In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:	)	
	)	Chapter 13 Case
MICHAEL MAX SACKS	)	
f/d/b/a Floorworks General Contractors	)	Number 00-41973
2612 Dogwood Avenue	)	
#D-24	)	
Savannah, Georgia 31404	)	
	)	
Debtor	)	

MEMORANDUM AND ORDER

Linda and James Olson filed an "Objection to Exemption of Linda and James Olson" in Debtor's chapter 13 case. The matter came before the court at the confirmation hearing wherein the Olsons appeared to assert their objection which is substantively an objection to confirmation of the proposed plan on the ground that the plan has not been proposed in good faith pursuant to 11 U.S. C. § 1325(a)(3). At the conclusion of the confirmation hearing, the Court took the matter under advisement and invited the parties to submit briefs and documentation in support of their respective positions. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L). The Court, having considered the briefs, arguments, and other documentation submitted by the parties, now enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

During May 1999, Michael Max Sacks d/b/a Floorworks General Contractors ("Debtor") contracted with Linda and James Olson (the "Olsons") to perform various construction and renovation projects on their residence. Debtor received an initial payment of $10,000.00 and took weekly draws on the project. After receiving approximately $27,500.00 from the Olsons, Debtor ceased work on the project. Debtor failed to satisfactorily complete the work as promised and the Olsons retained a third party to complete the project. Subsequently, the Olsons filed suit in State Court against Debtor on July 14, 1999, asserting counts for negligent construction, breach of contract, breach of warranty, fraud, emotional distress, and attorney's fees. When Debtor failed to file an answer to the lawsuit, the Olsons filed a Motion for Entry of Default which was granted by the State Court. After a hearing on the Olsons' request for damages, the State Court entered judgment on March 1, 2000, in favor of the Olsons in the amount of $39,940.93. The judgment included damages for breach of contract, defective workmanship, consequential damages, attorney fees, and $1,000.00 of punitive damages for fraud.

On May 10, 2000, the Olsons took a post-judgment deposition of Debtor for the purpose of discovering assets. Debtor did not have counsel appear with him at the deposition. Debtor was questioned regarding his interest in real property several times during the deposition. Debtor testified that he did not own any real property and that approximately 21 acres of real property located in Bulloch County, Georgia, was, and always had been, in his wife's name. (Sacks Dep. at 9 and 21-22). Debtor also testified that the property was purchased around 1997 and was owner-financed by George and Sarah

Kendrick. (Sacks Dep. at 21-22).

On July 20, 2000, Debtor filed for protection under Chapter 13 of the Bankruptcy Code. Debtor's Schedule A of Real Property lists "21.23 acres located in Bulloch County, Georgia, 460 Pope Road, South, Ellabell, Georgia," with a value of $32,000.00. Debtor's Schedule D of Secured Creditors lists "George M. Kendrick" as the secured creditor on the 21.23 acre tract in Bulloch County with a debt of $32,960.00. There are seven (7) other secured creditors listed on Schedule D. Debtor's Schedule E of Priority Claims lists Child Support Recovery for $12,741.00. Finally, Debtor's Schedule F reflects $58,381.00 of unsecured debt for numerous creditors, with the Olsons being listed as the largest claimant for $40,016.00. Debtor's budget reflects that he is self-employed in the floor covering business with monthly income of $3,350.00 and monthly expenses of $3,025.00.

Debtor's chapter 13 plan proposes payments of $325.00 per month for sixty (60) months in order to pay a pro rata dividend to the unsecured creditors. The plan also proposes to surrender the Bulloch County property to George M. Kendrick in partial satisfaction of the claim, as well as to surrender a 1996 mobile home, a 1997 Dodge truck, a construction trailer, and a computer. Debtor seeks to retain a 1989 Ford truck, a bedroom suit, and wedding rings. The plan proposes to avoid the Olsons' lien pursuant to 11 U.S.C. § 522(f) and pay their claim as unsecured.

A title search of the Bulloch county records conducted by the Olsons after

the deposition reflected that the property located at 460 Pope Road South was titled in the name of "Max and Shirley A. Sacks." At the confirmation hearing, Debtor testified that he believed the property had been foreclosed upon prior to the May 10 deposition although he had not received any documentation regarding the foreclosure. The foreclosure of the property actually occurred on July 5, 2000, and is reflected in the "Deed Under Power" that was filed in Bulloch County on July 19, 2000, by George M. Kendrick. Debtor also testified that he was no longer living on the property as he and his wife separated in February 2000. Debtor's drivers license has been suspended by the State of Georgia due to his failure to pay child support.

CONCLUSIONS OF LAW

Section 1325(a) of the Bankruptcy Code provides that the Court shall confirm the proposed chapter 13 plan if all of the enumerated requirements have been met.[1] One of these requirements is that the plan has been proposed in good faith and not by any

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[1] 11 U.S.C. §1325(a) provides:

(a) Except as provided in subsection (b), the court shall confirm a plan if –

(1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28 [28 U.S.C. §§ 1911 et seq.], or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for by the plan -

(A) the holder of such claim has accepted the plan;

(B) (i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder; and

(6) the debtor will be able to make all payments under the plan and to comply with the plan.

means forbidden by law. "The term 'good faith' is not defined by the Code, and courts making a good faith inquiry must 'judge each case on its own facts after considering all the circumstances of the case.'" In re Wilcox, 251 B.R. 59, 64 (Bankr. E.D.Ark. 2000)(citing United States v. Estus (In re Estus), 695 F.2d 311, 316 (8th Cir. 1982))(other citations omitted). This Court has held that the "good faith requirement is one of the central, perhaps the most important confirmation finding to be made by the Court in any Chapter 13 case." In the Matter of Whipple, 138 B.R. 137, 139 (Bankr. S.D.Ga 1991)(citing Matter of Kull, 12 B.R. 654, 658 (S.D.Ga. 1981), *aff'd sub nom.* In re Kitchens, 702 F.2d 885 (11th Cir. 1983)). "The Chapter 13 debtor bears the burden of proving good faith if a creditor objects." In re Hendricks, 250 B.R. 415, 420 (Bankr. M.D.Fla. 2000)(citing In re Caldwell, 895 F.2d 1123 (6th Cir. 1990)).

In the case of In re Kitchens, the Eleventh Circuit Court of Appeals provided guidance by delineating the following factors to aid courts in the determination of whether debtors have proposed chapter 13 plans in good faith:

> (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 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 relief under the Bankruptcy Reform Act and its predecessors;
> (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;
> (11) the burden which the plan's administration would place on the trustee.

In re Kitchens, 702 F.2d 885, 888-89 (11th Cir. 1983). The Eleventh Circuit noted that "other factors or exceptional circumstances may support a finding of good faith, even though a debtor has proposed no or only nominal repayment to unsecured creditors." Id. at 889 (citing In re Estus, 695 F.2d at 317). The Eleventh Circuit also concluded that the court should consider the type of debt to be discharged and whether such debt would be nondischargeable under chapter 7. Id. This Court has recognized that good faith must be considered under the "totality of the circumstances." Matter of Whipple, 138 B.R. at 139. Thus, no one factor will be determinative of good faith and the Court will consider all the circumstances surrounding the Debtor's pre-petition activity and the filing of the chapter 13 case. In re Petersen, 228 B.R. 19, 24 (Bankr. M.D. Fla. 1998). "Under the totality of the circumstances test the Court should determine if there has been abuse of the provisions, purpose, or spirit of Chapter 13." Matter of Whipple, 138 B.R. at 143 (other citations omitted).

The Olsons contend that Debtor has failed to demonstrate "bona fides" in his dealings with them. Specifically, they assert that Debtor fraudulently contracted his debt with them, admitted to engaging in fraudulent conduct by failing to file an answer to the lawsuit which caused the default judgment to be entered, and continued to defraud them after the entry of the default judgment by failing to disclose his one-half (½) interest in the Bulloch County property during the post-judgment deposition. The Olsons assert that

Debtor sought bankruptcy protection once they discovered his interest in the property and that Debtor is attempting to hide his fraudulent actions behind the protections afforded by the Bankruptcy Code. Debtor responds that his chapter 13 plan has been proposed in good faith in light of the totality of circumstances. Debtor admits that he was not able to complete the construction project in a manner which was consistent with the representations made at the outset of the contract and asserts that the problems were the result of poor weather, poor judgment, poor craftsmanship, and negligence. Debtor disputes that he intended to defraud the Olsons or that he wilfully breached the contract. In his reply brief, Debtor admits that his deposition testimony regarding his interest in the Bulloch County property was not correct but notes that he also testified that he believed the property had always been in his wife's name. Debtor contends that he was not able to defend the lawsuit due to his poor financial condition and that he sought bankruptcy protection to rehabilitate his deteriorating financial condition.

The Olsons raise a valid argument that Debtor's dealings with them lack "bona fides" because Debtor's pre-petition conduct with them has not been earnest. Debtor entered into the contract by giving the Olsons assurances regarding the construction and quality of workmanship for the project, as well as the expected completion date. Despite his representations and assurances, the quality of the workmanship was poor and Debtor failed to complete the project after receiving approximately $27,500.00 in draws from the Olsons. Debtor failed to take any action to defend the complaint filed against him by the Olsons in State Court. The State Court found that punitive damages were appropriate pursuant to O.C.G.A. § 51-12-5.1(b) and awarded $1,000.00 for punitive damages based

on the tort of fraud in the inducement.[2] All of these factors weigh against a finding that the debtor has demonstrated "bona fides" in his dealings with the Olsons. However, the circumstances under which Debtor contracted his debts and his lack of "bona fides" in his dealings are only one factor for the Court to consider in confirming the chapter 13 plan. "A Chapter 13 plan may be confirmed despite the most egregious pre-filing conduct where other factors suggest that the filing of the plan nevertheless represents a good faith effort by the debtor to satisfy his creditor's claims." In re Britt, 211 B.R. 74, 78 (Bankr. M.D.Fla. 1997)(other citations omitted).

