UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

GORDON R. FLYGARE and SHARON L. FLYGARE,

Appellants,

v.

BARBARA W. RICHMAN,

Appellee.

No. 90-4084
(D.C. No. 89-CV-921-W)
(District of Utah)

ORDER AND JUDGMENT[1]

Before McKAY, MOORE, and BRORBY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Gordon and Sharon Flygare, Chapter 13 debtors, appeal an order of the district court affirming a bankruptcy court order which declares certain stock to be property of the estate and

---

1 This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

which orders the Chapter 13 Trustee to liquidate that stock for the benefit of creditors.

The Debtors filed their first petition for relief in April 1980. The bankruptcy court denied confirmation and dismissed the case.

The Debtors filed a second petition in July 1980. In their schedules, the Debtors listed as assets 5,000 shares of stock in a family corporation known as Helaman Development Corporation. This represents one-sixth of the shares of Helaman Development. The Debtors claimed that the shares had zero value because no market existed for the stock.

The bankruptcy court again denied confirmation and dismissed the case. The district court affirmed the dismissal. This court reversed the district court order because the bankruptcy court had apparently applied the wrong test to determine good faith. See Flygare v. Boulden, 709 F.2d 1344 (10th Cir. 1983).

On remand, the Debtors submitted their First Amended Chapter 13 Plan. The amended plan was filed on September 20, 1983. In order to meet Chapter 13's "liquidation test,"[2] the Debtors made

2 The Bankruptcy Code prohibits confirmation of a plan unless "the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated." 11 U.S.C. § 1325(a)(4).

the following proposal in their First Amended Plan:

> Debtors propose to sell this [Helaman Development] stock on or before April 1, 1984, to whoever is the highest bidder. The proceeds of the sale shall be used in the Chapter 13 Plan and shall be used by the Trustee to pay unsecured claims. This shall be a good faith effort by the Debtors to sell these shares to whoever is the highest bidder. If at the end of this period, April 1, 1984, the Debtors are unable to sell the stock, then the stock shall remain as property of the estate not to be used for payment of the creditors. The Court shall hold a hearing on the sale of this stock on or after April 1, 1984, to determine whether the Debtors have complied with the provisions as set forth herein.

First Amended Chapter 13 Plan at 2. However, the amended plan listed the value of the Helaman Development stock as "not known" and described the corporation's assets as "twenty-four acres of pasture" in Billings, Montana. Id.

In addition to agreeing to sell the stock, the Debtors agreed to make scheduled payments. The Debtors eventually made payments which exceeded those required under the original plan and which netted the unsecured creditors about twelve percent of their claims, but the Debtors never sold the Helaman Development stock.

The First Amended Plan was confirmed by the bankruptcy court on August 20, 1984. On September 5, 1984, the Debtors scheduled a hearing to show that they had made good faith efforts to sell the Helaman Development stock. At the hearing, the Debtors' counsel admitted that there had been some controversy over the value of the stock. The bankruptcy court noted that only the Chapter 13 Trustee had received notice of the hearing. Therefore, the court did not proceed with the hearing. Instead, the court directed the

Debtor to give written notification to all unsecured creditors detailing the specific steps which the Debtors had taken to market the stock and giving the creditors an opportunity to object before the stock was returned to the Debtors. The Debtors never complied with the bankruptcy court's instructions to properly notify creditors, nor did they ever initiate any other effort to make the required showing of good faith effort to sell the stock.

Meanwhile, another of the Helaman Development stockholders filed a Chapter 7 petition. During the investigation of that bankruptcy, the Chapter 13 Trustee learned that in 1981, two years before the Debtors in this case filed their First Amended Plan in which they stated that the value of the stock was unknown, the Debtors had attended a stockholders' meeting at which they were informed that the land described as "twenty-four acres of pasture" was worth about $3,000,000. Furthermore, since 1981 the assets of the corporation have grown considerably. The value of the corporation's assets were never disclosed to the court by the Debtors in this case.

