IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
MICHAEL & MICHELLE DOTY,	)	CASE NO. BK04-40782
	)	
Debtor(s).	)	CH. 13

MEMORANDUM

Trial was held in Lincoln, Nebraska, on September 3, 2004, on objections to plan confirmation by Chong & Ken Wurdeman (Fil. #7 and Fil. #12), and on the debtors' objection to the Wurdemans' claim (Fil. #46). Bert Blackwell appeared for the debtors and Ken & Chong Wurdeman appeared on their own behalf. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. §§ 157(b)(2)(B) and (L).

The objection to confirmation is overruled. The objection to claim is granted in part.

The Wurdemans are creditors of the Dotys, arising from their rental of a Lincoln house to the Dotys from 1998 to 2000. They are challenging the Dotys' plan of reorganization on the grounds of feasibility and good faith.

The Wurdemans have filed an unsecured claim in this case for $23,336. This consists of unpaid rent, interest, attorneys' fees, and the cost of repairing damage to the property. The parties' agreement indicates that $6,880 in past-due rent and unpaid security deposit was owed when the Dotys moved out in February 2000.

The Dotys propose to pay about $270 a month for 60 months into the current plan. After paying their attorney fees and secured creditors, approximately $5,000 is to be distributed pro rata among the unsecured creditors.

I. Plan confirmation

In order 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). In Banks v. Vandiver (In re Banks), 248 B.R. 799, 803 (B.A.P. 8th Cir. 2000), the appellate court explained the good-faith analysis as follows:

> 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 [v. Slattengren], 974 F.2d at 76 [(8th Cir. 1992)]; [Handeen v. LeMaire (In re LeMaire)], 898 F.2d at 1349 [8th Cir. 1990)]; 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).

Part of the Wurdemans' objection suggests that the Dotys are abusing the bankruptcy system because they have filed four bankruptcy cases between them since 1998, and because this case and their previous Chapter 13 case were filed on the eve of trial dates in county court in litigation brought by the Wurdemans to collect this debt. Two of the cases were Chapter 7 cases filed by each of the debtors prior to their marriage. Their previous Chapter 13 case was dismissed because they were unable to make their plan payments after Mrs. Doty lost her job, and they did not have an attorney to file a post-confirmation plan modification. The Wurdemans are understandably frustrated, but the bankruptcy laws in this country exist to "relieve an

honest and unfortunate debtor of his debts and permit him to begin his financial life anew." Kelly v. Robinson, 479 U.S. 36, 46 (1986). The number of bankruptcy filings by these debtors, to discharge debts to creditors other than the Wurdemans, does not appear to be an abuse of the bankruptcy system. By the same token, filing bankruptcy to forestall litigation is not in and of itself indicative of bad faith. In re Penny, 243 B.R. 720, 728 n.5 (Bankr. W.D. Ark. 2000) (citing In re Casse, 219 B.R. 657 (Bankr. E.D.N.Y. 1998)); In re Mill Place Ltd. P'ship, 94 B.R. 139, 142 (Bankr. D. Minn. 1988).

The Wurdemans also suggest that their claim should be excepted from discharge because of the nature of the debt. They refer to a recent decision of this court excepting a landlord's debt from discharge because the damage to the residence appeared to have been willful and malicious. That case was a Chapter 7 case. This is a Chapter 13 case, in which debtors receive a "super discharge" of a broader scope of unsecured debts in exchange for making payments on those debts over the term of the plan. The "willful and malicious" exception from discharge applies only in Chapter 7 cases where most unsecured debts are simply discharged with little or no dividend to the creditor.

In support of their plan, the debtors testified that they each have medical problems which necessitate doctor visits, and in Mrs. Doty's case, hospitalization and on-going medications. Mrs. Doty is not employed outside the home, and does not anticipate seeking employment in the foreseeable future. The couple has young children, and Mrs. Doty testified that daycare expenses would be around $600 per month if she worked outside the home. She also testified that she has difficulty keeping a job because she is used to being self-employed, and that working outside the home causes stress in her family life. She also believes her employment opportunities are limited because she does not have a college degree. The family has used medical insurance reimbursements and their income tax refund to pay living expenses. Mr. Doty is employed with the State of Nebraska, and the plan payment is deducted from his paycheck. He may have to undergo back surgery, which will cause him to be off work for eight to ten weeks. It is not clear whether he will receive workers' compensation benefits for that.

