14-17269

In the United States Court of Appeals for the Ninth Circuit

IN RE CITY OF STOCKTON, CALIFORNIA,

Debtor.

MICHAEL A. COBB,

Objector-Appellant,

v.

CITY OF STOCKTON, CALIFORNIA,

Debtor-Appellee.

APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA,
CASE NO. 12-32118, HON. CHRISTOPHER M. KLEIN

DEBTOR AND APPELLEE CITY OF STOCKTON, CALIFORNIA'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS THE APPEAL AS EQUITABLY MOOT

Marc A. Levinson
Patrick B. Bocash
Lesley M. Durmann
Orrick, Herrington & Sutcliffe LLP
400 Capitol Mall, Ste. 3000
Sacramento, CA 95814
(916) 447-9200

Robert M. Loeb
Orrick, Herrington & Sutcliffe LLP
1152 15th Street, N.W.
Washington, D.C. 20005
(202) 339-8400

Christopher J. Cariello
Orrick, Herrington & Sutcliffe LLP
51 West 52nd Street
New York, N.Y. 10019
(212) 506-5000

Attorneys for Debtor-Appellee

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES*

Page(s)

Cases

* The City cites its Motion to Dismiss the Appeal as Equitably Moot, Dkt. 19, as "Motion"; Cobb's Response, Dkt. 25, as "Response"; and the amicus filing of Franklin High Yield Tax-Free Income Fund and Franklin California High Yield Municipal Fund as "Amicus."

Statutes

Other Authorities

I. Cobb's Failure to Seek a Stay, Coupled with the Plan's Substantial Consummation, Warrants Dismissal

A. As explained in the Motion (at 6-9), the equitable mootness doctrine recognizes that "public policy values the finality of bankruptcy judgments because debtors, creditors, and third parties are entitled to rely on a final bankruptcy court order." *In re Thorpe Insulation Co.*, 677 F.3d 869, 880 (9th Cir. 2012). This Court has recognized a "clear bright-line rule" for parties wanting to seek review of a bankruptcy plan. *In re Mortgages Ltd.*, 771 F.3d 1211, 1215, 1217 (9th Cir. 2014). It is a simple rule that "all litigants can understand": "When an appellant fails to seek a stay [of a confirmation order in a bankruptcy case] without giving adequate cause, … the appeal [i]s equitably moot." *Id.* at 1215.

Cobb concedes that he did not seek a stay of the consummation of the City's plan of adjustment ("the Plan"), Response 3. The status quo has now irreparably changed. After the bankruptcy court filed its order confirming the Plan on February 4, 2015, there was an immediate flurry of transactions consummating the Plan, and the Plan went fully effective on February 25, 2015. Motion 3-6, 9-11. Those transactions included the payment of millions of dollars to over one thousand creditors. Motion 9-10. One need only place the Plan documents and the declarations the City

submitted in support of its Motion side by side to see that virtually all of the Plan transactions have been accomplished. *Compare* Motion atts. A-C, *with* Modified Disclosure Statement with Respect to First Am. Plan for the Adjustment of Debts of City of Stockton, Cal., Nov. 21, 2013, *In re City of Stockton, Cal.*, 12-32118 (Bankr. E.D. Cal.), Dkt. 1215, at 73-77, 82, *available at* http://tinyurl.com/DisclosureStmt. Certainly Cobb identifies nothing remaining; so, contrary to his suggestion (at 6-7), there is no legitimate question as to whether the Plan has been "substantially consummated."[1]

Cobb's failure to satisfy the "obligatory" gateway requirement to seek a stay (even though aware of this Court's equitable mootness doctrine[2]), *In re Roberts Farms, Inc.*, 652 F.2d 793, 798 (9th Cir. 1981)—coupled with the substantial consummation of the Plan—warrants dismissal.[3]

---

[1] This Court should reject Cobb's invitation to delay resolution of the Motion until decision on the merits of Cobb's appeal. Response 18-20. The passage of time will only cause greater reliance on the new status quo, making relief even more impracticable.

[2] *See* Pet'n of Michael A. Cobb for Permission to Appeal, Sept. 5, 2014, *Cobb v. City of Stockton, Cal.*, 14-80121, Dkt. 1, at 13 (9th Cir.) (citing possibility of equitable mootness as reason for permission to appeal).

[3] Cobb's assertion (at 14 n.6) that he had little chance of *obtaining* a stay is irrelevant, because an "appellant has a high obligation to seek a stay

B. The Response does not offer any "adequate reason" for Cobb's decision not to bother with the required stay request, *In re Mortgages*, 771 F.3d at 1215. Instead, Cobb—along with amicus Franklin—attacks the requirement itself.

Cobb accuses the City of "cherry-pick[ing] language" from this Court's equitable mootness cases. Response 10. His very first quotation (at 2), however, highlights the importance of seeking a stay of the implementation of a bankruptcy plan. He quotes *In re Thorpe*, 677 F.3d at 881. There, in the very passage Cobb quotes, this Court held that it "will look first at whether a stay was sought, for absent that a party has not fully pursued its rights. *If* a stay was sought and not gained, we *then* will look to whether substantial consummation of the plan has occurred." *Id.* (emphasis added).

Cobb suggests that a further examination of other factors "must be made in every case," regardless of whether the appellant sought a stay. Response 5. But that, of course, would eliminate the value of the "clear bright-line" threshold rule, *In re Mortgages*, 771 F.3d at 1215. This Court properly looks to those other factors only where a party *did* seek a stay to

---

pending appeal, even if the chances of success seem dim." *In re Mortgages*, 771 F.3d at 1216 (internal quotation marks and citation omitted).

determine whether meaningful relief can be granted without substantially harming third parties. *In re Mortgages*, 771 F.3d at 1216. This threshold "requirement" of seeking a stay "is grounded in important principles of equity." *Id.* at 1216. It ensures that all interested parties, whether they are before the bankruptcy court or not, can set expectations prior to a change in the status quo.

The threshold requirement is all the more vital in chapter 9 cases. It is not just that many irreversible transactions have taken place here and that Humpty Dumpty can't be put back together again. It is also that the bankruptcy court does not have *the power* even to try to unscramble the egg without the City's consent. In enacting chapter 9, Congress understood that state and municipal entities were different than private debtors. *See generally In re Desert Hot Springs*, 339 F.3d 782, 789-90 (9th Cir. 2003) (discussing "unique aspects" of chapter 9). Allowing a creditor or court to create and impose a plan upon an instrumentality of a state would raise serious Tenth Amendment concerns. *Id.* Congress therefore expressly specified that no order regarding the "property or revenues of the debtor" can be entered without the consent of the debtor. 11 U.S.C. § 904(2).

Consistent with § 904, Congress did not allow alternative plans to be submitted by creditors in a chapter 9 case. *Cf.* 11 U.S.C. § 1121(c) (permitting creditor plans in chapter 11 cases after expiration of exclusivity). Nor did it empower the bankruptcy court to convert the case to a chapter 7 liquidation. *In re Desert Hot Springs*, 339 F.3d at 789; *cf.* 11 U.S.C. § 1112 (permitting conversion in chapter 11 cases). The bankruptcy court is "strictly limited to disapproving or to approving and carrying out" the proposed plan of adjustment submitted by the City. *Leco Props. v. R. E. Crummer & Co.*, 128 F.2d 110, 113 (5th Cir. 1942).[4] Only the debtor can propose a plan or propose a modification to its plan. 11 U.S.C. §§ 941, 942. And the bankruptcy court "shall confirm the plan" if it meets all statutory requirements. 11 U.S.C. § 943(b). If not, it may deny the plan or dismiss the case. *Id.* at § 930(a)(4)-(5).

Contrary to Cobb's and Franklin's assumptions, what the court cannot do is simply rewrite or modify a plan. Although the bankruptcy court suggested in regard to another creditor—Franklin—that it "could fashion a remedy" because it is "conceivable that some additional funds

[4] For that reason, the bankruptcy court may not "merely … order[] the City to pay more … on Cobb's claim," as Franklin suggests without citation to authority. Amicus 5.

could be made available," Response 16, exh. C at 20-22 (quoting the bankruptcy court), the court lacks the power to modify the Plan it confirmed. Even attempting to unravel settlements and transactions, compel a new plan, or dismiss the case would generate the very havoc, affecting a multiplicity of interested parties, the equitable mootness doctrine seeks to avert.

Likewise, there is no merit to Cobb's suggestion (at 8) that the bankruptcy court could amend the Plan to exempt his claim from discharge under 11 U.S.C. § 944(c)(1). Section 944(c)(1) provides for discharge only for claims "excepted from discharge by the plan or order confirming the plan." Cobb's claim is not excepted from discharge by the Plan, and the bankruptcy court may not unilaterally except a claim from discharge under an order confirming a plan for the reasons explained above.

C. For much the same reasons, Cobb and Franklin are wrong to rely on a possible exception in chapter 11 cases noted by the *In re Mortgages* Court. Response 12-13; Amicus 7. That possible "narrow exception," derived from this Court's earlier ruling in *In re Sylmar Plaza, L.P.*, 314 F.3d 1070, 1074 (9th Cir. 2002), applies only where the appellant seeks monetary relief and the bankruptcy court could "award [the appellant]

more money from a stable pool of available funds." *In re Mortgages*, 771 F.3d at 1217; *In re Sylmar*, 314 F.3d at 1074.[5] Under chapter 9, there is no additional "pool of available funds" for a court to award a creditor. As noted above, in a chapter 9 case, the court lacks the power to modify a plan to tap additional funds without the consent of the municipality. And, unlike in a chapter 11 case, creditors in a chapter 9 case cannot propose alternative plans seeking additional funds. *Compare* 11 U.S.C. § 1121, *with* 11 U.S.C. § 941.

Moreover, as a practical and legal matter, a municipal debtor *must* emerge from chapter 9 with sufficient reserve funds to continue to operate and save as a viable and functioning municipality. 11 U.S.C. § 943(b)(7) (a plan must be "feasible"). The absence of such funds is what drove the City into bankruptcy. And the funds the City retains under the confirmed Plan are based on detailed, long-term financial projections and budgeting that model a sustainable solvency. This financial framework formed the basis

[5] Despite recognizing the possibility of such an exception, the *In re Mortgages* Court makes clear that, at the very least, failure to seek a stay "weighs strongly towards equitable mootness." 771 F.3d at 1217. In resolving the case on the alternative ground that the mootness factors as a whole warranted dismissal, the Court nevertheless relied heavily on the appellant's failure to discharge its obligation to seek a stay. *Id.*

for the Plan and, very likely, the decisions of the vast majority of the City's creditors to vote to accept it. The funds it reserves to the City cannot be freely divvied up at the discretion of the bankruptcy court for the benefit of the small minority of creditors voting "No" without undermining the Plan's foundation. Indeed, doing so would violate the clear restrictions imposed by 11 U.S.C. § 904 on the court's authority in a chapter 9 case. The existence of such required funds is therefore irrelevant here.

D. Finally, Cobb and Franklin argue that equitable mootness should never apply in a chapter 9 case. Response 17-18; Amicus 9-10. This Court has, however, already recognized and applied the equitable mootness doctrine in a chapter 9 case, *In re City of Vallejo, Cal.*, 551 F. App'x 339 (9th Cir. 2013). Ignoring this Circuit's own ruling, Cobb instead cites to one from the District of Alabama that is currently on appeal to the Eleventh Circuit, *Bennett v. Jefferson County., Ala.*, 518 B.R. 613 (N.D. Ala. 2014). The reasoning of that district court cannot be squared with *In re City of Vallejo* and cannot, in any event, withstand scrutiny.

The *Jefferson County* district court thought application of the equitable mootness doctrine may be "in some tension with [the Supreme Court's] recent reaffirmation of the principle that a federal court's

obligation to hear and decide cases within its jurisdiction is virtually unflagging." 518 B.R. at 634 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014)). As an attack on the equitable mootness doctrine in *all* contexts, this proves far too much.

Moreover, application of the equitable mootness doctrine to this appeal is not a declination by the federal courts to exercise the jurisdiction granted by Congress. Rather, it simply requires an appellant to take certain steps to preserve a right to appeal before a plan of adjustment is substantially consummated and the status quo changes. If, as here, the appellant fails to take the basic step of seeking a stay, it is his omission, not the court's abstention, that causes the appeal to be dismissed.

The *Jefferson County* district court also suggested that because "substantial consummation" initially arose in chapter 11 cases, it must somehow not apply in a chapter 9 case. *Id.* at 635. In fact, the case for application of the doctrine to the chapter 9 context is far stronger than the chapter 11 context. As discussed above, in a chapter 11 case, a court can adopt a modified plan proposed by a creditor. Moreover, there is always the alternative of conversion to a chapter 7 liquidation, 11 U.S.C. § 1112. This gives the court possible avenues to compel payment of additional

funds even after a plan is confirmed and consummated. That power simply does not exist in the chapter 9 context. Thus, the rationale for enforcing the doctrine in the chapter 9 context is far more compelling.

The *Jefferson County* district court further cited the concern that application of the equitable mootness doctrine to a chapter 9 case would "allow a non-Article III court to decide important constitutional questions that place substantial future obligations on the citizens of Jefferson County without representation." *Id.* at 637. Although that could possibly justify the issuance of a stay, allowing review of important legal issues prior to the implementation of a plan, it does not support the sweeping disqualification of an established and sound equitable doctrine.

II. Conclusion

For the foregoing reasons, this Court should grant the City's motion and dismiss this appeal as equitably moot.

Dated: June 26, 2015

/s/ Robert M. Loeb

Robert M. Loeb
Orrick, Herrington & Sutcliffe LLP
1152 15th Street, N.W.
Washington, D.C. 20005
(202) 339-8400

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing reply with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 26, 2015, which will automatically serve all parties.

Dated: June 26, 2015

/s/ Robert M. Loeb
Robert M. Loeb
Orrick, Herrington & Sutcliffe LLP
1152 15th Street, N.W.
Washington, D.C. 20005
(202) 339-8400