UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

Cite as: [Unpublished]

James Joseph Hommerding, Debtor
Bankruptcy Case No. 01-30061-13

United States Bankruptcy Court
W.D. Wisconsin, Madison Division

March 7, 2002

J. David Krekeler, Krekeler Strother, S.C., Madison, WI for Debtor

Robert D. Martin, United States Bankruptcy Judge

MEMORANDUM DECISION

The debtor, James Hommerding, has returned to this Court to ask that his second amended chapter 13 plan be confirmed. Mr. Hommerding initially came under this Court's jurisdiction as an involuntary chapter 7 debtor on January 4, 2001. On March 13, 2001, Mr. Hommerding availed himself of his right to convert his case to chapter 13. He filed a plan of reorganization and sought its confirmation. One of Mr. Hommerding's petitioning creditors, Petro Oil, Inc. ("Petro"), objected to his plan, and this Court held a final hearing on the matter on July 3, 2001. The main thrust of Petro's objection was that Mr. Hommerding's plan did not satisfy §1325(a)(3)'s good faith requirement. In support of its argument, Petro pointed out that Mr. Hommerding owes Petro a potentially nondischargeable debt (presumably under §523(a)(2)(A)) of approximately $34,000[1] arising from four NSF checks written by Mr. Hommerding to Petro in exchange for Petro's delivery of fuel to Mr. Hommerding's former gas station/convenience store, Jim's Mobile Mart. Petro further argued that no sum would be paid to unsecured creditors under Mr. Hommerding's plan and that the whole purpose of the debtor's plan was to thwart his unsecured creditors.[2] William Chatterton, the chapter 13 trustee, raised an additional issue as to the plan's feasibility at the final hearing noting that the original plan failed to satisfy a priority tax claim in the amount of $107,245. Mr. Hommerding

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[1] Petro claims to be owed about $105,000 in total, but only has alleged that $34,000 of this debt is nondischargeable.

[2] Mr. Hommerding's original plan called for 36 monthly payments of $38 (totaling $1,368) to be made to the trustee. At the time of his original plan, Mr. Hommerding worked at MC Sports and had a net income of $1,525.24. He has recently taken a second job at Glacier Mobil that nets him $688 per month for part-time work. His total net income is thus $2,213.24.

had intended to use the proceeds from the sale of his gas station to pay this priority claim, but he did not have a full right to such proceeds at that time because his now ex-wife, Valerie Hommerding, also held an interest in the property.[3] As a result, this Court ruled that the plan could not be confirmed for its failure meet §1322(a)(2)'s requirement that §507 priority claims receive full payment. This Court, however, granted the debtor leave to amend his plan to account for the priority tax claim.

The debtor remedied his original plan's shortfall by obtaining consent from his ex-wife to apply her share of the gas station's sale proceeds to the IRS claim. Mr. Hommerding accordingly filed an amended plan on July 17, 2001. Petro renewed its objection to confirmation, and Mr. Chatterton objected to this amended plan because the debtor proposed to make payments to priority claims holders directly rather than through the trustee's office. The trustee's objection was later resolved in September of 2001 on the condition that Mr. Hommerding file a second amended plan that would recognize the trustee as the proper conduit for plan payments. Mr. Hommerding lagged in meeting the trustee's condition, and Mr. Chatterton accordingly filed a motion to dismiss the chapter 13 case in November of 2001. This Court dismissed the case on December 17, 2001, but stayed the dismissal for fourteen days and granted the debtor leave to amend.

