UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

In re:	)	Case No. 12-75188-SCS
SHAWNTE BURSTON,	)	
Debtor.	)	Chapter13

ORDER

This matter comes before the Court on the Objection to Confirmation of Chapter 13 Plan filed by R. Clinton Stackhouse, Jr., Chapter 13 Trustee ("Objection"), filed on February 11, 2013, regarding the Chapter 13 Plan ("Plan"), filed by the Debtor on December 21, 2012. In the Objection, the Trustee requests that the Court require the Debtor to serve a copy of the Plan in accordance with Rules 9014 and 7004 of the Federal Rules of Bankruptcy Procedure. The Debtor filed a response to the Objection on February 19, 2013, arguing that the Plan filed in the above-captioned case need only be noticed in accordance with Rules 2002 and 3015(d) of the Federal Rules of Bankruptcy Procedure, as such Plan did not contain any included motions that would necessitate special notice pursuant to Local Bankruptcy Rule 3015-2(B). On February 21, 2013, a hearing on the Objection was held and continued by the Court to allow the Chapter 13 Trustee to submit a brief in support of the Objection and the Debtor to file a response thereto.

The Chapter 13 Trustee filed a Memorandum Brief in Support of Objection ("Brief") on March 13, 2013. On March 28, 2013, the Debtor filed a Response to Memorandum Brief in Support of Objection ("Response Brief"). In his Brief, the Chapter 13 Trustee argues that all creditors must be served with the Plan in accordance with Rules 9014 and 7004. According to the Chapter 13 Trustee, service in this fashion is necessary for the following reasons: 1) the rights of all creditors—even unsecured—are affected by the Plan, which triggers the need for heightened notice under the Fourth Circuit's decision in *Banks v. Sallie Mae Servicing Corp.* (*In re Banks*), 299 F.3d

296 (4th Cir. 2002) (hereinafter "*Banks*"); 2) the provision in Paragraph 6 of the Plan for the assumption of an executory contract with Verizon should be treated as an included motion, rather than a request made as part of the Plan, for purposes of Rule 6006(a); 3) the provision of adequate protection payments to Michael Wayne Investments in the Plan should be treated as a request for superpriority payment of adequate protection pursuant to11 U.S.C. §§ 507(b) and 503(b); and 4) the Plan provides for the payment of attorney's fees "upon confirmation along with adequate protection payments" until paid in full, thereby altering the priority scheme for the payment of expenses and claims set forth in 11 U.S.C. § 507.

In his Response Brief, the Debtor argues that notice of the Plan to all creditors was sufficient. The Debtor bases his argument on 1) Rule 2002(b) of the Federal Rules of Bankruptcy Procedure, which requires twenty-eight (28) days notice of the time for the filing of objections; 2) Local Bankruptcy Rule 3015-2, which requires service of the Plan pursuant to Rule 7004 only for those creditors subject to included motions pursuant to 11 U.S.C. §§ 506 and/or 522(f); 3) Rule 6006(a), which specifically excludes from the requirements of service under Rule 7004, proceedings to assume, reject, or assign an executory that are included as part of a Chapter 13 Plan, such as the assumption of the Verizon contract provided for in Paragraph 6 of the Plan; 4) the provision of adequate protection payments in the Plan in fulfillment of the debtor's obligation to provide such payments pursuant 11 U.S.C. § 1326(a)(1)(C); and 5) the payment of attorney's fees through the Plan, after the payment of adequate protection, which does not run afoul of the priority scheme set forth in 11 U.S.C. § 507.

The continued hearing on the Objection was convened on April 11, 2013, at which time the Court considered the arguments raised by the parties in the Brief and Response Brief. At the conclusion of the hearing, the Court overruled the Objection for the reasons set forth below.

