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**UNITED STATES BANKRUPTCY COURT EASTERN
DISTRICT OF CALIFORNIA**

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

In re:

JAMES RICHARD JORGENSEN and LAURA
MAE JORGENSEN,

Debtors.

Case No. 18-14586-A-13

MEMORANDUM

WJH-1

Argued and submitted on November 7, 2019

at Bakersfield, California

Honorable Fredrick E. Clement, Bankruptcy Judge Presiding

Appearances:

H. Ty Kharazi and Nicholas E.
Aniotzbehere, Yarra Law Group for debtors
James Richard Jorgensen and Laura Mae
Jorgensen; Michael Farley, Farley Law
Firm, and Kurt F. Vote and Steven K. Vote,
Wanger Jones Helsley PC, for creditors
Donald G. Aluisi and Karen Aluisi

1 Pretrial orders may be vacated to prevent manifest injustice. An
2 accountant filed chapter 13 bankruptcy, proposing a 36-month plan that
3 pays creditors in full. Former clients oppose confirmation. After
4 eight months of discovery, the court scheduled trial. Creditors then
5 retained different counsel, who wants to vacate the trial date to
6 conduct additional discovery. Doing so will delay payments to
7 creditors until 18 months after the case was filed. Should the court
8 vacate its pretrial order?

9 **I. FACTS**

10 The Donald G. Aluisi and Karen Aluisi ("Aluisis") are farmers and
11 commercial real estate owners. James Richard Jorgensen ("Jorgensen")
12 was a certified public accountant, who served the Aluisis for more
13 than two decades.

14 After the Aluisis and Jorgensen parted ways, the Aluisis accused
15 Jorgenson of underreporting their tax basis on their state income tax
16 returns over a 14-year period and giving faulty tax advice with
17 respect to a tax-deferred real property exchange. The Aluisis contend
18 that these failures unnecessarily increased their income tax
19 liability. The Aluisis contend that Jorgensen's actions give rise to
20 a claim of professional negligence and that Jorgensen concealed his
21 errors, further giving rise to a claim of fraudulent concealment.
22 Jorgensen denies these allegations but contends that if he did err,
23 that he did not conceal that error.

24 Prior to this case, the Alusis sued Jorgensen for professional
25 negligence in state court.

26 **II. PROCEDURE**

27 Before the state court action could be resolved, Jorgensen and
28 his spouse, Laura, filed a chapter 13 bankruptcy. Their schedules

1 reveal modest assets, i.e., a home, two vehicles and the proceeds of
2 the sale of Jorgensen's practice, as well as \$21,000 of liquidated
3 undisputed unsecured debts. They also list a contingent,
4 unliquidated, and disputed debt to Aluisis in an "unknown" amount.
5 They have proposed, and sought confirmation of, a chapter 13 plan,
6 which provides for direct payment of their mortgage and for payment in
7 full of their allowed unsecured claims, i.e. \$21,000.

8 Throughout the bankruptcy, the Aluisis have been represented by
9 David R. Jenkins ("Jenkins"). As pertinent here, the Aluisis have
10 objected to confirmation of Jorgensen's chapter 13 plan. They do so
11 arguing lack of good faith based on Jorgensen's pre-filing planning
12 and on misrepresentations in the Statement of Financial Affairs, 11
13 U.S.C. § 1325(a)(3),(7), and the infeasibility of a plan that pays
14 allowed unsecured claims in full since the Aluisis' claim, once
15 liquidated, will have "seven figures." 11 U.S.C. § 1325(a)(6); Hr'g.
16 on Mot. to Confirm Plan, September 17, 2019.

17 The plan confirmation hearing has been pending eight months and
18 was continued five times. During that time the Aluisis have
19 propounded discovery. They have complained that the debtors'
20 discovery responses were incomplete, but they have not filed a motion
21 to compel further responses. At the fourth hearing on plan
22 confirmation, a frustrated chapter 13 trustee complained that the lack
23 of plan confirmation precluded distributions to other unsecured
24 creditors and described the Aluisis' actions as "holding the rest of
25 the creditors hostage." Hr'g. on Mot. to Confirm Plan, August 14,
26 2019. At the same hearing, Aluisis' counsel Jenkins indicated that he
27 needed time to review some recently received discovery and, when asked
28 whether there was further discovery he intended to undertake, he

1 responded, "I doubt it." *Id.* The court made the following order:

2 As more fully set forth on the record,

3 1. The motion will be continued to September 17, 2019, at
4 9:00 a.m. in Courtroom 11, Fifth Floor, 2500 Tulare Street,
5 Fresno, California, and **the matter will be ready for
6 resolution on the continued hearing date.**

7 2. Not later than August 28, 2019, Mr. Jenkins may file
8 opposition.

9 3. Not later than September 11, 2019, Mr. Aniotzbehere
10 may file a response.

