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FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 04-16544
	)	
DANIEL MICHAEL FREEMAN and	)	Chapter 13
LORETTA DUNN-FREEMAN,	)	
	)	Judge Pat E. Morgenstern-Clarren
Debtors.	)	
	)	**MEMORANDUM OF OPINION**

The chapter 13 trustee moves to dismiss this case on the ground that the debtors did not file it in good faith. The specific objection is that the debtors purchased a used Mercury Sable a few weeks before they filed their case. The trustee further objects that, if the case goes forward, the plan improperly provides for the car debt to be paid outside the plan. The debtors contend they acted in good faith, knowing that they needed transportation to get to work and aware that the vehicles they owned were unreliable and/or unsafe to operate. They contend further that there is no benefit to the estate in forcing them to pay the car note through the plan. For the reasons stated below, the motion is denied.

JURISDICTION

Jurisdiction exists 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), (O).

FACTS[1]

The debtors Daniel Freeman (age 38) and Loretta Dunn-Freeman (age 41) have been married for 10 years. Mr. Freeman has one child from a previous marriage. The debtors both earned GEDs; Mr. Freeman also has a certificate from a truck driving school and Ms. Freeman has one from a medical secretary course.

In the mid to late 1990s, Mr. Freeman was one of four partners in a business that loaded tractor-trailers for Goodyear Tire and Rubber. He earned about $48,000.00 a year in that work. In 1996, one partner had personal problems and the other partners bought him out. Apparently they picked a bad time to do so because the partners ended up with personal tax liability for distributions made to or taken by their former partner before they bought him out. Mr. Freeman was unable to pay this or the $14,000.00 that he owed for his own taxes. The IRS debt totaled $28,495.12. He reached an agreement with the IRS that he would pay $600.00 a month. After making 14 payments (some of which were late), he owed more than he did when he started the plan due to interest and penalties.

Mr. Freeman left this business in 1999 because there was not enough work. That same year, the debtors filed a chapter 7 case primarily to address credit card debt. Mr. Freeman had been using credit cards issued in his name to pay business expenses for the partnership to cover cash flow problems. When the business was operating, the business paid the credit card bills. When the business failed, Mr. Freeman was left with the debt. The Freemans lost their house in that bankruptcy.

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[1] The facts are from the evidentiary hearing held on September 29, 2004. The facts are really not disputed; the dispute is over the application of the facts to the law.

Ms. Freeman worked in the medical billing field from about 1992 to 1994, earning $7.50 an hour. For the last eight months she has worked at Chelsea Catering, earning $9.88 an hour delivering catering supplies to airplanes at Cleveland Hopkins airport.

The debtors live in a rented duplex. They have no real property and little personal property other than the car at issue here. The chapter 13 trustee does not challenge the debtors' budget, which is undeniably bare bones.

Mr. Freeman has been employed for the last five years at Mail Marketing as an ink jet operator. He earns approximately $21,000.00 annually. On March 23, 2004, the IRS issued a notice of levy on Mr. Freeman's wages for $32,144.03 in taxes due for 1996, 1998, 1999, and 2002. Mr. Freeman's wages were already subject to garnishment by the State of Ohio for delinquent child support. After deducting the child support and the monthly levy amount, Mr. Freeman calculated that he would take home $600.00 a month.

The Freemans consulted the attorney who represented them in their first bankruptcy case. They explained to him their transportation dilemma. They had title to two vehicles: a 1991 Eagle Summit with 76,000 miles and a 1997 Chevy truck. The Eagle was a recent gift from Mr. Freeman's father who did not think it would make the trip down to his new home in Florida. The Freemans had taken the car to a mechanic who told them that it was unsafe to drive, so they stopped driving it. The truck had major mechanical problems that would cost about $3,100.00 to repair, not counting the cost of rebuilding the engine. The truck then stopped running.

The debtors work different shifts. Mr. Freemen's license was suspended for non-payment of child support, but the suspension will soon be lifted. Mr. Freeman has been getting rides to

work with his neighbor, but the neighbor is moving. His brother, who has also provided some transportation, is getting a job in another city. Ms. Freeman needs a car to get to work and both Freemans need a car to get to the grocery store, medical appointments, banks, and the like.

After the Freemans' attorney reviewed the situation with them, he advised them to buy a reliable car at a modest price so that they would have a way to get to work and earn money to fund their chapter 13 plan. He also advised them that whatever purchase agreement they entered into would have to be paid in full because it would be bankruptcy fraud to enter into such an agreement intending to alter its terms through the bankruptcy.

The Freemans then visited several dealerships. Many declined to offer them any financing because of their credit record. At least two offered financing at 25%. Finally, Liberty offered them a $2,250.00 trade-in for their truck (far more than they had paid for it the year before) and a 19% interest rate on either a Sable or a Taurus. The dealer limited their choice to these models at the lender's insistence, the theory being that if the lender had to repossess the car these models would have enough value on resale to cover the loan balance. The Freemans chose a 2003 Sable because, at 76,000 miles, it had the lowest mileage. They then entered into a purchase agreement with Liberty under which they agreed to pay $299.87 a month for 72 months. The agreement was assigned to Capital One Auto Finance.

