

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA**

In re)	
)	CASE NO. 04-13968-BKC-RAM
OSMAR ESCALONA,)	
)	CHAPTER 13
Debtor.)	
)	

ORDER DENYING MOTION TO DISMISS

On May 5, 2005, the Court conducted a hearing on DirecTV’s Motion to Dismiss this Chapter 13 case (“Motion to Dismiss”). DirecTV seeks dismissal on the basis that Debtor’s chapter 13 plan was not filed in good faith. After considering the briefs filed by the parties, arguments of counsel and relevant case law, the Court denies DirecTV’s Motion to Dismiss.

Factual Background

DirecTV’s Motion to Dismiss is based on the following facts. In 2003, DirecTV brought suit against the Debtor in the United States District Court. The suit alleged that the Debtor intentionally engaged in the unauthorized use of DirecTV’s satellite transmissions in violation of several federal statutes. On February 4, 2004, the Honorable Paul C. Huck entered judgment in favor of DirecTV and against the Debtor for \$30,000 (the “Judgment”). Following entry of the Judgment, and before DirecTV could enforce it, Debtor filed chapter 7 on May 4, 2004. In his schedules, Debtor listed DirecTV as an unsecured creditor holding a non-priority claim in the amount of \$51,252. This scheduled amount constituted over half of Debtor’s listed unsecured debt.¹

On August 3, 2004, DirecTV filed an adversary proceeding seeking to except the Judgment

¹The total unsecured, non-priority debt was scheduled at \$91,491. Most of the other unsecured liabilities consist of credit card debt.

from discharge pursuant to 11 U.S.C. § 523(a)(6)(the “523 Action”). Debtor did not file an answer in the adversary proceeding and the Clerk entered a default. On September 1, 2004, before DirecTV could obtain default final judgment, Debtor converted his case to one under chapter 13. Upon conversion, the 523 Action was dismissed since the wilful and malicious injury exception to discharge in 523(a)(6) is not applicable in a chapter 13 case.

Debtor initially filed a chapter 13 plan which provided for five years of monthly payments to unsecured creditors, including DirecTV, totaling \$6,732. At the request of the chapter 13 trustee, Debtor filed a second amended chapter 13 plan which proposed to pay unsecured creditors \$9,460 over five years.² Although an increase from the initial chapter 13 plan, this latter sum will still result in little more than a 10% payout to unsecured creditors.

Discussion

DirecTV opposes the plan and seeks dismissal of Debtor’s chapter 13 case. DirecTV posits that Debtor’s motivation for converting to chapter 13 was to avoid a ruling in DirecTV’s favor in the 523 Action.³ DirecTV points out that the timing of Debtor’s conversion to chapter 13 was more than coincidental since the Debtor converted his bankruptcy case only after DirecTV filed the 523 Action. Based on this fact and on the small payout to unsecured creditors, DirecTV argues that Debtor’s

²The amended chapter 13 plan proposes to pay unsecured creditors \$15.53 for months 1 to 5; \$65.12 for months 6 to 12 and \$185.96 for months 13 to 60. Debtor’s total monthly income is \$1,392 as reported in his Amended Schedule I. Including his wife’s income, the total combined monthly income of Debtor is \$2,915. Debtor’s monthly expenses are \$2,757 leaving \$158 a month in excess income.

³Although the 523 Action was dismissed, Debtor’s counsel at oral argument conceded that DirecTV would have succeeded in excepting the Judgment from Debtor’s discharge. Accordingly, the Court assumes that the Judgment would have been excepted from discharge pursuant to § 523(a)(6).

chapter 13 case should be dismissed because the Debtor's chapter 13 plan was not filed in good faith.⁴ The Court rejects this argument.

The Bankruptcy Code requires a chapter 13 plan to be filed in "good faith." 11 U.S.C.A. § 1325(a)(3). Although not defined in the Bankruptcy Code, several courts, in attempting to define exactly what "good faith" is in this context, have provided an exhaustive list of factors to consider. See, e.g., Kitchens v. Georgia Railroad Bank & Trust Co., 702F.2d 885 (11th Cir. 1983).⁵ Notwithstanding the usefulness of such factor tests, no test concludes that good faith is lacking solely because a debtor seeks to discharge a debt in a chapter 13 plan that would be non-dischargeable in a chapter 7 case. See Hardin v. Caldwell (In re Caldwell), 895 F.2d 1123, 1127 (6th Cir. 1990)(stating "it is not conclusively bad faith for a debtor to seek to discharge a debt incurred through his own criminal or tortious conduct, but that factor may be considered."). The reason for this is apparent when considering the congressional intent of chapter 13 of the Bankruptcy Code: "The premises of the bill with respect to consumer bankruptcy are that use of the bankruptcy law

