United States Bankruptcy Court
Western District of Wisconsin

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In re Berry and Christina L. Parker, Debtors
Bankruptcy Case No. 91-34084-12

United States Bankruptcy Court
W.D. Wisconsin

May 12, 1995

Galen W. Pittman, Hoffman, Addis, Pittman & Brandau, La Crosse, WI, for debtors.
Patricia M. Gibeault, Axley Brynelson, Madison, WI, for Agribank, FCB.
William A. Chatterton, Ross & Chatterton, Madison, WI, Trustee.

Robert D. Martin, United States Bankruptcy Judge.

MEMORANDUM DECISION

On December 13, 1991, Berry and Christina Parker filed a chapter 12 bankruptcy. A plan was confirmed on April 23, 1992. In March 1993, the Parkers' milking facilities were destroyed by fire. From the insurance proceeds, the Parkers paid their secured creditors and a variety of unsecured creditors, some of which were provided for in their confirmed plan. An amended plan providing for payment of remaining debts, including real estate taxes, attorney fees and one late filed claim, was approved by the court on October 12, 1993. Under this plan, the Parkers were to pay $710.12 for 36 months. However, no order confirming the amended plan was signed until September 12, 1994.

Before the order confirming the amended plan was signed and without notice to creditors or court approval, on September 1, 1994, the Parkers sold their homestead for $159,900. (The value of the property had previously been determined on February 18, 1992 in conjunction with the initial plan confirmation to be $74,000.) Neither the original plan nor the amended plan called for the sale of the property. The Parkers used a portion of the sale proceeds to promptly pay the entire balance remaining under the amended plan.[(1)] The remainder was used to purchase a new homestead in St. Charles, Illinois. On December 1, 1994, the trustee filed a summary of final account indicating that all payments under the amended plan had been completed. On December 20, 1994, Agribank, FCB ("FCB"), a general creditor, filed by motion an objection to the Parkers' discharge and to distribution of funds to the debtors.[(2)] It is unclear what funds FCB believed to be available for distribution.[(3)]

A hearing on the motion was held January 30, 1995. Because FCB could not object to discharge by motion,[(4)] and with the hope of reaching the merits of the creditor's concerns, I construed FCB's objection as a motion for modification of the plan to increase the amount to be paid. A final hearing on the motion as construed was scheduled for March 14, 1995. At that hearing, FCB initially attempted to argue that 11 USC § 1225 (1994) required that when there is a challenge to the feasibility of the reorganization, the unsecured creditors must either be paid in full or all disposable income be paid to the trustee. (TR 66). Noting that confirmation of a plan was not then

at issue, I instructed FCB to address its argument to 11 USC § 1229 (1994). FCB then argued that modification was warranted because the Parkers received more income than the plan had projected, the excess amount was disposable and should be distributed to unsecured creditors. (TR 72). In its brief, FCB also contended that its objection to the chapter 12 plan confirmation could be brought at the end of the plan despite its failure to appeal the orders of confirmation. However, FCB made no other arguments concerning the interpretation of 11 USC § 1229 (1994).

From the bench, I denied FCB's motion for modification holding that the confirmed plan was specific as to what amount of payments had to be made, and that those payments were completed at or near the time the property was sold. (TR 107). In my oral ruling, I erroneously stated that the sale of the property occurred prior to April or June 1994 and that the funds were available for distribution sometime in October 1993. (TR 108). I now believe the reference to October 1993 was an inadvertent misstatement of the date (and recognized as such by the people present in court) which, nonetheless, went uncorrected. In any event, upon review of the facts presented at the final hearing, it is clear that the sale did not take place until September 1994 and that the funds were not available until after that sale. The errors, although unfortunate, are not material. The basis of my ruling was that the plain language of 11 USC § 1229 required that motions for modification be made prior to completion of the plan. No one disputes that the payments required by the Parkers under the confirmed amended plan were completed prior to the trustee's December 1, 1994 final account, nor that the FCB motion was filed after that account had been served on FCB.

