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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
AKRON

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:) CASE NO. 04-53400
)
Michael Fernandez,) CHAPTER 13
)
DEBTOR(S)) JUDGE MARILYN SHEA-STONUM
)
) ORDER RE: TRUSTEE'S REQUEST
) FOR TURNOVER

This matter is before the Court on the Trustee's Motion for Turnover [docket # 14], Trustee's Brief in Support [docket # 35], Debtor's (defined below) Response to Turnover Motion [docket # 15] and Debtor's Brief in Opposition to Turnover Motion [docket # 28], the Trustee's Motion for Order Restraining Alienation of Funds [docket #32] and the Debtor's response [docket #33]. The Court held hearings on these related motions and responses on October 21, 2004 and February 10, 2005 (the "Hearings").

Jurisdiction

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E) and (L) over which this Court has jurisdiction pursuant to 28 U.S.C. § 1334(b). Based upon the statements of counsel at the February 10, 2005 hearing and the arguments in their papers, the Court makes the following findings of fact and conclusions of law.

Undisputed Facts

Michael Fernandez (the "Debtor") filed a voluntary petition for relief under Chapter

13 of the Bankruptcy Code on June 21, 2004. Debtor lists \$35,000 in insurance proceeds from the settlement of a personal injury matter in his Statement of Financial Affairs. On Schedule B, Debtor lists \$25,000 in a savings account (apparently the remaining personal injury settlement proceeds). The Debtor claimed exemptions with respect to the \$25,000 in the total amount of \$795 (less than the \$5,000 allowed for personal injury proceeds under O.R.C. § 2329.66.)

The Debtor scheduled unsecured claims in the amount of \$31,507.50. The Debtor's Plan, as filed on June 21, 2004, proposed to pay creditors 86% over 5 years. The Plan was confirmed (subject to the reservation of issues raised by the Trustee's turnover motion). Docket ## 20 and 21. The Debtor's Plan provides that confirmation shall not vest all of the property of the estate in the Debtor. Therefore, all property of the estate shall remain property of the estate and until the case is closed, dismissed or converted to a case under another chapter of the Bankruptcy Code.

The actual claims filed by creditors prior to the bar date only total \$20,425.66. After the bar date passed, the Debtor filed a motion to modify plan (post-confirmation) to shorten the duration of the plan to thirty-nine (39) months. *See* docket #36. Following the hearing on February 10, 2005, the Debtor filed a Second Motion to Modify Chapter 13 Plan so as to provide for a 100% repayment to creditors over forty-seven (47) months. Docket # 45. The Trustee filed a response in opposition to the Second Motion to Modify on March 29, 2005. Docket # 46.

At the Hearings, Debtor's counsel stated that the Debtor intended to use the Funds, following completion of his Chapter 13 Plan, to purchase a modest home.

Relief Requested

The Trustee is seeking the turnover of \$13,000 from the Debtor's savings account (approximately ½ of the proceeds from the personal injury settlement) (the "Funds") pursuant to 11 U.S.C. § 542. The Trustee argues that the Debtor did not file his plan in good faith and should be required to turn over the Funds so that the debtor may complete his plan within 3 years, and comply with the "best interests" test under 11 U.S.C. § 1325 (a)(4) and the "best efforts" test under 11 U.S.C. § 1325(b).

The debtor argues that the Chapter 13 Trustee has no authority to seek turnover of a non-exempt asset, even if it is cash, so long as the debtor's plan provides that creditors will receive in deferred cash payments at least as much as these creditors would receive in a hypothetical chapter 7 and so long as the debtor is devoting all of his disposable income to the chapter 13 plan for at least three years.

Discussion

Section 1325 of the Bankruptcy Code provides in pertinent part,

(a) [T]he court shall confirm a plan if - ...

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date; ...

(b) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

Best Interests

Under the last proposed modification of the Plan the Debtor plans to pay 100% to his creditors. This modification seems designed to satisfy, and does satisfy the best interest test under § 1325(a)(4).

Best Efforts

Section 1325 of the Bankruptcy Code requires debtors to devote all of their "disposable income" to the plan. "Disposable income" is defined as "income which is received by the debtor." 11 U.S.C. § 1325(b)(2). Income is not defined by the Bankruptcy Code." Relying on the decisions in *Watters v McRoberts*, 167 B.R. 146 (S.D. Ill. 1994) and *Gaertner v Claude (In re Claude)*, 206 B.R. 374 (Bankr. W.D. Pa. 1997), the Trustee argues that the Debtor should be required to include the Funds in his disposable income. In the cases cited by the Trustee, the debtors received the proceeds from a personal injury claim post-petition. Thus, the funds were income, not assets in the possession of the debtor at the time of filing. The bargain struck by a debtor in a chapter 13 is to pay all of his disposable income to creditors for a specified time period in exchange for being allowed to retain his pre-petition assets. *See, e.g., In re Golek*, 308 B.R. 332 (Bankr. N.D. Ill. 2004). Including a debtor's pre-petition assets in the disposable income calculation would destroy the nature of this bargain.

In this case, the Debtor held the Funds at the time he filed his chapter 13 petition. The Funds were not income, but an asset. The Code requires a debtor to contribute "disposable

income,” not assets (even if they are liquid). With the exception of the Funds, the Trustee agrees that the Debtor is contributing all of his disposable income to fund the Plan. Therefore, the Court finds that the Debtor has satisfied the best efforts test under § 1325(b).¹

Good Faith

Section 1325 requires that a plan be proposed in good faith. 11 U.S.C. § 1325(a)(3). “[A] good faith determination under § 1325(a)(3) requires an inquiry into all the facts and circumstances of a debtor’s proposed plan.” *In Re Okoreeh-Baah*, 836 F.2d 1030 (6th Cir.1988).

Good faith is an amorphous notion, largely defined by factual inquiry. In a good faith analysis, the infinite variety of factors facing any particular debtor must be weighed carefully. We cannot here promulgate any precise formulae or measurements to be deployed in a mechanical good faith equation. The bankruptcy court must ultimately determine whether the debtor’s plan, given his or her individual circumstances, satisfies the purposes undergirding Chapter 13: a sincerely-intended repayment of pre-petition debt consistent with the debtor’s available resources. The decision should be left simply to the bankruptcy court’s common sense and judgment.

Okoreeh-Baah, 836 F.2d at 1033.

The ultimate charge to a bankruptcy court on this issue is to determine whether the debtor’s plan, given his or her individual circumstances, satisfies the purposes undergirding Chapter 13: a sincerely-intended repayment of pre-petition debt consistent with the debtor’s available resources. In this case, the Debtor has in his possession cash available to pay all of his debts in full, such that if this were a chapter 7 case the Debtor’s creditors would likely

¹ Given that the Debtor can only meet the best interests and best efforts test through the funding of a plan that goes beyond 3 years, the Court finds “cause” to extend the plan beyond three (3) years.

receive 100% of the amount owed to them. In his first Chapter 13 plan, the Debtor proposed to pay his creditors 86%. Even after the bar date passed and the Debtor was aware that his assets exceeded his obligations, the Debtor did not propose to increase the dividend payable to his creditors. It was only after the Hearings that the Debtor proposed to modify his plan in order to pay his creditors 100%.

The Court finds it difficult to believe that the Debtor's plan was a sincerely-intended repayment of pre-petition debt consistent with the Debtor's available resources.

Turnover

Section 542 of the Bankruptcy Code provides, in pertinent part,

an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

Section 542 does not provide for turn over of *all property of the estate*. Rather, the statutory language is specific and is somewhat more narrowly drawn. Turnover is restricted to two kinds of property: 1) property that the trustee may use, sell, or lease under § 363 of this title or 2) property the debtor may exempt under § 522. In this case, the property is neither exempt under § 522 nor is it property that the trustee may use, sell or lease under § 363.

Generally, a chapter 13 debtor remains in possession of all property of the estate. 11 U.S.C. § 1306. A chapter 13 trustee is neither empowered nor authorized to collect or liquidate property of the estate or property of the debtor. 11 U.S.C. § 1302; *EconoLube N' Tune, Inc. v. Frausto (In re Frausto)*, 259 B.R. 201, 211 (Bankr. N.D. Ala. 2000). It is the

debtor rather than the chapter 13 trustee who exercises the authority of a trustee under § 363 to use, sell or lease property of the estate. 11 U.S.C. § 1303; *Sims, et al., v. Capital One Financial Corp.*, 278 B.R. 457, 476 (Bankr. E.D. Tenn. 2002). In the context of chapter 13, the turnover provisions contained within § 542(a) run to the debtor. *See TranSouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 687 6th Cir. BAP 1999 (“To the extent a chapter 13 debtor can ... use property of the estate under § 363, the debtor succeeds to the mandate in § 542(a) that compels delivery of property that is usable by the debtor.”) Therefore, the Court finds that under a literal reading of § 542, the chapter 13 trustee is not empowered to compel turnover of assets in the debtor’s possession.

The Debtor cites to *In re Lee*, 35 B.R. 452 (Bankr. N.D. Ga. 1983). In that case, a chapter 13 debtor’s bank unilaterally closed the debtor’s bank account upon the debtor’s filing of his chapter 13 petition and transferred all the funds on deposit (total of \$238.35) to the chapter 13 trustee. The bankruptcy court held that the bank violated the automatic stay, directed the trustee to pay over to the debtors the sum which the bank had transferred and found that “[a] chapter 13 debtor is entitled to remain in possession of his estate, except as otherwise stated in a confirmed plan or in an order confirming a plan; this includes control over and constructive possession of funds deposited in his bank account.” 35 B.R. at 455, 458-59.

Notwithstanding that a chapter 13 debtor is entitled to remain in possession of his estate, the Bankruptcy Court for the Southern District of Georgia found that settlement funds claimed as exempt by the debtor and to be paid post-petition on behalf of a pre-petition

personal injury claim should be held in escrow by the trustee until such time as the debtor completes his chapter 13 plan. *In re Webster*, 1994 WL 16006047 (Bankr. S.D. Ga.) In *Webster* the debtor's plan proposed to pay creditors a 100 % dividend. Relying on § 522(c), the *Webster* court found that even though the plan proposed to pay 100%, allowing the debtor to exercise control over the funds prior to completion of his chapter 13 plan would allow him to reap the benefit of the exemption available in chapter 13 without having made final payment in accordance with a confirmed plan. Such a result would be contrary to the letter and spirit of chapter 13. *See In re Webster*, 1994 WL at *3.

This Court agrees with the reasoning of the *Webster* court. It would be contrary to the spirit of Chapter 13 to allow the debtor the benefit and use of the Funds without completing his chapter 13 plan. Although the Debtor may not be required to turnover possession of the Funds to the Trustee for distribution to creditors, the Debtor should not be allowed to freely access the Funds until his chapter 13 Plan is complete.

Therefore, the Court finds the Debtor's Second Motion to Modify to be well taken and directs, consistent with the Debtor's stated intention with respect to the Funds, that the Funds shall be placed by the Debtor in an interest-bearing escrow account and that such Funds shall remain in that interest-bearing escrow account until the Debtor completes his Chapter 13 Plan or upon further order of the Court; further, the Debtor shall provide copies of the current statement of such account to the Chapter 13 Trustee on no less than a quarterly basis.

IT IS SO ORDERED.



MARILYN SHEA-STONUM
Bankruptcy Judge



CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 27 day of May, 2005, the foregoing Order was sent via regular U.S. Mail to:

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