debtor.)	

MEMORANDUM DECISION REGARDING APPLICATION FOR APPROVAL OF CHAPTER 7 TRUSTEE’S FEES AND EXPENSES

Terri L. McCracken, Esq., appeared for the debtor Deon P. McCracken (the “Debtor”). James Edward Salven appeared as and for the former chapter 7 trustee.

The application for approval of chapter 7 trustee’s fees and expenses (the “Application”) was argued before the undersigned on May 17, 2005. The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and 11 U.S.C. § 503. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) & (B). For the reasons set forth below, \$400 of the Application is denied with prejudice. The balance of the Application is premature and will therefore be denied without prejudice.

This bankruptcy case was filed as a “no-asset” chapter 7 on December 30, 2004. James Edward Salven was appointed to act as the chapter 7 trustee (the “Trustee”). On her schedules, the Debtor listed a ½ future interest in real property located at 726 East San Carlos Avenue, Fresno, California, which is currently subject to a life estate in favor of Rosemary Milburn (the “Property”). The Debtor valued her interest in the Property at \$ 0.00 and she did not exempt her interest in the Property.

Under 11 U.S.C. § 704, the Trustee had the duty to, *inter alia*, investigate the financial affairs of the debtor and to collect and reduce to money the property of the estate. Through his investigation at the meeting of creditors, and after consulting with a realtor, the Trustee determined that the Property had a potential value of more than \$100,000 which could be sold, subject to the life estate, for the benefit of the creditors. On February 18, 2005, the Trustee filed a report of assets and requested that a notice of assets be sent to

1 creditors so that they could file proofs of claim. That notice was sent the same day.
2 However, to prevent the Trustee from selling her interest in the Property, the Debtor applied
3 to convert her chapter 7 case to chapter 13 on March 2, 2005. The case was converted by
4 order entered on March 4, 2005. The Trustee's jurisdiction over the assets of the estate
5 terminated upon conversion of the case.

6 The Debtor's chapter 13 plan purports to pay 100% of the unsecured claims,
7 estimated in the Plan at \$10,000, at the rate of \$200 per month over a period of 60 months
8 (the "Plan"). The Trustee filed this Application for compensation of his time and expenses
9 incurred in the chapter 7, prior to conversion, in the amount of \$2,565 and \$450.58,
10 respectively. The Trustee filed a corresponding proof of administrative claim in the chapter
11 13 in the amount of \$3,015.58. The court construes the Debtor's opposition to this
12 Application to be an objection to the Trustee's proof of claim. At the hearing, the court ruled
13 that \$400 of the Trustee's costs, representing a payment to the realtor, would be disallowed
14 because the Trustee never obtained court approval to employ a realtor pursuant to 11 U.S.C.
15 § 327. The court took under submission the remainder of the Trustee's Application, in the
16 amount of \$2,615.58.

17 The Debtor objects to allowance of the Trustee's administrative claim which, if
18 approved, she will have to pay through her Plan in addition to the other claims. However,
19 the Trustee's Application and the Debtor's objection are premature because the Plan has not
20 yet been confirmed. It is not clear that the Debtor can confirm a chapter 13 plan or that the
21 Debtor will actually have to pay any of the Trustee's fees through a chapter 13 plan. On the
22 record before the court, including the claims register, it appears that the Plan is not feasible,
23 meaning that it cannot be confirmed at this time. The court does not need to rule on the
24 Trustee's Application unless and until the Debtor is otherwise able to confirm her Plan and
25 stay in chapter 13. If she cannot confirm a feasible Plan, this case will likely be reconverted
26 to chapter 7 and, presumably, the Trustee will be reinstated to administer the estate. In that
27 event, the Trustee's compensation will be governed by 11 U.S.C. § 326 and this Application
28 will become moot.

1 Pursuant to 11 U.S.C. § 1325(a)(4), the Plan must pay to the unsecured creditors at
2 least as much as they would receive from the chapter 7 Trustee if the case had remained in
3 chapter 7. Based on the Trustee's estimate of value in the Property (at least \$100,000), it
4 appears that the Debtor will have to pay all of her unsecured claims in full to confirm a
5 chapter 13 plan.

6 The Debtor's Plan provides for payments to the chapter 13 trustee in the amount of
7 \$200 per month for 60 months, for a total of \$12,000. After chapter 13 trustee's fees and
8 expenses, about \$10,000 of this will actually go to creditors. It is not clear to the court why
9 the Plan only projects that there will be \$10,000 of unsecured claims because the Debtor's
10 schedules list unsecured nonpriority debts of \$35,803.98. The claims register shows that the
11 unsecured claims filed to date, excluding the Trustee's administrative claim, already exceed
12 \$18,500. If the Trustee's Application is approved, the unsecured claims will exceed
13 \$21,100. Based on the claims filed to date, the Debtor will need to pay approximately twice
14 as much money (approximately \$400 per month), to fund a confirmable chapter 13 plan.
15 The last date for creditors to file claims in this case does not expire until August 1, 2005.
16 There is a very real possibility that the claims actually filed in this case, and the amount
17 needed to fund the Plan, will increase substantially.

18 Under 11 U.S.C. § 1325(a)(6), the Debtor must also establish, as an element of
19 confirmation of her Plan, that she "will be able to make all payments under the plan and to
20 comply with the plan." The Debtor's Schedules I & J show that the Debtor does not even
21 have enough disposable income to fund the Plan in its present form (\$200 per month). There
22 is nothing in the record to suggest that the Debtor will be able to fund a Plan which provides
23 for full payment of the unsecured claims scheduled or actually filed. The present Plan does
24 not appear to be confirmable and the court is not persuaded that this case will remain in
25 chapter 13.

26 Based on the foregoing, the Trustee's Application for chapter 7 administrative
27 expenses shall be DENIED with prejudice to the extent of the \$400 he paid to a realtor. The
28 balance of the Trustee's Application, \$2,615.58 shall be DENIED without prejudice to the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Trustee’s right to re-notice the Application for further consideration, or the Debtor’s right to object to the Trustee’s proof of claim, when and if it appears that the Debtor can confirm an otherwise feasible chapter 13 plan.

Dated: June _____, 2005

/s/ W. Richard Lee
W. Richard Lee
United States Bankruptcy Judge