

THIS OPINION IS NOT INTENDED FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE)	CASE NO. 98-53282
)	
NORMAN J. PRINZO,)	CHAPTER 7
)	
Debtor.)	JUDGE MARILYN SHEA-STONUM
)	
)	ORDER SUSTAINING OBJECTION TO
)	CONFIRMATION OF PLAN

This matter came before the Court on the Objection to Chapter 13 Plan of Debtor (the "Objection") filed by Ronald and Marilyn Graham (the "Grahams") and the response of Norman J. Prinzo ("Debtor") thereto. In the Objection, the Grahams contend that Debtor does not have "regular income" as required by 11 U.S.C. § 109(e), that Debtor's proposed 5% payment to unsecured nonpriority creditors is insufficient and that Debtor did not file his chapter 13 case in good faith. Because of the facts in this case, it is only necessary for the Court to deal with the first issue at this time.

This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (L) and (O). This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 157(a) and (b)(1) and by the Standing Order of Reference entered in this District on July 16, 1984.

I. FINDINGS OF FACT

A. Debtor's Schedules and Statement of Financial Affairs

On October 15, 1998, Debtor filed a petition under chapter 13 of the Bankruptcy Code. Because Debtor filed a chapter 7 case on September 20, 1994 and received a discharge in that case on July 3, 1995, he is ineligible to be a debtor in a chapter 7 case at

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this time.

Debtor is single and has one five year old son. Debtor has scheduled no secured debt but has scheduled unsecured priority claims in the amount of \$2,000 for child support and \$9,500 for income taxes for tax years 1996 and 1997. Debtor has scheduled unsecured nonpriority claims in the aggregate amount of \$29,671.85.

According to his Schedules, Debtor owns two automobiles, a 1986 Jeep and a 1986 Dodge Caravan. Debtor's Schedule I, which does not state Debtor's occupation, indicates that his gross monthly income is \$3,750 per month. His employer is Universal Concepts, Inc., a corporation for which Debtor is the sole shareholder. [Debtor's Schedule I, Debtor's Statement of Financial Affairs]

In contrast to Debtor's alleged monthly income stated in Schedule I, Debtor's Statement of Financial Affairs indicates that his gross annual income was \$20,257 in 1996, \$17,762 in 1997 and \$20,000 in 1998. Based on that information, his average monthly income for 1996 through 1998 was approximately \$1,611.64 (more than a \$2,000 per month discrepancy from the figure in Schedule I). In Debtor's amended Schedule J, filed on February 11, 1999, Debtor lists monthly expenditures in the amount of \$2,800, including rent in the amount of \$625 per month, alimony, maintenance and support paid to others in the amount of \$282 per month, and child care and school expenses in the amount of \$475 per month.

B. Debtor's Proposed Chapter 13 Plan of Reorganization

Pursuant to his chapter 13 plan (the "Plan"), Debtor proposes to pay "\$300 every month for 52 months, or all of Debtors' [sic] future disposable income pursuant to 11 U.S.C. Section 1322(a)(1) and Section 1325(b)(2)." Creditors holding unsecured nonpriority claims shall be paid 5% of their claims. The Plan may extend beyond 52

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months but to no longer than 60 months.

After the chapter 13 trustee filed an objection to the Plan, Debtor filed his amended Schedule J, decreasing his listed monthly expenditures from \$2,850 per month to \$2,800 per month and thus increasing Debtor's view of his disposable income to \$350 per month. After the filing of the amended Schedule J, an Order Changing Employee Deductions was sent to Universal Concepts, Inc., changing the deduction from Debtor's wages to \$350 per month.

C. Debtor's Testimony at the Evidentiary Hearing Regarding the Objection

1. Debtor's reasons for commencing his bankruptcy cases

On March 31, 1999, the Court held a hearing regarding the Objection. At that time, Debtor testified that he filed his chapter 13 case as a result of litigation between Debtor and Jimmy Schroeder, the former production manager for Prinzo Renovation, an entity through which Debtor provided services as a general contractor. Mr. Schroeder initiated the litigation against Debtor, and Debtor filed an answer and a counterclaim seeking a judgment against Mr. Schroeder in excess of \$25,000. [Exhibit 2]

Debtor testified that Mr. Schroeder did not properly perform his responsibilities as production manager, which had a negative impact on Prinzo Renovation's cash flow. Debtor further explained that he could not afford to pay Prinzo Renovation's bills and could not afford to continue the litigation with Mr. Schroeder, so Debtor filed his chapter 13 bankruptcy case.

As concerns his prior bankruptcy filing, Debtor testified that his prior case resulted from injuries Debtor suffered in an accident which prevented him from working for more than six months. Debtor further testified that he was not paid for three months work he performed as a tile tradesman prior to the accident. Because of his loss of income, Debtor

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could not afford to pay his bills and filed a petition under chapter 13 of the Bankruptcy Code; the case was later converted to a case under chapter 7 of the Bankruptcy Code.

2. The creditors in Debtor's chapter 13 case

Debtor discussed three of his disgruntled prepetition customers, two of whom are listed in his Schedules as creditors holding unsecured nonpriority claims. For example, Pat Farnsworth is listed as holding a \$400 unsecured nonpriority claim. [Schedule F] Debtor testified that Ms. Farnsworth paid \$1,000 for an addition to her home, a project for which Mr. Schroeder allegedly was responsible. Certain of the payment was applicable to completed blueprints. After Ms. Farnsworth fired Mr. Schroeder and refused to allow Debtor to complete her project, Debtor did not refund \$400 of Ms. Farnsworth's payment to her. With respect to the Grahams, Debtor testified that they gave Debtor \$10,000 to perform a job at their home. Debtor alleged that he completed the work to a certain point, after which it became unbearable to work in their home. After Debtor terminated his relationship with the Grahams, he did not refund any of their \$10,000 payment; Ronald Graham is listed on Debtor's Schedules as holding a disputed unsecured nonpriority claim in the amount of \$10,000. [Schedule F] With respect to other creditors listed in his Schedules, Debtor acknowledged that several hold claims relating to material acquired for Debtor's construction projects.

