Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
June 01, 2018

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * * *

In re:	)	Case No. 18-11534-MKN
	)	Chapter 13
THEODORA HART,	)	
	)	Date: May 16, 2018
Debtor.	)	Time: 9:30 a.m.
	)	

ORDER ON JOINT MOTION OF NIKOLAOS TOUROUTOGLOU, M.D. AND BENCHMARK CAPITAL, LLC TO (1) DISMISS OR CONVERT TO CHAPTER 7 PURSUANT TO 11 U.S.C. § 1112(b) FOR BAD FAITH, (2) TERMINATE AUTOMATIC STAY OR CONFIRM STAY TERMINATES AUTOMATICALLY 30 DAYS AFTER FILING; AND (3) BAN DEBTOR FROM REFILING FOR BANKRUPTCY WITHOUT PRIOR COURT APPROVAL THROUGH APRIL 1, 2024[1]

On May 16, 2018, the court heard the Joint Motion of Nikolaos Touroutoglou, M.D. and Benchmark Capital, LLC to (1) Dismiss or Convert to Chapter 7 Pursuant to 11 U.S.C. § 1112(b) for Bad Faith, (2) Terminate Automatic Stay or Confirm Stay Terminates Automatically 30 Days After Filing; and (3) Ban Debtor From Refiling for Bankruptcy Without Prior Court Approval Through April 1, 2024 ("Motion"). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On March 22, 2018, a voluntary Chapter 11 "skeleton" petition was filed by Theodora

[1] In this Order, all references to "ECF No." are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to "FRBP" are to the Federal Rules of Bankruptcy Procedure.

Hart ("Debtor"). (ECF No. 1).[2] Attached to the bankruptcy petition is a Verification of Creditor Matrix submitted by the Debtor to which is attached the Debtor's list of creditors ("Creditor Matrix"). On the same date, a Notice of Chapter 11 Bankruptcy Case ("Bankruptcy Notice") was filed, setting forth: (1) an April 26, 2018, date for the meeting of creditors; (2) a deadline of June 25, 2018, for creditors to file complaints objecting to the dischargeability of certain debts ("Dischargeability Deadline"); and (3) a deadline of July 25, 2018, for creditors to file proofs of claim ("Claims Bar Date"). (ECF No. 3). A copy of the Bankruptcy Notice was served by mail on parties appearing on the Creditor Matrix. (ECF No. 7).[3]

On April 4, 2018, Debtor filed a motion to extend the deadline to file her schedules ("Schedules") and statement of financial affairs ("SOFA") (ECF No. 11), which was noticed for hearing on May 9, 2018. Benchmark Capital, LLC ("Benchmark") filed an opposition on April 22, 2018. (ECF No. 34). The court granted the request at the hearing inasmuch as the Schedules and SOFA had been filed timely on April 23, 2018. (ECF No. 35).[4] On her property Schedule "A/B," Debtor listed a single family home located at 11521 Evergreen Creek Lane, Las Vegas, Nevada ("Evergreen Property") at a value of $1,500,000, and a condominium located at 10809 Garden Mist Drive, Las Vegas, Nevada ("Garden Mist Property") at a value of $290,000. On her secured creditor Schedule "D," Debtor listed Benchmark as having a claim in the amount of $1,152,679 secured by the Evergreen Property and Wells Fargo Bank as having a claim in the amount of $239,071 secured by the Garden Mist Property. On her unsecured creditor Schedule

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[2] Debtor filed five prior bankruptcy petitions in this district under various chapters of the Bankruptcy Code. Chapter 7 Case No. 00-10558-LBR was commenced on January 26, 2000, and a Chapter 7 discharge was obtained on May 12, 2000. Chapter 13 Case No. 09-19710-BAM was commenced on June 8, 2009, and was dismissed on August 13, 2009. Chapter 13 Case No. 10-32449-BAM was commenced on November 30, 2010, and was dismissed on July 19, 2011. Chapter 11 Case No. 13-16968-MKN was commenced on August 14, 2013, and a Chapter 11 discharge was obtained on April 1, 2016. Chapter 11 Case No. 17-10384-MKN was commenced on January 30, 2017, and was dismissed on December 28, 2017.

[3] On March 23, 2018, the case was reassigned from Judge Laurel E. Davis to Judge Mike K. Nakagawa.

[4] A written order granting the extension has not been submitted by Debtor's counsel.

"E/F," Debtor listed Niklaos Touroutoglou ("Touroutoglou") as having a disputed unsecured claim in the amount of $240,700, based on certain litigation pending in the Eighth Judicial District Court, Clark County, Nevada, entitled Touroutoglou v. Hart, Case No. A-18-767281-B ("State Court Action"). In Part 4 of her SOFA, Debtor lists the State Court Action, among other lawsuits, as currently pending.[5]

On April 11, 2018, "Debtor's Motion for Entry of an Order (A) Re-Setting Bar Dates for Filing Proofs of Claim, (B) Approving the Form and Manner for Filing Proofs of Claim, and (C) Approving Notice Thereof" was filed, and noticed for hearing on May 9, 2018. (ECF Nos. 19 and 21). An opposition, along with the declaration of Jeff Arlitz, were filed by Benchmark on April 24, 2018. (ECF Nos. 39 and 40). On April 25, 2018, the United States Trustee, Tracy Hope Davis ("UST") filed an opposition. (ECF No. 41). On this same date, Touroutoglou filed an omnibus joinder to Benchmark's opposition. (ECF No. 43). On May 2, 2018, Debtor filed an omnibus reply to Benchmark's opposition and UST's opposition. (ECF No. 51). At the hearing, the court denied the motion, and creditor Benchmark was directed to prepare the order denying the motion, and circulate the order for Debtor's counsel to sign off.[6]

On April 13, 2018, the instant Motion was filed by Touroutoglou and Benchmark, (ECF No. 24 and 29) along with the declarations of Touroutoglou, and Nima Rodefshalmon (ECF Nos. 26 and 27). The Motion was noticed to be heard on May 16, 2018.

On May 1, 2018, Touroutoglou filed a proof of claim in the nonpriority, unsecured

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[5] Debtor also lists Adversary Proceeding No. 17-01225-MKN, that creditor Touroutoglou had commenced against her in the most recently dismissed Chapter 11 proceeding. The basis for both the State Court Action and the Adversary Proceeding to determine dischargeability of debt, are allegations that the Debtor misappropriated certain gold coins from Touroutoglou between 2014 and 2017. The debt is alleged to be nondischargeable under Sections 523(a)(2,4 and 6). Of the five prior bankruptcy cases commenced by the Debtor, see note 2, supra, Touroutoglou was a prepetition claimant in only the last one, i.e., the Chapter 11 proceeding that was dismissed on December 28, 2017. In other words, Touroutoglou has not been prevented from pursuing the claims in his State Court Action by a series of bankruptcy filings. Only one of the Debtor's prior bankruptcy cases had any impact on Touroutoglou.

[6] On May 21, 2018, an order was entered denying the motion. (ECF No. 63).

amount of $299,822.30.[7]

On May 2, 2018, Debtor filed an opposition to the Motion ("Opposition") along with the declaration of Theodora Hart. (ECF Nos. 52 and 53).

On May 9, 2018, Touroutoglou, filed a reply to Debtor's opposition ("Reply"). (ECF No. 55).[8]

On May 16, 2018, the court orally ruled that the automatic stay terminated pursuant to Section 362(c)(3)(A), inasmuch as the Debtor's prior Chapter 11 proceeding had been dismissed within one year and the automatic stay in the current Chapter 11 proceeding expired as a matter of law after 30 days.[9] As to the remaining relief sought by Touroutoglou and Benchmark, the Motion was taken under submission.[10]

DISCUSSION

In addition to confirming that the automatic stay terminated, the Motion seeks to (1) dismiss the Chapter 11 proceeding or to convert to Chapter 7, and, (2) to bar the Debtor from

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[7] The proof of claim is timely inasmuch as the Claims Bar Date is July 25, 2018. According to the claims register prepared by the court clerk, unsecured claims in the total amount of $485,657.39 have been filed as of May 22, 2018, which includes a priority unsecured claim in the amount of $74,524.58 filed by the Internal Revenue Service. It appears that the dollar amount of Touroutoglou's general unsecured claim is far in excess of fifty percent of the aggregate unsecured claims.

[8] On May 11, 2018, the Declaration of Andrea M. Gandara, Esq. was filed, in Request for an Ex Parte Order Terminating the Stay Due to Debtor's Refiling of Bankruptcy Case Within Preceding One-Year Period of Dismissal of Debtor's Prior Bankruptcy Case Pursuant to 11 U.S.C. § 362(c)(3) and (j) ("362(j) Request"). (ECF No. 57).

[9] A foreclosure sale of the Evergreen Property had been scheduled by Benchmark for March 23, 2018. The sale was stayed when the Debtor filed her latest bankruptcy petition on March 22, 2018. Because the stay has been terminated, Benchmark is free to pursue its nonbankruptcy remedies against that property. Similarly, further proceedings in the State Court Action were stayed when the Debtor filed her latest petition. Because the stay has been terminated, Touroutoglou is free to pursue that litigation. Any determination of dischargeability of that obligation, however, is reserved to the bankruptcy court if Touroutoglou timely commences a new adversary proceeding before the Dischargeability Deadline.

[10] On May 21, 2018, orders confirming the termination of the automatic stay were entered on behalf of Benchmark and Touroutoglou. (ECF Nos. 64 and 65). In light of the order with respect to Touroutoglou, the 362(j) Request is moot.

seeking bankruptcy relief without prior court approval through April 1, 2024 (in the event that dismissal is granted). The alleged basis for dismissal or conversion is that the instant Chapter 11 proceeding was filed in bad faith within the meaning of Section 1112(b). See Motion at 12:14 to 14:10. The basis for barring the Debtor from seeking bankruptcy relief for six years in order to prevent an alleged abuse of the bankruptcy process and waste of judicial resources, as permitted by Section 349(a) and Section 105(a). See Motion at 16:1 to 17:19.

In response, Debtor argues that Touroutoglou and Benchmark have failed to meet their burden of proof by a preponderance of the evidence. See Opposition at 4:15 to 7:10. Moreover, she maintains that cause does not exist to bar her from future bankruptcy relief for six years, even if dismissal of the present case is appropriate. See Opposition at 7:11 to 8:8.

In reply, Tourtouglou and Benchmark maintain that the Debtor's conduct during the five prior bankruptcy cases, rather than the shear number of cases, suggest that the latest Chapter 11 proceeding should be dismissed for cause under Section 1112(b)(1). See Reply at 3:4-14. Moreover, they argue that the Debtor will be unable to obtain a discharge unless she pays all of her creditors in full under a Chapter 11, thereby apparently suggesting that she will not be able to confirm a plan. See Reply at 3:11-14. Finally, Touroutoglou and Benchmark argue that a six-year restriction on future bankruptcy relief is warranted given her history of bankruptcy filings and an inability to obtain a discharge in the current proceeding. See Reply at 3:25 to 4:4.

The court having considered the written and oral arguments presented, along with the materials presented and the Debtor's bankruptcy history, concludes that cause has not been established warranting dismissal or conversion at this time under Section 1112(b). Because dismissal is not appropriate, it is unnecessary to consider a conditional bar to future bankruptcy relief. Several reasons support this conclusion.

First, Debtor's most recent, previous Chapter 11 proceeding was dismissed by an order entered on December 28, 2017 ("Dismissal Order").[11] The language of the Dismissal Order correctly noted that the court's ruling was "based upon the findings of fact and conclusions of

[11] The Dismissal Order was entered as Docket No. 134 in that Chapter 11 proceeding.

law placed on the record at the hearing on the Motion to Dismiss." Dismissal Order at 2:7-8. At that hearing, the Debtor appeared in pro se and orally requested a continuance, but that request was denied.[12] The court then granted the underlying dismissal motion as unopposed only, without entering any oral findings or conclusions with respect to the grounds raised by the moving parties. Thus, the Dismissal Order was not entered on the basis of a finding of bad faith, because no such finding was made at the hearing. Instead, dismissal of the prior Chapter 11 proceeding was based on a lack of opposition and nothing else.

Second, Debtor's other four bankruptcy cases do not support a finding of bad faith in the present case. Case No. 00-10558-LBR actually resulted in a Chapter 7 discharge entered on May 12, 2000. There is nothing in the record of that proceeding suggesting that the Debtor's commencement of the case was a substantial abuse under then-Section 707(b) or that any cause existed under then-Section 707(a) to dismiss the Chapter 7 petition. That the Debtor received a Chapter 7 discharge, typically reserved to the "honest but unfortunate debtor," see Grogan v. Garner, 498 U.S. 279, 286-287 (1991), militates against any inference that her first bankruptcy proceeding is indicative of bad faith.

Debtor's next bankruptcy proceeding, Case No. 09-19710-BAM, was commenced nine years later on June 8, 2009, at a time when she was eligible for a Chapter 13 discharge under now-Section 1328(f)(1).[13] The case was dismissed under Section 521(i), however, because the

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[12] In making her request in pro se, Debtor represented that she had arranged the resources necessary to address the most pressing creditor claims, including Benchmark, and that the resources were expected to arrive before the end of the week. Other than the Debtor's representation, no evidence of any kind confirming the arrangement or impending arrival of resources, was offered or presented. Because similar representations had been made by the Debtor through her bankruptcy counsel during the Chapter 11 proceeding, the court denied the request for a continuance. The court proceeded to consider the pending dismissal request as an unopposed contested matter.

[13] Under 1328(f)(1), the bankruptcy court is prohibited from granting a discharge of the debts provided for in a confirmed Chapter 13 plan if the individual debtor received a discharge in a case filed under Chapter 7 within 4 years prior to the filing of the Chapter 13 petition. In this instance, Debtor's prior Chapter 7 case was filed on January 26, 2000, more than 4 years prior to her Chapter 13 petition. If she was eligible to be a Chapter 13 debtor under Section 109(e), the court would not have been barred under Section 1328(f)(1) from granting her a Chapter 13

Debtor did not timely file her statement of financial affairs, nor a statement of current monthly income and expenses. There was no suggestion, much less a finding, that the Chapter 13 proceeding was commenced in bad faith.

Debtor commenced a new Chapter 13 proceeding the following year, Case No. 10-32449-BAM. However, the second Chapter 13 case was dismissed, *inter alia*, because the Debtor had too much secured debt to be eligible for Chapter 13 relief under Section 109(e). There was no suggestion, much less a finding, that the Chapter 13 proceeding was commenced in bad faith.

Two years later, Debtor commenced an individual Chapter 11 proceeding, Case No. 13-16968-MKN, which was not subject to the secured debt limit under Section 109(e).[14] A Chapter 11 plan of reorganization was confirmed by an order entered on October 2, 2014. That order included a specific factual finding that the Debtor had proposed the plan in good faith. On April 1, 2016, an order was entered granting the Debtor a Chapter 11 discharge.

Just as the Dismissal Order was not based on a finding of bad faith, none of the Debtor's other bankruptcy proceedings suggest that bad faith was present. Indeed, in the only instance where the Debtor's good faith or bad faith was addressed, the court specifically found that she had proposed her confirmed Chapter 11 plan in good faith. While that factual finding likely has no issue preclusive effect in the present Chapter 11 proceeding, it does undercut the evidentiary inferences suggested by Touroutoglou and Benchmark in support of the instant Motion.

