UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

RAYMOND W. TEJCHMA and JUDY A. TEJCHMA,

Debtors.
_____/

Case No. DG 09-09138
Chapter 12
Hon. Scott W. Dales

Jointly Administered

In re:

T-BERRY FARMS, INC.,

Debtor.

_____/

Case No. DG 09-09141
Chapter 12

OPINION AND ORDER GRANTING MOTION TO DISMISS

PRESENT: HONORABLE SCOTT W. DALES
United States Bankruptcy Judge

I. INTRODUCTION

This matter is before the court on the chapter 12 trustee's post-confirmation motion to dismiss, premised on the Debtors' default in making payments under the Plan. All interested parties, including the Debtors, agree that dismissal is appropriate given the Debtors' worsening financial position. The only issue is whether the plan payments in the hands of chapter 12 trustee Joseph A. Chrystler (the "Trustee") should revest in the Debtors pursuant to 11 U.S.C. § 349 or be distributed to creditors in accordance with the confirmed Plan.

The Trustee and almost all the creditors agree that the payments should be distributed according to the Plan. Creditor Hamilton Farm Bureau ("Hamilton"), on the other hand, argues

that the plan payments are proceeds of its original collateral -- the blueberry bushes -- and both types of collateral remain encumbered.

The court held a hearing on May 15, 2013 in Grand Rapids, Michigan, where all parties agreed that there were no facts in dispute and that the court could make its decision based upon the parties' papers and arguments of counsel. For the following reasons, the court will dismiss the case after the Trustee distributes the remaining funds in accordance with the Plan.

II. JURISDICTION

The court has jurisdiction over the Debtors' bankruptcy cases pursuant to 28 U.S.C. § 1334(a). This matter is a "core proceeding" as enumerated in 28 U.S.C. § 157(b)(2)(a), and has been referred to the bankruptcy court pursuant to 28 U.S.C. § 157(a) and LCivR 83.2(a) (W.D. Mich.).

III. BACKGROUND

Raymond W. Tejchma, Judy A. Tejchma, and T-Berry Farms, Inc. (the "Debtors") have suffered numerous reversals due to weather and market forces following the confirmation of their joint chapter 12 plan on June 11, 2010.[1] Creditors have not been paid in over two years even though the Debtors have proposed several unworkable, post-confirmation plan amendments to address their various setbacks.

On October 11, 2011, after the Debtors failed to make their June and September 2011 payments, Hamilton filed a request for an emergency hearing on its Motion Requesting Escrow of Sale Proceeds from the blueberry crop (the "Escrow Motion," DN 101). According to the Escrow Motion, Hamilton sought to ensure that the Debtors would use the proceeds from the upcoming sale of the blueberry crop to make payments as mandated under the Plan.

[1] *See* Debtors' Joint Chapter 12 Plan (DN 17) and Debtors' First Amendment to Debtors Joint Chapter 12 Plan (DN 75) (collectively the "Plan"). The court confirmed the Plan on June 11, 2010. *See* Order Confirming Plan and Approving Attorney Fees (DN 87).

To resolve the Escrow Motion, Hamilton and the Debtors submitted a Stipulation and Agreed Order under which the Debtors agreed to remit to the Trustee $38,493.11 (the "Funds") from the sale of their 2011 blueberry crop. The court entered an order approving the stipulation on October 21, 2011 (the "Escrow Order," DN 108), and directed the Trustee to hold the Funds in escrow pending further order of the court. The Trustee has been holding the Funds since October 21, 2011.

After numerous aborted attempts to amend their Plan, and after the Debtors retained new counsel, it became clear that their reorganization was doomed. Their new counsel, Robert A. Stariha, Esq., conceded as much on the record in Grand Rapids on May 15, 2013.

In view of the hopeless situation, and after extending every courtesy, the Trustee now moves to dismiss the Debtors' chapter 12 cases because of their inability to meet their obligations under the Plan. In addition, the Trustee asks the court to allow him to distribute the Funds to the creditors in accordance with 11 U.S.C. § 1226(a) and the terms of the confirmed Plan.

