United States Bankruptcy Court
District of New Mexico

Document Verification

Case Title: **Vicky W. Bryan v. Charles Wright Bryan**
Case Number: **01-01076**
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UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW MEXICO

Clerk's Minutes

Before the Honorable James Starzynski

James Burke, Law Clerk
Jill Peterson, Courtroom Deputy

Joe Jameson Court Reporters
(505) 242-2809

Sara Edmonds Troske

Date:
TUESDAY, MAY 7, 2002

In Re:
CHARLES BRYAN
No. 13-01-11378 SA
and
VICKY W. BRYAN
Adv. No. 01-1076
v.
CHARLES WRIGHT BRYAN

Oral Ruling on Complaint

Attorney for Debtor: Gary Ottinger
Vicky Watson Bryan: Pro Se

Summary of Proceedings:

Exhibits _____

Testimony _____

ORAL RULING ATTACHED

CASE DISMISSED - OTTINGER WILL SUBMIT ORDER

Charles Wright Bryan 01-11378 April 17, 2002
RULING:
FH: Adv Proc no. 01-1076: 507(a)(7) – priority claim and the other issues addressed by the final pretrial order of April 17, 2002 (docs 24, 25)– most of these are also confirmation issues.
FH: Confirmation of Plan (doc 18)
Objections by Vicky Bryan (former spouse):
not feasible (24)
Fraud in schedules (54)
Schedule I income too low and notes to brother are fraud (60)

1334 and 157; core; 7052.

A. Support vs. property distribution:

Standards for determining whether a payment or exchange of funds or other property is support addressed by § 507(a)(7) are as follows:

I must construe "support" broadly, at least for §523 purposes, and that applies to § 507(a)(7) determinations as well, given that the definition of "support" is to be the same under 523(a)(5) and 507(a)(7) because of the virtual identity of the language of those two sections. Dewey v Dewey (In re Dewey), 223 BR 559, 563-64, 565 (10th Cir. BAP 1998), aff'd 1999 WL 1136744 (10th Cir. 1999) ("Dewey").

The terms "alimony" and "support" are to be given a broad construction to support the Congressional policy that favors enforcement of spousal and child support, thereby overriding the general bankruptcy policy which construes the exceptions to discharge narrowly. Collier ¶ 523.11[2], at page 523-78, citing Jones v. Jones (In re Jones), 9 F.3d 878, 881 (10th Cir. 1993)(the term "support" as used in § 523(a)(5) is entitled to a broad construction); Dewey, 223 B.R. at 564 (the term "support" is to be read broadly and in a realistic manner).

Whether an obligation to a former spouse is in the nature of support is resolved according to federal bankruptcy law, not state domestic relations law. Young v. Young (In re Young), 35 F.3d 499, 500 (10th Cir. 1994) ("Young"); Sylvester v. Sylvester, 865 F.2d 1164, 1166 (10th Cir. 1989)(per curium) ("Sylvester")(citing Goin v. Rives (In re Goin), 808 F.2d. 1391, 1392 (10th Cir. 1987)) ("Goin"). That determination is made as of the time of the divorce, not later, Sampson v. Sampson (In re Sampson), 997 F.2d 717, 725-26 (10th Cir. 1993) ("Sampson"), regardless of the ex-spouses' current needs or circumstances. Young, 35 F.3d at 500;

Sylvester, 865 F.2d at 1166. On the other hand, nothing about the federal basis for making the dischargeability decision precludes either party from returning to State Court to pursue a change in the substance of the support obligation as may be permitted under state law. Federal courts should not put themselves in the position of modifying state matrimonial decrees. Sylvester, 865 F.2d at 1166.

In making these decisions, the Court must consider not only the state court decree but must also look behind it. Young, 35 F.3d at 500. The "basic inquiry is ...what was intended by the [state] court in entering the decree and whether the evidence adduced in support of the decree justifies that court's characterization of the payments as alimony." Id. Accord, Champion v. Champion (In re Champion), 189 B.R. 516, 518 (Bankr. D.N.M. 1995). But see Goss v. Goss, 722 F.2d 599, 602 (10th Cir. 1983) (holding that bankruptcy court was collaterally estopped from deciding alimony issue differently than did the state court; decided under § 17a(7) of the Bankruptcy Act).