3. Debtor's current income and expenses

At the evidentiary hearing, the Court admitted an income statement for Prinzo Renovation for the nine month period ending September 30, 1998. That income statement indicates that the net income of Prinzo Renovation for that period was \$13,035.67. With respect to his income for the first quarter of 1999, Debtor stated that he was not sure of the amount, except that it was less than the gross monthly income of \$3,750 listed in

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Schedule I. Debtor stated that his income had been depressed as a result of the bad winter and that he anticipated his income would increase when the weather improved.

Debtor has not missed any monthly plan payments. Because Debtor has had insufficient income to pay his monthly expenses and to fund his plan payments, he testified that he has been borrowing money from friends and family to pay his bills. In addition, Debtor stated that he lives in a house owned by Michele Weber, his girlfriend for the last four years, and that he does not provide Ms. Weber with his \$625 monthly rent payment when he cannot afford to do so.

II CONCLUSIONS OF LAW

Section 109(e) of the Bankruptcy Code provides that only an individual with "regular income" may be a debtor under chapter 13 of the Bankruptcy Code. Section 101(30) of the Bankruptcy Code defines an individual with regular income as "an individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, other than a stockbroker or a commodity broker." Based on Debtor's Statement of Financial Affairs, Debtor's annual gross income has been sufficiently stable to fund a chapter 13 plan; Debtor has earned a minimum of approximately \$17,700 per year for the three years ending in 1998. However, Debtor's gross income has been insufficient in amount to fund the chapter 13 plan which he has proposed. Consequently, the pertinent concern is not whether Debtor satisfies the standards for filing a case under chapter 13 of the Bankruptcy Code, but whether the Plan is feasible, as required under § 1325(a)(6) of the Bankruptcy Code. In re Ruiz, 13 B.R. 94 (Bankr. S.D. Fla. 1981)(holding that court required to evaluate feasibility of chapter 13 plan, even when no creditor objects to confirmation of plan on that basis).

Section 1325(a)(6) provides that, prior to confirming a plan, a court shall

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determine if "the debtor will be able to make all payments under the plan and to comply with the plan." However, Debtor's average monthly income for 1996 through 1998 was approximately \$1,611.64 [Statement of Financial Affairs], and given that Debtor has not changed occupations since that period of time, and is self-employed, Debtor has failed to establish any basis for the more than \$2,000 increase in his gross monthly income which is indicated by Schedule I. Consequently, it appears that Schedule I overstates Debtor's current monthly income and thus is not the appropriate measure for evaluating feasibility. In re Roe, 14 B.R. 649 (Bankr. D. Kan. 1981)(finding that debtor's monthly income was overstated in Schedule I based on debtor's gross annual income for prior year and debtor's testimony of increased business expenses and, in light of that overstatement, holding that chapter 13 plan was not feasible).

Using Debtor's average monthly income of \$1,611.64 for 1996 through 1998, Debtor's monthly income is less than Debtor's monthly expenses of \$2,800 [Amended Schedule J]. Even if the Court were to eliminate the \$625 per month rental payment from Debtor's listed expenses (in accordance with Debtor's testimony that he is not required to pay rent), Debtor's monthly expenses would still exceed Debtor's monthly income. Therefore, Debtor has failed to establish that Debtor will be able to make all payments under the Plan and to comply with the Plan, and the Court must deny confirmation of the Plan under § 1325(a)(6) of the Bankruptcy Code. In re Wilkinson, 99 B.R. 366, 369 (Bankr. N.D. Ohio 1989)(denying confirmation when debtors' income was insufficient to fund proposed plan and payments to be made to secured creditors outside of the plan); In re Lattimore, 69 B.R. 622, 626 (Bankr. E.D. Tenn. 1987)(denying confirmation when

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proposed monthly plan payment exceeded debtors' monthly disposable income).¹

Therefore, confirmation of the Plan is denied under § 1325(a)(6) of the Bankruptcy Code, without prejudice to the Grahams' contentions that Debtor's proposed 5% payment to unsecured nonpriority creditors is insufficient and that Debtor did not file his chapter 13 case in good faith. During the chapter 13 docket, at 2:00 p.m. on June 10, 1999, the Court shall hold a status conference to evaluate whether Debtor is capable of proposing a confirmable chapter 13 plan and to consider the impact of his inability, if any, to do so.

IT IS SO ORDERED.

MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 5/28/99

Debtor testified that he borrows money from friends and family to pay his bills when he has insufficient income to pay his bills and to make his Plan payments. Even if such assistance can be included when evaluating the feasibility of the Plan [see, e.g., In re Hanlin, 211 B.R. 147 (Bankr. W.D.N.Y. 1997)(explaining that court regularly approved plans in which the contribution of some assistance to a debtor's own income is necessary to make a plan "feasible"); In re Fischel, 103 B.R. 44 (Bankr. N.D.N.Y. 1989)(suggesting that court would approve plan which required monthly contribution from debtor's friend if friend would legally obligate himself to dedicate a portion of his income for the term of the plan and demonstrated an ability to do so)], Debtor did not make a record establishing that such assistance would continue to be available to him throughout the term of the Plan.