

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)	
)	
RUTH ESTHER GOODMAN,)	CASE NO. BK98-81481
)	
DEBTOR.)	CH. 13

MEMORANDUM

Hearing was held on Confirmation of Plan and Objection by Thomas L. Wilkinson. Appearances: Monica Kruger for the debtor and Jeff Miller for the objector. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(L).

Background

This debtor has an associate's degree in accounting and obtained a job with the Omaha general agent for a national insurance company. Over a period of two years, she embezzled funds from her employer. When such embezzlement was discovered, she was terminated from her employment, charged with a crime by the local authorities and sued by her employer. She did not contest the civil suit and a judgment was entered against her in the approximate amount of \$100,000.00.

In the criminal matter, she entered into a pretrial diversion program and paid a total of \$21,000.00 in restitution to the employer at the rate of \$500.00 per month. Upon completion of the restitution, the criminal charges were dismissed.

During the years she was required to make restitution, although she was able to obtain employment in 1994 with a different company, and although she continues to have such employment, she was unable to generate sufficient net monthly revenues from that employer or from a second job to permit her to make all of the monthly restitution payments. Therefore, she directed her new employer to reduce the state and federal income tax withholding from her paycheck to zero. By increasing her net pay in this manner, she was able to make the restitution payments; however, she was still unable to make regular payments on a student loan and, eventually, the

taxing authorities informed her that she owed income tax, both on part of the amount embezzled and on the income which she earned from which no taxes had been withheld.

She entered into a payment agreement with the Internal Revenue Service. Her wages then began to be garnished by the collection agency for the student loan. Thereafter, and after completion of her restitution obligation, the former employer from which she had embezzled funds instituted collection activities, including garnishment of her wages. Finally, when she came up short on payments to the Internal Revenue Service under the payment plan because of the other garnishments, the Internal Revenue Service terminated the payment plan, levied and garnished her wages.

In June of 1998, her net take-home pay was reduced, as a result of the various garnishments, to such a low level that she was unable to make payment on her other living costs. She then filed this Chapter 13 bankruptcy case.

The debtor is currently attempting to exist on the net income from one job, which provides her with an annual gross income of \$22,000.00 per year. Although at one time during the collection process she held two jobs, she had health problems and her doctor advised her to quit the second job for health reasons.

It appears that the debtor has already attempted to reduce her monthly living expenses to pay down her debt by moving from Omaha to a small town north of Omaha where she lives with her mother. Her schedules show a monthly income of \$1,597.30 and monthly living expenses of \$1,271.50, leaving the amount of \$325.80 as monthly net disposable income for application to payments under a Chapter 13 plan.

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The plan proposes to pay \$325.00 each month for thirty-six months, with the first payments being applied to attorney fees and thereafter all net payments, after deduction of trustee fees, being applied to priority claims and then to general unsecured claims.

The Internal Revenue Service has filed one claim in the amount of \$10,855.61, of which \$4,448.68 is alleged to be entitled to priority, and a second claim in the amount of \$10,172.61, of which \$3,826.54 is asserted as an unsecured priority claim and \$6,346.07 as a general unsecured claim.

The Nebraska Department of Revenue has filed a claim in the amount of \$1,236.99, of which \$999.46 is alleged to be an unsecured priority claim. In addition, the Nebraska Department of Revenue has filed a claim in the amount of \$1,045.86, \$845.86 of which is alleged to be an unsecured priority claim.

The debtor's former employer, from whom she embezzled certain amounts, has filed a claim of \$116,068.24 including \$94,152.31 in principal and \$21,915.93 in interest. The claim does not account for approximately \$25,000.00 that the claimant collected through restitution, garnishment, and execution. The total amount of the allowed secured claim of the former employer is not in issue at this time, but it is clear that it approximates \$100,000.00.

The former employer filed a motion to dismiss the bankruptcy case and filed an objection to the Chapter 13 plan, on the grounds that the petition itself and the plan are filed in bad faith. By a prior journal entry, after a hearing, the motion to dismiss was overruled and trial was held on the matter of the good faith of the debtor in filing the Chapter 13 plan.

