

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
FT. MYERS DIVISION**

In re:

KEVIN ADELL,

Chapter 11 Case

Case No. 9:03-bk-23684-ALP

Debtor. \_\_\_\_\_ /

**ORDER ON  
MOTION OF STN.COM, INC. AND ADELL  
BROADCASTING FOR RECONSIDERATION  
OF ORDER ON CONFIRMATION OF FOURTH  
AMENDED PLAN (Doc. No. 460)  
AND  
DEBTOR'S MOTION FOR  
RECONSIDERATION OF ORDER DENYING  
CONFIRMATION; MOTION FOR  
PERMISSION TO FILE FOR THE COURT'S  
CONSIDERATION OF SECOND PLAN  
MODIFICATION (Doc No. 461)**

The matters under consideration in this still pending Chapter 11 case of Kevin Adell (Debtor) are the following;

- (1) Motion of STN.Com, Inc. and Adell Broadcasting Corp. for Reconsideration of Order on Confirmation of the Fourth Amended Plan (Doc. 460)
- (2) Debtor's Motion for Reconsideration of Order Denying Confirmation; Motion for Permission to File and For the Court's Consideration of Second Plan Modification (Doc. 461).

In order to place the issues raised in the proper perspective it should be helpful to briefly summarize the proceedings and events leading up to the filing of the present Motions for Reconsideration

On April 25, 2003, the United States Bankruptcy Court for the Eastern District of Michigan entered an Order Regarding Alleged Debtor's Damages (the Sanctions Order). In the Sanctions Order, the Court determined that "John Richards Homes Building Co., L.L.C., shall recover from Kevin Adell compensatory damages in the amount of \$4,100,000; punitive damages in the amount of \$2,000,000; and attorney

fees and costs in the amount of \$313,230.68, plus interest at the statutory rate." The award was based on the Court's determination that the Debtor, Kevin Adell, had filed an involuntary petition against John Richards Homes Building Co., L.L.C. (JRH) in bad faith, and that sanctions for the bad faith filing were therefore warranted pursuant to §303(i) of the Bankruptcy Code.

On May 8, 2003, two weeks after the entry of the Sanctions Order in Michigan, the Debtor purchased a home in Naples, Collier County, Florida, for the approximate purchase price of \$2,800,000.00.

On May 21, 2003, the Debtor appealed the Sanctions Order to the United States District Court for the Eastern District of Michigan.

Meanwhile, JRH obtained an injunction from the Bankruptcy Court that prohibited the Debtor from selling or disposing any of his assets. Additionally, JRH recorded a certified copy of the Sanctions Order in the public records of Collier County, Florida.

On September 17, 2003, the Bankruptcy Court in Michigan entered an Opinion Regarding JRH's Motion for Miscellaneous Post-Judgment Relief. In re John Richards Homes Building Co., L.L.C., 298 B.R. 591 (Bankr. E.D. Mich. 2003). In the Opinion, the Court found that (1) the Debtor's "claim of exemption in his Florida home is preempted by §303(i)," and that (2) the Debtor "does not have the intent to reside in Florida permanently," and therefore "is not entitled to claim the Florida homestead exemption."

Consequently, on the same date, the Court entered a separate Order Regarding JRH's Motion for Miscellaneous Post-Judgment Relief, which provided that "within 60 days, Kevin Adell shall sell his Florida home and remit the proceeds to JRH."

The Debtor appealed the Order disallowing his homestead exemption, and also filed a Motion for Stay Pending Appeal. The Motion for Stay Pending Appeal was denied by the Bankruptcy Court.

On October 14, 2003, therefore, the Debtor filed an Emergency Motion for Stay Pending Appeal in the United States District Court in Michigan. On November 10, 2003, the District Court granted the Debtor's Emergency Motion, on the condition that the Debtor post a cash bond in the amount of \$2,800,000.00. The District Court later amended the Order to provide that the bond could be either a cash bond or a surety bond. No bond was posted.

