

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT HAMMOND

IN RE:)
)
DONALD LEE CHESNEY) BANKRUPTCY NO. 04-66306
TIGRE CHESNEY)
Debtors)

MEMORANDUM OPINION AND ORDER

I

Statement of Proceedings

This Chapter 13 case came before the Court on May 18, 2005 for a final evidentiary hearing on the Objection filed by J. P. Morgan Chase Bank, N.A. as successor by merger to Bank One (“J.P. Morgan”) on March 3, 2005 to the Confirmation of the Debtor’s Plan.

The primary issue raised by the parties and to be tried at the hearing was the value of the Debtors’ Real Estate commonly known as 1215 N. Main Street, Crown Point, IN 46307 (“Real Estate”). The Debtor’s Plan at Paragraph 4, expressly provides that J. P. Morgan’s mortgage lien shall be “stripped away” or voided pursuant to §§506(a), 506(d), and 1327(c), as the value of J. P. Morgan’s secured interest in the Real Estate was zero and that J. P. Morgan’s Claim was to be treated as wholly unsecured..

Pursuant to Order dated March 4, 2005 a Prehearing Conference was scheduled for March 16, 2005. Pursuant to that Order, the Court pursuant to Fed. R. Bk. P. 9014 and N. D. Ind. L.B.R. B-7016-1, expressly directed that Fed. R. Bk. P. 7016 and Fed. R. Civ. P. 16 apply to this Contested Matter. A Prehearing Conference was held on March 16, 2005, and on March 16, 2005 the Court issued a Prehearing Order that provided, in its

relevant part, as follows:

2. This Order and any Pre-hearing Statements filed by the parties shall control the subsequent course of action of the final hearing and may not be amended except by consent of the parties and approval of the Court or to prevent manifest injustice. All motions and responses thereto are hereby merged with this Order.

3. The parties stipulate pursuant to Fed. R. Civ. P. 29 that in lieu of a Fed. R. Civ. P. 34 Motion by Objectant to inspect and appraise Debtors' real estate, Objectant by its duly authorized representative may inspect and appraise said real estate upon 48 hour prior telephonic notice by counsel for Objectant to counsel for Debtors. Said Notice shall be given by the Objectant's attorney to attorney for Debtors no later than fourteen (14) days from the date of this Order. Unless otherwise agreed by the parties the inspection and appraisal shall take place at a reasonable time, between the hours of 9:00 o'clock A.M. and 5:00 o'clock P.M. on a weekday.

* * * *

5. Written Reports by Expert Witnesses: That pursuant to Fed. R. Bk. P. 9014, the Court directs that Fed. R. Civ. P. 26(a) should apply to this contested matter and that pursuant to Fed. R. Civ. P. 26(a)(2)(A), and Fed. R. Civ. P. 26(a)(2)(C), the parties shall no later than seven (7) days prior to the Final Hearing scheduled below provide to the opposing party a written report prepared and signed by any witness retained or specially employed to provide expert testimony in this Contested Matter that complies with the requirements of Fed. R. Civ. P. 26(a)(2)(B). Any such report shall be served by fax or hand delivered. If any such report is not timely served as required above, any such witness may be precluded from testifying. (emphasis supplied)

No verified motion was filed by J. P. Morgan to modify the above Prehearing Order or to continue the final evidentiary hearing.¹

¹ N. D. Ind. L.B.R. B-507-1-1(d), Continuances, provides as follows:

A motion to postpone an evidentiary hearing on account of the absence of evidence shall be made only upon affidavit, showing the materiality of the evidence expected to be obtained; that due diligence has been used to obtain it; where the evidence may be. If the motion is for an absent witness, the affidavit must show the name and residence of the witness, if known; the probability of procuring the testimony within a reasonable time and that the absence has not been procured by the act or connivance of the party, or by others at the party's request, or with his or her knowledge or consent, the facts that the party believes to be true, and that the

The Debtors on May 16, 2005 filed their Motion to Continue the hearing scheduled for May 18, 2005. Said Motion stated, in part, as follows:

3. That by agreement of all parties the Debtors real estate was subject to an inspection and appraisal by a representative of the Objectant on April 4, 2005.
4. That the Debtor's counsel has requested the Objectant to provide a copy of the inspection/appraisal report conducted on the Debtor's real estate on several occasions but as of this date a copy of said report has not been received.
5. That the Debtors will be prejudiced in this matter if a Final Hearing is conducted without the Debtors being aware of the Objector's appraisal value in the Real Estate and the basis of that appraisal.
7. That the Debtors counsel has attempted to contact Objector's counsel by telephone regarding this matter but has been unable to speak to counsel to determine his position on the Debtors' Motion.

