



IT IS ORDERED as set forth below:

Date: April 15, 2008

A handwritten signature in black ink, appearing to read "W. H. Drake", is written over a horizontal line.

**W. H. Drake
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

IN THE MATTER OF:	:	CASE NUMBER
	:	
JULIAN DON SHERROD,	:	07-12288-WHD
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
Debtor.	:	BANKRUPTCY CODE

ORDER

Before the Court is the issue of confirmation of a Chapter 13 plan proposed by Julian Sherrod (hereinafter the "Debtor"). Armanda Sherrod (hereinafter "Sherrod") has objected to confirmation. The Court held an evidentiary hearing on January 31, 2008. This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 11 U.S.C. § 157(b)(2)(L); § 1334.

FINDINGS OF FACT

The Debtor and Sherrod were married and divorced. Pursuant to the terms of the parties' settlement agreement (the "Settlement Agreement"), which was incorporated into the divorce decree, the Debtor was directed to pay certain debts. These included all mortgage payments, taxes, insurance, maintenance, utilities, and expenses related to the marital home, in which Sherrod and the parties' two minor children resided. The settlement agreement also anticipated that the Debtor would receive funds from a personal injury cause of action (the "Personal Injury Proceeds"), which was not yet resolved at the time the settlement agreement was executed. The Settlement Agreement required the Debtor to use Personal Injury Proceeds to satisfy certain obligations, including the first and second mortgages on the marital residence within 30 days of receipt.

The Debtor received approximately \$207,000 in Personal Injury Proceeds. Rather than using all of the Personal Injury Proceeds to pay the divorce-related debts, the Debtor used a portion of the proceeds to honor this obligation and approximately \$66,000 of the proceeds to buy motorcycles and electronics, furnish his apartment, to purchase jewelry for his current wife, and for payment of living expenses. When asked why he did not use all of the Personal Injury Proceeds to pay the divorce-related debts, the Debtor essentially testified that he did not have enough money to pay off the mortgage, he left the marriage with little to no property, felt that he had done enough for his ex-wife, and deserved to keep a little of the money for himself. He further testified that he had spoken with Sherrod about the fact that he did not have enough money to pay off the mortgage and that she was agreeable to

having him pay down the mortgage over time. Sherrod denies that she ever gave the Debtor permission to not pay off the mortgage or to use any of the Personal Injury Proceeds in a manner contrary to that provided for under the terms of the Settlement Agreement.

The Debtor did use the remainder of the Personal Injury Proceeds to pay almost all other obligations under the settlement agreement. The Debtor used the Personal Injury Proceeds to pay off Sherrod's student loan (\$12,811), Sherrod's automobile debt (\$16,900), various marital debts, and the second mortgage on the marital residence (\$26,766) and complied with his obligation to make certain repairs and improvements to the marital residence and to reimburse Sherrod \$1,094 for certain miscellaneous expenses. Additionally, the Debtor used a portion of the proceeds to make some of the first mortgage payments on the marital residence.

On September 25, 2007, the Debtor filed a voluntary petition under chapter 13 of the Bankruptcy Code. The Debtor's proposed chapter 13 plan anticipates payments through the plan to Sherrod of a domestic support obligation arrearage in the amount of \$4,850 and direct payments to Sherrod of on-going domestic support obligations as the payments come due. The plan also discloses the Debtor's intent to file an adversary proceeding to determine whether the Debtor's obligation to pay Sherrod's mortgage is dischargeable pursuant to section 523(a)(15). All allowed, general unsecured claims, however, would receive a 26% dividend. The Debtor estimates the total unsecured claims to be \$116,051, with the largest

claim being Sherrod's mortgage debt.¹ The Debtor's plan does not provide for payment of any secured claims. The plan would be funded through bi-weekly payments in the amount of \$357 for approximately five years and the contribution of the Debtor's 2007, 2008, and 2009 tax refunds.

CONCLUSIONS OF LAW

Sherrod objects to confirmation on the basis that the Debtor has failed to satisfy section 1325(a)(3), which requires that a chapter 13 plan must be proposed in good faith and not by any means forbidden by law. *See* 11 U.S.C. § 1325(a)(3). The Code does not define the term "good faith." To determine whether a plan has been proposed in "good faith," the "facts of each bankruptcy case must be individually examined in light of various criteria" to determine whether . . . there has been an abuse of the provisions, purpose, or spirit of [Chapter 13] in the proposed plan." *In re Kitchens*, 702 F.3d 885, 888-89 (11th Cir. 1983).

In *In re Kitchens*, the Eleventh Circuit provided a list of non-exclusive factors to assist bankruptcy courts in determining whether the debtor proposed a plan in good faith. These included "(1) the amount of the debtor's income from all sources; (2) the living expenses of the debtor and his dependents; (3) the amount of attorney's fees; (4) the probable or expected duration of the debtor's Chapter 13 plan; (5) the motivations of the

¹ Claims filed in the case, other than the two claims filed representing the mortgage debt and Sherrod's child support arrearage claim, indicate approximately \$10,000 of additional claims, for a total of \$124,517.

debtor and his sincerity in seeking relief under the provisions of Chapter 13; (6) the debtor's degree of effort; (7) the debtor's ability to earn and the likelihood of fluctuation in his earnings; (8) special circumstances such as inordinate medical expense; (9) the frequency with which the debtor has sought [bankruptcy] relief . . . ; (10) the circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealings with his creditors; and (11) the burden which the plan's administration would place on the trustee.” *In re Kitchens*, 702 F.3d 885, 888-89 (11th Cir. 1983); *see also In re Estus*, 695 F.2d 311, 317 (8th Cir. 1982) (under the tenth factor, court should consider the extent to which claims are modified, the extent of preferential treatment among classes of creditors, and whether such debt would be nondischargeable under chapter 7, and court should also consider whether the debtor has accurately stated his debts and expenses and whether the debtor has purposefully attempted to mislead the court).² In short, a plan satisfies the good faith requirement if, after considering the totality of the circumstances, the Court finds that there is a likelihood that the “plan will achieve a result consistent with the objectives and purposes of the Code.” *In re Hatem*, 273 B.R. 900 (S.D. Ala. 2001) (quoting *In re McCormick*, 49 F.3d 1524 (11th Cir. 1995)).

