

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

MARY LORENZO,

Case No. 6:09-bk-04179-ABB

Chapter 13

Debtor.

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ORDER

This matter came before the Court on the Debtor Mary Lorenzo's Objections to the asserted claims of Home Buyers "R" Us, LLC ("HBRU") and Robert A. Kaplus ("Kaplus") (collectively, "Respondents") (Doc. Nos. 98, 99). An evidentiary hearing was held on October 26, 2010 at which the Debtor, her counsel, counsel for Respondents, and the Chapter 13 Trustee Laurie K. Weatherford appeared. The parties filed post-hearing briefs pursuant to the Court's directive (Doc. Nos. 165, 166).

The Debtor's objections to Respondents' asserted claims are due to be sustained for the reasons set forth herein. The Court makes the following findings of fact and conclusions of law after reviewing the pleadings and evidence, hearing live testimony and argument, and being otherwise fully advised in the premises.

Claim Objections

The Debtor and Kaplus have been involved in various business ventures.¹ They embarked on two business ventures in 2006 in which they intended to purchase low-cost houses, renovate them, and sell them for a profit. Their first venture in 2006, referred to

¹ The Court entered a Memorandum Opinion and Judgment on July 22, 2010 in the adversary proceeding *Robert A. Kaplus and Home Buyers "R" Us, LLC v. Mary Lorenzo*, AP No. 6:09-ap-00832-ABB in favor of the Debtor and against the Creditors pursuant to 11 U.S.C. Sections 523(a)(2)(A) and 523(a)(4). The Memorandum Opinion sets forth the parties' history and dealings in detail. The parties agreed in open Court on October 26, 2010 to rely the evidence presented and findings made in the Adversary Proceeding are relevant and controlling in the claim objection proceeding.

as the BTB Venture, involved Kaplus, the Debtor, and B.T.B. Consulting Group. Their second venture, referred to as the Lake County Venture, involved Kaplus, the Debtor, and HBRU, an entity Kaplus and the Debtor created in connection with the venture.

The 2006 ventures were not successful and Respondents instituted civil actions against the Debtor in the Florida State Courts in Orange and Lake Counties. The Debtor filed this bankruptcy case on March 31, 2009 (“Petition Date”) and the Florida State Court litigation was stayed by the automatic stay of 11 U.S.C. Section 362. No judgments were entered by the Florida State Courts. The properties acquired through the ventures were ultimately sold at foreclosure sales.

The Debtor listed Kaplus as an unsecured creditor in Schedule F (Doc. No. 1) for two debts in unknown amounts relating to the Florida State Court litigation. The debts are listed as contingent and unliquidated. HBRU is referenced in the debt description sections, but is not listed as a creditor. Respondents each filed a proof of claim:

- (i) HBRU filed a general unsecured proof of claim, Claim No. 22-1, for \$357,538.05 plus interest for “money loaned & breach.” The Attachment to the claim sets forth the claim amount is comprised of eleven purported debts, including: down payments of \$124,754.72; payments to subcontractors of \$100,804.22; monthly advances of \$40,000.00; legal fees of \$30,846.26, and “rental income from various properties” for an unknown amount.
- (ii) Kaplus filed a general unsecured proof of claim, Claim No. 23-1, for \$102,292.36 for “money loaned & fraud.” The claim is comprised of principal of \$67,000.00, prejudgment interest of \$20,867.22, and attorneys’ fees and costs of \$14,425.14.

The attachments to Claim Nos. 22-1 and 23-1 set forth the claims are based upon the complaints filed by Respondents against the Debtor in the Florida State Court litigation.

The Debtor requests the asserted claims be disallowed in their entirety on the grounds: (i) the funds provided by Kaplus and/or HBRU for the 2006 ventures were not loans, but investments; (ii) the claims were unliquidated on the Petition Date; (iii) the amounts claimed as owed are unsubstantiated and Respondents have established no right to payment; (iv) no statutory or contractual basis exists for an award of attorneys' fees or costs; and (v) no basis exists for an award of "prejudgment interest" to Respondents.

Respondents assert: (i) the funds provided to the Debtor were loans and not investments; and (ii) the principal debt amounts contained in the claims were found to be valid debts in the Adversary Proceeding. Respondents concede they are not entitled to recover attorneys' fees, court costs, or prejudgment interest. They contend Claim No. 22-1 constitutes an allowed unsecured claim in the amount of \$67,000.00 and Claim No. 23-1 an allowed unsecured claim in the amount of \$326,691.79.