The Court reviewed the Motion to Continue and on May 17, 2005 orally advised counsel for the Debtors and J. P. Morgan by telephone that the Motion to Continue would be denied, that the hearing would be held, and that J. P. Morgan would be precluded from submitting any evidence as to the value of the Debtors' Real Estate for failure of J. P. Morgan to comply with Paragraph No. 5 of the Court's Prehearing Conference Order dated March 16, 2005.

Thereafter on May 17, 2005 J. P. Morgan filed its Emergency Motion for the Court to Reconsider its decision to proceed with the final evidentiary hearing on May 18, 2005 as scheduled and to preclude any witness by J. P. Morgan from testifying as to the Value of the

party is unable to prove such facts by any other witness whose testimony can be as readily procured. If the adverse party will stipulate to the content of the evidence that would have been elicited at trial from the absent document or witness, the trial shall not be postponed. In the event of such a stipulation, the parties shall have the right to contest the stipulated evidence to the same extent as if the absent document or witness were available at trial.

Debtors' Real Estate. No valid cause was set out in Motion as to why J. P. Morgan did not comply with Paragraph No. 5 of the Prehearing Order, but merely asserts that "it would be of no prejudice to either party to allow the creditor to present its evidence in Court". The record is devoid of any attempt by J. P. Morgan to comply with the prehearing Order.

II

Conclusions of Law
and
Discussions

The Court disagrees with J. P. Morgan's assertion that there would be no prejudice to the Debtors by allowing J. P. Morgan to submit evidence of the Debtor's Real Estate and denies the Motion of J. P. Morgan. The value of the Debtor's Real Estate and, in turn, the extent of J. P. Morgan's mortgage lien interest in the Debtor's Real Estate is extremely critical to the confirmability of the Debtors' Plan as it relates to the Secured Claim of J. P. Morgan. The failure of J. P. Morgan to timely provide the Debtors with a copy of its Appraiser's Report was highly prejudicial to the Debtors in the preparation of their submission of their case as to this Contested Matter. According to the Debtors' Motion to Continue the inspection and appraisal of the Debtor's Real Estate by J. P. Morgan took place on April 4, 2005, and pursuant to the Court's prehearing Order dated March 16, 2005 a copy of the Appraiser's written Report should have been provided by J. P. Morgan to the Debtors no later than May 4, 2005, or seven days prior to the hearing originally scheduled for May 11, 2005.

Federal Rule Civil Procedure 16(f), as made applicable by Fed. R. Bk. P 7016, provides, in part, as follows: "If a party or party's attorney fails to obey a scheduling or

pretrial order,...the judge, upon motion or the Court's own initiative, may make such orders with regard thereto as are just, and among others any orders provided in Rule 37(b)(2)(B), (C), (D).”

Federal Rule 37(b)(2)(B), as made applicable by Fed. R. Civ. P. 16(f), provides, in part, that “If a party...fails to obey an order to provide...discovery... the Court...may make such orders in regard to the failure as are just, and among others the following: ... (B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;...”

The Seventh Circuit in the case of Matter of Maurice, 21 F.3d 767 (7th Cir. 1994) states as follows:

Two purposes for requiring the parties to comply with a prehearing (or pretrial) order include identifying witnesses and resolving evidentiary disputes in advance of trial, thus narrowing the issues and expediting the trial. When one party fails to comply with a court's prehearing order without justifiable excuse, thus frustrating the purposes of the prehearing order, the court is certainly within its authority to prohibit that party from introducing witnesses or evidence as a sanction.

ID. 21 F.3d at 773.

Rule 37(b) sanctions for discovery abuses are proper upon finding of willfulness, bad faith or fault on the part of the noncomplying litigant. Melendez v. Illinois Bell Telephone Co., 79 F.3d 661, 671 (7th Cir. 1996). However, bad faith is not required for a Court to sanction a party for discovery abuses. Id. Although willfulness and bad faith are associated with conduct that is intentional or reckless, the same is not true of “fault”. Long v. Steepro, 213 F.3d 983, 987 (7th Cir. 2000). “Fault ‘does [n]ot speak to the noncomplying party’s disposition at all, but rather only describes the reasonableness of the conduct - or lack thereof

- which eventually culminated in the violation’”. Id. (quoting Marrocco v. General Motors Corp., 966 F.2d 220, 224 (7th Cir. 1992)). In this case, based upon the record, while the Court cannot conclude that J. P. Morgan acted in bad faith or wilfully in not providing the Debtors with a copy of its appraisal report it certainly was at fault and no justifiable excuse for its failure to do so was provided to the Court.

