

In the United States Bankruptcy Court

for the Northern District of Iowa

ROBERT EUGENE AKERS SR.

aka Robert E. Akers

HELEN BARBARA AKERS

Debtor(s).

Bankruptcy No. L-92-00626C

Chapter 13

ORDER

On August 26, 1993, the above-captioned matter came on for hearing pursuant to assignment. Debtors appeared in person with Attorney Jeffrey Berg. Creditor Donald Carr appeared pro se. Also appearing was the Chapter 13 Trustee Carol Dunbar.

The matter before the Court is a confirmation hearing on Debtors' second amended Plan. Creditor Donald Carr has filed an objection to confirmation of this Plan. The Case Trustee did not file a specific objection, however, expressed certain concerns at the time of the confirmation hearing. The matter was presented to the Court after which it was taken under advisement.

This case was originally filed as a Chapter 7 Bankruptcy on March 31, 1992. The Chapter 7 schedules reflected secured debt for motor vehicles and a home. They also listed reflected unsecured creditors with a total amount of indebtedness of approximately \$40,500. The Chapter 7 case remained active until a Notice of Conversion of Chapter 7 to Chapter 13 was filed by the Debtors on March 4, 1993. An Order converting this case to a Chapter 13 was filed by Judge William Edmonds on March 4, 1993. The schedules were amended and a Chapter 13 Plan was proposed on April 19, 1993. This Plan was subsequently amended by the Debtors in a proposed amended Chapter 13 Plan filed May 14, 1993. Objections were filed and a second proposed amended Chapter 13 Plan was filed on July 19, 1993. On July 22, 1993, the Chapter 13 Trustee filed a report asserting no objection to this second proposed amended Chapter 13 Plan. The only objection to this Plan was filed by Creditor Donald Carr on July 26, 1993.

Attorney Carr's objection states that he is a creditor and has a judgment against the Debtors in Linn County with a balance remaining as of July 22, 1993 in the amount of \$13,221.62. Mr. Carr asserts that the proposed Plan does not provide for substantial and meaningful payments to the Debtors' unsecured creditors and that this final proposed amended Chapter 13 Plan is proposed in bad faith. Attorney Carr filed an additional objection to the second proposed Plan on August 19, 1993. In addition to the foregoing, Mr. Carr also objected to the payment of attorney's fees to Attorney Jeff Berg, the bankruptcy attorney for the Debtors. An objection is made as to the status of a retirement account and disposition of the parties' home outside of the plan.

In summary, Attorney Carr states that it is inequitable to allow confirmation of this Plan without the Debtors being required to pay at least 60% of the anticipated total amount of unsecured claims. In oral arguments, Attorney Carr stated that this level of payment could be achieved by either increasing the total number of payments beyond the three year period or increasing the amount payable each month. Attorney Carr noted that the final amended Plan establishes excess income by the Debtors of \$652 per month. The Debtors propose to pay \$500 into the Plan each month thereby allowing an undistributed amount of \$152. Mr. Carr objects to this amount of money not being paid into the Plan. Chapter 13 Trustee Dunbar also expressed concern that this amount may be excessive.

The Court will examine the Plan in light of the objections made. First, the Court notes that no objection is made to the statement of assets and available income. Therefore, the Court's analysis will be based upon a monthly income statement which allows excess income available to be put into the Plan in the amount of \$652. Secondly, no objection was made

by any secured creditors. The Plan contemplates that the parties' home will be sold and the secured creditors will be paid from the sale of the parties' homestead. The only other priority claims under 11 U.S.C. 507 involve payment to Attorney Berg in the amount of \$2,000 and compensation to the Trustee in the amount of \$1,800. The Court, upon examination of the file and having considered the statements of counsel, does not find any substantial reason to deny confirmation based upon the secured claims or treatment of priority claims under 11 U.S.C. § 507.

The primary claim made by the creditor involves the payment of the residue to unsecured creditors. Under the second proposed amended Chapter 13 Plan, the Debtors propose to pay \$500 per month into the Plan for a period of 36 months. This constitutes approximately 36% of the total amount of unsecured claims of \$40,500. Attorney Carr feels that, based upon the income of the parties and their disposable income, Debtors should pay an amount in excess of 36% to unsecured creditors. Mr. Carr proposes that this additional amount be paid into the Plan either by increasing the monthly amount or by increasing the number of months over which this Plan should be paid up to the maximum of five years.

