

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Janet Rafferty and	:	
Martin Rafferty,	:	
Debtors,	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 97-CV-6763
First Union Mortgage Corp.	:	
Appellant.	:	
	:	
	:	

MEMORANDUM OF DECISION

McGlynn, J. **January** , 1998

Before the court is the appeal of First Union Mortgage Corporation ("First Union") from the September 25, 1997 order of the United States Bankruptcy Court for the Eastern District of Pennsylvania. In its order, the Bankruptcy Court disallowed the proof of claim filed by First Union after confirmation of the chapter 13 plan at issue and continued the original proof of claim filed by debtors Janet and Martin Rafferty ("the Raffertys") on First Union's behalf. For the reasons which follow, the Bankruptcy Court's order will be affirmed.

I. Background

On March 28, 1996, First Union instituted a mortgage foreclosure action against the Raffertys in the Court of Common Pleas of Montgomery County. First Union's complaint itemized the Raffertys' debt to First Union as follows:

Principal of Mortgage Debt due and unpaid	\$84,145.75
Interest currently due and owing at 11% per annum calculated from September 1, 1994 at \$25.36 each day	\$14,277.68
Late Charge of \$41.57 per month assessed on the 16th of each month	\$789.83
Escrow Advances made by Plaintiff	\$2,021.39
Attorney's fee	\$3,000.00
TOTAL	\$104,234.65

On May 10, 1996, the Raffertys filed their voluntary petition for bankruptcy under chapter 13 of Title 11 of the United States Code. On July 2, 1996, they gave notice to all interested parties, including First Union, that the deadline to file a proof of claim was ninety days from the meeting of creditors scheduled for July 26, 1996. That ninety-day period expired on October 26, 1996. First Union did not file a proof of claim by that date, and on October 29, 1996, the Raffertys filed a proof on First Union's behalf which listed the Raffertys' amount in arrears to First Union at \$14,278.00. The Raffertys apparently derived this figure from First Union's complaint in mortgage foreclosure, which stated the interest due at that time in the amount of \$14,277.68. This sum did not include several other charges assessed by First Union relating to the foreclosure, including: (1) monthly late charges of \$789.83; (2) escrow advances in the amount of \$2,021.39; and (3) an attorney's

fee of \$3,000.00. At the same time the Raffertys filed their proof of claim, they served copies of the proof upon First Union and the trustee in bankruptcy. The Raffertys subsequently filed an amended chapter 13 plan on or about January 22, 1997. The trustee in bankruptcy recommended that the plan be confirmed and the Bankruptcy Court did so on February 25, 1997.

On April 8, 1997, First Union filed a belated proof of claim seeking an arrearage of \$29,070.00. The Raffertys objected, claiming that the proof was filed "more than five months after the expiration of the deadline, eleven months after having received notice of the bankruptcy itself, and four months after receiving notice of the proof of claim filed on its behalf by the Raffertys' counsel." Raffertys' Objection at ¶ 9. First Union responded that the Raffertys misconstrued First Union's complaint in mortgage foreclosure "that clearly set forth a portion of the arrearages due, not the total arrearages due" and that the Raffertys "could have set forth the correct arrearages as they, as Mortgagors, certainly are knowledgeable of the amount owed as they could have easily figured out how many mortgage payments they failed to make." First Union's Reply to Raffertys' Objection at ¶ 9.

After a hearing, the Bankruptcy Court held that, without proof of fraud, In re Szostek barred First Union from asserting an untimely objection and request that the plan be vacated after confirmation of the chapter 13 plan. 886 F.2d 1405 (3d Cir. 1989).

II. Discussion

A. Standard of Review

In reviewing a bankruptcy court's order, this court sits as an appellate court with jurisdiction over final judgments, orders and decrees of bankruptcy judges. 28 U.S.C. § 158(a). The bankruptcy court's legal conclusions are subject to plenary review, and the district court may not set aside a bankruptcy court's findings of fact unless they are clearly erroneous. In re Brown v. Pennsylvania State Employees Credit Union, 851 F.2d 81, 84 (3d Cir. 1988).

B. Revocation of a Confirmed Chapter 13 Plan

In this appeal, First Union seeks to set aside the Bankruptcy Court's confirmation of the Raffertys' amended chapter 13 plan and replace the proof of claim filed by the Raffertys on First Union's behalf with its own proof of claim. First Union's primary argument is that the Raffertys fraudulently procured confirmation of their chapter 13 plan by proposing the plan in bad faith, in violation of 11 U.S.C. § 1325(a)(3). Secondly, First Union contends that the chapter 13 plan's failure to conform to 11 U.S.C. §§ 1325(a)(5)(A) & (B)(ii) compels revocation of the plan.

