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District of New Mexico

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
CHARLENE MARIE WETZEL,
Debtor. No. 13-00-10064 SA

MEMORANDUM OPINION

This matter came before the Court to consider confirmation of the Debtor's Chapter 13 Plan. The Debtor appeared through her attorney Donald Becker. Gary D. Wetzel and Stamen D. Wetzel ("Wetzels") appeared through their attorney Elvin Kanter. The Trustee appeared through her attorney Annette DeBois. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A) and (L).

FACTS

Debtor filed her Chapter 13 proceeding on January 7, 2000. On January 12, 2000, the Clerk's Office caused to be mailed the Notice of Commencement of Case and Section 341 Meeting. The original mailing list includes Gary D. Wetzel, Stamen D. Wetzel, James L. Tenner, Klaus H. Mau, and Kanter & Everage (the latter three being the Wetzels' various attorneys.) The deadline fixed for filing proofs of claim was May 5, 2000. Debtor filed her statements, schedules, and Chapter 13 plan on January 21, 2000. The Plan and Notice of Deadline to file objections to plan was sent to all creditors on January 21, 2000.

On Schedule A, Debtor lists a condominium[1], worth $83,700, with a mortgage against it of $41,254.94. Schedule B does not claim ownership of a $34,000 deposit in the California Superior Court Registry. Schedule D lists one secured creditor, the mortgage company. Schedule E lists no priority debts. Schedule F, unsecured debts, include four credit cards with a total balance due on them of $9,641.66, and the claims of the Wetzels based on a California lawsuit. Her Schedule I lists total income of $1,486.89, and Schedule J lists total expenses of $1,372.97.

The Plan calls for monthly payments of $100 for 36 months, but the Debtor may extend the plan up to 60 months if required to pay secured or priority creditors[2] in full. It also states "Debtor has a disputed claim against proceeds held under Court order in litigation with family members, which Debtor proposes to release in full settlement of their claims." The Plan's Class 1 consists of trustee fees and attorney fees. Class 2 consists of taxes and mortgage arrears, if any, and the Wetzels' claims in the disputed, unliquidated amount of $50,000. Class 3, secured debts to be paid directly by Debtor or from liquidation of collateral, consists of the condominium mortgage and the Wetzels'

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[1]The Wetzels assert that this condominium is held in constructive trust by Debtor.

[2]Debtor's plan states that her mortgage is current and that no taxes are owed, but states there are possible taxes from a tax audit.

claims (secured by the $34,000 in the California Superior Court). The Plan states "Debtor proposes to transfer funds to claimants, as a full and complete settlement of their claims." See Plan, page 4. Paragraph 4, "Payments Outside the Plan" provides:

> Debtor will pay the approximate funds of $34,000.00 to Plaintiffs, Gary D. Wetzel and Stamen D. Wetzel, being held under jurisdiction of Superior Court of California, in the Mater [sic] of Virgil D. Wetzel, case no., EP004354, if Plaintiffs will stipulate to a full and complete satisfaction of their claims, otherwise, Debtor anticipates claims litigation with the Plaintiffs.

Paragraph 5 provides:

> Any claim filed after the bar debt set forth on the Notice of § 341 meeting is deemed provided for by Confirmation of this plan and will receive the sum of zero ($0.00) in full satisfaction of its claim. This treatment will not affect a creditor's valid lien.

On February 1, 2000 the Internal Revenue Service objected to confirmation because the 1999 income tax return had not yet been filed; this objection was withdrawn on April 4, 2000. On February 15, 2000 the Wetzels objected to confirmation on the grounds 1) that the Debtor has failed to list all estate assets, 2) the plan was proposed in bad faith, as an attempt to avoid a debt which would be nondischargeable under Chapter 7, and 3) the plan fails the Chapter 7 liquidation test. On February 22, 2000 the Chapter 13 Trustee objected to confirmation on various grounds, requesting that Schedules B, I, and J be amended, requesting that the plan provide for payment of income tax

refunds to the trustee, requesting documentation of various expenses, and claiming that the plan was not filed in good faith because there appeared to be no dividend available for unsecured creditors.

On February 16, 2000 the Wetzels gave notice of a motion to dismiss and hearing set for March 13, 2000 to all creditors. The motion to dismiss was actually filed with the Court on March 1, 2000, and essentially argues that the case was filed in bad faith. Debtor objected to dismissal on March 6, 2000, claiming that the petition was filed in good faith. On April 5, 2000 the Wetzels filed a Supplemental Motion to Dismiss Case, claiming that Debtor included as an asset property that she holds in constructive trust. Debtor responded that the claim regarding a constructive trust was not relevant.

On March 1, 2000, the Wetzels also filed a motion for relief from automatic stay to prosecute the state court case against the Debtor currently pending in Los Angeles. Debtor objected on March 6, 2000 arguing that a proof of claim and claims objection process would be in the best interests of the estate, rather than continuing the Los Angeles litigation.

The Court held a preliminary hearing on confirmation on April 5, 2000 and fixed July 11, 2000 as the date for the final confirmation hearing. The Wetzels' counsel appeared at the April 5, 2000 hearing and had notice of the final hearing. The Wetzels

did not file a proof of claim by the May 9, 2000 deadline, or thereafter. On July 11, 2000 the Wetzels filed a brief in support of their objection to confirmation. The Court held a final confirmation hearing on July 11, 2000, which now results in this Memorandum. The Court points out that the only issues dealt with in this Memorandum are confirmation of the Chapter 13 Plan, the pending Motion to Dismiss, and the pending Motion for Relief from Automatic Stay. Any issues related to ownership of property or imposition of a constructive trust are not before the Court, because those matters require an adversary proceeding. See Bankruptcy Rule 7001(2) or (9).

At the confirmation hearing, Debtor's counsel represented that they had reached a stipulation with the trustee for confirmation[3]. Debtor provided the only testimony. The Court admitted Wetzel's Exhibits A and B as the only exhibits.

Debtor testified that she had been in litigation with her brothers in California for two years, and that to continue the litigation she would have had to hire a California attorney and fly herself and witnesses to California, and that on her salary she simply could not afford it. She had been living in Denver when her father became ill and she walked out on her life in Denver and moved to Pennsylvania to take care of him. Later they

[3]That stipulation included payment of all tax refunds and dividends to the Trustee

moved to California, then New Mexico. She incurred credit card debts during this time. Her father died, leaving approximately $56,000. She testified that his will provided for $3,000 each to an aunt and cousin with the remainder to be split between herself and two brothers (the Wetzels). The Wetzels filed a lawsuit during this time period, claiming that Debtor had misappropriated funds from her father during his lifetime. Upon the advice of her attorney, Debtor deposited the 2/3rds of the father's residuary estate into the California court's registry.

On cross examination Debtor testified that Exhibit B was an accounting provided to the California Court, and that a disbursement on March 6, 1998 of $43,000 to her was used as a down payment on the condominium, and that this was a gift from her father. Exhibit A is a minute order entered by the California Superior Court. Paragraph 7 states "The issue still remains regarding the legitimacy of gifts of the car and the condominium. This issue is to be determined at the final distribution hearing." Therefore, to the extent the Wetzels' objection to confirmation and motion to dismiss are based on an alleged constructive trust, see Wetzel's Memorandum of Law in Opposition to Confirmation at page 4 ("Debtor's Plan is not proposed in good faith in that it would allow the Debtor to retain wrongfully obtained property."), the Court finds that they have not met their burden of showing that any property is, in

fact, so held. What they have established is that they claim the property is held in constructive trust. As noted above, however, confirmation of this plan does not dispose of any ownership issues, nor does the plan itself demonstrate an intent to foreclose those issues.

CONCLUSIONS OF LAW

CONFIRMATION

Bankruptcy Code Section 1324 provides "After notice, the court shall hold a hearing on confirmation of the plan. A party in interest may object to confirmation of the plan." The only pending objection in this case is from the Wetzels. Debtor questions whether they are a "party in interest" because they have not filed a proof of claim. See In re Luna, Case 13-99-13304-SA, Memo Opinion (Bankr. D. N.M. April 11, 2000). It is true that Luna holds that a party who fails to file a proof of claim has no standing; however the creditor in Luna was an unsecured creditor. Compare Davis v. Mather, 239 B.R. 573, 579 (10th Cir. B.A.P. 1999):

> [W]e do not agree with the Debtor's extrapolation that a party in interest is limited solely to creditors... [Party in interest] is generally understood to include all persons whose pecuniary interests are directly affected by the bankruptcy proceedings. We extend this definition to include anyone who has an interest in the property to be administered and distributed under the Chapter 13 plan.

(Citations omitted).

In this case the Wetzels have not filed the proof of claim. They therefore cannot participate in any distributions from the trustee. However, they are treated in the plan as secured or partially secured creditors. The plan treats them by turning over the funds in the California Court Registry. This fund is not being "administered and distributed" under the Plan, the Debtor is treating it more as an abandonment of oversecured property and is a payment "outside the plan".

Three scenarios are possible. First, if the Wetzels are really unsecured creditors, they have filed no proof of claim and, as in Luna, have no standing to object to confirmation. Second, if the Wetzels are really secured creditors and turn out to be fully secured, then they are not affected by this Chapter 13 plan. Third, if it turns out that they are only partially secured creditors, they have waived the right to receive any dividends on their deficiency by failing to file a claim, and under Luna lack standing to object.

The Court therefore finds that the Wetzels have no pecuniary interest in the plan confirmation process and lack standing to object. The plan should be confirmed. However, even if the Court were to find the Wetzels had standing, the Court finds that the plan should be confirmed.

Section 1325(a) provides that the Court "shall confirm a plan if" six factors are met. If there is an objection by the

trustee or "the holder of an allowed unsecured claim", then the Court may not approve the plan unless one of two other conditions are met. Section 1325(b)(1). The Wetzels do not hold an allowed unsecured claim. Therefore, section 1325(b)(1) is not relevant, and the Court shall confirm if the six factors of section 1325(a) are met.

Although the Wetzels objection was based on three grounds, the only evidence presented by the Wetzels was cross examination of the Debtor[4] and submission of Exhibits A and B, which all went to the issue of good faith, or lack thereof. The Court therefore finds that the Wetzels have failed to meet their burden of persuasion with respect to their assertions that the schedules omitted assets and that the plan fails the chapter 7 liquidation test. See In re Mendenhall, 54 B.R. 44, 47 (Bankr. W.D. Ar. 1985)("[I]f 11 U.S.C. § 1325 places any burden on the Debtor, it is the burden of coming forward with evidence to rebut any evidence introduced in support of an objection by a creditor or the Chapter 13 trustee.") See also Robinson v. Tenantry (In re Robinson), 987 F.2d 665, 668 (10th Cir. 1993)("Generally, a party who refers to an issue in passing and fails to press it by

[4]Debtor's answers under cross examination completely supported her contention that the disbursement of $43,000 which she used to purchase the condominium was intended by her father to be a gift to her, and that there was no basis for a claim of constructive trust.

supporting it with pertinent authority, or by showing why it is sound despite the lack of supporting authority, forfeits the point.")(citation omitted).

The Court of Appeals for the Tenth Circuit has adopted a totality of the circumstances approach to the meaning of "good faith" in section 1325(a)(3) of the Bankruptcy Code. Flygare v. Boulden, 709 F.2d 1344, 1347 (10th Cir. 1983). The factors listed by the Flygare court are:

> (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.

Id. at 1347-48. The Court will address each factor in turn.

(1) The Debtor's Schedules I and J show disposable income of $113.92 and the plan calls for monthly payments of $100.00. Debtor is, essentially, paying all disposable income. She

has also agreed to pay any tax refunds and dividends to the trustee.

(2) There was no evidence regarding this factor.

(3) The plan's duration is 36 months, with an option to extend it to 60 months. "Absent some compelling reason and as long as debtors meet the requirements of § 1325, they should not be forced to pay into a plan that extends beyond three years." Washington Student Loan Guaranty Association v. Porter (In re Porter), 102 B.R. 773, 778 (9th Cir. B.A.P. 1989).

(4) There is no evidence that the plan or statements are inaccurate or that there was any attempt to mislead the Court. While the percentage dividend is not set forth in the plan, the Court finds that $11,138.51 of claims have been filed. Class 1 of the plan calls for attorney fees of $900.00. The plan calls for payments of at least $3,600.00 It appears that this will result in a dividend of about 20%.