On November 14, 2003, the Debtor filed a Petition under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the Middle District of Florida. In connection with the chapter 11 case, the Debtor listed the home in Naples on his "Schedule A – Real Property," with a value of \$2,800,000.00, and claimed the home as exempt on his "Schedule C – Property Claimed as Exempt."

On February 10, 2004, JRH filed a Motion to Dismiss Chapter 11 Case. (Doc. 145). In the Motion, JRH asserted that the chapter 11 case was filed in bad faith and therefore should be dismissed for "cause" pursuant to §1112(b) of the Bankruptcy Code.

On May 28, 2004, the Court entered an Order on Motion to Dismiss. (Doc. 287). In the Order, the Court found that the case involves a two-party dispute between the Debtor and JRH, and that the primary reason that the Debtor filed the case was to prevent the loss of his home in Naples. (p. 17). Nevertheless, the Court denied the Motion to Dismiss, for the reason that:

Notwithstanding the teachings of Natural Land, *supra*, this Court is of the opinion that the Debtor should have one opportunity to attempt to obtain confirmation of the Third Amended Plan, provided that the plan may be amended only at the confirmation hearing through an order of confirmation, and that the confirmation hearing will not be rescheduled to allow for a Fourth Amended Plan.

(Doc. 287, Order on Motion to Dismiss, pp. 18-19).

On June 30, 2004, approximately one month after the entry of the Order on the Motion to Dismiss, the Court entered an Order Overruling Objection to Debtor's Disclosure Statement; Approving Disclosure Statement; and Setting Confirmation Hearing. (Doc. 313). In approving the Debtor's Disclosure Statement, the Court again stated that the "Debtor shall be given one single opportunity to obtain confirmation of the plan;" provided, however, that the Debtor may "amend any provision of the Debtor's Third Amended Plan of Reorganization ten (10) days prior to the hearing to consider confirmation of the Plan." (Doc. 313, p. 6). The confirmation hearing was scheduled for August 18, 2004.

On August 12, 2004, the Debtor filed his Fourth Amended Chapter 11 Plan of the Debtor. (Doc. 352). The Plan was further amended at the confirmation hearing on August 18, 2004.

On October 27, 2004, after considering all of the evidence presented at the hearing, the Court entered an Order on Confirmation of Fourth Amended Chapter 11 Plan of the Debtor and Corrected Modifications to the Same. (Doc. 455). In the Order, the Court denied confirmation of the Debtor's Plan because (1) the Plan, as modified, was not "fair and equitable" with respect to JRH's claim within the meaning of §1129(b) of the Bankruptcy Code; (2) the Plan was "silent as to the proposed treatment of the allowed secured claim in violation of §1129(a)(7)(A)(ii)" of the Bankruptcy Code; and (3) the Debtor did not adequately prove that the Plan was "feasible" as required by §1129(a)(11) of the Bankruptcy Code.

#### The Motions for Reconsideration

On November 5, 2004, the Debtor filed his Motion for Reconsideration of the Order Denying Confirmation. (Doc. 461). In the Motion, the Debtor contends that the Order contains manifest errors of law and fact in the Court's analysis of the Debtor's good faith, in the Court's application of the fair and equitable standard under §1129(b)(2)(B), and in the Court's analysis of the feasibility of the Plan. Additionally, the Debtor also asserts that threshold issues remained undecided at the time of the confirmation hearing:

Based upon the allowance of Richards LLC's claim, the Court found that Debtor's Plan is silent regarding the treatment of Richards LLC's secured claim of \$2,800,000, in violation of §1129(a)(7)(A)(ii) of the Bankruptcy Code. Before making this determination, the Court should have determined whether the Debtor is entitled to claim his Naples homestead as exempt and, if so entitled, whether the Debtor may avoid Richards LLC's judicial lien pursuant to §522(f). Indeed, at the time of the confirmation hearing, the Court had not heard the Debtor's pending motion to avoid judicial lien and Richards LLC's objection to the Debtor's claim of exemption of the Naples home. Until those issues are decided, it is error to determine whether the Debtor is providing Richards LLC with at least as much under the Plan as Richards LLC would receive in a liquidation.

