(Cite as: 1998 WL 614693 (Bankr.D.Vt.))

In re Robert W. PHILLIPS, II, Debtor

No. 97-11150.

United States Bankruptcy Court. D. Vermont.

July 23, 1998.

J.T. Schwidde, Esq., of Glinka & Schwidde, Rutland, VT, for Robert W. Phillips, II (Debtor).

J.R. Harrington, Esq., of Sulloway & Hollis, P.L.L.C., Concord, NH, for Dr. Conrad Carantit (Creditor).

J.M. Sensenich, Esq., Wilder, VT, Chapter 13 Standing Trustee pro se (Trustee).

MEMORANDUM OF DECISION DISALLOWING CLAIMS OBJECTION

CONRAD, Bankruptcy J.

***1** Debtor objects [FN1] to the unsecured claim of a creditor who has already been paid under the terms of Debtor's confirmed Chapter 13 Plan. Debtor's "objection to [Creditor's] claim incorporated the evidence presented to this Court during the December 1, and 2, 1997 hearings on [Creditor's] motion to dismiss [Debtor's] Chapter 13 Case." Debtor's "Memorandum of Law in Support of his Objection to Conrad M. Carantit's Claim and Objection to Conrad M. Carantit's Motion to Dismiss," 2 (Doc. # 122-1 5/4/98). Also before us is a motion by Creditor to dismiss the Debtor's objection.

> FN1. Our subject matter jurisdiction over this controversy arises under 28 USC § 1334 (b) and the General Reference to this Court under Part V of the Local District Court Rules for the District of Vermont. This is a core matter under 28 USC §§ 157(b)(2)(A) and (B). This Memorandum of Decision constitutes findings of fact and conclusions of law under Fed.R.Civ.P. 52, as made applicable by Fed.R.Bankr.P. 7052.

We disallow Debtor's objection for several reasons: Creditor has not had an opportunity for a hearing; Debtor has failed to prove his case; we have already ruled against Debtor on the same evidence; and the issue of the validity vel non of Creditor's claim was mooted by confirmation of Debtor's Chapter 13 Plan. We address each issue in turn.

DISCUSSION

The only evidence Debtor relies on to support his motion to disallow Creditor's claim was presented in two days' of evidentiary hearings on December 1-2, 1997. We heard then a very strange story about what people will do with money and what people with money will do. Aided by Debtor's frequent objections, we attempted with limited success to keep Creditor focused on the issues relevant to the matter then before us. That matter was Creditor's motion to dismiss Debtor's Chapter 13 case. We were not concerned with Debtor's ultimate liability for Creditor's claim, but only with whether, at the time of the hearing, Debtor's liability was contingent and he had regular income, and whether his Chapter 13 filing was in good faith.

Contingency and regular income were important because, "[o]nly an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $250,000 ... may be a debtor under chapter 13...." 11 U.S.C. § 109(e). Creditor's $1,801,255 unsecured claim vastly exceeded the statutory cap for noncontingent debt. The regularity and sufficiency of Debtor's income was also doubtful.

In addition, the circumstances of Debtor's filing for Chapter 13 and his intentions with respect to Creditor's claim raised good faith filing issues. Reduced to essentials, Creditor alleges that Debtor, Debtor's company and/or Debtor's employees fleeced him. Creditor has been pursuing his legal remedies against Debtor with vigor and enthusiasm in Vermont and New Hampshire. The targets of Creditor's efforts at redress include Debtor's father, the alleged beneficiary of a fraudulent conveyance from Debtor. Although Debtor's liability to Creditor has been fully extinguished in Debtor's Chapter 7 and Chapter 13 cases, the object of Debtor's objection to the claim is to protect his father.

