2020 Mont. B.R. 122

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re **MURRAY JOHN DIGHANS and DEANNA ANNE DIGHANS**, Debtors.	Case No. **16-61076-BPH**

O R D E R

At Butte in said District this 6th day of April, 2020.

Pending in this Chapter 11[1] bankruptcy is Debtors' Motion to Incur Secured Debt and for Sanctions ("Motion") filed January 22, 2020, at ECF No. 596. Allied World Specialty Insurance Company ("Allied") filed its Response to the Motion, and raised several arguments in opposition to the relief requested ("Response"). ECF No. 600. Prior to the hearing on April 1, 2020, the Court entered an Order ("Pre-Hearing Order") outlining its preliminary understanding of the issues based on its review of the pleadings, pre-filed exhibits and docket. The Pre-Hearing Order also required Debtors and Allied to file additional briefing clarifying their positions, and whether there was an agreement regarding the admission of exhibits.[2] The parties complied, and on the record confirmed they agreed to the admission of all the pre-filed exhibits. ECF Nos. 607, 609

[1] Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all "Rule" references are to the Federal Rules of Bankruptcy Procedure.

[2] These submissions were helpful and assisted the Court with a better understanding of the positions the parties were taking.

and Exhibit I at ECF No. 613. Finally, Debtors conceded at the hearing that § 364 did not support the relief being requested, as noted in the Court's Pre-Hearing Order.

Although relief under § 364 is not appropriate, Debtors' confirmed Second Amended Plan ("Plan") provides this Court with jurisdiction to, "re-examine any claim that has been allowed." Article IX(b), ECF No. 415. The immediate dispute involves Allied's allowed claim and whether Allied has a security interest in Debtors' crops. Debtors' allege that post confirmation they sought a loan from Commodity Credit Corporation ("CCC"). As a condition of any loan, CCC requires completion of a lien waiver form by any creditor that holds a lien on commodities described in the form. Allied put forth different arguments to support its refusal to sign the form. For example:

> The lien waiver form, as Allied World explained to the Debtors' counsel, is not accurate. The lien waiver form requires Allied World to release a lien in the commodities described therein, e.g. crops. Allied World is uncomfortable signing the lien waiver form because the form makes implicit admissions about the scope and nature of Allied World's claim. Allied World disagrees with those implied admissions, particularly as the Debtors have yet to complete their plan repayment obligations necessary to discharge Allied World's claim. Indeed, the lien waiver form states that the information provided is subject to certain civil and criminal fraud statutes. Consequently, Allied World simply cannot sign the form.

Response ¶3 ECF No. 600. Thus, this Court must determine the scope and nature of Allied's claim in these proceedings.

A. <u>Allied's Pre-Petition filings.</u>

Debtors and Allied entered an Agreement of Indemnity in July 2015. Claim 4-1, Part 3. Section 5.1.1 includes language that grants Allied a security interest in certain collateral, including goods. *Id*. Approximately a year later, Allied filed a UCC Financing Statement with the Montana Secretary of State with a collateral description that included goods. Goods, by definition includes "crops grown, growing, or to be grown." Mont. Code Ann. § 30-9A-102.

The financing statement and security agreement also refer to "all products and proceeds of the foregoing."

B. Allied's Claim and Plan Treatment in Bankruptcy.

Allied filed proof of claim 4-1 ("Claim"). At part 2, question 9, Allied indicated that the Claim was not secured. Claim 4-1. Consistent with its representation that its Claim was not secured, the remainder of part 9 is blank (nature of property and basis for perfection). *Id*. There is no mention of a UCC financing statement or other lien perfection document. *Id.* Pursuant to a Stipulation and Agreement ("Stipulation") between Debtors and Allied, creditors in Class X, including Allied, are to be paid as follows:

> Debtors will pay the unsecured class (Class X – unsecured – impaired) $100,000 for the year 2017, $150,000 for the years 2018, 2019, 2025, and 2026, and $125,000 for the years 2020 through 2024, to be distributed pro rata to those unsecured creditors with an allowed claim. Except as otherwise contained herein, Debtors specifically reserve the right to object to creditors' claims. Debtors will pay the above amounts through cashflow. Debtors will make the 2017 payment before the end of this year.