Ms. Bryan has the ultimate burden of persuasion, whether this case is looked at as a § 523(a)(5) matter, Sampson 997 F.2d at 725; 4 King et al., Collier on Bankruptcy (15th Ed. Rev. 1999) ¶ 523.04, at page 523-19 ("Collier"), or as a § 507(a)(7) matter.

Ms. Bryan must prove her case by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 290, 111 S.Ct. 654, 661 (1991).

Ms. Bryan has not met this burden. In exhibit D-2 (also C 11), Judge Macaron found and concluded respectively that both parties could support themselves (Finding 69) and that neither party should pay spousal support to the other (Conclusion V), and this is borne out by the findings that Mr. Bryan during the marriage worked in lower paying jobs deliberately and Ms. Bryan, although having less formal education, worked first as a Hyatt waitress, then also as a Circle K store manager, and then afterward as an area manager for Circle K corporation (Findings 28 and 34), February 1, 2000 trial transcript (Ex D6) at pages 23-26 . In fact, at the time of the trial in state court, Ms. Bryan was earning $37,500 per year, Ex D6 at page 23, lines 3-4. She also worked a second job from about August 1997 until June 1999 (F 61). In addition, the thrust of much of Judge Macaron's decision is that Ms. Bryan essentially cheated Mr. Bryan by not disclosing to him the large disbursements of community assets resulting from her gambling, when she was the one in charge of the family finances (FF 33-68), resulting in Judge Macaron's decision that the property should be distributed in such a way as to correct that wrong (CC O-T, and W).

Further evidence of the correctness of Judge Macaron's decision was Ms. Bryan's testimony that she did not ask for spousal support during the divorce trial. And Judge Macaron had before him testimony that James Bryan was paying the attorney fees for Wright Bryan and the argument from Ms. Bryan's attorney that this financial help was a predicate for the award of attorney fees to Ms. Bryan's counsel (D6, pp. 132-135). That evidence was significant for two reasons: first, the evidence of James Bryan's paying Wright Bryan's attorney fees was adduced for the purpose of obtaining attorney fees for Ms. Bryan's counsel at the end of the divorce proceedings, consistent with the state

doctrine that in a divorce proceeding, the parties should be equally matched for the fight; the evidence was not adduced for the purpose of obtaining spousal support for Ms. Bryan, as Ms. Bryan's attorney specifically stated at page 134, ll. 17-18 (Exhibit D6). Second, with this information in front of him (and in fact with Wright Bryan's counsel suggesting that James Bryan's paying of the attorney fees might support an award of support to Wright Bryan – pages 133-34), Judge Macaron clearly had the evidence and the issue before him to award spousal support (to either side), if he had determined to do so. Confronted with the evidence and issue, Judge Macaron did not make such a award. Ms. Bryan's statement that she did not know the Debtor was seeing (or would see) a BR lawyer or she would have made different decisions if she had known that, merely makes clearer what the understanding was at the time about spousal support; namely, that Ms. Bryan at that time was not seeking spousal support.

In other words, the evidence presented at the trial in this court supports the conclusions that (1) Judge Macaron's decree did not intend to award any support to Ms. Bryan and (2) there was no basis at that time for an award of spousal support to Ms. Bryan.

In view of the standards enunciated above and the facts, the Court finds and concludes that the payments and other property transfers to Ms. Bryan required by decree issued by Judge Macaron clearly did not constitute support as contemplated by § 507(a)(7) [or § 523(a)(5), for that matter], and just as clearly were intended by him, and served the function of, a property distribution. Whether the payments constitute a property distribution that should be treated as support, so to speak, pursuant to 523(a)(15), is not before the Court at this time, has not been considered, and so the Court does not rule on it at this time.

