UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re	]	Case No. 03-53576-ASW
	]	
Reginald Thomas Hamberry and Valerie Louise Hamberry,	]	Chapter 13
	]	
Debtors.	]	
	]	

MEMORANDUM DECISION
DENYING MOTION BY WMC MORTGAGE CORPORATION
TO SET ASIDE ORDER CONFIRMING PLAN

Reginald and Valerie Hamberry ("Debtors") filed a plan ("Plan") in this Chapter 13[1] case and it was confirmed. WMC Mortgage Corporation ("Creditor"), a secured creditor in the case, has filed a motion ("Creditor's Motion") to set aside the order confirming the Plan, which is opposed by the Debtors.

The Creditor is represented by Charles W. Nunley, II, Esq. ("Nunley") of the Sierra Law Group. The Debtors are represented by James J. Gold, Esq. and Norma L. Hammes, Esq. of Gold and Hammes.

The matter has been briefed and argued, and submitted for

[1] Unless otherwise noted, all statutory references are to Title 11, United States Code ("Bankruptcy Code"), as applicable to cases commenced on June 2, 2003.

decision. This Memorandum Decision constitutes the Court's findings of fact and conclusions of law, pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure ("FRBP").

I.

FACTS

The facts are largely undisputed.

The Debtors filed their Chapter 13 petition on June 2, 2003. Their schedules list Fairbanks Capital Corporation ("Fairbanks") as the holder of a deed of trust on their home, and give a mailing address in Florida.

On June 10, 2003, Nunley signed and served a Request For Special Notice ("Notice Request") upon the Debtors, their counsel, and the Chapter 13 trustee ("Trustee"). It stated that he represented Fairbanks, cited FRBP 2002, and asked that "all notices in this case be given to and served upon" Nunley at his office in California. Nunley filed the Notice Request on June 13, 2003.

On June 13, 2003, Fairbanks filed a proof of claim in the Debtors' Chapter 13 case, stating that notices should be sent to it at an address in Pennsylvania, and asserting a claim secured by a deed of trust on the Debtors' home. The proof of claim was signed on June 10, 2003.

On June 17, 2003, the Court issued an Order Establishing Procedures And Chapter 13 Notice For Meeting Of Creditors ("Procedures Order"). The Trustee's office served a copy of the Procedures Order upon creditors on June 18, 2003, together with a copy of the Debtors' Plan. Fairbanks was served at the Florida address stated in the Debtors' schedules, not at the Pennsylvania

address stated on Fairbanks' proof of claim; Nunley was not served at all. Nunley has filed a declaration stating that "this office did not receive notice of the filing of the Plan and did not timely object. The failure of [the Creditor] to object to its treatment under the Plan was entirely inadvertent".

The Procedures Order fixes July 14, 2003 as the last date on which to file an objection to confirmation of the Debtors' Plan. Fairbanks filed no objection.

As to Fairbanks, the Debtors' Plan provides that: pre-petition arrears of $14,000 are to be cured in part through the Plan, from payments made by the Debtors to the Trustee at the rate of $250 per month for fifty-two months; post-petition payments are to be made directly to Fairbanks by the Debtors outside the Plan at the rate of $2,500 per month "until sale or refinancing"; and the Debtors' home is to be sold or refinanced "within 18 months of confirmation of this plan, curing the remaining arrears owed to Fairbanks Capital through the escrow".

The Debtors' Plan was confirmed by an order ("Confirmation Order") issued and entered on September 10, 2003. On March 29, 2004, the Creditor moved to have the Confirmation Order set aside. The moving papers identify the Creditor as the servicing agent for Fairbanks.

The Creditor's moving papers include a declaration of Nunley stating, inter alia, that the monthly payment required under Fairbanks' deed of trust is $4,300.89, rather than the $2,500 that is to be paid directly outside the Plan post-petition.

Each party's pleadings make factual statements that are not in the form of a declaration, but neither party objected to them being

considered as evidence, and did not contradict them. The Creditor's motion states that the total amount owed under Fairbanks' deed of trust is more than $560,000, which exceeds the $545,000 scheduled value of the Debtors' residence. The Debtors' pleadings in opposition to the Creditor's motion state two relevant facts. First, that it is the "standard office policy" of the Debtors' counsel to send copies of bankruptcy petitions to the affected secured creditors by facsimile transmission the day after filing. Second, that the Debtors have made every monthly payment to the Trustee since the case was commenced "regularly and without fail".

