11 USC §109(e)
Liquidated
Contingent

In re Nickens

Case No. 394-30882-hlh13 94-1249 11-2-94 (EOD 11-3-94)

Reversing HLH

US District Court judge Malcolm Marsh reversed Judge Hess's oral ruling that the chapter 13 debtor was eligible under §109(e). The creditor seeking to dismiss the bankruptcy case argued that it lost $510,597 as a result of a breach of a lease by a corporation in which the debtor was an officer. Before the corporation defaulted under the lease, the debtor and another officer withdrew $117,000 and $80,000, respectively.

Before the debtor filed for relief, the creditor/lessor filed an action in state court seeking a judgment against the debtor and the other officer. The creditor/lessor argued that the withdrawals by the officers caused the subsequent lease default.

Once the debtor filed for relief, the action against him was stayed and the state case proceeded to trial against the other officer. Ultimately, the state court rendered a judgment against the officer for $80,000.

The creditor/lessor argued to the bankruptcy court that the debtor was not eligible since the $117,000 claim against him was liquidated. The debtor argued that, under the rationale expressed in In re Hustwaite, the claim was not liquidated since it would require an evidentiary hearing to determine whether, and in what amount, the debtor was liable for. The court noted that the state court proceeding had not been concluded against the debtor. Since there was a bona fide dispute as to liability and possibly even such a dispute as to the amount of the claim, if any, the bankruptcy court held that the claim was unliquidated on the date the petition was filed. Thus, the court denied the creditor's motion to dismiss.

On appeal, Judge Marsh held that the amount of the debt was liquidated because the amount was readily ascertainable and an "extensive evidentiary hearing" was not needed in light of the state court's findings in the creditor/lessor's case against the other officer. Judge Marsh wrote that the creditor/lessor's debt "may be readily ascertained based upon the record ... ."

Finally, Judge Marsh held that the debtor was not eligible for relief and "granted" the creditor's "notice of appeal" and "reversed" the bankruptcy "decision."

P94- _____

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In re:	
LOWELL NICKENS and VICKIE NICKENS,	Civil No. 94-1249 Case No. 394-30882-H13
Debtors.	OPINION

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MARSH, Judge.

This is a bankruptcy proceeding wherein a creditor contests the Bankruptcy Court's denial of its motion to dismiss the debtor's Chapter 13 bankruptcy. Appellant, Klokke Corporation, contends that the debtors are ineligible for Chapter 13 protection because their unsecured, liquidated, noncontingent liabilities

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(40)

exceed $100,000 in violation of 11 U.S.C. § 109(e). Following a hearing before United States Bankruptcy Judge Henry L. Hess, the court denied Klokke's motion to dismiss and this appeal followed. This court has jurisdiction to consider this appeal pursuant to 28 U.S.C. § 158. For the reasons which follow, the Bankruptcy Court's denial of Klokke's motion to dismiss is reversed.

BACKGROUND

The facts are undisputed. Klokke Corporation is a commercial landlord which entered into a ten year lease with Classic Expositions, Inc. (Classic), an Oregon corporation, in July of 1990. The debtor, Lowell Nickens is the majority shareholder and president of Classic. In November of 1991, Classic defaulted on its rent obligations, but later cured. However, Classic defaulted on its obligation to pay property taxes at this time. In April of 1992, Classic again defaulted on its rent payment and was removed from the property through state proceedings.

Subsequently, Klokke filed an action in Washington County Circuit Court against Classic, Nickens and Floyd Hambleton, another corporate officer, alleging that Nickens and Hambleton had engaged in misconduct and depleted the assets of the corporation rendering it insolvent and unable to pay its rent. In October of 1991, just prior to the first default, Nickens withdrew $117,000 to pay his personal taxes and Hambleton withdrew $80,00 for payment of a promissory note. The parties stipulated that the total loss sustained due to breach of the lease was $510,597.48. This figure does not include $13,472.64 plus 12% interest for a

limited guarantee executed by Lowell and Vickie Nickens.

Two days prior to trial, the case against Nickens was stayed by the filing of the instant bankruptcy petition. The case proceeded to trial against Hambleton and on February 23, 1994, Circuit Court Judge Mark Gardner issued detailed findings and conclusions. Judge Gardner found that Hambleton exercised control over the corporation and that his $80,000 withdrawal in October of 1991 was improper and a cause of the loss suffered by Klokke. Based upon these findings, Judge Gardner entered a judgment for Klokke for $80,000.

On April 28, 1994, Klokke filed a motion to dismiss the Nickens' Chapter 13 petition arguing that its claim against Lowell Nickens for $510,597.48 plus the $13,472.64 owing on the guarantee rendered the Nickens ineligible for Chapter 13 filing status. Nickens objected, arguing that the $510,597.48 portion of the claim was unliquidated and therefore properly excludable from amounts used to calculate eligibility. Nickens also disputed that the $117,000 transfer was improper, arguing that the amount represented a salary bonus. On June 24, Judge Hess signed an order denying Klokke's motion to dismiss.

STANDARD

A bankruptcy court's conclusions of law are reviewed de novo. In Re Lockard, 884 F.2d 1171, 1174 (9th Cir. 1989). The meaning of the terms "contingent" and "unliquidated" as used in 11 U.S.C. § 109(e) is a conclusion of law and thus, is subject to de novo review. In Re Loya, 123 B. R. 338 (9th Cir. BAP 1991).

DISCUSSION

Chapter 13 of the Bankruptcy Code was enacted to provide individual debtors with a reorganization alternative to a liquidation of assets under Chapter 7. In Re Madison, 168 F.R. 986, 987 (D. Hawaii 1994). However, relief under Chapter 13 is limited to individuals who satisfy criteria set forth at 11 U.S.C. § 109(e):

> "Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000 . . . may be a debtor under Chapter 13 of this title."

Klokke's claim is an unsecured debt. Therefore, the issue is whether its claim of direct shareholder liability under the corporate lease is "liquidated," and "noncontingent."

On June 21, 1994, the parties appeared before Judge Hess for argument on Klokke's motion to dismiss. Judge Hess expressed concerns over whether Klokke could legally maintain an action against a shareholder of a corporation for a debt of the corporation[1] and rejected Klokke's motion to dismiss, finding that

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[1] Unfortunately, Judge Hess found Klokke's citations to the case of Amfac Foods v. Int'l Systems, 294 Or. 94 (1982) unconvincing. Amfac does in fact hold that a creditor may bring an action directly against a corporate shareholder and may recover misappropriated funds if it can establish that the shareholder controlled the corporation, engaged in misconduct and that the misconduct caused the injury in question. See also, Stirling-Wanner v. Pocket Novels, Inc., 129 Or. App. 337, 341, rev. denied, 315 Or. 442 (1994); Alexander v. U.S. Tank & Const. Co., Inc., 114 Or. App. 266, 268-69 (1992), rev. denied, 315 Or. 442 (1993); and Salem Tent & Awning Co. v. Schmidt, 79 Or. App. 475 (1986).

Although the Amfac theory of recovery differs somewhat from a statutory fraudulent conveyance theory, see Amfac, 294 Or. at 101, n.8, I note that in fraudulent conveyance actions filed under

the claim was unliquidated because liability would require an evidentiary hearing.

The parties agree that resolution of this dispute turns upon the resolution of a split of authority. In making his decision, Judge Hess relied upon two of his own prior decisions, In Re King, 9 B.R. 376 (D. Or. 1981) and In Re Hustwaite, 136 B.R. 853 (D. Or. 1991) and expressly rejected citations to Ninth Circuit Bankruptcy Appellate Panel decisions to the contrary, e.g. In Re Sylvester, 19 B.R. 671 (9th Cir. BAP 1982).[2] Judge Hess correctly noted that BAP decisions are non-binding. In Re Lamar, 111 B.R. 327, 329 (D. Nev. 1990). However, they are "persuasive." Id.

