United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

In re Marvin S. Marcus, Debtor
Bankruptcy Case No. MM11-87-01392

United States Bankruptcy Court
W.D. Wisconsin

December 6, 1990

Roger Schnitzler, Madison, WI, for debtor.
William J. Rameker, Murphy & Desmond, Madison, WI, for trustee.
Mark Burish, Madison, WI, a creditor.

Robert D. Martin, United States Bankruptcy Judge.

MEMORANDUM DECISION

On March 26, 1987 the debtor, Marvin S. Marcus, filed his voluntary Chapter 11 petition. On July 6, 1987 a proof of claim was filed in the name of Jack Marcus for the amount of $375,293.57, and a second proof of claim in the name of Jack Marcus, Inc. was filed for the amount of $78,100.00. On September 23, 1988 the debtor filed its notice and objection to the claim of Jack Marcus; an amended notice and objection was subsequently filed on October 7, 1988. On October 11, 1988 this court issued an order consolidating objections to claims, including that objecting to the claim of Jack Marcus, and set the matter for trial on February 9 and 10, 1989. Shortly prior to the trial, Marvin Marcus died.

The central matter of discussion at the hearing on February 9, 1989 was whether in light of Marvin Marcus' death the case should be dismissed. The parties present reached a consensus that a great deal of their progress in resolving disputes among them would be lost if the case were dismissed. Therefore, largely in order to prevent dismissal of the case, an oral stipulation was put on the record. Prior to entry of the stipulation, the trustee, William J. Rameker, advised the court as follows:

> Although we haven't been able to confirm with Jack Marcus, Jack Marcus has represented to everybody or several, he will drop his claim out of the estate, which is $75,000, and transfer his interest in Maple Leaf to the estate. Any interest the estate receives will be included in the transfer of interest to Mr. Evans.
>
> Jack Marcus has dropped his claim from $27,500 to $21,000, and there is a possibility that would be negotiated lower.

In addition, Joseph Kuemmel, who appeared on behalf of several of the debtor's creditors, indicated that "Jack Marcus is going to drop any claim he has for the RimRock note that's due, drop all his claims to anything."

Furthermore, Roger Schnitzler, debtor's counsel, speaking in reference to the stipulated agreement, stated: "I discussed it with Jack [co-personal representative of the debtor's

estate], he's in California, we discussed it yesterday, he was in agreement that we should pursue this course of action." Jack Marcus was neither present at the hearing nor was he represented by an attorney. (At his deposition taken on April 26, 1990 Jack Marcus acknowledged that although he had told Roger Schnitzler at one point in time that he was prepared to waive all his claims, he was no longer willing to do so.)

On December 29, 1989 the trustee filed his notices and objections to the claims of both Jack Marcus and Jack Marcus, Inc. On August 13, 1990 the court heard the application of the attorney for trustee, William J. Rameker, for a third interim allowance of compensation and reimbursement of expenses in the total amount of $38,877.75, and the trustee's motion to approve a stipulation on the disputed claims of Jack Marcus and Jack Marcus, Inc. The terms of the proposed stipulation provide, inter alia, that the Jack Marcus claim will be allowed as a general unsecured claim in the amount of $50,000.00, and the Jack Marcus, Inc. claim will be allowed as a general unsecured claim in the amount of $78,100.00. Attorney Mark D. Burish, a creditor of the debtor-deceased who is a party to the February 2, 1989 stipulation, objected to both the proposed stipulation and the requested attorneys fees.

To determine the appropriate disposition of the motion, application, and objections, the following issues must be addressed:

1. Whether Jack Marcus and Jack Marcus, Inc. have waived their respective claims;

2. Whether Jack Marcus and Jack Marcus, Inc. may be estopped from asserting their respective claims; and

3. Whether the attorney for the trustee may be denied his fees and expenses due to his alleged failure to obtain written withdrawals of claims from Jack Marcus and Jack Marcus, Inc. prior to the February 9, 1989 hearing. It is argued that had such waivers been obtained, the claims would have been eliminated, and the additional attorneys fees with respect to such claims would not have accrued.

Somewhat reluctantly, I reach the following conclusions:

1. Jack Marcus and Jack Marcus, Inc. have not waived their respective claims.

2. Jack Marcus and Jack Marcus, Inc. may not be estopped from asserting their respective claims.

3. The attorney for the trustee may not be denied his fees and expenses due to his alleged failure to obtain written withdrawals of claims from Jack Marcus and Jack Marcus, Inc. prior to the February 9, 1989 hearing.

I.

Bankruptcy Rule 3006 provides:

A creditor may withdraw a claim as of right by filing a notice of withdrawal, except as provided in this rule. If after a creditor has filed a proof of claim an objection is filed thereto or a complaint is filed against that creditor in an adversary proceeding, or the creditor has accepted or rejected the plan or otherwise has participated significantly in the case, the creditor may not withdraw the claim except on order of the court after a hearing on notice to the trustee or debtor in possession, and any creditors' committee selected pursuant to §§ 705(a) or 1102 of the Code. The order of the court shall contain such terms and conditions as the court deems proper. Unless the court orders otherwise, an authorized withdrawal of a claim shall constitute withdrawal of any related acceptance or rejection of a plan.

In our case, prior to the time of the February 9, 1989 hearing at which the stipulation was entered, the debtor had filed an objection to the claim of Jack Marcus. Therefore, in accordance with Bankruptcy Rule 3006, Jack Marcus was required to file a notice and motion for withdrawal of claim, and thereafter to obtain court approval of his motion, in order to withdraw his claim. See also Matter of Pat Freeman, Inc., 42 BR 224, 228 (Bankr SD Ohio 1984) ("Pursuant to Bankruptcy Rule 3006, creditors may withdraw a claim anytime except after an objection is filed. After an objection has been filed, an order of the bankruptcy court is necessary to withdraw such claim."); In re Penn Hook Coal Co., Inc., 68 BR 804, 807 (Bankr WD Va 1987) (citing cases which held that after an objection to a proof of claim has been filed, a proof of claim may be withdrawn only subject to approval by the court).

Jack Marcus did not file such a notice and motion, and never received court approval of the withdrawal of his claim. Because the requirements of Bankruptcy Rule 3006 had not been met, Jack Marcus' claim remained a claim against the estate at the time of the February 2, 1989 hearing and continues to be such at the present time.

As no objection had been filed to the claim of Jack Marcus, Inc. by the time of the February 9, 1989 hearing, pursuant to Bankruptcy Rule 3006, Jack Marcus, Inc. would have been able to withdraw its claim as of right by filing a notice of withdrawal. See also In re Oberlies, 94 BR 916, 924 (Bankr ED Mich 1988) ("Although a creditor may withdraw a claim as of right, it must do so in writing by filing a notice of withdrawal."); Matter of Overly-Hautz Co., 81 BR 434 (ND Ohio 1987).

Despite oral representations that the claim of Jack Marcus, Inc. would be withdrawn, the corporation did not file a notice of withdrawal prior to the February 9, 1989 hearing. The requirements of Bankruptcy Rule 3006 for withdrawal of the claim were not satisfied, and the claim of Jack Marcus, Inc. therefore remained a claim against the estate at the time of the February 9, 1989 hearing, and continues to be such at the present time.

II.

The requirements of Bankruptcy Rule 3006 notwithstanding, Mr. Burish argues that Jack Marcus' oral waiver of his claims must be enforced, thereby eliminating the claims of Jack Marcus and Jack Marcus, Inc. against the estate. In Pension Benefit Guaranty Corp. v Pincus, Verlin, Hahn, Reich & Goldstein Professional Corp., 42 BR 960, 966 (ED Pa 1984), Judge Newcomer stated: "I know of no basis on which I could conclude that state common law pertaining to waiver overrides the clear provisions of the Bankruptcy Act." Similarly, this court is not aware of any basis upon which state common law waiver may be said to override the clear mandate of Bankruptcy Rule 3006.

Mr. Burish additionally contends that "[e]ven if Jack Marcus' oral representations do not constitute a waiver of his rights, he should not be allowed to assert his claim based on doctrines of estoppel." In Skycom Corp. v Telstar Corp., 813 F2d 810 (7th Cir 1987), the Seventh Circuit Court of Appeals noted that "[i]n Wisconsin, as in other states, a promise that is designed to induce commercially reasonable detrimental reliance will be enforced to the extent necessary to compensate the relying party for his injury in relying." Skycom, 813 F2d at 817 (citations omitted). Previously, in Janke Construction Co., Inc. v Vulcan Materials Co., 527 F2d 772 (7th Cir 1976), the Court enumerated the elements of promissory estoppel:

(1) defendant made a definite promise to plaintiff with the reasonable expectation that the promise would induce action of a definite and substantial character on the part of the plaintiff; (2) that the promise induced such action; (3) that plaintiff acted in justifiable

reliance upon the promise to its detriment; and (4) that injustice can be avoided only by enforcement of the promise.

Janke Construction, 527 F2d at 779.

Assuming arguendo that Mr. Burish may be said to have detrimentally relied on Jack Marcus' oral representations, such reliance was neither "commercially reasonable" nor "justifiable." His promissory estoppel claim therefore must fail. Jack Marcus' oral representations notwithstanding, Mr. Burish is charged with knowledge of the requirements of Bankruptcy Rule 3006.(1) Under the Rule, a claim to which no objection has been filed may be withdrawn by a written notice of withdrawal, and a claim to which a written objection has been filed may be withdrawn only upon court approval following notice and a hearing. In either case, a filing with the bankruptcy court is required.

At the time of the February 9, 1989 hearing, no such filing had been made with respect to either the claim of Jack Marcus or that of Jack Marcus, Inc. Furthermore, prior to entry of the stipulation, the trustee clearly advised the court and the parties present at the hearing that Jack Marcus' representations concerning waiver of his claims had not been confirmed. In spite of this fact, as the trustee notes, "[n]o parties-in-interest or creditors who entered into the Stipulation expressly stated that their agreement to the Stipulation was conditioned on Jack Marcus releasing one or both of the subject claims."

Where the trustee had clearly advised that waiver of the claims of Jack Marcus and Jack Marcus, Inc. was not confirmed, and where the statutory conditions precedent to withdrawal of the claims of Jack Marcus and Jack Marcus, Inc. were not fulfilled, Mr. Burish's reliance on Jack Marcus' oral assertions that he would waive said claims was neither justified nor commercially reasonable. Mr. Burish's promissory estoppel contention therefore must be denied.

III.

The attorney for the trustee has applied for a third interim allowance of compensation and reimbursement of expenses in the total amount of $38,877.75. Mr. Burish argues that the application should be denied due to the attorney for the trustee's alleged failure to obtain written withdrawals of claims from Jack Marcus and Jack Marcus, Inc. prior to the February 9, 1989 hearing. Mr. Burish contends that had such waivers been obtained, the claims would have been eliminated, and the additional attorneys fees with respect to such claims would not have accrued.

It may not be gainsaid that Mr. Burish's scenario for trustee activity is attractive, but he cannot seriously contend that the attorney for the trustee had the power to "force" Jack Marcus to execute the waivers. What Mr. Burish seems in reality to question is the professional quality of the services rendered to the estate. Specifically, by failing to condition the trustee's acceptance of the stipulation on Jack Marcus' compliance with the requirements of Bankruptcy Rule 3006, may the attorney for the trustee be said to have invited the very problem which has arisen (i.e., the trustee now seeks approval of a stipulation pursuant to which Jack Marcus and Jack Marcus, Inc. retain general unsecured claims totalling $128,100.00, when on February 9, 1989 a compromise was supposedly reached pursuant to which Jack Marcus and Jack Marcus, Inc. were to waive their claims in the bankruptcy)? If so, then should the attorney for the trustee's fees and expenses be denied because such services were not of value to the estate? 11 USC § 330.

The trustee "owes a fiduciary duty to debtor and creditors alike to act fairly and protect

their interests." In re Whet, Inc., 750 F2d 149 (7th Cir 1984). The attorney for the trustee in turn represents the trustee in carrying out that duty. Regarding the applicable standard of care it has been stated:

The applicable standard is the exercise of due care, diligence and skill both as to affirmative and negative duties. The measure of care, diligence and skill required of a trustee is that of "an ordinarily prudent man in the conduct of his private affairs under similar circumstances and with a similar object in view." Mistakes in judgment cannot be the basis of a trustee's liability in his official capacity. The failure to meet the standard of care, however, subjects the trustee to liability in his official capacity.

Ford Motor Credit Co. v Weaver, 680 F2d 451, 461 (6th Cir 1982) (citations omitted); see also In re Cochise College Park, Inc., 703 F2d 1339, 1357 (9th Cir 1983).

As has been stated, prior to entry of the stipulation at the February 9, 1989 hearing, the trustee clearly advised the court and the parties present that Jack Marcus' oral representations concerning the waiver of the claims of Jack Marcus and Jack Marcus, Inc. had not been confirmed. It was certainly the prerogative of each of the eight other attorneys who approved the stipulation (either, like Mr. Burish, on his own behalf, or on behalf of the clients represented) to condition that approval on withdrawal of the claims of Jack Marcus and Jack Marcus, Inc. which complied with the requirements of Bankruptcy Rule 3006. None, however, did so.

Presumably, these eight attorneys were ordinarily prudent. They conducted their affairs with regard to the February 9, 1989 stipulation under the same circumstances as the trustee and with the same object in view. That none conditioned his or her acceptance of the stipulation on compliance with Bankruptcy Rule 3006 is either some evidence that the attorney for the trustee complied with the applicable standard of care, or that each of the attorneys agreeing to the stipulation suffered from a mistake in judgment.

It would appear that to the extent, if any, that the attorney for the trustee may be said to have failed to exercise due care, the failure was due to a mistake in judgment, i.e., a good faith belief that Jack Marcus would honor his agreement to withdraw from the estate the claims of Jack Marcus and Jack Marcus, Inc. Such a mistake is insufficient grounds upon which to penalize the attorney for the trustee by denying his application for fees and expenses.

Furthermore, when it later became apparent that Jack Marcus would not withdraw the claims from the estate, the trustee on December 29, 1989 duly filed objections to the claims and later filed a motion to approve a stipulation regarding the disputed claims of Jack Marcus and Jack Marcus, Inc. The representations and proofs previously submitted satisfy me that the stipulation is in the best interests of the estate and I approve it. I am also satisfied that the application of the attorney for the trustee for a third interim allowance of compensation and reimbursement of expenses should be approved. 11 USC § 330(a). I therefore grant the attorney for the trustee's application in the amount of $38,877.75.

END NOTE:

1. See In re Liberty Trust Co., 89 BR 13, 15 (Bankr WD Tex 1988), in which it was stated that "[a]ll parties coming before this Court are charged with notice of all the local rules." A fortiori, all parties are charged with knowledge of the federal Bankruptcy Rules. See also In re Johnson, 105 BR 806, 808 (Bankr ND Tex 1987) (the debtor and the debtor's attorney were charged with knowledge of the requirements of Bankruptcy Rules 7004(b)(1) and 9006(e)).