In the United States Bankruptcy Court

for the Southern District of Iowa

SARAH ELAINE BOUMA	Bankruptcy No. 99-00109-CH
Debtor(s).	Chapter 13

ORDER RE MOTION FOR AUTHORITY TO FILE OBJECTION TO CONFIRMATION OF DEBTOR'S CHAPTER 13 PLAN

This matter came before the undersigned on July 13, 1999 on a Motion for Authority to File Late Objection to Confirmation of Debtor's Chapter 13 Plan. Present at the telephonic hearing on that date were Elizabeth Goodman representing the Chapter 13 Trustee, Jerrold Wanek representing Debtor Sarah Bouma, and Tom Tarbox representing Creditor Master Financial, Inc. ("MFI"). After oral argument, the Court took the matter under advisement. The time for filing briefs has now passed and this matter is ready for resolution. MFI did not file a brief by the deadline set by the Court. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), (L).

FINDINGS OF FACT

Debtor filed her Chapter 13 Plan on January 27, 1999. One provision of the plan bifurcates MFI's claim, recognizing a secured claim of $9,416 and an unsecured claim of $31,175 on MFI's total claim of $40,591. The claim arises from a second mortgage on Debtor's residence. The first mortgage debt totals $75,853. The house is valued at $85,000.

Debtor sent a notice to interested parties informing them that February 20, 1999 was the bar date for filing objections to confirmation of the plan. The notice further stated that objections would be set for hearing, "[o]therwise, an appropriate order will be entered without further notice and hearing." MFI did not file an objection to confirmation by the bar date. The Notice of Bar Date for Objections, filed January 27, 1999, certifies that it was mailed to MFI at P. O. Box 1109, Orange CA. MFI filed its proof of claim showing the same address on February 19, 1999.

Trustee filed an objection to confirmation. The Court set a hearing for April 19, 1999 on confirmation and Trustee's objection. MFI was not served notice of the hearing. Debtor and Trustee reached a resolution of Trustee's objection prior to hearing and a Consent Order was entered on April 9, 1999. Therefore, no hearing was held. The court entered a order confirming the plan on April 12, 1999.

On April 14, 1999, MFI filed a Motion for Authority to File Late Objection to Confirmation and an Objection to Confirmation. Debtor filed a resistance. She states the motion and objection should be overruled and denied as untimely.

MFI states it did not receive notice of the Chapter 13 Plan within sufficient time to comply with the Bar Date Notice. It did not deliver the notice to counsel in California until April 8, 1999 and Iowa counsel received the information only on April 13, 1999. MFI asserts it is unjust to confirm the plan,

which contains a provision treating its claim contrary to Code requirements, "simply because the physical location of the creditor made it impossible to comply with the local rule concerning the Bar Date for Objections to the Plan." At hearing, MFI argued that its objection to confirmation was timely as it was filed prior to the hearing date set for confirmation of the plan and Trustee's objection to confirmation. MFI objects that the plan violates §1322(b)(2), which does not allow bifurcation of a claim secured by Debtor's residence.

BIFURCATION OF CLAIM

The Supreme Court has held that §1322(b)(2) prohibits a Chapter 13 debtor from reducing an undersecured mortgage to the fair market value of the mortgaged residence. Nobelman v. American Sav. Bank, 508 U.S. 324, 331 (1993). Modification by bifurcating a claim into secured and unsecured components is prohibited by §1322(b)(2) if the lender's claim is secured solely by a lien on the debtor's principal residence. Id.at 332.

MFI filed a proof of claim on February 19, 1999, documenting a claim of $41,238.51 with arrearages of $1,583.72. As the record currently stands, specifically with reference to the security documents attached to MFI's claim, it appears that MFI's claim is secured solely by an interest in Debtor's residence. Under §1322(b)(2) and the foregoing assumptions, bifurcation of MFI's lien as provided for in Debtor's plan may well be prohibited. However, the Court must first consider the impact of the intervening confirmation order to determine if the merits of MFI's position is reached.

UNTIMELY OBJECTION

Under §1327(a), the provisions of the confirmed plan bind the debtor and each creditor. This Court has noted that the Eighth Circuit Court has not ruled on the effect of Chapter 13 confirmation, but found precedent in Chapter 11 and 12 cases. In re Harnish, 224 B.R. 91, 94 (Bankr. N.D. Iowa 1998). In Harnish, a creditor who had failed to object to confirmation later objected to the trustee's report on claims which treated its claim as unsecured. Id.at 92. This Court determined that the creditor had filed a proof of claim and the claim was provided for in the confirmed plan as unsecured. Id.at 94. "By participating in the case by filing a proof of claim, [the creditor] acts at its peril and cannot be excused from failing to monitor its plan treatment. . . Because the plan was confirmed without preserving [the creditor's] lien, that lien is extinguished." Id.

