IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEBRASKA

IN THE MATTER OF PHILLIP EUGENE KOERPERICH, Debtor. BENKELMAN COOPERATIVE EQUITY EXCHANGE and CLINTON J. LIVINGSTON, Plaintiffs, v. PHILLIP EUGENE KOERPERICH, having done business as McCOOK LIVESTOCK SERVICES, INC., and L. & K. TRUCKING, Defendants.	FILED DISTRICT OF NEBRASKA AT_____M MAR - 5 1981 William L. Olson, Clerk By_____Deputy CIV. 80-0-612 BK. 80-0-317 MEMORANDUM OPINION

This matter came on for hearing and determination with reference to the filing of an appeal from an order of the Bankruptcy Court dated September 8, 1980, ordering confirmation of the debtor's (appellee-defendant) Chapter 13 plan.

The plan in question proposes to make no payments to unsecured creditors. Appellants-plaintiffs are the only unsecured creditors, holding claims scheduled at $41,468.48. The main thrust of the objections filed by appellants is that the zero payment plan in question is not filed in good faith in that appellee's sole purpose in filing the Chapter 13 proceeding is to discharge a debt previously determined to be non-dischargeable.[1] An examination of the appellee-debtor's structure

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1. The debtor-appellee initially filed a Chapter 7 voluntary bankruptcy in December, 1974, listing appellants as unsecured creditors. In November, 1975, the bankruptcy court ordered default judgments for the appellants on their claims of non-dischargeability of the debts owed by the debtor-appellee. In November, 1976, the District Court of Red Willow County, Nebraska, entered a judgment against the debtor-appellee in favor of appellants based on the earlier default judgments. In November, 1978, the debtor-appellee filed a motion in the bankruptcy court to set aside the default judgments entered in November, 1975, and said court denied the motion. The debtor-appellee appealed the order of the bankruptcy court denying the motion to set aside the default judgments and said appeal is currently pending before this Court. In February, 1980, the debtor-appellee filed for relief under Chapter 13 of the bankruptcy Act of 1978, which is the subject matter of the instant appeal.

clearly indicates that this is the case, as the debts at issue are the only ones which will be dealt with or affected by the plan.

The Bankruptcy Court rejected and denied appellant's objections noting that the Bankruptcy Court's previous holdings have approved zero payment plans, finding that they do not violate the good faith requirements of 11 U.S.C. § 1325(a)(3) and cites *In re Harland*, 6 Bcy.Ct.Dec. 235 (D.Neb. 1980). Accordingly, the Bankruptcy Court entered an order on September 8, 1980, overruling the said objections and confirming the debtor's Chapter 13 plan. It is from this order that the present appeal is lodged.

On September 22, 1980, the Circuit Court of Appeals for the Eighth Circuit filed its opinion in *Tenney v. Terry* (*In re Terry*, 630 F.2d 634 (1980)), which dealt with the precise question that is now before this Court, namely, whether a zero payment Chapter 13 plan may be made in good faith. In reversing the Bankruptcy Court which had found that the plan of the debtors was proposed in good faith and confirming the plan over the trustees objection, the Court of Appeals, in *Terry*, stated at pages 635-36:

> We next consider the question of whether a zero payment Chapter 13 plan may be in good faith. The bankruptcy judge reasoned that a requirement of payments for "good faith" would create difficulties, because such a requirement would necessitate a determination in every case of whether the proposed payments were sufficient for "good faith." We agree that a payment required would create some difficulties, because of the absence of any statutory guideline as to the minimum necessary percentage payment. However, we cannot agree that a Chapter 13 plan to pay nothing may be in good faith. Such a plan amounts to an abuse of § 1328 (granting a more generous discharge than Chapter 7) and of the spirit of the chapter, that the debtor "make payments" under a plan. *See In re Campbell*, 3 B.R. 57, 59, 5 B.C.D. 1365, 1366 (S.D.Cal. Bankr. 1980); *In re Iacovoni*, 2 B.R. 256, 262 5 B.C.D. 1270, 1272 (D.Utah Bankr. 1980).
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> We conclude that the bankruptcy court erred in confirming the zero payment plan.

It is the opinion of this Court that *Terry* is clearly dispositive of the question in the instant appeal and requires a reversal of the bankruptcy court.[2]

Accordingly, a separate order will be entered this day sustaining appellant's objections to the Chapter 13 plan herein and denying confirmation of said plan.

BY THE COURT:

JUDGE, UNITED STATES DISTRICT COURT

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2. The bankruptcy court did not address the issue, headon, whether the debtor-appellee had sufficient excess income with which to make payments inasmuch as the bankruptcy court held that a zero payment plan was acceptable. However, the record reflects that even should the bankruptcy court follow a repayment schedule of requiring a minimum ten per cent of the debtor-appellee's monthly income as being applicable to all debts, the debtor-appellee would have at the most a monthly excess income of about $55, which is negligible and which would not amount to excess income out of which to make payments.