To avoid the dismissal, Mr. Hommerding filed the second amended chapter 13 plan on December 31, 2001. This time around, the debtor increased his payments from $38 per month to $386 per month and extended the length of the plan from 36 to 48 months. The changes would allow Mr. Hommerding to satisfy some additional priority tax claims that had arisen in the interim. The trustee endorses this plan because the priority claims will now be paid through the trustee's office. Petro has not forsaken its "good faith" objection and reasserts essentially the same arguments it had at the July 3, 2001 final hearing.[4]

Mr. Hommerding's plan can be confirmed over the objection of Petro. Testimony at the final hearing on July 3, 2001 did not indicate that Mr. Hommerding was attempting to thwart his creditors. He appears to have made a sincere effort to work out a repayment plan in accord with his current employment status, even though his repayment plan falls well shy of satisfying his unsecured creditors. The fact that Mr. Hommerding has incurred a

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[3] Denny Jax, Petro's owner, testified that Mr. Hommerding promised to pay him from the proceeds of this sale. Mr. Jax attended the sale's closing, but did not receive any of the proceeds.

[4] In addition, St. Francis Bank has objected to the plan's modification claiming that it has an interest in the gas station's sale proceeds. St. Francis alleges that this interest arises from a judgment against Valerie Hommerding entered on January 10, 2002 and that such judgment should be satisfied from her half interest in Jim's Mobile Mart. Although it may have a legitimate claim to be paid from these proceeds for they are a part of the Hommerding marital estate, St. Francis has not demonstrated that it has a lien upon the funds. An objection to the confirmation of Mr. Hommerding's chapter 13 plan is not the proper procedural mechanism for St. Francis to gain access to these funds.

nondischargeable debt to Petro would not mandate a finding of bad faith. In fact, there is no certainty that Mr. Hommerding's issuance of NSF checks to Petro would lead to a finding of nondischargeable fraud under §523(a)(2)(A).

The cases are legion (and all over the board) on the subject of a chapter 13 debtor's good faith in proposing a plan. See 3 Keith M. Lundin, Chapter 13 Bankruptcy § 183.1 (3rd ed. 2001) (courts' determinations of the good faith of "[p]lans that aggressively manage nondischargeable claims are a crapshoot"). The Seventh Circuit "has refused to adopt a specific test or definition of good faith." In the Matter of Love, 957 F.2d 1350, 1355 (7th Cir. 1992); See also In re Schaitz, 913 F.2d 452 (7th Cir. 1990). The bankruptcy court is to use a "totality of the circumstances" test and make decisions "on a case-by-case basis" to evaluate the good faith of a chapter 13 plan. Id. The Seventh Circuit has articulated a number of nonexclusive factors for a bankruptcy court to consider in deciding if a debtor has exercised good faith in proposing a chapter 13 plan:

1) Does the proposed plan state [the debtor's] secured and unsecured debts accurately?

2) Does it state [the debtor's] expenses accurately?

3) Is the percentage of repayment of unsecured claims correct?

4) If there are or have been deficiencies in the plan, do the inaccuracies amount to an attempt to mislead the bankruptcy court?

5) Do the proposed payments indicate 'a fundamental fairness in dealing with one's creditors'?

In re Rimgale, 669 F.2d 426, 432-33 (7th Cir. 1982) (quotation omitted). Judge Posner captured the essence of the foregoing factors with the following words that summarize a bankruptcy court's good faith inquiry:

> Is [the debtor] really trying to pay the creditors to the reasonable limit of his ability or is he trying to thwart them? '[A] sincere effort at repayment' is a sine qua non of good faith.

In re Schaitz, 913 F.2d 452, 453-54 (7th Cir. 1990) (quoting In re Caldwell, 895 F.2d 1123, 1126 (6th Cir. 1990)).

Mr. Hommerding did not seek bankruptcy protection. It was thrust upon him. Mr. Hommerding's testimony during the July 3rd final confirmation hearing does not reveal that he was trying to thwart his creditors by filing a chapter 13 plan; he legitimately converted the involuntary case brought against him to chapter 13. Although it is true that the plan will pay Mr. Hommerding's unsecured creditors virtually nothing, it is difficult to say that he is shirking.