Third, it is premature to suggest a particular outcome for this Chapter 11 proceeding. The Debtor can obtain a discharge of her prebankruptcy debts only through completing a confirmed Chapter 11 plan. See 11 U.S.C. § 1141(d)(5).[15] If Touroutoglou obtains a judgment

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discharge upon completion of a confirmed plan.

[14] Because she waited for more than one year after the dismissal of her last Chapter 13 case, the automatic stay in her Chapter 11 proceeding was not subject to the thirty day limit imposed by Section 362(c)(3)(A).

[15] Unlike discharges in Chapter 7, see 11 U.S.C. § 727(a)(8), and in Chapter 13, see 11 U.S.C. § 1328(f), individual persons and non-individual entities who obtained a prior bankruptcy discharge are not prohibited by Section 1141 from obtaining a subsequent Chapter 11 discharge

determining that Debtor's obligation is nondischargeable under Section 523(a)(2, 4 or 6), any unpaid portion of that judgment will survive the completion of a confirmed plan. See 8 COLLIER ON BANKRUPTCY, ¶ 1141.05[2][d] (Alan N. Resnick and Henry J. Sommer, eds., 16th ed. rev. 2018).[16] If the Debtor does not propose to pay all claims in full, she can still attempt to confirm a Chapter 11 plan by cramdown of any dissenting classes. See 11 U.S.C. §§ 1124(1), 1126(f), 1129(b) and 1141(a).[17] Dissenting unsecured claimants can force the Debtor to contribute the value of any prebankruptcy assets she wishes to retain by raising an objection under the "absolute priority rule," see Zachary v. California Bank & Trust Co. (In re Zachary), 811 F.3d 1191, 1197-1199 (9th Cir. 2016), while holders of allowed unsecured claims also can object to plan confirmation, thereby requiring the Debtor to devote her projected disposable income for at least a five-year period. See 11 U.S.C. § 1129(a)(15)(B).[18] See also In re Zachary, 811 F.3d at

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at any time.

[16] "In general, unlike a corporate debtor, an individual debtor in a chapter 11 case has the same status as an individual debtor in a chapter 7 case with respect to nondischargeable debts. If a debt is excepted from discharge under section 523, the debtor cannot obtain a discharge of such debt in a chapter 11 case...An individual debtor will be discharged from debts that would be nondischargeable under subsection 523(a)(2), (4) or (6) if the creditor does not request a determination of the nondischargeability of such a debt..."

[17] Claims are impaired under Section 1124(1) if a plan alters the legal, equitable or contractual rights of the claimant. Only claims that are impaired are allowed under Section 1126(f) to reject a proposed Chapter 11. Claimants who reject plan treatment are subject to cramdown under Section 1129(b) even if their claims are not paid in full. Claimants who are not paid in full are still bound by a confirmed plan under Section 1141(a).

[18] Section 1129(a)(15)(B) prescribes that an individual Chapter 11 debtor's projected disposable income ("PDI") is defined by applying Section 1325(b)(2). Section 1325(b)(2) in turn prescribes the method used in Chapter 13 cases for PDI to be calculated. From an individual debtor's "current monthly income ("CMI")," the disposable income amount is derived by deducting "amounts reasonably necessary to be expended...for the maintenance or support of the debtor..." and "if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business." 11 U.S.C. § 1325(b)(2)(A and B). The "amounts reasonably necessary to be expended" are to be determined in accordance with Section 707(b)(2)(A and B) if the debtor's CMI is above the median in the judicial district where the debtor filed his or her bankruptcy case. 11 U.S.C. § 1325(b)(3). Section 707(b)(2) imposes strict limits on the living expenses that an individual debtor can claim, thereby increasing the amount of disposable income that must be paid to creditors. See,

1199 (describing the requirement to comply with both the absolute priority rule and Section 1129(a)(15) as a "double whammy").

