In the United States Bankruptcy Court

for the Northern District of Iowa

LARKEN HOTELS LIMITED PARTNERSHIP
Debtor(s).

Bankruptcy No. 94-10388KC

Chapter 11

ORDER RE DEBTOR'S MOTION TO REOPEN

On May 2, 1996, the above-captioned matter came on for hearing pursuant to assignment on a Motion to Reopen filed by Larken Hotels Limited Partnership, the reorganized Debtor. Attorneys Clifton Jessup, Angela Layden and Dan Childers appeared on behalf of Debtor. Attorney John Atwood appeared as attorney-of-record for Debtor's general partner, Larken Properties, Inc. Attorneys Robert F. Kidd and Mike Vestle appeared on behalf of ORIX USA Corporation. Attorneys Jim Carr and Wes Huisinga appeared for the Sheet Metal Workers National Pension Fund (the "Pension Fund"). After hearing evidence and arguments of counsel, the Court took the matter under advisement. The time for filing briefs has now passed and this matter is ready for resolution. Debtor's Motion to Reopen is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (O).

STATEMENT OF THE CASE

Debtor originally filed the above-captioned Chapter 11 case in the District of Nebraska. It was transferred to the Northern District of Iowa by Order of the Bankruptcy Court of the District of Nebraska on January 28, 1994. The case was officially received in this Court on March 14, 1994 and docketed on that date. Debtor proposed a Plan and an Amended Plan. A confirmation hearing was held after which an Order confirming Debtor's First Amended Plan of Reorganization and Technical Amendments was entered on July 29, 1994. The Court entered a Final Decree closing this Chapter 11 case on February 6, 1996.

Debtor filed a Motion to Reopen on April 1, 1996. Debtor asserts that it recently discovered that it has an equitable ownership interest in the Doubletree Hotel in Nashville, Tennessee and a cause of action against SMWNPF Holdings, Inc., a wholly-owned subsidiary of the Pension Fund, for recovery of this property (the "Doubletree claim"). It relies on a Purchase Agreement dated March 26, 1991 and an Assignment of Purchase Agreement dated September 24, 1991 to support its interest in the hotel. Debtor estimates that the hotel is worth in excess of $7 million.

Neither the property interest nor the cause of action was disclosed in Debtor's original bankruptcy schedules or its Disclosure Statement. Debtor requests that the Court reopen the case to allow it to amend the Schedules and Statement of Affairs and to take whatever action is necessary to vest title to the discovered property in its name. Debtor asserts that, if the Court reopens the case, it intends to institute an adversary proceeding to recover the property.

The Pension Fund filed an objection to reopening the case. It asserts that Debtor acted in bad faith in filing this Motion. In summary, the Pension Fund asserts that it and Debtor entered into negotiations prior to confirmation of the Plan in which the Pension Fund gave up substantial rights without Debtor disclosing that it believed it had an interest in the Doubletree Hotel in Nashville, Tennessee held by the Pension Fund's subsidiary.

The Pension Fund summarizes Debtor's reasons for reopening the case as follows: 1) to amend bankruptcy schedules to list the Doubletree property interest and claim; and 2) to commence an adversary proceeding in this Court to assert the Doubletree claim. The Pension Fund asserts that there is no reason to reopen in order to allow Debtor to pursue either of these goals. Debtor wishes to assert its alleged claim against a subsidiary of the Pension Fund based on a prepetition

contract. The Pension Fund argues that Debtor released all claims against the Pension Fund and its subsidiaries in its confirmed Chapter 11 Plan. It states that it has taken irreversible action in reliance on the Plan.

The Pension Fund also argues that there is no benefit to any of the creditors in reopening the case to allow Debtor to amend schedules and attempt to litigate its Doubletree claim. Ultimately, the Pension Fund states that determination of the ownership of the asset in controversy can be carried out in any Court with appropriate jurisdiction. No legitimate reason exists to reopen this case as there is no administration to be done on this asset.

At the hearing and in its post-trial brief, Debtor pledged to pay unsecured creditors in Class 7 of its Plan in full from any recovery in an action on its Doubletree claim. The Pension Fund responds that Debtor can do that whether or not the case is in Bankruptcy Court. It argues that any benefit given to unsecured creditors would be purely voluntary on Debtor's part and that there is no reason to burden the bankruptcy system with a matter that can be of no binding benefit to creditors.