Upon learning of the value of Helaman Development's assets, the Trustee moved for a declaration that the stock was still property of the estate and for an order authorizing liquidation of the stock to satisfy the claims of creditors. The hearing on the Trustee's motion was held on July 25, 1989.

At that hearing, the Debtors admitted that they had never complied with the order of the bankruptcy court, issued nearly five years before. They argued, however, that the stock had revested in them despite their failure to comply. Additionally, they argued that the Trustee's motion was barred by laches, and that the Debtors were entitled to discharge on equitable and policy grounds because they had made monthly payments which exceeded the monthly payments required by the plan.

The Debtors then offered to present evidence at that hearing of their good faith efforts to sell the stock. The Debtors had not sent the required notice to creditors, but, the Debtors argued, "This hearing has been on notice to all the creditors and has indicated that the Trustee does not believe the Debtor's efforts to sell the stock were in good faith. This hearing would certainly comport with the Court's requirement in 1984, if the Court believes such proof is required." Record, supplemental vol. 3, at 15. Later, the Debtor offered, "If the Court concludes that the requirement of the hearing should be met and is not met by this hearing, we would be willing to send out notice to all creditors, including a description of the Debtors' activities and have a hearing." Id. at 17.

The bankruptcy court rejected the Debtors' arguments and held that the stock was still property of the estate because the Debtors had not taken the steps necessary to allow revesting. The court also rejected the Debtors' offer to present evidence of good faith efforts to sell the stock, stating, "Today they offer to provide testimony or to do what the Court ordered them to do years ago. I find that it's simply too late, that the Debtors have shown an unwillingness to perform under the Plan." Id. at 21. The bankruptcy court then granted the Trustee's motion. The district court affirmed the bankruptcy court order.

The Debtors now challenge the bankruptcy court's conclusion that the Helaman Development stock did not vest in them, but remains property of the estate. We review de novo mixed questions of fact and law. In re Ruti-Sweetwater, Inc., 836 F.2d 1263, 1266 (10th Cir. 1988). We affirm the district court order for the reasons set out therein. We agree that the plan placed the burden of establishing their good faith efforts to sell the stock upon the Debtors. The Debtors did not meet this burden, nor did they comply with the order of the Bankruptcy court.

The Debtors challenge the power of the Trustee to liquidate the stock. We agree with the reasoning of the district court on this issue, and add that the bankruptcy court has broad powers under the Bankruptcy Code to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," and to "tak[e] any action or mak[e] any determination necessary or appropriate to enforce or implement court order or rules, or to prevent an abuse of process." 11 U.S.C. § 105(a). The order issued by the bankruptcy judge in this case falls within this provision.

The Debtors raise the equitable defense of laches and argue that it is inequitable for the court to order the liquidation of the stock when the debtors have made payments exceeding those required in the original plan. However, the bankruptcy court found, and we affirm, that the Debtors disregarded a prior order and showed unwillingness to perform under the plan. With such unclean hands, the Debtors may not now seek equitable relief from the court's order. See, e.g., Oklahoma Retail Grocers Ass'n v. Wal-Mart Stores, Inc., 605 F.2d 1155, 1157 (10th Cir. 1979) (in appropriate case, court of equity will withhold aid in accordance with clean hands doctrine).

Finally, we hold that the bankruptcy court did not abuse its discretion by refusing to allow the Debtors to present evidence of their good faith efforts to sell the stock. See Alexander v. United States, 849 F.2d 1293, 1301 (10th Cir. 1988) (abuse of discretion standard of review for rulings on admission or exclusion of evidence). The Debtors' good faith was not called into issue by the Trustee's motion. Furthermore, the Debtors had made no effort to provide the required notice to creditors. The bankruptcy court had already made clear that such notice was required before the Debtors would be allowed to make a showing of good faith.

The order of the district court is therefore AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Monroe G. McKay
Circuit Judge