Generally, once a plan is confirmed, late objections may not be made. In re Northrup, 141 B.R. 171, 173 (N.D. Iowa 1991). "In other words, failure to object prior to confirmation will operate as a waiver of the objection after confirmation." Northrup, 141 B.R. at 173. A creditor who does not object runs the risk that the bankruptcy court will not discover any potential deficiencies in the plan and will confirm it. Id.

In In re Wagner, No. L87-02143D, slip op. at 3 (Bankr. N.D. Iowa Sept. 9, 1988) (Melloy, J.), a creditor requested relief from the order confirming the Chapter 13 plan. It asserted that "through inadvertence, oversight and lack of understanding" it did not realize its claim was being stripped down. Id.at 5. This Court recognized the res judicata effect of an order confirming a chapter 13 plan. "[S]ecured creditors may not sleep upon their rights and expect to awaken to the full enjoyment of them." Id.at 7. The Court concluded that no excusable neglect existed to grant relief from the confirmation order. Id. It listed seven alternative procedures for attacking a confirmed plan as follows:

> 1) Appeal of the confirmation order; 2) Motion to alter or amend the order, including a motion for reconsideration of a hearing; 3) Motion to dismiss the case; 4) Motion to

> correct a clerical mistake; 5) Adversary proceeding to revoke confirmation; 6) Motion to set aside the confirmation on due process grounds; and 7) Motion to modify the chapter 13 plan.

Id.at 8. Because the creditor had not correctly utilized any of these procedures, the Court denied its request for relief from the confirmation order. Id.

In re Szostek, 886 F.2d 1405, 1406 (3d Cir. 1989), is a lead case in refusing to vacate a confirmed Chapter 13 plan where the creditor had not timely objected to the plan. The Court of Appeals concluded that "after the plan is confirmed the policy favoring the finality of confirmation is stronger than the bankruptcy court's and the trustee's obligations to verify a plan's compliance with the Code." Id. In re Walker, 128 B.R. 465, 467 (Bankr. D. Idaho 1991), recognized the competing interests of finality in §1327(a) and protecting home loan creditors in §1322(b)(2). The court had confirmed a plan which modified a home loan creditor's rights in the absence of a timely objection by the creditor. Id. When the creditor subsequently moved for relief from stay, the court concluded the creditor was bound by the terms of the plan, even though the plan violated §1322(b)(2). Id.at 468. The court stated: "if confirmed plans could be routinely upset by late-filed objections to claim treatment, Chapter 13 would certainly become a toothless tiger." Id.

In In re Klus, 173 B.R. 51, 53 (Bankr. D. Conn. 1994), a creditor sought to modify a Chapter 13 plan to undo the plan's bifurcation of its claim. The court stated that even if the confirmation order was wrong under the then-existing law, it is a final order and cannot be disturbed. Id.at 56; see also In re Kouterick, 161 B.R. 755, 760 (Bankr. D.N.J. 1993) (where a creditor knows of a basis for challenging confirmation and fails to object, the creditor cannot be permitted to use that basis to claim fraud under §1330 after confirmation).

MFI did not appeal the confirmation order, move to dismiss the case, assert a clerical mistake, institute an adversary proceeding to revoke confirmation, or move to modify the plan. Its request to file a late objection to confirmation may be construed to be a motion to alter or amend the order or a motion to set aside the confirmation on due process grounds. As a motion to alter or amend, MFI is asserting its failure to file a timely objection is the result of excusable neglect. As a due process argument, MFI asserts it was unable to comply with the bar date because of its location in California. Further, MFI argues that setting a bar date for objections to confirmation is contrary to Rule 3015(f) which states objections shall be filed "before confirmation of the plan."

DUE PROCESS

MFI does not assert it failed to receive notice of the bar date for objections. Debtor's attorney certified serving MFI with a copy of the Notice of Bar Date for Objections. MFI filed its proof of claim on February 19, 1999, one day before the deadline for filing objections to confirmation. In the motion to file late objection, MFI asserts merely that "the physical location of the creditor made it impossible to comply" with the bar date. The certificate of service on the notice states it was mailed on January 26, 1999, giving a 25-day bar date of February 20, 1999. MFI does not assert that the content of the notice was insufficient to inform it of its rights; it merely states its distance from Iowa made timely response "impossible."

