UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 00-11090-JMD
Chapter 11

Stephen Camann,
Debtor

MEMORANDUM OPINION

I. INTRODUCTION

The Court has before it the adequacy of the disclosure statement filed by Stephen Camann, the Debtor, on October 3, 2000 to which Joan Camann ("Joan"), the Debtor's former spouse, and Gregory Camann ("Greg"), the Debtor's son, object. The Court also has before it the adequacy of the disclosure statement filed by Joan on October 17, 2000 to which the Debtor objects. The disclosure statements reveal that both the Debtor's plan and Joan's plan will pay all non-marital creditors in full. The difference between the two plans is the treatment of Joan's marital claims arising under a final divorce decree.

The Court held a hearing on the adequacy of both disclosure statements on November 6, 2000 at which time the Court took the matters under advisement. Having considered the parties' written pleadings, the arguments of the parties made at the hearing, and the relevant law, the Court approves the adequacy of both disclosure statements for the reasons outlined below.

II. DISCUSSION

A. Debtor's Disclosure Statement

Joan and her son Greg objected to the adequacy of the Debtor's disclosure statement on the following grounds. First, they state that the Debtor has incorrectly characterized claims as unimpaired when they are in fact impaired. Second, Joan argues that the Debtor's disclosure statement contains several confusing and misleading terms. Third, Joan argues that the Debtor's disclosure statement omits

information necessary for creditors to adequately assess the merits of the Debtor's plan. Fourth, Joan argues that the disclosure statement should not be approved as the Debtor's plan is not feasible and will likely require further judicial intervention after confirmation.

1. Impairment

The first issue is the issue of impairment. At the hearing, Greg dropped his objection to the Debtor's plan based on the Debtor's characterization of the claim of Citizens Bank ("Citizens") as unimpaired. At the hearing, the Debtor explained that Citizens' claim is not being impaired as Citizens is retaining all of its rights under its notes and mortgages. In addition, Citizens, who was represented by counsel at the hearing, did not make any oral or written objection to the disclosure statement on this or any other ground.

Joan has objected to the Debtor's disclosure statement on the basis that it incorrectly characterizes her claims and interests as unimpaired. Section 1124 of the Bankruptcy Code provides generally that "a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan . . . leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest." 11 U.S.C. § 1124(1). See In re Otero Mills, Inc., 31 B.R. 185, 185 (Bankr. D.N.M. 1983). "A statement that a class is not impaired does not necessarily make it so. A creditor may assert that he is improperly treated as unimpaired." In re Forest Hills Assocs., Ltd., 18 B.R. 104, 104 (Bankr. D. Del. 1982). See also In re Jones, 32 B.R. 951, 954 n.5 (Bankr. D. Utah 1983) ("It is clear that even though a plan specifies that a particular class is not impaired under the plan, that class may argue the issue of impairment.").

Here, the Debtor has proposed a plan that will pay his general unsecured creditors, except Joan and Greg, in full with interest on the effective date of the plan. The Debtor proposes to pay Joan from the proceeds of the sale of the assets of Camco, Inc. ("Camco") and Manchester Realty Co. ("Manchester Realty") to Constantine Scrivanos (the "Scrivanos Deal"). If the Scrivanos Deal is not consummated by June 1, 2001, the Debtor will have the opportunity to sell the assets to another interested buyer by August 1,

2001. The Debtor further proposes an in-kind distribution of the income producing assets if the assets are not sold within 120 days of the effective date of the plan. In addition, the Debtor's plan attempts to cure any and all defaults by the Debtor under the parties' December 1995 divorce decree (the "Divorce Decree") and attempts to limit Joan's compensation for any pecuniary loss suffered or incurred by reason of the Debtor's default.

The Court finds that these provisions do not comport with the requirements of the Divorce Decree, which provides for the immediate liquidation of the property upon the appointment of a commissioner after April 30, 1998 if the parties' assets remain unsold. The Divorce Decree makes no other provision for the disposition of the assets if they remain unsold after the April 30, 1998 date. Accordingly, it appears that the Debtor is proposing to alter Joan's legal, equitable, and/or contractual rights which results in the impairment of her claim under the Debtor's plan.

