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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
May 4, 2007
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE SNOWVILLE FARMS, LLC, Debtor.	BAP No. UT-06-034
SNOWVILLE FARMS, LLC and GEORGE B. LOVE, Appellants, v. BARNES BANKING COMPANY, LIFE INVESTORS INSURANCE COMPANY OF AMERICA, AEGON USA REALTY ADVISORS, INC., and WHEATLAND SEED, Appellees.	Bankr. No. 04T-36559 Chapter 11 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Utah

Before NUGENT, McNIFF, and BERGER[1], Bankruptcy Judges.

BERGER, Bankruptcy Judge.

Snowville Farms, LLC, and George B. Love (collectively "Snowville")[2]

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[1] Honorable Robert D. Berger, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Kansas, sitting by designation.

[2] Snowville Farms, LLC, was a debtor business entity controlled by co-appellant George B. Love. In addition to these two debtors, the post-confirmation

(continued...)

appeal from an order entered by the United States Bankruptcy Court for the District of Utah denying Snowville's request under 11 U.S.C. §1142(b) to compel its creditors, Barnes Banking Company ("Barnes") and Life Investors Insurance Company of America/Aegon USA Realty Advisors, Inc. ("LIICOA"), to execute lien waivers in order to facilitate Snowville obtaining a loan so it could carry out the terms of its confirmed plan. For the reasons set forth below, the decision of the bankruptcy court is AFFIRMED.

I. BACKGROUND

Snowville owned and operated two wheat and safflower farms. Barnes and LIICOA were its two largest secured creditors. Barnes held a first priority lien on Snowville's crops, inventory, and equipment. Barnes valued its lien at $673,950 plus accrued interest, fees, and costs at confirmation. LIICOA held a first priority lien on Snowville's farmland and second priority lien on Snowville's crops. LIICOA's total mortgage claim at confirmation was approximately $7,011,911. LIICOA subordinated its crop lien to Barnes pursuant to a pre-petition Subordination and Intercreditor Agreement.

On December 19, 2005, the bankruptcy court confirmed Snowville's plan of reorganization, allowing Snowville to continue its farming business. The plan required Snowville to pay Barnes $550,000 by December 31, 2005, out of the "proceeds of sale of the year 2005 crops, from the proceeds of any [Farm Service Agency] loans, and any drought relief funds . . . ."[3] The plan required Snowville to pay LIICOA the first installment of $320,000 on its debt by January 20, 2006.

Snowville failed to make either of these payments because it did not sell

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[2] (...continued)
reorganized debtors include the following substantively consolidated affiliates: George Love Farming, LC; George Love Farming Partnership; and George Love Family Partnership.

[3] Joint Plan of Reorganization at 23, *in* Appellants' Appendix at 69.

enough crops to generate the funds needed. Instead, Snowville decided to fund the plan payments with a loan. Farm Service Agency ("FSA") of the U.S. Department of Agriculture provides loans to farmers secured by harvested-but-yet-unsold crops through the Commodity Credit Corporation ("CCC"). The purpose of the loan program is to allow farmers to obtain cash for crops immediately rather than wait for a crop purchaser to receive and pay for the crops. According to the loan documents, FSA loans must be secured by crops pledged free and clear of all liens. Thus, Snowville could not obtain an FSA loan unless Barnes and LIICOA agreed to release, or at least subordinate, their crop liens to FSA.

Between the December 19 confirmation date and the December 31 payment due date, Snowville requested Barnes sign a lien waiver so it could obtain a $380,000 FSA loan (representing half the pledged crop's value) to apply toward Barnes's $550,000 payment. Prior to plan confirmation, Snowville did not request either Barnes or LIICOA execute an FSA lien waiver; however, Snowville contends both creditors were aware of the lien waiver requirement because the FSA loan requirements were a topic of testimony at a May 18, 2005, hearing which both Barnes and LIICOA attended.

Barnes refused to sign the lien waiver because the FSA lien waiver form was ambiguous and could have been interpreted to mean Barnes waived its lien entirely rather than merely subordinated it to FSA. Further, Barnes feared executing the lien wavier would breach the Intercreditor Agreement with LIICOA because of LIICOA's junior crop lien. Lastly, Barnes did not believe it should have to subordinate its first priority lien rights in return for only $380,000 plus a promise to receive the balance at some unknown time when the plan provided for a $550,000 payment on December 31, 2005. Snowville paid Barnes $70,000 toward the $550,000 in late January but has since made no more payments.

As the January 20, 2006, payment date approached for LIICOA, Snowville

again requested a lien waiver from Barnes. This time, Snowville requested the first $320,000 of the $380,000 FSA loan be applied to LIICOA in order to prevent a default under the mortgage. Barnes was apparently willing to work with Snowville in order to protect its crop lien and avoid foreclosure of the farm by LIICOA; however, Barnes insisted LIICOA also sign a lien waiver. LIICOA refused.

Snowville filed a motion for order enforcing the plan pursuant to 11 U.S.C. §1142(b), arguing that because the FSA loan was contemplated in the confirmed plan, Barnes and LIICOA were breaching the plan by refusing to execute the lien waivers. The plan provided in pertinent part:

> The allowed claim of Barnes Banking Company ("Barnes") will continue to be secured as described in paragraph 5.3.2 and in addition with first priority lien on any property purchased with cash collateral of Barnes including but not limited to the grain/seed cleaning machine; this claim shall be paid $550,000 out of the proceeds of sale of the year 2005 crops, **from the proceeds of any FSA loans,** and any drought relief funds on or before December 31, 2005, and shall be paid an additional $200,000 out of the sale of the year 2006 crops . . . .[4]

This is the only reference to an FSA loan in the plan. However, the plan also specifically incorporated an April 21, 2005, cash collateral stipulation between Snowville and Barnes. The stipulation acknowledged that Snowville could request Barnes's assistance in acquiring an FSA loan in the future, but explicitly provided that Barnes was not required to consent.[5]

The bankruptcy court denied the motion to enforce because the plan did not mention that either Barnes or LIICOA would need to subordinate, release or waive their liens. Additionally, the bankruptcy court found that even if LIICOA and Barnes had executed lien waivers, Snowville would not have been able to

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[4] Joint Plan of Reorganization at 22-23, *in* Appellants' Appendix at 68-69.

[5] Snowville first tried to get approval for an FSA loan during the May 18, 2005, hearing, but the bankruptcy court denied the request.

make the required plan payments with only $380,000 in loan proceeds without further concessions from Barnes and LIICOA for deferred payments. Thus, the court found Snowville, and not Barnes or LIICOA, had breached the plan.

After the motion to enforce was denied, Snowville pursued this appeal but did not request a stay or an expedited review of the decision. Rather, in March 2006, another Love entity filed a Chapter 7 petition to stop LIICOA's foreclosure on the farms. The Chapter 7 debtor owned 25% of the farms. In August 2006, Snowville cooperated with the Chapter 7 trustee to facilitate the sale of one of Snowville's farms. The Chapter 7 trustee is marketing the other farm, again, with Snowville's cooperation. The second farm is apparently under contract.[6]

II. JURISDICTION

Snowville timely filed its Notice of Appeal and no party elected to have the appeal heard by the United States District Court for the District of Utah.[7] If the appeal is not otherwise moot, we have jurisdiction to decide it.

III. STANDARD OF REVIEW

The Court reviews the bankruptcy court's findings of fact for clear error and reviews its conclusions of law *de novo*.[8] Questions as to the ambiguity of a confirmed plan are reviewed *de novo*; however, interpretation of a confirmed plan based upon the record, testimony, or other extrinsic evidence is reviewed for clear error.[9]

IV. DISCUSSION

Shortly before oral argument, LIICOA challenged whether the appeal had

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[6] The representation was made during oral argument on January 23, 2007.

[7] 28 U.S.C. § 158(a)(1), (b)-(c); Fed. R. Bankr. P. 8001(a) & (e); Fed. R. Bankr. P. 8002(a); 10th Cir. BAP L.R. 8001-1.

[8] *In re Schneider*, 864 F.2d 683, 685 (10th Cir. 1988); *Clark v. Sec. Pac. Bus. Credit, Inc. (In re Wes Dor, Inc.)*, 996 F.2d 237, 241 (10th Cir. 1993).

[9] *In re K.D. Co., Inc.*, 254 B.R. 480, 488 (10th Cir. BAP 2000).

become moot because of the sale of the farms. This Court must determine *sua sponte* whether the appeal is moot as a result of subsequent events.[10] A matter is moot if the issues presented are no longer viable, and the court is unable to render effective relief or restore the parties to their original position.[11]

Authority for equitable mootness states failure to obtain a stay pending appeal renders the case moot because action taken in reliance on the lower court's decree cannot be reversed. For example, when a trustee has already sold assets to third parties, a court may be powerless to undo what has been done.[12] If an event occurs while an appeal is pending which makes it impossible for the court to render any effective relief to the prevailing party, the appeal is moot and must be dismissed. On the other hand, while the court may not be able to return the parties to their *status quo ante*, an appeal is not moot if the court can fashion some type of meaningful relief. The party asserting mootness has a heavy burden to establish there is no effective relief remaining for a court to provide.

Snowville argues effective relief is available if this Court reverses the bankruptcy court's finding that Barnes and LIICOA did not breach the plan. If Snowville prevails on appeal, and the bankruptcy court is found to have erred in holding Barnes and LIICOA did not have to execute lien waivers, then, Snowville argues, it may pursue breach of plan damages.

Section 1142 is but one avenue for pursuing relief for a reorganization plan's failure. The debtor may seek contract damages.[13] Snowville elected to

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[10] *Id.* at 486.

[11] *Id.; In re Wedel*, 107 F. App'x 824 (10th Cir. 2004).

[12] *Out of Line Sports, Inc. v. Rollerblade, Inc.*, 213 F.3d 500, 501-02 (10th Cir. 2000).

[13] *See, e.g., Paul v. Monts*, 906 F.2d 1468, 1475-76 (10th Cir. 1990) (Chapter 7 trustee could sue for breach of contract claims after failed reorganization plan).

pursue specific performance. However, by putting another entity in Chapter 7 bankruptcy, selling one of its farms, and allowing the other farm to be placed under contract, Snowville has effectively abandoned its plan. Plan enforcement under 11 U.S.C. §1142, the subject of the appeal, is no longer available. The passage of time and change of circumstances brought about by Snowville's own decisions have closed this door. The appeal is moot, but even if this Court could fashion an alternative remedy, it would not do so because the bankruptcy court correctly found that Barnes and LIICOA did not breach the plan.

The bankruptcy court correctly denied the motion to enforce because the confirmed plan did not require Barnes and LIICOA to release, waive, or subordinate their loans to the FSA. The bankruptcy court found that because the plan did not contain these requirements, Barnes and LIICOA did not breach any provisions of the confirmed plan and, thus, could not be compelled to execute the lien waiver.

The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.[14] "[T]he court should refrain from issuing orders directing third parties to take action unless the action is directly called for by the terms of the plan or is necessary to allow the plan to be implemented. Nor should a party be required to execute an agreement unless the significant terms of the agreement have been set forth in the plan."[15] Section 1142(b) does not confer substantive rights, but it

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[14] 11 U.S.C. §1142(b).

[15] 8 *Collier on Bankruptcy* ¶ 1142.03[2], at 1142-6 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2006) (citing *In re Modern Steel Treating Co.*, 130 B.R. 60, 65 (Bankr. N.D. Ill. 1991), *aff'd*, No. 91 C 5747, U.S. Dist. LEXIS 5118 (N.D. Ill. April 1, 1992)).

allows the bankruptcy court to enforce unperformed terms of a confirmed plan.[16] The court cannot compel the execution of a document if there is no agreement on the terms or if the terms are uncertain.[17] As in contract interpretation, the court cannot supply terms or create an obligation which does not exist under the plan itself.[18] Section 1142(b) provides courts with authority to direct action only if the plan "so requires and . . . properly sets forth the agreement of the parties."[19]

In this case, Snowville did not carry its burden. Here, the plan makes an offhand reference to an FSA loan without reference to any requirement that either Barnes or LIICOA would be required to participate in Snowville's obtaining the loan. In fact, because the plan expressly incorporated and preserved the cash collateral stipulation, Barnes explicitly bargained for the right to refuse to assist with the FSA loan application. Snowville's argument that Barnes and LIICOA were nonetheless on notice of FSA loan requirements cuts both ways. If the FSA loan was as integral to the plan as Snowville claims, Snowville, knowing full well an FSA loan required a lien release, should have provided for the lien release in its plan. Without an express condition that Barnes and LIICOA must execute lien waivers, the bankruptcy court did not have a provision in the plan to enforce.

Further, the bankruptcy court correctly found Snowville breached the agreement by failing to make the payments and being unable to make the

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[16] *In re U.S. Brass Corp.*, 301 F.3d 296, 306 (5th Cir. 2002) (refusing to force claimants to arbitrate their claims when the plan contemplated they would be litigated).

[17] *In re Modern Steel Treating Co.*, 130 B.R. at 65, *aff'd*, No. 91 C 5747, U.S. Dist. LEXIS 5118 (N.D. Ill. April 1, 1992).

[18] *Vill. of Rosemont v. Jaffe (In re Emerald Casino, Inc.)*, 334 B.R. 378, 387 (N.D. Ill. 2005), *aff'd*, No. 05-4558, 2007 U.S. App. LEXIS 7600 (7th Cir. April 3, 2007).

[19] *Official Unsecured Creditors' Comm. of Erie Hilton Joint Venture v. Siskind (In re Erie Hilton Joint Venture)*, 137 B.R. 165, 170 (Bankr. W.D. Pa. 1992).

payments even with the FSA loan. The FSA loan proceeds would not have satisfied the required plan payments. Even if the bankruptcy court could have ordered execution of the lien waivers, Snowville stood to gain only $380,000, when it needed a total of $870,000 to comply with the plan. Thus, failure to obtain the lien waivers would not have implemented the plan without further concessions by Barnes and LIICOA, which were clearly not provided for in the plan.

V. CONCLUSION

For the reasons stated herein, the decision of the bankruptcy court denying the motion to enforce is AFFIRMED.