Affirmed 86:400
87:187

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
WILLIAM WESLEY ZELLNER,	)	CASE NO. BK85-799
	)	
DEBTOR	)	

MEMORANDUM OPINION

This matter was heard in Omaha, Nebraska, on January 6, 1986, on the objection to the confirmation of a Chapter 13 plan, said objection having been filed by Education Assistance Corporation, a creditor. Appearing on behalf of the debtor was William Wesley Zellner, pro se. Appearing on behalf of the objecting party was Jeffrey T. Sveen of Aberdeen, South Dakota.

Findings of Fact

William Zellner filed a Chapter 13 petition on March 4, 1985. The majority of his debts at the time of filing were student loans. All of his debts at the time of the hearing on the objection to the plan were student loans.

The creditor alleges that the plan should not be confirmed because it has not been filed in good faith, that the value of the property distributed under the plan is less than the amount that would be paid on such claim if the estate were liquidated under Chapter 7, and that the debt to the objecting creditor is a long-term debt under 11 U.S.C. §§1322(b)(5) and 1328(a)(1) and that the last payment is due after the date on which final payment is proposed under the plan.

Mr. Zellner received a Ph.D. in Sociology from South Dakota State University in 1982. During the time he pursued his studies, he obtained guaranteed student loans from the South Dakota Student Loan Assistance Corporation and from the Valley Bank of Coal Valley, Illinois, which Illinois loans were guaranteed by the Illinois Guaranteed Program. The total principal amount of the loans from South Dakota amount to $7,500 and the total principal amount of the loans from Illinois amount to $2,500. With the accrual of interest up to the date of the filing of claims, the South Dakota loan balance was $9,176.33 and the Illinois loan balance was $3,676.62.

After receiving his doctorate, Mr. Zellner obtained employment as a professor at Doane College in Crete, Nebraska. His beginning salary was $17,000 per year. Payments on the student loan did not begin until approximately one year following graduation. When the payment period began, Mr. Zellner was unable to make the required payments on the South Dakota loan and apparently was unable to make the payments on the Illinois loan.

Not realizing that the student loans could not be discharged in a Chapter 7 bankruptcy, Mr. Zellner filed a Chapter 7 bankruptcy in the Bankruptcy Court of the District of Nebraska and, after receiving his discharge in bankruptcy, was surprised to learn from the student loan organization that the loans were not discharged. The South Dakota student loan organization instituted collection efforts, including letters, telephone calls and, eventually, obtaining a judgment in the trial court of the State of South Dakota.

Mr. Zellner then filed his Chapter 13 petition and plan which, as amended in June of 1985, proposes to pay the trustee out of future earnings or other income the sum of $193.13 each month for 60 months beginning July 1, 1985. Mr. Zellner testified that he had made the payments as proposed by the amended plan and, since there is no evidence contrary, this Court will assume that he has made the appropriate payments.

The original schedule of current income and current expenditures filed by Mr. Zellner showed expenses of $1,076 per month and income of $1,021 per month, leaving a net monthly deficiency. His plan proposed to pay $150 per month to be applied first to a secured claim and then to the student loans. The amended plan provides to pay $193.13 per month, with $142.50 being paid per month to the secured creditor for approximately three months and thereafter to pay the full monthly payment on a pro rata basis to the student loan organizations.

At trial Mr. Zellner testified that since the filing of the Chapter 13 petition he has obtained new employment at a university in Oklahoma and his monthly take-home pay, prorated over a twelve-month period is $1,500 per month. His expenses as itemized during his direct and cross-examination testimony are $1,337 per month, leaving approximately $163 per month disposable income to be applied to the plan. Even though the numbers do not add up, Mr. Zellner testified very strongly that he believed that he could make the payments of $193 plus per month.

Some of the expenses shown on his initial schedules included payment to a college retirement program. After the filing of the petition and after changing jobs, Mr. Zellner received a lump-sum payment from the Doane College Retirement Fund in the approximate amount of $6,000. He testified that such lump sum was immediately rolled over into an IRA account for his retirement. Such lump sum was received by him more than six months after the date of the

filing of the petition. Mr. Zellner is a 50-year old man with a wife and two young children, ages 3 and less than 1 month. He did not begin his college education until he was over 40 years old and completed it with a Ph.D.

The items listed on his original schedule of expenditures and the items he testified to and the amounts of such items are not unreasonable and are necessary for the maintenance of his family.

Issues

The issues to be decided are:

1. Since this Chapter 13 petition was filed for the sole purpose of eliminating student loans, is it in violation of §1325 with regard to the "good faith" filing requirement?

2. Since student loans are not dischargeable in a Chapter 7 bankruptcy, would the creditor, on the date this petition was filed, receive more in a Chapter 7 liquidation from this estate, than it will receive under the Chapter 13 plan?

3. Is this a long-term debt under §§1322(b)(5) and 1328(a)(1) and, therefore, not subject to the provisions of a Chapter 13 plan?

4. Does the debtor propose to use 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 to fund the plan?

Conclusions of Law

The creditor claims that the various interpretations of Chapter 13 prohibit the confirmation of a Chapter 13 plan if the main purpose of the plan is to obtain the discharge of student loans. See In re Estus, 695 F.2d 311 (8th Cir. 1982). The Estus case and others cited by the creditor require the Bankruptcy Court to look at a number of factors, including whether or not discharge of a student loan was a significant reason for filing the plan, before the Court could find that the plan was filed in good faith. This Court decided in the case of In the Matter of Jerry and Betty Akin, Case No. BK85-136, decided October 15, 1985, that the amendments to the Bankruptcy Code effective in 1984 eliminate the prohibition of confirmation of a Chapter 13 plan if its main purpose is to discharge student loans. The reason the Court believes such prohibition was eliminated by the amendments to the Code is that the Code now provides that §1325(b)(1):

"(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the Court may not approve the plan, unless as of the effective date of the plan--

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides 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 the payments under the plan.

(2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended--

(A) for the maintenance or support of the debtor or a dependent of the debtor; or

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business."

This Court interprets the amended section quoted above to mean that if the debtor proposes to give all of its disposable income during the three-year period beginning when the first payment is due under the plan to fund the plan, there is no more that the Court should ask of the debtor. If the debtor has given all of its income to make payments under the plan, the plan is filed in good faith. Therefore, the question with regard to good faith is whether or not the debtor is using all of its disposable income for the three-year period to fund the plan and, the question is not whether or not discharge of a student loan was the purpose of filing the plan.

If the estate were liquidated as of the date of the filing of the petition of this plan, the creditor, although having the benefit of that section of the Code which prohibits the discharge of student loans under Chapter 7, would not receive any funds from

the estate. Therefore, its objection that it will receive less than the amount that would be paid on such claim if the estate were liquidated under Chapter 7 is not tenable. See Akin, supra.

The Code section cited by the creditor claiming that the debt is a long-term debt and, therefore, is not subject to the plan is not accepted. The analysis in the Akin case is detailed and covers the exact same objection by the exact same creditor.

The debtor has $6,000. Shouldn't the debtor be required to use that $6,000 to pay the student loans? The answer, as far as this Court is concerned, is that the debtor is not required to use the $6,000 to pay the student loans. The $6,000 is not income and is, therefore, not included in disposable income for the purpose of determining good faith. In addition, the $6,000 was received more than 180 days after the filing of the petition in this case. Therefore, if this estate were liquidated pursuant to Chapter 7, the $6,000 would not be considered property of the estate because of the date of its receipt. See §541(a)(5).

The Bankruptcy Court for the District of Nebraska has previously analyzed the meaning of §1325()(4). That section states that ". . .the court shall confirm a plan if--(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under Chapter 7 of this title on such date.

Judge Crawford, Bankruptcy Judge for the District of Nebraska, analyzed the meaning of this section in the case of Clay Benjamin Statmore, Sarah Frances Statmore, Case No. BK80-2583, by unpublished memorandum opinion dated July 28, 1982. In that case, the debtor attempted to modify its Chapter 13 plan to reduce the amount payable to unsecured creditors from $6,000 to zero. The debtors claimed that the assets which creditors could look to changed from the date the Chapter 13 petition was filed to the date the modification was requested, and because of that change, the debtors' assets on the date the modification was requested were totally exempt under applicable law. Therefore, the debtors argued, the plan satisfied the requirement of §1325(a)(4) in that as of the date of modification, the unsecured creditors in a Chapter 7 liquidation would receive nothing.

Judge Crawford decided that the Court would look to the value of the assets on the date the petition was filed when determining whether or not the creditors would receive more under a liquidation pursuant to Chapter 7 than they would receive under the Chapter 13 plan.

Obviously, in the Statmore case, the assets declined in value between the date of the filing of the petition and the date the modification was requested. In this case, the assets have

increased in value from the date the Chapter 13 petition was filed to the date hearing was held on the objection to the plan. This Court shall follow the analysis by Judge Crawford in the Statmore case. Therefore, since the $6,000 was not available to the debtor and was not an asset of the estate on the day the Chapter 13 petition was filed or within 180 days thereafter, if liquidation were to occur, the creditors would receive none of the $6,000.

The final issue is whether or not the debtor proposes to provide all of the debtor's disposable income to fund the plan for the next three years. Although the creditor attempted to show the Court that the debtor would be able to receive additional income each year by working summer schools and night school, the Court is convinced that the likelihood of summer school employment which would increase the annual income of the debtor is speculative. Therefore, the Court finds that the current contract rate of $18,000 net income which provides $1,500 per month to the debtor on a pro rata basis over twelve months is the amount he is likely to receive over the next three years.

The debtor proposes to pay approximately $194 per month to fund the plan. He proposes to make that payment over five years. He will thereby pay in $11,587.80. Deducting the trustee administrative cost of 10% leaves $10,429.02 to be allocated between the two student loan creditors. On a pro rata basis this creditor will receive 71% of the total payment of $10,429.02. Therefore, this creditor will receive $7,404.60. This is approximately 81% of the allowed claim of this creditor, $9,176.33.

ORDER

This plan is confirmed and the student loan claims should be paid on the pro rata basis of 71% to the South Dakota creditor and 29% to the Illinois creditor.

DATED: January 15, 1986.

BY THE COURT:

Timothy J. Mahoney
U.S. Bankruptcy Judge

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