¶8, ECF No. 443. And, "Allied's Proof of Claim is allowed as filed." ¶10, ECF No. 443. The Stipulation was approved. ECF No. 446. Debtors' Plan was confirmed. ECF No. 467.

C. Allied's Claim Post Confirmation.

Allied makes quite a fuss about Debtors' request that it execute the lien waiver explaining it "is uncomfortable signing the lien waiver form because the form makes implicit admissions about the scope and nature of Allied World's claim." Allied is bound by the terms of the confirmed Plan. § 1141(a). The scope and nature of Allied's Claim can be readily determined by resort to the Court's docket. Allied filed its Claim as an unsecured claim, and the Claim was allowed as filed. For purposes of the Plan, and so long as the Plan is in effect, Allied has an unsecured claim.

D. Allied's alleged security interest in crops Post Confirmation.

This Court cannot reconcile Allied's position and arguments with § 1141(a) and (c), and the res judicata effect of the confirmation order. In this case, Allied refers to § 1141(d)(5)(A), and at the conclusion of the argument reasons, "the terms of the Plan are in force, including Allied World's retention of all its interests (*i.e.*, UCC lien) until it is paid as set forth under the Plan." At best, Allied seems to think that despite having failed to allege its claim was secured at any point in the case prior to confirmation, it is the intended beneficiary of the following language found in the Plan:

> Upon confirmation, the Debtors shall be revested with all assets and shall retain all property during the term of the plan as provided herein. The secured creditor and holders of interest shall retain any security or other interest in the Debtors' property until their claims have been satisfied as prescribed herein.

ECF No. 600 (emphasis added by Allied in its brief). This construction is not persuasive.

First, the provisions of a confirmed plan bind the debtor, any entity issuing securities or acquiring property under the plan, and any creditor of, or equity security holder or general partner in, the debtor. § 1141(a). One Court has explained:

> Under § 1141(c), the term 'interests' subsumes the term 'lien' and therefore upon confirmation, unless otherwise provided, property vests in the reorganized debtor free and clear of the creditor's lien. Following confirmation of a Chapter 11 plan, a creditor's lien rights are only those granted in the confirmed plan. As a result, a creditor no longer can enforce its pre-Chapter 11 confirmation lien rights but instead can only enforce its lien rights granted in the plan.

In re Central Steel Tube Co., 1989 WL 1684539, *4, (Bkrtcy. S. D. Iowa 1989). Here, Allied has no interest or lien under the Plan because it stipulated it had an unsecured claim. Its reliance

on the Plan language quoted above is misplaced because it never asserted it was a secured creditor.

The confirmed plan is a binding final order accorded full res judicata effect, and this principle is broadly applied. *See In re Wolfberg*, 255 B.R. 879 (9th Cir. B.A.P. 2000). The issue of whether Allied was secured or unsecured was not litigated prior to confirmation, because there was nothing to litigate. Allied affirmatively asserted that it was unsecured, Debtors agreed and stipulated to the allowance and treatment of Allied's Claim as unsecured. The res judicata effect of plan confirmation is not limited to issues that were litigated, but also extends to and bars relitigation of any issues that could have been raised in the confirmation proceedings. *In re Heritage Hotel Partnership*, 160 B.R. 374, 377 (9th Cir. B.A.P. 1993). Allied abandoned its lien in connection the claims allowance process and confirmation. The record demonstrates Allied had the opportunity to assert and litigate its status as secured. It chose not to do so. On the record before the Court, there is no basis to conclude that Allied has any interest or lien in Debtors' 2019 crops. To the contrary, it is an unsecured creditor, and any effort to relitigate this issue is barred.