Section 1325(a) contains six conditions which, if all are satisfied, require a court to confirm a chapter 13 plan. "[T]he provisions of § 1325(a) are not mandatory," however, and the bankruptcy court may "confirm a plan which comports with the mandatory provisions of § 1322, but does not meet the conditions

of § 1325(a)(5)(B)(i)-(iii).” In re Szostek, 886 F.2d 1405, 1412 (3d Cir. 1989).

The Bankruptcy Court was correct in finding that In re Szosteck, 886 F.2d 1405 (3d Cir. 1989), controls the outcome here. In Szosteck, a scheduling mixup caused counsel for the mortgagee to miss the hearing at which the Bankruptcy Court confirmed the debtors’ chapter 13 Plan. Id. at 1407. The mortgagee filed objections to the plan three days after the hearing and 13 days after the deadline for filing objections, complaining that the plan did not provide for calculation of the secured claim’s present value under 11 U.S.C. § 1325(a)(5)(B)(ii). Id. at 1407. In ruling for the debtors, the Court of Appeals held that, absent a showing of fraud under § 1330(a), a mortgagee who had failed to object to the confirmation of a chapter 13 plan, wherein the debtor proposed treatment of the mortgagee’s claim in a manner to which the mortgagee later contended was in violation of the Code, was barred by § 1327 from asserting a post-confirmation objection and request that the plan be vacated. Id. at 1408. The Court reasoned 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. at 1406, 1412. Although Szostek was decided in the context of § 1325(a)(5)(B)(ii), the Court’s reasoning applies equally to First Union’s assertion under § 1325(a)(3) that the Raffertys proposed their plan in bad faith.

"[A] confirmation order is res judicata as to all issues decided or which could have been decided at the hearing on confirmation." Id. at 1408; 11 U.S.C. § 1327.¹ While 11 U.S.C. § 1330(a)² may allow for revocation of an order of confirmation "if such order was procured by fraud," the Bankruptcy Court found First Union's argument that the Raffertys submitted their proof of claim in bad faith³ to be unpersuasive for two reasons: (1)

¹ 11 U.S.C. § 1327 provides:

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

² 11 U.S.C. § 1330(a) provides:

On request of a party in interest at any time within 180 days after the date of the entry of an order of confirmation under section 1325 of this title, and after notice and a hearing, the court may revoke such order if such order was procured by fraud.

³ First Union cites In re Norwood, 178 B.R. 683 (E.D. Pa. 1995), in support of its argument that confirmation of the Raffertys' plan should be revoked because they did not file their proof of claim in good faith, allegedly violating § 1325(a)(3). This argument, however, was foreclosed by the Court of Appeals in Szostek, 886 F.2d 1405 (3d Cir. 1989). While the Norwood standard for bad faith may be relevant to a bankruptcy court's decision to confirm or deny a chapter 13 plan under § 1325(a)(3),

because "even if true, the allegation [was] unsupported by any evidence of record," and therefore fell well short of the required showing of fraud, and (2) because the figure for delinquent interest stated in the original proof of claim was "the same amount as set forth in the mortgagee's own foreclosure complaint." In re Rafferty, Bankr. No. 96-14334, slip op. at 2 n.1 (Bankr. E.D. Pa. Sept. 25, 1997). These are findings of fact which are reviewed under the clearly erroneous standard. In re Wallen, 34 B.R. 785, 788 (9th Cir. 1983); Bankr. R. 8013.

Section 1330(a) allows revocation of a confirmed plan only upon a showing of common law fraud, which requires: (1) that the debtor made a materially false statement; (2) that the debtor knew that the statement was materially false or that he made the materially false statement in reckless disregard for its truth; (3) that the debtor intended the court to rely on the materially false statement; (4) that the court did rely on the materially false statement; and (5) that as a result of the court's reliance, the confirmation order was entered. In re Siciliano, 167 B.R. 999, 1014-15 (E.D. Pa. 1994). The standard of proof necessary for a showing of fraud under § 1330(a) is "the classic, demanding standard of establishing fraud by clear and convincing evidence." Id. (citing In re Scott, 77 B.R. 636, 638 (Bankr. N.D. Ohio 1987)).

First Union has not shown by clear and convincing evidence

it is not germane to whether a chapter 13 plan, once confirmed, should be revoked pursuant to § 1330(a).

that the Raffertys' conduct was fraudulent. First Union merely concludes that the Raffertys must have known that the arrearage stated in their proof of claim was incorrect because: (1) the complaint in mortgage foreclosure "clearly shows that the \$14,277.68 amount was for delinquent interest, not for the full arrearages;" and (2) because the Raffertys filed their bankruptcy petition nearly two months after First Union filed its foreclosure complaint, implying that the Raffertys deliberately ignored the accumulation of two months additional interest. First Union Br. at 7. While fraud may be adduced from circumstantial evidence, Chorost v. Grand Rapids Factory Show Rooms, Inc., 172 F.2d 327, 329 (3d Cir. 1949), the circumstances relied upon by First Union do not prove that the Raffertys either knew of the falsity of their arrearage statement or acted with reckless disregard for its truth, and intended the Bankruptcy Court to rely on that falsehood in confirming the chapter 13 plan. As a result, First Union has failed to prove fraud under § 1330(a) -- the only means of revoking a confirmed chapter 13 plan. See In re Szostek, 886 F.2d at 1413.

The same reasoning applies to First Union's assertion of §§ 1325 (a)(5)(A) & (B)(ii). Section 1325(a)(5)(B)(ii) requires that "the value, as of the effective date of the plan, of property to be distributed under the plan on account of [a secured] claim is not less than the allowed amount of such claim." In Szostek, the Court of Appeals expressly stated that, absent a showing of fraud under § 1330(a), § 1325(a)(5)(B)(ii)

does not provide grounds for vacating a confirmed chapter 13 plan where the creditor failed to timely object to the plan. 886 F.2d 1405, 1406 (3d Cir. 1989). Because there is insufficient evidence to show that the Raffertys acted fraudulently under § 1330(a), First Union may not challenge the plan's finality under § 1325(a)(5)(B)(ii).

Section 1325(a)(5)(A) requires that the holder of a secured claim must have accepted the plan. That section does not compel revocation of the plan for the same reasons § 1325(a)(3) does not. The policy favoring finality of confirmation discussed in Szostek is stronger than the bankruptcy court's obligation to verify that the Raffertys' plan complied with § 1325(a)(5)(A) of the Code. See id. at 1406. First Union's claim that it could not have accepted the plan because it was not served with a copy of the plan⁴ is therefore unavailing, as § 1325(a)(5)(A) does not

⁴ The court is skeptical of First Union's contention that it was not served with a copy of the Raffertys' amended plan. The Raffertys filed a certificate of service with the Bankruptcy Court along with their amended plan. Bankr. Ct. Docket, Bankr. Pet. # 96-14334, ¶ 18 (Bankr. E.D. Pa. Oct. 29, 1997). While this document is not part of the record on appeal, its presence on the Bankruptcy Court's docket indicates the likelihood that the Raffertys did in fact serve First Union with a copy of the plan. This suspicion is bolstered by First Union's reference to "a communication breakdown" between itself and its former counsel on this matter. First Union Br. at 11. In addition, First Union's spectacular lack of diligence in this case -- as acknowledged in its plea for enlargement of time on the basis of "excusable neglect," First Union Br. at 11 -- supports the inference that the mistake, if one occurred, was committed by First Union rather than the Raffertys.

In any event, the proof of claim filed by the Raffertys on First Union's behalf gave First Union ample notice that the Raffertys were submitting to the Bankruptcy Court an arrearage of \$14,278.00. First Union could have objected to the Raffertys'

provide a vehicle for attacking a plan after confirmation.

**C. Do Debtors Have an Affirmative Duty to Ascertain
the Correct Amount of Their Debt?**

Without citation of authority, First Union asks the court to impose an affirmative duty on debtors to ascertain, or attempt to ascertain, the correct amount of arrearages before submitting proofs of claim on behalf of creditors under Bankruptcy Rule 3004. The court hesitates to impose such an obligation here. As First Union's mortgage foreclosure complaint shows, supra part II, the determination of mortgage arrearage figures can be a complex calculation involving late charges, attorney fees, accumulation of interest and other variables. Requiring debtors to perform independent assessments of their arrearages might very well be asking them to attempt tasks for which they lack sufficient skill and information. Further, "[i]t is well established that 'if no objection to the plan is filed after proper notice of the case, the creditor is bound by the terms of the plan and has no right to later challenge the propriety of the plan.'" In re Waldman, 88 B.R. 59, 61 (E.D. Pa. 1988)(quoting 5 Collier on Bankruptcy, ¶ 1324.01 at 1324-5). It would be inappropriate to place on the debtors the burden of determining the accuracy of the creditor's own figures. Rather, the creditor must safeguard its own interests by participating in bankruptcy proceedings about which it has received notice.

proof of claim stating that figure, but failed to do so because of its own neglect. Id.

D. Amending a Proof of Claim After Confirmation

First Union also cites United States v. Owens, 84 B.R. 361 (E.D. Pa. 1988), for the proposition that a proof of claim can be amended after confirmation of the plan. That case is inapposite. While Owens does state that "amendments to proofs of claim should in the absence of contrary equitable considerations or prejudice to the opposing party be freely permitted," id. at 363, that statement was made in reference to amendment after the bar date set by the court, and did not pertain to amendments after confirmation of a plan. There is no authority for the proposition that proofs of claim may be freely amended after confirmation of a chapter 13 plan.

E. Enlargement of Time to File a Proof of Claim

As an alternative argument, First Union requests an extension of the time in which to file its proof of claim. It bases this request on Bankruptcy Rules 3003(c)(3) and 9006(b)(1)(2). Although Rule 3003(c)(3) does allow for enlargement of time for filing proofs of claim, it also explicitly provides that, "[t]his rule applies in chapter 9 and 11 cases." The Rule's Advisory Committee Note, Subdivision (a), plainly states, "[t]his rule applies only in chapter 9 and 11 cases." (Emphasis added). And if those limiting phrases are insufficiently clear, one might look to the title of the Rule, "Filing Proof of Claim or Equity Security Interest in Chapter 9 Municipality or Chapter 11 Reorganization Cases." This is a chapter 13 case, to which Rule 3003 clearly does not apply.

Rule 9006(b) is also inapplicable. That rule allows enlargement of time for filing a proof of claim "only to the extent and under the conditions" stated in Rule 3002(c). Bankr. R. 9006(b)(3). Rule 3002(c) specifies five circumstances in which a court may enlarge the time for filing a proof of claim,⁵

⁵ Those circumstances are:

(1) A proof of claim filed by a governmental unit is timely filed if it is filed not later than 180 days after the date of the order for relief. On motion of a governmental unit before the expiration of such period and for cause shown, the court may extend the time for filing of a claim by the governmental unit.

(2) In the interest of justice and if it will not unduly delay the administration of the case, the court may extend the time for filing a proof of claim by an infant or incompetent person or the representative of either.

(3) An unsecured claim which arises in favor of an entity or becomes allowable as a result of a judgment may be filed within 30 days after the judgment becomes final if the judgment is for the recovery of money or property from that entity or denies or avoids the entity's interest in property. If the judgment imposes a liability which is not satisfied, or a duty which is not performed within such period or such further time as the court may permit, the claim shall not be allowed.

(4) A claim arising from the rejection of an executory contract or unexpired lease of the debtor may be filed within such time as the court may direct.

(5) If notice of insufficient assets to pay a dividend was given to creditors pursuant to Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall notify the creditors of that fact and that they may file proofs of claim within 90 days after the mailing of the notice.

none of which are present here. The court therefore lacks discretion to enlarge the period of time for First Union to file its proof of claim. See In re Vertientes Ltd., 845 F.2d 57, 59 (3d Cir. 1988)(stating that the exceptions provided in paragraph (3) of Rule 9006(b) refer to rules under which the court has no discretion to extend time, or can extend it only within limits set out in those Rules).

III. Conclusion

The Bankruptcy Court's order sustaining the Raffertys' objection to First Union's late-filed proof of claim filed was correct under the Court of Appeals' ruling in In re Szostek, 886 F.2d 1405 (3d Cir. 1989). Absent fraud under 11 U.S.C. § 1330(a), nonconformance with 11 U.S.C. §§ 1325(a)(3)&(5)(A)-(B) does not provide grounds for challenging a confirmed chapter 13 plan. Furthermore, the court will not place on the debtors the burden of determining the accuracy of the creditor's own arrearage figures, when the creditor must protect its own interests by participating in bankruptcy proceedings about which it has received notice. There is no authority for the proposition that creditors may amend proofs of claim after confirmation, and Bankruptcy Rules 3003(c)(3) and 9006(b) do not allow the court to enlarge the period of time in which creditors may file their proofs of claim under the facts of this case. As

Bankr. R. 3002(c)(1)-(5).

a consequence, the order of the Bankruptcy Court is affirmed.