² Following the enactment of the Bankruptcy Amendments and Federal Judgeships Act of 1984, many courts have considered the first factor to have been subsumed by the so-called “disposable income” test and have held that the disposable income requirement prevents or limits the court’s ability to consider whether the debtor is contributing all of his income to the plan. *See In re Johnson*, 346 B.R. 256 (Bankr. S.D. Ga. 2006).

In this case, there is no indication from the evidence that the Debtor currently has a significant source of income in relation to his debts and expenses that he is not intending to contribute to the repayment of his creditors, that his living expenses are unreasonably high, that he is proposing to pay an unusually high amount of his income to attorney's fees, that his ability to earn or his income will substantially fluctuate during the life of his plan, that the Debtor has any special circumstances, such as inordinate medical expenses, or that the Debtor's case would create any unusual burden on the Chapter 13 trustee. The Debtor's motivation in seeking bankruptcy relief was broader than the simple desire to discharge his obligation to Sherrod. The Debtor does have unsecured debts to pay in addition to this obligation. The Debtor's testimony substantiates the fact that his inability to make his payments on Sherrod's obligation, his child support, and payments on his other unsecured debt led to his need to file a bankruptcy petition. The parties are in agreement and the evidence substantiates the finding that the Debtor did not have enough money to pay off the mortgage debt in full. Accordingly, even if he had used the funds according to the terms of the divorce decree, the Debtor's obligation to make the monthly mortgage payment as it came due would have remained. It is certainly true that, had the Debtor followed the provisions of the Settlement Agreement, he would have less debt to pay now. This, however, does not require a finding that he would not have been in a position in which he would have felt compelled to file for bankruptcy relief. The Court concludes that the Debtor was sincere in filing his chapter 13 petition. *See In re Young*, 237 F.3d 1168 (10th Cir.

2001), abrogated on other grounds, *Marrama v. Citizens Bank of Mass.*, 127 S. Ct. 1105 (2007) (the fact that debtor owed debts other than a nondischargeable debt supported finding that chapter 13 filing was not solely to bilk the creditor holding the nondischargeable debt).

The only factor that Sherrod focuses on to demonstrate the Debtor's bad faith is the tenth factor, which requires the Court to delve into the "circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealings with his creditors." Sherrod rightfully notes that the Debtor had the money to comply with at least a part of his obligation under the Settlement Agreement. If he had simply used those funds to pay down the mortgage, he would have been in a much better place when financial distress struck and he could have paid the remainder of the mortgage debt as a secured debt through his plan. Sherrod urges the Court to consider the fact that the Debtor did not simply breach a contractual obligation to pay a debt, but rather ignored the terms of the state court's order granting the divorce. First, the Court finds credible the Debtor's testimony that he at least believed that he had Sherrod's permission to continue paying the mortgage off over time. Second, although the fact that the Debtor was, nonetheless, in contempt of the divorce decree is troubling, it alone does not persuade the Court that the filing of the Debtor's plan was in bad faith. *See In re Smith*, 286 F.3d 461 (7th Cir. 2002) ("Congress has made it clear that some debts, although nondischargeable in Chapter 7, may be discharged under the more liberal rules of Chapter 13. We are not free to second-guess Congress' policy choice in this

regard. What is required is “‘that the plan must be ‘*proposed* in good faith,’ not that the debt was incurred in good faith. ‘[A] Chapter 13 plan may be confirmed despite even the most egregious pre-filing conduct where other factors suggest that the plan nevertheless represents a good faith effort by the debtor to satisfy his creditor's claims.’”) (citations omitted).

The Debtor is not a serial filer, and, in fact, this is his first bankruptcy case.³ He has not attempted to hide income or inflate his expenses in order to propose a plan that pays little of his debts. He is proposing a significant dividend to unsecured creditors when viewed against the total amount of his debt. This is also not a case in which the Debtor, dissatisfied with the terms of his divorce, failed to appeal the divorce decree and simply chose to ignore its terms and make no attempts to satisfy its obligations. Rather, the Debtor complied with the bulk of the terms of the divorce decree. The fact that the Debtor failed to use available funds to pay off the mortgage debt does not warrant a finding that, under the totality of the circumstances, the Debtor did not propose his plan in good faith. The Debtor has voluntarily submitted himself to the jurisdiction of this Court, knowing that this Court may well determine that the debt is nondischargeable. In that event, Sherrod’s interest in having her mortgage paid will be protected, and the Debtor will receive legitimate bankruptcy relief as to his other creditors.

³ It should also be noted that this is not a case in which the Debtor first filed a chapter 7 petition in an attempt to completely discharge his debts, only to convert to chapter 13 in order to avoid the attempt of a creditor to obtain a judgment of nondischargeability.

CONCLUSION

For the reasons stated above, the Court finds that the Debtor's plan satisfies the requirement of section 1325(a)(3). Accordingly, Sherrod's objection to confirmation is **OVERRULED**.

Any remaining confirmation issues will be addressed at a hearing to be held on **May 8, 2008 at 9:10 a.m.** in Second Floor Courtroom, 18 Greenville Street, Newnan, Georgia.

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