In Talamantes-Penalver v. Immigration & Naturalization Serv., 51 F.3d 133, 135 (8th Cir. 1995), the court concluded that a ten-day filing deadline comports with due process, even as applied to persons living in remote locations. An alien attempting to appeal a deportation decision argued the ten-day deadline for filing a notice of appeal was unconstitutional, considering she lived in St. Paul,

Minnesota and the place of filing was Chicago, Illinois. Id. The court distinguished a case where the appellant was living in Hawaii and the place of filing was California. Id.at 136. The court applied the factors set out in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), to determine the 10-day deadline did not violate due process requirements.

The Court concludes the 25-day bar date comports with due process as applied to the facts of this case. Twenty-five days notice of the deadline to object to confirmation is sufficient to inform MFI of its rights in time for it to respond from California. There is nothing in this record to establish that MFI's geographical distance from Iowa made it impossible to file a timely response.

EXCUSABLE NEGLECT

MFI filed a supplemental affidavit by Donna Smith who is employed as a Bankruptcy Supervisor. She states that, within a few weeks before Debtor filed her Chapter 7 petition, MFI's bankruptcy department underwent significant personnel changes. The department was understaffed and lacking in training, but has now rectified these problems. MFI requests that the Court find its failure to file a timely objection to confirmation arose from excusable neglect.

To determine whether a party's neglect of a bar date is excusable, the court takes into account all of the relevant circumstances surrounding the party's omission. Pioneer Inv. Serv. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380, 395 (1993).

> These include . . . the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id. The proper focus is upon whether the neglect of the party and its counsel is excusable. Id.at 397. In Pioneer, the Court gave little weight to the fact that counsel was experiencing upheaval in his law practice at the time of the bar date. Id.at 398.

In In re Harlow Fay, Inc., 993 F.2d 1351, 1352 (8th Cir. 1993), cert. denied, 510 U.S. 825 (1995), the court applied the Pioneer analysis to determine whether excusable neglect existed for debtor's untimeliness in filing a brief on appeal. Debtor argued that counsel's financial pressures, relocation of offices and reduction in staff constituted excusable neglect. Id. The court held that the district court did not abuse its discretion in dismissing the appeal on the basis that debtor failed to establish excusable neglect. Id. The court focuses on the blameworthiness of the defaulting party, seeking to distinguish between contumacious or intentional delay and a marginal failure to meet deadlines. Johnson v. Dayton Elec. Mfg. Co., 140 F.3d 781, 784 (8th Cir. 1998); In re Payless Cashways, Inc., 230 B.R. 120, 138 (B.A.P. 8th Cir. 1999).

A creditor blamed corporate restructuring, including downsizing and the departure of the credit manager responsible for monitoring the case, for the failure to object to treatment of its claim in In re O.W. Hubbell& Sons, Inc., 180 B.R. 31, 35 (N.D.N.Y. 1995). The court noted that the creditor had an obligation to insure that proper office procedures were in place to ensure that pleadings were brought to the attention of counsel once received by the company. Id. In In re Waggoner, 157 B.R. 433, 434 (Bankr. E.D. Ark. 1993), the creditor's counsel miscalculated the deadline for filing an objection to confirmation. This was a mistake of law which the court concluded did not constitute excusable neglect under Rule 9006(b)(1). Id.at 436. The court refused to allow the creditor to make an untimely objection to confirmation asserting its secured claim was undervalued. Id.; see also In re Kidd, 142

B.R. 238, 240 (Bankr. S.D. Ohio 1992) (denying as untimely objection to confirmation filed two days after deadline and finding excusable neglect did not exist).

This Court concludes MFI has not shown that its failure to file a timely objection to confirmation occurred as the result of excusable neglect. Debtor will be prejudiced by further delay and the need to reformulate her Chapter 13 plan. Although MFI's objection was filed only two days after the confirmation order was entered, the bar date had expired nearly eight weeks earlier. While nothing in the record indicates MFI acted in bad faith, the reasons for the delay, personnel changes and lack of training in MFI's bankruptcy department, were within MFI's control. Taking into account all the relevant circumstances, MFI has failed to prove its neglect of the bar date was excusable.

BAR DATE VS. CONFIRMATION DATE

Local Rule 28 for the Southern District of Iowa states: "The debtor shall prepare and serve a bar date notice for objection to the plan along with a copy of the plan pursuant to the guidelines set forth in local rule 14(b)(2)(D)." According to Local Rule 14(b)(2)(D), the debtor must give 25 days notice of confirmation of a Chapter 13 Plan. Rule 14(b)(1) requires notice that timely objections will be set for hearing but otherwise an appropriate order will be entered without further notice or hearing. The Court finds that Debtor's Notice of Bar Date for Objections to her Chapter 13 Plan complies with the Local Rules. Such notice further complies with Fed. R. Bankr. P. 2002(b) which requires 25 days notice for objections to confirmation of a Chapter 13 plan.

