

IN THE MATTER OF

CASE NO. BK85-214

JOE SCHULTE, d/b/a Schulte
Implement Co.,

vs.

MEMORANDUM OPINION

The Motion to Dismiss is overruled. Memorandum opinion follows.

This is a Chapter 13 case filed by Patrick M. Mathers in January of 1985. The moving party, Joe Schulte, obtained a judgment in State District Court against the debtor for an amount due on open account. The State District Court judgment is in the amount of \$21,158.59. After obtaining the judgment, Mr. Schulte proceeded to execute on personal property allegedly owned by debtor. He went through the appropriate procedures in the State Court and the Boyd County, Nebraska, sheriff eventually took possession of certain farm equipment located on land owned by the debtor's father, Emery Mather. The debtor claims no interest in most of the personal property seized by the Boyd County Sheriff. He claims that he gave all of the farm equipment to his father in return for the settlement of a debt which had accumulated in varying amounts over several years. The settlement was made in May of 1984, prior to, but within one year of the filing of his Chapter 13 petition. The debtor claims to be a self-employed carpenter. He claims that he has no interest in any corporate stock or any assets other than his tools of the trade and a vehicle.

His plan proposes to pay \$100 per month for 36 months. If the plan is confirmed, the creditor, Mr. Schulte, would receive little or nothing on the judgment.

Mr. Schulte filed his Motion to Dismiss and claims that the debtor has failed to list all of his assets, has failed to keep adequate records of his business prior to and since the date of filing of the petition for relief and, therefore, the petition is not filed in good faith and should be dismissed.

In support of his motion, the moving party presented evidence concerning the ownership of farm equipment that had been seized by the sheriff of Boyd County. The sheriff testified that when he seized the property Mr. Mather's father claimed only certain pieces of equipment as being owned by him and stated that the rest of the equipment was owned by Patrick. However, Patrick, his father, his brother and his sister all testified that from 1974 through 1984 Patrick had borrowed various sums of money from his parents and that in May of 1984 Patrick and his father made a settlement of the debt by a transfer of all of the farm equipment from Patrick to his father in consideration for the forgiveness of the debt. Therefore, the farm equipment became the property of Patrick's father in May of 1984.

In addition to the testimony of the family members, evidence was presented which included written and signed agreements concerning the debt obligation, the transfer of the equipment and the forgiveness of the debt.

Although family transactions such as this and the testimony of family members in support of the transaction are somewhat suspect, the evidence is persuasive that the debtor owed his father money, entered into written statements concerning the debt and the transfer of the equipment, and the forgiveness of the debt. Therefore, the conclusion is that there was a transfer of the equipment in May of 1984 from the debtor to his father. Although this transfer was within one year of the filing of the petition, no action to set aside the preference has been started. As of May, 1984, the ownership of the equipment was held by the debtor's father, although perhaps subject to set aside pursuant to the appropriate pleadings.

The moving party also presented evidence that the debtor, Patrick Mathers, has an ownership interest in a sole proprietorship known as Twin Butte Construction and that he had failed to list that ownership interest on his schedules. The debtor testified that he did not have an ownership interest in Twin Butte Construction, although he did perform contract labor services for Twin Butte Construction. His testimony is that Twin Butte Construction is a business started by and owned by his sister and that he simply performed labor services for the company. He claims to be an independent contractor and absolutely denies any ownership interest.

The debtor's sister testified that she is the owner of Twin Butte Construction. The checking account is in the name of Twin Butte Construction with her employer identification number or social security number as the identifying number. She testified that she filed a separate Schedule C on her Federal Income Tax returns showing income and expenses from the sole proprietorship known as Twin Butte Construction.

The moving party showed that the Twin Butte Construction checks actually had Patrick Mathers' name printed on them as if he were the sole proprietor. In addition, Patrick Mathers' 1984 Income Tax Return, Schedule C, which includes income and expenses of a sole proprietorship indicated that Patrick Mathers was doing business as Twin Butte Construction. Income and expense items shown on books and records of Twin Butte Construction seem to be very similar to the income and expense items shown on the Schedule C for Patrick Mathers' construction business. Finally, neither the debtor nor the debtor's sister responded to subpoenae served upon them requiring them to bring to the trial their books and records concerning their businesses.

The debtor's sister testified that they were served with the subpoena the day before the trial and were unable to gather all of the books and records required by the subpoena, talk to their lawyer and prepare for trial on short notice. This Court concludes that although there is a close and confusing inter-relationship between the business of Twin Butte Construction purportedly owned by the sister of the debtor and his own sole proprietorship contracting business, there is insufficient evidence to show that he is the owner of Twin Butte Construction. In addition, the evidence is that Twin Butte Construction has no assets and has no income in excess of its expenses. Therefore, even if the debtor claimed an interest in the business, he would have nothing more to add to his schedules, other than the name because it has no assets, no equity and makes no profit.

To summarize, the debtor has listed all of his assets and his income and does have books and records, although they were not provided to the Court at the date of trial.

Conclusions of Law

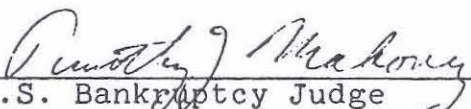
Section 1307(c) of the Bankruptcy Code provides that the Court, after notice and hearing, may dismiss a Chapter 13 case for cause. The various included examples of cause in §1307(c) do not include failure to file in good faith. However, good faith is a requirement of the Bankruptcy Code in general and the examples of cause in §1307(c) are not exclusive. Therefore, this Court may, under the appropriate fact situation, dismiss a Chapter 13 petition because it is not filed in good faith. See In Re Robinson, 18 B.R. 891 (Bankruptcy, D. Connecticut, 1982).

However, this is not the appropriate factual situation in which to conclude that the petition was not filed in good faith. As indicated in the finding of facts listed above, this Court has found that the assets were appropriately listed, even though there was probably a preferential transfer made in May of 1984. The preferential transfer alone is not sufficient for this Court to find that the petition was not filed in good faith. There are other remedies available to the trustee and the supposedly injured unsecured creditor with regard to the preferential transfer.

Since the facts do not justify a conclusion that the petition was not filed in good faith, the motion is overruled. Separate order to follow.

DATED: October 4, 1985.

BY THE COURT:


U.S. Bankruptcy Judge

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