Citing factual discrepancies, FCB moved for reconsideration of my oral ruling pursuant to FRBP 9023.[(5)] A hearing was held and the matter of reconsideration was taken under advisement so that a transcript of the prior hearing and the ruling made thereat could be received and reviewed.

FCB offers three arguments in support of reconsideration. First, on the pleadings filed, the court should revoke the Parkers' confirmation pursuant to 11 USC § 1230. Second, the court should use its equity power under 11 USC § 105 to protect the interest of the unsecured creditors. Third, the intent of Congress and principles of equity will be thwarted if the court's ruling is allowed to stand.

It must first be determined if any of FCB's arguments fall within the scope of a motion for reconsideration. Motions for reconsideration serve the limited functions of correcting manifest errors of law or fact or presenting newly discovered evidence. Publishers Resource v Walker-Davis Publications, 762 F2d 557, 561 (1985); Keene Corp. v International Fidelity Ins. Co., 561 FSupp 656, 665-66 (ND Ill 1982) aff'd 736 F2d 388 (7th Cir 1984). The scope of a motion to reconsider does not extend to the introduction of evidence which could have been introduced at trial or to the presentation of legal argument for the first time. Publishers Resources, 767 F2d at 561. Nor is a motion for reconsideration an opportunity to raise again arguments previously presented. Backlund v Barnhart, 778 F2d 1386 (9th Cir 1985); see also MGIC Indemnity Corp. v Weisman, 803 F2d 500, 505 (9th Cir 1986).

FCB's first two contentions, that the court revoke the Parkers' confirmation under 11 USC § 1230[(6)] and that the court utilize 11 USC § 105 to protect the interest of creditors, were not presented at the March 14, 1994 hearing. They are both legal arguments which could have been presented at that hearing and therefore are beyond the scope of a motion for reconsideration. Publishers Resources, 767 F2d at 561. It is somewhat tempting when the party's pleadings have already been construed liberally to attempt to reach the merits of a controversy to grant the party yet further license to construe the pleadings. However, tempting as that may have been at the time of a

hearing, all its attraction is lost when issues are first raised in a motion for rehearing.

FCB's third argument requires greater consideration. FCB's motion to reconsider states:

26. Because of the debtors' failure to comply with the Bankruptcy Code, its rules, and procedures, if a modification of the plan is denied and a discharge entered, they will have obtained in excess of $100,000, the majority of which would not have been available to them if required disclosures had been made or if the case had been converted to a Chapter 7 liquidation.

This paragraph suggests that while the plain language of § 1229 requires that the motion be brought before the completion of the plan payments, such a result is clearly at odds with the intent of Congress. In its brief, FCB suggests that the completion of payments language refers not to the debtor paying the trustee, but rather, to the trustee making required disbursements to creditors. As both of these arguments imply that the ruling of the court was manifestly erroneous, FCB's argument may be within the scope of a reconsideration motion.

Section 1229(a) provides:

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, on request of the debtor, the trustee, or the holder of an allowed unsecured claim to

(1) increase or reduce the amount of payments on claims of a particular class provided by the plan;

(2) extend or reduce the time for such payments; or

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

This court is bound by the statute's plain language unless the result is "demonstrably at odds with the intention of its drafters." Griffin v Oceanic Contractors, Inc., 458 US 564, 571 (1982); see also U.S. v Ron Pair Enterprises, Inc., 109 S Ct 1026, 1031 (1989).

FCB argues that motions for plan modification may be brought until the trustee makes his final disbursements. Because the trustee had not yet disbursed all funds paid under the Parkers' chapter 12 plan (or at least, that is the unsupported assumption of FCB's objection), FCB claims its motion was timely. This raises precisely the question which I hoped would be addressed when, at the preliminary hearing, I construed FCB's motion as one for modification and set it for final hearing. My hope was frustrated when the timing of the motion was neither briefed nor argued at the final hearing and no evidence was presented as to whether the trustee held funds for further distribution. Nonetheless, I will consider it now.