There is nothing before the court to indicate that the debtors have tried to misstate their income and expenses, mislead the court, or misuse the protections of the Bankruptcy Code. In the absence of such evidence, I am unable to find bad faith. The debtors have testified that they are devoting all of

their projected disposable income over the next five years, which is the maximum term permitted by the Bankruptcy Code, to their proposed reorganization plan. They cannot do any more than that. If the Dotys were capable of paying their debts in full, they would be ordered to do so, but they are not. See In re Ault, 271 B.R. 617, 621 (Bankr. E.D. Ark. 2002) ("As to the motivations and sincerity of the Debtor in seeking chapter 13 relief, the Court notes that the Debtor has proposed to pay substantially all monthly disposable income into the plan. This fact supports a finding that, while the Debtor's plan payment is relatively small, it represents his best effort to repay his creditors.") and In re Gillespie, 266 B.R. 721, 727 (Bankr. N.D. Iowa 2001) ("Gillespie has devoted all disposable income to the plan that is required by the Code. . . . The plan term is the maximum length permitted by the Code. Gillespie is living a modest lifestyle, and he has proposed a reasonable budget. . . . Therefore, the court finds and concludes that the plan has been proposed in good faith as required by 11 U.S.C. § 1325(a)(3).")

In other words, even if all of the Wurdemans' allegations concerning the debt are true, it does not establish bad faith on the part of the Dotys in filing this bankruptcy case or this plan. Despite an anticipated low percentage of repayment on their unsecured debts, the Dotys are devoting what they can to the plan. The objection to confirmation will be overruled.

II. Objection to claim

The debtors have objected to the Wurdemans' claim, on the basis that the lease and supplemental agreement executed on February 21, 2000, establish a claim only for past-due rent and not for damage, attorneys' fees, or interest.

However, a review of the file in the Dotys' previous Chapter 13 case (Case No. BK01-40512) indicates that the Wurdemans' claim in that case was allowed as filed after the debtors withdrew their objection. See Order of Feb. 7, 2002 (Fil. #37 in BK01-40512). The claim was in the amount of $21,629.66. Of that, $2,398 was paid through that Chapter 13 plan, leaving a balance of $19,231.66 when the case was dismissed.

Because the debtors had an opportunity to contest the claim in the previous case but withdrew their objection and permitted the claim to be allowed as filed, the allowance of the claim should be res judicata in this case. In applying the Eighth Circuit test for whether the doctrine of res judicata bars

litigation of an issue, the court examines whether (1) a court of competent jurisdiction rendered the prior judgment, (2) the prior judgment was a final judgment on the merits, and (3) both cases involved the same cause of action and the same parties. Canady v. Allstate Ins. Co., 282 F.3d 1005, 1014 (8th Cir. 2002). Issues which could have been raised in prior litigation, but were not, are barred as well. In re Martin, 287 B.R. 423, 432 (Bankr. E.D. Ark. 2003). "Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." Brown v. Felsen, 442 U.S. 127, 131 (1979).

Because the amount of the Wurdeman's claim was previously determined, it will be allowed in this case in the same amount less the payments received through the previous Chapter 13 plan, or a net of $19,231.66.

Separate order will be entered.

DATED: October 18, 2004

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:
*Bert Blackwell
Ken & Chong Wurdeman
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.

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IT IS ORDERED: The debtors' objection to the Wurdemans' claim (Fil. #46) is granted in part. The claim is allowed in the amount of $19,231.66. The Wurdemans' objections to confirmation of the plan (Fil. #s 7 and 12) are overruled. The plan may be confirmed. See Memorandum filed contemporaneously herewith.

DATED: October 18, 2004

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

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