The Olsons assert that Debtor's testimony at the post-judgment deposition further evidences his lack of "bona fides" as they allege that Debtor's failure to disclose his interest in the Bulloch County property was an attempt to conceal assets. After reviewing the transcript, the Court is persuaded that the discussions of the Bulloch County property during the deposition are not conclusive that the Debtor was attempting to hide his interest in the property. Debtor denied any interest in real estate but disclosed the existence of the property in question several times during the deposition. Debtor's erroneous testimony that he did not have any interest in real property was based on his belief that the property was, and always had been, in his wife's name. Debtor also testified at the deposition that he was not living on the property and that he had never signed any

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[2] O.C.G.A. §51-12-5.1(b) provides:

> Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.

papers transferring title to the property to his wife since the Olson's filed suit. (Sacks Dep. at. 6 and 23). Debtor was separated from his wife, was not living at the property, and it was foreclosed upon less than two months later. The existence of the property as a marital residence was not concealed. In light of the totality of the testimony, I find his testimony about lack of record title, standing alone, to be insufficient to establish a willful attempt to conceal or defraud.

The Olsons allege that the Debtor's motivations for seeking relief under chapter 13 is to avoid liability for his fraudulent actions toward the Olsons and to discharge the judgment debt. The Olsons cite the cases of Memphis Bank & Trust Company v. Whitman and Matter of Wall to support their argument that the timing of the filing of the case reflects a lack of good faith. The Sixth Circuit Court of Appeals in Memphis Bank & Trust Company v. Whitman considered a case where a debtor obtained an automobile loan using inflated income figures, failed to make any payments on the car note, filed a chapter 13 petition within two months after incurring the debt, and sought to reduce the monthly payment on the note and to extend the note to 60 months. The Sixth Circuit stated that courts should consider the debtor's pre-petition conduct and not allow a debtor to profit from dishonest means through the filing a chapter 13 petition within a few days of the wrong. Memphis Bank & Trust Co. v. Whitman, 692 F.2d 427, 432 (6th Cir. 1982). In the Matter of Wall case, the Court found that the plan was not proposed in good faith where the debtors readjusted their assets to remove them from the reach of creditors in anticipation of an adverse state court judgment. Matter of Wall, 52 B.R. 613 (Bankr. M.D.Fla. 1985).

The Court recognizes that the timing of Debtor's filing indicates an attempt to avoid payment to the Olsons on the judgment and raises questions as to Debtor's motivations and sincerity in seeking chapter 13 relief. Debtor's petition was filed four and one-half (4 ½) months after entry of the State Court judgment and more than two (2) months after the deposition. However, "[t]he fact that bankruptcy followed in close proximity to a particular creditor's obtaining judgment against the debtor does not give that creditor special status cognizable under the bankruptcy code." In re March, 83 B.R. 270, 277 (Bankr. E.D.Pa. 1988). The Court believes that Debtor's actions in this case are distinguishable from the deliberate actions of the debtors in the Memphis Bank & Trust and Wall cases cited by the Olsons. Debtor's schedules and his testimony at the confirmation hearing reflect his need for bankruptcy relief for reasons other than the Olsons' judgment. Debtor chapter 13 plan addresses numerous other creditors, including a delinquent child support obligation. While the filing of the chapter 13 petition halted the Olsons' collection efforts, the evidence does not support a finding that the primary purpose of this chapter 13 case was to abuse the judicial process and hinder or frustrate the Olsons' collection efforts. *See* In re Peterson, 228 B.R. 19 (Bankr. M.D.Fla 1998)(Court found that Debtor's primary purpose in filing chapter 13 was to impede state court litigation where judgment was near a final determination). The Court finds that the existence of the Olsons' judgment and the timing of filing should not preclude chapter 13 relief for the Debtor.