II.
ANALYSIS

A. Notice

The Trustee did not send a copy of the Procedures Order and Plan to Nunley, even though she had been served with the Notice Request eight days earlier, which was then filed five days before the Trustee's mailing. Pursuant to FRBP 2002, the Trustee should have served a copy of the Procedures Order and Plan upon Nunley. However, the Creditor does not rely on a lack of notice other than to say that Nunley did not receive "notice of the filing of the Plan" and the Creditor's failure to object to confirmation was "inadvertent"; nor does the Creditor brief the issue.

In any event, it is beyond dispute that the Creditor's principal (Fairbanks) and Nunley both had actual knowledge of the bankruptcy case at least by June 10, 2003, when Fairbanks' proof of

claim filed on June 13, 2003 was signed, and when Nunley served the Notice Request. Shortly thereafter, the Trustee served Fairbanks with a copy of the Procedures Order and Plan on June 18, 2003. The Creditor cites no authority for the proposition that, under such circumstances, Nunley's failure to receive his own separate "notice of the filing of the Plan" should excuse the Creditor from the bar dates for objecting to confirmation and for seeking revocation of confirmation, nor has the Court located any. See, e.g., In re Price, 871 F.2d 97 (9th Cir. 1989), holding that the FRBP 4007(c) bar date for filing complaints to determine dischargeability of debts under §523 applied to a creditor whose attorney knew of the bankruptcy case in time to learn of applicable bar dates and protect the client's rights. Both Fairbanks and Nunley knew of the case in ample time to protect Fairbanks' rights because they learned of the case at least by June 10, 2003 (and possibly sooner) and the last day for objection to confirmation was July 14, 2003 -- further, the Plan was not confirmed until September 10, 2003, and Rule 3015-1(b)(4) of the Bankruptcy Local Rules for the Northern District of California permits objections to be filed at any time prior to confirmation with a showing that the objector acted "diligently". Moreover, Fairbanks was served with a copy of the Procedures Order and Plan on June 18, 2003, and the Creditor does not contend that Fairbanks failed to receive those.

B. Relief Sought

The Creditor's motion refers to having the Confirmation Order "set aside", without explaining the meaning of that term or citing the authority under which such relief is sought.

(1) Revocation

If what the Creditor seeks is revocation of the Confirmation Order, the motion is defective in several ways. Pursuant to §1330(a), an order confirming a Chapter 13 plan is subject to revocation as follows:

> 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 [§1325], and after notice and a hearing, the court may revoke such order if such order was procured by fraud.

The Confirmation Order was entered on September 19, 2003, and 180 days thereafter was March 17, 2004 -- the Creditor's motion was not filed until March 29, 2004, and so is untimely. Further, no fraud is alleged, nor is any apparent. Finally, FRBP 7001(5) requires that revocation of an order confirming a Chapter 13 plan be accomplished by the filing of a complaint to commence an adversary proceeding. The third defect is procedural and might arguably be waived by the Debtors' failure to object to it, but each of the first two defects is fatal.

The recent decision of the Bankruptcy Appellate Panel for the Ninth Circuit ("BAP") in In re Valenti, 310 B.R. 138, 145 (9th Cir. BAP 2004) ("Valenti") notes that revocation of confirmation is governed by §1330 and permitted only for fraud, and holds that the 180 day limit fixed by §1330(a) precludes late requests for relief even if the fraud was not discovered until after the bar date:

> We start with the context: there is a strong policy of finality applying res judicata to confirmation orders. See Multnomah County v. Ivory (In re Ivory), 70 F.3d 73 (9th Cir.1995). This policy is reflected in Section 1327(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.["] 11 U.S.C. s 1327. [¶] Section 1330 allows the court to revoke confirmation of a Chapter 13 plan. That section provides a narrow exception to res judicata and finality, limited in two important ways: the request for revocation must be made "within 180 days after the date of the entry of [the Confirmation Order]" and revocation is only authorized "if such order was procured by fraud." 11 U.S.C. §1330(a). Absent such fraud, or if revocation is not requested within 180 days, res judicata applies. See Franklin Fed. Bancorp, FSB v. Lochamy (In re Lochamy), 197 B.R. 384, 386 (Bankr.N.D.Ga.1995) (challenge to eligibility under §109(e) after confirmation of Chapter 13 plan was barred by res judicata because "the issue of eligibility is implicit in the confirmation hearing"). [¶] It does not matter if, as Creditors allege, Debtor concealed any misconduct. To borrow a phrase from a Ninth Circuit case applying the nearly identical language of Section 1144, the 180-day bar applies to bar revocation even if "the fraud is not discovered until the period has passed." Dale C. Eckert Corp. v. Orange Tree Assocs., Ltd. (In re Orange Tree Assocs., Ltd.), 961 F.2d 1445, 1447 (9th Cir.1992) (for revocation of Chapter 11 confirmation order under §1144, "strict compliance" with the 180-day period is "a prerequisite to relief"). See also 11 U.S.C. §1144 (minor difference in phrasing from §1330(a), stating that court may order revocation if "and only if" such order was procured by fraud).

Here, the Creditor does not allege that the Confirmation Order was procured by fraud (nor is fraud apparent from the facts stated), and so would not be entitled to relief under §1330 even if the request for revocation had been made timely. Conversely, even if fraud were alleged, the motion is barred by the time limits of §1330(a).

(2) Rule 60(b)

If the Creditor's reference to having the Confirmation Order "set aside" refers to relief from final orders under Rule 60(b) of

the Federal Rules of Civil Procedure, Valenti holds that such relief is not available and explains why.

> That rule, however, is only applicable to bankruptcy cases by virtue of [FRBP] 9024, which explicitly states that Rule 60(b) "applies in cases under the Code except that ... a complaint to revoke an order confirming a plan may be filed only within the time allowed by §1144, §1230, or §1330." Fed. R. Bankr.P. 9024 (emphasis added). Therefore, we follow other courts that have held that Rule 60(b) cannot be used to evade the 180-day time limit in Section 1330(a). See Branchburg Plaza Assocs., L.P. v. Fesq (In re Fesq), 153 F.3d 113 (3d Cir.1998) (§1330(a) precludes relief under Rule 60(b)), cert. denied, 526 U.S. 1018, 119 S.Ct. 1253, 143 L.Ed.2d 350 (1999); Mason v. Young (In re Young), 237 B.R. 791, 800-03 (10th Cir. BAP 1999), aff'd on other grounds, 237 F.3d 1168 (10th Cir.2001); Educational Credit Mgmt. Corp. v. Robinson (In re Robinson), 293 B.R. 59, 62-65 (Bankr.D.Or.2002). See also Orange Tree Assocs., 961 F.2d at 1447 (for revocation of Chapter 11 confirmation order under §1144, "strict compliance" with the 180-day period is "a prerequisite to relief" even if "the fraud is not discovered until the period has passed"). [footnote omitted] [¶] We recognize that the Ninth Circuit has applied Rule 60(b) in an analogous context, to affirm revocation of a discharge order on grounds other than those stated under the discharge revocation provisions of Section 1328(e). See Cisneros v. U.S. (In re Cisneros), 994 F.2d 1462 (9th Cir.1993). Nevertheless, Cisneros is properly read as "a reaffirmation of a court's inherent power to correct its own clerical errors" rather than a sweeping mandate to act beyond the authority of a statutory provision that is tailored to the relief sought. Ford v. Ford (In re Ford), 159 B.R. 590, 593 (Bankr.D.Or.1993). See also Robinson, 293 B.R. at 61-65 (following Fesq and Ford to hold that Rule 60(b) did not provide an alternative to Section 1330(a) for revocation of confirmation order); Roost v. Reynolds (In re Reynolds), 189 B.R. 199, 202 (Bankr.D.Or.1995) ("Ford remains good law"); U.S. v. Trembath (In re Trembath), 205 B.R. 909, 914 (Bankr.N.D.Ill. 1997) (following Ford). [¶] No clerical error is alleged in this case. Therefore, Cisneros does not help Creditors. [¶] We also recognize that Rule 60(b) might be applicable to address the situation in which a confirmation order exceeded

> the bankruptcy court's jurisdiction. Accord In re Hudson, 260 B.R. 421, 443-444 (Bankr.W.D.Mich. 2001) ("Rule 9024 may be utilized to set aside or relieve a party from the effect of a chapter 13 confirmation order when notice is constitution-ally inadequate"). See also Robinson, 293 B.R. at 65 (noting that "plaintiff has not alleged any lack of due process in this case"). [¶] Creditors make no argument, however, that the Confirmation Order exceeded the bankruptcy court's jurisdiction. Moreover, although the bankruptcy court suggested that there might be a jurisdictional argument if Debtor were not eligible for Chapter 13 relief, our own binding precedent, affirmed by the Ninth Circuit, holds that Section 109(e) is not jurisdictional. See Federal Deposit Ins. Corp. v. Wenberg (In re Wenberg), 94 B.R. 631, 637 (9th Cir. BAP 1988), aff'd 902 F.2d 768 (9th Cir.1990). See also In re Verdunn, 210 B.R. 621, 623-24 (Bankr.M.D.Fla. 1997) (citing cases); Lochamy, 197 B.R. 384 (§109(e) not jurisdictional); Jones, 134 B.R. 274 (same). In other words, Section 109(e) does not create a jurisdictional basis to "get around" Section 1330(a). [footnote omitted]

Valenti, at 146-148

Accordingly, the merits of the Creditor's motion cannot be reached, since the confirmed Plan must be given res judicata effect and each issue presented has therefore already been determined in favor of the Debtors.