(Doc. 461, p. 7)(Emphasis supplied). The Debtor apparently contends that his Plan would satisfy the requirements for confirmation set forth in §1129(a) of the Bankruptcy Code if the Court determines the JRH's lien is avoidable pursuant to §522(f) and the claim of JRH is an unsecured claim.

The heart of the issue raised by the Motions for Reconsideration concerns the treatment of JRH's claim in the Debtor's Fourth Amended Chapter 11 Plan, and whether such treatment satisfies the requirements for confirmation contained in §1129 of the Bankruptcy Code.

On April 14, 2004, JRH filed its Proof of Claim in this case (Claim No. 11) in the total amount of \$7,454,366.26. The Claim consists of a secured portion in the amount of \$2,800,000.00, and an unsecured portion in the amount of \$4,654,366.26. The secured portion is based on the recordation of the Sanctions Order in the public records of Collier County, Florida.

JRH's claim is identified as a Class 10 claim in the Debtor's Fourth Amended Chapter 11 Plan. The Claims in Class 10 are designated as "impaired" under the Plan. (Fourth Amended Plan, §2.4).

Generally, the Fourth Amended Plan provides that JRH's claim would be paid according to one of two alternative methods of treatment. In "Alternative A," the Debtor would receive the sum of \$700,000.00 in cash on the Effective Date of the Plan, and would subsequently receive a percentage of the proceeds of certain litigation. In "Alternative B," JRH's claim would be paid "in full over a ten year period, with interest calculated at the prime rate on the Effective Date plus one (1%) percent." According to "Alternative B," the claim would be paid "once Richards, LLC's claim is finally allowed and all appeals exhausted and set offs allowed or disallowed."

Neither Alternative A nor Alternative B provides that JRH would retain its lien on the Debtor's home in Naples.

After considering the evidence presented at the confirmation hearing, the Court made the following findings in its Order denying confirmation:

The basic difficulty with the treatment of the claim of John Richards should be obvious when one considers the fact that under the Fourth Amended Plan, John Richards will not receive any funds at all, possibly as long as ten years,

while the other unsecured creditors will receive full satisfaction of their claims in hundred eighty (180) days. This is hardly a fair and equitable treatment of the claim of John Richards. And, the Fourth Amended Plan fails to meet the requirement for a cram down pursuant to Section 1129(b) of the Code.

Moreover, the Fourth Amended Plan is totally silent as to how the portion of the claim of John Richards, which is at least partially secured provides for the retention of this lien. John Richards domesticated the Sanction Order in Collier County and John Richards claims that this created a lien on [the Debtor's] residence relying no doubt on the determination by the Michigan Bankruptcy Court that the residence is not homestead and even [if] it is, is not immune from the claim of John Richards.

(Doc. 455, Order on Confirmation, pp. 20-21). The status of JRH's Claim as either secured or partially secured is therefore crucial to a determination of the Plan's compliance with §1129. Additionally, of course, JRH's secured status is at least partially dependent on the Debtor's ability to claim the home in Naples as exempt.

The record reflects that JRH filed an Objection to the Debtor's Claim of Exemptions on January 16, 2004, and that the Debtor and JRH subsequently filed Cross-Motions for Summary Judgment with respect to the Objection to Exemptions. (Docs. 97, 184, 212). Further, the record also reflects that the Debtor filed a Motion to Avoid the Judicial Lien of JRH on March 8, 2004, and that JRH filed a written response to the Debtor's Motion on March 29, 2004. (Docs. 193, 232). Although a preliminary hearing was scheduled on the Motion to Avoid Judicial Lien for April 15, 2004, no orders were ever entered that disposed of either JRH's objection to the Debtor's exemptions, or the Debtor's Motion to Avoid JRH's Judicial Lien. The matters remained unresolved at the time of the confirmation hearing on August 18, 2004.

For these reasons, this Court is satisfied that it is appropriate that the Motions for Reconsideration currently at issue should be abated pending a disposition of the determination of the status of the secured portion of JRH's claim.