11 Civil Minutes, August 14, 2019, ECF # 11 (emphasis added).

12 Both parties filed supplemental briefs and evidence. Apparently
13 unaware of the court's admonition at the previous hearing, the
14 Aluisis' supplemental opposition stated:

15 Here the Debtors did misrepresent significant facts in the
16 preparation of their schedules and statement of financial
17 affairs. **The Creditors are still in the midst of
18 conducting discovery and, for their part, the Debtors have
19 not been as forthcoming as the Creditors believe they are
20 required to be. . .**

21 Supplemental Brief by Aluisis ¶ 3, August 28, 2019, ECF # 115
22 (emphasis added).

23 At the fifth hearing, believing the matter ready for resolution,
24 the court announced its intention to confirm the Jorgensens' plan. In
25 response, the Aluisis argued that they had still not received some of
26 the documents requested, e.g., the buy-sell agreement for Jorgensen's
27 accounting practice, as well as some bank statements and cancelled
28 checks, and requested an evidentiary hearing. The court and Jenkins
had the following exchange:

Court: Other than the question of these two documents (sic)
that haven't been provided, is there any other
discovery you want?

Jenkins: I'd have to check with my co-counsel who is

1 coordinating that with me. I could get back to you
2 today.

3 Court: Well, unfortunately not. I'm going to be done with
4 court. I guess my question is whether I should just
5 be setting an evidentiary hearing at this time?

6 Jenkins: I don't see why not.

7 Court: Well, the why not is [that] there may be additional
8 discovery and that's what I am trying to get you to
9 commit yourself on.

10 Jenkins: If we set the evidentiary hearing out say about six
11 weeks that will give me time to meet and confer with
12 Mr. Aniotzbehere and file a motion to compel if I need
13 to.

14 Hr'g. on Mot. to Confirm Plan, September 17, 2019.

15 Believing that the Aluisis had been given sufficient time to conduct
16 discovery, the court closed discovery and issued a pretrial order
17 scheduling an evidentiary hearing two months later. Pretrial Order
18 September 26, 2019, ECF # 123.

19 Three weeks later the Aluisis substituted the firm of Wanger
20 Jones Helsley PC ("the Wanger firm") for Jenkins as their counsel of
21 record.

22 Less than one month before the evidentiary hearing, the Aluisis
23 filed this motion to vacate the pretrial order and reopen discovery to
24 depose the Jorgensens, as well as to compel them to produce further
25 documents. The Wanger firm opined that the remaining discovery could
26 be accomplished in 120 days and the evidentiary hearing re-scheduled
27 thereafter. The Wanger firm describes the discovery received as
28 "incomplete and inadequate" and the additional discovery requested as
"crucial." Vote decl. ¶¶ 4, 6, October 24, 2019, ECF # 133. The
Aluisis' former attorney, Jenkins, supported the motion, declaring
that he had "never been involved in a lawsuit as complicated" or with

1 the "potential to be [as] heavily litigated as this case." Jenkins
2 decl. ¶ 16, October 24, 2019, ECF # 134. He attributes the delay in
3 seeking this discovery to "a long-term medical condition" that
4 "impacts his energy level" and "affects [his] ability to concentrate."
5 *Id.* at ¶ 15. Jorgensens opposed the motion.

6 **III. LAW**

7 The pretrial order binds the parties and may only be modified "to
8 prevent manifest injustice." Fed. R. Civ. P. 16(e), *incorporated by*
9 Fed. R. Bankr. P. 7016, 9014(c); *United Phosphorus, Ltd. v. Midland*
10 *Fumigant, Inc.*, 205 F.3d 1219, 1236 (10th Cir. 2000). The party
11 seeking modification bears the burden of demonstrating that proceeding
12 without modification of the pretrial order will result in manifest
13 injustice to them. *Byrd v. Guess*, 137 F.3d 1126, 1132 (9th Cir. 1998)
14 (abrogated on other grounds, *see Moreland v. Las Vegas Metropolitan*
15 *Police Dept.*, 159 F.3d 365, 372-373 (9th Cir. 1998)). In ruling on
16 such a motion, courts should consider:

17 (1) the degree of prejudice or surprise to the defendants
18 if the order is modified; (2) the ability of the defendants
19 to cure any prejudice; (3) the impact of the modification
20 on the orderly and efficient conduct of the case; and (4)
any degree of willfulness or bad faith on the part of the
party seeking the modification.

21 *Byrd*, 205 F.3d at 1236, *citing United States v. First Nat'l Bank*
22 *of Circle*, 652 F.2d 882, 887 (9th Cir. 1981).

23 **IV. DISCUSSION**

24 **A. Impairment**

25 In this context, manifest injustice requires a risk that
26 Aluisis' ability to protect their interests at trial will be
27 significantly impaired. No such risk exists here. The court has
28 scheduled a two-day evidentiary hearing. As a part of that

1 hearing the Aluisis will be afforded the opportunity to examine
2 the Jorgensens under oath and to subpoena records. While the
3 opportunity to depose the Jorgensens and review records in
4 advance of trial would assist the Aluisis in preparing for trial,
5 it does not follow that denial of that discovery, particularly
6 where they were given eight months prior to trial to do so,
7 constitutes manifest injustice.