Several provisions of the confirmed Plan, Technical Amendments to the Plan and Order Confirming Amended Plan are relevant. The Order, filed July 29, 1994, states that the Order confirming the Plan and the Plan itself are binding on the Debtor and all parties in interest. (Order at 10, ¶ 1, and at 18, ¶ 19.) It provides for a permanent injunction against any party in interest commencing an action inconsistent with the Plan. (Order at 15, ¶ 11(a).) Substantial Consummation was deemed to occur on the Effective Date. (Order at 17, ¶ 14). The Effective Date was 30 days after confirmation. (Technical Amendments at A-1, ¶ 2.)

The Court retained jurisdiction "[t]o adjudicate all Claims to an ownership interest, mortgage lien or security interests in any property of the Debtor's estate, except . . . (b) the assets transferred prepetition to the Pension Fund". (Order at 14, ¶ (d).) Debtor "released the Pension Fund from all Disputes which [Debtor] may have on the Confirmation Date." (Technical Amendments at A-6, ¶ 9.3(b).) The Plan defined "Pension Fund" to mean "the Sheet Metal Workers National Pension Fund . . . its . . . affiliates, subsidiaries, successors and assigns." (First Amended Plan at 12, ¶ 1.46.) All claims of the Pension Fund, secured or unsecured, were treated as Class 6 claims. Class 7 claims were other Unsecured Claims. (First Amended Plan at 16.)

CONCLUSIONS OF LAW

Under § 350(b), "[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." The burden of establishing grounds for reopening the case is on the moving party. In re Daniels, 163 B.R. 893, 895 (Bankr. S.D. Ga. 1994). In order to prevail in its request to reopen, Debtor must establish that if the case is reopened, the court has authority to grant the underlying relief. In re Pratt, 165 B.R. 759, 760 (Bankr. D. Conn. 1994); In re Krapfl, No. 94-11535KC, slip op. at 2 (Bankr. N.D. Iowa Aug. 4, 1995). If it is established that no relief can be afforded to the moving party, the court may refuse to reopen the case. Primmer, slip op. at 2. The decision whether or not to reopen a case lies within the sound discretion of the bankruptcy court. In re Coppi, 75 B.R. 81, 82 (Bankr. S.D. Iowa 1987).

Debtor moves to reopen its Chapter 11 case in order to amend schedules to list a previously undisclosed interest in the Doubletree Hotel and institute an adversary proceeding to enforce that interest. The question presented to this Court is whether it has authority to allow Debtor to amend schedules postconfirmation and assert its rights to this previously undisclosed asset. A schedule or statement may be amended as a matter of course at any time before the case is closed. Fed. R. Bankr. P. 1009(a). Debtor has not cited any authority to support a right to amend schedules after a Chapter 11 plan is confirmed and consummated and the case is closed. One court has held that equitable estoppel bars a Debtor from amending schedules in this situation. In re Momentum Mfg. Corp., 25 F.3d 1132, 1137 (2d Cir. 1994).

The doctrines of equitable estoppel, judicial estoppel and res judicata have all been applied to preclude a Chapter 11 debtor from asserting claims after confirmation of a Plan if a debtor failed to disclose claims during the Chapter 11 case. See generally In re Hoffman, 99 B.R. 929 (N.D. Iowa 1989).

RES JUDICATA

A bankruptcy court's order confirming a Chapter 11 Plan of reorganization is a final order binding the debtor and all creditors to the terms of the plan. Hoffman, 99 B.R. at 936; 11 U.S.C. § 1141. The confirmed plan is res judicata as to all questions pertaining to such plan which were raised or could have been raised. Id. A four-step analysis is frequently utilized to determine whether the doctrine of res judicata bars subsequent action:

1. the first suit resulted in a final judgment on the merits;
2. the first suit was based on proper jurisdiction;
3. both suits involved the same cause of action;
4. both suits involved the same parties or their privies.

Id., citing Lovell v. Mixon, 719 F.2d 1373, 1376 (8th Cir. 1983); see also Eubanks v. FDIC, 977 F.2d 166, 169 (5th Cir. 1992) (applying doctrine of res judicata to order confirming Chapter 11 Plan).

The only truly debatable element in this case is whether the confirmed Chapter 11 plan involves the same cause of action which Debtor is now trying to assert. The Eighth Circuit has adopted the transactional test to determine whether this third element is met. Lane v. Peterson, 899 F.2d 737, 742-43 (8th Cir.), cert. denied, 498 U.S. 823 (1990). Under this test, both suits involve the same cause of action if they arise from the same nucleus of operative facts. Id.