In King, three creditors filed objections to a chapter 13 petition based on state fraud claims filed previously against the debtor seeking compensatory and punitive damages totalling over $300,000. King, 9 B.R. at 379. Judge Hess rejected these objections finding that the existence of a "substantial dispute" between the creditors and the debtor as to both liability and the amounts owing rendered the claims unliquidated. Id. at 378. The court noted that its finding was based upon the absence of any evidence proffered by either party as to the merits of the underlying claims. Id. In making this determination, the court defined the terms "contingent" and "liquidated" as follows:

O.R.S. 95.200, the transferee of the conveyance is considered a "necessary party," whereas the transferor is not. Creditor's Rights & Remedies, § 9.11 (Oregon CLE 1990).

[2] In Sylvester, the BAP expressly rejected Judge Hess' analysis in King. Sylvester, 19 B.R. at 674-75.

"Whether a claim is contingent deals with the certainty of the liability. Whether a claim is liquidated involves whether the amount due can be determined with sufficient precision."

Id.

In Hustwaite, the creditor argued that a disputed $159,000 claim for medical expenses stemming from a sexual abuse claim rendered the debtor ineligible for chapter 13 protection. Hustwaite, 136 B.R. 854. Judge Hess noted the substantial delay that would be caused if the bankruptcy court had to determine liability, and thus rejected the creditor's claim on the basis that liability could not be established "without the need for an evidentiary hearing." Id. at 855.

In Sylvester, the bankruptcy court granted a creditor's motion to dismiss and the debtor appealed, contending that a contract claim against him was subject to affirmative defenses and offsets. The court rejected the King decision's definition of the term "liquidated" claim finding it confused the term with a "disputed" claim which is properly included in a § 109(e) determination. According to Sylvester, the terms "disputed, contingent and unliquidated have different meanings," and thus, a disputed claim may nevertheless be "liquidated" for purposes of § 109(e) where the amount of the claim is "readily ascertainable" such as in the case of a contract debt. Sylvester, 19 B.R. at 673; see also In Re Fostvedt, 823 F.2d 305, 306 (9th Cir. 1987) (adopting

Sylvester's definition of term 'liquidated').[3] Based on this assessment, the court affirmed the bankruptcy court's dismissal of the debtor's chapter 13. Sylvester, 19 B.R. at 673.

Other courts have similarly rejected the King approach on the basis that it relies too heavily upon the debtor's characterization of his debt. See e.g. Madison, 168 B.R. at 989; and In Re Claypool, 142 B.R. 753, 755 (Bankr. E.D. Va. 1990) (disputed claims must be included under 109(e) or debtors would be able to bootstrap themselves into chapter 13 eligibility simply by disputing liability). In In Re Pennypacker, 115 F.R. 504, 506-07 (E.D. Penn. 1990), the court agreed with Judge Hess that it would pose an unfair burden and undue delay to require a bankruptcy court to decide disputed debts, but chose to err on the side of including such disputed debts in the § 109(e) determination to avoid undue reliance on the debtor's characterization of the debt.

While Sylvester focused on the term "liquidated," other courts have also expressed views divergent from those in King regarding the term "contingent." In Fostvedt, the Ninth Circuit defined a "contingent" debt as "one to which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability of the debtor to the alleged creditor." Fostvedt, 823 F.2d at 306; see also Loya, 123 B.R. at 340. One court explained that the "classic example" of a contingent debt is a guaranty since liability on the guaranty will

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[3] However, the court specifically declined to address the question of whether a "dispute" rendered a claim "unliquidated" or "noncontingent." Fostvedt, 823 F.2d at 306.

not attach until the principal defaults. Pennypacker, 115 B.R. at 507. In Loya, the court held that malpractice claims against a debtor, although disputed, were nevertheless non-contingent because "the advice that gave rise to these claims has already been given and acted upon." Loya, 123 B.R. at 340.