Perhaps he, as the holder a of bachelor's degree in ecology and soil sciences, could obtain a better paying job so that he would have more disposable income to repay his unsecured creditors, but there is no direct evidence that such a job is available to him. As of February 22, 2002, Mr. Hommerding has taken a part time job as a clerk at a gas station to supplement his monthly income from MC Sports. Taking into account Mr. Hommerding's current employment, he appears to be making a sincere effort at repayment, even though this effort falls well short of satisfying unsecured creditors.[5] Moreover, "the fact that a bankrupt's only debts might be debts not dischargeable under Chapter 7 should not automatically prevent the approval of a Chapter 13 plan." In re Schaitz, 913 F.2d at 455. See also In re Smith, 848 F.2d at 818. It is far from a foregone conclusion that Mr. Hommerding's debts to Petro would be adjudged nondischargeable.[6]

Mr. Hommerding's plan is no less confirmable than another that originated in this Court and traveled all the way up to the Seventh Circuit to be confirmed. See In re Day, No. 98-3182, 1999 WL 96117 (7th Cir. 1999) (Table decision at 172 F.d 52). In Day, this Court originally overruled a creditor's good faith objection to a plan that proposed to pay less than .4% of that creditor's $100,000 claim for aggravated battery, which had been stipulated to as nondischargeable under §523(a)(6) because it resulted from a willful and malicious injury.

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[5] "The use of §1325(a)(3)'s good faith test as a vehicle for monitoring the quantum of payments to unsecured creditors, questionable from the outset, clearly became untenable with the enactment of the disposable income test of §1325(b) in 1984. To confirm a plan, a debtor not only must show that unsecured creditors will be paid at least as much as they would have received in a liquidation, [under] §1325(a)(4), but also must commit all of her disposable income for three years to plan payments . . . [under] §1325(b). . . . If a debtor is applying all of her disposable income to payments under the plan, it is difficult to see how the fact that unsecured creditors still might not be receiving a substantial dividend can be counted as bad faith; indeed, by definition the debtor would not be able to pay any more." Charles J. Tabb, The Law of Bankruptcy § 12.15 at p. 930 (1st ed. 1997).

[6] Mr. Hommerding's testimony at the final hearing suggested that he might have written the NSF checks in order to obtain gasoline for the purpose of keeping his business operating. However, the testimony appears to fall short of proving that Mr. Hommerding knew that his checking account would not cover the amounts for which he wrote the checks to Petro, even though he had sole control of his bank records. Thus, the testimony would not necessarily result in a determination of nondischargeability of the debts obtained by Mr. Hommerding's issuance of NSF checks to Petro. See Williams v. United States, 478 U.S. 279 (1982) (holding that the mere issuance of an NSF check is not per se fraudulent); See also 1 Ginsberg & Martin on Bankruptcy §11.06[D][a], 11-79 (4th ed. 1998) ("[t]he cases are consistent in requiring a showing that, at the time the debtor uttered the checks, the debtor did not intend to make them good."); See also In re Levitsky, 137 B.R. 288 (Bankr. E.D. Wis. 1992) (denying a debtor his discharge because when the debtor issued five NSF checks "he either knew he had insufficient funds in his checking account to cover them or acted with such reckless disregard for the status of his account as to amount to willful misrepresentation.") Petro has not proved that Mr. Hommerding did not intend to make his checks good; nor did it prove that he knew he had insufficient funds or acted with reckless disregard.

This Court found that "'there . . . [was] . . . an effort to pay within [Day's] ability to pay," given Day's 'minimal level of support.'" Id. at 2 (quoting this Court's oral decision). The Seventh Circuit eventually affirmed this Court's ruling in Day finding that "[n]o evidence suggest[ed] clear error in the bankruptcy court's finding that Day's plan represented a sincere effort at repayment given Day's meager [$1,050 per month] income." Id. at 4. Mr. Hommerding has taken a second job, but his current monthly income is still only $2,214.24. His repayment plan appears to represent his best effort to repay his creditors and satisfies the good faith requirement for confirmation.