UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

CONCH HOUSE BUILDERS, LLC, Case No.: 3:07-bk-3392-JAF
Chapter 11

Debtor.

_____/

ORDER DENYING SUNSEEKER INVESTMENTS, INC.'S LIMITED MOTION TO CORRECT LIST ATTACHED TO THE CONFIRMATION ORDER

This case is before the Court on Sunseeker Investments, Inc.'s ("Sunseeker") Limited Motion to Correct List Attached to the Confirmation Order (Doc. 562, the "Motion"). On September 19, 2012, the Court held an evidentiary hearing (Doc. 578, "Minutes"). At the conclusion of the hearing, the Court took the matter under advisement and directed the parties to file briefs in support of their respective positions. Such briefs having been filed (Docs. 579, 580), the matter is now ripe for the Court's determination. The Court has jurisdiction pursuant to 28 U.S.C. § 1334(b). This is a core matter pursuant to 28 U.S.C. § 157(b)(2)(A).

For the reasons stated herein, the Motion (Doc. 562) is denied.

I. Background

On August 7, 2007, the Debtor filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code[1] (Doc. 1). In its Schedule F, Timothy Tadlock ("Tadlock") is listed as a general unsecured creditor with a claim in the amount of $124,904.00 (Debtor's Exs. 1 and 2). Tadlock is apparently the sole principal of Sunseeker (Doc. 579 at 6, n.18). The subject $124,904.00 claim relates to a $100,000.00 loan made to the Debtor by Tadlock as the lender

[1] Unless otherwise indicated, all references to the "Bankruptcy Code" or "Code" are to 11 U.S.C. § 101 *et seq*., and all references to a "Bankruptcy Rule" or "Rule" are to the Federal Rules of Bankruptcy Procedure.

(Debtor's Ex. 13). The loan was to be secured by a "Deed of License" to a particular boat slip (*id*.; *see also* Movant's Ex. 11). The Deed of License, however, was "not to be recorded," and was to be returned to the Debtor upon the repayment of the loan (Debtor's Ex. 13). It appears the loan proceeds were provided to the Debtor by Sunseeker (*see* Movant's Exs. 11 and 12). Subsequently, when the Debtor was apparently unable to repay the loan upon its maturity, Tadlock and the Debtor entered into a agreement entitled, "Agreement for Reimbursement and Payment of Funds and General Release" (the "Release") (Debtor's Ex. 14). This document, in essence, created new terms for the subject loan. The Release is executed by Tadlock, "individually and as lenders [sic]" and Conch House Builders, LLC (*id*.). The Release, is signed by Tadlock as "Director" of Sunseeker (*id*.).

Sunseeker, however, was not listed as a creditor in the Debtor's bankruptcy schedules (*see* Doc. 92). On July 31, 2008, the Debtor filed its initial Chapter 11 plan of reorganization (Doc. 249, the "Initial Plan"). Tadlock was listed as an unsecured Class 7 creditor in the Initial Plan (*id*. at 6). The Initial Plan, however, was not confirmed. On July 29, 2009, the Debtor filed an amended Chapter 11 plan of reorganization (Doc. 332, the "Amended Plan"). The Amended Plan listed Tadlock as an unsecured Class 7 creditor (*id*. at 6). The Amended Plan, however, was also not confirmed.

On August 27, 2009, Tadlock filed an individual Chapter 11 case (Case No.: 3:09-bk-7212-JAF) (Debtor's Ex. 9). In his bankruptcy schedules, Tadlock did not list having a claim against the Debtor. On November 10, 2009, Tadlock's bankruptcy was converted to a Chapter 7 case, and a Chapter 7 Trustee was appointed by the Court (Debtor's Ex. 9). On February 17,

2010, Tadlock received his discharge of debtor (Debtor's Ex. 9). The case has been fully administered (*id*.).

On August 26, 2009, Sunseeker filed for bankruptcy protection under Chapter 11 of the Code (Case No.: 3:09-bk-7172-JAF) (Debtor's Ex. 8). In its bankruptcy schedules, Sunseeker did not list any amount owed to it by the Debtor; however, Sunseeker listed as an asset a claim of $121,000.00 owed to it by "Conch House Builders Association."[2] On October 16, 2009, attorney Robert Wilcox filed a Notice of Appearance as the attorney for Sunseeker in the Conch House Chapter 11 bankruptcy case (Debtor's Ex. 6). Sunseeker did not file a proof of claim in the Conch House Chapter 11 bankruptcy case (*see* Debtor's Ex. 2). On August 23, 2011, Sunseeker moved to dismiss its bankruptcy case, claiming there were no substantial assets (Debtor's Exs. 16 and 17). The Sunseeker bankruptcy case was dismissed on September 28, 2011 (Debtor's Ex. 18).

On April 14, 2010, the Debtor filed its Second Amended Chapter 11 Plan for Reorganization (Doc. 407, the "Plan"). Neither Tadlock nor Sunseeker is listed as a creditor in the Plan (*id*.). On May 17, 2010, the Court entered an Order Scheduling Continued Confirmation Hearing and Fixing Time for Filing Acceptances or Rejection of Plan, and Notice of Hearing (Doc. 419). Notice of this Order was sent to the full mailing list of recipients, which included both Tadlock and Sunseeker (Doc. 424). The Order provided that June 26, 2010 was the last day for filing written acceptances or rejections of the Plan, and that objections to confirmation were to be filed and served before July 20, 2010 (Doc. 419 at 1). Neither Tadlock

[2] The Debtor is Conch House Builders, LLC.

nor Sunseeker filed an objection to the Plan and neither moved to correct the list of unsecured creditors in the Plan.

On April 13, 2011, approximately one year after the Plan was filed, the Court entered the Order Confirming the Plan (Doc. 552, the "Confirmation Order"). Both Sunseeker and Tadlock received notification of the Confirmation Order (*see* Doc. 553). The Confirmation Order required that any objections to confirmation be filed within thirty days of entry of the Order (Doc. 552 at 24). Neither Tadlock nor Sunseeker filed a timely objection to any portion of the Plan or the Confirmation Order and neither filed a timely motion to correct the list of unsecured creditors listed in the Plan.

On September 2, 2011, after the Debtor fulfilled its obligations under the Plan, the Court entered a Final Decree (Doc. 560), which was served on both Tadlock and Sunseeker (Doc. 561). On February 2, 2012, nearly one year after the Order Confirming the Second Amended Chapter 11 Plan of Reorganization was entered (Doc. 552), and five months after entry of the Final Decree, *supra*, Sunseeker filed the instant Motion (Doc. 562). Although Tadlock is not a party to the Motion, Sunseeker posits that Tadlock "would join in the relief requested," and would assign his interest in any and all distributions to Sunseeker (Doc. 562 at 1, n.1).

II. Analysis

By way of the Motion, Sunseeker requests the Court to: (1) enter an Order altering the confirmed Plan to include Tadlock's claim as listed on the Debtor's Schedule F;[3] (2) require that Tadlock's claim be paid in accordance with the other allowed claims under the confirmed Plan;

[3] The Debtor did not list Tadlock's claim as disputed, unliquidated, or contingent on its Schedule F; thus, pursuant to 11 U.S.C. § 1111(a) and Rules 3003 and 3007 of the Federal Rules of Bankruptcy Procedure, Tadlock held an allowed claim in the amount of $124,904.00 in the Debtor's Chapter 11 bankruptcy case.

and (3) require reimbursement of Sunseeker's fees and costs associated with bringing the Motion (Doc. 562 at 4). In support, Sunseeker argues, *inter alia*, that by being unilaterally omitted from the confirmed Plan, Tadlock's due process rights were violated (Doc. 579 at 3). For the reasons stated herein, the Court is not persuaded.

11 U.S.C. § 1141, entitled "Effect of Confirmation" provides, in part:

> (a) ... [T]he provisions of a confirmed plan bind the debtor ... and any creditor ... whether or not the claim or interest of such creditor ... is impaired under the plan and whether or not such creditor ... has accepted the plan.
>
> (d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—
>
> (A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) ... whether or not—
>
> (i) a proof of the claim based on such debt is filed or deemed filed ...;
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> (ii) such claim is allowed under section 502 of this title; or
>
> (iii) the holder of such claim has accepted the plan.

