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UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

CLERK, U.S.
BANKRUPTCY COURT
CASE NO. _____

In re:

Case Number:

COSMOS TRUST,

EF11-84-00339

Debtor.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND
ORDER TO PAY CLAIM

Roger Packard, by Attorney Peter F. Herrell, having filed a Motion for an order to pay claim; and Debtor Cosmos Trust, by Attorney James C. Ritland, having filed an Objection; and hearings having been held; and both Movant and Debtor appearing by counsel; and briefs having been filed; the Court, being fully advised in the premises, FINDS THAT:

1. On August 3, 1982, the Jackson County, Wisconsin, Circuit Court awarded Roger Packard an \$8,061.97 default judgment against Carlton J. West and Debtor Cosmos Trust. Said judgment was granted following failure of the attorney for both Mr. West and the Debtor to appear at a deposition, a motion hearing and a pre-trial conference. See Wis. Stats sec. 802.11(5)(c) (default judgment may be entered as sanction for failure to appear at pre-trial conference).

2. Mr. Packard's judgment was docketed--creating a lien on the Debtor's Jackson County real property. See Wis. Stats. sec. 806.15 (judgment liens).

3. On February 27, 1984, the Debtor filed for relief under Chapter 11 of the Bankruptcy Code. Mr. Packard was scheduled as a judgment creditor with an unsecured¹, disputed claim in the amount of \$7,212.75.

4. On August 8, 1984, the Debtor filed a motion for approval of sale of certain Jackson County real estate (hereinafter "the Laufenberg Farm"). The motion, as amended on September 10, 1984, provided for the distribution of "closing expenses" as payment of a judgment of foreclosure, a second mortgage, real estate taxes and attorneys fees. "The balance to be held in trust to be distributed under the terms of any plan of reorganization . . . or . . . by further order of the court" (hereinafter, "the Balance Trust").

5. On September 6, 1984, Mr. Packard filed an objection to the Debtor's motion and a proof of claim in the amount of \$9,496.12 (plus 12% interest from the date of filing) which asserted a secured status by virtue of the docketed judgment.

6. On September 10, 1984, the Debtor's motion was granted from the bench and, on September 20, 1984, this Court signed an Order approving the sale of the Laufenberg Farm "free and clear of all liens".

7. On October 10, 1984, Mr. Packard filed a motion for an

¹ The Debtor continues to refer to Mr. Packard's claim as unsecured; however, "[a]n allowed claim of a creditor secured by a lien . . . is a secured claim to the extent of the value of such creditor's interest . . . in such property . . ." 11 U.S.C. sec. 506(a).

order directing the payment of his claim from funds in the Balance Trust.

8. On October 29, 1984, the Debtor filed an objection to Mr. Packard's motion and a motion to make distributions from the Balance Trust as payment of unrelated debts, to-wit: Jackson County real estate taxes other than those paid in connection with the Laufenberg Farm sale, past due payments on a "Wyss Farm" land contract and the Debtor's attorney's fees.

9. The Debtor's substantive objections to Mr. Packard's motion are based upon allegations that the judgment was based upon fraudulent damage claims and was contrary to Wisconsin law.

Discussion

10. Validity of Claims. "A claim or interest, proof of which is filed . . ., is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. sec. 502(a). If an objection is made, "the court, after notice and a hearing, . . . shall allow such claim . . . except to the extent that--(1) such claim is unenforceable . . ." 11 U.S.C. sec. 502(b).

11. The hearing required by 11 U.S.C. sec. 502(b) is such hearing as is appropriate in the particular circumstances. 11 U.S.C. sec. 102(1)(A). Here, there have been argumentative hearings and, because the Court will treat the Debtor's factual allegations as true, there is no need for an evidentiary hearing.

12. "Courts have consistently applied res judicata to default judgments." In re Walz, MM11-83-2036, ___ B.R. ___ (Bankr. W.D.Wis. Dec. 20, 1984).

13. A party objecting to a claim may invoke the equitable powers of a bankruptcy court to avoid the operation of the doctrine of re judicata when:

- (1) the prior judgment is the product of fraud, collusion or duress,
- (2) the prior court lacked jurisdiction, or
- (3) the judgment was founded on no real debt or on a legally unenforceable obligation and the objecting party was prevented from raising that defense in the prior action.

In re A-1 24 Hour Towing, Inc., 33 B.R. 281 (Bankr.D.Nev. 1983) (cases collected); see In re Farrell, 27 B.R. 241, 245-246 (Bankr.E.D.N.Y. 1982) (third ground available only when objecting party prevented from raising defense).

14. A prior judgment is the product of fraud when the judicial machinery was prevented from performing the impartial task of adjudicating the case. See Truitt v. Truitt, 383 So.2d. 276 (Fla.App. 1980) (res judicata applied when there was no fraud on the court); cf. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944) (collateral attack on judgment permitted where there was a deliberately planned and carefully executed scheme to defraud the Court of Appeals). Belated allegations of perjury are not sufficient to invoke equitable relief from the doctrine of res judicata. Truitt, ante; see Hazel-Atlas, ante, 322 U.S. at 245 ("[t]his is not simply a case of a judgment obtained with the aid of a witness who, on the

basis of after-discovered evidence, is believed possibly to have been guilty of perjury"); cf. Fed.R.Civ.P. 60(b) (motion for relief from judgment on grounds of fraud --except fraud upon the court-- must be made within one year of judgment), Wis. Stats. sec. 806.07 (substantially similar to Fed.R.Civ.P. 60(b)).

15. Both of the Debtor's substantive allegations are in the nature of an attack on the merits of the Jackson County judgment. However, Debtor does not allege that it was prevented from presenting any evidence, raising any defense or making any appeal in the Jackson County litigation. See Link v. Wabash R. Co., 370 U.S. 626, 634, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) ("each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney'").

16. It has been more than two years since Mr. Packard took his judgment; there is no evidence that the Debtor has applied to the Jackson County Circuit Court for any direct or collateral relief from said judgment. Cf. 27 Am.Jur.2d Equity sec. 130 (1966) (Equity aids the vigilant and the diligent).

17. The Debtor can not avoid the preclusive effect of Mr. Packard's judgment.

18. Payment of Claim. The Debtor, which has received an order permitting it to pay claims of parties with a secured interest in the Laufenberg Farm (with the exception, of course, of Mr. Packard) and has moved for an order permitting it to pay the claims of certain parties with no interest in the Laufenberg

Farm, now argues that Mr. Packard's claim must be satisfied within a plan of reorganization.

19. Even if the Bankruptcy Code does not provide for payment of an oversecured creditor's claim from the proceeds of the sale of the secured property, contra 11 U.S.C. secs. 105(a) & 363(e), the Debtor may not be heard to object to payment of one oversecured creditor when others have been paid on the Debtor's motion.² 28 Am.Jur.2d Estoppel and Waiver sec. 69 (1966) ("[t]he rule against inconsistent positions applies generally to positions assumed . . . in the course of the same action or proceedings").

CONCLUSIONS OF LAW

1. Mr. Packard is a secured creditor with an interest in the Balance Trust.
2. Mr. Packard's claim should be paid from the Balance Trust.

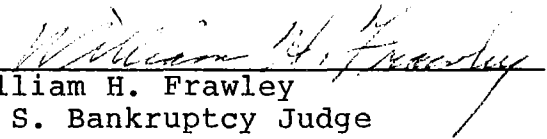
² Assuming that adversary proceedings were required, contra 11 U.S.C. sec. 363(c), the same reasoning applies to estop the Debtor's procedural objections. See generally In re Coleman, 37 B.R. 120, 122 (Bankr.W.D.Wis. 1984) (adversary proceedings waivable).

ORDER

IT IS ORDERED THAT Cosmos Trust pay, forthwith, the claim of Roger Packard from the proceeds of the sale of that real property heretofore referred to as the Laufenberg Farm.

Dated: February 5, 1985.

BY THE COURT:



William H. Frawley
U. S. Bankruptcy Judge

cc: Attorney Peter F. Herrell
Attorney James C. Ritland