This leaves for consideration, the second part of the Motion in which the Debtor seeks permission to file a second plan modification. In opposing the Motion, counsel for JRH cites the case of In re University Creek Plaza, 176 B.R. 1011 (S.D. Fla. 1995), in which case the late Bankruptcy Judge, Sidney M. Weaver, denied the Debtor's attempt to amend the plan at the confirmation hearing to make it better when it appeared that the plan as filed could not be confirmed. Judge Weaver's Order was challenged by appeal and the District Court held it is within the discretion of the Bankruptcy Court to permit an amendment. Thus, the denial of any further amendment should not be subject to review, because the Bankruptcy Court is in the better position to determine whether the proposed amendment was made in bad faith. The District Court on review of University Creek Plaza emphasized that the denial of further amendments of the Plan was based on the bad faith of the debtor.

At first blush, one might conclude that this Motion is without merit because of this Court's previous determination, first in the Order on the Motion to Dismiss and, second in the Order Approving the Disclosure Statement, both of which provided that the Debtor should have only one single opportunity to attempt to obtain confirmation of the Plan, and that no further amendment would be permitted except as stated in its Order Approving the Disclosure Statement (Doc. No. 313), and furthermore, the confirmation hearing will not be rescheduled to consider any further amendments.

One would be less than candid not to concede that facially the facts involved in University Creek Plaza, *supra*, are strikingly similar to the fact pattern involved in this Chapter 11 case. However, there is an important difference, because it is without dispute that in the present instance two important issues were never resolved, both of which bear heavily on the confirmability of the proposed new amendment. One involves the Objection to the Debtors homestead claim to his Naples residence and the other the Debtor's ability to use §522(f)(1) of the Code to invalidate a lien on the Debtor's residence, allegedly created by a recordation. In sum, a final determination of the proper status of the claim of JRH is absolutely essential to evaluate the Debtors Plan of Reorganization.

The provisions in this Court's Orders on the Motion to Dismiss and Approving Disclosure Statement (Doc. No. 145 and Doc. No. 313) respectively, prohibiting any new amendments were not based on any provision of the Code nor on any

provisions of the Federal Rules of Bankruptcy Procedure, but instead, on the inherent power of the Court. It was intended to assure a speedy but fair adjudication of all matters presented for its consideration and the prohibition against further amendments, especially post confirmation, was intended to prevent any further delay. However, it is quite likely that the dispute will end up before the District Court and because of this Court's failure to rule on these issues the matter will be remanded with directions to rule on the same. This, in turn, would cause substantial additional delays in resolving this ongoing dispute between the Debtor and JRH.

Based on the foregoing, this Court is satisfied that ruling on the Motion for Permission to File for the Court's Consideration of Second Plan Modification should be deferred pending the resolution of the two unresolved issues, that is: the Objection to Debtor's Claim of Exemptions filed by John Richard Homes and the Motion to Avoid Judicial Lien filed by the Debtor.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that ruling on the Motion of STN.Com, Inc. and Adell Broadcasting Corp. for Reconsideration of Order on Confirmation of Fourth Amended Plan, and on the Debtor's Motion for Reconsideration of Order Denying Confirmation; Motion for Permission to File and for the Court's Consideration of Second Plan Modification, shall be abated pending disposition of the Objection to Debtor's Claim of Exemptions filed by John Richards Homes Building Co., L.L.C., and the Motion to Avoid Judicial Lien filed by the Debtor, Kevin Adell. It is further

ORDERED, ADJUDGED AND DECREED that a final evidentiary hearing shall be conducted on January 5, 2005, at 1:30 p.m. at the Federal Building and Federal Courthouse, Room 4-117, Courtroom D, 2110 First Street, Fort Myers, Florida, to consider (A) the Objection to Debtor's Claim of Exemption filed by John Richards Homes Building Co., L.L.C., and (B) the Motion to Avoid Judicial Lien filed by the Debtor, Kevin Adell.

DONE AND ORDERED at Tampa, Florida, on December 16, 2004.

/s/ Alexander L. Paskay  
Alexander L. Paskay  
U.S. Bankruptcy Judge