Finally, Allied has argued that a plan default and failure is inevitable. As the Court noted at the hearing, neither party has a crystal ball, so it gives little attention to these arguments. Interestingly, Allied seems to confuse its rights today with the rights it may enjoy in the future, if Debtors' fail to fully perform under the Plan. This Court will not opine on the parties' respective rights at some later date, but would encourage the parties to consider § 552's effect on any future dispute between the parties' involving post-petition crops and any alleged security interest in those crops.[3]

[3] Application of § 552 to the record before the Court now provides an independent basis

E. The Sanctions Request.

Debtors' Motion concludes by requesting that the Court impose sanctions on Allied. The Motion does not refer to the Court's inherent authority under § 105(a), Rule 9011, or its civil contempt power, leaving the Court to guess the basis of Debtors' request. In response to the Court's Pre-Hearing Order, Debtors explain that the request for sanctions is premised on § 105(a), and the Court's contempt power. Although one could conclude that Allied's legal arguments needlessly increased the cost of litigation in violation of Rule 9011(b)(1), counsel for both parties contributed to the immediate squabble between Allied and Debtors. Under these circumstances and based on the record, This Court will not engage a fault-finding exercise. If it did, fault would be allocated to counsel for Debtors and Allied.

If counsel for both parties had engaged in a more disciplined discussion of the issues, devoid of posturing, this Court's involvement would not have been necessary. Allied's counsel should have been capable of drafting a statement for Debtors and CCC that articulated a justifiable position regarding its rights under the Plan that is in effect and the 2019 crop. If Allied's counsel had given such a statement the same time and attention it invested in drafting its pleadings and participating in the hearing, a hearing would likely not have been necessary. Debtors' did little to invite Allied's cooperation as evidenced by the emails the parties filed as exhibits.

(independent from the analysis of the Plan above) to conclude, there is neither a legal nor factual basis that would permit Allied to assert an interest in Debtors' 2019 crop, which is the subject of CCC's lien waiver request. The 2019 crop is "after acquired property" and not subject to Allied's pre-petition lien. *See In re Dettman*, 84 B.R. 662, 664 (9th Cir. BAP 1988).

The emails provided to the Court show that the parties' counsel provocatively argued with one another, trading conflicting legal conclusions devoid of any thoughtful explanation. For example: "As you know liens ride through bankruptcy"[4]; "your client has never had a crop lien"[5]; and, "Nice empty threat. You might get more with honey rather than threats in the future"[6]. In addition, there was the "Google" email in which, Debtor's counsel urged Allied's counsel to "google" the information being requested. Based on the record, the Court concludes Allied's refusal to cooperate was far more attributable to an underlying unwillingness to assist Debtors, than the strength of any legal position it could assert.[7] As counsel continued to exchange emails, Allied's intransigence became fixed. Counsel for Debtors and Allied played a part in transforming a simple request into a fiasco that required the Court's assistance. As a result, sanctions will not be awarded to Debtors.

Accordingly, **IT IS SO ORDERED**,

1. Debtors' Motion to Incur Credit at ECF No. 596 is denied[8];

---

[4] ECF No. 609-2.

[5] ECF No. 607-3.

[6] ECF No. 607-2.

[7] In an email dated December 11, 2019, Allied's counsel stated:

> I am saying that my client has no obligation to help you[r] client qualify for a loan. If your client wants to settle with my client and negotiate mutual releases, as consideration for such settlement my client may assist the Dighans.

ECF No. 609-4. Based on the record, this statement, more so than any argument Allied put forth, captures Allied's underlying position.

[8] Not because it is impermissible, but because Debtors are free to pursue post confirmation financing with CCC or other lenders without court authorization or approval under § 364.

2. Pursuant to Article IX(b) of the Plan and the Court's reexamination of Allied's Claim in conjunction with the Motion to Incur Debt, the record before the Court demonstrates, (a) Allied has an unsecured claim under the Plan, (b) the Plan is in effect, and (c) Allied has no interest in the 2019 crop, or subsequent crop years, so long as the Plan is in effect.[9]

3. Debtors' request for sanctions included with the Motion to Incur Debt at ECF No. 596 is denied.

BY THE COURT:

Hon. Benjamin P. Hursh
United States Bankruptcy Court
District of Montana

[9] "Courts have split on the issue of whether a creditor's lien in after-acquired property, cut off under section 552(a) upon the debtor's commencement of a bankruptcy case, reattaches upon the dismissal of the case." 5 COLLIER ON BANKRUPTCY P 552.01 (16th 2020).