IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

STATE OF WISCONSIN DEPARTMENT
OF NATURAL RESOURCES,

OPINION AND ORDER

Appellant,

12-cv-550-bbc

v.

MISSISSIPPI SPORTS &
RECREATION, INC.,

Appellee.

- -

STATE OF WISCONSIN DEPARTMENT
OF NATURAL RESOURCES,

OPINION AND ORDER

Appellant,

12-cv-752-bbc

v.

MISSISSIPPI SPORTS &
RECREATION, INC.,

Appellee.

- -

Appellant-creditor Department of Natural Resources is appealing an order of the United States Bankruptcy Court confirming the small business Chapter 11 reorganization plan of appellee-debtor Mississippi Sports & Recreation, Inc. and denying the DNR's motion to dismiss Mississippi's plan for its failure to comply with the plan confirmation deadline in

11 U.S.C. §§ 1121(e)(3) and 1129(e). In Case No. 12-cv-550-bbc, the DNR appealed only the bankruptcy court's order denying its motion to dismiss. Notice of Appeal, dkt. #1, at 1. In Case No. 12-cv-752-bbc, the DNR appealed the bankruptcy court's order confirming Mississippi's Chapter 11 plan. Notice of Appeal, dkt. #1, at 1. Although it is not likely that the order denying the DNR's motion to dismiss was an appealable final order, jurisdiction over its second appeal is secure because the order confirming the plan is an appealable final order under 28 U.S.C. § 158(a)(1). Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351, 1354 (7th Cir. 1990) (citing In re Xonics, Inc., 813 F.2d 127 (7th Cir. 1987)). Because the issues raised are the same in both cases, the DNR's uncontested motion to consolidate the cases for appeal will be granted.

The DNR contends that the bankruptcy court erred in not requiring Mississippi's compliance with the 45-day deadline for confirming small business Chapter 11 reorganization plans, 11 U.S.C. § 1129(e), and the statutory requirements for extension of that deadline. 11 U.S.C. § 1121(e)(3). The record shows that the bankruptcy court extended the confirmation deadline seven times over a period of seven months, with no objection by the DNR. When the DNR finally objected to the continuances by filing a motion to dismiss the bankruptcy case, the bankruptcy court denied the motion. It held that although the extensions did not comply precisely with the statute, they were in "sufficient compliance" with § 1121(e)(3) not to require dismissal. Case No. 10-17601-tsu, dkt. #133, at 8.

The bankruptcy court's decision is an understandable response to a late filed

objection by a creditor who has remained silent for seven months while extensions were discussed. Bankruptcy proceedings are often informal, particularly when matters such as reorganizations are underway; the bankruptcy court directs much of its effort to encouraging and prodding the parties to negotiate a workable plan rather than making rulings on legal issues. Moreover, the DNR has never identified any injury or threat of injury that it has suffered because of the various extensions that the bankruptcy court allowed. Nevertheless, the statutory language of §§ 1121(e)(3) and 1129(e) is mandatory and not ambiguous. The plain meaning of the statutes controls. Therefore, I find that the bankruptcy court violated those statutes by failing (1) to make a finding that the court was more likely than not to confirm Mississippi's plan within a reasonable period of time; and (2) to issue a signed order extending the deadline before the existing deadline expired, as required by the statutes. Further, I conclude that the bankruptcy court could not use its equitable powers under 11 U.S.C. § 105(a) to confirm Mississippi's plan when these requirements were not met. Therefore, I must reverse the bankruptcy court's order.

The following summary of relevant facts and proceedings is drawn from the record of the proceedings before the bankruptcy court.

FACTS

Appellee-debtor Mississippi Sports & Recreation, Inc. is a small business that operates a campground resort in southwest Wisconsin. On October 15, 2010, it filed for Chapter 11 bankruptcy protection. Mississippi filed its Chapter 11 small business plan on August 1,

2011, within 300 days of filing bankruptcy, as required by 11 U.S.C. § 1121(e)(2). The bankruptcy court scheduled a telephonic conference on approval of the disclosure statement and confirmation of the plan for September 15, 2011, the 45th day after Mississippi filed its small business plan.

