

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
CHARLES & MAXINE ALTIC,) CASE NO. BK86-2654
)
DEBTORS) Chapter 13

MEMORANDUM OPINION

Evidentiary hearing on creditor objection to debtor's Chapter 13 plan was held on October 16, 1987. Appearing on behalf of the debtor was Mary Powers of Omaha, Nebraska. Appearing on behalf of the creditor, Clark Equipment Credit Corporation (Clark), was R. J. Stevenson of Omaha, Nebraska.

Findings of Fact

Debtors are husband and wife and filed a joint petition for relief under Chapter 7 of the Bankruptcy Code on or about September 16, 1986. Creditor filed a complaint objecting to the dischargeability of its debt on the theory that the debtor Charles Altic converted to his own use the proceeds of certain checks which were either made jointly payable to him and the creditor or which represented proceeds of insurance coverage on collateral in which the creditor had a security interest.

Charles Altic was the only named defendant in the adversary proceeding objecting to the dischargeability of the debt. Debtor did not respond to the complaint and creditor filed a motion for a default judgment. Immediately prior to the entry of the default judgment, debtors filed a motion to convert the Chapter 7 case to a Chapter 13 case. Thereafter they filed a Chapter 13 plan which proposes a payment of \$50 per month over a period of 18 months to cover all administrative expenses and payment on unsecured claims. Creditor objects to the plan on the grounds that it is not filed in good faith.

Mrs. Altic has very little likelihood of obtaining employment which would provide the household with much more than the minimum wage. Her net take home pay is approximately \$500 per month.

Mr. Altic, although previously self employed or an officer of a wholly-owned corporation, is now unemployed and suffers from a heart problem. He has been determined totally disabled for Social

Security purposes and receives both Social Security disability and Veterans Administration disability payments. His total monthly receipts from the two agencies equals \$792.

The debtors failed to comply with the statutory requirement that a specific schedule of income and expenses be included in their filing materials. Therefore, it is difficult to determine what the actual expenses were at the time of the original Chapter 7 filing, what the actual expenses were at the time of the conversion to Chapter 13 and what the actual expenses are as of the date of the hearing. However, Mr. Altic did testify that current monthly expenses for the family unit do not exceed \$700. In listing those expenses, however, the debtor testified that he is not paying any payment on either mortgage or rental. His house has been foreclosed upon and was subject to sale several days following the hearing. In addition, although he receives veterans' medical benefits, his wife has no health insurance or any other type of health coverage. Therefore, he suggests that the actual family unit monthly expenses far exceed the current expenses because eventually the family unit will need to pay rent and will need to pay medical expenses or medical insurance premiums, which he estimates at a minimum of \$100 per month.

The heart of the complaint by the creditor is that the debt owed to the creditor would have been nondischargeable in the Chapter 7 bankruptcy case and, because of that fact, plus the debtors' actions and statements since the adversary complaint was filed, this Court should find the Chapter 13 filing to be not in good faith and refuse to confirm the plan.

Debtors converted to Chapter 13 on the eve of the entry of an order granting creditor a default judgment on its complaint to determine dischargeability. The complaint alleged that the debtor, Charles Altic, was the purchaser of certain business equipment and granted to the creditor's predecessor a purchase money security interest. Some or all of the equipment was then stolen from the debtor. Debtor reported the items as stolen to the appropriate authorities and reported the theft to the insurance company. The insurance company issued one check for approximately \$17,000 made payable both to Mr. Altic and to the creditor. Mr. Altic endorsed the check in his own name and also in the name of the creditor and cashed it. Mr. Altic then turned over \$12,000 of the proceeds to the creditor.

The complaint further alleges that the creditor was not aware that the insurance check was for \$17,000. The complaint further alleges that the debtor did not have any authority to endorse the check and that all of the proceeds of the insurance should have been payable to and paid over to the creditor. The complaint further alleges that the debtor, therefore, fraudulently endorsed the check and obtained approximately \$5,000 by such fraud.

In addition, the complaint alleges that on a second piece of equipment the insurance company issued a check directly to the debtor, without the name of the creditor. Such check was negotiated by the debtor and the creditor^{did} not receive any of the proceeds of the check. The creditor alleges that such negotiation and failure to pay the proceeds to the creditor is conversion because such proceeds represent proceeds of the collateral, just as if the collateral were simply sold rather than stolen.

The debtor, Charles Altic, acknowledges that he did negotiate the check that was payable jointly to him and the creditor, but denies that he was without authority to negotiate such check. He also admits that he received a check from the insurance company made payable only to him and that he did negotiate it. His testimony is that this creditor was not a named insured with regard to that particular piece of equipment and, therefore, he had the right to negotiate the check.

The Court finds as a fact that the allegations of the complaint, with the response of Mr. Altic, create a prima facie case for nondischargeability and this decision shall assume a nondischargeable obligation exists.

Neither Mrs. Altic nor Mr. Altic properly listed their debts and expenses as required by the Bankruptcy Code. This Court heard the testimony of Mr. Altic and finds that the failure to file the appropriate income and expense schedule was not intentional and was not done with the purpose of misleading the Court or the creditors.

Mr. Altic testified at trial and one of the exhibits admitted at trial was his deposition which was taken on September 25, 1987. Counsel for the creditor has strongly urged that this Court consider Mr. Altic's testimony at the deposition to be fraudulent or to find that this debtor lied either at the deposition or at trial concerning his reason for filing Chapter 13 bankruptcy. Throughout the deposition which consists of 102 pages and which lasted for two and one-half hours, counsel for the creditor asked Mr. Altic why he converted his Chapter 7 bankruptcy case to Chapter 13. Frequently his answer was that he made such a conversion on the advice of counsel. When the creditor asked what such advice was, counsel for the debtor objected and directed Mr. Altic not to answer. However, on other occasions throughout the deposition, Mr. Altic did answer. For example, on page 9 of the deposition and continuing through page 12, the debtor responded that he filed his conversion because it would be cheaper in the long run for him to do so. He explained that he had no money to hire an attorney to defend the nondischargeability complaint and be required to go to a trial on the nondischargeability complaint.

He testified exactly the same way during the trial.

He also testified throughout the deposition and throughout the trial that he was not exactly sure what Chapter 13 would do, but he understood that some of his creditors would get some money and that he moved to convert upon the advice of his lawyer.

The Court finds that the conversion was on advice of the lawyer and was to avoid the cost of litigation and probability of a judgment of nondischargeability.

Finally, the creditor suggests that the filing of the motion to convert immediately prior to the entry of an order of default judgment on a nondischargeable debt in Chapter 7 is an attempt by the debtor to manipulate the Bankruptcy Code.

Conclusions of Law and Discussion

The Eighth Circuit Court of Appeals has clearly spoken concerning the duties of the bankruptcy judge with regard to a Chapter 13 plan and the analysis that is required for a determination that such case or plan violate the good faith requirements of the Bankruptcy Code. The Eighth Circuit decision in the case of In re Estus, 695 F.2d 311 (8th Cir. 1982) listed a number of factors that the Court must consider prior to making a finding that the case or plan has been filed in good faith.

Since the Estus decision, the relevant sections of Chapter 13 of the Bankruptcy Code have been amended to include the requirement that the debtor pay all of his or her disposable income into the plan for a three-year period from confirmation date if an unsecured creditor or the trustee objects to a plan which does not include all disposable income. See Section 1325(b)(1)(B).

Recently the Eight Circuit had the opportunity to review the good faith requirements of Chapter 13 in light of the decision by the Bankruptcy Court of the District of Nebraska that a Chapter 13 debtor could propose a plan which would discharge his obligation on a federally insured student loan and still not violate the good faith requirements of the Code. Education Assistance Corporation vs. Zellner, Slip Op., September 3, 1987 (8th Cir.).

In Zellner, the Circuit Court reaffirmed Estus by stating that "the simple fact that a loan that is nondischargeable under Chapter 7 does not make it nondischargeable under Chapter 13". Page 3 of the Slip Opinion. The Court then analyzed the good faith requirements of 11 U.S.C. § 1325(a)(3). At page 9 of the Slip Opinion the Circuit Court suggests that the good faith inquiry, since the amendment of the statute concerning disposable income, should focus on factors "such as whether the debtor has

stated his debts and expenses accurately; whether he has made any fraudulent misrepresentation to mislead the Bankruptcy Court; or whether he has unfairly manipulated the Bankruptcy Code."

This Court has considered the legal requirements as stated by the Eighth Circuit. This Court notes that the main objection of this creditor concerns the actions by one co-debtor, Mr. Altic, with regard to the conversion of this case from Chapter 7 to Chapter 13 and his intention and reasons for such conversion. Mrs. Altic was not indebted to this creditor. This creditor had no claim that any obligation existed as between Mrs. Altic and this creditor. Therefore, Mrs. Altic apparently could convert from Chapter 7 to Chapter 13 without objection by this creditor.

The Court has reviewed the testimony concerning income and expenses. Mrs. Altic is now and will probably be for the future limited to minimum wage labor positions. She previously held a position of trust and was convicted of embezzlement.

Mr. Altic is totally disabled under the Social Security standards and is on regular medication for a serious heart problem with the undisputed testimony that the prognosis for his future is guarded.

After reviewing the evidence, the arguments of counsel, the brief and the requirements as stated by the Eighth Circuit, this Court finds that none of the actions by the debtor, Mr. Altic, are in bad faith. Mr. Altic, like other debtors, takes the advice of his lawyer. His lawyer has made some tactical decisions with regard to which chapter to choose and, when it appeared that expensive litigation might be involved with this creditor and that there was a possibility that the Court could find this creditor's debt nondischargeable, Mr. Altic's lawyer advised him to withdraw from Chapter 7 and proceed under Chapter 13 of the Bankruptcy Code. There is nothing improper about this activity.

Even if the Court were to find that the actions of Mr. Altic were improper or an attempt to manipulate the Bankruptcy Code, such actions should not be imputed to Mrs. Altic. She has separate debt obligations and there has been no objection by any of her creditors to the Chapter 13 filing or the Chapter 13 plan. These are joint debtors with a joint plan and the actions, needs and financial circumstances of both debtors must be considered by this Court.

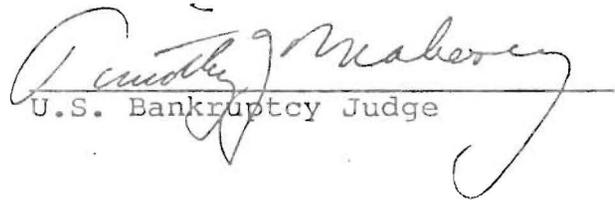
Separate from the "good faith" question, the Court does determine that this plan cannot be confirmed. It must be amended to provide that all disposable income shall be contributed during the life of the plan. In addition, it must be amended to show the actual income and expenses of these debtors at this time as well as projected income and expenses during the life of the plan.

Therefore, the objection of the creditor is sustained in part and overruled in part and the debtors are granted 30 days to file an amended plan.

Separate Journal Entry shall be filed.

DATED: October 22, 1987.

BY THE COURT:


U.S. Bankruptcy Judge

Copies mailed to:

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