B. Confirmation of plan:

In March, April and October 1998, prior to Ms. Bryan filing the divorce petition in December 1998, James Bryan loaned the parties a total of $28m, in order to pay off debt, particularly the bill to AMEX which had refused to go along with the Consumer Credit Counseling debt repayment program based on interest reduction, and in order to let Wright Bryan invest in an air filtration business. (Note: to be clear, these $28m in loans were different than the $24,521 loaned to the marital community during the divorce in order to preserve the equity in the houses that the parties were financing then.) Ms. Bryan has argued here and before Judge Macaron that the advances were not in reality a loan, but rather a return to the community of cash that had been earned by the debtor and transferred to his brother without getting anything in return. The Court had informed the parties that it would consider evidence of that claim, even though the Court had previously concluded that this "cause of action" was litigated before Judge Macaron and decided by him in favor of Wright Bryan in such a way (same parties, sufficient incentive, necessarily decided) that the doctrine of issue preclusion or collateral estoppel, or perhaps claim preclusion or res judicata, precluded the Court from rendering a judgment on the issue. But the Court did permit the presentation of such evidence for the purpose of determining whether the petition and the plan may have been filed in bad faith; that is, if it were the case that the debtor had transferred non-reported cash income to his brother who then "loaned" it back to the estate, and the debtor pursued that fiction during the chapter 13 case,

and the Court so found, it might well be the basis for denying confirmation of the plan, among other things. Whether this is the correct interpretation of the doctrine of collateral estoppel the Court does not need to determine, given its ruling as set out below. But, for what it is worth, cf. Russell, Bankruptcy Evidence Manual (West 2002), § 30, at page 132 ("Any reasonable doubt as to what was decided by a prior judgment should be resolved against using it as an estoppel."). (Citations omitted.) The Court has considered the exhibits and the testimony presented in the trial conducted in this court, and has read the state court trial transcript, and concluded that it is more likely than not that the advances of $28m from James Bryan to the community in 1998 were genuinely loans and not disguised money transfers.

If Wright Bryan were transferring money to his brother James, it was during a time when Vicky Bryan was in control of the finances – at least through August 1997 – or when they were doing CCC and she had at least joint control of the finances, through June 1999. They separated in September 1998 (although she testified in the DR case that Wright Bryan and she continued to live together for some time after the filing of the divorce petition – D6 at page 17) and she filed the divorce petition in December 1998. The trial was in February 2000, so there was not much time for accumulating those large amounts of money for James from the date of the filing of the petition in December 1998 and the date of the trial a little over a year later (although that apparently was not the period that Ms. Bryan alleges the money transfers took place. Further, given that the two of them embarked on a spending spree of sorts in 1996 and into 1997 (which included both more discretionary spending on vacations and gambling), there was also not much income during that time that was available to be diverted to accumulating a large fund to transfer to James Bryan. And this was not a case of Ms. Bryan not knowing about the alleged transfers; she has testified before Judge Macaron and twice before this Court (at the September 24, 2001 hearing – Ex. C10 – and at this hearing) that she helped Wright Bryan make those transfers with a money belt and "money sock". So according to her testimony she knew about those transfers from the community and let them happen without doing anything about them. All of that seems unlikely. And it seems equally unlikely that she knew about the transfers and approved of them with some sort of understanding that the funds would be considered to be community property in the hands of James Bryan. Ms. Bryan also argued that the form promissory notes evidencing those loans could not be authentic because two of the notes – for March and April 1998, Exhibits C 16 and 18 – were executed before the form which was used was even in existence. The form they used shows a revision date of June 1998. However, the testimony in front of Judge Macaron was that the notes were executed in December, some time after the last of the loans was made, in October 1998, in order to ensure that the loans from James Bryan were documented, and that the Bryan family members took that step upon learning that a divorce petition had been filed. D6, at page 128, ll. 1-14 (testimony of James Bryan). The Court also reviewed the trial testimony of Lynn Bryan, the sister of the two brothers and the witness on the three notes, and found that her explanation seemed reasonable in support of the after-the-fact execution of the notes. So the Court concludes, based on the evidence presented to it, that there is insufficient evidence to support the claim that Mr. Bryan transferred community funds to his brother James who then loaned the funds back to the marital estate. Of course, as the Court has already pointed

out, Judge Macaron already denied relief on that cause of action (D-2, Finding # 30), so that, to the extent this Court either had to consider, or was allowed to consider, the issue again, the Court agrees with the conclusion reached by Judge Macaron.

An even more hotly contested issue was whether Mr. Bryan was underreporting his income. This issue is significant, since if the Debtor were underreporting his income in this case, he would not only be violating the reporting requirements of the Code and rules, but he would also be acting in bad faith, thus precluding confirmation of his chapter 13 plan. For what it is worth, the Court agrees with Judge Macaron that the Debtor was underreporting in the years prior to the filing of the divorce petition. However, by the time of the filing of the bankruptcy petition and the trial on confirmation, it appears that the Debtor was no longer doing that, or at least that there was insufficient evidence to prove that he was doing so.

