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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
LEVELAND

In re:) Case No. 03-15744
)
ANTHONY ANGELO,) Chapter 13
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**

Creditor Ameriquest Mortgage Company moves to deny confirmation in this Chapter 13 case and to dismiss with sanctions on the ground that this is a bad faith third bankruptcy filing. The debtor argues that he filed the case in good faith and that a change of his business and health circumstances between the second and third filings justifies this filing. For the reasons stated below, Ameriquest's motion is denied.

JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) and (L).

FACTS

The material facts are not in dispute. The debtor has been in the flooring business for 14-15 years. In 1999, the debtor signed a note secured by a mortgage on his house in favor of Ameriquest Mortgage Company. When he defaulted on the note payments, Ameriquest obtained a state court judgment against him and attempted to sell the house at a sheriff's sale. The debtor filed three Chapter 13 bankruptcy cases to stop such sales. This is the history of the cases:

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The First Case (No. 00-15144 filed July 13, 2000)

At some point in mid-2000, apparently about when this case was filed, the debtor pleaded guilty to a misdemeanor of driving while under the influence of alcohol. He testified that he “went off the deep end” when his mother was dying and the conviction is related to that state of affairs. He served a six-month sentence and was released early. This case was dismissed on November 27, 2000 for lack of funding.

The Second Case (No. 01-10626 filed January 25, 2001)

The debtor again began flooring work after his release. This case was dismissed for lack of funding and then reinstated on August 10, 2001. The debtor’s plan was confirmed on January 23, 2002. Although the testimony was not entirely clear, it appears that in October 2002, the debtor’s business slowed down. He then had a chance to do a large flooring job with his brother. At about the time the job was starting, the debtor was diagnosed with viral meningitis and advised not to work for at least ten days. He stayed home for two days before returning to work because he could not afford to stay out longer. He became ill again, at which time his doctors told him to stay home or risk paralysis. This time, the debtor took off 20 days and someone else got the job he had been working on because it could not wait. He fell behind even more and his case was dismissed for lack of funding on April 18, 2003.

This Third Case (No. 03-15744 filed May 3, 2003)

The debtor filed this case to stop a sheriff’s sale set for May 5, 2003. Before filing, he gave his attorney \$2,500.00 to offer to Ameriquest to stop the sale. Ameriquest declined the offer, although the attorney still holds that money. The debtor has mailed his June Chapter 13 payment to the Chapter 13 Trustee and will have an additional \$1,000.00 to set aside for his case

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in a few days when he is paid. His business has picked up recently and he received checks for \$800.00 and \$1,500.00 shortly before he filed this case. Since the filing, he has received paychecks from The Floor Show totaling about \$3,000.00 together with about \$6,000.00 in additional gross income. They have told the debtor that they have about a year's worth of work for him. The debtor intends to pay additional money to the Chapter 13 Trustee during the summer when business is traditionally better than in the winter. The debtor's health is now good. He hopes to save his home through this Chapter 13 case.

The debtor admits that his statement of financial affairs is inaccurate and incomplete. The income amounts for 1998, 1999, and 2000 are wrong and there is no information listed for 2001 or 2002. (Exhibit F ¶ 1). The explanation seemed to be that these numbers were taken from his second case filing. As best as the Court understands, the debtor had tax issues which he addressed and/or resolved with the IRS which is why he now knows the numbers are not correct. He did not explain why the 2001 and 2002 numbers are missing or why an amended document has not been filed to supply this information.

The debtor did not schedule the tools which he owns and uses on the job. He believes they are worth about \$2,000.00.

The debtor's budget in support of his Chapter 13 plan is, in his attorney's words, "a tight one" with only \$150.00 allocated for food and \$130.00 for transportation. (Exhibit E, Schedule J). His sister, who owns a restaurant, frequently provides him with food. The budget shows disposable monthly income of \$274.08 which the debtor proposes to pay to the Chapter 13 Trustee for 60 months, which will pay his unsecured creditors a 10% dividend on their debts.

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DISCUSSION

Ameriquet's motion to deny confirmation and to dismiss rests on its argument that the debtor filed this case in bad faith, as evidenced by his serial bankruptcy filings.

I.

A Chapter 13 debtor's good faith is relevant to plan confirmation. See 11 U.S.C. § 1325(a)(3) ("[T]he court shall confirm a plan if . . . the plan has been proposed in good faith and not by any means forbidden by law."). A debtor's lack of good faith is, therefore, a basis to deny plan confirmation. The debtor bears the burden of proving good faith in this context. See *Ed Schory & Sons, Inc. v. Francis (In re Francis)*, 273 B.R. 87, 91 (B.A.P. 6th Cir. 2002) (citing *Hardin v. Caldwell (In re Caldwell)*, 895 F.2d 1123, 1126 (6th Cir. 1990)). A debtor's lack of good faith is also a basis to dismiss his case. See *Alt v. United States (In re Alt)*, 305 F.3d 413, 418-19 (6th Cir. 2002) (noting there is abundant authority to support dismissing a Chapter 13 case that is not filed in good faith under § 1307(c) for cause). The burden of showing that a case was not filed in good faith lies with the party seeking dismissal. *Id.* at 420 (citing *In re Love*, 957 F.2d 1350 (7th Cir. 1992)).

