

In the United States Bankruptcy Court

for the Northern District of Iowa

JAMES HOWARD NEKOLA
Debtor(s).

Bankruptcy No. 93-12099KC
Chapter 13

ORDER RE: CONFIRMATION

On July 12, 1994, the above-captioned matter came on for hearing pursuant to assignment. Debtor James Howard Nekola appeared in person with his Attorneys Joseph Peiffer and Linda Merritt. Also appearing was Attorney Martin McLaughlin from the U.S. Attorney's Office on behalf of FmHA. The matter before the Court was a confirmation hearing on Debtor's proposed Chapter 13 Plan. The only objector was FmHA. The matter was considered after which it was taken under advisement.

Debtor converted this Chapter 7 case to Chapter 13 in accordance with 11 U.S.C. § 706(a). Debtor proposed a Plan under which he would pay \$150 per month or 100% of his disposable income for 60 months to the Chapter 13 Trustee for distribution to creditors. Under this Plan, unsecured, nonpriority claims would receive 1.7 percent. If a Chapter 7 were pursued in this case, unsecured, nonpriority claims would receive nothing.

The United States Attorney, on behalf of the Farmers Home Administration (FmHA), objected to confirmation of the Plan. Debtor and FmHA resolved all objections except the United States' claim that Debtor has failed to account to FmHA for 29 sows, four boars, 25 hogs, and the offspring from the 29 sows. The FmHA requests that the Court deny confirmation of Debtor's Plan. No specific code or case authority is cited as a basis for this objection.

At the confirmation hearing, Debtor testified that he bought feeder pigs with funds advanced by FmHA. He then sold some of the pigs and kept the gilts, using the proceeds to pay feed bills. He later bred the gilts. The pigs contracted E. Coli scours, and eventually Debtor sold all of the pigs and sows. He applied the proceeds toward veterinarian bills, medical tests, and feed. He testified that these expenses exhausted all sale proceeds. FmHA received nothing. Debtor stated that he understood the loan agreement permitted him to pay expenses related to raising the pigs before applying proceeds toward the loan.

CONCLUSIONS OF LAW

The Bankruptcy Code requires that the Court consider those confirmation requirements set forth in 11 U.S.C. § 1325(a). A debtor's plan must be confirmed if all six factors are satisfied. In re Johnson, 708 F.2d 865, 867 (2d Cir. 1983). The United States has not specifically claimed that any of the six requirements of § 1325(a) have not been satisfied. Nevertheless, the Court has "an independent obligation to be sure that the proposed plan complied with the Bankruptcy Code." In re Northrup, 141 B.R. 171, 172 (Bankr. N.D. Iowa 1991).

The debtor who proposes a Chapter 13 plan bears the burden of proving that all requirements for confirmation of the plan are satisfied. In re Nelson, No. 86-01554W, Adv. No. 1396, slip op. at 10 (Bankr. N.D. Iowa June 1, 1987) (quoting In re Wall, 52 B.R. 613, 616 (Bankr. M.D. Fla. 1985)). Here, no party disputes and the Court finds that the Plan complies with the provisions of Chapter 13, in that the fee has been paid, the amount distributed under the Plan is not less than the amount that would be paid under Chapter 7, holders of secured claims have made arrangements according to § 1325(a)(5), and Debtor will be able to make all payments under the Plan.

The remaining element is whether the Plan has been proposed in good faith and not by any means forbidden by law. 11 U.S.C. § 1325(a)(3). This good faith requirement "focuses on the debtor's motivation for seeking relief, financial and personal goals he seeks to accomplish through the case, and his attitude toward the integrity of the bankruptcy process, as manifested on the face of his statements, schedules, pleadings, and plan." In re Cordes, 147 B.R. 498, 503 (Bankr. D. Minn. 1992). The good faith provision is perhaps the most extensively litigated of Chapter 13 issues. Casenote, "Good Faith" Analysis Under Chapter 13--The Totality of Circumstances Approach: Handeen v. LeMaire, 23 Creighton L. Rev. 573, 577 (1990).

In 1982, the Eighth Circuit established a non-exhaustive, eleven factor test of good faith under § 1325 (a) that includes:

- (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 311, 317 (8th Cir. 1982). Following the Estus decision, the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, added a new section § 1325(b) which authorizes courts to confirm a plan in which all of the debtor's disposable income for three years is applied to make payments under the plan. 11 U.S.C. § 1325(b). In Education Assistance Corp. v. Zellner, 827 F.2d 1222, 1227 (8th Cir. 1987), the Eighth Circuit concluded that

the new section's "ability to pay" criteria subsumed most of the Estus factors and narrowed the scope of the good faith inquiry. The court described the narrower focus as depending upon "whether the debtor has stated . . . debts and expenses accurately; whether [debtor] has made any fraudulent misrepresentations to mislead the bankruptcy court; or whether [debtor] has unfairly manipulated the Bankruptcy Code." Id.

In 1989, the Eighth Circuit again visited the issue of good faith under § 1325(a). In re LeMaire, 898 F.2d 1346 (8th Cir. 1989). The LeMaire court determined that a civil judgment which arose from criminal act does not, as a matter of law, preclude its discharge in Chapter 13. The court also held that a bankruptcy court must consider the totality of circumstances in determining whether a Chapter 13 plan has been proposed in good faith. It held that while prefiling is not determinative of whether a plan is proposed in good faith, it is relevant. Id. at 1348, 1349, 1352.

During the confirmation hearing, the United States cited LeMaire and Memphis Bank & Trust Co. v. Whitman, 692 F.2d 427 (6th Cir. 1981). The Sixth Circuit held, in Memphis Bank, that a bankruptcy court should evaluate "good faith" when the plan is proposed as well as when the debt is incurred. Id. at 431-32 (affirming the bankruptcy court's determination that where a debtor incurred a debt fraudulently, the debtor should be required to pay the debt in full to receive confirmation). The Eighth Circuit disallowed confirmation of a plan, in LeMaire, because the main debt was a tort claim by a plaintiff the debtor had shot five times. Id. at 1347. The court held that manifestations of bad faith need not be based upon a finding of actual fraud, rather that the bankruptcy courts "preserve the integrity of the bankruptcy process by refusing to condone its abuse." Id. at 1352. To accomplish this, LeMaire instructs the bankruptcy court to consider the § 523 discharge exemptions in light of the underlying public policies. Id. at 1352-53 (describing a "particularly strong policy prohibiting the discharge of a debt resulting from a willful and malicious injury following an attempted murder").

The present case contains none of the "unmistakable manifestations of bad faith" found in LeMaire. Debtor's conduct demonstrates, at worst, disagreement regarding contractual provisions relating to the application of proceeds to maintenance expenses.

Debtor here has stated his debts and expenses accurately, has made no known fraudulent misrepresentations to mislead the Court, and has not unfairly manipulated the Bankruptcy Code. Therefore, the narrower focus on the issue of "good faith" described in Zellner is appropriate. Debtor apparently followed the loan agreement as he understood it. He paid off veterinarian and feed bills associated with the collateral.

The objection lodged by FmHA, in this case, appears to assert misconduct but does not specify violation of any particular code provisions. It is not the obligation of the Court to determine an appropriate Code provision or its applicability as it relates to a general complaint in the context of the confirmation process. This is why a party's motion "shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought." Fed.R.Bankr.Proc. 8011. As FmHA's complaint is of a general nature, the Court has examined it in light of the Court's independent obligation to ensure that the proposed Plan complies with the Code. Having made this examination, the Court has determined "good faith" in accordance with § 1325(a)(3) and the relevant 8th Circuit case law. Based upon these conclusions, the Court concludes that this Plan satisfies the requirements of § 1325(a) and is confirmable.

WHEREFORE, the Court finds that any objection to the confirmation of the Plan filed by FmHA is **OVERRULED**.

FURTHER, for the reasons set forth herein, the Court finds that Debtor's Chapter 13 Plan meets the requirements of § 1325 and should be confirmed.

FURTHER, the Chapter 13 Trustee is requested to prepare an appropriate confirmation order for the Court's consideration.

SO ORDERED this 2nd day of August, 1994.

Paul J. Kilburg
U.S. Bankruptcy Judge