

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 13 Case
)	Number <u>89-10079</u>
JOEL THOMAS McDONALD, SR.)	
FRANCES FROLINE McDONALD)	
)	
Debtors)	
)	
BANK OF BURKE COUNTY)	FILED
)	at 3 O'clock & 27 min P.M.
Movant)	Date 9-1-89
)	
vs.)	
)	
JOEL THOMAS McDONALD, SR.)	
FRANCES FROLINE McDonald)	
)	
Respondents)	

ORDER

Joel Thomas McDonald, Sr. and Frances Froline McDonald, debtors in this Chapter 13 proceeding, have proposed through modification a Chapter 13 plan to pay Thirty and No/100 (\$30.00) Dollars weekly for a period of 60 months resulting in a pro rata distribution to unsecured creditors to which Bank of Burke County, hereinafter "Bank", as the largest unsecured creditor, has objected. Confirmation hearing was held July 20, 1989, and this court makes the following findings of fact and conclusions of law.

The Chapter 13 trustee's analysis indicates eight allowed creditor claims all of which are unsecured in the total amount of

Twenty Three Thousand Five Hundred Twenty-Four and 99/100 (\$23,524.99) Dollars. The claim of the Bank represents approximately 60% of the debt. Educational loans due Pennsylvania Higher Education Assistance Agency equals

approximately 33% of the debt. The balance of the debt appears from the claims filed to represent medical expenses. The Bank has objected to confirmation contending that the plan was not proposed in good faith pursuant to 11 U.S.C. §1325(a)(3). The factual basis for this contention is not in dispute.

This Chapter 13 proceeding was filed on January 20, 1989. On June 16, 1989, the debtor Joel Thomas McDonald, Sr., hereinafter "debtor", entered into a real estate transaction with Timothy and Donna Kelly wherein the debtor purchased approximately five acres of unimproved real estate in Burke County, Georgia for Ten Thousand Eight Hundred and No/100 (\$10,800.00) Dollars. The purchase was financed in full by the sellers accepting a note and deed to secure debt covering the five acres in question from debtor. The note and deed to secure debt provided for interest at the rate of ten percent (10%) per annum payable in monthly installments of One Hundred Forty-Two and 74/100 (\$142.74) Dollars each, beginning on the 16th day of July, 1989, and continuing on the 16th day of each month thereafter until paid in full, except that the final payment, if not sooner paid, shall be due and payable on June 16, 1999.

In response to the allegations of the Bank, debtor testified at the confirmation hearing that he purchased the property

for his sister, the property had been transferred to this sister, and she had assumed the debt. He further testified that it was the understanding of all parties associated with the closing that the

debt was his sister's, and not his obligation. Debtor testified that the reason for the transaction being closed in his name was that his sister was on vacation when the property became available, and an immediate closing was necessary to avoid losing the property.

As he did not hold a power of attorney from her, it was necessary to close in his name. The debtor further testified that his sister had also purchased a mobile home, which has been located on the property in question, and the debtors are leasing the mobile home

and the land from his sister for Two Hundred Sixty-Eight and No/100 (\$268.00) Dollars per month. Debtor maintains that he holds no interest in the property, and no obligation toward payment of the debt due against the property.

The Bank contends that confirmation should be denied based upon this transaction as evidence of a bad faith filing, and that, according to the Bank, "debtors have violated the provisions of the Bankruptcy Code, specifically, debtors have incurred secured debt after the filing of the bankruptcy without first obtaining approval of the court." As to the latter contention, the Bank fails to cite any code provision allegedly violated by the debtors in incurring this post-petition obligation. The only provision of Chapter 13 which addresses the issue of post-petition debts is 11 U.S.C. §1305. Section 1305 provides:

(a) A proof of claim may be filed by any entity that holds a claim against the debtor

1. for taxes that become payable to a governmental unit while the case is pending; or
2. that is a consumer debt, that arises after the date of the order for relief under this chapter, and that is for property or services necessary for the debtor's performance under the plan.

(b) Except as provided in subsection (c) of this section, a claim filed under subsection (a) of this section shall be allowed or disallowed under Section 502 of this title, but shall be determined as of the date such claim arises, and shall be allowed under §502(a), 502(b) or 502(c) of this title, or disallowed under §502(d) or 502(e) of this title, the same as if such claim had arisen before the date of the filing of the petition.

(c) A claim filed under subsection (a)(2) of this section shall be disallowed if the holder of such claim knew or should have known that prior approval by the trustee of the debtor's incurring the obligation was practicable and was not obtained.

This section does not contain a prohibition against post-petition indebtedness, it merely provides the procedures for dealing with such indebtedness. This court has long recognized the inequities

of a debtor securing the benefits and protection of this court and at the same time incurring additional debt post-petition. To remedy this problem, the standard order of confirmation of a Chapter 13 plan provides "3) Debtor shall not incur any indebtedness without the approval of the Court or the Trustee." However, in this case confirmation is still at issue.

While this debtor who incurred a post-petition debt is not in specific violation of the Bankruptcy Code or order of this court, whether incurring a post petition debt for the purchase of approximately five acres of unimproved real estate evidences a bad faith filing remains for consideration. The confirmation criteria under 11 U.S.C. §1325(a)(3) provides in pertinent part

"(a) . . . , the court shall confirm if -

. . .

(3) the plan has been proposed in good faith . . .

Although a comprehensive definition of good faith is not practical, broadly speaking, the basic inquiry should be whether under the circumstances of the case there has been an abuse of the provisions, purpose and spirit of Chapter 13. Kitchens v. Georgia Railroad Bank and Trust Company, 702 F.2d 885 (11th Cir. 1983). The Kitchens decision basically sets forth 13 factors to be considered on the question of good faith. Of those 13 factors two are relevant to this inquiry:

(a) The motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13; and

(b) The circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealings with his creditors.

At the conclusion of the confirmation hearing in this case, and based upon the unrebutted evidence presented by the debtor, as to the circumstances surrounding the purchase and financing of the property in question, this court withheld confirmation pending the filing by the debtor of adequate proof that the debtor's obligation

to the Kellys, sellers and financiers of the property in question, was satisfied. In response, the debtor has now filed a quit-claim deed from Joel McDonald, Sr. to Gloria M. Peluso dated July 19 1989, describing the same property purchased by the debtor with the additional language as follows:

"This property is conveyed subject that security deed from Joel McDonald, Sr. to Timothy Kelly and Donna Kelly recorded in Deed Book 169 page 756 of the deed records of Burke County, Georgia; and, as a part of the consideration for this deed, party of the second part assumes and agrees to pay the unpaid balance of principal and interest owed thereunder and secured thereby and also hereby assumes obligations of the maker of said security deed under the terms of said security deed the balance of said indebtedness being \$10,747.25 as of the date of this conveyance."

The problem with this document is that it does not release the debtor from the obligation. It merely creates an obligation between the debtor and Ms. Peluso whereby Ms. Peluso has agreed to meet the payments as called for in the obligation of the debtor. The Kellys are not parties to this document and have not released the debtor. If in fact the property was purchased for the benefit of Ms. Peluso and all parties to the transaction were aware of this as the basis for the purchase, a release by the Kellys or refinancing by Ms. Peluso with satisfaction of the outstanding security deed and note signed by the debtor is appropriate.

The failure of the debtor to provide this documentation in support of his testimony does cause this court to question the motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13. In addition, the circumstances under which this debtor has contracted this debt demonstrates a clear lack of bona fides in dealing with not only the Kellys, but also the creditors which he proposed to include within his Chapter 13 filing and pay 28.9% of their allowed claims. This court cannot conclude that the debtors' plan is proposed in good faith, and confirmation must therefore be denied. The debtor has not demonstrated a commitment to the purpose and spirit of

Chapter 13 rehabilitation and repayment. It is obvious that the debtors cannot manage the repayment of their present debt without the protection of this court, yet, while under this court's protection preventing creditors from enforcing their claims, debtor, Joel Thomas McDonald, Sr., has obligated himself for Ten Thousand Eight Hundred and No/100 (\$10,800.00) Dollars in additional debt. The Court of Appeals for the Eleventh Circuit articulated the responsibility of this court in conducting a confirmation hearing when it stated:

"We hold that with §1325(a)(3) Congress intended to provide bankruptcy courts with a discretionary means to preserve the bankruptcy process for its intended purpose. Accordingly, whenever a Chapter 13 petition appears to be tainted with a questionable purpose, it is incumbent upon the bankruptcy courts to examine and question the debtor's motives. If the court discovers unmistakable manifestations of bad faith, as we do here, confirmation must be denied.

Unmistakable manifestations of bad faith need not be based upon a finding of actual fraud, requiring a proof of malice, scienter or an intent to defraud. We simply require that the bankruptcy courts preserve the integrity of the bankruptcy process by refusing to condone its

abuse.

The cornerstone of the bankruptcy courts has always been the doing of equity. The protection and forgiveness inherent in the bankruptcy laws surely requires conduct consistent with the concept of basic honesty. Good faith or basic honesty is the very antithesis of attempting to circumvent a legal obligation through a technicality of the law. In re: Walderon, 785 F.2d 936, 941 (11th Cir. 1986) See also Flygare v. Boulden 709 F.2d 1344, 1347 (10th Cir. 1983); U.S. v. Estus, 695 F.2d 311, 316 - 17 (8th Cir. 1982); In re: Ringale, 669 F.2d 426, 431 - 32 (7th Cir. 1982).

Although the Bankruptcy Code has no specific provision prohibiting a debtor from incurring a post petition debt, such a transaction as here may provide the factual basis for finding a lack of good faith in filing and denying confirmation of a Chapter 13 plan. As this is a joint case, IT IS THEREFORE ORDERED that confirmation of the debtors' plan is denied.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 1st day of September, 1989.