The Debtor responds that his plan contains a savings clause that provides that the terms and provisions of the Divorce Decree shall govern with respect to all matters provided in the Divorce Decree but not dealt with in the Debtor's plan. He points out that the plan also provides that in the event of any inconsistency between the terms of the plan and the Divorce Decree, the terms and provisions of the Divorce Decree shall govern and have priority. The Debtor argues that this provision renders Joan's claim unimpaired.

The Court finds the savings clause is insufficient to render Joan's claim unimpaired. If the savings clause, and Joan's ability to return to state court, trump the Debtor's plan, then the Debtor's plan would have no binding legal effect on Joan or her claim. It would be nothing more than a proposal to Joan as to how her claim could be treated. If the end result of the Debtor's plan is that the Divorce Decree controls the treatment of Joan's claim, then Joan and the Debtor would be in the same position as they were in on April 12, 2000, the day the Debtor filed Chapter 11 bankruptcy. If that is the case, then the Debtor's bankruptcy has been nothing more than a delay tactic and a sham. Such an interpretation of the Debtor's plan would implicate the Debtor's good faith and section 1129(a)(3) of the Bankruptcy Code, which

provides that a debtor's plan may be confirmed only if "[t]he plan has been proposed in good faith and not by any means forbidden by law." The Court will not interpret the Debtor's plan in such a manner at this stage of the case, and, accordingly, finds that Joan's claim is impaired. The Court notes, however, that the Debtor's good faith may be an issue at confirmation.

Because the Court finds that Joan's claim is impaired, the Debtor must provide Joan with a ballot so that she may vote on the Debtor's plan. Even if Joan were not impaired, the Debtor would still be required to serve her with a copy of his plan and disclosure statement. See Jones, 32 B.R. at 954 n.5 ("The Bankruptcy Rules require mailing of a plan and disclosure statement to all holders of a claims or interests without excluding members of impaired classes."); Fed. R. Bankr. P. 3017(d).

2. Confusing and Misleading Terms

As the Court indicated at the hearing, the Court is concerned only with items that are confusing to the Debtor's other creditors, i.e., creditors other than Joan and Greg who have been represented by counsel at all hearings, who have been participating in the case, and who have more information accessible to them than the Debtor's other creditors. Here, the Court finds that the elements to which Joan objects would not confuse or affect general unsecured creditors. Accordingly, the Court denies this part of Joan's objection.

3. Lacks Adequate Information

Joan also argues that the Debtor's plan lacks adequate information. The Court finds that the Debtor's disclosure statement contains information that is adequate to apprize the Debtor's creditors of the Debtor's financial situation and to permit the Debtor's creditors to vote on his plan of reorganization. As noted at the hearing, the Debtor's unsecured creditors will be paid in full with interest through his plan. This is the information that is critical to his creditors, and this information is made clear by the Debtor's disclosure statement. To the extent that the Debtor's disclosure statement is missing certain information, the Debtor shall fill in the blank spaces in his disclosure statement before it is filed with the Court and distributed to creditors.

4. Feasibility

Lastly, Joan argues that the Debtor's plan is not feasible and will require further judicial intervention post-confirmation. The issue of feasibility is a matter for confirmation that need not be addressed at this stage of the Debtor's case.

B. Joan Camann's Disclosure Statement

The Debtor objects to Joan's disclosure statement on four grounds. First, the Debtor argues that the Court cannot exercise jurisdiction over the assets of Camco and Manchester Realty unless those corporations consent to having their assets liquidated for purposes of funding Joan's plan of reorganization. Second, the Debtor argues that the Court cannot rewrite the terms of the Divorce Decree which the Court would have to do in order to confirm Joan's plan. Third, the Debtor argues that Joan has consented to the Scrivanos Deal and therefore she is barred from proposing any plan which, if confirmed, would make it impossible for the Debtor to consummate such a transaction. Fourth, the Debtor argues that Joan's disclosure statement cannot be approved because it lacks adequate information in that it fails to tell creditors, parties in interest, and interest holders what the value of a reorganized Camco will be under Joan's plan.

1. Jurisdiction over the Assets of Camco and Manchester Realty

The Debtor argues that the Court has no jurisdiction over the assets of the Debtor's corporations. Pursuant to the Divorce Decree, Joan was awarded a fifty percent interest in the net proceeds from the sale of the "Designated Assets," which include Camco and Manchester Realty. The New Hampshire Supreme Court has indicated that, in general, it is common practice to include business assets as part of the marital estate. See Hillebrand v. Hillebrand, 130 N.H. 520, 523 (1988) (holding that the husband's dental practice assets, including office equipment, accounts receivable, and business cash, were properly included in the parties' marital estate). See also Bursey v. Town of Hudson, 143 N.H. 42 (1998). Pursuant to New Hampshire law, the Divorce Court "may order redistribution of any property falling within the joint marital estate, or within the individual estates of either spouse." Bursey v. Town of Hudson, 143 N.H. 42 (1998) (quoting Holliday v. Holliday, 139 N.H. 213, 215 (1994)).

Here, the Divorce Court issued a final decree in which it provided that Joan was entitled to fifty percent of the net proceeds from the sale of the assets of Camco and Manchester Realty. The Divorce Decree further provided that if the sale of Camco was structured as a sale of stock rather than assets, the Divorce Decree provisions would be adapted to achieve the same economic division between the Debtor and Joan.

Under New Hampshire law it is clear that Joan has a legally protected property interest in the assets of Camco and Manchester Realty. In Bursey v. Town of Hudson, 143 N.H. 42 (1998), the New Hampshire Supreme Court examined a spouse's property interest in real estate held by a corporation owned by the other spouse. In that case, a significant asset within the marital estate was ownership of a corporation that owned real estate in the Town of Hudson (the "Town"). The temporary decree awarded the temporary exclusive control of the corporation to the husband. The husband was responsible for paying all debts and liabilities incurred by the corporation. The husband and his corporation failed to pay the 1993 property taxes on the real estate in Hudson. In 1994, the Town placed a lien on the property for nonpayment of taxes. In July 1996, the Town sent a notice of impending tax deed to the corporation requiring payment of back taxes and interest. The wife advised the Town of her divorce proceedings, her claim to the real estate as marital property, and her ability to pay the outstanding taxes. She requested that the Town delay the tax deeding so she could seek relief in superior court. The wife filed a petition for a temporary restraining order and preliminary injunction to enjoin the Town from deeding the property. The superior court denied the relief on an ex parte basis, and in September 1996, the tax collector deeded the real estate to the Town. The wife filed an appeal with the New Hampshire Supreme Court.

Upon review, the New Hampshire Supreme Court held that, even though the wife lacked title to both the real estate and the corporation's stock, her interest in the corporation and its assets was protected by the temporary decree, which granted the wife an equitable interest in the corporation. The court concluded that "the [wife] had a legally protectable property interest in the real estate through her claim to [the corporation] by virtue of the inclusion of the corporation's stock within the marital estate." Id. As

support for its conclusion, the court cited RSA 458:16-a, which provides in pertinent part that "[p]roperty shall include all tangible and intangible property and assets, real or personal, belonging to either or both parties, whether title to the property is held in the name of either or both parties." RSA 458:16-a, I.

Thus, the Bursey case makes clear that Joan has a legally protectable property interest in the assets of Camco and Manchester Realty by virtue of the Divorce Decree. Joan was attempting to deal with the Debtor's failure to distribute the marital assets in accordance with the Divorce Decree in the Divorce Court when the Debtor voluntarily filed a bankruptcy case in this Court. It is clear that the reason the Debtor filed bankruptcy was to deal with the claims of his former wife and son. Having brought his former wife's marital claims to this Court, the Debtor cannot argue now that this Court lacks jurisdiction over the corporate assets.

Given the record before it, the Court cannot rule that Joan is unable to propose a disposition of the assets of Camco and Manchester Realty in her Chapter 11 bankruptcy plan. Because the Court cannot say that Joan's plan is non-confirmable on its face, Joan may distribute her disclosure statement and plan to the Debtor's creditors.

2. Rewriting the Terms of the Divorce Decree

The Debtor claims that the Court cannot confirm Joan's plan because it requires the rewriting of the terms of the Divorce Decree.

> A property distribution in cases of divorce and separation creates vested rights upon which the parties are entitled to rely in starting and planning a new and different life. It is, in effect, an assignment of assets, however modest or extensive, reflective of the efforts of the parties and the considered judgment of the equity court in arriving at a degree of parity called fairness. Such judgments are made, as are judgments in the business world generally, upon reflection of the prevailing economic climate as well as the vicissitudes of economic times. Although, in appropriate cases, non-economic considerations may come into play, as, for instance, with the origin and distribution of family heirlooms, the great weight of considerations in most cases is economic. For this reason, in marital cases, as in the business world, modification of interests thought to be vested is not permitted in the absence of fraud, undue influence, deceit or misrepresentation . . . or mutual mistake . . . .

McSherry v. McSherry, 135 N.H. 451, 453-54 (1992) (citations omitted).

In this case, the Divorce Decree set forth various procedures for distributing the parties' marital estate, particularly with respect to the "Designated Assets," including Camco and Manchester Realty. The Divorce Decree gave the parties until April 30, 1996 to enter into an agreement regarding the disposition of these assets. If, as of May 1, 1996, the parties had not entered in an agreement, the Debtor was to immediately place the assets on the market for sale. If any of the assets remained unsold as of April 30, 1998, Joan was permitted to move for the appointment of a commissioner to conduct a sale of the assets. It is clear that the parties have not followed these provisions of the Divorce Decree.

Neither the Debtor nor Joan are attempting to modify the parties' property settlement to the extent that it calls for a fifty-fifty split of the Camco and Manchester Realty assets. Rather, the dispute between the parties involves the means for implementing the split. The Debtor proposes that the assets be liquidated while Joan proposes an in-kind distribution. What Joan is attempting through her plan is to provide an alternative means for distributing the assets, she is not attempting to change the economic effect of the Divorce Decree. The Debtor has not cited any authority for the proposition that the Divorce Court may not approve an alternative method for distributing the assets. To the contrary, several New Hampshire cases suggest that Joan may be able to return to state court to litigate the proper disposition of these assets. See

Sommers v. Sommers, 143 N.H. 686 (1999) (stating that if a court's order merely implements the terms of the stipulation, it will not result in a modification of a property settlement); Spellman v. Spellman, 136 N.H. 235, 238 (1992) ("Where, as here, the parties have failed to effect the terms of a property settlement, and the terms of the decree material to that settlement must be interpreted and implemented by further order of the court, it is appropriate that the court take a second equitable look to determine what order would carry out the original equitable mandate.").

Accordingly, if it is possible for Joan to propose such a disposition of the property in the Divorce Court, the Court finds that Joan may propose such a disposition here in this Court as the Debtor is the party who voluntarily brought the parties' dispute over Joan's martial claims to the Bankruptcy Court. Again, because it is not clear that Joan's plan is non-confirmable on its face, she may distribute her disclosure statement and proceed with the plan process.

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Joan) have competent bankruptcy attorneys and financial advisors who can assist in determining which plan is in their client's best economic interests.

In addition, the Court notes that the Debtor has failed to provide similar information in his own disclosure statement and plan as neither provides an estimate as to the value of what Joan will receive under the Debtor's plan, taking into account the costs associated with the proposed sales and any tax implications. To the extent that the Debtor argues that Joan's disclosure statement lacks adequate information, his own disclosure statement similarly lacks adequate information. While the Court finds no basis to the Debtor's objection, the Court notes that the Debtor may raise the issue of the valuation of a reorganized Camco at confirmation.

III. CONCLUSION

For the reasons outlined above, the Court finds that both disclosure statements contain adequate information within the meaning of section 1125(a)(1) of the Bankruptcy Code. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order setting in accordance with this opinion shall be entered.

DONE and ORDERED this 16th day of November, 2000, at Manchester, New Hampshire.

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J. Michael Deasy
Bankruptcy Judge