Legal Standard

Among other requirements for confirmation of a Chapter 13 plan, the Bankruptcy Code at 11 U.S.C. § 1325(a)(3) provides that the plan must be proposed in good faith and not by any means forbidden by law. The Bankruptcy Code does not define the phrase "good faith." However, the Eighth Circuit Court of Appeals has discussed the meaning of the phrase and the manner in which the trial courts are to determine the existence of good faith. In United States v. Estus (In re Estus), 695 F.2d 311, 316 (8th Cir. 1982), the court focused on "whether the plan constitutes an abuse of the provisions, purposes or spirit of Chapter 13." The court then suggested several factors to be considered when making such a determination. These factors were:

(1) the amount of the proposed payments and the amount of the debtor's surplus;

(2) the debtor's employment history, ability to earn and likelihood of future increases in income;

(3) the probable or expected duration of the plan;

(4) the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court;

(5) the extent of preferential treatment between classes of creditors;

(6) the extent to which secured claims are modified;

(7) the type of debt sought to be discharged and whether any such debt is nondischargeable in Chapter 7;

(8) the existence of special circumstances such as inordinate medical expenses;

(9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act;

(10) the motivation and sincerity of the debtor in seeking Chapter 13 relief; and

(11) the burden which the plan's administration would place upon the trustee.

In re Estus, 695 F.2d at 317.

In 1984, the Bankruptcy Code was amended to add Section 1325(b). That section requires, upon an objection by a trustee or by a holder of an allowed unsecured claim, that the plan provide that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan. In contrast to the language of the Code when Estus was decided, the Code now specifically requires the debtor to submit all disposable income, at least during the first three years, to be applied to plan payments, or the plan cannot be confirmed.

Following the amendment to the Code, the Eighth Circuit Court of Appeals was once again faced with a need to deal with the phrase "good faith." In Education Assistance Corp. v. Zellner (In re Zellner), 827 F.2d 1222, 1227 (8th Cir. 1987), the court narrowed the focus concerning the good faith analysis to the following criteria:

(1) whether the debtor has accurately stated debts and expenses,

(2) whether the debtor has misled the court or made any fraudulent misrepresentations, and

(3) whether the Bankruptcy Code is being unfairly manipulated.

In re Zellner, 827 F.2d at 1227.

Finally, the Eighth Circuit Court of Appeals in Handeen v. LeMaire (In re LeMaire), 898 F.2d 1346, 1349 (8th Cir. 1990) (en banc), held that although the Section 1325(b) statutory language had narrowed the focus of the analysis, the decision in Zellner preserved the "totality of circumstances" approach that the Estus factors addressed. In other words, although the main emphasis of the "good faith" analysis is to be on the accuracy of the stated debts and expenses, the honesty with which the debtor has brought the matters before the court, and whether the debtor has unfairly manipulated the Code, the trial judge is still required to review each of the factors listed in Estus and make a determination if, under the totality of all of the circumstances, in the specific case before it, the judge can find as a matter of fact, that the plan is filed in good faith.

Discussion

The debtor testified at trial and acknowledged that she had embezzled funds from her former employer. She admitted that she did not respond to the employer's lawsuit and that a judgment was entered against her in the approximate amount of \$100,000.00. Through the criminal restitution process, the debtor has already paid back approximately \$21,000.00, and, through garnishment of her wages and otherwise, the victim of her embezzlement has received a few thousand more.

To maximize further repayment, the debtor agrees to extend the life of the plan for a total of sixty months.

In considering the totality of the circumstances, the facts in this case demonstrate that the debtor did file her plan in good faith. She has provided all of her monthly disposable income to be applied to the plan for sixty months. She has a relatively stable employment history, staying with one firm for the last five years. Prior to that, however, she was employed by the objecting party, from whom she embezzled. She has a two-year college degree in accounting, but because of the embezzlement, it is unlikely that she will, at least in the near future, be employed in any type of capacity that would use the accounting skills. Her current job includes inputting information to computers.

There is no challenge to the accuracy of the debtor's statements of the debts or expenses, and there do not appear to be any inaccuracies which could be construed as an attempt to mislead the court.

There is no preferential treatment between classes of creditors and no secured claims are modified.

None of the debts for which claims have been filed are dischargeable in a Chapter 7 case. The student loan obligation, because of its age, may be dischargeable.

There are no special circumstances, such as inordinate medical expenses. However, the debtor is unable to work at a second job because of her health.

The debtor has not filed bankruptcy before and did not file bankruptcy for more than five years after her obligation to her former employer was incurred. She filed bankruptcy only as a result of a garnishment by the Internal Revenue Service which reduced her net take-home pay to such an extent that she could not cover living expenses. She did not file bankruptcy in the face of the restitution order, the post-restitution garnishment activities by her former employer, or in the face of collection efforts from the student loan entity.

Focusing on the Zellner criteria, it is clear that the debtor has accurately stated debts and expenses. Although at trial there was some discussion with regard to whether she

admitted stealing the full amount for which the judgment was entered or whether she had actually used some of the funds she stole to pay for expenses of a childbirth, none of that discussion is relevant to the issues before the court. She took the money. She did not fight the lawsuit filed by the employer. Judgment was entered for more than \$100,000.00. She paid back at least \$21,000.00 through restitution and several hundred or several thousand more through garnishment and execution. She does not necessarily agree with the position of the former employer with regard to exactly how much was stolen and she does not necessarily agree with the former employer with regard to how the money was spent. Such disagreement is not the equivalent of a misleading statement or a fraudulent misrepresentation to the court.

Finally, the Bankruptcy Code is not being unfairly manipulated. As mentioned above, the debtor did not file bankruptcy solely in response to collection efforts of her former employer, but only after creditors had reduced her take-home pay to such a level that she was unable to pay her modest living expenses.

Conclusion

Although the debtor has been found to have filed the plan in good faith, the plan, as it stands, cannot be confirmed. First, it must extend for a period of sixty months. Second, the evidence is that the debtor currently contributes \$15.00 per pay period to a 401K plan administered by her employer. The policy of this judge is that a Chapter 13 debtor should not be permitted to contribute funds to a saving account during the pendency of a Chapter 13 case, unless the unsecured claims are being paid in full. This rule is generally enforced and is specifically enforced when debtors are relatively young, as is this debtor. If the debtor completes the plan, she will be discharged of all her debts that are dischargeable in a Chapter 13 case and she will then be able to begin the process of saving for retirement.

The objection to the plan is overruled. However, this plan is denied confirmation. The debtor is granted thirty days to file an amended plan which reflects the above-listed changes. Failure to do so will result in a dismissal. If such a plan is timely filed, the debtor may also submit a proposed confirmation order. The debtor is not required to send out the plan pursuant to Local Rule 9013 and no hearing

will be scheduled. The proposed confirmation order, if it and the amended plan are in conformity with this order, will be executed and filed. That confirmation order will be the final appealable order in this matter; this order denying the objection and denying confirmation of the plan are not final appealable orders.

Separate journal entry to be filed.

DATED: June 17, 1999

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:
114 KRUGER, MONICA GREEN

Copies mailed by the Court to:
Jeff Miller, P.O. Box 241358, Omaha, NE 68124-5358
Kathleen Laughlin, Trustee
United States Trustee

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

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RUTH ESTHER GOODMAN,)	CASE NO. BK98-81481
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<u>DEBTOR(S).</u>)	
)	CH. 13
)	Filing No.
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	
)	DATE: June 17, 1999
<u>Defendant(s)</u>)	HEARING DATE:

Before a United States Bankruptcy Judge for the District of
Nebraska regarding Confirmation of Plan and Objection by
Thomas L. Wilkinson.

APPEARANCES

Monica Kruger, Attorney for debtor
Jeff Miller, Attorney for objector.

IT IS ORDERED:

Objection overruled. Plan denied confirmation. Amended
plan to be filed within thirty days. See memorandum filed
this date.

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

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