

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

WE-18J

IN RE:)
MICHAEL L. AUGUSTSON)
MARGARET J. AUGUSTON) BANKRUPTCY NO. 02-64932
)
Debtors)

MEMORANDUM OPINION AND ORDER

Final hearing held on May 27, 2003, in this Chapter 13 case on Objection filed by DaimlerChrysler Services North America LLC ("Objectant") on January 29, 2003, to the Confirmation of the Plan filed by the Debtors.

Debtors appear by counsel.

Trustee appears.

Objectant fails or refuses to appear and no motion to continue the hearing was filed by the Objectant.¹

Submitted.

The Objectant has the initial burden of coming forward with the evidence in support

¹ N.D. Ind. L.B.R. B-5071-1(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 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.

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:

[generally, 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 Objectant has failed to appear and present 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 DaimlerChrysler Services North America LLC to the Confirmation of the Plan by the Debtors is hereby **DENIED**.

The Clerk shall enter this Order upon a separate document pursuant to Fed. R. Bk. P. 9021.

Dated: May ____, 2003

JUDGE, U.S. BANKRUPTCY COURT

Distribution

Debtors, Attorney for Debtors
Objectant's Attorney
Trustee, U.S. Trustee
Rev. 05/02/03