Ms. Bryan's primary arguments were that while they were married, Mr. Bryan had underreported his income, that Mr. Bryan operated very largely on a cash basis, and that Mr. Bryan's spending records from 1999 through 2001 showed cash expenditures exceeding reported cash availability. As already stated, the Court does not dispute that at least prior to 1999, it appears that Mr. Bryan probably was underreporting his income. And unquestionably it is unusual for people to pay bills such as mortgage payments in cash rather than by check or automatic withdrawal. But neither of these facts compel the conclusion that Mr. Bryan has underreported his income in this case. Having considered the evidence presented, the Court has concluded that it is possible for Mr. Bryan to have subsisted on his reported cash income and to have made deposits of cash into his checking account if, as he testified, he lived very frugally and "did without" at times in order to make ends meet. (For example, Mr. Bryan testified, without contradiction, that he wore cast off shirts from Hyatt guests for years at a time. And there was testimony in both trials about how much it bothered Mr. Bryan that when he and Ms. Bryan would go to a movie with discount tickets, she would buy popcorn that cost more than the cost of the movie itself. His preference would have been to pick up a candy bar and smuggle it into the theater. Given that the cost of popcorn and a drink at a theater now exceeds the cost of even a regular admission, the Court finds this testimony credible.) In any event, attached to these minutes is a chart showing the Court's calculations (actually, the staff attorney's calculations which the staff attorney has patiently explained to the Court and which the Court agrees with) showing that practically speaking the numbers are consistent with Mr. Bryan's assertions, albeit just barely. What that analysis shows is that the year and half cash flow from tips was sufficient to make the cash deposits into the checking account on the same or following days. For example, the fourth column shows that on March 11, 2000, Mr. Bryan reported tips of $387, and that on March 15 (column 3) he deposited $350 of cash into his checking account. The second half of the analysis shows that for CY 2000 and, to the extent information is available, CY 2001, the Debtor had sufficient funds to cover all his expenses.

And while Mr. Bryan's testimony that he keeps in his head the totals of his weekly cash tips so that he can report them to his employer (as he is required to do for tax purposes) gives this Court some pause, it is still not enough to raise sufficient doubts about the Debtor's credibility that Ms. Bryan has convinced the Court that she is correct. For someone as fixed on

cash and on the daily frequently small numbers of living, as Mr. Bryan clearly is, remembering and calculating each day what the “take” has been, is not incredible. Indeed, for millennia now, illiterate merchants all around world have done exactly that. Bottom line, part of the Court’s consideration in reaching the conclusion about the income reporting is that mere nonconformity (and nonconformity it certainly is) does not constitute a lack of credibility.

A related issue argued by Ms. Bryan was Mr. Bryan’s schedules I and J and his amended schedules I and J, the one showing his income and expenses as of the date of the filing of the petition and the other his income and expenses as of the date of the conversion to chapter 13 (and both reflecting the hoped-for effect of the filing – namely, the discharge of debt). In the statement of affairs, filed with the petition on March 2, 2001, Mr. Bryan stated that his income in 1999 was almost $20m, and in 2000 was slightly over $21m. Ex C1. These numbers are consistent with his tax returns for those years, although the returns were completed for filing in July 2001. Exhibits C8 and C9 respectively. More important, the attached W2 forms from Hyatt (Debtor’s employer then and now) are consistent with those numbers.

The Debtor’s March 2 schedule I shows annualized income of about $20m. His June 28, 2001 amended schedule I shows annualized income of about $24m, excluding the additional “casual” income of $125 per month. This $24m represents an increase of 20% over the prior figure. The debtor explained that these differences arose from the fact that he had visited with Mr. Ottinger a number of months before the petition was filed on March 2, 2001, and at that earlier time information was provided and schedules prepared that were unintentionally not reviewed or corrected prior to when Mr. Bryan signed the declaration page to the schedules on March 1, 2001. (See attachment to the voluntary petition filing. Doc 1.) (The Debtor’s counsel Mr. Ottinger confirmed and supplemented that explanation. However, although the statement was made by Mr. Ottinger as an officer of the court, and the Court has never had any reason, and still has no reason whatever to doubt Mr. Ottinger’s credibility, the Court does not treat as evidence any statement by Mr. Ottinger, because Mr. Ottinger’s statement was not made under oath.)