When Debtor filed a Chapter 7 petition in this Court, Creditor responded by commencing an adversary proceeding to determine the dischargeability of his claim against Debtor. Creditor's complaint alleged his claim against Debtor was nondischargeable under §§ 523(a)(2)(A) and (B) and (a)(6). The adversary proceeding was still pending when Debtor received his discharge on May 28, 1997. Debtor then promptly commenced this Chapter 13 case. The Plan he proposed provided:

***2** In full and complete satisfaction of the pending adversary proceeding against the Debtor in the case of Conrad W. Carantit v. Robert W. Phillips, II, Ad[v]. Pro. No. 97-1027 that was pending in Debtor's prior Chapter 7 Case, and without any admission on the merits of that proceeding, Debtor shall pay Conrad M. Carantit, the sole creditor having survived the entry of the Court's May 28, 1997 Discharge of Debtor in Debtor's prior Chapter 7 case No. 97-10174, ("Carantit") a total of $9,000.00 as part of the Confirmation of Debtor's Chapter 13 Plan. Debtor shall pay the Trustee the lump sum of $10,000.00 for the Plan Payment within 30 days of the confirmation of Debtor's Plan from proceeds of a post-petition loan.

A discharge in Chapter 7 relieves the debtor of liability "from all debts that arose before the date of the order for relief," except for debts excepted from discharge under § 523. § 727(b). Creditor contended in the adversary he commenced in Debtor's Chapter 7 case that Debtor's conduct and/or the conduct of Debtor's employees in their dealings with Creditor barred Debtor's discharge under § 523. Debtor chose to forego a determination on the merits by filing a Chapter 13 case. Chapter 13 permits a debtor to discharge indebtedness that would not be dischargeable in Chapter 7. Compare § 727(b) and § 1328(a). The trade-off is that in order to obtain a Chapter 13 discharge, a debtor must commit his projected disposable income for the next three years to pay off creditors. § 1325(b). Obviously, to meet this requirement, a debtor must have a "regular income." § 109(e).

Accordingly, with the prompting of frequent objections by Debtor, we excluded much of the evidence Creditor offered that would have been relevant to the issue of Debtor's ultimate liability for the acts of his company and his employees because it was not relevant to the issues of contingency, regular income, and good faith in filing.

Creditor, a Concord, N.H., physician, described the circumstances of two loans he made that form the basis of his claim against Debtor. One day in 1995,

[a] fellow by the name of Ted Birch called me and told me that a certain fellow by the name of Gene Hopper is going to call me about a bridge loan. So Mr. Hopper called me and talked to me about a short-term bridge loan that they wanted help for in order to get a line of credit from a prince from the Middle East.

Tr. 20 (12/1/97). Accordingly, Creditor, loaned $185,000 to Flexible Mortgage Corp. ("Flexible"), the entity which needed help in opening the spigot to the Middle East money. In consideration of the loan of $185,000, Creditor received back a promissory note from Flexible in the amount of $234,653.47. Asked to explain the discrepancy between the amount loaned and the face amount of the note, Creditor explained, "Oh, they wanted to give me a big commission for the short term of loan so they could get their line of credit." Tr.. 30 (12/1/97).

***3** When the note came due, Creditor asked said Hopper where the repayment was. "And he told me that there was this unfortunate happening that delays the payment because one of their, the source of their financing in Canada died." Tr. 35 (12/1/97). Not to worry, though, because Hopper had a plan.

[Hopper] told me that Flexible Mortgage is trying to get another line of credit through a certain financing institution in Massachusetts named Delta. And Ingrid Kiefer apparently was supposed to be a co-chairman in that corporation. But she ... has some obligation to fulfill before she could be reinstated as co-chairman and needed that $300,000, and to be reinstated, to now have the influence to loan Flexible Mortgage something like five million

dollars line of credit.... [I]n so doing, Gene Hopper told me that all the ... first loan, including this, will be paid at the same time.

Tr. 39 (12/1/97).

Ingrid Kiefer was unavailable to testify, so Creditor read her version of how she came to borrow money from Carantit.

I think Flexible needed more money, and they ran out of investors, so Dr. Carantit came up.

....

[T]hey needed somebody to step in that had a good credit background so that Dr. Carantit would feel comfortable to lend the money to because Flexible was going under, and since they already had one loan with Dr. Carantit, that he was not going to loan any more money to Flexible Mortgage at that point.

Tr. 114-15 (12/1/97). So, Kiefer testified, the plan was "[t]o get the money from Dr. Carantit, and then it was going to be funneled back to Flexible Mortgage, and then Dr. Carantit was going to be paid back within a ten-day to two-week time period...." Tr. 117-18 (12/1/97). Creditor did make a loan of $300,000, receiving in return a promissory note signed by Kiefer in the amount of $415,841. Tr. 56, (12/1/97). Kiefer testified at her deposition that most of the money was in fact transferred to Flexible before Flexible went out of business. Tr. 126-27 (12/1/97). After we listened to the reading of the transcript, Debtor objected to its admissibility, and we sustained his objection, excluding it from evidence. Tr. 131 (12/1/97). That ruling, however, was in the context of a hearing on whether the debt was contingent, not whether Debtor was ultimately liable.

