

In the United States Bankruptcy Court

for the Northern District of Iowa

JONATHAN ZAHNER
Debtor(s).

Bankruptcy No. 99-01666-W
Chapter 13

ORDER

This matter came before the undersigned on November 17, 1999 for hearing on Confirmation of Debtor's Chapter 13 Plan. Attorney Don Gottschalk represented Debtor Jonathan Zahner. Attorney Melvin Wolf represented Creditor Michael Nutting. Carol Dunbar appeared as Chapter 13 Trustee. Green Tree Financial filed an objection but was not represented at the hearing.

After the presentation of evidence and argument, the Court took the matter under advisement. The time for filing briefs has now passed and this matter is ready for resolution. This is a core proceeding under 28 U.S.C. §157(b)(2)(L).

STATEMENT OF THE CASE

Debtor seeks confirmation of his Amended Chapter 13 Plan. Mr. Nutting holds a default judgment against Debtor arising from an Iowa District Court action for assault and battery. He asserts Debtor's plan is filed in bad faith. Mr. Nutting also claims Debtor is not devoting his entire disposable income to the plan. Trustee joins in Mr. Nutting's objections to confirmation. She also objects that Debtor's schedules are inaccurate and that he has failed to turn over certain financial information. Green Tree Financial Corporation filed an objection that appears to have been settled.

FINDINGS OF FACT

The facts of this case are largely undisputed. On October 6, 1995, Michael Nutting obtained a default judgment in a state court action against Debtor for \$25,000 in actual damages and \$50,000 in punitive damages. The action was based on an alleged physical assault by Debtor against Mr. Nutting on May 19, 1995. Mr. Nutting has collected approximately \$2,360 on his judgment by garnishing Debtor's wages. The total claim, including interest, is now \$105,739.

Debtor filed for relief under Chapter 13 of the Bankruptcy Code on July 22, 1999. On August 31, 1999, Debtor filed an amended plan. This five-year plan proposes a dividend to unsecured creditors of approximately 12 per cent. Mr. Nutting's claim constitutes more than 80 per cent of Debtor's total unsecured debt. The parties do not dispute that this claim would be nondischargeable in a Chapter 7 case under §523(a)(6) as a debt arising from a willful and malicious injury.

CONCLUSIONS OF LAW

The Bankruptcy Code requires that the Court consider the 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 debtor who proposes a Chapter 13 plan bears the burden of proving that all requirements for confirmation of the plan are satisfied. In re Lewis, 170 B.R. 861, 862 (Bankr. D. Md. 1994); In re Nelson, No. 86-01554W, Adv. No. 1396, slip op. at 10 (Bankr. N.D. Iowa June 1, 1987).

GOOD FAITH

Mr. Nutting first claims the Plan is unconfirmable because Debtor proposed it in bad faith. He points out that Debtor seeks to discharge a debt in his Chapter 13 case that would be nondischargeable in a Chapter 7 proceeding. The issue is whether Debtor's use of the Chapter 13 "super discharge," together with other relevant circumstances, indicate that Debtor filed the Plan in bad faith.

A plan must be proposed in good faith and "not by any means forbidden by law." 11 U.S.C. §1325(a) (3). The Eighth Circuit has adopted a "totality of the circumstances" approach to determining a debtor's good faith. Education Assistance Corp. v. Zellner, 827 F.2d 1222, 1227 (8th Cir. 1987). This approach focuses on the following factors, none of which is alone determinative: 1) the accuracy of the debtor's schedules; 2) whether the debtor has made any fraudulent misrepresentations to the court; 3) the type of debt sought to be discharged; 4) the use of the super discharge; 5) the debtor's motivation and sincerity in seeking Chapter 13 relief; and 6) whether the debtor has unfairly manipulated the Code. Zellner, 827 F.2d at 1222; In re LeMaire, 898 F.2d 1346, 1349-53 (8th Cir. 1990); Noreen v. Slattengren, 974 F.2d 75, 77 (8th Cir. 1992).

Mr. Nutting correctly points out that a debtor's use of the super discharge is a relevant factor in a court's good faith analysis. LeMaire, 898 F.2d at 1352. Other circumstances indicating bad faith are necessary, however, to support a finding of bad faith. Id.

There are two principal factors that affect the "good faith" analysis when a debtor seeks the benefit of the super discharge. The first is the "moral repugnancy" of the act giving rise to the debt at issue. See Noreen, 974 F.2d at 77 (bankruptcy court's finding of bad faith not clearly erroneous where, inter alia, debtor sought to discharge potential liability for alleged sexual abuse of creditor); LeMaire, 898 F.2d at 1352-53 (denying confirmation of a plan that sought to discharge debtor's liability for shooting creditor five times); In re Nipper, 224 B.R. 756, 759 (Bankr. E.D. Mo. 1998) (distinguishing LeMaire and Noreen, and confirming plan that would discharge debtor's liability for embezzlement, because the conduct giving rise to the judgment was not as morally repugnant as that involved in LeMaire and Noreen, and the debtor had paid over two-thousand dollars of the judgment over a period of time); In re Martin, 189 B.R. 619, 624 (Bankr. E.D. Va. 1995) (distinguishing LeMaire, and confirming plan that would discharge an assault judgment because the conduct giving rise to the judgment does not "rise to the level" of the conduct involved in LeMaire); but see In re Sitarz, 150 B.R. 710, 725-26 (Bankr. D. Minn. 1993) (debtor seeking to discharge liability incurred through fraud filed Chapter 13 plan in bad faith where the creditors were individuals who suffered great economic harm as a result of the debtor's conduct).

The second factor that affects a court's "good faith" determination when a debtor will benefit from the super discharge is the debtor's general attitude and conduct toward the creditor at issue. The use of the super discharge does not support a finding of bad faith when the circumstances indicate that the debtor is genuinely seeking to reorganize and to rehabilitate the debtor's finances. Nipper, 224 B.R. at 759; Martin, 189 B.R. at 624.

The super discharge will support a finding of bad faith, however, when circumstances indicate that the debtor is using Chapter 13 merely as a means to continue to contest, thwart, or avoid liability for the judgment at issue. Noreen, 974 F.2d at 77 (bad faith where debtor filed because of potential liability for alleged sexual assault rather than because of debts that came due in the ordinary course); In re Kurtz, 238 B.R. 826, 830-31 (Bankr. D.N.D. 1999) (denying confirmation where debtor sought super discharge, proposed meager payment to creditors, and had transferred significant assets in anticipation of the judgment giving rise to the debt at issue); In re Norwood, 178 B.R. 683, 689 (Bankr. E.D. Pa. 1995) (finding bad faith where debtor's testimony indicated that he filed Chapter 13 as part of his strategy to defend a sexual assault claim filed in state court); In re Carsrud, 161 B.R. 246, 252-53 (Bankr. D.S.D. 1993) (bad faith where debtor paid all unsecured creditors except his sister, who held a claim against the debtor arising from rape, had "never accepted responsibility for his actions," and had taken "targeted" steps to avoid liability on the judgment at issue); In re Swan, 98 B.R. 502, 505 (Bankr. D. Neb. 1989) (bad faith where debtor sought super discharge, proposed three year plan, and debtor converted to Chapter 13 only after creditor objected to discharge of debt).

A. Severity of Debtor's Conduct

The conduct giving rise to the judgment at issue in this case is distinguishable from the conduct involved in LeMaire and Noreen. The debtor in LeMaire sought to discharge liability arising from an attempted murder. LeMaire, 898 F.2d at 1347. The debtor in Noreen sought to discharge potential liability for sexual assault. Noreen, 974 F.2d at 75. Indeed, many of the cases where a court has found bad faith involved conduct more severe than that involved in this case. *See, e.g.*, Norwood, 178 B.R. at 689 (sexual assault); Carsrud, 161 B.R. at 253 (rape of debtor's sister).

Debtor's conduct giving rise to the judgment at issue in this case is a physical assault. Although this conduct is serious and egregious, it does not rise to the level of conduct involved in LeMaire and Noreen. *See, e.g.*, Nipper, 224 B.R. at 759 (embezzlement not as serious as conduct involved in LeMaire and Noreen); Martin, 189 B.R. at 624 (assault does not "rise to the level" of the conduct involved in LeMaire). This is especially important because the court in LeMaire strictly limited its holding to the facts of that case. 898 F.2d at 1353. The Court, therefore, is mindful of the egregiousness of Debtor's conduct, but recognizes that the conduct does not rise to the severity of that involved in LeMaire. With that in mind, the Court will analyze Debtor's conduct toward Mr. Nutting.

B. Debtor's Attitude Toward Mr. Nutting

Conduct less severe than that involved in LeMaire and Noreen will support a finding of bad faith if there are additional circumstances indicating some type of mistreatment of the creditor involved. *See, e.g.*, Kurtz, 238 B.R. at 830-31 (bad faith where plan sought to discharge assault judgment and debtor hid and transferred significant assets during the trial of the underlying cause); Swan, 98 B.R. at 505 (bad faith where debtor sought to discharge assault and battery liability, converted the case from a Chapter 7 when creditor objected, and filed a three-year plan).

A debtor has not filed a Chapter 13 plan in bad faith where there are no circumstances, other than the benefit of the super discharge, to indicate that the debtor is using the Chapter 13 process to further malign a creditor. For example, the court in Nipper, held that a debtor who would benefit from the super discharge had proposed his plan in good faith. Nipper, 224 B.R. at 759. The debtor did not seek relief immediately after suit was filed, or judgment was entered, on the claim at issue. *Id.* The debtor had paid \$2,300 on the claim through garnishment over the course of nearly three years. *Id.* Moreover, the debtor filed for relief because of general financial hardship, including foreclosure actions against the debtor's home, rather than a belief that he was not in fact liable to the creditor at issue. *Id.* In short,

the court found no "other factors" indicating bad faith. Id.; see also LeMaire, 898 F.2d at 1352 (requiring factors other than the benefit of a super discharge to support a finding of bad faith).

Similarly, the debtor in Martin sought to discharge an assault judgment under Chapter 13's super discharge. Martin, 189 B.R. at 620. The debtor had paid \$600 on the claim, and proposed a six percent dividend to unsecured creditors over a thirty-six month plan. Id. The court applied the "totality of the circumstances" test to find that the debtor had proposed his plan in good faith. Martin, 189 B.R. at 622-24. The court relied primarily on the debtor's motivation in filing. Martin, 189 B.R. at 624. Finding that the debtor filed for relief because of financial hardship and a genuine desire to reorganize and rehabilitate his financial life, the court held that there were no "other circumstances" to support a finding of bad faith. Id.

In this case, Debtor has paid \$2,360 to Mr. Nutting over a period of approximately four years through garnishment. Debtor did not seek Chapter 13 relief on the heels of, or in anticipation of Mr. Nutting's 1995 judgment. Instead, Debtor testified that he sought bankruptcy advice only after Green Tree Financial threatened to bring a foreclosure action against his home. During that same time, Debtor also had his income tax refunds withheld because of debts he owed to another creditor.

It is clear that Debtor seeks relief from more than Mr. Nutting's judgment. Although Mr. Nutting's claim has increased Debtor's financial hardship, Debtor's financial problems extend beyond his debt to Mr. Nutting. There is no indication that Debtor filed for relief in an effort to thwart the legitimacy of Mr. Nutting's claim. Instead, it appears that Debtor seeks to reorganize and rehabilitate his finances in a manner consistent with the policies of Chapter 13.

The terms of the Plan further support the conclusion that Debtor is seeking to rehabilitate and reorganize his finances, rather than thwart Mr. Nutting. Debtor has proposed a five year plan, the maximum length allowed under the Code. 11 U.S.C. §1322(d). Although the dividend to unsecured creditors under the Plan is a modest twelve percent, Debtor devotes all of his disposable income to the Plan.

There are no circumstances indicating that Debtor filed the Plan out of a belief that Mr. Nutting's claim is not legitimate. Although Debtor did not contest Mr. Nutting's state court action, there is no indication that his failure to defend was because he planned to file Chapter 13 and discharge the liability. See, e.g., Norwood, 178 B.R. at 689 (bad faith where debtor did not contest state court action because of attorney's advice that he could discharge any liability in a Chapter 13). Indeed, Debtor has expressed remorse for his prior actions toward Mr. Nutting.

Mr. Nutting has failed to draw the Court's attention to any factor other than Debtor's benefit from the super discharge that indicates bad faith. The circumstances of this case indicate that Debtor filed the Plan in a legitimate and good faith effort to regain control over his finances. Being unable to find any "other factors" indicating Debtor filed the Plan in bad faith, the Court denies Mr. Nutting's objection to confirmation of the Plan.

II. Disposable Income

Mr. Nutting next claims the Plan is not confirmable because Debtor does not dedicate all of his disposable income to the Plan. A plan that proposes to pay less than 100% of all unsecured claims is only confirmable if the debtor commits all disposable income to the plan. 11 U.S.C. §1325(b). The Plan does not propose full payment to unsecured creditors. The Court, therefore, must determine whether Debtor is devoting all of his disposable income to the Plan.

The Code defines disposable income as the debtor's income less the debtor's "reasonably necessary" living expenses. 11 U.S.C. §1325(b)(2). The objecting creditor bears the initial burden under §1325(b) to produce satisfactory evidence that the debtor is not applying all disposable income to the plan. Education Assistance Corp. v. Zellner, 827 F.2d 1222, 1226 (8th Cir. 1987).

Debtor lists \$1,455.02 per month in income, and \$1,233.40 per month in expenses, leaving \$221.62 per month in disposable income. Debtor's Plan proposes monthly payments of \$220. None of Debtor's claimed expenses appear excessive. Nonetheless, Mr. Nutting objects that the Court should not confirm the Plan because "in the opinion of this creditor the debtor's best effort would allow him to pay at least \$500.00 monthly into the plan." Mr. Nutting has offered no evidence to support this statement.

Mr. Nutting also asserts that Debtor's "best efforts" require him to liquidate his IRA. Although the "best efforts" test requires a debtor to devote income distributed from an account to a Chapter 13 plan, it does not require a debtor to liquidate the corpus of the account for the benefit of creditors. See Zellner, 827 F.2d at 1225-26 (although relevant to the "best interest" test of §1325(a)(4), debtor's non-exempt IRA account is not relevant to the "best efforts" requirement of §1325(b)); In re Solomon, 67 F.3d 1128, 1132 (4th Cir. 1995) (corpus of IRA is not income); In re Baker, 194 B.R. 881, 885 (Bankr. S.D. Cal. 1996) (although "best efforts" test requires debtor to devote a stream of income, regardless of its source, it does not require a debtor to liquidate the corpus of an account for the benefit of creditors).

Mr. Nutting does not claim that liquidating Debtor's IRA account in a Chapter 7 would result in a payment to creditors greater than payments under the Plan. See 11 U.S.C. §1325(a)(4). Instead, Mr. Nutting claims that the "best efforts" requirement of §1325(b) requires Debtor to liquidate his IRA for the benefit of creditors. The Code does not impose such a requirement on a debtor. Mr. Nutting has offered no evidence that Debtor is not devoting all of his disposable income to the Plan. Debtor's expenses are reasonable as listed. Mr. Nutting's "best efforts" objection is overruled.

III. Trustee's Objections

Trustee objects to confirmation of the Plan because Debtor has not given her the financial information she needs to properly evaluate the Plan. Debtor has not listed all creditors. The Plan does not correctly treat all secured creditors. Debtor has not turned over copies of tax returns as requested. Debtor has not accurately reported his wages after garnishment and IRA deductions were discontinued. Debtor has not reported income and household expenses attributable to his girlfriend who has lived with him for seven years.

Although Debtor has amended his Schedules I and J, these schedules remain inaccurate and incomplete. Debtor has not amended to provide for the Iowa Department of Revenue claim that he mentioned at his §341 meeting. Also, Debtor did not list at least one of his student loan creditors and a Clerk's office to which he is paying fines.

Debtors have an obligation to provide accurate schedules and to cooperate with the trustee to "enable the trustee to perform the trustee's duties" under the Code. 11 U.S.C. §§521(1), (3). Debtor's failure to provide accurate schedules and to remit tax returns and pay stubs to Trustee is a violation of his duties under the Code. See also Local R. 4002-1. Trustee is unable to raise potential objections to confirmation without complete and accurate information. The Court is similarly unable to determine whether the Plan complies with the law without accurate schedules. As a result, the Court must deny confirmation of the Plan at this time.

CONCLUSION

The Court finds that Debtor filed the Plan in good faith. Although Debtor seeks the benefit of the Chapter 13 super discharge, there are no other circumstances that indicate Debtor is abusing the provisions of Chapter 13. Mr. Nutting's bad faith objection is overruled.

The "best efforts" requirement of the Code does not require Debtor to liquidate his IRA. Debtor's expenses appear reasonably necessary, and Mr. Nutting has failed to establish that Debtor is not devoting all of his disposable income to the Plan. Therefore, Mr. Nutting's "best efforts" objection is overruled.

Debtor has not complied with his duties under the Code and local rules to cooperate with the Trustee. Debtor has not corrected errors in his schedules or provided current tax and wage information to the Trustee. The Plan as now written contains various inaccuracies that prevent the Court from confirming it at this time.

WHEREFORE, for the above stated reasons, confirmation of the Plan is **DENIED**.

FURTHER, Mr. Nutting's objections to confirmation of the Plan are **OVERRULED**.

FURTHER, the Trustee's objections are **SUSTAINED** in part and **OVERRULED** in part.

FURTHER, Debtor has until December 29, 1999 to provide accurate information to Trustee as specified in Trustee's Brief and this Order.

FURTHER, if Debtor timely provides the information specified in Trustee's Brief and this Order, Debtor may file an amended plan addressing the matters noted above, at which time the amended plan will be set for a further confirmation hearing limited to those issues.

SO ORDERED this 9th day of December, 1999.

Paul J. Kilburg
Chief Bankruptcy Judge