Whether the Debtor seeks to confirm a Chapter 11 plan with the consent of all creditors or by cramdown, she will still be required to demonstrate that her proposed plan is feasible, i.e., that it is not likely to be followed by liquidation or need for further financial reorganization. See 11 U.S.C. § 1129(a)(11). To the extent any plan would depend on outside financial sources, Debtor would have the burden of proving that receipt of such financing is more probable than not. See, e.g., In re Trans Max Technologies, Inc., 349 B.R. 80, 92-94 (Bankr. D. Nev. 2006) (low threshold for plan feasibility was not met where debtor failed offer credible evidence that funding would be provided by third parties). On the present record, the court cannot conclude that the Debtor is incapable of meeting that burden.

Under the circumstances, the Debtor certainly has significant hurdles to confirming and completing a Chapter 11 plan. These hurdles are no doubt accentuated by the expiration of the automatic stay pursuant to Section 362(c)(3)(A) as to both the Debtor and property of the estate. See Reswick v. Reswick (In re Reswick), 446 B.R. 362, 373 (B.A.P. 9th Cir. 2011); Lattin v. Midland Mortgage Co. (In re Lattin), 461 B.R. 832, 833 (Bankr. D. Nev. 2011). Moreover, Touroutoglou appears to control acceptance of any class of general unsecured creditors,[19]

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e.g., 11 U.S.C. § 707(b)(2)(A)(ii)(V) [allowance for housing and utilities may exceed Local Standards issued by Internal Revenue Service if the debtor provides documentation and demonstrates that such actual expenses are reasonable and necessary]. In this case, Debtor's monthly expense Schedule "J" indicates that she lives with her spouse in a household consisting of two people. Her monthly income Schedule "I" attests that her take-home pay is $18,000, while her non-filing spouse's take-home pay is $3,600. For cases filed between November 1, 2017, and March 31, 2018, the annual median income for a two-person household was $60,906. Because the Debtor's annual income far exceeds the median income in Nevada, the expense limitations under Section 707(b)(2) appear to be applicable. Under the Local Housing and Utilities Standards for Clark County for the same period, the mortgage or rent allowance for a two-person household is $1,164 per month.

[19] For an impaired class to accept a proposed Chapter 11 treatment, the plan must be accepted by a majority in number and two-thirds in dollar amount of the class members who actually vote. 11 U.S.C. § 1126(c). If Touroutoglou has more than half of the dollar amount of all general unsecured claims, see discussion at note 7, supra, then his vote alone would prevent class acceptance. Debtor could only confirm a Chapter 11 plan through cramdown under Section

thereby raising the prospect of the "double whammy" described by the circuit panel in Zachary. Thus, Debtor's prospects may be daunting even if she confirms a Chapter 11 plan.

For these reasons, dismissal or conversion of the Debtor's current Chapter 11 proceeding is not warranted at this time. If sufficient evidence is presented in the future of the circumstances contemplated by Section 1112(b), however, a renewed request for relief may be presented.

IT IS THEREFORE ORDERED that the Joint Motion of Nikolaos Touroutoglou, M.D. and Benchmark Capital, LLC to (1) Dismiss or Convert to Chapter 7 Pursuant to 11 U.S.C. § 1112(b) for Bad Faith, (2) Terminate Automatic Stay or Confirm Stay Terminates Automatically 30 Days After Filing; and (3) Ban Debtor From Refiling for Bankruptcy Without Prior Court Approval Through April 1, 2024, Docket Nos. 24 and 29, be, and the same hereby is, **DENIED**.

Copies sent to all parties via CM/ECF ELECTRONIC FILING

Copies sent via BNC to:

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1129(b), thereby requiring her to satisfy the absolute priority rule for dissenting unsecured classes.