On September 12, 2011, three days before the scheduled hearing, appellant-creditor Department of Natural Resources filed an objection to the plan confirmation. Despite the objection, the hearing took place as scheduled and both the DNR and Mississippi participated by telephone. The bankruptcy court did not confirm Mississippi's plan on September 15, 2011 because Mississippi needed time to work through the DNR's objections. Mississippi did not file a motion to extend the time for plan confirmation, but the court gave oral approval to rescheduling the confirmation hearing for November 10, 2011 and entered the new conference date into the docket immediately after the hearing. The court did not enter a formal written order extending the deadline for confirmation. The DNR did not object to the rescheduling of the plan confirmation conference at the hearing or afterwards.

On November 10, 2011, the bankruptcy court rescheduled the plan confirmation hearing again, this time for January 12, 2012. It moved the confirmation hearing date several more times. On January 12, 2012, it rescheduled the hearing to February 23, 2012; on February 23, 2012, it rescheduled it to March 7, 2012; on March 7, 2012, it rescheduled it to March 15, 2012 and on March 15, 2012, it rescheduled it to April 24, 2012. The bankruptcy court held an in-person hearing in La Crosse on April 24, 2012, but rescheduled the final confirmation hearing date again, this time to May 22, 2012. On none of the

occasions on which it rescheduled the hearing did it make a finding about the likelihood of plan confirmation or issue a signed order. After each rescheduling, the court entered the new confirmation hearing date into the docket immediately.

On April 25, 2012, the DNR filed a motion to dismiss the case, contending that Mississippi's small business plan had to be dismissed because it had not been confirmed within 45 days of filing, as required by 11 U.S.C. § 1129(e). The DNR argued that when the bankruptcy court held the hearing on September 15, 2011, it was required either to confirm Mississippi's plan or grant an extension that complied with 11 U.S.C. § 1121(e)(3). The DNR contended that the extension did not comply because Mississippi had not filed a motion to extend the confirmation deadline; the DNR had received inadequate notice; the bankruptcy court had not made a finding by a preponderance of the evidence that Mississippi's plan would more likely than not be confirmed within a reasonable time; and it had not issued a signed order before the existing deadline expired.

The bankruptcy court considered the DNR's motion to dismiss on May 22, 2012, in conjunction with the hearing on confirmation of Mississippi's Chapter 11 plan. It denied the motion orally and confirmed the plan that day. On June 8, 2012, it entered a written opinion and order denying the motion to dismiss, holding held that confirmation was proper because it had complied substantially with the requirements of § 1121(e)(3). Case No. 10-17601-tsu, dkt. #133, at 8.

OPINION

When a district court reviews a bankruptcy court order, the district court applies a "clearly erroneous" standard to questions of fact, Fed. R. Bankr. P. 8013, and reviews questions of law and the application of law to fact de novo. Mungo v. Taylor, 355 F.3d 969, 974 (7th Cir. 2004). In this case, the parties do not dispute any of the facts, so the only questions the court must determine are legal ones: (1) whether the bankruptcy court complied with the requirements of 11 U.S.C. § 1121(e)(3) when it confirmed Mississippi's Chapter 11 small business plan after the 45-day confirmation deadline of 11 U.S.C. § 1129(e) had passed and (2) whether the bankruptcy court had the equitable power to confirm Mississippi's plan despite Mississippi's and its own non-compliance with §§ 1121(e)(3) and 1129(e).

Congress decided in 2005 that debtors filing small business Chapter 11 bankruptcies should be more closely monitored by the United States Trustee and the bankruptcy courts, because these cases "often are the least likely to reorganize successfully." H. Comm. on the Judiciary, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, H. Rep. No. 109-31, pt. 1 at 92 (2005). To achieve this close monitoring, it imposed deadlines on small business bankruptcies that the debtors must meet as they proceed through the bankruptcy process. The relevant deadline in this case is that "[i]n a small business case, the court shall confirm a plan that . . . is filed in accordance with section 1121(e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3)." 11 U.S.C. § 1129(e). Section 1121(e)(3) provides:

> The time fixed in section 1129(e) within which the plan shall be confirmed, may be extended only if–
>
> (A) the debtor, after providing notice to parties in interest (including the United States Trustee), demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time;
>
> (B) a new deadline is imposed at the time the extension is granted; and
>
> (C) the order extending time is signed before the existing deadline has expired.

11 U.S.C. § 1121(e)(3). Failure to confirm a plan "within the time fixed by this title or by order of the court" constitutes cause for dismissal. 11 U.S.C. § 1112(b)(4)(J).

A court's interpretation of the bankruptcy code starts "'where all such inquiries must begin: with the language of the statute itself.'" Ransom v. FIA Card Services, N.A., 131 S. Ct. 716, 723 (2011) (quoting United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989)). "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." Lamie v. United States Trustee, 540 U.S. 526, 534 (2004) (internal citations omitted).

