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No. 92780-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED
APR 07 2016
WASHINGTON STATE
SUPREME COURT

BENJAMIN C. ARP,

Respondent,

v.

JAMES H. RILEY and "JANE DOE" RILEY, husband and wife and the marital community composed thereof; and SIERRA CONSTRUCTION CO., INC., a Washington State Corporation,

Petitioners.

MEMORANDUM OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CHAPTER 13 TRUSTEES IN SUPPORT OF PETITION FOR REVIEW

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IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

The National Association of Chapter 13 Trustees ("NACTT") is a nonprofit organization of chapter 13 bankruptcy trustees and practitioners. Its members are concerned that the holding of the Court of Appeals that chapter 13 debtors have no duty under the Bankruptcy Code to disclose post-confirmation property interests is mistaken and that allowing the holding to stand may be harmful and misleading.

STATEMENT OF THE CASE

Benjamin Arp filed a chapter 13 bankruptcy petition and the Bankruptcy Court confirmed his repayment plan in 2009. Op. at 2. The confirmation order vested all property of the estate in the debtor (but also gave the Bankruptcy Court "exclusive jurisdiction" over the property). *Id.*

On October 5, 2010, Arp suffered serious injuries in an automobile accident involving James Riley while Riley was working for the Sierra Construction Company. *Id.* Arp did not file a formal notice of any claims against Riley or Sierra during his bankruptcy case, though he did refer to the accident in a response to a motion to dismiss the case. *Id.* at 3. The Bankruptcy Court granted Arp a discharge in March 2012. *Id.*

Arp later filed this action against Riley and Sierra. The trial court below dismissed the case on summary judgment, based on judicial estoppel and lack of standing. *Id.* The Court of Appeals reversed.

SUMMARY OF THE ARGUMENT

As part of its analysis of judicial estoppel, the Court of Appeals below concluded that a chapter 13 debtor has no duty under the Bankruptcy Code to disclose a property interest acquired after the confirmation of a repayment plan. To the NACTT's knowledge, no federal court of appeals has reached a similar conclusion, and several appellate court decisions directly contradict it. The Court of Appeals in this case based its holding on its own conclusion that a property interest acquired after confirmation of a chapter 13 plan is not property of the bankruptcy estate. This approach suffers from at least two flaws.

First, it ignores the legal uncertainty regarding the scope of post-confirmation property of the estate. Rather than examining the debtor's duty to disclosure post-confirmation property in light of the uncertain status of the property, the court tried to predict the status itself. This approach merges the issue of disclosure with the ultimate determination regarding the information disclosed. As long as there is a reasonable possibility that post-confirmation property might represent property of the estate, debtors have a duty to disclose information about the property.

Second, the holding of the Court of Appeals implicitly builds on the false premise that a property interest is not relevant to a chapter 13 case if it is not property of the estate. Other property can also be relevant to a chapter 13 case. For example, a chapter 13 plan is subject to a test requiring the debtor to commit all of his or her projected disposable income during the plan term to the repayment of creditors, and most courts apply this test of ability to pay without regard to whether the available funds are property of the estate. Similar considerations apply to post-confirmation modifications.

Debtors seeking relief from debts in bankruptcy court have a duty of full and complete disclosure. Creditors and trustees have a legitimate expectation that chapter 13 debtors will disclose material property interests acquired during the chapter 13 case.

ARGUMENT

The Court of Appeals below began its analysis of judicial estoppel with an examination of a chapter 13 debtor's duty to disclose a cause of action that accrues after the confirmation of a chapter 13 plan. The court concluded that the Bankruptcy Code imposes no such duty. The NACTT disagrees and believes that the court's analysis is potentially harmful and misleading. The NACTT, however, would emphasize that it takes no position on the ultimate application of judicial estoppel in this case.

I. The conclusion of the Court of Appeals is inconsistent with federal appellate court authority.

Contrary to the holding of the Court of Appeals below, multiple federal appellate courts have held that chapter 13 debtors have a duty to disclose property acquired post-confirmation. *See, e.g.*, *Jones v. Bob Evans Farms, Inc.*, No. 15-2068, 2016 WL 308659, at *2 (8th Cir. Jan. 26, 2016) ("[A] Chapter 13 debtor who does not amend his bankruptcy schedules to reflect a post petition cause of action adopts inconsistent positions in the bankruptcy court and the court where that cause of action is pending."); *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1274-75 (11th Cir. 2010) ("[W]hen Robinson filed her claim against Tyson while her bankruptcy was still pending, the claim vested in the bankruptcy estate and Robinson had a duty to notice the suit to all creditors.").

The NACTT has not identified any controlling decision on this question by the Ninth Circuit. But, like other federal appellate courts, the Ninth Circuit has recognized that debtors have a "continuing duty" to amend bankruptcy schedules. *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 785 (9th Cir. 2001) ("The debtor's duty to disclose potential claims as assets does not end when the debtor files schedules, but instead continues for the duration of the bankruptcy proceeding."). And the Ninth Circuit, in an unreported decision, has even applied this precedent to conclude that a debtor has a duty to disclose post-petition assets. *See Benetatos v. Hellenic Republic*, 371 F. App'x 770, 771 (9th Cir. 2010) (rejecting a debtor's argument that he had no duty to disclose post-petition receivables).

Despite the strong authority supporting a disclosure requirement, the Court of Appeals in this case concluded that debtors do not have that duty. This conclusion is at odds with the duty of "full, candid, and complete disclosure by debtors of their financial affairs" on which the "viability of the system of voluntary bankruptcy depends." *Searles v. Riley (In re Searles)*, 317 B.R. 368, 378 (B.A.P. 9th Cir. 2004), *aff'd*, 212 F. App'x 589 (9th Cir. 2006), *quoted in Retz v. Samson (In re Retz),* 606 F.3d 1189, 1199 (9th Cir. 2010).

The analysis of the Court of Appeals suffers from at least two flaws. First, the court assumed that debtors have no duty to disclose uncertain property interests as long as the ultimate determination is that the property is excluded from the estate. This approach ignores other parties' legitimate interest in information about the disputed property in the absence of a controlling decision on its status. Second, the court assumed that debtors have no duty to disclose property unless it is property of the estate. In a chapter 13 case, however, property that is outside the estate may be relevant, so this measure of the duty of disclosure is incomplete.

II. Debtors have a duty to disclose significant property interests, even if the status of the property is uncertain.

The Court of Appeals based its holding that a debtor has no duty to disclosure a post-confirmation property interest entirely on its conclusion that post-confirmation property is not property of the estate. Rather than just examining a debtor's duty of disclosure in light of the uncertain status of the property, the court sought to predict the status of the property itself. Needless to say, the opinion of a state court of appeals on this question is not determinative. But even if it were, the approach merges two distinct issues—the duty to disclose information about disputed property and the ultimate determination regarding the status of the property. Prior to a determination of the status of property, the information about it is plainly relevant to the parties to a chapter 13 case.

The Ninth Circuit, like many other courts, has emphasized that a debtor has a duty to disclose even *potential* assets. *See, e.g.*, *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 785 (9th Cir. 2001) (referring to the debtor's "duty to disclose potential claims as assets"). This principle supports a rule requiring disclosure of any significant asset acquired post-confirmation, even if there may be some question about whether the asset is property of the estate.

As the Court of Appeals in this case recognized, the scope of the property of the estate after confirmation of a chapter 13 plan is uncertain in the Ninth Circuit, and the question has generated no less than four different approaches among other federal courts of appeals. In fact, the Bankruptcy Appellate Panel for the Ninth Circuit has reached a conclusion that seems contrary to the opinion of the Court of Appeals in this case. *See Dale v. Maney (In re Dale)*, 505 B.R. 8, 13 (B.A.P. 9th Cir. 2014). The clear possibility that an asset might be property of the estate is enough to require the disclosure of it.

Without disclosure, interested parties are unlikely to have a meaningful opportunity to request a determination regarding the property. "If postconfirmation assets were not subject to disclosure, modifications for increased payments would be rare because few debtors would voluntarily disclose new assets, and the trustee and creditors would be unlikely to obtain this information from sources other than the debtor." *Waldron v. Brown (In re Waldron)*, 536 F.3d 1239, 1246 (11th Cir. 2008). Requiring disclosure, by contrast, merely brings the information to light.

III. The property of the estate does not define the scope of a chapter 13 debtor's disclosure obligations.

Without any real analysis of the issue, the Court of Appeals plainly assumed that chapter 13 debtors only have a duty to disclose post-confirmation property if it represents property of the estate. The extent of the property of the estate does matter in a chapter 13 case. Most directly, it affects the "best interest of creditors" test in § 1325(a)(4), which requires a debtor's chapter 13 plan to provide for creditors to receive no less than the present value of the amount they would receive in a liquidation under chapter 7. But property that is excluded from the estate can also be relevant in a chapter 13 case.

For example, a chapter 13 plan may propose to pay claims from property that is not included in the estate. *See* 11 U.S.C. § 1322(b)(8). More importantly, a chapter 13 debtor is subject to a test of ability to pay, *see* 11 U.S.C. § 1325(b), and this test is not limited to property of the estate. Under the majority approach to this test, courts consider funds exempted from the estate in evaluating disposable income. *See, e.g.*, *Taylor v. United States (In re Taylor)*, 212 F.3d 395, 397 (8th Cir. 2000) ("The fact that a pension is exempt from the reach of creditors does not preclude a bankruptcy court from finding that the pension is also disposable income for purposes of Chapter 13."); *Freeman v. Schulman*

(In re Freeman), 86 F.3d 478, 481 (6th Cir. 1996) ("The inquiry does not turn in any way on whether the income was 'exempt' under Tennessee law.").

The projected disposable income test may even include property that was never property of the estate at all. *See In re Talley*, 240 B.R. 22, 23 (Bankr. D. Neb. 1999) ("[T]he status of the property, whether property of the estate, but exempt, or not property of the estate, which is the source of the revenue, is not relevant for determining whether the revenue received by the debtor should be included in disposable income."). In fact, the definition of "current monthly income"—the income side of the "disposable income" formula—includes amounts paid by other entities on a regular basis for the debtor's household expenses, 11 U.S.C. § 101(10A)(B), and thus encompasses amounts that never enter the estate at all.

Under § 1329 of the Bankruptcy Code, a debtor, a trustee, or an unsecured creditor may request modification of a confirmed plan. This provision makes post-confirmation property significant, whether or not it is property of the estate. "[P]ostconfirmation disclosure reinforces the ability-to-pay standard of Chapter 13. . . . Under the ability-to-pay standard, creditors share both the gains and losses of the debtor." *Waldron v. Brown (In re Waldron)*, 536 F.3d 1239, 1246 (11th Cir. 2008) (citations omitted). A trustee or creditor might request a modification if post-confirmation property increases a debtor's ability to pay. *See, e.g.*, *In re Baxter*, 374 B.R. 292, 296 (Bankr. M.D. Ala. 2007) ("[W]hile the proceeds of a post-confirmation cause of action are not property of the chapter 13 estate, they are nevertheless properly considered as additional disposable income warranting modification of the plan."). And post-confirmation property would clearly be a factor in the consideration of a debtor's motion to modify a plan to reduce plan payments.

Parties to a chapter 13 case have a legitimate interest in information about money or other property the debtor has received or might receive after confirmation of the plan, even if the property is not property of the estate.

CONCLUSION

For the foregoing reasons, the NACTT requests that the Court grant the Petitioner's request for review.

Respectfully submitted,

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Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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Attached, please find two documents for filing in the case identified below. The first is a motion for permission to file an amicus curiae memorandum in support of a petition for review; the second is the proposed memorandum (which Rule 10.6(b) permits the movant to file with the motion).

Case Name:
BENJAMIN C. ARP v. JAMES H. RILEY and "JANE DOE" RILEY, husband and wife and the marital community composed thereof; and SIERRA CONSTRUCTION CO., INC., a Washington State Corporation

Case Number:
No. 92780-4

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