The Court having prohibited J. P. Morgan from introducing in evidence the value of the Debtor’s Real Estate, the Court now turns to J. P. Morgan’s Objection to Confirmation.

The Objectant has the initial burden of coming forward with the evidence in support of its Objection to a Plan. In re Valley Park Group, Inc., 96 B.R. 16, 21 (Bankr. N.D.N.Y. 1989); In re Silver Falls Petroleum Corp., 55 B.R. 495, 497 (Bankr. S.D. Ohio 1985); In re Northeast Dairy Co-op Federation, Inc., 73 B.R. 239, 248 (Bankr. N.D.N.Y. 1987). As stated by the Court in In re Blevin, 150 B.R. 444 (Bankr. W.D. Ark. 1992):

[i]n Education Assistance Corp. v. Zellner, 827 F.2d 1222 (8th Cir. 1987), the Eight Circuit Court of Appeals agreed with the reasoning of Menden hall [54 B.R. 44 (Bankr. W.D. Ark. 1985)], stating that:

[g]enerally, in civil litigation, the party seeking to change the status quo has the ultimate burden of proving his allegations are true. See Joseph A. Bass Co. v. United States, 340 F.2d 842, 844 (8th Cir. 1965) (“[i]t is fundamental that the burden of proof * * * rests upon the party who, as determined by the pleadings or the nature of the case, asserts the affirmative of an issue”). Since a Chapter 13 plan that meets the requirements of section 1325(a) would be confirmed absent the objections of the creditor, the creditor has, at minimum, “the initial burden of producing satisfactory evidence to support the contention that the debtor is not applying all of his disposable income” to the plan payments. In re Fries, 68 B.R. 676, 685 (Bankr. E.D. Pa. 1986); see also In re Menden hall, 54 B.R. 44, 45-46 (Bankr. W.D. Ark. 1985).

827 F.2d at 1226. The holding of Education Assistance Corp. v. Zellner is binding in this Circuit.

Substantial support exists for the Eighth Circuit's view. For example, a leading treatise on bankruptcy states that:

An objection to confirmation gives rise to a contested matter which is to be litigated by the parties directly involved, including the debtor and the objecting creditor or creditors. Generally, the burden of going forward with evidence and the ultimate burden of proof is borne by the party objecting to confirmation, and if that party fails to prosecute the objection, the objection should be dismissed.

5 Collier on Bankruptcy, ¶1324.01[3] (15th ed. 1991). See also, In re Packham, 126 B.R. 603 (Bankr. D. Utah 1991); In re Fricker, 116 B.R. 431 (Bankr. E.D. Pa. 1990); In re Colon Vasquez, 111 B.R. 19 (Bankr. D.P.R. 1990); In re Carver, 110 B.R. 305 (Bankr. S.D. Ohio 1990); In re Stein, 91 B.R. 769 (Bankr. S.D. Ohio 1988); In re Keffer, 87 B.R. 509 (Bankr. S.D. Ohio 1988); In re Navarro, 83 B.R. 348 (Bankr. E.D. Pa. 1988); In re Cruz, 75 B.R. 56 (Bankr. D.P.R. 1987); In re Fries, 68 B.R. 676 (Bankr. E.D. Pa. 1986); In re DeSimmons, 17 B.R. 862 (Bankr. E.D. Pa. 1981); HCC Consumer discount Co. v. Tomeo (In re Tomeo), 1 B.R. 673 (Bankr. E.D. Pa. 1979). Therefore the creditor has the burden of proof on issues raised by the objection.

In this case, no credible evidence concerning value was received. Therefore, the bank failed to meet its burden of proof on the issue of valuation. The objection to confirmation is overruled and the plan is confirmed.

Id. 150 B.R. at 446.

Accordingly, because the J. P. Morgan is prohibited from presenting any evidence in support of its Objection, it has not met its initial burden of coming forward with the evidence. Therefore, said Objection shall be denied. It is therefore,

ORDERED, ADJUDGED, AND DECREED, that the Objection by J. P. Morgan to the Confirmation of the Plan by the Debtor is hereby DENIED.

The Clerk shall enter this Order upon a separate document pursuant to Fed. R. Bk. P.

9021.

Dated: May 25, 2005

Mark J. Jank

JUDGE, U. S. BANKRUPTCY COURT

Distribution

Debtor, Attorney for Debtor
Objectant's Attorney
Trustee, U.S. Trustee