In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

GERALD D. JOHNSON and JUDITH K. JOHNSON *Debtor(s).*	Bankruptcy No. 95-50511XS Chapter 13

ORDER RE: CONFIRMATION HEARING ON DEBTORS' THIRD AMENDED PLAN

Gerald D. and Judith K. Johnson (DEBTORS) have submitted their amended Third Amended Chapter 13 Plan to the court for confirmation (docket nos. 86 and 95). Two creditors have filed objections: the United States of America on behalf of Farm Service Agency (FSA) (docket no. 90) and State Bank of Alcester (BANK) (docket no. 89). Carol Dunbar, the standing trustee, recommends confirmation (docket no. 99). Hearing was held March 5, 1996 in Sioux City. This is a core proceeding under 28 U.S.C. § 157(b)(2)(L).

Bank and FSA have raised several objections to confirmation. Each claims a security interest in the debtors' homestead, and each is concerned that the debtors will not be able to pay the proposed value of the homestead over the five-year life of the plan. They say the plan is not feasible. Bank objects to the debtors' valuation of the homestead. FSA objects to the debtors' efforts under the plan to use 1996 rental income from the debtors' non-homestead farmground to pay claims secured by the homestead. FSA claims a security interest in the rental income, and it contends that debtors' proposed use of the income fails to recognize its interest, thus violating 11 U.S.C. § 1325(a)(5)(B)(ii) and showing a lack of good faith. Each raises objection to the plan on the ground that it does not provide that all of the debtors' projected disposable income will be applied to make payments under the plan, as is required under 11 U.S.C. § 1325(b)(1)(B).

I conclude that the plan is not confirmable because it fails to meet the Code's disposable income requirement. Because I will enter an order dismissing the case, I decline to reach the other issues.

Gerald and Judith are husband and wife. They are separated and in the process of dissolving their marriage. Gerald attends the University of South Dakota in Vermillion. He anticipates graduating in May 1997 with a degree in criminal justice. He hopes to get a job in either Sioux City or Sioux Falls. While attending school, he lives in an apartment in Vermillion. He supports himself with part-time jobs and student loans.

Judith rents a residence in Sioux City. She is employed full-time with Western Hills Area Education Agency. Her gross annual salary is $31,104.00. Her net annual salary is approximately $22,104.00. She is obligated on two student loans and on a claim secured by her personal automobile. Under the plan, she would make the monthly payments on these debts. According to the amended projected cash flows (docket no. 95, exhibit 1, pages 3-5), her annual projected expenses, including plan payments on the three obligations mentioned and all deductions from her salary, total $28,947.12.

Debtors jointly own a 2.52-acre homestead in South Dakota. Gerald has testified he intends to live there again once he graduates. The home is now occupied by the couple's son and his wife. Under the plan, the son will pay to the trustee rent which will be distributed to creditors holding security interests in the home. When Gerald moves back, the son's rent will be reduced.

The plan provides for payment of secured claims and priority unsecured claims. In their schedules, debtors listed $100,250.00 in unsecured claims not including the unsecured portions of secured claims. With one exception, the schedules do not specify how much of the unsecured debt is jointly owed. The plan states that "[d]ebtors will submit all, or such portion of future income, to the supervision and control of the trustee as is necessary for implementation of the plan." (Plan, docket no. 86, page 6). The amended projected cash flow shows no such intent (docket no. 95, exhibit to plan, pages 3-5). It is clear that Judith proposes to devote her disposable income to plan payments to unsecured creditors only until Gerald's anticipated graduation in May 1997. Their combined "pre-degree" income, including all of Judith's income, Gerald's income, and rental income from the homestead, is projected at $49,992.00. The projected "pre-degree" expenses are $43,275.12. The expenses include Judith's payments on her student loans and car. The excess income is projected at $6,716.88. From it, the debtors propose to pay $3,996.00 on the homestead debt, $1,591.00 to the IRS and $620.80 to the trustee for her fees. The balance of $508.36 would go to unsecured creditors.

After Gerald graduates, the projection shows distribution through the trustee only of Gerald's disposable income. His disposable income, projected at $6,328.00, would be used to pay the homestead and IRS claims and the trustee payments. The balance available annually for unsecured creditors would be $119.48. Judith would retain projected annual disposable income of $2,156.00.

This chapter 13 case appears to be an effort by Gerald to save the acreage. There is nothing wrong with such a motive. I mention it only to make the point that it does not appear to be Judith's goal. The couple is in the midst of a divorce. It appears she is willing to contribute her disposable income to the plan only until Gerald graduates from university. After that, she contributes no disposable income to the payment of unsecured claims. She proposes a plan within his plan, and her plan pays only her living expenses, her student loans and her car payment. The excess of her income over her expenses is approximately $180.00 per month. Because Bank and FSA have raised a disposable income objection, Judith is required to propose a plan which would pay that amount to the trustee. She has not done so. This is not unintentional. Debtors' counsel agrees that such is the plan, but he argues that, even so, net disposable income is not calculated and paid until the end of the five-year plan. Presumably, he does not believe there will be any and, therefore, Judith should not have to propose to pay any.

I disagree. As she has projected disposable income, the plan cannot be confirmed because she clearly does not propose to devote it to payments under the plan. The plan violates 11 U.S.C. § 1325(b)(1)(B).

This case has been pending since March 27, 1995. Debtors have proposed four plans and have litigated the confirmation of two of them. Bank and FSA have requested dismissal of the case. When I denied confirmation of the prior plan, I gave the debtors a further opportunity to propose a confirmable plan. In the prior plan, all of Judith's disposable income was included in the cash flow projection for 1996. In examining feasibility of the prior plan, I extended debtors' one-year projection based on the evidence introduced as to future changes in circumstances. I said in a prior decision that it appeared the couple would generate substantial disposable income over five years--at least $30,000.00. In filing the pending plan, debtors have recalculated their projections. Projected annual expenses rose from $25,600.00 to $43,275.00 (pre-graduation). Under the plan, instead of $30,000.00 being available to unsecured creditors, it is projected that about $1,182.00 would be available. Either the earlier plan's cash flow was ill-considered, or the new one reflects a desire to pay unsecured creditors little, if anything. The change reveals an intent to withdraw Judith's disposable income from the plan. After denying confirmation of the previous plan, I permitted additional time to file another plan to correct problems, not intentionally create them. No more time will be allowed. The case should be dismissed pursuant to 11 U.S.C. § 1307(c)(5).

IT IS ORDERED that confirmation of debtors' Third Amended Plan filed November 17, 1995 and amended February 26, 1996 is denied.

IT IS FURTHER ORDERED that debtors' chapter 13 case is dismissed. Judgment shall enter accordingly.

SO ORDERED THIS 15th DAY OF MARCH 1996.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order and a judgment by U.S. mail to: John Harmelink, Richard Moeller, Carol

Dunbar, A. Frank Baron, Debtors, U. S. Attorney and U. S. Trustee.