IV. ANALYSIS

The court's decision is guided principally by two statutory provisions, the first governing the effect of a confirmed chapter 12 plan and the second dictating the consequences of dismissal. S*ee* 11 U.S.C. §§ 1227 (effect of confirmation) and 349(b) (effect of dismissal).

In general, a confirmed chapter 12 plan is regarded as a judgment binding on "the debtor, each creditor, each equity security holder, and each general partner in the debtor. . ." 11 U.S.C. § 1227(a). For this reason, the Trustee and the majority of creditors argue that because the Debtors made payments in accordance with the Plan and the Plan precisely specifies how and to whom payments should be made, the funds should be distributed in accordance with the Plan.

Hamilton, in contrast, asks the court to direct the Trustee to pay the Funds to the Debtors, in anticipatory reliance on 11 U.S.C. § 349(b)(3), the default provision that generally revests estate property in a debtor upon dismissal. Section 349(b) provides, in relevant part, as follows:

> (b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under Section 742 of this title –
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> . . .
>
> (2) vacates any order, judgment, or transfer ordered, under Section 522(i)(1), 542, 550, or 553 of this title; and
>
> (3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

11 U.S.C. § 349(b).

In short, Hamilton argues that the terms of the chapter 12 Plan are vacated upon dismissal, and the Funds held by the Trustee should revert back to the Debtors upon dismissal. The Trustee and the other creditors, in contrast, argue that the court should invoke the crucial preamble to the revesting provision in 11 U.S.C. § 349(b) which states: "[u]nless the court, for cause, orders otherwise . . . ."

After considering the circumstances of this case, the court finds that the Trustee has shown cause to "order otherwise" under Section 349(b), and to distribute the funds per the confirmed Plan, which the court regards as binding despite the imminent dismissal.

Section 1227(a) specifies the effect of chapter 12 plan confirmation:

> Except as provided in Section 1228(a) of this title, the provisions of a confirmed plan bind the debtor, each creditor, each equity security holder, and each general partner in the debtor, whether or not the claim of such creditor, such equity security holder, or such general partner in the debtor is provided for by the plan, and whether or not such creditor, such equity security holder, or such general partner in the debtor has objected, has accepted, or has rejected the plan.

11 U.S.C. § 1227(a). In other words, the Trustee is bound to act in accordance with the terms of the confirmed chapter 12 Plan, and neither the Debtors, the creditors, nor any party interest may assert any claims or rights inconsistent with the Plan. *See In re Wruck*, 183 B.R. 862, 865 (Bankr. D.N.D. 1995). Consequently, in the Debtors' confirmed chapter 12 Plan, Articles III and IV control how the Trustee distributes the Funds.

This interpretation is consistent with cases holding that "a confirmed plan is a contract," *see, e.g.*, *In re Modern Steel Treating Co.*, 130 B.R. 60, 65 (Bankr. N.D. Ill. 1991), and that upon confirmation, the parties' rights are fixed. *See In re Astroglass Boat Co.*, 32 B.R. 538, 542 (Bankr. M.D. Tenn. 1983). It is also consistent with cases decided by the United States Supreme Court which give the provisions of a confirmed plan *res judicata* effect, precluding collateral attack, such as Hamilton appears to be mounting. *See, e.g., United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010) ("The Bankruptcy Court's order confirming [Debtors'] proposed plan was a final judgment"); *Prudence Realization Corp. v. Ferris*, 323 U.S. 650, 655 (1945) ("the order confirming the plan of reorganization is *res judicata*"); *see also 8 Collier on Bankruptcy* ¶ 1227.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011).

Moreover, this court is not persuaded by the logic of *In re Keener*, 268 B.R. 912 (Bankr. N.D. Tex. 2001), a case which Hamilton relies upon in its response (DN 201). The court in that case specifically undervalued the *res judicata* provision of Section 1227(a) as applied to dismissals, suggesting that dismissal invalidates the terms of a confirmed plan. In response to the Trustee's dismissal motion, Hamilton asks the court to adopt a similar approach, urging the court to direct the Trustee to distribute the Funds to the Debtors under Section 349(b), rather than to creditors in accordance with Articles III and IV. The court rejects Hamilton's argument for several reasons, both statutory and equitable.