"In assessing a debtor's motivations and sincerity in seeking chapter 13 relief, courts have examined such facts as the degree to which creditors are made whole through plan payments, the length of the plan, the amount of disposable income allocated

to the plan, and the debtor's need for relief." In re Wilcox, 251 B.R. at 67-68 (other citations omitted). This is Debtor's first bankruptcy petition. Debtor is proposing to surrender several of his valuable assets, which will reduce his expenses, while seeking to retain a 1989 Ford truck, a bedroom suit, and wedding rings. Debtor is not seeking to retain luxury items at the expense of his unsecured creditors. Debtor has a delinquent child support problem which will be addressed through the chapter 13 plan. Although the anticipated distribution to unsecured creditors is approximately ten percent (10%), Debtor is demonstrating a sincere effort to repay his creditors in that he is dedicating all of his disposable income to the plan over sixty (60) months. There is no allegation that Debtor has made any fraudulent misrepresentations to the Court or in his schedules. A review of Debtor's budget reflects that his living expenses are not extravagant. Taking a broader perspective of Debtor's financial situation, the Court is persuaded that Debtor's overall financial condition reflects a need for chapter 13 relief and that the chapter 13 petition was filed for rehabilitative purposes and not solely as a vehicle to defeat the Olsons' claim. *See* In re Wilcox, 251 B.R. 59 (Bankr. E.D.Ark. 2000)(Court found chapter 13 plan proposed in good faith after weighing Debtors' pre-petition conduct and misleading testimony against the accuracy of the schedules, sincerity, and motivations for seeking bankruptcy relief).

Pursuant to Kitchens, the type of debt which a debtor seeks to discharge is relevant to the consideration of whether a plan has been proposed in good faith. The Olsons argue that their judgment debt would be nondischargeable under Sections 523(a)(4)

or (a)(6) in a chapter 7 case under the theory of collateral estoppel.[3] "[A] default judgment issued by a state court may have collateral estoppel effect in a bankruptcy proceeding to prevent relitigation of issues underlying the determination of dischargeability". Sterling Factors, Inc. v Whelan, 245 B.R. 698, 704 (N.D.Ga. 2000)(other citations omitted). The Olsons assert that collateral estoppel would apply in this case because Georgia courts recognize that a default judgment under Georgia law is equivalent to a decision on the merits. Id. at 706; Branton v. Hooks (In re Hooks), 238 B.R. 880, 885 (Bankr. S.D.Ga. 1999). Debtor even conceded in his reply brief that the debt may be nondischargeable in a chapter 7 case under a theory of judicial estoppel.

Arguably, the Olsons' debt may be excepted from discharge if this were a chapter 7 proceeding. However, chapter 13 of the Bankruptcy Code provides a more liberal provision for the discharge of all debts with a limited number of exceptions.[4] "Through operation of the statutes, Congress anticipated that debtors could utilize Chapter 13 as a means of discharging otherwise nondischargeable debts." In re Paulsen, No. 94-03147, 1995 WL 128473, at *1 (Bankr. D. Idaho Mar. 27,1995). Section 1328(a) specifically permits chapter 13 debtors to discharge the type of debt at issue in this case. 11 U.S.C. §1328(a). "[A] plan is not per se filed in bad faith merely because it proposes

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[3] 11 U.S. C. Section 523(a)(4) provides that a debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny is not discharged in a chapter 7 case. 11 U.S.C. Section 523(a)(6) provides that a debt for willful and malicious injury by the debtor to another entity or to the property of another entity is not discharged in a chapter 7 case.

[4] Debts which are excepted from discharge in chapter 13 are for the curing of default on long-term debt when the final payment is due after the proposed final chapter 13 plan payment, debts for alimony and child support obligations, debts for certain educational loans, debts for the death or personal injury caused by the debtor's unlawful operation of a vehicle while intoxicated, and debts for restitution, for a criminal fine, included in a sentence on the debtor's conviction of a crime. 11 U.S.C. §1328(a).

to discharge a debt that is nondischargeable in a chapter 7." In re Wilcox, 251 B.R. at 67. *See also* In re Britt, 211 B.R. at 74 (Court found plan proposed in good faith despite fraudulent character of debt for embezzlement which Debtor sought to discharge in chapter 13 proceeding even though debt was determined nondischargeable in a prior chapter 7 proceeding).

In conclusion, the Olsons had a good basis for asserting this good faith objection to confirmation because Debtor's pre-petition conduct and testimony at the post-judgment deposition presented a close case on the issue of "bona fides" and raised an issue as to whether Debtor was attempting to manipulate the Bankruptcy Code by filing this chapter 13 petition. However, having considered the facts of the case under the Kitchens factors and the totality of the circumstances in the filing of the case, the Court finds that there has been a satisfactory showing that the plan has been proposed in good faith. The plan meets the requirements for confirmation pursuant to 11 U.S.C. § 1325. Debtor had legitimate reasons for seeking chapter 13 relief to rehabilitate his financial condition, not solely to discharge the Olsons' judgment debt. The Court finds that the proposed plan does not constitute an abuse of the provisions, purpose, or spirit of the Bankruptcy Code.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the "Objection to Exemption of Linda and James Olson" is overruled and Debtor's proposed chapter 13 plan is confirmed. The Trustee shall

calculate the payment necessary to adequately fund the plan as proposed and issue the appropriate salary order.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of March, 2001.