The debtors filed their chapter 13 case on May 24, 2004. They listed the Eagle and the Sable, but mistakenly stated that the Sable had been purchased in 2003. There was no suggestion that this was done to defraud or for other improper motives; it was a mistake and the trustee does not argue otherwise. The plan has these relevant terms: the priority debt owed to Cuyahoga

County (child support), the IRS, and Ohio will be paid 100%; the unsecured creditors will be paid at least 2%; the lease on the debtors' apartment is assumed; Capital One will be paid according to the terms of the purchase agreement outside the plan; and the plan is estimated to run at least 59 months.

THE POSITIONS OF THE PARTIES

The chapter 13 trustee argues that the case should be dismissed as a bad faith filing because the debtors entered into the car lease knowing they would be filing a chapter 13 case and knowing that by making the monthly car payments their pre-existing creditors would receive less than they would otherwise have. The trustee also argues that if the case is permitted to go forward, the debtors should be required to make the car payments inside the plan; i.e. through the trustee's office. The debtors contend they purchased reasonable transportation so that they could keep their jobs and fund the plan. They also deny that the bankruptcy code requires them to make the car payments inside the plan given that the contract runs more than 60 months.

DISCUSSION

Section 1307(c) provides for the dismissal of a chapter 13 case for cause. *See* 11 U.S.C. § 1307(c).[2] A debtor's lack of good faith is cause to dismiss the case.[3] *See Alt v. United States*

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[2] Alternatively, § 1307(c) provides for case conversion.

[3] A chapter 13 debtor's good faith is also relevant to plan confirmation. *See* 11 U.S.C. § 1325(a)(3) (providing that "the court shall confirm a plan if . . . the plan has been proposed in good faith and not by any means forbidden by law[.]"). "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 for lack of good faith under Section 1325(a)'." *Alt*, 305 F.3d at 420 (quoting *In re Love*, 957 F.2d 1350, 1356 (7th Cir. 1992)). The trustee's motion and brief cite the debtors' lack of good faith with respect to their proposed plan; however, plan confirmation is not the issue being decided here. *See* Docket 18.

(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)). "The key inquiry . . . is whether the debtor is seeking to abuse the bankruptcy process." *Id.* at 419. "Stated somewhat differently, a Chapter 13 case is illicit if its pendency is fundamentally unfair to creditors in a manner that contravenes the *spirit* of the Code." *Chase Manhattan Mortgage Corp. v Rodriguez (In re Rodriguez)*, 248 B.R. 16, 19 (Bankr. D. Conn. 1999) (emphasis in original). The trustee has the burden of proving that this case was not filed in good faith. *See Alt,* 305 F.3d. at 420 (citing *In re Love*, 957 F.2d 1350 (7th Cir. 1992)).

The issue of a debtor's good faith in filing chapter 13 is fact specific and requires consideration of the totality of the circumstances. *Id.* at 419-20. The relevant factors include: 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 In re Alt*, 305 F.3d at 419-20 (citing *Society Nat'l Bank v. Barrett (In re Barrett)*, 964 F.2d 588, 592 (6th Cir. 1992) and noting that the factors used to analyze whether a plan has been proposed in good faith are also properly considered on a motion to dismiss for lack of good faith). Additional 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.* (citing *In re Love*, 957 F.2d 1350, 1357 (7th Cir. 1992)).

The chapter 13 trustee's motion to dismiss is premised on the debtors' purchase of a car just before they filed their chapter 13 case. However, that act alone does not show bad faith. *See, for example, In re Mitchell*, 191 B.R. 957 (Bankr. M.D. Ga. 1995). Moreover, when all the circumstances are considered, it is clear that the debtors did not act in bad faith in filing this petition.

The debtors previously filed under chapter 7. That filing is not indicative of bad faith because it resulted from a failed business venture. The debtors both work and together they earn a modest income which is not likely to change substantially. Their budget is conservative and does not provide for anything but essentials. The fee which they paid their attorney is reasonable. The 59 month plan which they have proposed will pay in full the substantial priority obligations for past due child support and taxes which were not discharged in their first case. The explanation which they gave regarding their need for and purchase of the 2003 Sable is entirely credible. In particular, their vehicles were old and in considerable disrepair and they needed a replacement vehicle to allow them to maintain their employment and carry on with their lives. They chose a used vehicle and obtained the best terms available. They understood and proposed from the outset that the car loan would be paid in full according to its terms. Also, their reason for filing the chapter 13 does not carry the taint of bad faith. The decision was motivated by their desire to avoid the IRS wage levy and to address their debts under a chapter 13 plan. Finally, although the trustee suggests that the debtors should be required to pay their car loan through their plan, the bankruptcy code does not require them to do so under these facts and there was no

evidence that doing so would benefit their creditors. Based on these considerations, the court finds that the debtors have not abused the bankruptcy process and they should be permitted to proceed with their chapter 13 case.

CONCLUSION

For the reasons stated, the chapter 13 trustee's motion to dismiss is denied. A separate order will be entered reflecting this decision.

Date: 5 Oct 2007

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

Richard Nemeth, Esq.
Holly Scherf, Esq.

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LORETTA DUNN-FREEMAN,	)	
	)	Judge Pat E. Morgenstern-Clarren
Debtors.	)	
	)	**ORDER**

For the reasons stated in the memorandum of opinion filed this same date,

IT IS, THEREFORE, ORDERED that the chapter 13 trustee's motion to dismiss this case is denied. (Docket 13). The adjourned confirmation hearing will be held on **October 26, 2004** at 1:30 p.m.

Date: 5 Oct, 2004

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

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Holly Scherf, Esq.