The deductions from gross income are $593 in the original schedule I and $390 in the second schedule I, accounted for mostly by the elimination in the second schedule of the $212 that the Debtor was proposing to save for his retirement each month. By reason of the reduced deductions and the additional casual income, the Debtor went from $1,090 net income to $1,720 net income, a dramatic appearing increase. The original schedule J expenses of $1,237 increased by $425 in the amended schedule J to $1,662. The difference is mainly accounted for by the addition of line items for charitable contributions of $200 and a home equity payment of $213. (There were other much smaller additions and subtractions that netted to the $425. And since the filing of the amended schedules, the Debtor and the chapter 13 trustee have made compromises concerning those items to get the plan confirmed consensually.)

With respect to the increase in gross income from the Hyatt, the schedules should have been reviewed prior to the filing, and there was no evidence of exactly when the visit with counsel took place. Nevertheless, while a 20% increase in income is not insignificant, here the difference in absolute dollars was a little under $4m per year, which was a difference of $303 per month. That does not constitute a major miscalculation, and it is

understandable that such an error could have been committed negligently but not intentionally or in bad faith. And while it would have bolstered Debtor's case to have pinpointed when the visit(s) to counsel occurred – and the Debtor did have the burden of persuasion on this issue – the evidence presented was sufficient for the Court to conclude that the lower gross income figure in the original schedule I was not intentional or the result of acting in bad faith. To put it more precisely, the court finds that it is more likely than not, albeit with not much room to spare, that the Debtor is and has been acting in good faith with respect to his schedules.

Another concern that the Court had upon hearing and reading this evidence and the amended schedules was that the fit was almost "too neat" between the deficit chapter 7 schedules and the slightly "surplus" chapter 13 schedules which would be needed in order to support a successful chapter 13 confirmation bid. But then, the "cover sheet" to the amended I and J says explicitly that the debtor is not only taking on additional "casual" employment, but is also reducing expenses, for the purpose of making the chapter 13 plan work. The reduced expenses actually refers to the deletion of the retirement savings, and there was sufficient evidence that Mr. Bryan had begun contributing on a regular basis to Asbury Methodist church. (The debtor's exhibit D-3 shows that debtor began making contributions to the church, at the rate of about $150/month, beginning in August 2000, so that if that visit with Mr. Ottinger took place before that, it would explain why the first schedule I was initially incorrect.) Presumably the Debtor could also reduce his church contributions if that would be required to make a plan work. In any event, chapter 13 debtors routinely adjust or juggle their budgets in order to make a repayment plan work. And judging by the tenor of the new bankruptcy "reform" legislation, these two actions by the Debtor are exactly what Congress would like to see all debtors doing. Thus the Debtor is certainly not to be faulted for amending his schedules to do those things.

As a side note, I should comment on what Ms. Bryan says happened to her with her divorce counsel. She alleges that the pre-trial litigation in her case was very expensive, and she got behind in her bills, so that her firm refused to provide an attorney for her until the last minute (when it came time for trial a little over a year later), when it assigned a junior attorney who had taken no depositions and did not fully understand the facts of the case that Ms. Bryan wanted to put on. (The lawyer also submitted the proposed findings of fact and conclusions of law required by Judge Macaron.) If these allegations are true, they represent the litigant's nightmare that also leads to such (justified) criticism of the legal system, in which finances drives or appears to drive what gets effectively presented to the court. However, from a reading of the entire trial transcript, it appears to me that her counsel vigorously represented Ms. Bryan, including a pointed and effective cross examination of Mr. Bryan. More to the point, however, is that even were this the case in the divorce case before Judge Macaron, Ms. Bryan's solution is not a relitigation of the merits of the money-transfer cause of action, but rather at this stage Ms. Bryan's solution might be a cause of action against her former counsel. But of course I am not saying that there was malpractice, because the only person who testified about that was Ms. Bryan, and not the firm.

One other note that needs to be added here is that this was one of the most difficult cases this Court has had to decide. Both parties appeared to

the Court to be competent and credible. Yet the testimony of the parties about some of the allegations made – for example, the alleged transfer of tens of thousands of dollars of cash to James Bryan – are so obvious and so at odds that someone must not be telling the truth. And there is no really clear indication to me which party that is. The Court also reviewed the transcript of the trial before Judge Macaron, and that transcript also left questions in the mind of this Court about who was telling the truth. So ultimately the Court has had to rely on the tiebreaker; that is, who had the burden of persuasion and was that burden met. In this case, Mr. Bryan had the burden of persuading the Court of his good faith, and he made at least a prima facie case with his testimony. The burden then swung to Ms. Bryan to come forward with evidence of lack of good faith, and she tendered her evidence in support of her allegations of money transfers, underreporting of income, etc. However, at the end of the day, so to speak, this Court does not find it more likely than not that her allegations are true, and therefore she has not met her burden of persuading the Court of the truth of her allegations. Thus, it remains the case that Mr. Bryan has met the burden of coming forward with evidence of good faith, and of persuading the Court of that good faith. But having said that, the Court will continue to wonder, as it has ever since the hearing on James Bryan's stay motion months ago, exactly what did happen in those months and years preceding the filing of the petition.

With respect to the merits of the trial, one of the core requirements for confirmation is the debtor's good faith. Based on what has been said, I find that the Debtor has acted in good faith and has not lied or otherwise filed any false statements. I also find that the other requirements of § 1325 of the code for confirmation of the plan have been met.

Before we are done, the Court needs to address another matter from the adversary proceeding, no. 01-1076; namely, the issue of requested relief paragraph C in the proposed amended complaint (doc 22; see paragraphs 21 and 22; see also doc 20, Motion to Amend Complaint, paragraph 7). This part of the proposed amended complaint deals with $24,521 that was loaned by James Bryan to the Bryans during the divorce proceeding in order to preserve the parties' equity in some of the houses during the divorce proceeding. It was loaned pursuant to Judge Macaron's court order, secured by a lien on one of the houses pursuant to court order, and then repaid upon the closing of the sale of the house and the later disbursement of the proceeds from the registry of the state court (see D7, pp. 226-231). The proposed amended complaint may have been seeking a determination that repayment of the $24,521 was a preference to an insider that should be recovered as part of the good faith plan process. The literal wording of the complaint sought a declaration of nondischargeability and priority payment to Ms. Bryan of the proceeds of that preference action, which is not possible or contemplated by Code. When the Court ruled that Ms. Bryan could not amend her complaint to seek the declaration of nondischargeability and priority (doc 25), it overlooked the implicit cause of action for a preference. Arguably therefore Ms. Bryan should have been permitted to argue that the alleged preference should have been pursued.

In fact, the effect of the estate recovering that preference would be to expose Ms. Bryan to an additional collection effort by James Bryan, since that $24,521 is clearly a community obligation which would not be paid in full under the chapter 13 plan. Ms. Bryan has already made it clear that one (and

perhaps the only) reason for pursuing this litigation so strenuously against the Debtor is that she is, as a result of his filing, exposed to more than double the liability she anticipated having to deal with from James Bryan. Since neither the chapter 13 trustee nor any other party raised this objection, the Court questions the utility of Ms. Bryan raising it now, in this context, with such a potentially adverse impact on her. And given that at first blush, there is a defense to the preference action – see 11 U.S.C. § 547(c)(1) or (c)(4) – there seems to be even less reason for anyone, including Ms. Bryan, to pursue such an action. For these reasons, it still makes sense confirm to chapter 13 plan, even without a provision in it for pursuing a preference action against James Bryan.

C. Conclusion

For the foregoing reasons, the Court finds that the requirements for confirmation have been met, and that it should confirm the proposed chapter 13 plan with the changes agreed upon with the chapter 13 trustee. The Court also finds that it should dismiss the adversary proceeding.

D. Order

It is therefore ordered that the debtor's chapter 13 plan (doc 18), filed June 29, 2001, is confirmed as amended by the trustee's changes. It is also ordered that, with respect to adversary proceeding 01-1076, the complaint and any amendments thereto – that is, all requests for relief – are denied and the complaint is dismissed, with the exception of the original request for relief under §523(a)(15), filed when the Debtor's case was still a chapter 7 case. This one cause of action is dismissed without prejudice as moot, since it is conceivable that the Debtor may not perform the chapter 13 plan in its entirety and may end up back in a chapter 7 proceeding. If Ms. Bryan continues to believe that a preference cause of action should be pursued against James Bryan, she may file a motion seeking reconsideration of the order dismissing the adversary proceeding within ten days of the entry of the written order contemplated by this ruling. In that motion she must explain what law and facts exist that would make such an action successful, and explain who would pursue the action, since the chapter 13 trustee has so far not done so and the debtor is unlikely to do so, or at least is unlikely to do so with the requisite enthusiasm and will to win.

