IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20879
Summary Calendar

IN THE MATTER OF: TRANS MARKETING HOUSTON, INC.,

Debtor.

AQUILA ENERGY MARKETING CORPORATION,

Appellant,

v.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF TRANS MARKETING HOUSTON, INC., AND BANQUE PARIBAS,

Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 94 890 c/w 94 1137)

July 3, 1995

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

Aquila Energy Marketing Corporation, an unsecured creditor, appealed the bankruptcy court's confirmation of a reorganization

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*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 Pursuant to that Rule, the court has determined that this opinion should not be published.

plan for Trans Marketing Houston, Inc., a Chapter 11 debtor. The district court dismissed Aquila's appeal as moot. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On April 16, 1993, Trans Marketing Houston, Inc. ("Trans Marketing"), a trader of petroleum, chemicals, and natural gas, filed a voluntary petition for bankruptcy under Chapter 11. Prior to Trans Marketing's filing for bankruptcy, one of its unsecured trade creditors, Aquila Energy Marketing Corporation ("Aquila"), filed suit in Texas state court in an effort to recover approximately $1.8 million in receivables. In March 1993, Aquila obtained a prejudgment writ of garnishment and served the writ on Banque Paribas, Trans Marketing's primary lender who held perfected liens and security interests on virtually all of Trans Marketing's property.

Aquila filed a proof of claim for approximately $3.44 million. Trans Marketing, in turn, instituted an adversary proceeding against Aquila seeking to avoid the state court writ of garnishment as a preferential transfer. An official creditors' committee was established and undertook to devise a confirmable plan. The creditors were divided into eight classes, one through seven of which were priority, tax, and secured creditors. Class eight contained all unsecured creditors. After many months of negotiation, the creditors presented a plan to the

bankruptcy court for confirmation.[1] On January 9, 1994, the bankruptcy court entered an order confirming the plan. One of the aspects of the confirmed plan-- and the aspect to which Aquila primarily objects-- is an injunction which prohibits Aquila from collecting on its writ of garnishment until after the federal courts have determined whether such collection would constitute a preferential transfer.[2]

On February 2, 1994, Aquila appealed the confirmation order to the district court and asked the bankruptcy court for a stay pending appeal. On March 1, 1994, the reorganization plan became effective by its own terms. On March 28, 1994, the bankruptcy court denied Aquila's request for a stay. On October 24, 1994, the district court dismissed Aquila's appeal as moot. Aquila filed a timely notice of appeal to this court.

II. ANALYSIS

The concept of "mootness" in the context of an appeal of the confirmation of a bankruptcy reorganization plan is broader than that traditionally employed in the context of Article III's command that the judicial power extend only to "Cases" or "Controversies." U.S. CONST. art. III, § 2, cl. 1. Specifically,

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[1] Of the 68 unsecured creditors who voted on the plan, 66 voted to accept the plan and two (including Aquila) voted against it. The creditors accepting the plan represented nearly $11 million in claims, while the two opposing it represented $3.445 million in claims (all but $3000 of which was claimed by Aquila).

[2] The liquidation trustee has since been substituted for Trans Marketing in this adversarial proceeding.

in the context of an appeal of the confirmation of a bankruptcy reorganization plan, the mootness issue "is not an Article III inquiry as to whether a live controversy is presented; rather, it is a recognition by the appellate courts that there is a point beyond which they cannot order fundamental changes in reorganization actions." Manges v. Seattle-First Nat'l Bank (In re Manges), 29 F.3d 1034, 1038-39 (5th Cir. 1994), cert. denied, 115 S. Ct. 1105 (1995). Thus, even though there may still be a viable dispute among the parties on appeal, "a reviewing court may decline to consider the merits of a confirmation order when there has been substantial consummation of the plan such that effective judicial relief is no longer available." Id. at 1039.

In determining whether an appeal of a bankruptcy confirmation order is moot, this court has historically examined three factors: (1) whether a stay has been obtained; (2) whether the plan has been "substantially consummated," and (3) whether the relief requested would affect either the rights of the parties not before the court or the success of the plan. Id.; see also Halliburton Serv. v. Crystal Oil Co. (In re Crystal Oil Co.), 854 F.2d 79, 81-82 (5th Cir. 1988).