Support for FCB's argument can be found in In re Cook, 148 BR 273 (WD Mich 1992). In Cook, while under a chapter 12 plan, debtors became entitled to proceeds from the Michigan lottery. Hours before a motion to modify the plan was filed, the debtors prepaid all that remained under the plan. Because the debtors had completed the plan payments, the debtors asserted that the motion to modify was untimely. The court rejected this argument because the plan required a sale of property with the proceeds to be distributed to lienholders. That sale had not taken place. Id at 278-79. Because the sale had not been completed, the court held that the plan payments were not completed and that the motion was timely.[(7)]

The court in Cook read the "completion of payments" language in § 1229 to mean the final distribution by the trustee to all creditors. Other courts have disagreed. In In re Phelps, 149 BR 534 (Bankr ND Ill 1993) (Ginsberg, J.) the court examined the "completion of payments" language in § 1329.[(8)] The court compared the language of § 1329 with the language of § 1328.[(9)] The language of § 1328(a) provides that the debtor receive a discharge "as soon as practicable after completion by the debtor of all payments under the plan." Section 1329(a), however, does not include "by the debtor." Because Congress did not specify in § 1329 that the payments were those "by the debtor," a literal application of the section might require that modification be made if sought prior to the trustee's last disbursement. This is the rationale of Cook.

However, Judge Ginsberg reasoned that such a plain reading of § 1329 would lead to an absurd result when read with § 1328. "If completion of payments in § 1329 means both completion of payments by the debtor to the trustee and by the trustee to the creditors under the plan, the trustee would have the right to seek to amend the plan to increase the amount the debtor's unsecured creditors with allowed claims would receive after the debtor had received a discharge." Id at 538-39. Congress could not have intended such a result. Therefore, Judge Ginsberg held that "completion of payments" refers to the completion of payments by the debtor to the trustee. Furthermore, by delaying disbursements, the trustee could unilaterally extend a time limitation by which she is one of the parties bound. I am compelled to accept and adopt the reasoning of Phelps rather than that of Cook.

Even so, FCB may prevail if it can show that this interpretation of § 1229 is contrary to Congress' intent. Ron Pair, 109 S Ct at 1031. Arguably, FCB hinted at this argument in its motion to reconsider, but neither party has addressed Congress' intent in passing § 1229. Nor is there a great deal of legislative history available elsewhere. However, some well reasoned cases have allowed dismissal after the debtor has completed payments under a plan on the basis of the intention of Congress, and they provide a useful analog. See Matter of Escobedo, 28 F3d 34 (7th Cir 1994); In re Powers, 140 BR 476 (Bankr ND Ill 1992). Although allowing dismissal or modification after the debtor had completed the plan payments, these cases hold so because the order confirming the plan had no effect, not because the motion was timely as suggested by FCB. See Escobedo, 8 F3d at 35; Powers, 140 BR 476; see also Phelps, 149 BR at 539 n 7 (explaining that in Powers the order confirming a debtor's chapter 13 plan was void and therefore debtor's payments had no legal significance).

In Escobedo, the debtor confirmed a chapter 13 plan without opposition. Apparently, (although it is not so stated in the opinion) claims were not fully determined prior to confirmation. The trustee filed a late objection to the plan's confirmation, asking that the court allow $24,158.00 in administrative claims. The claims were allowed subject to the debtor's objection within 10 days. The debtor failed to object to the claims and failed to modify her plan to account for the new claims. Rather, the debtor continued to make the original plan payments. After the debtor had completed those payments, the trustee moved to either dismiss or modify the plan. There is no discussion in the opinion of whether this motion was timely although it is implicit that the motion was not denied as untimely. The court held that although the debtor had completed the plan payments consistent with the confirmed plan, because the plan failed to pay all priority claims as required by § 1322(a)(2), the plan's confirmation was nugatory, and affirmed the case dismissal.