(5) The plan does not give preferential treatment to any class of creditors. Furthermore, there is no classification of unsecured creditors. See 11 U.S.C. § 1322(b)(1).

(6) The plan does not modify any secured claims.

(7) The Wetzels argue that this element is dispositive. They claim that the debt owed to them would be nondischargeable under chapter 7 due to embezzlement or fraud. They also

cite to the timing of the Chapter 13 filing as evidence that Debtor was filing only to avoid the determination of her liability in the California suit. The Court disagrees that this is dispositive. Embezzlement or fraud, even if proved, would be only one factor to consider under Flygare. See also Matter of Chaffin, 836 F.2d 215, 216 (5th Cir. 1988)("The fact that [debtor] is invoking Chapter 13 to obtain discharge of a debt previously held non-dischargeable in Chapter 7 because it was incurred through fraud cannot, as a matter of law, suffice to show bad faith.") Compare In re Lilley, 91 F.3d 491, 496 (3rd Cir. 1996):

> It is therefore wholly implausible that Congress would hold that the type of conduct in which Mr. Lilley admittedly engaged [tax fraud] is so egregious as to warrant dismissal of his petition, but benign enough that the debt incurred as a result of this conduct would be dischargeable if no effort to dismiss his petition were made. ... We therefore join the Seventh, Ninth and Tenth Circuits in holding that the good faith of Chapter 13 filings must be assessed on a case-by-case basis in light of the totality of the circumstances.

Even if this element were dispositive, the Court would find in favor of the Debtor. The Debtor's uncontradicted testimony was that she had run out of money, had credit card debts, and was facing mounting legal fees and legal costs and simply could not pay based on her salary. While it is true that the timing of the filing may be viewed as an

indication of bad faith, the Debtor sufficiently explained that the California lawsuit was at the point where it needed cash to continue and she simply did not have it.

(8) There was no evidence of any extraordinary circumstances, other than the immediate need of cash to continue funding the lawsuit in California.

(9) The Debtor has not filed other bankruptcy petitions within the last six years. See Voluntary petition.

(10) The Court finds that the Debtor's motivation in filing the bankruptcy was to obtain a discharge of her debts while making a best effort payment into her chapter 13 plan. The plan does not attempt to determine property rights in the assets referred to in the California Superior Court's minute order.

(11) The plan is a relatively simple Chapter 13 plan and should place no administrative burden on the Chapter 13 Trustee.

The Court finds that, under Flygare, the Debtor has proposed the plan in good faith.

MOTION TO DISMISS

The Motion to Dismiss alleges that the case was filed in bad faith. The only evidence presented to the Court concerned the alleged prepetition fraudulent behavior by Debtor. The Court of Appeals for the Tenth Circuit has adopted a "totality of circumstances" approach to dismissal of a Chapter 13 case. Gier

v. Farmers State Bank of Lucas, Kansas (In re Gier), 986 F.2d 1326, 1329 (10th Cir. 1993). Having reviewed the Flygare factors in connection with confirmation, the Court also finds that the Chapter 13 case was not filed in bad faith. Furthermore, the Wetzels lack standing to seek dismissal of the Chapter 13 case. See In re Luna, Case 13-99-13304-SA, Memo Opinion (Bankr. D. N.M. April 11, 2000). The Court will enter an Order denying the Motion to Dismiss.

CONCLUSION

The Court finds that the Wetzels lack standing to object to confirmation of the Debtor's Chapter 13 plan because they failed to file a proof of claim. Even if they had standing, however, the Court finds that the Debtor proposed her plan in good faith as required by 11 U.S.C. § 1325(a)(3) as interpreted by In re Flygare. The Chapter 13 Trustee shall prepare an Order Confirming Chapter 13 Plan that incorporates the Trustee's agreements with the Debtor within twenty days of the entry of this Memorandum Opinion. The Court also finds that neither the Motion to Dismiss nor the Motion for Stay Relief are well taken and will therefor enter Orders denying the motions.

Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on the date stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered or mailed to the listed counsel and parties.

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