UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re

Case No. 8:04-bk-6835-KRM

MICHAEL L. MCCLUNG,

Debtor.

ORDER DENYING CONFIRMATION OF THIRD MODIFIED PLAN OF REORGANIZATION AND CONVERTING CASE TO CHAPTER 7

THIS CASE came before the Court on January 14, 2005, for a final evidentiary hearing on confirmation of the Debtor's second amended Chapter 11 plan. On February 17, 2005, the Court orally ruled that the second amended plan could not be confirmed because it was not feasible and was not fair and equitable to the dissenting Class 4, consisting of a single unsecured creditor, New Buffalo Savings Bank, holding a claim in the amount of $617,485.83.[1] The Debtor was permitted, however, to amend his plan and on February 28, 2005, he filed a third amended plan (the "Plan").

On March 7, 2005, the Court considered confirmation of the Plan, including the additional amendments that were proposed by counsel in open court on March 7, 2005. After hearing argument of counsel and considering the Plan, the evidentiary record, and all prior proceedings in this case, the Court determines that the Plan cannot be confirmed.

First, the Plan does not meet the requirements of Bankruptcy Code Section 1129(a)(11) in that the Plan is not feasible. The Plan proposes to secure certain future payments to the sole Class 4 creditor by the grant of a second mortgage on the Debtor's homestead. There is no basis in the record to establish the Debtor's ability to continue paying the $6,967.00 per month that is due on the existing first mortgage. It is likely that the Debtor will default on the first mortgage and the proposed junior lien would be extinguished by a foreclosure prior to payment of the Class 4 debt to be secured by the second mortgage.

Further, the Plan was not accepted by Class 4, which is an impaired class. Thus, the requirement of Bankruptcy Code Section 1129(a)(8) is not met. Under the circumstances of this case, the Court finds that the Plan cannot be confirmed over the dissenting vote of Class 4 because the Plan is not fair and equitable to that class, as required by Bankruptcy Code Section 1129(b)(2).

The Debtor has advanced most of the same arguments made by the debtor in In re Henderson, 2005 WL 428520 (Bankr. M.D. Fla., 2005). In that case, the Court reasoned that an individual debtor does not have to surrender all exempt assets to confirm a Chapter 11 plan under Section 1129(b), because an individual debtor's interest in exempt property can never be junior to the claims of dissenting unsecured creditors, who are unable to levy on exempt property. Thus, the court held that the individual debtor's Chapter 11 plan could be confirmed over the dissent of unsecured creditors, where his non-debtor spouse's contribution of cash was sufficient new value for the debtor's retention of exempt and non-exempt assets.[2]

Even if this Court were to accept such arguments and rule that Section 1129(b)(2)(B)(ii) - the so-called "absolute priority rule" – is not applicable in the case of an individual debtor, it does not automatically lead to the

---

[1] In this bench ruling, the Court concluded that the Plan did satisfy the other applicable requirements for confirmation, including good faith, compliance with the provisions of Title 11, compliance with the "best interest" requirement, and acceptance by at least one class of impaired claims (Class 5). 11 U.S.C. § 1129(a).

[2] But see, Northwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988) (applying absolute priority rule in the case of individual debtors). In re Gosman, 282 B.R. 45 (Bankr. S.D. Fla. 2002); In re Yasparro, 100 B.R. 91 (Bankr. M.D. Fla. 1989).

conclusion that the Plan is "fair and equitable." If a Chapter 11 plan fails to meet the first statutory definition of "fair and equitable" (i.e., it fails to provide full payment to the dissenting class) and the other statutory basis for cram down does not apply to an individual's Chapter 11 plan, then the Court would have to make its own determination of whether the treatment provided for the dissenting class is inherently "fair and equitable."[3]

Under the Plan, the Debtor in this case would retain both non-exempt and exempt assets; the non-debtor spouse is said to be contributing $35,000 of cash to fund the Plan. But, she would also be granted a release from the estate's potential claim against her for up to an estimated $530,000.00 in alleged pre-bankruptcy fraudulent transfers. The Court finds that Mrs. McClung's proposed cash contribution is inadequate to support the compromise of her claim and to provide meaningful "new value" to justify a cram down on Class 4. With the proposed release of Mrs. McClung, the Debtor's proposed retention of assets, and the feasibility issue noted above, the Plan is not "fair and equitable" to Class 4.

For the foregoing reasons, as well as those stated on the record in open court at the hearings held on February 17 and March 7, 2005, it is hereby

ORDERED:

1. Confirmation of the Plan is denied.

2. This case is converted to Chapter 7. The United States Trustee shall appoint an interim Chapter 7 trustee.

3. The Debtor shall file a schedule of unpaid debts incurred after the commencement of a Chapter 11 case pursuant to Fed. R. Bank. P. 1019(5) within fifteen (15) days from the date of this order. The schedule of unpaid debts must contain a declaration of the debtor in accordance with Fed. R. Bank. P. 1008, list only the debts incurred after the commencement of the Chapter 11 case, and properly identify the schedule under which the debt is listed. If no unpaid debts exist, the Debtor shall file a verified statement to that effect. The Statement of Intention, if required, shall be filed within thirty (30) days following entry of this order or before the first date set for the meeting of creditors, whichever is earlier. The Debtor should not file a complete set of new schedules or a petition unless the schedules were not previously filed. Any amendments to the petition and schedules must comply with Fed. R. Bank. P. 1008 and Fed. R. Bank. P. 1009.

4. All pending motions shall be deferred until **April 13, 2005, at 9:30 a.m.** at which time the Court will hold a status conference in this matter.

5. All funds currently being held in escrow shall continue to be so held until further order of this Court.

DONE AND ORDERED at Tampa, Florida, this 7th day of April, 2005.

K. RODNEY MAY
United States Bankruptcy Judge

[3] The Court rejects the Debtor's argument in this case that the Plan must be confirmed because it "satisfies" Section 1129(b)(2)(B)(ii), the very same provision that the Debtor asserts does not apply. The Debtor cannot have it both ways: the Plan cannot "satisfy" a requirement that is said not to apply in the case of an individual debtor.

Certificate Of Service

I transmitted today a copy of this order to the Bankruptcy Noticing Center for mailing to the following persons:

Michael L. McClung, Debtor, 1023 Tocobago Lane, Sarasota, Florida 34236

Dawn Carapella, Esquire, Attorney for Debtor, Post Office Box 1102, Tampa, Florida 33601-1102

Michael P. Brundage, Esquire, Post Office Box 2231, Tampa, Florida 33601-2231

Denise Barnett, Esquire, Office of United States Trustee, Timberlake Annex, Suite 1200, 501 E. Polk Street, Tampa, Florida 33602

All Creditors and Interested Parties

Dated: _____ By: _____

Deputy Clerk