THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE	)	CASE NO. 99-53529
	)	
DANIEL I. McARTHY,	)	CHAPTER 13
	)	
	)	JUDGE MARILYN SHEA-STONUM
Debtor.	)	
	)	**ORDER RE: OBJECTION TO**
	)	**DEBTOR'S PROPOSED CHAPTER**
	)	**13 PLAN**

This matter came on for a hearing on May 25, 2000 on the "Objections of Anson Zacour to Debtor's Proposed Chapter 13 Plan" and Debtor's reply. 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. §§ 1334(b), 157(a) and (b)(1) and by the Standing Order of Reference entered in this District on July 16, 1984.

I. Issue:

Whether Debtor's plan was proposed in good faith pursuant to 11 U.S.C. §1325(a)(3).

II. Findings of Fact:

1. On November 15, 1999, Debtor filed a petition for relief under chapter 13 of the Bankruptcy Code. Debtor previously filed a petition under chapter 13 on June 7, 1999. The June 7th bankruptcy case was voluntarily dismissed by Debtor. After dismissal of the June 7th case, Debtor received approximately $800 from the chapter 13 trustee. During the may 25th hearing, Debtor testified that he used the funds returned by chapter 13 trustee to pay his cable bill listed in Debtor's Schedule F.

2. The chapter 13 plan filed with Debtor's June 7th bankruptcy petition proposed

to pay $288 per month to the chapter 13 trustee. The chapter 13 plan filed with Debtor's November 15th bankruptcy petition (the "Plan) proposes to pay $298 per month to the chapter 13 trustee, proposes to pay unsecured creditors a 10% dividend and is set for 39 months. During the May 25th hearing, Debtor testified that he is willing to extend the Plan to 60 months but, to date, the length of the Plan has not been extended.

3. During the May 25th hearing, Debtor also testified that a break-up with his girlfriend, who is also the mother of his child, resulted in financial instability which caused him to voluntarily dismiss his June 7th bankruptcy petition.

4. On or about October 12, 1996, Debtor was involved in an altercation with Anson Zacour ("Zacour") at Wannemaker's Tavern in Akron, Ohio. On February 21, 1997, at the conclusion of a jury trial for aggravated assault, Debtor was found guilty. Zacour's Exhibit (hereinafter "ZX ") 1.

5. On or about October 10, 1997, Zacour filed an action against Debtor in the Court of Common Pleas of Summit County requesting civil remedies for assault and battery. ZX 3. That action was resolved by an Agreed Judgment Entry (the "Judgment Entry") entered on or about February 18, 1999 in which Debtor agreed to pay Zacour the total sum of $75,000 at the rate of $100 per month beginning on February 1, 1999. ZX 4. Pursuant to the Judgment Entry, Debtor acknowledged that the $75,000 debt was for "willful and malicious injury to [Zacour] within the meaning of Section 523(a)(6) of the United States Bankruptcy Code." ZX 4 at ¶ 5. Debtor currently owes $74,400 on the Judgment Entry. *See* Debtor's Schedule F. The Judgment Entry constitutes approximately 85 percent of the debts identified by Debtor in the current petition. *See* Debtor's Schedule F. Zacour has questioned the status of other alleged obligations of Debtor listed in his schedules. Of the remaining debts, Debtor provides documentation for

a judgment entry entered in the Municipal Court of Akron, Ohio, case no. 98CVI09898, granting Debtor's former state court counsel judgment in the amount of $1,716.25. Debtor's Exhibit (hereinafter "DX") 5. Debtor testified as to the validity of the remaining debts in the petition but provided no documentation. Debtor testified that he consulted bankruptcy counsel prior to or during the settlement negotiations culminating in the Judgment Entry. ZX 12 at pg.39, lines 14-16. Debtor testified that he considered filing a chapter 7 bankruptcy petition but he rejected that idea because of his perception of the burden the Judgment Entry would place on his credit. ZX 12 at pg. 42, lines 13-16.