First, because the court has not yet dismissed the case (unlike *Keener*), the Plan remains binding on the parties, including the Trustee. It obligates the Debtors to "submit all present and future earnings of the Debtors to the supervision and control of the Court, as is necessary for the execution of the Plan." *See* Debtors' First Amendment to Debtors Joint Chapter 12 Plan at p. 12 (DN 75). The Debtors did so, resulting in the escrow of the Funds the Trustee is now holding. The Plan also directs the Trustee to make quarterly distributions until 2015. The court sees no reason to ignore Section 1227(a) and the preclusive effect of the Plan with respect to the payments the Debtors have made in accordance with the Plan, simply because the case is about to be dismissed.

Second, the court rejects Hamilton's premise that dismissal necessarily vacates the chapter 12 Plan or somehow unwinds actions taken in reliance on the Plan. Indeed, the *Keener* court itself observed that courts must protect reliance interests. For its part, Congress expressly identified in Section 349(b)(2) the orders that are vacated, and the transactions that are unwound, upon dismissal of a bankruptcy case, and omitted confirmation orders from the list.[2] This omission seems consistent with the binding effect that Congress prescribed for confirmed plans. *See* 11 U.S.C. §§ 1141(a), 1227(a) and 1327(a). Moreover, property of the estate presumptively vests in a debtor at confirmation (as it did in these cases), making the default revesting provisions of Section 349 more important before confirmation in most cases. *Id.* §§ 1141(b), 1227(b) and 1327(b). "As long as the statutory scheme is coherent and consistent, there is generally no need for a court to inquire beyond the plain language of the statute." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240-41 (1989). From Section 349, it appears that

[2] For the most part, the orders that are vacated upon dismissal relate to the exercise of chapter 5 avoidance and recovery powers. *See* 11 U.S.C. § 349(b)(2) (referring to orders, judgments, or transfers under Sections 522(i)(1), 542, 550, or 553).

dismissal does not *ipso facto* vacate a confirmation order, but instead gives the court some discretion regarding disposition of property upon dismissal.

Assuming, however, the court needed to look beyond the text of Section 349, the interpretative principle known formally as *expressio unius est exclusio alterius* -- the expression of one thing is the exclusion of others -- fortifies the conclusion that dismissal does not vacate the confirmation order, at least not to the extent that compliance remains possible and equitable. *See In re Newtown*, 64 B.R. 790 (Bankr. C.D. Ill. 1986) (a debtor's claim could not be reinstated under that section because the claim did not fall under one of the enumerated items). The court does not read statutory snippets in isolation, but must consider language in context and in harmony with other provisions of the Code. *Kelly v. Robinson*, 479 U.S. 36, 43 (1986); In *re Jamo*, 283 F.3d 392, 398 (1st Cir. 2002) (citing *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 914 (9th Cir. 1996)). Specifically, under Sections 1226(a) and 1227(a), the trustee must distribute any and all payments received in accordance with the plan, and Section 349 is not invariably inconsistent with these sections.

Third, assuming the court is mistaken that Section 1227(a) makes the Plan binding even in contemplation of dismissal, the court still finds authority to prevent the Funds from revesting in the Debtors within Section 349(b) itself, because that provision "contemplates that the court can choose to keep some terms binding on the parties where there is cause." *See Wiese v. Community Bank*, 552 F.3d 584, 589 (7th Cir. 2009). Therefore, if the court finds "cause" it may prevent the Funds from revesting in the Debtors, and instead direct the Trustee to remit them to creditors in advance of dismissal, even assuming, *arguendo*, the Funds come within the literal terms of Section 349(b)'s revesting provisions.[3]

[3] Under the statute, and unless the court orders otherwise, dismissal "revests the property of the estate in the entity in which *such property was vested immediately before the commencement* of the case under this title." 11 U.S.C.

