IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	CASE NO. BK02-83871
	)	
MICHAEL LEE SCHNEBEL,	)	CH. 13
	)	
Debtor(s).	)	Filing No. 73, 77

MEMORANDUM

Trial was held in Omaha, Nebraska, on December 6, 2004, before a United States Bankruptcy Judge for the District of Nebraska, regarding the debtor's second amended Chapter 13 plan (Fil. #73) and objection by Omaha Police Federal Credit Union (Fil. #77). Howard Duncan appeared for the debtor and Sara Miller appeared for Omaha Police Federal Credit Union. 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)(L).

The debtor filed a Chapter 13 plan which was objected to by his former spouse and by Omaha Police Federal Credit Union. He settled the matter with his former spouse and filed an amended plan.

Omaha Police Federal Credit Union is owed several thousand dollars on unsecured obligations. It objected to the amended plan on the basis that the debtor had not properly accounted for an interest in certain real property and that the plan was not filed in good faith. Trial on both of those issues was held on December 6, 2004.

In 2001, Mr. Schnebel and his wife separated and he moved out of the couple's residence. His parents, who lived in Omaha at the time, allowed him to live in their home from February 2001 through August 2001.

During the time he was living with his parents, he and they looked for a house that he could renovate and eventually live in. His mother, Ilene DeBoer, agreed to purchase a house in Springfield, Nebraska, with the understanding that she would also provide some funds necessary to rehabilitate the house. The plan was that eventually the house would be rehabilitated and Mr. Schnebel would have sufficient credit to enable him to take out a mortgage and purchase the house from her.

During 2002, Mr. Schnebel used funds from an account owned by Mrs. DeBoer and funds from his own checking account to purchase materials to be used in the rehabilitation of the house. He borrowed some funds from the credit union on the oral or written assurance that the funds would be used for materials to be used for the rehabilitation of the house and that he would eventually purchase the house.

In the fall of 2002, after the house had been significantly improved, Mrs. DeBoer obtained an appraisal which valued the house at $117,000. She testified that she originally purchased the house for $55,000 from her own funds and had contributed additional funds for a total of $90,000. She further testified that she wanted to sell the house to her son so that she could pay off the loans she had obtained after the purchase.

Her son was unable to finance the purchase of the house in either late 2002 or early 2003. His financial condition was such that he filed bankruptcy in late 2002.

Although he was not able to purchase the house, he was living in it. He suggested to his mother that a friend of his might be interested in purchasing the house. The mother and the friend made arrangements for the purchase and the house was sold to Mr. Schnebel's's friend in March of 2003. He and his friend have lived in the house ever since.

Although Mrs. DeBoer testified that she only wanted her $90,000 investment back, the evidence includes a seller's closing statement which shows that the property was sold for $164,000. It also shows that part of the proceeds of the sale were treated as a gift to someone to the tune of $49,000. Finally, it shows that Mrs. DeBoer received net funds from the sale of $24,000.

Mrs. DeBoer denies knowledge of any of the information contained on the seller's closing statement. When confronted with the "gift" shown on the seller's closing statement, she testified that she assumed that money simply went to the buyer because she certainly did not receive it and did not need it. As a matter of fact, she did not even claim to know the price the property sold for. She also does not acknowledge that she received $24,000 as net proceeds, but, when confronted with a copy of a check, she acknowledged that she had endorsed the check. She still claimed that the money did not go into her pocket.

Prior to bankruptcy, the debtor had conveyed his one-half interest in a boat to his mother. His estimate of the value of his interest in the boat was $9,000. When asked to explain the purpose of the transfer, he claimed that it was to reimburse his mother for rent and other advances that she had made to him from February 2001 and thereafter.

Mrs. DeBoer acknowledged the receipt of the boat and acknowledged that the purpose of the transfer of the boat to her was to compensate her for funds she had advanced, plus rent. She has never used the boat and it currently is stored at the real estate in Springfield where the debtor resides. She did testify that she had not asked for any rent, but her son apparently felt it was important to provide her with the equivalent of rent.

Since the purchase of the house by Mr. Schnebel's friend, he claims to have been paying her rent of between $800 and $900 per month. There is no written lease and no written agreement with regard to such payment. In addition, Mr. Schnebel

was unclear about how he determined the fair amount to pay for rent. He testified that he assumed that the monthly mortgage payment on the house was probably around $800 to $850, but he denied that he knew the amount of the mortgage or the actual amount of the monthly payment. Although he has lived in the house with his friend for two years, and supposedly pays an amount in rent equivalent to the mortgage payment, he testified that he has never discussed with his friend any of the financial aspects of the house purchase.

It is the position of the credit union that the debtor owns an interest in the property. The deed to the property is in the name of Mr. Schnebel's friend and there is no evidence that he has a legal interest in the property. The credit union assumes that because he had planned to purchase the house, had borrowed money to improve the house and invested his own funds in the rehabilitation of the house, and his mother sold the house to the person he lives with, he must have at least an equitable interest in the property. The credit union has not suggested a statute or case law that supports such a theory.

Separate from the issue of his possible interest in the property is the issue of whether this case and this plan are filed in good faith. The debtor testified that he had put about $15,000 of his own money into the rehabilitation of the house. He claims that he received nothing from the sale proceeds. His mother claims that she received no more than $9,000 or $10,000 from the sale proceeds, notwithstanding the evidence that she received at least $24,000 and gave a gift to someone of $49,000.