6. Debtor testified that he is currently employed by Psychological Consultants (an entity owned by his father) and by Village Seamless Gutters. Debtor testified that he works approximately 35 hours per month at Psychological Consultants at approximately $14 per hour. Debtor testified that his work at Village Seamless Gutters is seasonal in nature with April through October representing the best months for income. Debtor testified that he earns approximately $35,000 from Village Seamless Gutters and approximately $6,000 per year at Psychological Consultants for a total of $42,000 per year. Debtor further testified that he does not anticipate any growth in his income and that his ability to earn income is now more limited by the amount of time he needs to spend with his daughter. Debtor's statement of financial affairs shows that his income was approximately $28,300 in 1996, $28,300 in 1997, and $32,700 in 1998. Debtor testified that in 1999, he earned approximately $47,000 but that he would not be able to earn $5,000 of that amount because of his parenting responsibilities. DX 4. Debtor further testified that his father's business is "going down" and as a result there is less work for him which will result in a lower future income.

7. An Amended Child Support Enforcement Agency Administrative Support

Order shows that the Debtor is required to pay $204 per month in child support. Debtor testified that he has included payments for a babysitter, which are $110 every other week, in the child support payments listed in his schedules. DX 3a-3b. *See also* Debtor's Schedule J. In addition to these payments, Debtor testified that he must provide diapers and a special lactose intolerant milk formula.

III. Conclusions of Law:

Zacour argues that the Plan should not be confirmed because it was not filed in good faith pursuant to 11 U.S.C. §1325(a)(3) which provides, in material part:

> (a) [T]he court shall confirm a plan if--
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> (3) the plan has been proposed in good faith and not by any means forbidden by law[.]

See 11 U.S.C. §1325(a)(3). In *Hardin v. Caldwell* (*In re Caldwell*), 895 F.2d 1123, 1126 (6th Cir. 1990), the Sixth Circuit Court of Appeals suggested twelve factors that could be examined to determine if good faith is present:

(1) the amount of the proposed payments and the amount of Debtor's surplus;
(2) Debtor's employment history, ability to earn and likelihood of future increase in income;
(3) the probable or expected duration of the plan;
(4) the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court;
(5) the extent of preferential treatment between classes of creditors;
(6) the extent to which secured claims are modified;
(7) the type of debt sought to be discharged and whether any such debt is nondischargeable in Chapter 7;
(8) the existence of special circumstances such as inordinate medical expenses;
(9) the frequency with which Debtor has sought relief under the Bankruptcy Reform Act;
(10) the motivation and sincerity of Debtor in seeking Chapter 13 relief;
(11) the burden which the plan's administration would place upon the trustee;

and

(12) whether Debtor is attempting to abuse the spirit of the Bankruptcy Code.

Caldwell, 895 F.2d at 1126-27. Debtors seeking a discharge under Chapter 13 bear the burden of proving that the plan has been proposed in good faith. *Caldwell*, 895 F.2d at 1126. In this case, the Court finds that Debtor has failed to meet his burden. While noting that the factors listed in *Caldwell* are not an all inclusive list, the Court notes that factors 2, 3, 4, 7, 10 and 12 correspond to Zacour's allegations.

The second factor listed in *Caldwell* relates to Debtor's employment history, ability to earn and likelihood of future increase in income. Debtor contends that his future income is not likely to increase. However, a review of Debtor's statement of financial affairs and Debtor's 1999 federal income shows that Debtor's income has increased from approximately $28,300 in 1996 to approximately$47,000 in 1999. Debtor also contends that his father's business, Psychological Consultants, is not doing well and that he has increased parenting responsibilities which will cause a reduction in his income from that employer. Debtor has provided no proof of the financial situation of his father's business, and without more, the Court finds that Debtor has not shown that he cannot expect his future income to increase nor that it will decrease. In any event, Debtor has not shown an inability to pay the $1,200 annual obligation pursuant to the payment plan incorporated in the Judgment Entry.