In the case at hand, Aquila unsuccessfully asked the bankruptcy court to issue a stay pending appeal to the district court. Aquila also asked the district court for a stay pending its disposition of the appeal on the merits, but the district court never ruled upon this motion, instead dismissing Aquila's appeal as moot. Aquila's lack of success in obtaining a stay

from either the bankruptcy or district court is irrelevant because, as Judge Easterbrook once so perspicaciously observed, "A stay not sought, and a stay sought and denied, lead equally to the implementation of the plan of reorganization." In re UNR Indus., Inc., 20 F.3d 766, 770 (7th Cir.), cert. denied, 115 S. Ct. 509 (1994); see also In re AOV Indus., Inc., 792 F.2d 1140, 1147 (D.C. Cir. 1986) (noting that the failure to obtain a stay has the same practical effect as a failure to seek a stay at all). Whether a stay has been obtained or not is important to the mootness analysis only because, if a stay is obtained, an appellate court has more maneuverability to fashion effective relief because the parties are being held in status quo. If a stay is not obtained, by contrast, the reorganization plan has, at least to some degree, gone forward, and the court must then consider whether it has gone "too far" forward such that providing the relief sought would work an injustice on those who have relied upon the finality of the plan. See In re UNR Indus., Inc., 20 F.3d at 770 (""[I]t is the reliance interests engendered by the plan, coupled with the difficulty of reversing critical transactions, that counsels against attempts to unwind things on appeal.").

With regard to the second factor in the mootness analysis-- i.e., whether the plan has been "substantially consummated"-- we

look to the Bankruptcy Code's definition for guidance.[3] The Bankruptcy Code defines substantial consummation as follows:

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
> (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
> (C) commencement of distribution under the plan.

11 U.S.C. § 1101(2). Using this definition as a yardstick, the district court concluded that the reorganization plan for Trans Marketing had been substantially consummated. Specifically, the district court considered the uncontroverted affidavit of John Weaver, the liquidation trustee, which stated that numerous irreversible events had taken place, including: transfer of all of Trans Marketing's property to the Liquidation Trust; payment of money to the trustee as a result of settlements provided by the plan; distributions to administrative and priority claimants; release of Banque Paribas from preconfirmation causes of action; granting new liens to Banque Paribas to secure its reduced debt; payment of $25,000 by Banque Paribas to the trustee for tax-related litigation expenses; payment of $50,000 by Banque Paribas to the trust to fund initial administrative expenses; payment to

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[3] Although we recognize that the Bankruptcy Code's definition of substantial consummation is designed to be used in the context of a request for modification of a plan, we have held that the statutory concept and definition of "substantial consummation" provides an appropriate yardstick in assessing the mootness of an appeal of a confirmation order "because it informs our judgment as to when finality concerns and the reliance interests of third parties upon the plan as effectuated have become paramount to a resolution of the dispute between the parties on appeal." In re Manges, 29 F.3d at 1041.

the trustee for services rendered; formation of new contracts between the trust and third parties; initiation by the trustee of litigation to collect Trans Marketing's accounts receivable; and the closing of all of Trans Marketing's offices. Because these actions had taken place by the time the district court heard Aquila's appeal, the district court concluded that "a reversal at this point would not restore the status quo that existed at the time of confirmation, but, on the contrary, would have a disastrous effect on the creditors." Thus, the district court concluded that there were foreseeable irreversible changes of position based upon the confirmation of the plan, rendering the plan substantially consummated and the appeal prudentially moot. We agree.

The reorganization plan, the confirmation of which is the subject of this appeal, became effective by its own terms on March 1, 1994-- over fifteen months ago. Since that time, all of Trans Marketing's property has been transferred to the liquidating trust, the liquidating trust has assumed the business and management of all or substantially all of the property dealt with by the reorganization plan, and distribution under the plan has been commenced. In other words, substantial consummation has occurred. See 11 U.S.C. § 1101(2). Furthermore, as set forth above, both the parties before the court as well as numerous third parties not before the court have entered into agreements with the trust that cannot now be revoked. If we were to unravel the plan at this point, there would be no way to restore these

parties to the status quo that existed before the confirmation order. Aquila suggests, as an alternative, that we could merely unravel that portion of the plan that they find offensive-- i.e., that we could "modify" the plan to suit their needs. We have unequivocally rejected this argument before, stating that "[t]he Bankruptcy Code provides that a plan may not be modified or amended after substantial consummation has taken place." In re Manges, 29 F.3d at 1043 n.13 (citing 11 U.S.C. § 1127(b)).[4]

III. CONCLUSION

To summarize, the plan has been virtually fully implemented and, at this juncture, unravelling it would be nearly impossible. Accordingly, it would be inequitable to grant the relief requested by Aquila and this appeal is prudentially moot. APPEAL DISMISSED.

[4] We also note that, as a creditor, Aquila does not have standing to request a modification of the plan, as the Bankruptcy Code vests such power only in "[t]he proponent of a plan or the reorganized debtor . . . ." 11 U.S.C. § 1127(b).