As it argued before the bankruptcy court, the DNR contends that Mississippi and the bankruptcy court failed to comply with § 1121(e)(3)'s extension requirements in four ways: (1) Mississippi did not file a motion to extend the confirmation deadline; (2) it failed to provide adequate notice to the DNR; (3) the bankruptcy court did not make a finding by a preponderance of the evidence that Mississippi's plan was more likely than not to be confirmed within a reasonable period of time; and (4) the bankruptcy court did not issue a

signed order before the existing deadline expired. For its part, Mississippi argues that the bankruptcy court acted correctly when it confirmed Mississippi's plan because the notice given to the DNR and the bankruptcy court's prompt docket entries of the rescheduled confirmation hearing dates constituted "constructive" compliance with § 1121(e)(3). In addition, Mississippi argues that the bankruptcy court's confirmation of its plan was proper because the bankruptcy court used its equitable powers to consider both the DNR's delay in raising its challenge and the burden that having to file a new bankruptcy case would place on Mississippi. Id. at 14-16.

Little time need be spent on the DNR's first argument that Mississippi failed to file a motion for extension with the bankruptcy court. Section 1121(e)(3) contains no language requiring a debtor to file a motion for an extension of the 45-day plan confirmation deadline. 11 U.S.C. § 1121(e)(3); Bertram Communications LLC v. Netwurx, Inc., 2009 WL 3809800, *3 (E.D. Wis. Nov. 13, 2009) (rejecting argument that debtor must file motion; "appellant is reading into § 1121(e)(3) a requirement that simply does not exist"). The statute requires only that the debtor "demonstrate" that the court will be able to confirm the plan. 11 U.S.C. § 1121(e)(3)(A). In most instances, filing a motion is the advisable course for debtors seeking to obtain an extension, but doing so is not required by the bankruptcy code and the DNR has shown no reason for the court to read such a requirement into the code.

Second, the DNR argues that Mississippi failed to provide all its creditors prior notice of its extension request. Section 1121(e)(3)(A) requires debtors to provide notice to parties

in interest before requesting an extension of the 45-day deadline. Section 102(1) defines the phrase "'after notice and a hearing' or a similar phrase" as meaning "after such notice as is appropriate in the particular circumstances." 11 U.S.C. § 102(1). In this case, all creditors received notification of the original confirmation hearing. The bankruptcy court advised all parties that wished to participate in the hearing that Mississippi was seeking additional time to resolve outstanding matters regarding the potential sale of real estate and the resolution of various environmental concerns. At the September 15 confirmation meeting, all parties had the opportunity to raise any concerns they had about extending the date for confirmation to November 10. The bankruptcy court provided electronic notice for each subsequent confirmation hearing on the court's online docket. This was sufficient compliance by the bankruptcy court with the notice requirement of § 1121(e)(3)(A).

Third, the DNR argues that Mississippi failed to show on or before the 45-day deadline that confirmation of its plan would more likely than not occur within a reasonable time period. Under § 1121(e)(3)(A), a debtor must "demonstrate[] by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time." The bankruptcy court record does not include any transcript of the arguments presented at the September 15 hearing or at any subsequent confirmation hearing in which the parties discussed the likelihood of confirmation. The bankruptcy court issued no orders in which it explained why it was likely that Mississippi's plan would be confirmed within a reasonable time. In this regard, the procedure the bankruptcy court used failed to comply with the plain language of § 1121(e)(3)(A).

The bankruptcy court found that "[n]othing in the code requires the court to memorialize these findings in an order, especially where no party opposes the relief requested by the debtor" and that "[t]he adjournments were granted based on representations that progress was being made toward reorganization." Case No. 10-1760-tsu, dkt. #133, at 5 and 8. Relying on these findings, the bankruptcy court concluded that it had substantially complied with § 1121(e)(3)(A) in this case. Id. I believe that this conclusion was in error.

Nothing in the text of § 1121(e)(3) indicates that substantial compliance satisfies the requirements of § 1121(e)(3)(A), but even if it did, the bankruptcy court failed to comply substantially with § 1121(e)(3)(A) by not making a record of its findings. At a minimum, substantial compliance with § 1121(e)(3) requires some way of giving reviewing courts a record of the arguments and evidence the bankruptcy court relied upon in finding that confirmation was more likely than not to occur within a reasonable time. Without an appropriate record, a district court cannot review the legality of a bankruptcy court's order.