Even if identity of claims exists, res judicata might not act as a bar unless the plaintiff could have or should have brought the claim in the former proceeding. Eubanks, 977 F.2d at 173. In Eubanks, the confirmed Chapter 11 plan acted as a bar to the debtor's cause of action against a bank for breach of fiduciary duties, fraud and breach of contract where the debtor had never listed the claims in his Chapter 11 case but did know of them preconfirmation. Id. at 174. Similarly, in Hoffman in the Northern District of Iowa, the court held that the debtor's lender liability action against a creditor bank after confirmation of the Chapter 11 plan was barred by res judicata. The lender liability action put into issue the same facts which would also determine the validity of the bank's claim in the Chapter 11 case. Id. at 937.

This Court has stated that whether a claim could have been brought in the Chapter 11 proceeding depends in large part on whether the claim accrued prior to bankruptcy. In re DeKlotz, Adv. No. 93-1007LC, slip op. at 3 (Bankr. N.D. Iowa Sep. 1, 1993). Whether a cause of action has accrued can be determined by analyzing whether it is sufficiently rooted in the pre-bankruptcy past. In re Doemling, 127 B.R. 954, 957 (W.D. Pa. 1991). A cause of action is determined to be accrued when all of the elements of the claim are present and the plaintiff has knowledge of the claim. Harris v. St. Louis Univ., 114 B.R. 647, 649 (E.D. Mo. 1990).

EQUITABLE ESTOPPEL

The Hoffman court also held that equitable estoppel applied to bar the Debtor's postconfirmation action because it was not disclosed in the Chapter 11 case. Id. at 934.

> A debtor must disclose any litigation likely to arise in a non-bankruptcy contest. The result of a failure to disclose such claims triggers application of the doctrine of equitable estoppel, operating against a subsequent attempt to prosecute the actions. The doctrine of equitable estoppel requires the following elements to be established:
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> 1. a misrepresentation or concealment of material facts by the other party,
> 2. lack of knowledge of the true facts by the party to whom the misrepresentation is made,
> 3. an intent to cause reliance on the misrepresentation, and
> 4. actual reliance on the misrepresentation to the detriment of the party to whom the representation was made.

Id., citing Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 417 (3d Cir.), cert. denied, 488 U.S. 967 (1988), and International Harvester Credit Corp. v. Leaders, 818 F.2d 655, 659 (8th Cir. 1987). This is the same test applied in Momentum Mfg.. to bar the debtor from amending schedules postconfirmation to delete certain claims. 25 F.3d at 1136.

One court has stated that a subsequent amendment to disclose a claim postconfirmation is "too little too late". In re H & L Dev., Inc., 178 B.R. 71, 74 (Bankr. E.D. Pa. 1994). Modification of the plan was not possible because it had already been substantially consummated. Id.; 11 U.S.C. § 1127(b). H & L Development expanded on Hoffman to make equitable estoppel applicable to suits against nonlenders. Id. at 74 n.3. It held that failure to disclose the claim precluded the debtor from litigating it postconfirmation. Id. at 75.

JUDICIAL ESTOPPEL

Judicial estoppel can bar a subsequent suit when the debtor's current position is clearly contrary to the Chapter 11 Plan treatment of the creditor's claim. Oneida Motor Freight, 884 F.2d at 419. The Hoffman court applied judicial estoppel as an alternative ground for dismissal of the debtor's postconfirmation lender liability claim against a creditor bank. 99 B.R. at 935.

Judicial estoppel consists of two elements: (1) the debtor asserted an inconsistent position in a prior proceeding and (2) the prior proceeding was adopted by the court. Rosenshein v. Kleban, 918 F. Supp. 98, 104 (S.D.N.Y. 1996). Judicial estoppel is invoked to prevent a party "playing fast and loose" with the courts and to protect the essential integrity of the judicial process. Hoffman, 99 B.R. at 935 (citation omitted). In the context of Chapter 11, it has been applied to prevent a debtor from asserting a postconfirmation action which the court characterized as a plan to "conceal your claims; get rid of your creditors on the cheap, and start over with a bundle of rights." Payless Wholesale Distribs., Inc. v. Alberto Culver (P.R.) Inc., 989 F.2d 570, 571 (1st Cir.), cert. denied, 114 S. Ct. 344 (1993). This is inherently contrary to basic bankruptcy principles. Id. The court held that the debtor, "having obtained judicial relief on the representation that no claims existed, can not resurrect them and obtain relief on the opposite basis." Id.

The cases are not in agreement on whether intent is an element of judicial estoppel. The standard established by the Second Circuit for the application of judicial estoppel makes no mention of intent. Rosenshein, 918 F. Supp. at 105; Bates v. Long Island R.R., 997 F.2d 1028, 1037-38 (2d Cir.), cert. denied, 114 S. Ct. 550 (1993). The Third Circuit has held that judicial estoppel is not triggered unless "intentional self-contradiction is . . . used as a means of obtaining unfair advantage." Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 362 (3d Cir. 1996).

Hoffman recognized the Eighth Circuit's statement in dicta in Total Petroleum, Inc. v. Davis, 822 F.2d 734, 737 n.6 (8th Cir. 1987), that judicial estoppel could be "tantamount to a knowing misrepresentation to or even fraud on the court." 99 B.R. at 935 n.3. However, the Eighth Circuit's concerns about the doctrine of judicial estoppel are not present in Hoffman which considers the doctrine in circumstances substantially similar to those present in this case. Id. Knowledge of a potential claim and motive for concealment in the face of an affirmative duty to disclose can give rise to a sufficient inference of intent. Ryan Operations, 81 F.3d at 363 (discussing Oneida which applied judicial estoppel without discussion of intent); Rosenshein, 918 F. Supp. at 105 (stating that if intent is relevant, it may be inferred from a knowing nondisclosure of claims).

OTHER CONCERNS

The Pension Fund has addressed other concerns arising from allowing Debtor to assert its ownership interest and cause of action postconfirmation. If Debtor schedules and recovers a previously undisclosed asset, the recovery should arguably be administered and distributed to creditors. Although Debtor apparently does not propose to modify its Plan, the U.S. Trustee has opined that if the asset is recovered, the Chapter 11 plan must be modified in order make an equitable distribution to creditors.

Generally, a Chapter 11 debtor may modify a plan after confirmation and before substantial consummation of the plan. 11 U.S.C. § 1127(b). Debtor's Plan was substantially consummated according to the provisions of the Plan on the Effective Date 30 days after confirmation, or approximately August 28, 1994. The only exception to the bar to modification after substantial consummation occurs if there is an unforeseen change in circumstances. In re Bullion Hollow Ents., Inc., 185 B.R. 726, 729 (W.D. Va. 1995). Such circumstances must have been unknown at the time of substantial consummation of the plan. Id. at 730.

Another quite basic concern raised by the Pension Fund is jurisdiction. It questions whether the Court would have

jurisdiction to determine the Doubletree claim if it reopens Debtor's case at this time. In In re Haws, 158 B.R. 965, 970 (Bankr. S.D. Tex. 1993), the court was presented postconfirmation with a claim asserted to be an asset of Chapter 11 debtors not listed in their schedules. It held that it did not have subject matter jurisdiction over the claim because it would have no conceivable effect on the bankruptcy estate. Id. at 971. This conclusion was based on the fact that the lawsuit was a nonplan asset and disposition of such asset would not affect implementation or execution of the plan. Id.

CONCLUSION

This Court concludes that Debtor is barred from reopening its Chapter 11 case. Debtor is not entitled to amend its schedules to disclose its Doubletree claim or to assert its Doubletree claim in this Court postconfirmation. Even assuming the Court would have jurisdiction over an adversary proceeding asserting Debtor's Doubletree claim, Debtor is estopped from pursuing it after confirmation of its Chapter 11 Plan.

All four elements of res judicata are satisfied in this instance. The Order Confirming Amended Plan was a final judgment made with proper jurisdiction and binding upon both Debtor and the Pension Fund. The Court finds that the Plan involved the same cause of action as the Doubletree claim. The Pension Fund's claim in the Chapter 11 case was based on prepetition transactions with Debtor concerning various hotels, including the Doubletree Hotel. Therefore, the Plan and the Doubletree claim arise from the same nucleus of operative facts.

