

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

IN RE:)	CHAPTER 13
)	
ROYCE DAVID YODER,)	CASE NO. 05-68671
Debtor.)	
)	JUDGE RUSS KENDIG
)	
)	
)	MEMORANDUM OF DECISION
)	

This matter is before the Court on the motion to dismiss and objection to confirmation filed by creditor Floor Plans, Inc. (hereafter "Creditor"). A hearing was held on May 2, 2006. Donald M. Miller, counsel for Debtor, and Patrick J. Keating, counsel for Creditor, appeared at the hearing. Debtor also was present and testified.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(a) and the general order of reference entered in this district on July 16, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(L). The following constitutes the court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

FINDINGS OF FACT

Debtor commenced a Chapter 13 bankruptcy case on October 14, 2005, three days prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). The Chapter 13 case followed on the heels of a Chapter 7 case which Debtor and his wife filed on September 4, 2004. Debtor and his wife received a discharge in the Chapter 7 case on October 6, 2004, more than one year prior to the commencement of the Chapter 13 case.

In the course of the Chapter 7 case, Creditor filed a complaint objecting to discharge of its debt under 11 U.S.C. §§ 523(a)(2)(A), 523(a)(2)(B), 523(a)(4), and 523(a)(6). The dispute arose from automotive sales out of trust for a former business in which Debtor was a principal and Creditor was the lender. The matter was scheduled for trial on May 2, 2005 but the trial was not held because the parties informed the Court the matter was settled. An agreed order, filed on October 4, 2005, stipulated that \$133,000.00 was not discharged. Based on Debtor's testimony in this case, the terms of the agreement included payments of \$500.00 per month to Creditor. Debtor agreed to the nondischargeable debt of \$133,000.00 because counsel informed him he probably would

not win if the matter went to trial and he didn't have the money for litigation or attorney's fees. Following the agreement that the debt was nondischargeable, Debtor did not make any payments on the debt and did not contact Creditor regarding the debt, nor did Creditor contact him about payments.

Debtor talked to his counsel about his options with regard to the debt, including Chapter 13. After some consideration, he decided to pursue Chapter 13. His list of reasons included: (1) he did not think he would be able to pay \$500.00 per month for twenty or thirty years; (2) his wife's medical bills and needs; (3) learning that Creditor settled with his partner, on the same debt, for \$12,500.00. He admitted he owes the money to Creditor, and probably owes more, but recognized he doesn't have it and won't have it in his lifetime.

Debtor filed his Chapter 13 case ten days after entry of the agreed order in the adversary proceeding. Only four debts are included in the Chapter 13 schedules: first and second mortgages on Debtor's residential real estate, a vehicle lease, and the \$133,000.00 debt owed to creditor. Pursuant to the plan's provisions, Debtor will personally pay the mortgage and lease creditors. Creditor will be paid by the Chapter 13 trustee through the plan, which is to be funded by monthly payments of \$500.00 from Debtor. The plan's term is for sixty months, the maximum length. Creditor will receive the net of the \$500.00 after the trustee's commission and attorney's fees, if any, are deducted.

Debtor is a 52 year old male with some medical problems. He is prescribed two medications, Zoloft, an anti-depressant, and Crestor for cholesterol, but he cannot afford the Crestor. Debtor is married and his wife works, although Debtor said she probably should not be working because of her poor health. She takes sixteen pills a day and their medical expenses are high. Debtor's Schedule J lists medical and dental expenses of \$600.00 per month. He testified that their prescription expenses, not including other medical expenses, for 2005 were \$8,000.00.

Debtor is employed as a car salesman. Debtor's income and expenses increased since the Chapter 7 filing in 2004. In the Chapter 7 case, Debtor listed expenses of \$3,681.35 and now lists \$4,233.00 in monthly household expenses. The combined household net income in the Chapter 7 was \$3,308.55; it is now \$4,733.00.

Debtor has few assets. He owns a home, appraised in the Chapter 13 case for \$145,000.00, with two mortgage liens totaling approximately \$135,000.00. He does not own savings or retirement accounts. He will need to rely on Social Security upon reaching retirement. No vehicles are titled in his name, although he is leasing a 2000 Lincoln. He does not have collectibles, collections or expensive recreation equipment of any kind.

Debtor acknowledged his understanding of Chapter 13, including an understanding that if his income increases, his payments will increase. Debtor said that \$500.00 per month is all he can afford, and sometimes he has to squeeze that out.

The Court found Debtor to be a credible witness.