It is the burden of the debtor to present sufficient evidence to enable the court to determine, first, that a plan is filed in good faith, and second, that the debtor has listed all of his assets. In this case, the debtor could have called as a witness his friend, the owner of the house. That person might have been able to explain the real estate transaction in terms more clearly than Mrs. DeBoer was able to do. For example, if called to testify by the debtor, she could have informed the court with regard to the supposed gift that is shown on the closing statement. She could have explained whether she had discussed that matter with either the debtor or Mrs. DeBoer and whether she or Mrs. DeBoer or someone else actually received those funds. Additionally, she could have explained the basis upon which she receives "rent" from Mr. Schnebel and if she has any agreement with Mr. Schnebel to sell the property to him or convey to him any interest in the property.

The credit union tried, but failed, to subpoena Mr. Schnebel's friend. Mr. Schnebel did not indicate that he had even asked his friend to come and testify on his behalf.

The purpose of the Bankruptcy Code is to afford the honest but unfortunate debtor a fresh start, not to shield those who abuse the bankruptcy process in order to avoid paying their debts. Molitor v. Eidson (In re Molitor), 76 F.3d 218, 220 (8th Cir. 1996) (quoting In re Graven, 936 F.2d 378, 385 (8th Cir. 1991)).

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.").
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> As one court has put it,
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> > The broader inquiry is "whether the Bankruptcy Code is being unfairly manipulated" by the debtor, Education Assistance Corp. v. Zellner, 827 F.2d at 1227, or put another way, "whether the plan constitutes an abuse of the provisions, purpose, or spirit of Chapter 13," In re Estus, 695 F.2d at 317. Though the words "good faith" suggest a subjective state of mind, the courts can consider objectively-manifested circumstances to make an inference on the existence or non-existence of this element. The relevant factors include the debtor's candor and honesty with the court in the bankruptcy case; the conformity of the plan with the policy goals of the bankruptcy laws; the debtor's expressed attitude, past and present, toward the legal process and its values; the extent to which the debtor's past conduct conformed with the substantive law that governed his relationship(s) with creditor(s); and the debtor's past conduct in relation to the integrity of the legal system. The court may consider the fundamental fairness of the debtor's proposed treatments of creditors' claims. Id. See also In re LeMaire, 898 F.2d at 1349; In re Estus, 695 F.2d at 315; In re Banks, 248 B.R. at 803 n.2; In re Barger, 233 B.R. 80, 83 (8th Cir. BAP 1999) (applying identical language of 11 U.S.C. § 1225(a)(3)).

> Another relevant fact is the debtor's pre-bankruptcy conduct toward specific creditors treated under the plan, whether it occurred in the context of legal proceedings or not. In re LeMaire, 898 F.2d at 1352; In re Barger, 233 B.R. at 84; In re Bayer, 210 B.R. at 795-796. The court must consider the way in which the debtor has commenced and prosecuted his Chapter 13 case: "whether the debtor has stated debts and expenses accurately[, and] whether the debtor has made any fraudulent misrepresentations to mislead the bankruptcy court." In re Barger, 233 B.R. at 83 (citing Noreen v. Slattengren, 974 F.2d at 76, and In re LeMaire, 898 F.2d at 1349); In re Bayer, 210 B.R. at 796.

In re Soost, 290 B.R. 116, 122 (Bankr. D. Minn. 2003).

It appears that the debtor and his mother have simply organized the sale of this property to the debtor's friend to avoid any funds going to the former wife and the credit union. There has now been a settlement with the former wife, but that does not excuse the conduct of the debtor and his mother with regard to the real estate transaction and the failure of either of them to explain where all the "profit" on the sale of the house went. Their testimony concerning the sale of the house and the lack of testimony concerning who actually received the excess sale proceeds causes me to question the credibility of both of them. I do not believe that the debtor would invest $15,000 in a house and then not claim some of the proceeds of the sale. I do not believe an intelligent woman who had $55,000 of her own cash to invest in a rehabilitation project would be content with receiving only a return of her investment on the sale of the property when the sale produced more than $70,000 of excess funds.

It was the debtor's burden to explain his failure to claim his right to some of the excess funds and his arrangement with his friend regarding his current or future interest in the property. He has failed to meet his burden. Therefore, I find that the plan is not filed in good faith and cannot be confirmed, pursuant to 11 U.S.C. § 1125(a)(3). The testimony in support of confirmation is so unbelievable that the case itself should probably be dismissed for filing in bad faith. However, I will give the debtor an opportunity to file a plan that fairly deals with the unsecured claims, taking into account the concerns expressed above.

Separate order will be filed.

DATED this 9th day of December, 2005.

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Howard Duncan
Sara Miller
Kathleen Laughlin
U.S. 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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ORDER

Trial was held in Omaha, Nebraska, on December 6, 2004, before a United States Bankruptcy Judge for the District of Nebraska, regarding the debtor's second amended Chapter 13 plan (Fil. #73) and objection by Omaha Police Federal Credit Union (Fil. #77). Howard Duncan appeared for the debtor and Sara Miller appeared for Omaha Police Federal Credit Union.

IT IS ORDERED: The plan is not confirmed. The debtor shall file another amended plan, taking into consideration the concerns expressed in the Memorandum filed contemporaneously herewith. Such plan shall be filed by January 5, 2005, or the case will be dismissed.

DATED this 9th day of December, 2005.

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:
*Howard Duncan
Sara Miller
Kathleen Laughlin
U.S. Trustee

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