The only unresolved question regarding applicability of res judicata is whether Debtor could have or should have brought the Doubletree claim preconfirmation. This raises the question of whether Debtor knew of its cause of action against the Pension Fund's subsidiary before confirmation of the Plan on July 29, 1994. Debtor is basing its interest in the Doubletree Hotel on agreements executed in 1991. This makes it sufficiently rooted in the bankruptcy past to have accrued preconfirmation if Debtor had knowledge of the claim. Debtor asserts that it did not discover that the documents created its interest in the hotel until after confirmation of the plan.

Larry Cahill, Debtor's president, testified at the hearing. The Pension Fund asserts that he testified to knowing about the claim throughout the bankruptcy case. The Court would not characterize his testimony as an admission of preconfirmation knowledge of the claim. However, neither has the Debtor convinced the Court that it was totally ignorant of the potential for a claim under the 1991 documents until after confirmation of its Plan. The Court finds that Debtor has failed to prove that the claim was unknown or unforeseen such that it could not have been asserted prior to confirmation of the plan. It seems clear to this Court that Debtor and its various representatives were aware of all facts which would have supported this claim. Oversight in failing to list this claim is not equivalent to lack of knowledge. The Court further finds that the potential for the existence of the Doubletree claim was sufficiently within the contemplation of the parties such that it was encompassed by the waivers provided for in the Plan.

This Court concludes that judicial estoppel also applies to bar the Doubletree claim. Debtor's failure to disclose the existence of the claim in its schedules and in the disclosure statement estops it from asserting it now. Asserting an interest in the Doubletree Hotel is clearly contrary to the Plan's treatment of the Pension Fund's claim and the Plan's waivers between Debtor and the Pension Fund. Debtor insists that it did not make a knowing misrepresentation by failing to disclose its claim because it did not discover its interest until after confirmation. The Court concludes that Debtor must have been aware preconfirmation of at least the potential for a claim to the Doubletree Hotel. Debtor is therefore estopped from asserting the claim postconfirmation. See Pako Corp. v. Citytrust, 109 B.R. 368, 377 (D. Minn. 1989). While it is not clear that intent is a relevant consideration to application of judicial estoppel in this context, such intent can be inferred from Debtor's nondisclosure of the potential of the Doubletree claim preconfirmation in the face if its affirmative duty to do so. See Rosenshein, 918 F. Supp. at 105.

Most, if not all, of the elements of equitable estoppel are also present to bar Debtor's assertion of the Doubletree claim. Debtor did not disclose the potential for this cause of action, the Pension Fund did not know Debtor's assets included the cause of action, and the Pension Fund relied on the waiver of claims in the confirmed Plan in writing off significant amounts of its unsecured claim. The third element of equitable estoppel, Debtor's intent to cause the Pension Fund's reliance on the nondisclosure of the claim, is not clear in the record.

Therefore, while the doctrine of equitable estoppel is not established on this record, res judicata and judicial estoppel

clearly establish grounds for denying Debtor's motion to reopen and barring its assertion of the Doubletree claim.

In summary, Debtor is denied reopening its Chapter 11 case as this Court has no authority to grant the underlying relief sought of amending schedules and litigating the Doubletree claim. The confirmed Plan which fails to provide for the claim bars postconfirmation enforcement of the claim. Debtor could have and should have disclosed the claim and dealt with it in the Plan. Because it failed to do so, it is now barred from litigating the claim. Thus, no purpose could be served by reopening the case. Furthermore, the Plan cannot now be modified to provide for distribution of any recovery on the Doubletree claim because it has already been substantially consummated and the existence of this claim was not unknown to the extent that it constitutes unforeseen circumstances justifying postconfirmation modification.

Debtor may not pursue the undisclosed claim purely for its own benefit. Rosenshein, 918 F. Supp. at 103. Pledging to pay Class 7 claims in full with any recovery on the claim fails to provide for distribution to claims in other Classes, notably Class 6 claims of the Pension Fund. The Court cannot "unscramble the omelet". The confirmed and consummated Plan cannot be undone to allow Debtor to pursue the Doubletree claim either for its own benefit or for the benefit of creditors.

WHEREFORE, Debtor's Motion to Reopen Case is DENIED.

FURTHER, Debtor's failure to disclose the Doubletree claim prior to confirmation of its Chapter 11 Plan bars it from pursuing the claim postconfirmation.

FURTHER, Debtor is barred from amending its schedules and statement of affairs postconfirmation to disclose the Doubletree claim.

SO ORDERED this 3rd day of June, 1996.

Paul J. Kilburg
U.S. Bankruptcy Judge