⁴Creditor DirectTV also argued that Debtor's conversion from chapter 7 to chapter 13 was filed in bad faith. However, this Court rejects an interpretation of 11 U.S.C. § 706(a) that imposes a good faith component at the time of conversion since § 706(a) grants an absolute right to convert from chapter 7 to chapter 13 if the case was not previously converted. But see, e.g., Finney v. Smith, 992 F.2d 43 (4th Cir. 1993)(adding element of good faith to conversion under 706(a)).

⁵Such factors include, but are not limited to, the amount of the debtor's income from all sources; the living expenses of the debtor and his dependents; the amount of attorney's fees; the probable or expected duration of the debtor's chapter 13 plan; the motivations of the debtor and his sincerity in seeking relief under the provisions of chapter 13; the debtor's degree of effort; the debtor's ability to earn and the likelihood of fluctuation in his earnings; special circumstances such as inordinate medical expense; the frequency with which the debtor has sought relief under the Bankruptcy Code and its predecessors; 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 the burden which the plan's administration would place on the trustee. Kitchens, 702 F.2d at 888-89.

should be a last resort; that if it is used, debtors should attempt repayment under chapter 13.” H.R. Rep. No. 95-595, 95th Cong. (2d Sess. 1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6080. Such intent is clearly expressed in the Bankruptcy Code through the super-discharge provisions set forth in 11 U.S.C. § 1328 which allow for the discharge of “bad act” debts. In short, Congress, attempting to motivate debtors to pay something to creditors in chapter 13, allowed debtors to discharge certain debts in chapter 13 that would otherwise be non-dischargeable in chapter 7.

This Court agrees with DirecTV that attempting to utilize chapter 13 to discharge a bad act debt in conjunction with other circumstances can amount to a lack of good faith in a proposed chapter 13 plan. Caldwell, 895 F.2d at 1123; In re McGovern, 297 B.R. 650 (S.D. Fla. 2003); In re Peterson, 228 B.R. 19 (Bankr. M.D. Fla. 1998) overruled on other grounds by In re Baker, 264 B.R. 759 (Bankr. M.D. Fla. 2001). In Caldwell, the court held that the debtor systematically concealed assets throughout the bankruptcy process, including failure to disclose an IRA account, denial of ownership in real property when in fact the debtor had several years of ownership in the property, evading question regarding tax refunds and debtor’s removal of his name from a joint savings account held with his wife. The court found these additional circumstances sufficient to hold that the chapter 13 plan was not filed in good faith. In Peterson, the court found that the chapter 13 plan was not filed in good faith because the debtor’s proposed plan paid less than 2% of unsecured claims over the statutory minimum period without accounting for the possibility that the debtor’s income would substantially increase over the life of the plan.

This case is not analogous to those situations where an individual has gone through great lengths “to reduce the assets available to his creditors, to make minimal payments and over the shortest possible time, and to make even those only when threatened” with legal action. Caldwell,

895 F.2d at 1128. Nor is this a case where the “debtor is attempting to abuse the judicial process and circumvent the purposes of the reorganization provisions.” Peterson, 228 B.R. at 19. Rather, the Debtor is attempting to pay his unsecured creditors, including DirecTV, at least some portion of their debts. There are no allegations that Debtor is concealing assets. Debtor’s second amended plan provides for payments over five years, a duration well over the statutory minimum of three years. Moreover, although the payments amount to only 10% of Debtor’s listed unsecured liabilities, these payments comprise substantially all of Debtor’s income and therefore, leads this Court to conclude that Debtor “is intent on repaying [DirecTV] as much as possible in a genuine effort at rehabilitation.” McGovern, 297 B.R. at 660.

Simply stated, there are no additional circumstances here that makes this case analogous to those instances where a debtor’s chapter 13 plan was rejected because of a lack of good faith. The mere fact that Debtor is attempting to discharge a non-dischargeable debt in a plan that is otherwise confirmable does not constitute a lack of good faith. It is therefore --

ORDERED that DirecTV’s Motion to Dismiss is denied.

ORDERED in the Southern District of Florida, this 21st day of September, 2005.

ROBERT A. MARK
Chief United States Bankruptcy Judge