Section 1121(e)(3)(A) establishes an evidentiary burden that must be met before the bankruptcy court can extend the confirmation deadline. In re AMAP Sales & Collision, Inc., 403 B.R. 244, 250 (Bankr. E.D. N.Y. 2009) (holding that debtor satisfied preponderance standard where debtor offered testimony, an affidavit and financial projections of debtor's anticipated profits and losses); In re Safeguard-RX, Inc., 2009 WL 249767, *1-2 (Bankr. S. D. Tex. Feb. 2, 2009) (finding that debtor failed to meet preponderance standard where debtor's testimony did not adequately address disputes between debtor and its landlord); In re Luther, 2007 WL 1063008, *2 (Bankr. D. Md. Mar. 22, 2007) (finding that debtor failed

to meet preponderance standard where debtor failed to appear at hearing on motion extension and failed to file any documents in support of extension). Without deciding exactly how much evidence must be presented to meet the evidentiary burden of § 1121(e)(3)(A), I conclude that the bankruptcy court must produce some record indicating the evidence it relied upon in coming to its conclusion.

The docket entries on which the bankruptcy court relies are insufficient to meet this requirement. The docket entry rescheduling the September 15 confirmation hearing to November 10 states only that the hearing date changed, without giving any reasons for the delay. Case No. 10-17601-tsu, dkt. #82. The bankruptcy court explained in its written opinion filed nearly nine months after the initial September 15 confirmation hearing that it had granted the adjournments in reliance on representations that progress was being made toward reorganization. Case No. 10-17601-tsu, dkt. #133, at 8. However, no docket entry mentions these representations or describes what they entailed. This leaves the court without the ability to review the bankruptcy court's extension order. Therefore, I conclude that the bankruptcy court and Mississippi failed to satisfy § 1121(e)(3)(A).

Finally, the DNR argues that the bankruptcy court failed to issue a formal signed order extending the confirmation deadline. Under 11 U.S.C. § 1121(e)(3)(C), the bankruptcy court must issue an order and ensure that "the order extending time is signed before the existing deadline has expired." In this case, no order was issued before the expiration of the existing deadline. The docket entry on September 15, 2011 rescheduling the confirmation hearing to November 10, 2011 is not listed on the docket report as an

"order." In fact, none of the docket entries rescheduling subsequent confirmation hearings are characterized as orders on the docket report and there is no document labeled as an order attached to any of the relevant docket entries. Compare Case No. 10-17601-tsu, dkt. #83 (no attachment), with id. #27 (attachment entitled "Order for Extension of Time to File Schedules"), and id. #72 (attachment entitled "Order Conditionally Approving Disclosure Statement and Setting Hearing on Final Approval of the Disclosure Statement and Confirmation of the Plan"). The language of § 1121(e)(3)(C) clearly requires an "order." See also In re Caring Heart Home Health Corp., Inc., 380 B.R. 908, 910 (Bankr. S.D. Fla. Jan. 31, 2008) ("[I]f no signed order exists prior to the expiration of the 45 day deadline, then no extension can be granted."). Mississippi has not shown that the docket entry entered after the September 15, 2011 hearing or any of the docket entries entered after the rescheduled confirmation hearings constituted an order that would comply with § 1121(e)(3)(C).

Even if I were to consider that these docket entries constituted orders, they would not comply with § 1121(e)(3)(C) because they were not signed. The relevant docket entries do not contain Judge Utschig's signature. Compare Case No. 10-17601-tsu, dkt. #83 (no signature listed on docket report), with id. #27 (docket report states "[s]igned on 11/17/2010"), and id. #72 (docket report states "[s]igned on 8/10/2011"). The plain language of the bankruptcy code requires a signature on the order. 11 U.S.C. § 1121(e)(3)(C). Because the docket entries entered after the various confirmation hearings did not constitute orders and did not include a signature, they did not comply with the

requirements of § 1121(e)(3)(C).

The bankruptcy court found that it had complied sufficiently with § 1121(e)(3)(C) because in today's electronic age of "'virtual' orders . . . the reality is that the adjournments were in fact handled prior to the expiration of the existing deadline whether a physical order was 'signed' or not." Case No. 10-17601-tsu, dkt. #133, at 5. The trouble with this conclusion is not the reality of the electronic age but the statute's requirement of a "signed order." The bankruptcy court's own electronic docket differentiates between an order and a docket entry and between a docket entry that is signed and one that it not signed.

Mississippi argues that even if the bankruptcy court did not comply with the specific requirements of § 1121(e)(3), it was permitted to exercise its equitable powers to grant the extension. This argument requires an assessment of the relation between the bankruptcy court's equitable powers and § 1121(e)(3). Under 11 U.S.C. § 105(a), the bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the bankruptcy code]." Although § 105(a) appears to grant broad discretionary power to the bankruptcy court, the Court of Appeals for the Seventh Circuit has explained that § 105(a) should be used only in limited circumstances and "within the confines of the Bankruptcy Code." Disch v. Rasmussen, 417 F.3d 769, 777 (7th Cir. 2005); see also Grabitske v. Brittingham & Hixon Lumber Co., Case No. 10-cv-267-bbc, 2010 WL 3666990, *4 (W.D. Wis. Sept. 15, 2010). "Otherwise, there is a real risk that more particular restrictions found throughout the Code would amount to nothing, because the court could always use the residual equitable authority of § 105(a)." Id. In Disch, the

bankruptcy court had used its equitable powers under § 105 to revoke a debtor's discharge although the debtor's conduct did not fall within the list of specific grounds warranting revocation under § 727(d). Id. at 774. The court of appeals held that the bankruptcy court could not rely on its § 105 powers in this way; if the bankruptcy court's equitable powers provided a "back door" around the specific list enumerated in § 727(d), the list might as well not exist. Id. at 778.

Section 1129(e) provides that the bankruptcy court "shall confirm" a small business plan "not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3)." Section 1121(e)(3) provides that the 45-day deadline may be extended "only if" three specific requirements are met. As in Disch, the relevant bankruptcy code provision in this case provides a specific list that must be followed before the bankruptcy court can take a particular action. The bankruptcy court may not employ its equitable powers under § 105(a) to circumvent the plain language of the bankruptcy code and the specific requirements of § 1121(e)(3), no matter how strongly it believes that the provisions of §§ 1121(e)(3) and 1129(e) are bad law. E.g., In re J & J Fritz Media, Ltd., 2010 WL 4882601, *2 (Bankr. W.D. Tex.) (characterizing §§ 1121(e)(3) and 1129(e) as part of "a pernicious piece of legislation enacted in 2005 that lays a trap for the unwary"). As the court of appeals has said, "[T]he power conferred by §105(a) is one to implement rather than override." In re Kmart Corp., 359 F.3d 866, 871 (7th Cir. 2004); see also Caring Heart, 380 B.R. at 910-11 (finding bankruptcy court's equitable powers did not allow it to contradict "clear meaning" of extension requirements in § 1121(e)(3)).

Last, the bankruptcy court stated in its opinion that the DNR "may be said" to have waived its right to assert non-compliance with §§ 1129(e) and 1121(e)(3) by its "repeated acquiescence to the adjournments of confirmation." Case No. 10-17601-tsu, dkt. #133, at 8. Whether a party can waive a statutory deadline depends on whether the particular deadline is considered a jurisdictional deadline, a claims-processing rule or a time-related directive. Dolan v. United States, 130 S. Ct. 2533, 2538 (2010). Mississippi has never argued that the DNR waived the deadline or discussed whether the two sections are the kinds of deadlines that can be waived, so I will not address this issue.

I agree with Mississippi and the bankruptcy court that the DNR's motion undermines the efficiency of the bankruptcy process. The DNR has never explained why it sat on this challenge for seven months while the parties spent time and money on putting together Mississippi's Chapter 11 reorganization plan or why it brought this motion, when Mississippi has said that it will simply file a new bankruptcy case if its current plan is dismissed. It is clear, however, that dismissal will result in the expenditure of additional money and time by Mississippi and the state of Wisconsin (and the bankruptcy court) on a case that has already taken too long to be resolved. Nonetheless, the prohibitions of § 1121(e)(3) are clear: the bankruptcy court cannot grant an extension of time for plan confirmation unless specific requirements are met.

ORDER

IT IS ORDERED that

1. Appellant-creditor Department of Natural Resources's motion to consolidate related appeals, dkt. #2, is GRANTED.

2. The decision of the United States Bankruptcy Court for the Western District of Wisconsin ordering the confirmation of the small business Chapter 11 reorganization plan of appellee-debtor Mississippi Sports & Recreation, Inc. and denying creditor's motion to dismiss is REVERSED and this case is remanded to the bankruptcy court for further proceedings in conformity with this decision.

Entered this 13th day of November, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge