

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

BANTERRA BANK,)	
)	
Appellant,)	
)	
vs.)	Case No. 11-cv-0962-MJR
)	
GARY CROCKER, and)	
TRUDY CROCKER,)	Appeal from BK 11-40057
)	
Appellees.)	

MEMORANDUM AND ORDER

REAGAN, District Judge:

I. Procedural and Jurisdictional Overview

On January 20, 2011, Debtors/Appellees Gary and Trudy Crocker (the Crockers) filed a Chapter 13 Voluntary Petition in the United States Bankruptcy Court for the Southern District of Illinois (Case No. 11-40057). On September 20, 2011, the Honorable Laura K. Grandy confirmed the Crockers' second amended Chapter 13 Plan filed August 28, 2011. Creditor/Appellant Banterra Bank (Banterra) appeals the September 20 Order; the interlocutory Minutes of Court entered July 19, 2011, denying Banterra's Objection to First Amended chapter 13 Plan; and the interlocutory Minutes of Court entered August 10, 2011, denying Banterra's Amended Motion to Convert.

Subject matter jurisdiction lies under 28 U.S.C. § 158(a) ("district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees ... of bankruptcy judges entered in cases" referred to them under 28 U.S.C. § 157.). This appeal was timely filed, and the parties have thoroughly briefed the questions presented herein. The Court heard oral argument on July 26, 2012, and took the matter under advisement. For the following reasons, the Court affirms the bankruptcy court's orders in their entirety.

II. Analysis

On appeal, Banterra raises the following issues:

1. Whether a secured creditor is deemed to have accepted a Chapter 13 plan when the creditor does not object to the original plan, the plan is not confirmed as filed but amended, and the original plan and first amended plan both state: "This plan may be confirmed without further notice or hearing unless written objection is filed and served within 21 days after the conclusion of the § 341 meeting of creditors. Objections to an amended plan must be filed and served within 21 days after the date of filing of the amended plan. If you have a secured claim, this plan may void or modify your lien if you do not object to the plan."
2. Whether the Court properly denied Banterra Bank's objection to the debtors' First Amended Chapter 13 plan where the debtors' schedules of assets and plan failed to properly list and value certain real and personal property assets and failed to recognize the secured status of perfected judgment liens on real estate.
3. Whether the Court properly denied Banterra Bank's objection to the debtors' First Amended Chapter 13 plan where under the debtors' amended plan, the value of the property to be

distributed to the secured creditor is less than the amount of the secured creditor's claims as filed.

4. Whether the Court properly denied Banterra Bank's motion to convert to chapter 7 or to dismiss, where debtors failed to substantially perform debtors' first amended plan prior to confirmation, failed to provide proof of casualty insurance on debtors' personal property in which Banterra Bank held a perfected lien, failed to properly list debtors' real and personal property.

5. Whether the Court properly allowed the proceeds from sale of business assets in which Banterra Bank held a perfected security interest to count toward satisfaction of debtors' default in plan payments.

6. Whether the Court properly denied Banterra Bank's motion to compel debtors to submit to a 2004 examination where debtors' had substantially defaulted on their first amended chapter 13 plan prior to confirmation.

7. Whether the Court properly confirmed debtors' second amended chapter 13 plan where under the debtors' second amended plan, the value of the property to be distributed to the secured creditor is less than the amount of the secured creditor's claims as filed, and debtors failed to object to Banterra Bank's secured claims.

Federal Rule of Bankruptcy Procedure 8013 provides that, on appeal, the District Court "may affirm, modify, or reverse a bankruptcy judge's ... order ... or remand with instructions for further proceedings."

Rule 8013 further provides:

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

Case law of this Circuit similarly instructs that a bankruptcy judge's "[f]actual findings are reviewed for clear error; [and] legal conclusions are reviewed *de novo*." ***In re Doctors Hosp. of Hyde Park, Inc.*, 474 F.3d 421, 426 (7th Cir. 2007), citing FED. R. BANKR. P. 8013 and *In re Crosswhite*, 148 F.3d 879, 881 (7th Cir. 1998). Accord *Meyer v. Rigdon*, 36 F.3d 1375, 1378 (7th Cir. 1994)(district court reviews bankruptcy judge's fact findings for clear error and legal conclusions *de novo*).**

A. Whether the Court has jurisdiction to decide issues designated 4 and 5, above.

On August 10, 2011, the bankruptcy court denied Banterra's amended motion to convert the case from a Chapter 13 to a Chapter 7 or to dismiss the case (Doc. 86). On August 23, 2011, the Court granted the Crockers' motion to sell and denied Banterra's motion to compel (Doc. 87). The notice of appeal from the bankruptcy court was filed on October 27, 2011. The Crockers contend that the orders at issue are final, appealable orders, and Banterra's notice of appeal was untimely. Banterra responds that the orders were not "final" for purposes of 11 U.S.C. § 158(a) and Bankruptcy Rule 8001.

Since the orders at issue did not bring the Crockers' case to an end and virtually the entire dispute remained to be decided, the orders were interlocutory and not final, appealable orders. ***See In re Salem*, 465 F.3d**

767, 774 (7th Cir. 2006), citing *Caldwell-Baker Co. v. Parsons*, 392 F.3d 886, 888 (7th Cir. 2004) (holding that, where an adversary proceeding continues, “[t]he order ... is no more a ‘final decision’ than an order denying summary judgment or denying a request for additional discovery; the litigation proceeds and the issue will be reviewed if it turns out to make a difference to an order that is independently appealable”); *In re Young*, 237 F.3d 1168, 1172-73 (10th Cir. 2001) (holding that the conversion of a Chapter 7 petition to a Chapter 13 petition was not final until the plan itself was approved) (additional citation omitted).

B. Whether Banterra is deemed to have accepted the Crockers’ Chapter 13 Plan when it did not object to the original Plan and, if so, whether *res judicata* barred objections to the Crockers’ amended plans and confirmation

The Crockers’ petition was filed under Chapter 13 of the Bankruptcy Code on January 20, 2011. Banterra was listed on Schedule D of Debtors’ Petition and in Paragraph 5B of Debtors’ Plan. The 341 Meeting of Creditors was held on February 24, 2011. The standard form Chapter 13 Plan adopted by the bankruptcy court, included in all of the Chapter 13 plans filed by the Crockers, notified all creditors that -

Anyone who wishes to oppose any provision of this plan ... must file a timely written objection. This plan may be confirmed without further notice or hearing unless written objection is filed and served.... Objections to an amended plan must be filed and

served within 21 days after the date of filing of the amended plan (Bkr. Doc. 88).

So, the deadline for all creditors to object to confirmation of the plan was 21 days from the date of the Meeting of Creditors, or March 17, 2011. Banterra failed to file an objection to the confirmation of its treatment under the plan by the deadline.

The Seventh Circuit has yet to reach the question of whether a failure to object in these circumstances is deemed to be acceptance. The First, Third and Tenth Circuits have considered the issue and agree that failure to object is deemed to be acceptance. ***In re Flynn*, 402 B.R. 437 (1st Cir. 2009); *In re Szostek*, 886 F.2d 1405 (3rd Cir. 1989); *In re Ruti–Sweetwater, Inc.*, 836 F.2d 1263 (10th Cir. 1988).** The Ninth Circuit has come to the opposite conclusion. ***In re M. Long Arabians*, 103 B.R. 211 (9th Cir. 1989).**

Having carefully reviewed case law, the Court concludes that the Honorable William V. Altenberger correctly found that inaction constitutes acceptance. The Court finds compelling the reasoning of the Tenth Circuit Court of Appeals: "To hold otherwise would be to endorse the proposition that a creditor may sit idly by, not participate in any manner in the formulation and adoption of a plan in reorganization and thereafter, subsequent to the adoption of the plan, raise a challenge to the plan for the first time." ***Ruti–Sweetwater, Inc.*, 836 F.2d at 166.**

The undersigned Judge cannot subscribe to the view that a party may neglect deadlines, which were perfectly clear and well known, and later attempt to alter an outcome where further action is foreclosed by its own negligence. It was Banterra's responsibility to actively protect its claim. Banterra was aware of the 21-day period for filing an objection and did not file one, so it was properly deemed to have accepted the plan. Banterra has only itself to blame for the missed the deadline and has no reasonable expectation that the Court will rescue it from its own failure to act. In sum, the Court deems Banterra's failure to object to the original plan to be acceptance thereof. The question then is the effect that acceptance had on Banterra's objections to amendments and to the ultimate confirmation of the Crockers' Plan.

The Crockers filed an Amended Chapter 13 Plan on April 22, 2011, in order to cure a Trustee Objection – specifically, to add a payment to creditor Southern Illinois Bank inside the Plan and raise the Plan payment accordingly. The Amended Plan did not affect the treatment of Banterra under the original Plan. On May 6, 2011, Banterra filed its Objection to Confirmation of Debtors' Amended Chapter 13 Plan.¹

¹ On August 29, 2011, the Crockers filed their second amended chapter 13 plan (Doc. 88), to which no objections were filed. On September 20, 2011, Judge Grandy entered an order confirming the plan (Doc. 93).

Banterra asserts that its objection should have been allowed because it objected within 21 days after the amended plan was filed. According to Banterra, the language regarding the 21-day deadline is ambiguous and insufficient to comport with due process.

The Court finds no ambiguity and no lack of due process in the language cited, particularly since it conforms to the statute that bars Banterra's objection, 11 U.S.C § 1323(c), which provides:

Any holder of a secured claim that has accepted or rejected the plan is deemed to have accepted or rejected, as the case may be, the plan as modified, **unless the modification provides for a change in the rights of such holder** from what such rights were under the plan before modification, and such holder changes such holder's previous acceptance or rejection. **(Emphasis added.)**

"Modification of a chapter 13 Plan prior to confirmation leaves prior acceptances or rejections unaltered unless the modification changes the rights of the holder of a claim and that party changes its prior acceptance or rejection." *In Re: Hopper*, 17 B.R. 292, 295 (Bkrtcy. Ky. 1982), *In re: Toth*, 61 B.R. 160 (Bkrtcy. N.D.III. 1986). In other words, "[a]cceptance or rejection prior to modification is binding, unless the modified plan alters a party's rights." **Norton Bankruptcy Law & Practice 3d § 150:1 (2011)**.

Banterra's Objection to the Amended Chapter 13 Plan alleged no alteration in its treatment under the original plan, and it is clear from the record that the alteration was specific to adding a payment to one creditor

and raising the plan payment accordingly. Judge Altenberger properly ruled on July 19, 2011, that by failing to object to its treatment under the original plan in a timely fashion, Banterra was bound by the terms of the plan affecting it prior to modification (Bkr. Doc. 78).

Because Banterra was deemed to have accepted the original plan, and its rights were unchanged under the amended plan (as well as the second amended plan), the bankruptcy court properly denied its objections to the first amended plan and confirmed the second amended plan, even if, as Banterra submits, certain assets were not properly listed and valued, the secured status of its liens on real property were not recognized and the value of the property to be distributed to it was less than the amount of its claims as filed.

In the alternative, Banterra's appeal is doomed under General Order 08-1 of the Bankruptcy Court for the Southern District of Illinois.²

² General Order 08-1 provides:

(1) **Amended Plans:** The filing of an amended plan moots any pending objections to a previously filed plan. If objections to a plan are scheduled for hearing and an amended plan is subsequently filed, the hearing will be stricken from the docket and counsel are excused from appearing. Nothing in this rule shall be construed to prohibit an interested party from filing an objection to the amended plan.

(2) **Amended Objections to Plans:** If a party files an amended objection to a plan, any previous objections filed by that party are moot. The Court will consider only those matters which have been raised in the amended objection.

(3) **Confirmation:** If the Chapter 13 trustee files a recommendation to confirm a plan or orally recommends confirmation, that recommendation moots any objections previously filed by the trustee. ***Upon the expiration of the time for objecting to a plan***, and/or upon the resolution of all pending objections to a plan, ***the Court will enter an order of confirmation***, whether or not the trustee's recommendation to confirm has been filed. [Emphasis added].

Issues raised by Banterra that call into question the bankruptcy court's reasons for overruling Banterra's objection to confirmation of the Crockers' first amended plan fail on the secondary ground that the first amended plan was replaced and superseded by the second amended plan – to which Banterra did not (and, under the foregoing analysis, could not) object.

C. Whether the Bankruptcy Court properly denied Banterra's motion to compel the Crockers to submit to a Rule 2004 examination

Banterra submits that a plan cannot be confirmed unless it is proposed in good faith and unless the debtors can comply with the plan and make all plan payments. Banterra contends that the Crockers and their records should have been examined as to income and expenses because (1) the Crockers defaulted on their plan payments from March through June 2011; (2) they admitted to Banterra that their plan was to sell all of their assets except their home; and (3) they allowed casualty insurance on three pieces of business equipment to lapse. Banterra asserts that the Crockers' representations to the Court as to their income between 2009 and 2011 showed a "wild swing" and were "preposterous."

In response to Banterra's amended motion to compel a Rule 2004 examination (Bkr. Doc. 70), counsel for the Crockers stated that at no time had he refused to produce them for examination; rather, he had recommended waiting until the Court ruled on the Crockers' motion to

dismiss Banterra's objection to confirmation for being untimely filed (Bkr. Doc. 82). The Crockers' counsel reasoned that if the court granted the motion, a request for a 2004 examination would be moot.

On August 10, 2011, the Honorable Kenneth J. Meyers called the case for hearing on Banterra's amended motion to convert or dismiss, its motion to compel a Rule 2004 examination, and its objection to the Crockers' motion to sell. Judge Meyers denied Banterra's motions and its objection (Docs. 86, 87). Although the order was summary, issues raised by Banterra were fairly and appropriately taken up. Judge Meyers denied the Rule 2004 examination, but the substance of Banterra's concerns was addressed. Specifically, Judge Meyers ordered that the Crockers' failure to pay the amount of the payment plan due by August 20, 2011, or any subsequent monthly plan payment would result in default and the case would be dismissed. Similarly, Banterra's amended objection to the motion to sell personal property was properly addressed – and denied. Banterra requested that if "other equipment" beside a 1989 homemade trailer was included in the sale, each item of equipment sold should be delineated. Judge Meyers' order delineated the additional equipment as a corn dog cooker that did not work, a funnel cake cooker, a grill (half-working), a deep fryer, a soda machine, a refrigerator and a sink. Judge Meyers ordered that the proceeds of this sale, the sum of \$28,000.00, be paid to Banterra. That

amount would also be considered as satisfying the Crockers' arrearage on its Chapter 13 plan payments, which amounted to \$22,240.00 on August 10, 2011.³

Banterra asserts that this latter decision, allowing the payment to Banterra for the trailer and equipment to be also counted against the Crockers' arrearage, constituted a "double-counting" of the proceeds and denied Banterra the plan payments on its remaining debts. Banterra's argument is singularly lacking in citation to any authority supporting its assertion that it is improper to allow a debtor to sell collateral and apply the proceeds to both a debt secured by the collateral and plan arrearages. The undersigned Judge's independent research did not disclose authority on point either.

Although also lacking in citation to authority, the Crockers' counsel cogently argued that bankruptcy rules are not violated when the sale of collateral is allowed and the proceeds routed to the trustee who releases them to the secured creditor. Counsel contended that if a debtor missed \$20,000 in plan payments and sold \$20,000 in collateral, he was caught up, and the outcome would only be unfair if the money were diverted to another creditor. Judicial experience and common sense weigh in favor of the latter conclusion. It would be unreasonable to hold that the Crockers

³ The Court was informed at the July 26, 2012, oral argument that the sale of the trailer and equipment had fallen through.

could sell collateral worth in excess of \$20,000 and, rather than having that amount credited to them, remain in arrears for a like sum.

Moreover, Banterra fails to show that it raised this issue before the bankruptcy court. Assuming for the sake of argument only, that Banterra is correct, it would be a waste of judicial resources to force the bankruptcy court to reopen this case in order to address an objection that Banterra should have made at the time of Judge Meyers' ruling. ***See, e.g., Greenlaw v. United States, 554 U.S. 237, 254 (2008) (noting that the legal system, and not just the parties, have an interest in finality).*** When an appellant attempts to raise an issue on appeal that was not adequately addressed below, the matter is waived. ***In re Sokolik, 635 F.3d 261, 268 (7th Cir. 2011), quoting Matter of Weber, 25 F.3d 413, 415 (7th Cir. 1994) (“[W]hen an issue was not raised in the bankruptcy court, a finding that the issue is waived at the district court level is ‘the correct result, since to find otherwise would permit a litigant simply to bypass the bankruptcy court.’”)***.

As to the motion to convert the case to a Chapter 7 or to dismiss it, Banterra made no showing that the Crockers were eligible for a Chapter 7 bankruptcy. The Crockers denied that they were eligible to be debtors under Chapter 7. ***See 11 U.S.C. 1307(g) (“Notwithstanding any other provision of this section, a case may not be converted to a case***

under another chapter of this title unless the debtor may be a debtor under such chapter.”). Other issues raised within Banterra’s motion were waived by its failure to object to the original plan.

Banterra has failed to carry its burden to demonstrate that the bankruptcy court’s findings of fact were clearly erroneous, and the Court’s *de novo* review of the law finds that there is no error. Stated another way, the Court finds that the law as applied to the facts is correct.

III. Conclusion

For the foregoing reasons, the Court **AFFIRMS** the Bankruptcy Court’s Order confirming the underlying case in its entirety.

IT IS SO ORDERED.

DATED this 12th day of September, 2012

s/Michael J. Reagan
MICHAEL J. REAGAN
United States District Judge