C. Creditor's Arguments Regarding Merits

As explained by Valenti, revocation under §1330 is a narrow exception to the "strong policy of finality applying res judicata to confirmation orders". Apart from that exception, the rule is that orders confirming plans have res judicata effect to bar relitigation of the plan's provisions even if those do not comply with the requirements of the Code and the order confirming was therefore "in error", see In re Ivory, supra. However, the Court notes that, even if the Creditor had raised its arguments about the

merits in a timely objection to confirmation of the Debtors' Plan, those might well have failed to prevail for the following reasons.

First, the Creditor cites In re Gavia, 24 B.R. 573 (9th Cir. BAP 1982) ("Gavia") and urges that the Plan violates §1322(b)(2) by modifying the rights of a creditor whose claim is secured only by the Debtors' principal residence, and is not feasible as required by §1325(a)(6). In Gavia, the debtors proposed to make no payments to anyone until they sold their home within six months, and the BAP held that it was not feasible to rely on the possibility of sale to fund a plan instead of making payments -- the Creditor believes that such a proposal is particularly speculative here, where the Debtors' residence is encumbered beyond its scheduled value to the extent of some $15,000. This case is readily distinguishable from Gavia, in that the debtors there were making no payments to secured creditors or to the trustee, and were depending entirely on a future sale to fund their plan. Here, the Debtors are making significant monthly payments to both the Trustee and Fairbanks,[2] so no one has to look to the future sale or refinance as the sole source of payment -- that event is to occur within eighteen months of confirmation and will serve only to complete payment of Fairbanks' secured claim, not to fund the entire Plan. Insofar as the feasibility of the monthly payments is concerned, the Debtors state without contradiction that those have been maintained to the Trustee throughout the case, and the Creditor does not complain of defaults in the post-petition payments that the Plan requires to be

[2] The monthly payments are $250 to the Trustee and $2,500 to Fairbanks. The latter is less than the $4,300.89 called for by Fairbanks' note but is far from a nominal or token amount.

made directly to Fairbanks. Finally, the fact that the Debtors' residence is over-encumbered to the extent of $15,000 beyond its scheduled value does not mean that sufficient appreciation is unlikely, so as to permit sale or refinance within eighteen months after confirmation of the Plan.[3]

Second, the Creditor argues that the Debtors are not eligible for Chapter 13 because they cannot fund a plan other than by liquidating assets, citing Gavia. In that case, the BAP held that the debtors were ineligible for Chapter 13 relief under §109(e) because they were not "individual[s] with regular income", who are defined by §101(30) as those "whose income is sufficiently stable to make payments under a Chapter 13 plan."

> The appropriate recourse for the debtors whose plan is nothing more than a liquidation is Chapter 7, not Chapter 13. See, In re Erwin, 10 B.R. 138, 4 C.B.C.2d 174, 177 (Bkrtcy.D.Col.1981). [¶] We are aware that §1322(b)(8) permits a Chapter 13 debtor to repay creditors out of property of the estate. However, we construe this section as permitting a plan to supplement payments from future income. A construction that permits sole payment from liquidation of the debtor's property would render 11 U.S.C. §109(e) meaningless and eliminate any difference between a Chapter 7 liquidation and a Chapter 13 debt adjustment.

Gavia, at 575. However, the debtors in Gavia admitted that their expenses exceeded their income, such that they had no disposable

---

[3] The confirmation process did not require the Debtors to prove the prospects of appreciation because no objection to confirmation was made based on feasibility. But the proposition of $15,000 appreciation within eighteen months is not unreasonable on its face, and the Debtors might well have provided evidence of likely appreciation had a timely objection to the Plan's feasability been made. In addition, judicial notice could properly be taken that such appreciation is common in the area. The Court also notes that the Trustee did not make a feasibility objection, as she routinely does when an extreme amount of appreciation would be needed to complete a plan through refinance or sale by a date certain.

income with which to fund a plan. In this case, the Debtors have available income of at least $2,750 per month, from which they are paying the Trustee $250 and Fairbanks $2,500 -- and that income has been so stable that there have been no defaults in either payment since the case was commenced in June 2003. Indeed, Gavia recognizes that this Plan is among the types that are permitted by the Bankruptcy Code: "a plan to supplement payments from future income".

CONCLUSION

For the foregoing reasons, the Creditor's motion to set aside the Confirmation Order must be denied. Counsel for the Debtors shall submit a form of order so providing, after review as to form by counsel for the Creditor.

Dated:

_____
ARTHUR S. WEISSBRODT
UNITED STATES BANKRUPTCY JUDGE