8 **B. Orderly and Efficient Conduct of the Chapter 13 Case**

9 Granting this motion will significantly, and negatively,
10 impact the orderly and efficient conduct of this chapter 13 case.
11 Chapter 13 bankruptcy is a compromise imposed by law on debtors
12 and their creditors. In Chapter 13, the debtor proposes a plan
13 that repays creditors, in part or in whole, by making monthly
14 payments from post-petition wages to the trustee, who in turn
15 disburses those funds to creditors. 11 U.S.C. § 1322(a)(1). In
16 exchange, creditors must withhold collection efforts and any debt
17 not paid by the trustee will be forgiven at the conclusion of the
18 case. 11 U.S.C. §§ 362(a), 524, 1328(a).

19 But such a plan is not effective unless it is confirmed by
20 the court. 11 U.S.C. §§ 1323(b), 1327(a). The bankruptcy code
21 mandates an early decision, i.e., usually not later than three
22 months after the case is filed, to confirm, or deny confirmation
23 of, the debtors' plan.¹ 11 U.S.C. § 1324(b); Fed. R. Bankr. P.
24 2003(a); *but see In re Escarcega*, 573 B.R. 219, 232 (9th Cir. BAP
25 2017). Central to the Chapter 13 process is an expeditious

26
27 ¹ Three months is calculated as follows: (1) the trustee must convene the
28 meeting of creditors not later than 50 days after the petition is filed, Fed.
R. Bankr. P. 2003(a); and (2) the court must hold a confirmation hearing not
later than 45 days after the meeting of creditors. 11 U.S.C. § 1324(b).

1 decision on confirmation of the plan.

2 Confirmation of the plan has advantages for both debtors
3 and creditors. Chapter 13 plans bind both the debtor and
4 creditors and, thus, provides certainty. 11 U.S.C. § 1327(a);
5 *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 276-77
6 (2010); *In re Evans*, 30 B.R. 530, 531 (9th Cir. BAP 2013) (res
7 judicata). Chapter 13 plans may be changed after confirmation
8 but only in limited circumstances. 11 U.S.C. § 1329(a); *Anderson*
9 *v. Satterlee (In re Anderson)*, 21 F.3d 355, 358 (9th Cir. 1994)
10 (requiring a showing of substantial and unanticipated changed
11 circumstances)); *contra, In re Mattson*, 468 B.R. 361, 367-68 (9th
12 Cir. 2012). Confirmation is intended to stabilize the debtor-
13 creditor relationship.

14 Most importantly, at least from the standpoint of
15 creditors, confirmation allows the Chapter 13 trustee to disburse
16 monies received from debtors:

17 A payment [to the trustee] shall be retained by the trustee
18 until confirmation or denial of confirmation. **If a plan is**
19 **confirmed, the trustee shall distribute any such payment in**
accordance with the plan as soon as is practicable. . .

20 11 U.S.C. § 1326(a)(2) (emphasis added).

21 Granting the Aluisis' motion will delay the confirmation
22 hearing and, assuming the plan is confirmed, payments to
23 unsecured creditors until 18 months after the case was filed.²
24 Even if confirmation of this plan is ultimately denied, the
25 debtors would need to propose another plan or risk dismissal or

26
27 ² That amount is calculated thusly: (1) this chapter 13 is presently 12 months
28 old; (2) creditors estimate another 120 days to conclude discovery; and (3)
the court estimates that resetting the evidentiary hearing will take two
additional months after discovery closes.

1 conversion of the case, which further delays resolution. Such a
2 result is not consistent with the bankruptcy code's mandate for
3 an expeditious decision on plan confirmation.

4 **C. Motive**

5 Finally, the movants have not sustained their burden of
6 proof as to proper motives in seeking to vacate the pretrial
7 order. This motion was not filed until the Aluisis substituted
8 the Wanger firm in place of Jenkins. The Wanger firm wishes to
9 undertake discovery probably not contemplated by Jenkins, i.e.,
10 the depositions of the Jorgensens. *Compare*, Jenkins decl. ¶ 18
11 ("I intended to conduct [the Joregensens] depositions"), with
12 Jenkins statements at the fourth hearing, Hr'g. on Mot. to
13 Confirm Plan, August 14, 2019 (when asked if he wished further
14 discovery Jenkins responded, "I doubt it."). This expansion of
15 the scope of discovery suggests that the Wanger firm would have
16 conducted the case differently than Jenkins did, had they been
17 counsel of record at the time. As a result, the movant has not
18 sustained their burden of proper motive.

19 **V. CONCLUSION**

20 For each of these reasons, the motion will be denied, and the
21 court will issue an order from chambers.

22 Dated: November 7, 2019

23
24
25 _____/s/_____
26 Fredrick E. Clement
27 United States Bankruptcy Judge
28