ARGUMENTS

Creditor, relying on 11 U.S.C. § 1325(a)(3), argues that Debtor filed the Chapter 13 case in bad faith. According to creditor, the bad faith is evidenced the following facts: he filed the case ten days after entry of the agreed order finding \$133,000.00 to be nondischargeable in his Chapter 7 case, Creditor's claim is the only claim to be paid through the Chapter 13, Debtor's expenses increased between the two filings, and Debtor did not attempt to make payments on the debt owed to Creditor. Creditor also objected to confirmation to Debtor's plan on the same grounds. Creditor urges the Court to conclude that the totality of the circumstances indicate this case was not filed in good faith.

Debtor contends that the plan was filed in good faith. Included in his list of supporting facts are the following: he proposes to pay substantially more than a typical Chapter 13 case, he is paying for the longest period of time available, he doesn't have meaningful assets, and he hasn't hidden, transferred or concealed assets. According to Debtor, these facts support the conclusion that he filed the case in good faith.

ANALYSIS

Similar standards undergird a Chapter 13 motion to dismiss and an objection to confirmation premised on 11 U.S.C. § 1325(b). The Sixth Circuit has instructed "that bankruptcy courts must look to the totality of the circumstances in determining a debtor's good faith in filing a Chapter 13 petition and plan." Ed Schory & Sons, Inc. v. Francis (In re Francis), 273 B.R. 87, 91 (citing Hardin v. Caldwell (In re Caldwell), 851 F.2d 852, 860 (6th Cir. 1988) (other citation omitted)). It is the Debtor's burden to prove that the case was filed in good faith. *See Francis*, 273 B.R. 87 (6th Cir. BAP 2002) (citing Hardin v. Caldwell (In re Caldwell), 895 F.2d 1123, 1126 (6th Cir. 1990)).

To determine whether a case is filed in good faith, a court must look at the following:

- (1) the amount of the proposed payments and the amount of the debtor's surplus;
- (2) the debtor's employment history, ability to earn and likelihood of debtor's surplus;
- (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 the 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 the debtor is attempting to abuse the spirit of the Bankruptcy Code.

Francis, 273 B.R. at 91 (citing Caldwell, 895 F.2d at 1126-27; Metro Employees Credit Union v. Okoreeh-Baah (In re Okoreeh-Baah), 836 F.2d 1030, 1032) (other citations omitted)).

The above list is not exclusive and courts can also take other into account that: good faith does not necessarily require substantial repayment of the unsecured claims, the fact a debt is nondischargeable under Chapter 7 does not make it nondischargeable under Chapter 13, and the fact that a debtor seeks to discharge an otherwise nondischargeable debt is not, *per se*, evidence of bad faith but may be considered as part of the totality of the circumstances analysis. In re Francis, 273 B.R. at 92 (citing Caldwell, 851 F.2d at 859-60 (internal quotations and citations omitted)). The criteria above provide the framework for the Court's analysis.

1. Amount of payments and Debtor's surplus

Debtor's plan proposes to contribute \$500.00 per month which is Debtor's entire disposable income based on Schedules I and J. Creditor points out that Debtor's expenses increased over \$500.00 in the year between filings. Creditor identifies the following increases in Debtor's budget:

<u>Expense</u>	<u>First Bankruptcy</u>	<u>Second Bankruptcy</u>
Phone	\$ 50.00	\$ 135.00
Cable	\$ 0.00	\$ 70.00
Home Maintenance	\$ 75.00	\$ 200.00
Food	\$ 300.00	\$ 410.00
Laundry/dry cleaning	\$ 0.00	\$ 50.00
Medical/dental	\$ 300.00	\$ 600.00
Transportation	\$ 60.00	\$ 250.00

According to Creditor, this is a clear indication of bad faith.

Fifty percent of increased expense is in the medical/dental category. After Debtor's testimony, the Court is convinced the medical expenses are substantial and probably more than \$600.00 each month. Regarding the other increases in expenses, the Court points out that the following expenses have decreased:

<u>Expense</u>	<u>First Bankruptcy</u>	<u>Second Bankruptcy</u>
Mortgages	\$ 1,626.00	\$ 1,584.00
Recreational	\$ 20.00	\$ 1.00
Life insurance	\$ 268.00	\$ 0.00
Car	\$ 353.00	\$ 203.00

The reduction in expenses is also significant. Not including the medical, Debtor's household expenses increased approximately \$250.00. Many factors can influence these changes, including rising fuel costs, older vehicles, and adjustments to cost of living. The Court also recognizes that Debtor no longer is paying a large life insurance premium which is a sizeable reduction in expense for an asset which would benefit Debtor and/or his family.

Since the 2004 case, Debtor's net monthly income increased approximately \$1,400.00 per month. Debtor's wife's income is virtually the same as it was in the previous case, so the increase is the result of Debtor's labor. The increase contravenes any notion that Debtor is purposefully underemployed since he has improved his position.

Additionally, the Court notes that Debtor is paying \$1,000.00 on a second mortgage with an approximate balance of \$35,000.00. It seems likely that this mortgage will be fully paid during the course of the plan, thereby leaving an opportunity for an increase in payments to Creditor. The Court orders Debtor, upon repayment of the mortgage loan, to file amended Schedules I and J with the Court and to file an appropriate modification of the plan and, in accordance with bankruptcy practice, to allow Creditor an opportunity to object.

Based on the above, the Court concludes that the changes in Debtor's income and expenses between filings do not indicate bad faith. While some of Debtor's expenses increased, other expenses decreased. Debtor increased his income by a substantially higher margin than expenses increased, so the resulting effect is a benefit to Creditor.

II. Employment history/earning potential

Debtor is a 52 year old car salesman. Since June 2004, he has been employed with Maple Street Auto since June 2004. Prior to his Chapter 7 case, Debtor had several businesses. The Statement of Financial Affairs in that case, signed by Debtor under the penalty of perjury, show that all the businesses closed prior to the filing of the Chapter 7 case. The Statement of Financial Affairs in this case states Debtor earned \$33,842.00 in 2003 and \$43,562.00 in 2004. Based on Schedule I, his 2005 gross earnings are estimated to be \$50,000.00.

It appears that Debtor has the potential to earn more commissions, subject to sales/market conditions. However, Debtor testified that he understands that additional earnings will increase his Chapter 13 payments. To assure that Debtor is reporting any increases, the Court will order Debtor to provide annual tax returns to the trustee each year. The same shall be made available to Creditor upon request. As for Debtor's long-term prospects for meaningful earnings above his current levels, it appears that age and health may be against him. However, no direct testimony on this matter was presented.

III. Probable/expected duration of plan

Debtor has proposed a sixty month plan, the longest duration available under the bankruptcy code.

IV. Accuracy of petition and schedules

Although Creditor objected to the increased expenses, Creditor did not challenge the accuracy of those expenses. Upon review, the Court finds that although the utility expenses appear slightly higher than normal, they are not unreasonable. As no other objections or challenges regarding the accuracy of the information submitted by Debtor have been made, there is no indication of bad faith.

V. Preferential treatment between classes of creditors

Four debts are included in this case: two mortgages, a vehicle lease and Creditor's claim. The mortgages are long-term secured debts which are to be paid regular monthly installments during the plan. The vehicle lease is to be paid in full. Creditor is the only unsecured claim. The treatment of all creditors is typical of treatment of similarly situated creditors in a typical Chapter 13 case. The Court does not find any discrimination or preferential treatment in the proposed plan.

Creditor suggests that paying only one creditor is emblematic of bad faith, but the Court does not agree. When the Debtor is paying only one debt, particularly when that debt was found nondischargeable in a prior bankruptcy case, it deserves closer scrutiny. It is but one factor in the totality of circumstances for a court to review.

VI. Extent to which secured claims are modified

Secured claims have not been modified in this plan.

VII. Type of debt sought to be discharged and whether such debt is dischargeable in Chapter 7

Creditor's claim results from a stipulated finding of nondischargeability in the Chapter 7 case. The claim arose from a floor plan financing agreement between the parties whereby Creditor financed the purchase of inventory and Debtor, and his affiliates, paid creditor from the sales proceeds. Creditor's nondischargeability complaint alleged Debtor failed submitted false financial information and failed to pay Creditor sales proceeds to which it was entitled. The parties agreed that \$133,000.00 was not discharged in the Chapter 7 case. This weighs heavily against Debtor.

VIII. The existence special circumstances, such as inordinate expenses

Debtor's testimony regarding his family's medical expenses was credible. Debtor's wife takes sixteen pills a day for various medical conditions. Debtor is prescribed two medications and can only afford to take one. Debtor listed medical expenses of \$600.00 in Schedule J, but testified in court that the amount was probably higher. According to Debtor, he and his wife had \$8,000.00 in medical expenses to itemize for tax purposes. Debtor testified that these were mainly prescription costs and may not have included all their doctor visits and/or co-pays. In light of Debtor's testimony, the Court finds that \$600.00 per month is the minimum monthly medical expenses.

IX. The frequency with which debtor has sought relief under the bankruptcy code

As stated above, Debtor sought Chapter 7 relief, and was granted a discharge, in a case commenced in 2004. Debtor filed the present case in October 2005.

X. The motivation and sincerity of debtor seeking Chapter 13 relief

It is here that the heart of the parties' dispute is focused and where Creditor hangs its hat. According to Creditor, bad faith is clearly evidenced by Debtor's filing a Chapter 13 case ten days after Creditor's debt was found nondischargeable. While true, the Court finds the timing to be of little consequence. Trial on the nondischargeability complaint was scheduled in March, months prior to the October entry of nondischargeability, and was not held upon the parties' representation that the matter had been settled. Thus, the Court concludes that Debtor did not file the Chapter 13 in direct response to the entry of nondischargeability.

Debtor proffered several reasons for the Chapter 13 filing: 1) he knew he would never be able to pay the debt off in his lifetime; 2) he had to consider payments of \$500.00 for twenty to thirty years in light of his wife's medical conditions; 3) Creditor settled with his partner on the same debt for \$12,500.00. He also stated that he did not want to settle with Creditor, but was advised by counsel that he probably would not win and he did not have money to cover legal expenses. He also stated he asked about his other options with regard to the debt and did not immediately choose Chapter 13. Debtor testified he understood that his payments in the Chapter 13 case can increase if his financial situation changes.

Creditor argues that Debtor's failure to make any payments on the nondischargeable debt prior to filing a Chapter 13 is also indicative of bad faith. Debtor admitted he did not contact Creditor about payments and also testified Creditor did not contact him about payments. Although Debtor testified payments on the loan were \$500.00 per month, neither party provided any evidence regarding other payment terms of the parties' agreement. Thus, it is not clear if payments were due prior to Debtor's filing of the Chapter 13. Regardless, the Court concludes that, while the lack of payments cuts in favor of Creditor, this fact is not dispositive of the matter.

The Court also recognizes Debtor's impervious position. Debtor was facing the effective date of BAPCPA. If Debtor filed a case prior to BAPCPA, he deals with a bad faith challenge to his Chapter 13. If he waits until after BAPCPA, he cannot file a Chapter 13 case, with hopes of obtaining a discharge, for four years. *See* 11 U.S.C. § 1328(f)(1). And, even if he would file a bankruptcy case, unless the debt was paid in full, it would not be subject to discharge. *See* 11 U.S.C. § 1328(a). Consequently, Debtor was left with two alternatives: attempt the Chapter 13 filing or be strapped with a debt which he likely would never be able to repay. He had no time to wait. It was now or never.

The Court finds that Debtor's motivation is self-serving, but cannot conclude his motivation/sincerity is so anti-Creditor as to rise to bad faith. This is not a veiled Chapter 7 plan. Debtor is proposing to pay Creditor \$30,000.00, less trustee's fees, which is approximately 20% of the amount owed. As stated before, he is making payments to Creditor for sixty months, the maximum time allowed in a Chapter 13 case.

XI. The burden which the plan's administration would place upon the trustee

Since the trustee is only paying one claim, the burden to the trustee will be minimal.

XII. Whether debtor is attempting to abuse the spirit of the Bankruptcy Code

The purpose of a bankruptcy discharge is to give the Debtor a fresh start, not a head start. Here, after Debtor makes his payments, it is unlikely that Debtor will be in a position to have a head start. He will be in his late fifties, with no retirement savings, and medical problems.

Taking the above findings in the aggregate, the Court concludes that Debtor has not filed the case in bad faith. Debtor has committed all of his disposable income to the plan in a sincere attempt to repay as much of the debt as possible, within the confines of Chapter 13. While some of the facts may individually suggest bad faith, the totality of the circumstances do not.

CONCLUSION

While the Court finds this matter distasteful, and certainly does not want to encourage people nearing retirement to steal money and then file a Chapter 13, the extenuating facts of this case will result in limited application in other cases. The Court finds that Debtor has not filed his Chapter 13 case in bad faith. Creditor's motion to dismiss is **DENIED** and Creditor's objection to confirmation is **OVERRULED**.

An appropriate order shall be entered.

/s/ Russ Kendig

RUSS KENDIG
U.S. BANKRUPTCY JUDGE

MAY 26 2006

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