First, all creditors, including Michael Wayne Investments, need only receive notice of the Plan filed in this case in accordance with Rule 2002(b) because service under Rules 9014 and 7004

is not triggered in this case. Rule 2002(b) requires that twenty-eight (28) day notice must be given of the time fixed for filing objections to a chapter 13 plan. In this jurisdiction, Local Bankruptcy Rule 3015-2(B) excepts from the general notice requirements of Rule 2002(b) those secured creditors who are the subject of "an included motion for valuation under 11 U.S.C. § 506(a) or an included motion for lien avoidance under 11 U.S.C. § 522(f)" and requires service of the chapter 13 plan in accordance with Rule 7004 on those secured creditors instead. If such motions are filed separately from the chapter 13 plan, then special notice under Local Bankruptcy Rule 3015-2(B) would not be necessary as the stand-alone motions themselves would be served in accordance with Rule 7004. Further, the 1983 Advisory Committee Note to Bankruptcy Rule 9014 identifies specific matters that constitute contested matters under Rule 9014. An objection to confirmation is among such examples, and Rule 3015(f) specifically provides that an objection to confirmation is governed by Rule 9014. It follows that while a chapter 13 plan may propose to modify a secured creditor's rights, *see* 11 U.S.C. § 1322(b)(2), the proposal of such treatment in the chapter 13 plan does not itself initiate a contested matter. Rather, a contested matter does not arise until an objection is made thereto by the creditor, presenting an "actual dispute." *See In re De Coro, Ltd.*, No 09-10369-C-15G, 2010 WL 5140440, at *4 (Bankr. M.D.N.C. Dec. 13, 2010) (quoting *Leavell v. Karnes*, 143 B.R. 212, 217 (S.D. Ill. 1990)). Thus, as a chapter 13 plan itself does not give rise to a contested matter, there is no basis to require service of a chapter 13 plan on creditors, except as provided for in Local Bankruptcy Rule 3015-2(B).

Despite the clear language of the rules, the Chapter 13 Trustee urges the Court to rely upon language in *Banks* and hold that Fourth Circuit precedent requires service of the Plan in accordance with Rules 9014 and 7004. Although the holding in *Banks* was abrogated by the Supreme Court's decision in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010), the summation within *Banks* distinguishing instances when notice is sufficient versus when service is required remains unaffected. The *Banks* Court recognized the proper role of Rule 2002 in providing notice of plan

provisions. "Bankruptcy Rule 2002(b) does not require specific notice of plan provisions affecting a particular creditor, nor does it require the notice to be served in any particular manner or upon any particular person." *Banks*, 299 F.3d at 301. The statement in *Banks* that follows this quote appears to be the basis for the Trustee's position that a plan must be served in accordance with Rules 9014 and 7004. When read alone—"[w]hen the *rights of specific parties become an issue*, however, service of the *initiating motion or objection* on the affected party is required," *id.* (citing *In re Boykin*, 246 B.R. 825, 828-29 (Bankr. E.D. Va. 2000) (Mayer, J.)) (emphasis added)—this quote could be interpreted as such. However, the emphasized text, which seems to refer to standard embodied by Rule 9014, must be read in context with the specific examples of such situations set forth later in *Banks* so as to give meaning to the phrase "when the rights of specific parties become an issue." Those examples are all situations where, if the matter was initiated outside the plan, service would be required. The cases cited as examples in *Banks—Linkous*,[1] *Cen-Pen*,[2] and *Deutchman*[3]—all involved debtors who sought to modify or otherwise extinguish certain liens without undertaking the procedural steps necessary to do so (*e.g.*, initiating an adversary proceeding). Including these types of actions inside the plan does not obviate the need for service of these types of actions, a point upon which there appears to be no disagreement by the parties. The holding in *Banks* is therefore consistent with the interplay of the applicable Federal Rules of Bankruptcy Procedure and Local Bankruptcy Rules previously described by the Court. Therefore, because no creditors are the subject of an included motion pursuant to 11 U.S.C. §§ 506(a) and/or 522(f), the Debtor need only provide notice of the Plan pursuant to Rule 2002(b) to all creditors.

Second, Verizon need only receive notice of the Plan pursuant to Rule 2002(b). Motions to assume, reject , or assign executory contracts or leases that are included as part of a chapter 13 plan

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[1] *Piedmont Trust Bank v. Linkous* (*In re Linkous*), 990 F.2d 160 (4th Cir. 1993).