The third factor listed in *Caldwell* relates to the probable or expected duration of the chapter 13 plan. As filed, the Plan is set for 39 months. Zacour has alleged that the length of the Plan is indicia of bad faith when considered against the 10% dividend to unsecured creditors and particularly to Zacour whose claim makes up approximately 85% of the unsecured claims. Debtor testified that he would be willing to extend the plan to 60 months. Under 11 U.S.C. §1322(c) a debtor in Chapter 13 can repay his creditors over

three years, but that period can be extended, at the debtor's request and with the court's permission, to as long as 5 years. Debtor is not required to do so, but the length of repayment is a relevant indicator of the debtor's good faith and in this case is one more factor which suggests that the Plan, as proposed, is not sincere. *See In re Kourtakis*, 75 B.R. 183, 188 (Bankr. E.D. Mich.1987).

The fourth factor listed in *Caldwell* relates to the accuracy of the Plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court. Debtor's Statement of Financial Affairs shows that Debtor's income increased from 1996 through 1998. However, Debtor's 1999 income is shown to be only $13,800 despite Debtor's 1999 federal tax return showing his income to be approximately $47,000. Debtor testified that the inaccuracy in the Statement of Financial Affairs was a simple error in the preparation of his schedules. However, the Court notes that Debtor's statements regarding his finances seem to be replete with errors. For example, Debtor lists the Judgment Entry as a disputed claim on both the June 7th and November 15th bankruptcy petitions and then testified that the claim was not in fact disputed at the May 25th hearing on this matter. Further, Debtor lists a claim from his previous state court counsel in the amount of $1,716.25 which Debtor testified that he did not owe. This claim was also not listed as disputed. Standing alone, such inaccuracies might not cause the Court to find a lack of good faith, but the extent of such inaccuracies, in combination with the other factors presented in this case, further suggest a lack of good faith concerning the accuracy of the debts in the Plan and the amount available to pay unsecured creditors. This impression is somewhat mitigated by Debtor's counsel's observation that some of the inaccuracies may be the result of his failure to update the information included in the 1999 schedules when his client re-filed in November 1999.

Still, Debtor attested to the accuracy of the schedules when he signed them. He had an obligation to read them and to note inaccuracies. Debtor's counsel had an obligation to help Debtor understand the meaning of phrases such as "disputed" in this context.

The seventh factor set forth in *Caldwell* relates to the type of debt sought to be discharged and whether any such debt is nondischargeable in Chapter 7. Debtor acknowledged that the $75,000 debt in the Judgment Entry was for "willful and malicious injury to [Zacour] within the meaning of Section 523(a)(6) of the United States Bankruptcy Code." Debts under § 523(a)(6) are not dischargeable under chapter 7. However, such debts may be discharged upon completion of a chapter 13 plan, once confirmed. To obtain confirmation of a chapter 13 plan, a debtor must satisfy the six requirements of 11 U.S.C. §1325 and the proposed plan payments must meet the requirements of 11 U.S.C. §1325(b). In *Caldwell*, the Sixth Circuit stated that "discharge under Chapter 13, though salvation for some debtors, is a loophole for others. *Caldwell*, 895 F.2d at 1126. The good faith or lack of it with which a plan is proposed, distinguishes a sincere effort at repayment from a false one. *Id.* Courts should not approve Chapter 13 plans which are nothing more than veiled Chapter 7 plans." *Id.* Debtor testified that consideration of a chapter 13 filing was a factor in his decision to enter into the Judgment Entry. The debt represented by the Judgment Entry is approximately 85 percent of all of Debtor's scheduled debts. Aside form the Judgment Entry, Debtor schedules show approximately $10,000 of claims. The inaccuracies of those claims and Debtor's failure to provide documentation for them deserves "particular scrutiny" since Debtor seeks to pay only a small portion of a debt which is nondischargeable in a chapter 7. *Caldwell*, 895 F.2d at 1126 (citing *In re Warren*, 89 B.R. 87, 95 (Bankr. 9th Cir. 1988)). In this case, the nondischargeability of the Judgment Entry indicates a lack of good faith.

Zacour's next set of allegations correspond to the tenth and twelfth factors listed in *Caldwell*, i.e., the motivation and sincerity of Debtor in seeking Chapter 13 relief and whether Debtor is attempting to abuse the spirit of the Bankruptcy Code. This is the central issue in this case. Debtor's sincerity in seeking chapter 13 relief is questionable since Debtor filed for relief under chapter 13 only a few months after the Judgement Entry was entered. In particular, it appears that Debtor's primary intention was to reduce the amount to be paid to his largest creditor, Zacour, to only a few thousand dollars despite having consented to a judgment for $75,000 only a few months before. Debtor was convicted of a crime in state court and consented to a civil judgment which arose out of that criminal case. Debtor, however, testified during the May 25th hearing that he did not believe that he was responsible for Zacour's injury and that the Court should somehow consider this as a factor in favor of the Plan. In essence, Debtor was requesting that the Court conduct a mini-trial on a criminal matter already resolved by a jury trial in a state court. It is not the function of the bankruptcy court to revisit the finished business of the state courts. The proximity of Debtor's filing coupled with Debtor's testimony evidences a lack of sincerity in Debtor's present chapter 13 petition.

Particularly noteworthy is that the Judgment Entry calls for low monthly payments, i.e., $100 a month, and that the judgment amount bears no interest if there is no default on monthly payments. Of particular concern is Debtor's own admission as to why he filed a chapter 13 bankruptcy in lieu of chapter 7 bankruptcy. Debtor contends that he did not file a chapter 7 bankruptcy because of the burden the Judgment Entry would place on him for years to come. Debtor admits that in a chapter 7 bankruptcy he might only have to pay the $100 a month to Zacour instead of the almost three hundred dollars per month he proposes to pay into the Plan. ZX 12 at pg. 42, lines 6-9. Despite this knowledge, Debtor

testified that his primary purpose in seeking to avoid payment of approximately 90 percent of the judgment amount was so that he could improve his credit worthiness.[1] In short, it appears that Debtor intended to resort to chapter 13 at the time that he agreed to the Judgment Entry. The changes in Debtor's financial affairs were not dramatic between the Judgment Entry and the date of filing. Chapter 13 is not available to avoid obligations on the facts of this case.

Debtor has also argued, but presented no evidence, that his ability to discharge the Judgment Entry in a chapter 13 seems to have been a point bargained for in the drafting of the Judgment Entry. The silence of the Judgment Entry with respect to chapter 13 proves nothing. On the particular facts of this case and this Plan, Debtor has failed to prove his good faith.

The Sixth Circuit has noted that chapter 13 is a salvation for some and loophole for others. *Caldwell*, 895 F.2d at 1126. In this case, the Court concludes the Plan is designed to use chapter 13 as a loophole to escape from an otherwise nondischargeable debt. That debt was structured to be manageable, and Debtor's mere desire to erase the judgment lien from his credit record is not a sufficient basis for confirming the Plan.[2] Bankruptcy is for the honest debtor and not those attempting to abuse the spirit of the Bankruptcy Code.

IV. <u>Conclusion:</u>

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[1] Debtor's January 17, 2000 deposition, stipulated to by the parties, provides "actually, I'm [filing a chapter 13 petition] so that I'll have credit when my daughter wants to - - decides to go to college, so that I can buy a house some day, so I can actually get a car." ZX 12 at pg. 42, lines 13-16.

[2] While it may be appropriate for Debtor to use chapter 13 as a method for getting the payment schedule with respect to the Judgment Lien out of default, the record evidence does not support the use of a chapter 13 plan to discharge without actual payment the vast majority of this particular debt.

Based upon the totality of these circumstances, Debtor has failed to meet his burden of showing that the Plan was proposed in good faith under 11 U.S.C. §1325(a)(3). Accordingly, the Plan cannot be confirmed.

IT IS SO ORDERED.

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MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 8/21/00