In the United States Bankruptcy Court

for the Northern District of Iowa

BERNIE B. BARKER
Debtor(s).

Bankruptcy No. 98-01601-C
Chapter 13

ORDER RE CONFIRMATION OF PLAN AND MOTION TO DISMISS

On September 29, 1998, the above-captioned matter came on for final hearing on confirmation of Debtor's Chapter 13 Plan. Debtor appeared with Attorney Thomas McCuskey. Chapter 13 Trustee Carol Dunbar was present. Also present were Creditor Wanda Vander Werf and her attorney, H. Raymond Terpstra II. Creditor Wanda Vander Werf also filed a Motion to Dismiss. Evidence was presented after which the parties were allowed to submit briefs. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B).

STATEMENT OF THE CASE

Debtor Bernie B. Barker (Barker) filed a Chapter 7 petition in this Court on June 12, 1997 (No. 97-01813-C). Wanda Vander Werf (Vander Werf), the former spouse of Barker, was a creditor in the Chapter 7 case and filed an adversary proceeding (Vander Werf v. Barker, Adversary No. 97-9176-C). Trial was held on March 19, 1998 and a ruling was entered on April 7, 1998 concluding that the obligations of Barker, under a decree of dissolution entered July 14, 1995 and an order modifying the decree dated May 24, 1996, are nondischargeable pursuant to 11 U.S.C. §523(a)(15). The records of this Court reflect that Barker was granted a discharge in the Chapter 7 case on September 19, 1997.

Barker filed the pending Chapter 13 petition on May 28, 1998 and filed a Plan on June 11, 1998. The only significant obligation to be paid through the Plan is the obligation to Vander Werf. Barker states in the Plan that "All other debts of the Debtor were either discharged in the Chapter 7 proceeding, are secured and current (the Debtor will continue to make those payments to the secured creditors outside the Plan) or will be dealt with outside the Plan." (Debtor's Plan, paragraph 1).

Barker filed a Schedule I and a Schedule J with the original petition. Trustee objected to the Schedules, asserting that significant questions appeared in both the income schedule and the expense schedule which required clarification. As a result of a hearing held on August 4, 1998, Barker was directed to amend the Schedules within ten days of hearing. Barker filed an amended Schedule I and amended Schedule J on August 14, 1998. Confirmation of the Plan was scheduled for final hearing on September 29, 1998.

At the final hearing, Trustee objected to the Plan, asserting that Barker proposed to classify unsecured debt in separate categories. Additionally, Trustee objected on feasibility grounds. In addition to the objections filed by Trustee, Creditor Vander Werf filed a Motion to Dismiss on July 15, 1998 alleging multiple grounds for dismissal. Vander Werf asserts that this Chapter 13 petition was filed in bad faith for the sole purpose of restructuring Barker's obligations to Vander Werf. The petition was filed one

day before a contempt hearing was to be held in State court concerning Barker's failure to pay his dissolution obligations. Vander Werf is the only creditor to be paid through the Plan. Vander Werf asserts that Barker's proposed Plan payments will not satisfy the obligations incurred by him under the dissolution decrees entered in the parties' dissolution of marriage.

FINDINGS OF FACT

Barker is 49 years of age and resides in Anamosa, Iowa. He is unmarried and has no dependents. He is employed by Franklin Industries in Monticello, Iowa. His father is the chief operating officer of this corporation. Barker earns approximately $30,000 per year from his employment at Franklin Industries. He also has a separate business designing custom items such as mirrors and tables out of wrought iron.

Barker and Vander Werf were married until a decree of dissolution was entered on July 14, 1995. Supplemental orders modifying this decree were entered on May 24, 1996. The decree requires Barker to pay an obligation to the Marion County State Bank, Pella, Iowa. This obligation is reflected in two Marion County State Bank loans. The first is loan No. 8715 and has an outstanding balance of $26,824.93. The second loan is No. 2359 and has a balance in the amount of $10,445.39. Vander Werf presented evidence that the total amount due and owing to the Bank is $37,270.32 as of the time of confirmation hearing. Barker's Plan proposes to pay Vander Werf in the amount of $25,000 over the 5-year life of the plan.