The issue of a debtor's good faith, whether raised on a motion to dismiss or as a basis to deny plan confirmation, is fact specific and requires consideration of the totality of the circumstances. *Id.* at 419-20. The factors which may be considered regarding a debtor's good faith in each context overlap substantially. *Id.* at 420. "However, given the more severe consequences [of dismissal], the law also recognizes that 'the bankruptcy court should be more reluctant to dismiss a petition under Section 1307(c) for lack of good faith than to reject a plan

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for lack of good faith under Section 1325(a)'." *Id.* (quoting *In re Love*, 957 F.2d 1350, 1356 (7th Cir. 1992)).

When analyzing whether a plan has been proposed in good faith, these factors are relevant: the debtor's income and expenses; the debtor's attorney's fees; the anticipated duration of the Chapter 13 plan; the debtor's sincerity in seeking relief; the debtor's earning potential; any special circumstances, such as unusually high medical expenses; the frequency with which the debtor has sought bankruptcy relief; the circumstances under which the debt was incurred; the amount of payment offered; the burden which administration would place on the trustee; and the statutorily-mandated policy of construing bankruptcy provisions in favor of the debtor. *See Society Nat'l Bank v. Barrett (In re Barrett)*, 964 F.2d 588, 592 (6th Cir. 1992). These same factors (where present) are also properly considered on a motion to dismiss for lack of good faith. *In re Alt*, 305 F.3d at 420. Additional relevant factors include: the nature of the debt; how the debt arose; the timing of the petition; whether the debt would be dischargeable in Chapter 7; the debtor's motive in filing; how the debtor's actions affected creditors; the debtor's treatment of creditors before and after the filing; and whether the debtor has been forthcoming with the court and creditors. *Id.* at 419 (citing *In re Love*, 957 F.2d 1350, 1357 (7th Cir. 1992)).

II.

Ameriquet's motion to dismiss is based on the premise that the debtor's multiple filings constitute prima facie evidence of bad faith, which shifts the burden to the debtor to affirmatively show his good faith. As discussed above, however, the issue of a debtor's good faith requires consideration of a number of factors, including the number of filings, and the burden of proving a lack of good faith for dismissal is Ameriquet's.

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In this case, dismissal for lack of a good faith filing is not warranted. The debtor filed this case and the two earlier cases to stop sheriff's sales to save his house. There is no evidence that these filings were abusive or intended solely to delay the foreclosure sales without a reasonable expectation of reorganization. The debtor went to jail soon after he filed his first case and he suffered a debilitating illness during his second case. These unusual circumstances led to the failures of those cases. The debtor is sincere in seeking Chapter 13 relief, a conclusion the Court reaches by considering the \$2,500.00 the debtor put on deposit with his attorney to pay Ameriquest and the detailed current income figures he provided at the hearing, as well as an assessment of the debtor's demeanor. He has proposed a 60 month plan (the maximum) which will provide a 10% dividend to unsecured creditors and he has begun making payments to the Chapter 13 trustee. He is healthy, his business is improving, and he realistically anticipates having the income to continue making his plan payments. The debtor's plan can be easily administered and this case will not unduly burden the Chapter 13 trustee. On the other hand, this is the debtor's third filing and it did stop several sheriff's sales, which means that Ameriquest expended both time and money without visible results. The filing also include errors. While it is the debtor's obligation to provide accurate information, the errors appear to be due to sloppiness rather than an attempt to mislead the court or creditors. Based on all of these facts, the Court finds that Mr. Angelo's case was filed in good faith and Ameriquest has not established cause to dismiss it.

III.

The finding that the debtor filed his case in good faith also disposes of the second issue, which is whether confirmation should be denied for lack of good faith. That part of

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Ameriquest's motion is also denied. At the hearing, Ameriquest raised questions about whether the plan is feasible although that was not addressed in the motion. The ruling on this motion does not bar Ameriquest from challenging confirmation on the ground that the plan is not feasible, should it wish to do so at the appropriate time.

CONCLUSION

For the reasons stated, Ameriquest's Motion to deny confirmation and to dismiss this case is denied. A separate order will be entered reflecting this decision.

Date: 1 July 2003



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Glenn Forbes, Esq.
Andrew Paisley, Esq.
Craig Shopneck, Trustee

By: Joyce L. Gordon, Secretary

Date: 7/1/03

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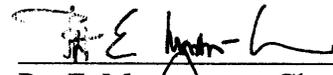
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Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **ORDER**

For the reasons stated in the Memorandum of Opinion filed this same date,
IT IS, THEREFORE, ORDERED that the motion of Ameriquest Mortgage Company to
deny confirmation and to dismiss this case is denied. (Docket 3).

Date: 1 July 2003



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Glenn Forbes, Esq.
Andrew Paisley, Esq.
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By: Joyce L. Gordon, Secretary
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