In the interests of judicial economy, we tried to exclude evidence introduced by Creditor to establish Debtor's ultimate liability for the acts of his agents, because that liability did not relate to the issue of whether or not the debt was contingent. [FN2] Accordingly, we deny Debtor's motion to disallow Creditor's claim because Creditor has never had an opportunity for a hearing on the issue of Debtor's ultimate liability. Even so, plenty of evidence of Debtor's ultimate liability got in. For example, Debtor admitted that the persons directly involved in fleecing Creditor were employees of Flexible Mortgage Corp., Tr. 194 (12/1/97), and that he had misrepresented his assets to obtain the New Hampshire banking license that Flexible and its employees operated under. Tr. 145-59 (12/1/97). Creditor contends, with considerable basis in the evidentiary record, that Flexible was not a corporation at all but Debtor's d/b/a. See e.g. Tr. 144 (12/1/97).

> FN2. In fact, the evidence tended to negate Creditor's case by proving that Debtor's liability, if any, was contingent. What we needed was evidence of Debtor's actions, not

of the actions of others for whom he was ultimately responsible.

***4** Thus, we also deny Debtor's motion to dismiss because Debtor has failed to prove his case on the merits. Moreover, we have already ruled against Debtor on this issue. Debtor moves to disallow the Creditor's claim based on the pleadings and evidence of record. [FN3] That is the functional equivalent of a motion for summary judgment under Fed.R.Bankr.P. 56. As Debtor acknowledges,

FN3. We do not appreciate Debtor's misstatement of the law and procedural history of this case at pages 2-3 of Debtor's Memorandum (Doc # 122-1, supra). Debtor, not Creditor is the moving party.

the non-moving party ... is entitled to have the evidence viewed in the light most favorable against the entry of the motion for summary judgment, and all inferences must be construed in his favor.

Rule 56 also imposes the dual burden on [the movant] to establish the absence of any disputed material facts and that summary judgment is warranted as a matter of law ....

Debtor's Memorandum, 2 (Doc # 122-1, supra.) We made specific rulings on the issue of summary judgment at the conclusion of the two-day hearing on Creditor's motion to dismiss Debtor's Chapter 13 case.

[I]t appears to me that based on the evidence that I have seen here today, it would be a fair dispute between the parties as to whether this debt would be discharged or not in a Chapter 7 case. [Creditor] has certainly a sufficient amount of evidence that his claim certainly would survive a motion to dismiss and his claim certainly would survive a summary judgment motion.

We have no reason to rule differently now than we did then.

In any event, confirmation of Debtor's Plan mooted the issue. The "Amended Chapter 13 Plan," confirmed by Order of Senior Bankruptcy Judge Charles J. Marro on December 5, 1997, specifically provides that Creditor will receive $9,000 "[i]n full and complete satisfaction" of Creditor's adversary proceeding against Debtor, "without any admission on the merits of that proceeding...." Exhibit to "Findings and Order Confirming Debtor's Chapter 13 Plan," 1 (Doc. # 47-1, 12/9/97). "The provisions of a confirmed plan bind the debtor and each creditor ...." § 1327(a). Accordingly, we will not allow Debtor to breach his undertaking by disallowing Creditor's claim.

CONCLUSION

As stated above, we disallow Debtor's objection because Creditor has not had an opportunity for a hearing, Debtor has failed to prove his case, we have already ruled against Debtor on the same evidence, and the issue of the validity vel non of Creditor's claim was mooted by confirmation of Debtor's Chapter 13 Plan.

Creditor is to submit an order consistent with this Memorandum of Decision within 10 days, upon five days' notice to Debtor. The order shall include a hearing date for a status conference at which the parties shall be prepared to discuss why this case should not be closed.

1998 WL 614693 (Bankr.D.Vt.)

Back to Opinions by Citation
Back to Opinions by Date

OR
Or Search for Keywords