As an initial matter, Sunseeker does not have standing to assert a claim on behalf of Tadlock. Sunseeker was represented by counsel in the Debtor's bankruptcy case; however, it never filed a proof of claim or otherwise asserted any interest in Tadlock's claim. Although Sunseeker listed in its Chapter 11 bankruptcy case a claim of $121,000.00 owed to it by "Conch House Builders Association," this entity is not the Debtor. Furthermore, Sunseeker moved to dismiss its bankruptcy case, claiming there were no substantial assets (Debtor's Exs. 16 and 17). Even though it received adequate notice, Sunseeker never filed a timely objection to any portion of the Plan or the Confirmation Order, nor did it file a timely motion to correct the list of unsecured creditors listed in the Plan. Based on the foregoing, the Court finds Sunseeker does not have standing to assert Tadlock's claim.

Even if Sunseeker somehow had standing to bring the instant Motion, it had ample notice of: (1) the Debtor's Plan (Doc. 407); (2) the Order Scheduling Continued Confirmation Hearing and Fixing Time for Filing Acceptances or Rejection of Plan (Doc. 419); (3) the Order Confirming the Plan (Doc. 552); and (4) the Final Decree (Doc. 560) (entered approximately one year and four months after the Debtor filed the Plan). Equity aids the vigilant, not those who slumber on their rights. Based on the foregoing, the Court finds Sunseeker has waived any interest it may have had in Tadlock's claim.

Alternatively, Sunseeker does not provide any federal rule upon which the Motion rests. Confirmation of a Chapter 11 plan of reorganization is the equivalent of a final judgment in ordinary civil litigation; thus, if not timely appealed from, an order confirming a Chapter 11 plan will have *res judicata* effect. The doctrine of *res judicata* in bankruptcy proceedings "not only bars a court from relitigating issues that have been litigated in a cause but also bars a court from litigating issues that *may have been litigated.*" *In re New River Shipyard, Inc.*, 355 B.R. 894, 912 (Bankr. S.D. Fla. 2006) (internal citations and quotations omitted; emphasis in original). Even the provisions regarding revocation of a confirmation order are not available to Sunseeker in this instance.

More particularly, 11 U.S.C. § 1144 and Bankruptcy Rules 9024 and 9006(b)(2) provide a strict 180-day limitation period for a party in interest to seek revocation of a confirmation order based on an allegation of fraud.[4] The Motion was filed on February 28, 2012 (321 days following entry of the Confirmation Order); as a consequence, Sunseeker is barred by the statute of limitations from seeking revocation of the Confirmation Order.

[4] The Court would note that the evidence and testimony presented at the hearing is inconclusive as to how or why Tadlock's claim was omitted from the Plan (*see* Doc. 581, the "Transcript of the Proceedings").

Sunseeker nevertheless asserts that Tadlock's (and presumably Sunseeker's) due process rights were infringed because the Debtor neither amended its schedules to list Tadlock's claim as either disputed, unliquidated, or contingent, nor did it file an objection to the claim under Rule 3007 of the Federal Rules of Bankruptcy Procedure (Doc. 562 at 3-4; Doc. 579 at 7-9).

While the Court agrees that unilaterally removing a creditor who has an allowed claim from a plan of reorganization is not an appropriate way by which to object to such claim, or by which to have such claim disallowed, it is nevertheless incumbent upon the creditor to ensure its claim is provided for in any plan of reorganization, and to either object to confirmation of the plan or appeal the order confirming the plan if its claim is not provided for under the plan. Sunseeker cites *In re Dynamic Brokers, Inc.*, 293 B.R. 489, 492-97 (9th Cir 2003) for the proposition that a debtor may not use a Chapter 11 plan of reorganization as a means by which to reduce (or omit) a claim that is deemed allowed without the creditor's consent. It should be noted, however, that in *In re Dynamic Brokers, Inc.* the creditor both objected to the treatment of its claim under the plan at the confirmation hearing(s) and filed a timely appeal of the order confirming the plan. *See id*. at 492-93. Neither was done in this instance.