[2] *Cen-Pen Corp. v. Hanson* (*In re Hanson*), 58 F.3d 89, 93 (4th Cir. 1995).

[3] *Deutchman v. IRS* (*In re Deutchman*), 192 F.3d 457 (4th Cir. 1999).

are specifically exempted from the service requirements of Rules 9014 and 7004 by Rule 6006(a). Rule 6006(a) provides that "[a] proceeding to assume, reject or assign an executory contract or unexpired lease, *other than as part of a plan*, is governed by Rule 9014." (emphasis added). Additionally, the Local Bankruptcy Rules in this jurisdiction do not require service of a chapter 13 plan on creditors who are the subject of motions to assume, reject, or assign executory contracts or leases. Since the assumption of the executory contract with Verizon is part of the Plan, rather than a proceeding brought by separate motion, Verizon need only receive notice of the Plan in accordance with Rule 2002(b).

Third, the proposal of adequate protection in a chapter 13 plan does not trigger service pursuant to Rules 9014 and 7004 on the recipients of such adequate protection. A chapter 13 debtor is required under 11 U.S.C. § 1326(a)(1)(C) to make adequate protection payments to creditors holding allowed secured claims. Local Bankruptcy Rule 3070-1(E) provides as follows:

> Pre-confirmation adequate protection payments governed by 11 U.S.C. §1326(a)(1)(C) shall be made by the debtor to the chapter 13 trustee as part of the total payment to the trustee, and the trustee shall pay the amount provided for by the plan to the secured creditor both before and after confirmation, unless the debtor's plan provides that such payments will be made directly by the debtor or no plan provision addresses payment of the secured claim, in which event the debtor shall make the preconfirmation payments directly to the secured creditor and furnish proof of such payments to the trustee.

Local Bankruptcy Rule 3070-1(E). Thus, the debtor's duty to provide adequate protection under 11 U.S.C. § 1326(a)(1)(C) is facilitated by the chapter 13 plan. Because provision of such adequate protection is a duty, adequate protection as provided for in a chapter 13 plan is not in the nature of a "motion" for adequate protection. Adequate protection in a chapter 13 plan context whereby the debtor is fulfilling his Section 1326(a)(1)(C) duty can be distinguished from adequate protection in other contexts where the debtor requests to pay a creditor adequate protection, such as a Motion to Obtain Credit pursuant to 11 U.S.C. § 364 or a Motion to Use Cash Collateral pursuant to 11 U.S.C. § 363. Motions pursuant to 11 U.S.C. §§ 363 and 364 are governed by Rule 9014 and must be served

in accordance with Rule 7004, wherein adequate protection is proposed as a subpart of a larger motion and the adequate protection proposed is offered as a *quid pro quo*. Therefore, the Debtor's provision of adequate protection in the Plan, in fulfillment of the his duty under Section 1326(a)(1)(C) to so provide, does not initiate a contested matter governed by Rule 9014 and does not require service of the Plan on the affected creditor under Rule 7004.

Finally, to the extent the Plan constitutes an application for the fees of the Debtor's attorney, its nature as an application for compensation does not trigger service under Rules 9014 and 7004. Regardless of the amount or timing of the proposed compensation, "a contested matter does not arise until there is an actual dispute—raised by an objection to an application for compensation." *Leavell,* 143 B.R. at 212. The application itself does not present an "actual dispute." Thus, the Plan need not be served in accordance with Rules 9014 and 7004, despite the included application for payment of attorney's fees.

Accordingly, the Court ORDERS that the Objection to Confirmation of Chapter 13 Plan filed by R. Clinton Stackhouse, Jr., Chapter 13 Trustee, is OVERRULED.

The Clerk shall deliver copies of this Order to the Debtor; Jessica R. Casey and Daniel M. Press, counsel for the Debtor; and R. Clinton Stackhouse, Jr., Chapter 13 Trustee.

IT IS SO ORDERED.

Apr 22 2013

/s/ Stephen C. St.John

STEPHEN C. ST. JOHN
Chief United States Bankruptcy Judge

Entered on Docket: 4/24/13