

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
)  
TERRY MEYER, ) CASE NO. BK03-83324  
)  
Debtor(s). ) CH. 13

ORDER

Hearing was held in Omaha, Nebraska, on February 24, 2005, on the debtor's amended Chapter 13 plan (Fil. #55) and objection by the Molai creditors (Fil. #57). John Turco appeared for the debtor, and Justin Eichmann appeared for Nabil Molai, Nazar Molai, Neda Molai, and Nofel Molai. A brief and supplemental evidence were filed after the hearing.

In June 2004, after obtaining relief from the automatic stay, the parties entered into a stipulated judgment in a pre-petition lawsuit involving the debtor's alleged invasion of the Molai children's privacy. Judgment was entered in favor of each of the four creditors and against the debtor in the total amount of \$80,000 (\$20,000 per creditor). No fact-finding occurred, and no liability was assessed.

The debtor's amended Chapter 13 plan proposes to classify the Molais as a special class of unsecured creditors and pay each of them \$1,000. The Molais object on good-faith grounds.

To be confirmed, a Chapter 13 plan must be proposed "in good faith and not by any means forbidden by law." 11 U.S.C. § 1325(a)(3). The debtor thus bears the burden of proof. In re Lancaster, 280 B.R. 468, 474 (Bankr. W.D. Mo. 2002). Good faith is a factual inquiry. Barger v. Hayes County Non-Stock Coop. (In re Barger), 233 B.R. 80, 84 (B.A.P. 8th Cir. 1999) (citing Handeen v. LeMaire (In re LeMaire), 898 F.2d 1346, 1349 (8th Cir. 1990)). Caselaw within the Eighth Circuit sets out the appropriate examination when a bankruptcy court is faced with the question of whether a plan has been proposed in good faith.

The relevant inquiry regarding good faith is "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." Education Assistance Corp. v. Zellner, 827 F.2d 1222, 1227 (8th Cir. 1987). However, the foregoing inquiry is governed by a "totality of the circumstances" test. Noreen, 974 F.2d at 76; LeMaire, 898 F.2d at 1349; In re Estus, 695 F.2d 311, 316 (8th Cir. 1982). Factors which are particularly relevant to determining good faith under the totality of the circumstances include: (1) the nature of the debt sought to be discharged; (2) whether the debt would be dischargeable in a chapter 7 bankruptcy case; and (3) the debtor's motivation and sincerity in seeking chapter 13 relief. LeMaire, 898 F.2d at 1349 (citing Estus, 695 F.2d at 317). See also In re Kurtz, 238 B.R. 826, 830 (Bankr. D.N.D. 1999) ("Further consideration must be given to the sincerity of the Debtor in putting forth his Chapter 13 plan of repayment and whether that plan demonstrates real sincerity on the part of [the Debtor] to repay his creditors as best he can in exchange for the liberal Chapter 13 discharge."). Another relevant factor in determining good faith is the Debtor's pre-filing conduct. LeMaire, 898 F.2d at 1352 (citations omitted). However, even in light of egregious pre-filing conduct by the Debtor, a chapter 13 plan may be confirmed if other factors "suggest that the plan nevertheless represents a good faith effort by the debtor to satisfy his creditors' claims." Id. (citation omitted).

Banks v. Vandiver (In re Banks), 248 B.R. 799, 803 (B.A.P. 8th Cir. 2000).

Pre-filing conduct is relevant but not determinative of the good faith issue; the good faith inquiry looks at the debtor's fairness in dealing with creditors. Barger, 233 B.R. at 84. Bad faith may be found where a judgment creditor's claim is the only significant debt to be dealt with under the plan, the debtor filed for Chapter 13 relief after that creditor attempted to enforce its judgment against him, and other facts and circumstances indicate improper motive. In re Soost, 290 B.R. 116, 122-23 (Bankr. D. Minn. 2003).

In this case, the totality of the circumstances indicates good faith on the part of the debtor in proposing this plan of reorganization.

The debtor has a number of creditors, most of whom are unsecured. The filed unsecured claims, aside from the Molai judgment, total approximately \$55,000. He has two secured creditors - Nebraska Furniture Mart and his parents. The \$700 Furniture Mart debt is provided for in the plan, as are \$4,200 in priority tax claims. His parents' claim is not. The plan is for a term of 48 months, with payments totaling \$12,000. It appears that the trustee fees, attorney fees and costs, priority and secured claims, and payments to the Molai claimants will consume the total amount paid into the plan, with little or nothing left to be shared pro rata among the other unsecured creditors.

The plan payments are being made by the debtor's parents because the debtor is currently incarcerated. His mother filed an affidavit indicating that she and her husband have made the plan payments since November 2003 and intend to do so until his release, with no arrangement that he will repay them after his discharge. The debtor does not expect to be released from custody for approximately three years. His long-time employer has submitted an affidavit indicating a willingness to re-hire him full-time at the same wage rate he was making prior to his arrest. It appears that the debtor does not have the ability to increase the funding of the plan at this point, but if he is released from custody prior to the end of the plan, his available disposable income will certainly change and the plan payments may need to be adjusted accordingly. See 11 U.S.C. § 1329.

The debtor's affidavit indicates that historically he has worked what amounts to two full-time jobs for several years, earning roughly \$32,000 to \$35,000 annually in the nearly three years prior to his arrest. He nevertheless was unable to pay certain income tax obligations, as well as other debts. This does not appear to be a situation in which the debtor filed for bankruptcy protection solely from the judgment creditors.

The judgment contains no findings of fact or admission of liability, so on its face it does not fit within the exceptions to Chapter 7 discharge listed in 11 U.S.C. § 523(a). Therefore, the debt might be dischargeable in a Chapter 7 proceeding, which would preclude the Molais from recovering anything on their judgment.

Finally, there is no evidence that he has misstated his assets and liabilities, misled the court, or manipulated the

Bankruptcy Code. There have been no contested matters involving any other creditor.

After considering the factors set out by the Eighth Circuit in the Estus, LeMaire and Noreen line of cases, I find that the debtor has carried his burden of establishing good faith in propounding this amended plan.

IT IS ORDERED the objection to confirmation by the Molai creditors (Fil. #57) is overruled. The amended plan may be confirmed.

DATED: April 29, 2005

BY THE COURT:

/s/ Timothy J. Mahoney  
Chief Judge

Notice given by the Court to:

\*John Turco  
Justin Eichmann  
Kathleen Laughlin  
United States Trustee

Movant (\*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.