

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)

PHILIP ALAN STERLING,)

DEBTOR)

CASE NO. BK80-1212

MEMORANDUM AND ORDER

This matter came on for hearing before the Court on objection to confirmation of the Chapter 13 Plan of the debtor on July 20, 1981. By agreement of the parties, the transcript of proceedings in the hearing held November 13, 1980, are to be used for the factual determinations in this matter.

Faye E. Smith, a creditor and plaintiff in this proceeding, objects to confirmation of the debtor's Plan on three grounds: first, that the Plan is not proposed in good faith as required by 1325(a)(3) of the Bankruptcy Code; secondly, that the Plan discriminates unfairly against one unsecured creditor in favor of the debtor's remaining unsecured creditors; and thirdly, that the Plan does not meet the test of 1325(a)(4) which requires that each allowed unsecured claim receive not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under a Chapter 7 proceeding.

The evidence submitted indicates that Mr. Sterling, the debtor, is a major in the United States Air Force having take-home pay after taxes of approximately \$2,367 per month. His monthly obligations amount to \$100 child support and a mortgage payment of \$480. His Plan proposes to pay \$190.05 to the trustee per month for distribution to creditors. Disbursements under the Chapter 13 Amended Plan filed March 9, 1981, provide for payment of priority payments as required by Rule 13-309(a) and dividends to secured creditors whose claims have been allowed, namely, Nebraska Federal Savings and Loan, Associates Financial Services, Clerk of the District Court, Sarpy County, to be paid outside the Plan. Unsecured creditors whose claims are duly proved and allowed will have any claims in excess of \$1,500 reduced to that amount. Accordingly, Bankcard Service Center shall be owed \$386.47. Faye Smith, plaintiff in this action, whose previous debt was listed as \$30,000 shall be paid \$1,500 under the Chapter 13 Plan. SAC Federal Credit Union's debt amounts to \$1,231.43. Texas Commerce Bank's debt of \$2,035.49 will be similarly reduced to \$1,500, and Weber Law Offices will receive \$1,331.43. Of the monthly payments to the trustee, \$165.26 is to be equally distributed each month among the five unsecured creditors until either their claim is paid in full or they receive \$1,500.

Plaintiff Faye Smith's first basis for objection i.e. that the Plan is not proposed in good faith is dispositive of this litigation. As this Court has previously ruled in the case In re Faust, 12 B.R. 679 (D. Neb. 1981), confirmation of a Chapter 13 Plan in bankruptcy will not be denied when a debtor is making reasonable efforts to make reasonable payments to creditors. What is reasonable, however, will depend upon the circumstances of each case. In making a determination as to whether or not this Plan is indeed filed in good faith, it is first necessary to determine whether the payments Major Sterling proposes under his Amended Plan are reasonable. Secondly, if it is found that his payments are reasonable and that no abuse of the provisions of Chapter 13 has been shown, Major Sterling must then be found to be devoting all or most of his excess income after reasonable expenses to the payment of creditors. Faust at 681.

In his amended Chapter 13 statement, the debtor in this case lists estimated average future monthly expenses as \$1,653 per month. Given his monthly income pursuant to testimony of \$2,367 per month, the debtor is left with an excess of \$714 per month. The amount which the debtor proposed to pay under his Plan, \$190.05 per month, represents 26.6% of his excess income. While nearly \$200 may appear to be reasonable, and may in fact be reasonable, it fails in the second Faust criterion, that of devoting all or most of a debtor's excess income after reasonable expenses to the payment of creditors. Accordingly, the Plan cannot be confirmed as meeting the §1325(a)(3) criteria that it be proposed in good faith.

The creditor's second contention that the Plan discriminates unfairly against the objector as an unsecured creditor in favor of others in that position has been rendered moot by the debtor's proposal of the Chapter 13 Amended Plan in which objector was listed as a creditor and was offered some payment.

It is unnecessary to reach the third contention that the value of the property to be distributed is less than the value that would be distributed under Chapter 7 liquidation and the reason that the criteria set forth in the Code at §1325(a) sub-sections (1) through (6) are inclusive. That is to say, each of those criteria must be met in order for the Plan to be confirmed. Since the Plan has failed in its burden of good faith, it is unnecessary to reach a determination of the potential liquidation values for the unsecured claims.

Accordingly, it is

ORDERED that the Chapter 13 Amended Plan of Alan Sterling, BK80-1212, cannot be confirmed and it is further

ORDERED that the objection to confirmation of the Plan by Faye E. Smith, creditor of the plaintiff, is sustained.

DATED: May 24, 1982.

BY THE COURT:

