Mitchell v. Billmeyer (In re CCC BES, Inc.), Civ. No. 92-1282-MA (D. Or. Jan. 5, 1993) (Marsh, D.J.)
unpublished affirming J. Perris

A creditor appealed a bankruptcy court order approving the compromise of several preference actions. The District Court held that the bankruptcy court may approve a compromise only if it is fair and equitable. In making that determination, the court must consider: (1) the probability of success in the litigation; (2) the difficulties, if any, to be encountered in collection; (3) the complexity, expense, inconvenience and delay attributable to the litigation; (4) the paramount interest of the creditors and a proper deference to their reasonable views. The bankruptcy court did not abuse its discretion in approving the compromise.

The creditor contended that the Notice of Intent to Settle was defective because it failed to specify all the reasons why the trustee believed settlement was fair and equitable. It is questionable whether the alleged technical defect in the notice could be grounds for reversal. In any event, the bankruptcy judge had cured any such defect by allowing the creditor additional time to prepare for the hearing after the creditor was completely apprised of the trustee's reasons for wanting to settle.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In re CCC BES, Inc., fka McLean Clinic, P.C., Debtor.	Bankruptcy No. 389-34026-S07 Civil No. 92-1282-MA
JOHN MITCHELL, Trustee, Plaintiff, v. DANIEL K. BILLMEYER, JOSEPH L. EMERICH, JACK L. CHITTY, RUDOLPH B. STEVENS, dba BECS Enterprises, Defendants.	Adversary No. 91-3489 OPINION
JOHN MITCHELL, Trustee, Plaintiff, v. RODNEY CONNOR, Defendant.	Adversary No. 91-3467

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(44)

JOHN MITCHELL, Trustee,

Plaintiff,

v.

RUDOLPH B. STEVENS,

Defendant.

Adversary No. 91-3466

JOHN MITCHELL, Trustee,

Plaintiff,

v.

LEE T. CORDOVA,

Defendant.

Adversary No. 91-3465

JOHN MITCHELL, Trustee,

Plaintiff,

v.

JACK L. CHITTY,

Defendant.

Adversary No. 91-3464

JOHN MITCHELL, Trustee,

Plaintiff,

v.

DANIEL K. BILLMEYER,

Defendant.

Adversary No. 91-3463

Bradley O. Baker
DUNN, CARNEY, etc.
Suite 1500
851 S.W. Sixth Avenue
Portland, OR 97204-1357

Attorneys for Plaintiff and Appellee John Mitchell

David R. Kluge
Suite 100
829 S.E. 182nd Avenue
Portland, OR 97233

Attorney for Appellant National Management Services, Inc.

MARSH, Judge.

The appellant National Management Services, Inc. ("NMS"), a claimant in the above-listed bankruptcy proceeding, brings this appeal challenging an order by the United States Bankruptcy Court for the District of Oregon approving the bankruptcy trustee's compromise and settlement of six preference claims. For the reasons stated below, the order of the Bankruptcy Court is AFFIRMED.

BACKGROUND

Each of the individual defendants listed in the adversary proceedings is a doctor and is or has been an officer, director and/or shareholder in the bankruptcy debtor. Defendant BECS Enterprises is a partnership composed of four of the individual defendants: Doctors Billmeyer, Emerich, Chitty and Stevens.

The day before filing its chapter 7 bankruptcy petition, the debtor made payments to the individual defendants as follows: $2,400 each to Doctors Billmeyer, Emerich, Chitty and Stevens, and $1,500 to Dr. Connor. Previously, the debtor also made two payments to BECS Enterprises each in the amount of $12,987.00 for antecedent past due rent. The bankruptcy trustee brought these adversary proceedings to avoid and recover these preferential transfers.

Subsequently, the bankruptcy trustee agreed to accept $18,800

as a compromise and settlement of the six adversary proceedings.[1] The trustee moved the bankruptcy court for an order authorizing the settlement of the preference claims, and served a Notice of Intent to Compromise and Settle Claim on the debtor, creditors and interested parties. NMS received this notice as it has an unsecured claim against the bankruptcy estate. NMS then filed a timely objection to the trustee's motion.

Following three hearings on the trustee's motion, the bankruptcy court entered an order authorizing the settlement of the preference claims. The bankruptcy court found that the settlement amount was fair and equitable after taking into account the creditors' interest, the costs of litigating the claims, the relatively high recovery on the claims against the individual defendants and the risk of a ruling adverse to the estate based on a "new value" defense on the claim against BECS Enterprises.

