DOCKET NUMBER: 94-11885
ADV. NUMBER: None
JUDGE: M. A. Mahoney
PARTIES: Warren David James, Leader Federal Bank for Savings
CHAPTER: 13
ATTORNEYS: J. C. McAleer, III, J. A. Lockett, Jr., G. Ritchey
DATE: 6/14/00
KEY WORDS:
PUBLISHED:

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

WARREN DAVID JAMES Case No. 94-11885-MAM-13

Debtor

ORDER DENYING TRUSTEE'S MOTION TO REOPEN CHAPTER 13 CASE AND TO SET ASIDE DISCHARGE

John C. McAleer, III, Chapter 13 Trustee
John A. Lockett, Jr., Attorney for the Debtor
George Ritchey, Attorney for Leader Federal Bank for Savings

This case is before the Court on the Motion of the Chapter 13 Trustee to Reopen the Case and to Set Aside Debtor's Discharge. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. The motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the Court has the authority to enter a final order. For the reasons indicated below, the Court is denying the trustee's motion to reopen the case and to set aside the discharge.

FACTS

Mr. James filed this chapter 13 case on September 16, 1994. In his schedules he listed a total debt to Leader Federal Bank for Savings (Leader Federal) in the amount of $13,272.95. He listed $8,000 as a secured claim and indicated that $5,272.95 of the debt was unsecured. Leader Federal filed a claim on October 11, 1994 in the amount of $18,811.20 and stated that it was fully secured. It filed a second claim for $555.60 on August 21, 1995 for force place insurance for 1989. This claim was disallowed on July 21, 1995 as being filed after the bar date for filing claims.

The debtor's first amended plan provided as follows:

> b. Secured Debts: During the Plan, payments to creditors who hold a security interest in Debtor's property and whose claims are duly proved and allowed as follows:
>
> NONE
>
> i. Preferences: The Debtor offers to make "preference" payments:
>
> NONE
>
> * * *
>
> c. Unsecured Debts: During the Plan, and pro rata with dividends to secured creditors, dividends to unsecured creditors whose claims are duly proved and allowed as follows:
>
> NONE

This plan was confirmed by order dated December 27, 1994. Unlike debtor's proposed plan, the confirmed plan did provide "a pro-rata dividend to all other creditors [other than secured creditors receiving preference payments, priority creditors and attorney's and trustee's fees] whose claims have been proved and allowed herein." The plan payments were $404 per month.

On August 12, 1998, the debtor sought to amend his confirmed plan so that his payments would stay at $404 per month after the trustee had moved to increase his monthly payments to $728 per month. The trustee had calculated that this was the amount that would be needed to complete the plan based on the claims filed. The debtor termed his motion as one to "reduce plan percentage." The motion asked that the Court set "their monthly payments at $404 and the plan percentage [be] modified to conform therewith."

On November 5, 1998, the Court granted the motion to reduce plan percentage. The Court's bench order read as follows:

> Debtor's motion to reduce percentage payout to general unsecured creditors and to reduce plan payments to $404 per month. Motion granted. The Debtor's Chapter 13 plan percentage payout was reduced to 55% with plan payments of $404 per month. Chapter 13 Trustee to prepare the order.

On November 13, 1998, the Court signed the order that the Chapter 13 Trustee had furnished. It provided:

> ORDERED that the pro rata dividend to unsecured creditors is reduced from 100% to 55% on balance owing.
>
> IT IS FURTHER ORDERED that the remaining provisions of the Confirmation Order entered on December 27, 1994, are RATIFIED.

On January 26, 2000, the Court discharged Mr. James because it was believed that he had completed all of the payments required under his Chapter 13 plan. On January 27, 2000, a final decree was entered closing the case.

On February 29, 2000, the trustee filed this motion to reopen the case and set aside the discharge. The trustee had only paid 55% of the unpaid balance of Leader Federal's claim after November 5, 1998. He believed that Leader Federal as a secured creditor should have been paid its entire claim. The remaining balance due on the claim is $2,936.59.

LAW

Debtor's counsel argues that Leader Federal's claim has been paid appropriately and the remainder of the debt is discharged. The plan confirmed on December 27, 1994, did not provide for any payment to Leader Federal except, at best, a pro rata distribution of its share of $404 per month from the plan. Leader Federal was on a level with all other creditors. It was given no preference. Leader Federal did not object to confirmation of the debtor's plan and is now bound by the final confirmation order. When Mr. James amended his plan in November 1998, the change in dividend affected Leader Federal in the same manner in which it affected all creditors

who share in the pro rata dividend. Leader Federal did not object to the amendment and is now bound by it.

Leader Federal's counsel argues that the original plan was a 100% plan so it did not matter that Leader Federal was not given a preference payment. It was going to receive 100% of its debt through the plan. Leader filed a proof of claim for $18,811.20 to which the debtor never objected. Therefore, the claim is allowed in the claimed amount as a secured claim. The orders reducing the plan percentage only affected unsecured creditors so that its claim should be paid in full.

The Court concludes that the debtor's position is correct. Once the plan was confirmed in which Leader Federal received no special treatment for its secured claim, it became bound to the treatment given to unsecured creditors. 11 U.S.C. § 1327(a).

Leader Federal filed a secured claim in the amount of $18,811.20. The debtor did not object to the claim so it is an allowed secured claim as filed. In a typical case, this would mean that Leader Federal would then receive "preferred" treatment under a debtor's plan. Leader would be given a set monthly payment or be paid directly outside of the plan.

However, in this case, the debtor's plan was unusual, and, if there were any objections filed, unconfirmable.[1] The plan provided for no payment on secured debts. 11 U.S.C.

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[1]Debtors' counsel file plans like this in order to keep all of the debtor's options open at confirmation. If the plan gives every creditor a zero return, then the debtor has the maximum amount of negotiating room. Also, if the dividend to unsecured creditors needs to be lowered to satisfy a need to give a secured creditor more money each month, the plan does not need to be renoticed to creditors. The creditors are receiving a zero return so that any amount agreed to above zero is an increase in payment. The same is true of the treatment of secured creditors.

In fact, the $404 per month payment proposed actually appeared to give creditors a 100% repayment of their debts, not zero. It was only after Leader Federal filed its large claim that the

§ 1325(a)(5) (court shall confirm plan over objection of secured creditor if collateral is surrendered or creditor is provided payments equal to present value of collateral). It provided for no payment on unsecured debts. 11 U.S.C. § 1325(a)(4) (court shall confirm plan if unsecured creditors receive more than they would receive if estate were liquidated). The order confirming the plan changed the unsecured creditors' treatment however. It provided payment of "a pro-rata dividend to all other creditors [other than secured creditors receiving preference payments, priority creditors and attorney's and trustee's fees] whose claims have been proved and allowed herein."[2] Since Leader Federal was not to be paid as a secured creditor with a preference, it too was to be paid a part of the pro-rata dividend. Leader Federal is bound by the terms of the plan under the Code and the doctrine of res judicata. 11 U.S.C. § 1327(a); *Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.)*, 898 F.2d 1544 (11th Cir. 1990), *cert. denied*, 498 U.S. 959, 111 S. Ct. 387, 112 L. Ed. 2d 398 (1990) (confirmed chapter 11 plan has res judicata effect).

This attempt by the trustee or Leader Federal to challenge the confirmed plan is essentially a motion to modify, alter or revoke the confirmation order. Whether governed by 11 U.S.C. § 1330(a) or Fed. R. Civ. P. 60(b), which is applicable pursuant to Fed. R. Bankr. P. 9024, the motion is untimely. The amended plan was confirmed November 13, 1998, more than a year before the filing of this motion by the trustee. 11 U.S.C. § 1330(a) (party must request revocation of confirmation within 180 days after entry of confirmation order); Fed. R. Civ. P.

100% payout would not work at $404 per month. When the trustee discovered this, he moved to increase the plan payments.

[2]This order, requiring a pro-rata payment on filed and allowed claims, is what typically resulted from the zero plans. Once the Court determined what could be paid, that amount was required from the debtor. A chapter 13 plan which paid nothing to any creditor would never be confirmed.

60(b) (motion for relief from order for mistake, inadvertence, surprise, excusable neglect, new evidence or fraud must be brought not more than one year after order was entered).[3] Even assuming this motion was timely, there is no cause to overturn it. Leader Federal was paid together with unsecured creditors under the first amended plan. Its treatment must continue in line with the unsecured creditors.[4] Leader Federal was on notice in December 1994 and in November 1998 that the plan provided no better than unsecured treatment for its debt. It did nothing. It is too late to complain. The final orders of the Court bind it. *Justice Oaks II*, 898 F.2d 1544; *Lawrence Tractor Co. v. Gregory (In re Gregory)*, 705 F.2d 1118 (9th Cir. 1983) (failure to object at confirmation hearing precludes subsequent attack on chapter 13 plan as illegal).

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[3]Some courts have determined that § 1330(a) is the exclusive provision pursuant to which a confirmation order may be vacated, notwithstanding the grounds for relief from an order set forth in Fed. R. Civ. P. 60(b). *See, e.g., Branchburg Plaza Associates, L.P. v. Fesq (In re Fesq)*, 153 F.3d 113 (3rd Cir. 1998) (Shadur, J.), *cert. denied,* 526 U.S. 1018, 119 S. Ct. 1253, 143 L. Ed. 2d 350 (1999); *In re Lee*, 89 B.R. 250 (1987), *aff'd*, *In re Hochman*, 853 F.2d 1547 (11th Cir. 1988); *but see, Fesq*, 153 F.3d at 120-24 (Stapleton, J., dissenting) (Rule 9024 does not limit the applicability of Fed. R. Civ. P. 60(b) to confirmation orders, but rather, incorporates the Rule 60(b) grounds as bases to vacate confirmation orders and simply adopts the Bankruptcy Code time limits applicable to motions or complaints to vacate confirmation orders); *In re Cook*, 205 B.R. 617, 625 (Bankr. N.D. Ala. 1996) ("[A] party may challenge a confirmation order only by filing a motion under Rules 9023 or 9024 or by filing a notice of appeal pursuant to Rule 8001."). This Court does not have to determine which conclusion is correct because the motion is not timely under both.

[4]In fact, it would be possible to argue that Leader Federal, once the plan was changed, should be paid nothing on the remainder of its debt. It is not an unsecured creditor. Therefore, no payment is due. The Court does not believe this result would be possible due to due process concerns. Leader Federal was not clearly told it would receive no further distributions on its claim. The debtor must pay Leader Federal (as it has done) at least the same amount as unsecured creditors are receiving.

The debtor's discharge was properly entered pursuant to 11 U.S.C. § 1328(a). All payments under the plan were completed and the claim of Leader Federal was provided for in the same manner as all other claims in the case. Now that the 55% of the unpaid balance after November 5, 1998 has been paid, Leader Federal should not be paid more in this case.[5] There is no allegation that the debtor fraudulently obtained its discharge. *See*, 11 U.S.C. 1328(e) (discharge may be revoked only if obtained by fraud). Even assuming the trustee or Leader Federal may obtain relief from the discharge order pursuant to Fed. R. Bankr. P. 9024, the Court finds no basis to set aside the discharge order. *See, Cisneros v. United States (In re Cisneros)*, 994 F.2d 1462 (9th Cir. 1993) (failure of bankruptcy court to notify chapter 13 trustee of properly filed claim justified revocation of discharge pursuant to Rules 9024 and 60(b)); *Nissan Motor Acceptance Corp. v. Daniels (In re Daniels)*, 163 B.R. 893, 897 (Bankr. S.D. Ga. 1994) (*Cisneros* does not mean that Rule 60(b) can be freely used to vacate discharge orders, but rather, "simply reaffirms that a court has the 'inherent power to correct its own clerical errors.'") (cite omitted). Leader Federal had the opportunity to object to its treatment in the same manner as unsecured creditors, but it chose not to do so. Leader Federal chose by its silence to be paid in the same manner and amount as unsecured creditors based on the plan providing 100% payment to unsecured creditors and then chose not to object when the payout to unsecured creditors was reduced. The plan was executed by the debtor and the trustee in accordance with its plain language. The plan was completed and the debt of Leader Federal was properly

[5]This order does not deal with the issue of what Leader Federal's and Mr. James' rights are in the collateral outside of this bankruptcy case.

discharged pursuant to § 1328(a). There is no basis to revoke the discharge. The trustee's motion to reopen and to set aside the discharge should therefore be denied.

THEREFORE, IT IS ORDERED that the motion of the trustee to reopen case and set aside discharge is DENIED.

Dated: June 14, 2000

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MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE