UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20721
Summary Calendar

IN THE MATTER OF: CPH, INC.,

Debtor,

CPH, INC., LEO WOU and MARY WOU,

Appellants,

versus

THE HONGKONG and SHANGHAI BANKING CORPORATION LIMITED,

Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-92-3346)

(June 8, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

By EDITH H. JONES, Circuit Judge:[*]

Appellants, the founders and former shareholders of the debtor, challenge the confirmation of a Chapter 11 reorganization plan on behalf of themselves and the debtor. Finding no reversible error, we affirm the confirmation of the plan.

---

[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

CPH is a Texas based joint venture with a Chinese entity which owns as its sole asset a hotel in China. CPH was formed and owned by Leo and Mary Wou who loaned $2.6 million in money and architectural services to facilitate the construction of the hotel. However, additional financing was acquired from Hong Kong & Shanghai Banking Corp. (HSBC) and Bank of China. In return for the loan to HSBC, the debtor agreed to subordinate any other debt to that loan. Due to the student massacre in Beijing, the hotel was not at first as profitable as anticipated and was unable to service its debt.

HSBC sued CPH in Hong Kong and secured a judgment in the amount of $8.5 million. When HSBC sued to enforce the judgment in California, CPH filed a voluntary Chapter 11 petition. HSBC and Bank of China filed claims in the approximate amounts of $14.1 million and $10 million respectively. Both the Debtor and HSBC filed competing reorganization plans. All of the unsecured creditors, except the Wous, voted to approve the HSBC plan and against approval of the debtor's plan.

The bankruptcy court, over the written objection of the Wous' individually, but not of the debtor, confirmed the HSBC plan. Neither the Wou's nor their lawyer attended the confirmation hearing, and the debtor did not file a written objection to the confirmation of the plan.

The HSBC plan classified the creditors into five classes: Class I consisted of administrative claims; Class II consisted of

HSBC only which was to be given 1,000 shares of CPH stock and a new promissory note in the amount of the debt minus $1,000; Class III consisted of all other unsecured creditors except the Wous and were to be given new promissory notes in the amount of the debts; Class IV consisted of the Wous' claim of $2.6 million that they loaned the company to build the hotel and was to be given a new promissory note in that amount; and Class V was the Wou's equity interest in CPH which was to be cancelled because the company was insolvent.

The district court affirmed the bankruptcy court's order. The Wous are now appealing this order on behalf of themselves and CPH. Neither the debtor nor the Wous moved for a stay of the plan pending appeal. It has now been over thirty months since the plan was confirmed. HSBC has assumed management of CPH and has issued promissory notes to the creditors to begin effectuation of the confirmed plan.

DISCUSSION

Appellants claim that the bankruptcy court erred in confirming the creditor's plan of reorganization because the plan was unfair and inequitable in violation 11 U.S.C. § 1129. On appeal from a bankruptcy decision, we review questions of law de novo and findings of fact for clear error. In re Consolidated Bancshares, Inc., 785 F.2d 1249, 1252 (5th Cir. 1986).

Appellants first contend that the plan fails the "best interests of the creditors" test, 11 U.S.C. § 1129(a)(7)(ii), because the Wou's did not receive as much under the plan as they would have in a chapter 7 liquidation. Both the bankruptcy court

and the district court on appeal found that the Wou's did receive at least as much under the plan as they would have in a liquidation. The only evidence offered on this issue was the testimony of an expert witness on behalf of HSBC who testified that all of the creditors would receive more under the plan than in a chapter 7 liquidation. Appellants can point to no record evidence to the contrary. Therefore, this finding is not clearly erroneous.

Appellants next contend that the plan's classification of the creditors' claims is unfair and inequitable. However, appellants do not dispute that the subordination agreement in favor of HSBC is valid. That the Wous' insider claim is classified below other unsecured creditors is not clearly erroneous because of the subordination agreement and because the unrefuted testimony at the confirmation hearing established that the Wous' claim was more accurately classified as equity and could have been completely cancelled because CPH was insolvent. See generally Matter of Briscoe Enter., Ltd., II, 994 F.2d 1160, 1167 (5th Cir.), cert. denied, 114 S.Ct. 550, 126 L.Ed.2d 451 (1993) (Claims may be classified separately for good business reasons and review of separate classification is for clear error).

Appellants' assertion that the plan violates the absolute priority rule is also meritless. Their attempt to transmogrify HSBC from the senior creditor into the "debtor," and then to argue that the "debtor" is receiving an interest ahead of creditors (the Wou's) in violation of the absolute priority rule is unavailing.

Appellants' further contentions that the plan was not proposed in good faith and that there was inadequate disclosure are also meritless. The bankruptcy judge's statement on the record that all of the requirements of section 1129 had been met, the plan was proposed in good faith, and "that it does not discriminate unfairly and that the affiliations have been disclosed," is sufficient, supported by the record, and not clearly erroneous.[1]

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

[1] Appellants' assertion that the plan violates the Joint Venture Agreement was not raised below and is not properly before this court. In re Martin, 880 F.2d 857, 860 (5th Cir. 1989).