DISCUSSION

A bankruptcy court's order approving a trustee's application to compromise a controversy is reviewed for an abuse of discretion. In re A & C Properties, 784 F.2d 1377, 1380 (9th Cir. 1986), cert. denied, 479 U.S. 854 (1986). The bankruptcy court may approve a compromise only if it is fair and equitable. In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988). In determining

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[1] Though the settlement was "global," i.e. , contingent on a resolution of all the claims, the settlement amounts attributed to each claim are as follows: $1,900 each in regard to the claims against Doctors Billmeyer, Chitty, Cordova and Stevens; $1,200 in regard to the claim against Doctor Connor; and $10,000 in regard to the claim against BECS Enterprises.

whether the compromise is proper, the court must consider: (1) the probability of success in the litigation; (2) the difficulties, if any, to be encountered in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors and a proper deference to their reasonable views in the premises. Id. (citing In re A & C Properties, 784 F.2d at 1381). "The law favors compromise and not litigation for its own sake, and as long as the bankruptcy court amply considered the various factors that determined the reasonableness of the compromise, the court's decision must be affirmed." In re A & C Properties, 784 F.2d 1381 (citations omitted).

Here appellant argues that the bankruptcy court erred in approving the settlement based on the attendant costs of litigating the claims. It was appellant's position before the bankruptcy court that the amounts at issue in the claims and the likelihood of prevailing on the claims justified the additional litigation expense.

Contrawise, the bankruptcy court determined that the cost of litigating the claim against BECS Enterprises would be exacerbated because that defendant could raise a "new value" defense. The "new value" defense is set forth in section 547(c)(4) of the Bankruptcy Code. 11 U.S.C. § 547(c)(4) (1992). Section 547(c)(4) provides that a trustee may not avoid a transfer to the extent that transfer was "to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to

or for the benefit of the debtor." The bankruptcy court determined that BECS could argue that at least one of the past due lease payments was given for new value; the new value being that BECS, after receiving the past due payment, allowed the debtor to continue in its lease despite the fact that BECS had the right to terminate the lease.

The issue of whether forbearance in exercising a right constitutes new value has not been addressed by the Ninth Circuit. Courts in other jurisdictions have reached opposite results. Compare Drabkin v. A & I Credit, 800 F.2d 1153, 1159 (D.C. Cir. 1986), with In re Quality Plastics, Inc., 41 B.R. 241 (Bankr. W.D. Mich. 1984) (officer-creditor's forbearance constituted new value). Clearly, the defense could have been raised and litigation costs would have been expended in resolving it. Furthermore, the lack of authority on the issue in this circuit increases the potential for an appeal and its attendant costs. When these considerations are coupled with the risk of an adverse ruling against the trustee on this claim and the costs necessarily incurred in litigating any claim to judgment, the settlement of the BECS claim cannot be labeled as unfair or inequitable, and the bankruptcy court did not abuse its discretion in approving it.

As to the claims against the individual defendants, the trustee settled those claims for $2,300 less than the claims sought. The bankruptcy court found that the difference would have quickly been expended as litigation costs if those claims were pursued because defendants' counsel indicated he would raise a

solvency defense to those claims. Indeed, the difference could have been expended as the natural costs of pursuing these five claims all the way through judgment. Again, I find that the bankruptcy court did not abuse its discretion in approving the settlement of these claims.

Appellant next argues that the settlement should not have been approved by the bankruptcy judge because it did not account for potential claims for moneys paid to these defendants beyond the 90 days but within 1 year prior to the date of bankruptcy. However, as the bankruptcy court noted, it approved these settlements only as to the checks listed in these claims against the defendants and not as to all possible claims against the defendants. This settlement does not act as a release of any other potential claims against these defendants. Accordingly, I find that the bankruptcy court did not abuse its discretion in approving this settlement even though it does not account for all potential claims against these defendants.

Finally, appellant argues that the settlement should not have been approved because the Notice of Intent to Compromise and Settle Claim fails to set forth all the reasons why the claims are being settled. In particular, the notice failed to set forth the new value issue. However, when the bankruptcy judge noted this deficiency, she set an additional hearing and provided appellant's counsel with additional time to prepare for and do discovery regarding the new value issue. Thus, even if the notice was defective, the bankruptcy court cured the deficiency and appellant

was not prejudiced by the deficiency. Indeed, appellant cites no authority, and I cannot find any, which requires the bankruptcy court to reject a settlement because of a mere technical defect in the notice. Accordingly, I find that the bankruptcy court did not abuse its discretion in approving the settlement despite the deficiency in the notice because appellant was given actual notice of the issue by the bankruptcy court, was given a reasonable time to prepare for a hearing on the issue, and was not prejudiced by the deficiency.

CONCLUSION

Based on the foregoing, the order of the Bankruptcy Court is AFFIRMED.

DATED this 4 day of January, 1992.

Malcolm F. Marsh
United States District Judge