Even if the Court had an independent duty to ensure that the Confirmation Order fully conformed to all the provisions of the Bankruptcy Code and Rules, a party in interest to a confirmed plan is nevertheless obligated to take appropriate, and timely, steps to adequately protect its interests, or risk forfeiting its rights. *See United Student Aid Funds, Inc. v. Espinosa*, 130 S.Ct. 1367, 1380 (2010), finding as follows:

> Rule 60(b)(4) [of the Federal Rules of Civil Procedure] strikes a balance between the need for finality of judgments and the importance of ensuring that litigants have a full and fair opportunity to litigate a dispute. Where, as here, a party is

> notified of a plan's contents and fails to object to confirmation of the plan before the time for appeal expires, that party has been afforded a full and fair opportunity to litigate, and the party's failure to avail itself of that opportunity will not justify Rule 60(b)(4) relief.[5]

To the extent Tadlock would join in the Motion and/or assign his interest in the claim to Sunseeker, it should be noted that the Court would likely find judicial estoppel applicable to his actions in this regard. Specifically, although Tadlock was aware he possessed an allowed claim in the Debtor's bankruptcy in the amount of $124,904.00, he never listed this claim as an asset in his individual Chapter 11 bankruptcy case (Case No.: 3:09-bk-7212-JAF) (Debtor's Ex. 9). On November 10, 2009, Tadlock's Chapter 11 bankruptcy was converted to a case under Chapter 7, and a Chapter 7 Trustee was appointed by the Court (*see* Debtor's Ex. 9). As Tadlock did not list in, or amended, his schedules to reflect the subject $124,904.00 claim, the Chapter 7 Trustee was never made aware of this asset of the Chapter 7 bankruptcy estate. On February 17, 2010, Tadlock received a discharge of debtor (Debtor's Ex. 9), and the case has been fully administered.

Sunseeker now presents to the Court that Tadlock is willing to join in the Motion and assign his interest in the claim to Sunseeker (Doc. 562 at 1, n.1). In accordance with the Eleventh Circuit Court of Appeals decision in *Robinson v. Tyson Foods, Inc*., 595 F.3d 1269 (11th Cir. 2010), if Tadlock were to embark on such a course of action, his inconsistent position(s) in this regard would likely be found by this Court to have been calculated to make a mockery of the judicial system.

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[5] Rule 60(b)(4) of the Federal Rules of Civil Procedure provides a mechanism by which a party may seek relief from a final judgment, up to one year after its entry, if the judgment is deemed void. As noted by the Supreme Court, a judgment is not void simply because it may have been erroneous. *Espinosa*, 130 S.Ct. at 1377. Moreover, a motion under Rule 60(b)(4) "is not a substitute for a timely appeal." *Id*.

To illustrate, a debtor seeking relief under the bankruptcy laws has a statutory duty to disclose all assets, or potential assets, to the bankruptcy court. 11 U.S.C. §§ 521(1), 541(a)(7). "The duty to disclose is a continuing one that does not end once the forms are submitted to the bankruptcy court; rather the debtor must amend his or her financial statements if circumstances change." *Robinson*, 595 F.3d at 1274 (internal quotations and citations omitted). Tadlock received the benefit of his Chapter 7 discharge. His creditors, however, were never made aware of his $124,904.00 claim in the Debtor's bankruptcy. It would be tantamount to making a calculated mockery of the judicial system for Tadlock to swear under oath that he did not hold any claim in the Debtor's bankruptcy case, yet join in the relief requested in the Motion and then assign his interest in the subject claim to Sunseeker.

III. Conclusion

For the foregoing reasons, it is **ORDERED**:

Sunseeker Investments, Inc.'s Limited Motion to Correct List Attached to the Confirmation Order (Doc. 562) is denied.

DATED this 8th day of January 2013 in Jacksonville, Florida.

/s/ Jerry A. Funk
JERRY A. FUNK
United States Bankruptcy Judge

Copies to:

All interested parties