Analysis

Allowed general unsecured claims are paid in a Chapter 13 case on a *pro rata* basis only to the extent any funds remain after payment of the allowed priority claims and secured claims. Equity interests are not entitled to distributions by the Trustee. An equity interest arising from a capital contribution or advance is not a debt and does not constitute a "claim." In re Georgetown Bldg. Assocs., Ltd., 240 B.R. 124, 137 (Bankr. D.D.C. 1999).

This Court is authorized pursuant to its equitable powers to examine Respondents' transactions with the Debtor and determine whether those transactions are loans or contribution to equity. In re Cold Harbor Assocs., L.P., 204 B.R. 904, 915 (Bankr. E.D. Va. 1997). Such powers exist independently of the Court's disallowance

power pursuant to 11 U.S.C. Section 502(b) and its equitable subordination power pursuant to Section 510(c). Fairchild Dornier GMBH v. The Official Committee of Unsecured Creditors for Dornier Aviation (N.A.), Inc. (In re Dornier Aviation, 453 F.3d 225, 232-233 (4th Cir. 2006). The Court, if the transactions labeled loans by Respondents are actually contributions to equity, may characterize the loans “to reflect the true nature of the transaction.” In re Cold Harbor, 204 B.R. at 915.

A variety of factors are relevant in determining on a case by case basis whether a payable is debt or equity. Celotex Corp. v. Hillsborough Holdings Corp. (In re Hillsborough Holdings Corp.), 176 B.R. 223, 248 (M.D. Fla. 1994). The following factors are relevant in the Debtor’s case:

- (i) The transactions between Kaplus and/or HBRU and the Debtor exhibit none of the formalities associated with a loan. No promissory notes or repayment schedules were issued.
- (ii) Repayment of the funds issued by Kaplus and/or HBRU was tied to the financial success of the parties’ ventures. The documentary evidence presented in the Adversary Proceeding reflects repayment was dependent upon the acquisition and sale of houses and the parties would split the net profits from the sales.
- (iii) The parties’ real estate ventures were thinly capitalized.
- (iv) HBRU was created by Kaplus and the Debtor to carry out their Lake County Venture by acquiring real property. The Debtor and Kaplus each own 50% of HBRU pursuant to the Nominee Agreement.
- (v) Kaplus refers to the transactions with the Debtor as “investments” and not loans in his correspondence.

The evidence overwhelmingly establishes the transactions between the parties constitute equity contributions and not loans. In re Celotex, 176 B.R. at 248-250; In re Georgetown Bldg., 240 B.R. at 137. The amounts contained in Claim Nos. 22-1 and 23-1

are Respondents' equity interests in the 2006 ventures, not debts, and do not constitute claims. In re Georgetown Bldg., 240 B.R. at 137; 11 U.S.C. §§ 101(5), 101(12).

Respondents are not entitled to any distribution in this bankruptcy case.

Remaining Issues

The two remaining issues in this case are the Trustee's Motion to Dismiss and the Respondents' objections to confirmation of the Debtor's Second Amended Plan. The Trustee seeks dismissal of this case pursuant to 11 U.S.C. Section 109(e) asserting general unsecured debts, even with the exclusion of Claim Nos. 22-1, 23-1, and 28, may exceed \$1,490,016.46 if deficiencies exist on surrendered real property. Respondents object to confirmation of the Debtor's Second Amended Plan on a number of grounds. These remaining issues are due to be set for a final hearing.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the Debtor's Objections to Claim Nos. 22-1 and 23-1 (Doc. Nos. 98, 99) are hereby **SUSTAINED** and Kaplus and HBRU, as holders of equity interests and not debts, are not entitled to any distribution in this case; and it is further

ORDERED, ADJUDGED and DECREED that the Trustee's Motion to Dismiss pursuant to 11 U.S.C. Section 109(e) (Doc. No. 110) and Respondents' Objection (Doc. No. 148) to Confirmation of the Debtor's Second Amended Plan (Doc. No. 146) are hereby set for a final hearing on February 15, 2011 at 1:30 p.m.

Dated this 26th day of January, 2011.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge