U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: **16-02672-jw**

Order On Consideration of Pleading of Kimberly Ann Gilbert, Directing A Stay of Plan Distributions, and Rule to Show Cause

The relief set forth on the following pages, for a total of 13 pages including this page, is hereby ORDERED.

FILED BY THE COURT
12/28/2016

US Bankruptcy Judge
District of South Carolina

Entered: 12/28/2016

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 16-02672-JW
	Chapter 13
Ryan Todd Gilbert,	
Debtor(s).	

ORDER ON CONSIDERATION PLEADING OF KIMBERLY ANN GILBERT, DIRECTING A STAY OF PLAN DISTRIBUTIONS, AND RULE TO SHOW CAUSE

This matter comes before the Court for a hearing on Kimberly Ann Gilbert's ("Movant") *pro se* pleading captioned "Complaint to Challenge Dischargeability, Motion to Appeal Confirmation and Convert Case for Cause" ("Pleading"). The debtor Ryan Todd Gilbert ("Debtor"), through counsel, filed an objection to the relief requested in the Pleading.[1]

Debtor and Movant are formerly husband and wife. The parties separated in 2013 and after a trial on the limited issues of child custody, support, visitation, and attorney's fees,[2] the Family Court entered an order on May 18, 2015 ("Family Court Order").[3] Among other relief, the Family Court Order granted the parties' divorce, awarded Movant child support of $361.00 per month, awarded Movant primary custody of the parties' minor children, determined and divided the Guardian Ad Litem fees, and ordered the Debtor to pay: (a) 25% of the children's

[1] Debtor's original bankruptcy counsel Michael Cox withdrew as counsel and retired from the practice of law in August 2016. Daniel A. Stone took over representation of the Debtor in August 2016 and filed the objection. Debtor's current counsel, David Melynk, was substituted as counsel by Consent Order Substituting Counsel entered on November 4, 2016.

[2] The Family Court Order indicates that the parties successfully mediated the issues related to the division of their property. The terms of the mediated property settlement are included as part of the Family Court Order, as are the court's rulings following a trial on the issues of child custody, visitation, and attorney's fees.

[3] A copy of the Family Court Order is attached to the Pleading.

uncovered medically related expenses; (b) Movant's attorney's fees related to a court ordered bankruptcy consultation;[4] and (c) 1/3 of the attorney's fees incurred by Movant in connection with the trial of domestic support issues. It appears from the record that the Debtor has not complied with all of the terms of the Family Court Order.

Debtor filed a petition under Chapter 13 of the Bankruptcy Code on May 31, 2016. Debtor's schedules identify three secured creditors: (1) Nationstar Mortgage, who holds the mortgage on Debtor's residence; (2) BB&T, who holds a lien on a vehicle in Movant's possession that was jointly purchased by the parties prior to their divorce; and (3) Flagstar Bank, who holds the mortgage on the former marital residence currently occupied and paid for by Movant. The schedules state that Debtor's original bankruptcy counsel has as a priority claim of approximately $550, and that Debtor has general unsecured debts totaling approximately $70,000.

Movant is identified in the schedules as being the holder of a priority claim for domestic support obligations in an "unknown" amount,[5] and the holder of an unsecured claim in the amount of $12,728.00, described as "$3000 ½ of withdrawal from Colonial Life award of 1/3 of wife's attny fees $9046.53." Movant received notice of the petition, but was not served with a copy of the schedules.

Concurrently with his petition, Debtor filed a proposed Chapter 13 plan ("Plan") using the form required by the Local Rules. The Plan provides that Debtor will pay the Chapter 13

[4] The Family Court Order contained an unusual provision that directed both Movant and Debtor to consult with bankruptcy counsel within 30 days of the entry of the order for the purpose of dealing with their "substantial marital debts." The Family Court Order directed that both Debtor and Movant's expenses related to "hiring and/or consulting with their respective bankruptcy attorney" were to be paid using a portion of the funds from Debtor's worker's compensation settlement.

[5] The comments in the schedules state that this claim is "$361 monthly Payment made by auto transfer from PCFCU." A review of the Family Court Order reveals that $361 is the amount of Debtor's court ordered monthly child support payments.

Trustee $110 per month for 36 months. Pre-petition, Debtor paid his original bankruptcy counsel $2,967 of his total $3,500 fee. The Plan provides for payment of the balance of bankruptcy counsel's fees to be made by the Trustee as part of the initial Plan disbursement.

With respect to Debtor's other creditors, the Plan states that Debtor is current with Nationstar Mortgage, and that Debtor will continue to pay Nationstar directly. The Plan provides for the surrender of Debtor's interest in the vehicle under lien to BB&T, and his interest in the former marital residence. The Plan leaves blank provisions which reference domestic support obligations. Finally, the Plan states that "General Unsecured creditors shall be paid allowed claims pro rata [sic] by the trustee to the extent that funds are available after payment of allowed claims."[6]

The Plan does not specifically reference Movant by name, nor does it state with specificity Debtor's proposed treatment of Movant's various claims (including Debtor's $361 monthly child support obligation) either in the domestic support sections or the section on general unsecured debt. The treatment of Movant's claims are not apparent from the face of the Plan.

The Plan was served on May 31, 2016. No objections were filed to the Plan, and it was confirmed on August 11, 2016. The order confirming the Plan ("Confirmation Order") was served on the entire mailing matrix on August 15, 2016.

[6] Although the schedules indicate approximately $70,000 in unsecured debt, the only unsecured creditors to file proofs of claim were: (a) Palmetto Citizens FCU, which filed a claim for $955.76 for a debt associated with an overdraft on Debtor's bank account; (b) Discover Bank, which filed a claim for $8,208.55 for unpaid credit card charges; and (c) Richard Whiting, Debtor's family court attorney, who filed a claim for $7,563.47 for unpaid attorney's fees related to the parties' divorce. BB&T and Flagstar Bank also filed proofs of claim for their co-signed debt, presumably to preserve their right to assert a deficiency claim should either liquidate the collateral securing their claims during the pendency of this case.

Movant did not timely file either a plan objection or a formal proof of claim.[7] On September 12, 2016, Movant filed the Pleading. In the Pleading, Movant details Debtor's defaults under the terms of the Family Court Order. She argues that the Plan fails to list or provide for all of the obligations imposed by the Family Court Order, and further alleges that Debtor's Chapter 13 case was not filed in good faith. Movant characterizes certain debts set forth in the Family Court Order as domestic support obligations, and seeks an order declaring these debts to be non-dischargeable. She also asks that Debtor's case be converted to Chapter 7 and that the confirmation of the Plan be revoked. A copy of the Family Court Order is attached to the Pleading, as are the Family Court mediator's report, and some emails between Movant and Debtor related to Movant's unsuccessful efforts to collect the sums awarded.

In opposition to the Pleading, the Debtor argues that: (1) the Pleading is procedurally improper because it was not filed as an adversary proceeding but rather, as a motion; and (2) the *res judicata* effect of the confirmed Plan precludes the relief requested by Movant because Movant was served with the Plan and notice of the confirmation hearing and did not interpose a timely objection. Debtor further asserts that because she was not specifically identified in the Plan, the treatment of Movant's claims fell into the unsecured creditor class, and any claim would have been paid *pro rata* with other unsecured creditors. Finally, Debtor disputes Movant's characterization of the debts as domestic support obligations, and maintains that they are in the nature of a property settlement and are properly treated as unsecured claims.

Discussion

The primary issue before the Court is whether the Confirmation Order prevents Movant from pursuing the domestic support obligations awarded her by the Family Court Order, and

[7] The deadline to file proofs of claim ran on October 11, 2016.

other remedies. Before it can reach this ultimate question, the Court must first undertake the threshold matters of the timeliness of the Pleading, and Movant's failure to file a formal proof of claim by the statutory deadline. The Court has jurisdiction over all of these matters pursuant to 28 U.S.C. §§ 157 and 1334(b). This is a core proceeding, and venue is proper.

1. Timeliness of Pleading.

As indicated above, the Pleading raises issues regarding conversion of the case, revocation of confirmation, the dischargeability of debt, and various other relief. The Movant's request for conversion and revocation of confirmation appear timely.

The deadline to object to Debtor's discharge was September 12, 2016. Movant filed the Pleading on September 12, 2016, at 12:01 p.m. as a "motion" on the docket of Debtor's main Chapter 13 case. Although incorrectly docketed, the Court will not penalize Movant, who is *pro se*, for filing the Pleading as a motion. Because it was filed with the Court on September 12, 2016, the Court will allow the Movant to treat the Pleading as a timely filed adversary complaint if necessary, subject to the condition that, within **fourteen (14) days** of the entry of this Order, Movant submits to the Clerk of this Court the adversary filing fee in the amount of $350.[8] In that event, the Clerk's office is directed to enroll the Pleading as an adversary proceeding and issue a Summons. Upon receipt of the Summons, Movant is directed to serve the Summons and the Pleading on Debtor and his bankruptcy counsel as provided for in the Federal Rules of Bankruptcy Procedure, and to file her certificate of service with the Clerk's office.

2. Proof of Claim.

[8] If Movant is unable to pay the filing fee, she may submit a motion to proceed *in forma pauperis*, which requires her to demonstrate an inability to pay the fee.

It appears from the record that Movant failed to file a formal proof of claim. At the November 3, 2016 hearing, Movant explained to the Court's satisfaction her mistaken belief that a hearing and ruling on her Pleading would occur in advance of the claims filing deadline, thus making the filing of a formal proof of claim not necessary.[9]

Although the Court cannot waive or alter the claims filing deadlines in a Chapter 13 case,[10] when there is evidence in the record that a creditor has affirmatively acted to alert other parties to the presence of its claim, the Court can recognize the action or pleading as an informal proof of claim. *See Davis v. Columbia Constr. Co., Inc.* (*In re Davis*), 936 F.2d 771 (4th Cir. 1991); *In re Elleco, Inc.*, 295 B.R. 797 (Bankr. D.S.C. 2002). When deciding whether to permit an informal proof of claim, the Court evaluates the facts before it on a case-by-case basis to determine whether the creditor has met two requirements: "(1) an affirmative act that puts the court and other parties on notice of an assertion of a specific claim and (2) possession of an intent to collect the claim." *In re Silas*, Case No. 02-02956-jw, slip op. at 3 (Bankr. D.S.C. May 10, 2006). If the creditor satisfies these two requirements, the Court must then determine any potential adverse impact that allowing the claim might impose on the debtor, other creditors, the trustee, and the general public. *Id.; see In re Hargrave*, 1995 WL 371462 at *3 (4th Cir. 1995).

In this case, it is abundantly clear from the Pleading and her arguments to the Court that Movant is asserting claims against Debtor arising out of the Family Court Order. It is also clear

[9] The initial hearing on the Pleading was held on the morning of October 6, 2016; however, due to confusion surrounding court closures for Hurricane Matthew, Movant did not appear to prosecute the Pleading. On October 6, 2016, Movant filed a "Motion to Reopen Hearing," explaining her confusion regarding the storm closings. A hearing on Movant's Motion to Reopen was scheduled for October 20, 2016, however, at the hearing it was determined that the new counsel for Debtor, Mr. Stone, had also consulted with the Movant, which caused a conflict of interest. The hearing on the Motion to Reopen was continued beyond October 20, 2016, to allow Debtor to obtain new counsel.

[10] *See In re Hargrave*, 1995 WL 371462 at *2 (4th Cir. 1995) ("A court will not recognize a late proof of claim [in a Chapter 13 case] even if there was a good reason for the untimely filing.").

that Movant possesses the intent to collect the claims. Therefore, the first two requirements are met in this case.

On the issue of the potential adverse impact that allowing Movant's informal proof of claim might have, a review of the record satisfies the Court that allowing the claims will not result in an adverse impact on the Trustee, other creditors, or the public. The Plan was confirmed relatively recently; therefore, the Trustee has made few disbursements to creditors. It appears that at the time of confirmation, Debtor considered the Plan to provide for Movant's claim as a general unsecured claim, and therefore contemplated a distribution to Movant. Since the Plan is only a 36 month plan and does not provide for 100% distribution, the Debtor is not prejudiced by including Movant because the funds would go to other creditors in that class if not paid to Movant.

Based on the foregoing facts, the Court finds that the Pleading qualifies as an informal proof of claim, and will treat it as such. Further, because the Pleading was filed well in advance of the October 11, 2016 claims bar date, the informal proof of claim is timely.

3. Binding effect of the Plan.

A confirmed chapter 13 plan is effective upon confirmation, and is binding on creditors, "whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." 11 U.S.C. § 1327(a) (2016);[11] *see United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 264 (2010); *In re Durham*, 260 B.R. 383, 396 (Bankr. D.S.C. 2001); *Russo-Chestnut v. Wells Fargo Home Mortgage* (*In re Russo-Chestnut*), Adv. Pro. No. 14-80064-jw, slip op. at 11 (Bankr. D.S.C. October 28, 2014).

[11] Hereinafter, all references to provisions under the United States Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.* (2016), shall be by section number only.

Creditors with notice of a plan who fail to object to their treatment generally are barred from later challenging the plan. 11 U.S.C. § 1327 (2016); *Russo-Chestnut*, *supra* at 11. However, when it appears from the facts that notice to a creditor was inadequate, the preclusive effect given to a confirmed plan by the Code must yield to the even stronger constitutional demands of due process. *See In re Durham*, 260 B.R. at 387 (the pivotal issue when determining whether a confirmed plan is binding is whether the creditor received adequate notice that its rights would be modified by the plan's treatment of its claim); *In re Cumbee*, Case No. 13-07634-jw, slip op at 5-7 (Bankr. D.S.C. July 14, 2014); *see generally Mullane v. Central Hanover Bank & Tr.*, 339 U.S. 306, 314 (1950) (To meet the requirements of due process, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."). In the Court's view, a creditor should not have to review the schedules and statement of affairs filed by a debtor in order to determine the intended classification and treatment under a chapter 13 plan. To meet due process requirements, a debtor's plan should clearly indicate a claim's treatment in order to trigger a claimant's duty to object if she disagrees with the treatment.

In addition to the notice issues, Movant asserts that her inability to timely object to the Plan was attributable to Debtor's prepetition failure to pay the attorney's fees which are the subject of a portion of her claims. Debtor's failure to pay Movant's attorney's fees as ordered by the Family Court caused Movant's family court attorney to decline to consult further with her regarding her claims against Debtor in this case.

A review of the Family Court Order indicates that equitable division and property issues were settled at mediation, while other issues related to child custody, child support, children's medical debts, and related domestic support obligations were addressed in the trial before the

Family Court. Even a cursory review of the Family Court Order indicates that at least some portion of the attorney's fees the Family Court awarded to Movant are directly related and attributable to the determination of the domestic support obligation. The law is clear that when deciding how to characterize a family court's fee award, this Court must consider, "the function served by the obligation," and view "the nature of the underlying litigation [as] dominat[ing] the examination of a fee award's nature." *Baker v. Baker* (*In re Baker*), Adv. Pro. No. 00-800480-jw, Case No. 99-10575-jw, slip op. at 22 (Banker. D.S.C. October 13, 2000). Therefore, attorney's fees incurred in pursuing domestic support would have the domestic support characterization, and be subject to such treatment under the Plan (nondischargeable and priority). A fair viewing of the Family Court Order makes it difficult for the Court to accept Debtor's position that all of the attorney's fees are related to property determinations and therefore would be properly characterized and treated as general unsecured claims.

This Court has an affirmative "obligation—to direct a debtor to conform his plan to the requirements of [the Code]," which includes ensuring that confirmation and due process requirements are satisfied. *Espinosa*, 559 U.S. at 277. One of the Code's clear requirements is that a creditor with a domestic support claim enjoy first priority status. 11 U.S.C. § 507(a)(1)(A) (2016). And, § 1322(a)(2) provides that a plan, "shall provide for the full payment . . . of all claims entitled to priority under § 507 of this title, unless the holder of a particular claim agrees to different treatment of such claim."

Based on the facts before it, the Court questions whether the Plan provided Movant with sufficient notice that Debtor intended to treat the claims awarded in the Family Court Order as general unsecured claims. While Debtor argues that Movant had notice of the Plan and failed to object to his "treatment" of her claims, it is axiomatic that before a claimant can be said to have

agreed to different treatment, the claimant must be given adequate notice that the debtor seeks to impose different treatment than that expressly required by the Code. *See Mullane*, 339 U.S. at 314; *In re Durham*, 260 B.R. at 387. The Plan, which appears silent regarding the "treatment" of the obligations owed to Movant, is deficient in this regard.

According to *Espinosa* and *Tylor v. Freeland & Kronz*,[12] one means of ensuring proper claim treatment in a Chapter 13 plan is to determine whether the improper claim treatment constitutes bad-faith litigation tactics. *See Espinosa*, 559 U.S. at 278. The Supreme Court made it clear that such tactics may be addressed in various methods, including using § 105 or Bankruptcy Rule 9011. *Id.* at 278-79.

Section 105 provides that:

> [t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105.

Bankruptcy Rule 9011(b) provides that the signing and filing of the Plan[13] is a certification to the Court that the Plan "is not being presented for any improper purpose . . . [and the] factual contentions [in the Plan] have evidentiary support . . . ." Bankr. R. 9011(b)(1) and (3).[14] While Debtor was represented in his case by counsel, who signed the Plan, the Debtor also signed the Plan. This Court has the authority under Bankruptcy Rule 9011 to sanction either

[12] 503 U.S. 638 (1992).

[13] In this case, Debtor's Plan is "an other paper" contemplated by Bankruptcy Rule 9011.

[14] *See In re Kersner*, 412 B.R. 733, 473 (Bankr. D. Md. 2009) ("Improper conduct may . . . include a variety of behavior. 'To harass or to cause unnecessary delay or needless increase in the cost of litigation' are merely examples provided in the rule.") (internal citation omitted).

an attorney, or the client, or both, for a violation of Bankruptcy Rule 9011. *In re Kilgore*, 253 B.R. 179, 187 (Bankr. D.S.C. 2000) (sanctioning a represented party even though the party had not signed the document offered to the Court). In this case, in which both counsel and the Debtor signed the Plan, Bankruptcy Rule 9011 is undoubtedly available to enable the Court address its concerns regarding the Plan. Fed. R. Bankr. P. 9011(c)(1)(B); *see also In re Kilgore*, 253 B.R. at 179; *White v. Creditor's Serv. Corp.* (*In re Creditors Serv. Corp.*), 207 B.R. 567, 570 (Bankr. S.D. Ohio 1997) ("Sanctions can be levied on the attorney as the signer of the pleading, the client as the catalyst behind the pleading, or both, based on the allocation of appropriate culpability."); *Home Savings Assoc. v. Woodstock Assoc. I, Inc.* (*In re Woodstock Assoc. I, Inc.*), 121 B.R. 238, 243 (Bankr. N.D. Ill. 1990) ("Generally, sanctions fall wholly on the client when he has misled his attorney as to the facts or purpose of the proceeding . . . . When an attorney and client share responsibility for litigation strategy and such strategy violates Rule 11, courts can impose joint and several liability.").

Conclusion

Having determined that the Plan may have violated Bankruptcy Rule 9011, the Court will issue its order requiring the Debtor to appear and show cause why he should not be sanctioned. In addition, it appears that a hearing to consider arguments on the relief requested by Movant is warranted, and that an interim order related to distributions under the Plan would be proper. For the reasons cited herein, it is therefore,

ORDERED that further distributions under the Plan by the Trustee are immediately stayed. Any funds received by the Trustee on or after the date of this Order are to be held in trust and not distributed until further Order of the Court. **The Court's order that the**

Trustee stay of distributions does not relieve the Debtor of his continuing obligation to make payments to the Trustee pursuant to the Plan. It is further,

ORDERED that a hearing on Movant's Pleading, including the Motion to Revoke Confirmation, Motion to Convert, and a status hearing on the Complaint to Challenge Dischargeability of Certain Debts, is scheduled for **January 26, 2017 at 10:00 a.m.,** in Columbia, SC. It is further,

ORDERED that the Debtor Ryan Todd Gilbert shall appear before this Court on for **January 26, 2017 at 10:00 a.m.,** in Columbia, SC, to show cause why the treatment of Movant's claim under the circumstances of this case should not be considered bad-faith litigation tactics, for which sanctions should be entered.

Any response to the Rule shall be filed and served on Movant on or before January 16, 2017.

The Clerk of Court shall serve this Order on Debtor, Movant, Trustee, and all creditors and parties in interest, within two (2) days of its filing.

AND IT IS SO ORDERED.