Courts have defined "cause" under Section 349(b) to mean an acceptable reason. *In re Sadler*, 935 F.2d 918, 921 (7th Cir. 1991). Some examples of acceptable reasons under Section 349(b) include: reliance of the parties on the terms of a plan to their detriment (*In re Wiese*, No. 06-10053-12, slip op. at 2-3 (Bankr. W.D. Wisc. June 6, 2007)); interests of the creditors (*Id*.); receipt by the Debtors of bankruptcy's benefits without upholding their end of the bargain by paying creditors (*In re Hufford*, 460 B.R. 172, 178 (Bankr. N.D. Ohio 2011)); and adherence to the Congressional purpose of Section 349(b) which is to "undo the bankruptcy case, as far as practicable," without trampling on rights acquired during the case. *Wiese,* 552 F.3d at 590 (citing H.R. Rep. 95-595, at 338 (1977)).

The court easily finds "cause" in the present case given the preclusive effect of the Plan and the need to prevent inequitable treatment of the creditors other than Hamilton who suffered the use of their collateral and the delays associated with this case in reliance on the Plan's promised payments. The court infers that creditor cooperation likely helped generate the Funds, directly or indirectly.

Moreover, the Debtors have not asked the court to revest the Funds in them, perhaps acknowledging that they have benefited from the automatic stay and should be required, in fairness, to part with the Funds. Indeed, they have already tendered the Funds to the Trustee to settle the Escrow Motion, intending to use them to pay creditors in accordance with the court's further order. As the Debtors continued operating and holding their creditors in limbo, the

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§ 349(b)(3) (emphasis added). By referring to the entity in which "such property was vested immediately before the commencement of the case," the statute arguably does not reach property that was not in existence before the commencement of the case (and therefore, not vested in any entity at that moment), such as proceeds or property generated through postpetition efforts of the debtors and others. Moreover, the Plan itself vested the property of the estate in the Debtors at confirmation. *See* Debtors' Joint Chapter 12 Plan (DN 17) at Art. V. (D). If the Funds are proceeds of the *Debtors'* property, rather than the estate's property, there may be no estate property upon which Section 349 may operate. *But see Annese v. Kolenda (In re Kolenda),* 212 B.R. 851, 853 (W.D. Mich. 1997). The court need not resolve these difficult questions given its reliance on the Plan.

creditors received little to nothing since the Trustee made the last payment over two years ago. At this point of the case, following the Plan's distribution provisions seems eminently fair.

The court is also mindful that revesting the Funds in the Debtors as Hamilton proposes will launch a race to the state courthouse, with Hamilton leading the charge and the other creditors chasing the Debtors for property (the Funds) that the Plan and confirmation order have already allocated among the competing claimants. Permitting the default revesting provision of Section 349 to take effect would embroil the Debtors and creditors in additional litigation that could easily and equitably be avoided by honoring the preclusive effect of the Plan. The court acknowledges that revesting the Funds in the Debtors, subject to Hamilton's security interest, to some extent restores the *status quo ante,* consistent with the Congressional aim undergirding Section 349, at least with respect to Hamilton's collateral that the Debtors owned prepetition.[4] The other creditors' reliance on the Plan, however, and their contributions in different ways to creating the Funds, weigh heavily against revesting.

V. CONCLUSION & ORDER

Accordingly, the court finds that the Plan binds all the interested parties, and that the Trustee must distribute the Funds to the creditors as contemplated in the Plan at Article IV. Even in the absence of a controlling plan provision, the court finds cause to override the revesting provisions of Section 349(b)(3), and therefore "orders otherwise."

Finally, the court notes that its decision to direct the Trustee to distribute the Funds in accordance with the Plan, and to dismiss the case, renders moot the creditors' various motions for stay relief, an accounting, or administrative expense treatment.

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[4] *See, supra*, n. 3.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Trustee shall distribute the $38,486.11 to the creditors pursuant the Plan, within 7 days after entry of this Order.

IT IS FURTHER ORDERED that the Trustee's Motion to Dismiss (DN 174) is GRANTED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Opinion and Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon all parties listed on the mailing matrix herein.

[END OF ORDER]

IT IS SO ORDERED.

Dated June 3, 2013

Scott W. Dales
United States Bankruptcy Judge