The Court will first address the creditor's claim that this Plan should be extended beyond three years. A Plan can be extended beyond three years under 11 U.S.C. § 1322(c) upon a finding of cause. However, the Court does not feel that increasing the total amount of payments in order to achieve a more substantial payment to unsecured creditors is "cause" as contemplated under this section. If this were true, every unsecured creditor would assert that their percentage of repayment would be increased if the Court increased the total amount of payments from 36 to 60 months. This does not appear to be an option that was considered to be cause when the various periods of payment were established under § 1322(c). As such, it is the conclusion of this Court that 36 months will be the payment period for this Plan as cause is not shown to extend this matter beyond the 36 month Plan envisioned by § 1322(c).

Secondly, 11 U.S.C. § 1325(a)(3) requires good faith on behalf of the debtor and the debtor's best efforts in making payments toward the Plan. A best efforts analysis requires an examination of the debtor's disposable income compared to the actual amount proposed to be paid into the Plan. A reading of § 1325(b)(1)(B) does not reveal an authorization for any contingency reserve. In other words, a strict reading of this section would appear to mandate that all excess income be committed to the Plan. However, reality and case law have indicated that a contingency reserve is sometimes reasonably necessary to deal with emergencies in the family which are not anticipated and therefore, not set out in the monthly expenses of the debtor. Having made that determination, however, the Court must then determine how much of a contingency reserve is reasonable. The Court has examined the schedules in this case. The Debtors' have declared excess income of \$652 of which \$500 is being applied toward the Plan. Therefore, approximately 77% of the parties' excess income is applied toward the Plan. This leaves 23% of the parties' excess income as uncommitted.

There is no numerical percentage which is a threshold requirement for payment into the Plan. Nevertheless, under this proposed Plan, \$500 is being applied toward the Plan and \$152 remains uncommitted which presumably is the contingency reserve for the Debtors. This is excessive based on the Court's reading of existing case law. Based upon the amount of money available for the Plan, it is the conclusion of this Court that \$590 is a much more realistic figure to be applied toward this Plan over a period of 36 months.

In summary, the Court finds that the Plan in general terms is subject to confirmation. However, the Court also determines that the parties have \$652 in excess income of which they are not committing a sufficient portion toward the Plan. The Court, therefore, finds that the Plan is not confirmable at this time based upon the amount of earnings which are being committed to the Plan by the Debtors. If the Debtors, however, consent to committing the sum of \$590 per month to the Plan for a period of 36 months, the Court will find that in all other respects this Plan is confirmable. Therefore, the Court will enter a denial of the Plan at this time. However, the Court allows the Debtors a period of two weeks within which to evaluate whether they will amend the Plan to the extent that \$590 will be payable into the Plan for a period of 36 months. If the Debtors file such an Amended Plan, the Court, having already held a full hearing on this matter, will find that this Plan is confirmable as amended without further notice or hearing.

WHEREFORE, for the reasons set forth herein, it is the finding of this Court that this Plan is confirmable in all respects with the exception of the amount of excess income allocated toward the Plan.

FURTHER, the Debtors will be allowed until September 17, 1993 within which to evaluate this Order and file an Amended Plan allocating \$590 of their excess income toward the Plan for a period of 36 months.

FURTHER, if the Debtors file this amendment, the Court will enter an Order confirming the Plan in its entirety without further notice or hearing as the Court has already held a full hearing and no further purpose would be served by additional hearings or notice.

FURTHER, if the Debtors do not file an Amended Plan within the time parameters set forth herein, the Court will find that the Plan is not confirmable and will therefore dismiss this Chapter 13 proceeding.

FURTHER, if the amendment is filed and the plan confirmed, the additional funds paid will be allocated toward payment of unsecured claims.

SO ORDERED this 2nd day of September, 1993.

Paul J. Kilburg
U.S. Bankruptcy Judge