Numerous objections raised at the confirmation hearing relate to expenditures listed in Schedule J as amended August 14, 1998. The first item relates to rent or house mortgage payments in the listed amount of $359 per month. This is an obligation owed on a mobile home where Barker resides. The underlying obligation is owed to First Iowa Bank. In Barker's Chapter 7 case, the obligation to First Iowa Bank was discharged with the exception of that portion secured by the mobile home, or approximately $20,000. The unsecured portion, which was discharged, is between $6,500 and $6,900. Barker asserts that he has informally reaffirmed the unsecured part of this debt to First Iowa Bank. He testified that he feels it is his obligation to make this payment and that he is trying to make good faith payments on this debt in addition to the debt owed to Vander Werf.

Barker specifically testified that of the $359 listed as payable to First Iowa Bank each month, $223.50 is payable on the portion on the debt secured by the mobile home. Barker has been paying the remaining $135.00 to the Bank on the unsecured obligation which was previously discharged and now informally reaffirmed. Barker stated that he recently stopped paying the unsecured portion of the debt to First Iowa because he signed a new six month note on the unsecured component. He testified that he is not making periodic payments but rather is paying the interest due every six months. It is Barker's position that he will pay this obligation outside the Plan.

According to Barkers' post-hearing brief, the $359 debt actually consists of $223.50 on a mobile home contract and $135 as lot rent. However, this position is inconsistent with testimony presented at trial by Barker and is, therefore, given no consideration in this opinion.

A second area of concern under amended Schedule J relates to the category of "Installment Payments" in which Barker lists a monthly payment of $375 described as "Business and Premarital Home". At the confirmation hearing, Barker testified concerning a preexisting obligation to Homeland Bank in the amount of $25,000 which was discharged in Barker's Chapter 7 case. Barker's father was a co-signer on this loan. This obligation was originally two loans which were consolidated and are now

payable to Union Planners Bank, the successor to Homeland. Barker states that he is paying $75 per week on this obligation. While Barker categorizes this obligation as reaffirmed debt, no formal reaffirmation documents were filed in the Chapter 7 case. When asked why he is repaying this obligation, he testified that his father had co-signed the original debt and that if he does not pay this obligation, his father would be liable and Barker may lose his job.

A second item under "Installment Payments" is categorized as "Reaffirmed debts" with a payment of $120 per month. Barker initially testified that he did not know what payments were included in this amount. Subsequently, he testified that it may include a component of payment to Attorney Michael Bowman who represented Barker in the Chapter 7 case. Still later, he testified that he believes this is for reaffirmed obligations to Montgomery Wards, Sears, and J.C. Penneys. The sums payable are $60 per month to Montgomery Wards; $40 per month to Sears; and $20 per month to Penneys. The record is unclear whether the Penneys obligation is pre- or post-petition debt.

Barker entered into a formal reaffirmation agreement with Sears on July 21, 1997 in his Chapter 7 case. This was in the total amount of $930.53. Approximately $600 of the total amount was unsecured. Barker also formally reaffirmed a debt to Monogram Credit Card Bank of Georgia for $2,435. This represents the debt owed to Montgomery Wards which Barker is paying at $60 per month. Barker also testified that he reaffirmed an obligation to J.C. Penneys. In his post-petition brief, Barker indicates that the debt to J.C. Penneys was incurred after the Chapter 7 discharge. This fact appears to be outside the record.

A third item under installment payments is "Incidentals" in the amount of $100 per month. Initially, Barker testified that this may be reaffirmed debt to Montgomery Wards and Sears. He subsequently testified that this was an emergency cash fund for unanticipated expenses and not payable to any specific creditor.

Barker proposes to pay $210 per month for the first year; $350 per month for the second year; and $550 per month for the final 36 months of this 60 month Plan. Over the first year of the Plan, Barker would pay a total of $2,520; $4,200 during the second year; and $6,600 for each of the next three years. Under Barker's analysis, this will require a balloon payment of approximately $1,130 to be payable at the end of the Plan. Vander Werf disputes these numbers and asserts that $25,000 is not the amount of money which is owed to her but rather $37,270.32 as of the date of confirmation hearing. (Vander Werf Exhibit 3). If this amount is amortized over a period of five years, it requires a payment of $764.66 each month during the entire five year period in order to liquidate this obligation. Under Barker's proposed payment schedule, Vander Werf asserts Barker will still owe almost $11,000 at the end of the plan.

Barker testified that he will have enough salary from his full-time employment and custom employment to make plan payments. He testified that some current obligations will be liquidated during the course of the Plan and will allow him to pay additional sums. Additionally, he testified that he is anticipating an increase in salary within the next year. He is anticipating a small bonus sometime in the future and, as of March 1 next year, he will receive an additional four weeks of vacation which he can sell as salary. Barker states that these matters, when considered together, will allow him to make the Plan payments as proposed.

Barker lists four unsecured creditors on Schedule E. Homeland Bank is listed as a creditor in the amount of $28,500. This loan was discharged in Barker's prior Chapter 7 petition. The second obligation is to Shimanek, Shimanek and Bowman for legal services in the amount of $600. These services were provided prepetition and may well have been discharged in the Chapter 7 proceeding.

The third unsecured creditor is listed as Attorney Thomas McCuskey in the amount of $2,815. It is unclear when these fees were incurred. Barker testified that he and Mr. McCuskey have an understanding that these fees will not be collected now but will be collected when it is possible for Barker to make payments. The final unsecured creditor is Vander Werf with a scheduled claim of $25,000.

DISCHARGEABILITY

Under 11 U.S.C. § 1328(a), a nondischargeable Chapter 7 debt may be discharged in Chapter 13, except any debt "(1) provided for under section 1322(b)(5) of this title; or (2) of the kind specified in section 523(a)(5) of this title." Education Assistance Corp. v. Zellner, 827 F.2d 1222, 1224 (8th Cir. 1987); In re Estus, 695 F.2d 311, 314 (8th Cir. 1982); In re Johnson, 787 F.2d 1179, 1181 (7th Cir. 1986). This reflects the intent of Congress to "encourage more debtors to attempt to pay their debts under bankruptcy court supervision." In re LeMaire, 898 F.2d 1346, 1353 (8th Cir. 1990) (quoting Estus, 695 F2d at 313).

Vander Werf objects to the proposed plan on the basis that it does not provide for full payment of her claim which was declared nondischargeable under §523(a)(15) in Barker's Chapter 7 case. The §523 (a)(15) exception to discharge in Chapter 7 for non-support obligations incurred in divorce proceedings is not included in §1328(a) which governs the dischargeability of debts in Chapter 13. A debtor is not automatically precluded from proposing a Chapter 13 plan which discharges a § 523(a) (15) obligation, if the plan satisfies the Chapter 13 confirmation standards.

REAFFIRMED DEBT

Barker characterizes some of the payments scheduled as expenses on Schedule J as reaffirmed or "informally" reaffirmed debts. The reaffirmation of debts discharged in bankruptcy proceedings is governed by 11 U.S.C. § 524. In re Hitt, 137 B.R. 401, 403 (Bankr. D. Mont. 1992). A reaffirmation agreement must comply with § 524 in order to be legally enforceable. In re Jackson, 49 B.R. 298, 302 (Bankr. D. Kan. 1985). The five requirements of §524 are: (1) the agreement must be made prior to discharge, (2) it must advise debtor of rescission rights, (3) it must be filed with the court, (4) debtor cannot have timely rescinded the agreement, and (5) the agreement must be in the debtor's best interest. 11 U.S.C. §524(c)(1)-(5); In re Latanowich, 207 B.R. 326, 334-35 (Bankr. D. Mass. 1997); In re Getzoff, 180 B.R. 572, 574 (B.A.P. 9th Cir. 1995). In addition, a debt which is reaffirmed without representation by an attorney is enforceable only if the court determines it is in the "best interest of a debtor" and does not impose "undue hardship." 11 U.S.C. §524(c)(6).

Barker's Schedule J reveals that he is paying, outside of the proposed plan, numerous debts which predated his Chapter 7 case. The debts to Sears (largely unsecured) and Monogram Credit Card Bank of Georgia (Montgomery Wards), totaling approximately $3,400, were formally reaffirmed in accordance with § 524(c). Barker's monthly payments on these debts are $40 to Sears and $60 to Wards. These reaffirmed debts survived Barker's Chapter 7 discharge pursuant to §524(c). No apparent reason exists, however, which excuses Barker from listing these debts as claims in his Chapter 13 schedules, as opposed to expenses, and paying them through the plan. An issue may exist, even if these were properly scheduled as claims, whether these reaffirmed debts should be paid completely or pro rata with other claims. The Court, however, prefers to leave that issue for another day.

Debtor's Schedule J also includes payments totaling $510 per month on debt predating the Chapter 7 case which was never reaffirmed in accordance with §524(c). These include the $135 payments to First Iowa Bank included on Schedule J as part of Barker's house payment, and payments to Union Planners Bank of $325 for co-signed debt and $50 for other unsecured debt. None of the § 524(c) requirements for reaffirming have been satisfied for these debts. Even assuming Debtor intended to reaffirm these debts prior to the Chapter 7 discharge, the reaffirmations would be ineffective. Neither an affidavit of attorney under § 524(c)(3) nor court approval under §§524(c)(6)(A)(i) and (ii) appear in the record. Barker's "informal" reaffirmation agreements for these debts do not comply with the §524(c) provisions. Therefore, the agreements are unenforceable and Barker is not personally liable on these discharged debts.

Barker argues that if he fails to pay the obligation to Union Planners Bank, his father will be liable as a co-signer. While this Court has recognized that disparate treatment for debts involving co-signers is authorized by the Code, the facts presented in this case do not justify application of that doctrine. See In re Janssen, No. 98-00141, slip op. at 4 (Bankr. N.D. Iowa May 7, 1998). Barker did not seek application of that doctrine in his Chapter 7 case and the Court is not satisfied that his presently expressed concerns are legitimate.

At trial, Barker characterized the J.C. Penneys payment of $20 per month as a reaffirmed debt. Contrarily, in his post-trial brief, Barker asserts this debt arose after his Chapter 7 case. No §524(c) reaffirmation agreement exists for the debt to Penneys. If it predated the Chapter 7 case, it was discharged and Barker is no longer personally liable. If it arose after Barker's Chapter 7 discharge, it should be listed as a claim in Barker's Chapter 13 schedules and paid through his Plan.

The debt payments Barker improperly included in Schedule J as monthly expenses total $630.

CREDITOR	MONTHLY PAYMENTS
First Iowa Bank	
Unsecured Portion of House Payment	$135.00
Union Planners Bank	
Co-Signed	325.00
Not Co-Signed	50.00
Sears	40.00
Montgomery Wards	60.00
J. C. Penney	20.00
TOTAL	**$630.00**

Barker has no obligation to First Iowa Bank or to Union Planners Bank on the debts which were discharged in his Chapter 7 case. Barker listed Sears and Montgomery Wards on Schedule D. They should receive payment through the plan. Penneys should either be listed on Schedule E and treated as an unsecured creditor in the plan, or not receive any payments as a discharged creditor.

DISPOSABLE INCOME

Barker's Chapter 13 plan must satisfy the §1325(b)(1)(B) disposable income limitation in order to be confirmed. The disposable income limitation is triggered if a trustee or unsecured creditor objects to a

proposed plan. 11 U.S.C. §1325(b)(1). When this occurs, the court may not approve the plan unless the debtor pays unsecured creditors in full or

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 payments under the plan. 11 U.S.C. §1325(b)(1)(B).

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

11 U.S.C. §1325(b)(2)(A), (B). The determination of whether an expense is "reasonably necessary" is not dependent on any precise formula. "The reasonableness of proposed discretionary expenses must be evaluated in light of debtors' income and Chapter 13 Plan payments." In re Anderson, 143 B.R. 719, 721 (Bankr. D. Neb. 1992).

Barker lists the previously discussed reaffirmed, "informally" reaffirmed and discharged debts as expenses in Schedule J. By doing so, Barker has artificially reduced his disposable income by $630 per month. Neither creditors nor Trustee can ensure that Barker would continue to pay the informally reaffirmed debts for which he has no personal liability. There is no guarantee Barker will adhere to this expense schedule if he later chooses to terminate payment. This Court concludes that expense payments of $630 are not reasonably necessary under §1325(b)(2) and should be included in Barker's disposable income.

Trustee has also objected to Barker's "Incidentals" expense of $100 on Schedule J. By testifying first that this constituted payment on reaffirmed debt and later that this constitutes an emergency cash fund, Barker has failed to convince the Court that this is a reasonably necessary expense. This amount should also be included in Barker's disposable income.

According to the amended Schedules, Barker has $199.50 excess income per month. Under the foregoing, Barker has an additional $730 available per month for plan payments. The Court concludes Barker's total disposable income under §1325(b) is $929.50. Barker's Chapter 13 plan which proposes monthly payments of less than that amount does not meet the disposable income test and is not confirmable.

GOOD FAITH

Under 11 U.S.C. § 1325(a)(3), a Chapter 13 plan, in order to be confirmed, must be proposed in good faith. Furthermore, a finding of bad faith authorizes the court to dismiss a Chapter 13 case. See 11 U.S.C. § 1307(c); see also In re Buchanan, 225 B.R. 672, 673 (Bankr. D. Minn. 1998); In re Belden, 144 B.R. 1010, 1019 (Bankr. D. Minn. 1992).

In this Circuit, the requisite elements for determining good faith have evolved through three significant cases. See In re Estus, 695 F.2d 311, 316 (8th Cir. 1982); Education Assistance Corp. v. Zellner, 827 F.2d 1222, 1227 (8th Cir. 1987); LeMaire, 898 F.2d at 1349. The Buchanan case extrapolates the relevant good faith test as:

a totality of the circumstances test with six factors earmarked for particular attention: (1) the debtor's accuracy in stating his debts and expenses; (2) the debtor's honesty in the bankruptcy process, including whether he has attempted to mislead the court and whether he has made any fraudulent misrepresentations in the matter of his bankruptcy; (3) whether the Code is being unfairly manipulated; (4) the type of debt sought to be discharged; (5) whether the debt would be nondischargeable under Chapter 7; and (6) the debtor's motivation and sincerity in seeking Chapter 13 relief.

Buchanan, 225 B.R. at 674.

The Court first examines Barker's conduct in disclosing his debts and expenses as well as his candor in this process. The Court has discussed, at some length, Barker's explanation of his disposable income and expenses. Inherent in the Court's determination of disposable income was the difficulty in acquiring exact figures as Barker's testimony often presented a "moving target". It was very difficult to acquire a true financial picture. Another example of Barker's failure to give a full and accurate disclosure of his finances is the nebulous manner in which he described payment of attorney fees. He testified he would pay attorney fees sometime in the future when he is able to. The law provides, however, that if these were fees from the Chapter 7 case, they were discharged in the Chapter 7 case. If they are Chapter 13 fees and not approved by the Court and treated in the Plan, they are not collectible thereafter. In re Thomas Digman, No. 98-00220-C, slip op. at 3 (Bankr. N.D. Iowa Aug. 17, 1998). Based on the complete record and the filed schedules, the Court must conclude that Barker's representation of his financial picture was often less than candid.

In considering the issue of good faith, the Court must consider the type of debt sought to be discharged. The only significant debt which is being treated in the Plan is the marital obligation owing to Vander Werf. Barker attempted to discharge this obligation in his Chapter 7 case. After being unsuccessful in doing so, he is now again attempting to modify the obligation in his Chapter 13 plan. Barker apparently paid few, if any, of his obligations to Vander Werf from the time of the discharge in the Chapter 7 case until the filing of the Chapter 13 petition. The Chapter 13 petition was filed one day prior to a contempt hearing in State court involving the allegation of his willful failure to pay this obligation.

Finally, the Court must examine Barker's motivation and sincerity in seeking Chapter 13 relief and whether he is unfairly manipulating the Bankruptcy Code. First, Barker's schedules were manipulated to artificially reduce disposable income. He has attempted to include, as expenses, debts for which he is not liable. Now, after almost all of his debts were discharged in the Chapter 7, Barker expresses the intent to reaffirm these obligations. He has included reaffirmed debts to Sears and Montgomery Wards as expenses when they should have been properly treated as secured or unsecured claims under the Plan. If the Plan is confirmed as proposed, Barker could discharge part of the debt which is presently owed to Vander Werf. If he accurately disclosed actual expenses and debts in his schedules, it is evident Barker is, in reality, capable of paying all debts in full, including Vander Werf's claim.

Second, Barker proposes a Plan with graduated and balloon payments. These features of the present Plan serve as nothing more than a delaying tactic. Barker has filed a Plan in which he makes small monthly payments for the first year, increasing progressively until the final three years of the Plan. While graduated payments are acceptable under certain circumstances, they must comply with Chapter 13 confirmation requirements. In re Lefler, No. 96-12601-C, slip op. at 2 (Bankr. N.D. Iowa July28, 1997). Here, the Plan payments are insufficient to pay the debt owed to Vander Werf. Additionally, Vander Werf's claim is based on a debt which she must pay off at $310 per month. The amount payable to Vander Werf through the proposed plan would be insufficient to allow Vander

Werf to meet her monthly obligations. Thus, during at least the first year of the Plan, Vander Werf is suffering additional losses because of the inadequacy of Plan payments. Confirmation of the Plan, as proposed, would have the effect of inflicting additional financial harm upon Vander Werf. Furthermore, Barker has badly understated his obligation to her. He presently owes the sum of $37,270.32. Barker scheduled the debt as $25,000.

In summary, it is the conclusion of this Court, based upon the record as a whole, that Barker originally filed the Chapter 7 petition for the exclusive purpose of discharging the obligation he owed to Vander Werf which arose from their dissolution decree. Because the adversary proceeding determined that the debt to Vander Werf was nondischargeable, Barker received a discharge in which all debts were discharged except of that owing to Vander Werf. Because his primary motivation in the Chapter 7 was to obtain discharge of the Vander Werf obligation and not necessarily the remainder of the debts, upon being granted a discharge, Barker proceeded to either formally or informally reaffirm or commence repayment of most of the obligations which were discharged in the Chapter 7 petition.

It is notable that Barker has been paying on these discharged obligations, but has failed to pay Vander Werf on the one obligation which was determined to be nondischargeable in the Chapter 7 petition. This failure to pay continued from the time of the entry of the discharge until Vander Werf filed a contempt application in State court seeking sanctions based upon Barker's willful failure to pay.

Under the Plan, Barker proposes to make graduated payments so payment of the majority of the obligation which is owed to Vander Werf is delayed as long as possible. An examination of the financial statements, when properly interpreted, reflect that Barker is capable of paying the obligation owed to Vander Werf if he foregoes payment of previously discharged debt. It is apparent that he would rather pay discharged obligations than those owing to Vander Werf. However, if his finances were properly managed, Barker would be capable of paying all his obligations, including the obligation owing to Vander Werf, without the necessity of a Chapter 13 Plan.

When viewed in its entirety, it is the ultimate conclusion of this Court that Barker's Plan has been proposed in bad faith. As such, in light of the fact that the proposed Plan contravenes the letter and spirit of the Bankruptcy Code, the Court finds that this Chapter 13 case has not been filed in good faith and must be dismissed.

WHEREFORE, Barker's Chapter 13 Plan violates the disposable income limitation and the good faith requirement of 11 U.S.C. §1325(a).

FURTHER, confirmation of Barker's Chapter 13 Plan is DENIED.

FURTHER, for the reasons set forth herein, the Court concludes that this Chapter 13 case has not been filed in good faith and cause exists to dismiss the case pursuant to 11 U.S.C. §1307(c)

FURTHER, for all the reasons set forth herein, this case is DISMISSED.

SO ORDERED this 16 day of November, 1998.

PAUL J. KILBURG

Paul J. Kilburg
U.S. Bankruptcy Judge