At the March 14 hearing, I distinguished the present case from the dismissal considered in Escobedo. I noted that in Escobedo, the priority tax claim was demonstrated postconfirmation to be greater than was assumed at confirmation, and found that determination different from a determination that the debtor could pay more after

appreciation of property has been realized. (TR 111). While the determination of a tax claim was an uncertainty at the time of confirmation in Escobedo, and probably not a proper subject on which to contest or appeal the confirmation order, the value of the property in our case was contested and determined at confirmation. That value must therefore be tested by an appeal of the order of confirmation (or the separate final order determining value, had one been entered). Valuations may in some sense be inherently unreliable, but that is a fundamentally different type of uncertainty from uncertainty of the priority tax liability in Escobedo.

Neither Escobedo nor Powers provide any assistance in determining Congress' intent. Because § 1229 is identical to § 1329 in all material respects and because there is little legislative history concerning § 1229, it may be instructive to consult the legislative history of § 1329. Section 1329's purpose is to provide the debtor, trustee, or holder of an unsecured general claim to request modification of a chapter 13 plan in response to changes in the debtor's circumstances. See Oversight Hearings on Personal Bankruptcy Before the Subcommittee on Monopolies and Commercial Law of the House Committee on Judiciary, 97th Cong, 1st Sess 181, 215-16, 221 (1981-82). Thus, where the debtor's disposable income substantially increases, a trustee or allowed unsecured creditor may move to modify the plan to increase plan payments. In re Arnold, 869 F2d 240, 242 (8th Cir 1989). The view and remedy is prospective only. There is no suggestion that plan payments could be increased retroactively. This is consistent with the fact that Congress provided that a motion to modify a chapter 13 plan must be brought before the completion of plan payments. The same is true in chapter 12.

On this further review of this case, it appears, as was initially held, that the introductory language of § 1229 serves to limit a party's opportunity to bring a motion to modify. The motion in this case was not made within the time permitted. This holding is not clearly at odds with Congress' intent.

Upon the foregoing, the motion for reconsideration is denied.

END NOTES:

1. In so doing, the Parkers shortened the duration of their plan. A plan's duration may be shortened either formally or informally. In re Phelps, 149 BR 534 (Bankr ND Ill 1993). A plan's duration may be formally changed by specifically amending the plan where an informal change in a plan's duration occurs when a debtor completes the payments required under the plan. Id at 537-38. Thus, when the Parkers completed the plan payments, they shortened the plan's duration.

2. FCB's objection provided in its entirety:

[FCB] objects to the discharge of the debtors and distribution of the funds on deposit with the Trustee to the debtors because the debtors have not paid all of their disposable income earned by them to the current Trustee as provided by Section 1225(b)(2) of the Bankruptcy Code. This general creditor believes that the debtors only paid funds that were estimates of their disposable income to the Trustee. The actual disposable income was not believed to have been paid to the Trustee during the plan.

3. There has been no evidence that the trustee had not already made the disbursements detailed in his final report.

4. FRBP 7001(4) provides that a proceeding to object to or revoke a discharge must be brought by adversary proceeding. To date, no adversary proceeding has been filed objecting to the Parkers' discharge.

5. FRBP 9023 provides that "Rule 59 F.R.Civ.P. applies in cases under the Code, except as provided in Rule 3008."

6. Even a germane and timely claim that the Parker's order of confirmation should be revoked could not be by motion. A proceeding to revoke a confirmation order must be brought by adversary proceeding. FRBP 7001(5). No adversary proceeding was or has been filed to revoke the Parker's plan confirmation.

7. FCB implicitly argues that the receipt of a price for real estate which is double in value determined by the court after hearing evidence some 30 months earlier is analogous to winning the lottery. For the purpose of this legal analysis, we need not determine the accuracy of the analogy.

8. 11 USC § 1229(a) is identical to 11 USC § 1329(a).

9. 11 USC § 1228(a) is identical to 11 USC § 1328(a) in material part.