In the Southern District of Iowa, a hearing on confirmation in Chapter 13 is scheduled only if there is a timely objection from the trustee or a creditor. This is consistent with the practice adopted in a number of districts in the country. See 2 Keith M. Lundin, Chapter 13 Bankruptcy §5.6 (2d ed. 1997). In this case, Trustee filed a timely objection to confirmation. Only this objection was set for the April 19, 1999 hearing. As previously noted, early resolution of Trustee's objection avoided the need for the hearing and the Court confirmed the plan prior to that date. Nothing in the record indicates that MFI received notice of the hearing date. As such, it cannot argue that it was relying on the date set for hearing as the date its objection to confirmation was due.

MFI cites Collier on Bankruptcy for the proposition that setting a deadline for objections to confirmation on a date before the confirmation hearing may be an invalid contradiction of Fed. R. Bankr. P. 3015(f). 9 Collier on Bankruptcy ¶ 3015.02 n.3 (Lawrence P. King, ed., 15th ed 1999).

Rule 3015(f) makes no reference to the need to file objections prior to any hearing date. In re Ryan, 160 B.R. 494, 496 (Bankr. N.D.N.Y. 1993). Rather, the Rule makes it clear that the Court may consider objections to a Chapter 13 plan as long as they are raised "prior to confirmation". Id.

As a general rule, any local rule of bankruptcy procedure that conflicts with a federal rule of bankruptcy procedure is invalid and of no effect. In re McGowan, 226 B.R. 13, 19 (B.A.P. 8th Cir. 1998).

> A local rule "may only be upheld if (a) it is consistent with the Bankruptcy Code in that it does not 'abridge, enlarge, or modify any substantive right,' as required by 28 U.S.C. §2075 and (b) it is 'a matter of procedure not inconsistent with' the Bankruptcy Rules as required by Bankruptcy Rule 9029."

Id. Courts must ensure that local bankruptcy rules do not adversely impact on a party's right to due process. Chevy Chase Bank v. Locke, 227 B.R. 68, 71 (E.D. Va. 1998). Due process requires notice

"reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

The Court concludes that the relevant local bankruptcy rules do not adversely impact on MFI's due process rights. Notice of the 25-day bar date for objections to confirmation was sufficient to comport with the requirements of Mullane. Use of the procedure set out in the local rules did not abridge MFI's rights under the Code and Rules. It received the requisite notice required by Rules 3015(f) and 2002 (b) to object to confirmation.

MFI confuses the date of the confirmation hearing, which eventually became unnecessary, with the date of confirmation which Rule 3015(f) makes the deadline for objections. Had MFI filed its objection between the bar date, February 20, 1999, and the date the Court entered the confirmation order, April 12, 1999, it is arguable that its objection would be considered timely under Rule 3015(f). MFI, rather, filed its objection after confirmation, on April 14, 1999, making it untimely.

Under the local bankruptcy rules, interested parties receive notice of the bar date for objections, rather than a hearing date for confirmation. In In re Peterman, 71 B.R. 624, 626 (Bankr. S.D. Iowa 1987), the Court stated:

> The use of bar dates for objections and resistances is absolutely essential to efficient docket control of any judicial system. . . . [T]he "communication factor" inherent in the bar date provides a means by which most disputes may be identified as real or imaginary before the court must become involved in the matter. . . . [R]iddling the policy on bar dates with exceptions would likely result in inconsistent treatment of similarly situated litigants over time. Any exception to the enforcement of the bar date must be granted on compelling equitable principle.

The Court concludes no compelling equitable principle exists upon which to allow MFI to file an untimely objection to confirmation. MFI appears to have a valid objection to bifurcation of its claim in Debtor's Chapter 13 plan. It failed, however, to assert that objection prior to confirmation. Once confirmed, the provisions of the plan are binding on MFI. Its failure to timely object operates as a waiver of the objection after confirmation. The procedures used to notify MFI of its right to object to confirmation comport with due process requirements. MFI has failed to support its assertion that its failure to file a timely objection was the result of excusable neglect.

WHEREFORE, the Motion for Authority to File Late Objection to Confirmation of Debtor's Chapter 13 Plan filed by Master Financial, Inc. is DENIED.

FURTHER, MFI's Objection to Confirmation is DENIED as untimely.

SO ORDERED this 18th day of August, 1999.

Paul J. Kilburg
U.S. Bankruptcy Judge for the
Northern District of Iowa