GBO tdo.

Attachment as stated:

A. Analysis of cash flow from tips that is sufficient to make the cash deposits into the checking account on the same or following days.

Date Exh c-6	**Payroll deposits in check acct Exh c-6**	**Cash deposits in check acct Exh C-6**	**Tips reported Exh C-7 date/amt.**	**Cash/Check Exh C-6**

010500				300.00
010500	156.24			
011900	147.79			
012400		200.00		
020200	133.41			
020900		225.00		
021600	110.11			
021700		250.00		
022800		225.00		
030100	235.16		3/11 $387	
031500		350.00		
031600	208.04			
032400		150.00		
032900	188.66		3/25 $241	
041000			4/8 $397	500.00
041200	150.71			
042600	116.92		4/22 $355	
050800		200.00	5/6 $328	
051000	212.18			
052400	70.41		5/20 $407	
060500		100.00	6/3 $312	
060700	172.67			
061900			6/9 $474	584.52
062100	131.63		6/17 $377	
070600	179.15		7/6 $348	
071900	169.66		7/15 $353	
072400				257.74
080200	247.79		7/29 $419	
081500		350.00	8/12 $335	

081600	146.31			
083000	255.36			
090500				300.00
091300	155.94		9/9 $445	
092000		400.00		
092700	449.27		9/23 $308	
101100	207.67		10/07 $534	
101600		600.00		
102300		250.00	10/21 $356	
102500	348.55			
110600		300.00	11/04 $387	
110800	143.60			
112200	446.98		11/18 $327	
113000				356.55
120600	211.62		12/02 $161	
122000		200.00	12/16 $278	
122000	209.27			
2000 subtotals[1]	**5205.1**	**3800**		**2298.81**
010801				256.27
011801	244.44			
013101	302.54			
021401	248.22			
022801	269.36			
030601		350.00		
031401	226.07			
032801	467.04			

[1] Year 2000 tax return W2 listed medicare wages and tips total of $21,110.45, so that the non-payroll income was three times the amount of the payroll income of $5,205.10.

040201		100.00		
041101	197.55			
042501	246.83			
043001		300.00		
050901	138.71			
051401	200.00			
052101	200.00			
052301	520.33			
060701	229.60			
062001	272.70			
062501		200.00		
070201		100.00		
070501	227.34			
070901				1288.44
071601		250.00		
071801	137.11			
19 MONTH TOTAL	**9332.94**	**5100**		**3843.52**
AVERAGE	**491.20**	**268.42**		**202.29**

B. Analysis based on Exhibit C-7, showing that the Debtor had sufficient funds available to pay his obligations in CY 2000 and, to the extent of available information, in CY 2001:

Year 2000

Disbursements:		
Per 2000 form 1040 (exh. c-9):	401k contribution (per w2)	2679.07
	FIT withheld	2545.33
	FICA withheld	1308.85
	Medicare withheld	306.10

	SIT withheld	336.54
	home mortgage int.	7635.00
	church contribs	1025.00
total from 1040		15835.89
estimated cash payments	725 per month per trial exhibit, but includes 200 per month for estimated charitable/church. So 525 x 12 =	6300.00
check payments	824 per month per trial exhibit, but includes approx 610 per month for mortgage, deducted above on 1040 as interest. So 214 x 12 =	2568
total disbursements		24703.89
SOURCES OF CASH:		
total wages on w2		-21110.45
beginning checking account balance 1/1/2000 (ex. c-6)	3383.10	
less ending checking account balance 12/31/2000 (ex. c-6)	-1106.86	-2276.24
T Rowe Price withdrawal in 1/00 (exh. c-15)		-2000.00
		-25386.69 (total funds available to pay disbursements of $24,703.89)
unlocated difference		-682.80 more funds than disbursements.

Year 2001 (Jan through July only because we have bank statements only through July, exh. c-6)

per bank statements, exh.c-6	3727.74	1700 cash deposits
payroll records	5,518.33 checks	4875.01 tips