

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

In Re:

PAUL S. PENLAND and
LESLIE D. PENLAND,

Debtors.

Bankruptcy Case
No. 05-00172

SUMMARY ORDER

On January 2, 2007, the Court conducted a status conference in the above chapter 13 case, at which Debtors Paul and Leslie Penland, Chapter 13 Trustee Bernie Rakozy, and the U.S. Trustee all appeared through their counsel. After due consideration of the record and the comments and arguments presented by the parties, it appears to the Court that, pursuant to 11 U.S.C. § 105(d) and its inherent powers to control its docket and calendar, this is an appropriate case for entry of a case management order.

A chronological review of the procedural status of this case is required. On November 8, 2005, the Court entered its order denying confirmation of Debtors' proposed chapter 13 plan and dismissing this case. Docket No. 62. On November 18, 2005, Debtors appealed that order to the Ninth Circuit

Bankruptcy Appellate Panel (“BAP”). Docket No. 64. On November 22, 2005, Debtors filed a Motion for a Stay Pending Appeal in this Court, Docket No. 66, which the Court denied in a decision and order entered on December 1, 2005. Docket Nos. 74; 75. On January 17, 2006, Debtors filed another motion for a stay pending appeal, this time with the BAP, which the BAP denied in an order entered on January 25, 2006, Docket No. 90, and on February 8, 2006, in an amended order, Docket No. 97.

In August, the BAP issued its decision affirming this Court’s order denying confirmation of Debtors’ proposed Chapter 13 plan, but reversing this Court’s order dismissing the case, and remanding the case to this Court for further proceedings consistent with the panel’s decision. The BAP’s judgment was entered on August 17, 2006. Debtors then sought rehearing with the BAP, which was denied in an order entered on August 31, 2006. Docket No. 104. The BAP’s order states, in part, that “[a]s noted in the memorandum decision, on remand, the debtors are free to file an amended plan that, the Panel is confident, the . . . bankruptcy judge will assess on its own merits under standards prescribed by statute and the law of the Ninth Circuit.” On September 14, the BAP issued its mandate to this Court. Docket No. 107.

On September 19, 2006, Debtors appealed the BAP’s decision

affirming this Court's denial of confirmation of Debtors' plan to the Ninth Circuit.

Docket No. 108. On October 23, 2006, the BAP entered an order denying

Debtors' motion for an extension of time to appeal. Docket No. 109. That BAP

order stated, in part, that:

[Debtors'] motion for extension of time to file a notice of appeal [to the Ninth Circuit] is [denied] because we do not understand our judgment to constitute a final order that can be appealed to the court of appeals pursuant to 28 U.S.C. 158(d).

By reversing the dismissal of the case and remanding for further proceedings, our decision on the merits operated to place the chapter 13 case back before the bankruptcy court in circumstances that permit [Debtors] to propose another chapter 13 plan for confirmation. This outcome of our merits decision was fundamentally interlocutory.

A further appeal at this junction could unduly prolong the chapter 13 process and similarly prolong the automatic stay, which would be a boon to the [Debtors] and deleterious to the creditors.

In light of the dubious jurisdiction over what presently is fundamentally an interlocutory appeal, even-handed administration of the bankruptcy system dictates that the motion to extend time . . . be denied.

While it does not appear in the record, counsel for Debtors indicated at the status conference that Debtors have appealed this BAP order as well.

However, Debtors acknowledge they have not asked either the BAP or the Ninth

Circuit to stay the BAP's original decision. Because the BAP's decision has not been stayed, the decision is valid based upon the "well established rule that an appeal will not affect the validity of a judgment or order during the pendency of the appeal, absent a stay or supersedeas[.]" *Seven Words LLC v. Network Solutions*, 260 F.3d 1089, 1099 (9th Cir. 2001) (quoting *Bennett v. Gemmill (In re Combined Metals Reduction Co.)*, 557 F.2d 179, 190 (9th Cir. 1977)).

In addition to this procedural history, additional facts are relevant to the Court's decision regarding how to manage this bankruptcy case. For example, the Chapter 13 trustee indicates that since the date the Court denied confirmation of Debtors' plan, Debtors have made no further payments to the Chapter 13 trustee. Additionally, Debtors' counsel indicates Debtors' financial situation may have changed in unspecified, significant ways, as compared to the fall of 2005, when the Court originally denied confirmation of Debtors' plan.

In December, 2005, this Court denied Debtors' request for a stay pending appeal, in part, because of the "strange circumstances" that would result. *See* Memorandum of Decision at 7, Docket No. 74. The Court expressed its concern that if a stay pending appeal were granted, Debtors would have the continuing benefit of the automatic stay preventing collection efforts by their creditors, while in the meantime, creditors would receive no payments because

Debtors' plan had not been confirmed. The Court found that such a situation would be grossly unfair to creditors and untenable. The BAP likewise refused to stay this Court's decision.

Based upon Debtors' arguments at the status conference, the circumstances are apparently even stranger now. The BAP reversed the Court's decision dismissing this case, so this is again an active chapter 13 case, and the automatic stay is presumably again in effect protecting Debtors. But despite the BAP's clear intention that Debtors promptly file another plan, Debtors see no need to do so. In Debtors' view, by appealing to the Ninth Circuit, they may enjoy all the benefits of chapter 13 relief without assuming any of the responsibilities. Despite Debtors' position, the Court concludes that the Bankruptcy Code requires them to file a plan and make payments. 11 U.S.C. § 1321 ("The debtor shall file a plan."); § 1326(a) ("Unless the court orders otherwise, the debtor shall commence making the payments proposed by a plan within 30 days after the plan is filed.").

The Court appreciates Debtors' desire to have the Ninth Circuit review the BAP's decision, and to thereby obtain confirmation of the plan rejected by this Court in November, 2005. But absent a stay, which Debtors have not sought, this Court is obliged to obey the mandate of the BAP that it conduct "further proceedings consistent with the panels [sic] memorandum decision."

Judgment at 1, Docket No. 107; *See also Seven Words LLC*, 260 F.3d at 1099 (stating that absent a stay, the order from which the appeal is taken is valid during the pendency of the appeal).

Accordingly, for these reasons, **IT IS HEREBY ORDERED THAT** Debtors file and serve a proposed amended chapter 13 plan and notice of a confirmation hearing within fourteen (14) days of the date of this order.

IT IS FURTHER HEREBY ORDERED THAT Debtors commence making payments to the Chapter 13 trustee within 30 days after such a plan is filed.

IT IS FURTHER HEREBY ORDERED THAT if Debtors fail to timely file a plan or commence payments, then upon advice and request of the Chapter 13 trustee, this case shall be dismissed without further notice or hearing pursuant to 11 U.S.C. § 1307(c)(1) and (3).

Dated: January 23, 2007



Honorable Jim D. Pappas
United States Bankruptcy Judge