Finally, Judge Hess' view expressed in Hustwaite that the need for an evidentiary hearing of any kind would render a claim unliquidated has not been adopted by other courts. In In Re Wenberg, 94 B.R. 631 (9th Cir. BAP 1988), aff'd, 902 F.2d 768 (9th Cir. 1990), the court provided that the judge should consider whether an evidentiary hearing would be extensive as a factor relevant to determining whether the claim would be subject to a bona fide dispute and thus, not subject to "ready determination." Id. at 634. The Wenberg court also clarified Sylvester's reference to "contract" debts and noted that 109(e) should not categorically exclude other types of claims that may require some form of evidentiary hearing but are nevertheless able to meet the "ready determination" test. Id. See also Pennypacker, 115 B.R. at 507 (discussing debts of a "contractual nature").

Based upon my review of these decisions, I find Pennypacker the closest to this case factually and further, I agree with the court's analysis of the law under 109(e) and find it to be a concise and consistent summary of the law as it has been stated by the Ninth Circuit in Fostvedt and the Ninth Circuit BAP in Sylvester and Wenberg. Under Pennypacker, a contingent debt is one which involves no liability until the occurrence of a

condition precedent such as a default triggering a guaranty obligation. In contrast, a disputed debt is one in which liability is presumed unless cut off by a condition subsequent, such as a judgment for the debtor. Pennypacker, 115 B.R. at 507.

Next, a debt is "liquidated" if the amount of the claim is "readily ascertainable," either because it is of a "contractual nature," Id., or is otherwise subject to "ready determination." Fostvedt, 823 F.2d at 306.

Klokke's unsecured debt against Classic is for $510,597.48, and at least $117,000 of that represents an unsecured debt against the debtor. Although Klokke must resort to a piercing argument in order for liability to attach to the debtor, I find that the claim is nevertheless one of a contractual nature since it is premised upon a lease agreement.[4]

All conditions precedent to the creditor's claim have occurred since there is no dispute that Classic is in default, Nickens withdrew $117,000 shortly before the default, and according to Judge Gardner, Classic was unable to pay its lease obligations following the withdrawal of funds by Nickens and Hambleton. Thus, although Klokke's claim is disputed in that Nickens may raise affirmative defenses, the claim is nevertheless noncontingent because all actions necessary to support a prima facie claim have already occurred.

As for the question of whether the debt is liquidated, I find

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[4] I note that there is no dispute that the debtors' $13,472.64 guaranty is a noncontingent, liquidated claim.

that it is readily ascertainable at least to the extent of the $117,000 drawn on the corporate account by Nickens in October of 1991 and that this determination may be made in this case without the need for an extensive evidentiary hearing in light of Judge Gardner's already extensive factual findings. As the Ninth Circuit BAP noted in Wenberg, the determination of eligibility under § 109(e) is not intended to be a final determination on the merits of the claim as such final determinations are more appropriately addressed in separate, later proceedings such as those for allowance of claims under 11 U.S.C. § 502. Wenberg, 94 B.R. at 635.

Because I find that Klokke's debt may be readily ascertained based upon the record, I express no opinion as to the need for or requirement of an evidentiary hearing.

Based on the foregoing, I find that the bankruptcy court erred in denying the creditor's motion to dismiss because Klokke's debt qualifies as an unsecured, noncontingent, liquidated claim within the meaning of § 109(e) which then exceeds that maximum amount allowable for the debtors to maintain this proceeding under a chapter 13 reorganization. Accordingly, appellant's notice of appeal (#21) is GRANTED and the bankruptcy court's decision of June 24, 1994 is REVERSED.

DATED this 2 day of ~~October~~ Nov, 1994.

Malcolm F. Marsh
Malcolm F. Marsh
United States District Judge