

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:) Chapter 13 Case
) Number 89-12003
EDWARD C. SMITH)
BERNICE B. SMITH)
)
Debtors)

_____)
)
BARNETT BANK OF ATLANTA) FILED
) at 4 O'clock & 23 Min. P.M.
Movant) Date: 8-10-90
)

vs.)
)
EDWARD C. SMITH)
BERNICE B. SMITH)
AND SYLVIA FORD DRAYTON, TRUSTEE)
)
Respondents)

ORDER

Barnett Bank of Atlanta ("Barnett Bank") the holder of a claim in this Chapter 13 proceeding objects to confirmation.

Barnett Bank sets forth four grounds for objection:

1. the plan was not proposed in good faith, 11 U.S.C. §1325(a)(3);
2. the debtor is unable to make the payments under the plan and to comply with the terms of the plan, 11 U.S.C. §1325(a)(6);

3. future interest to be paid under the plan on the secured portion of Barnett Bank's allowed claim results in the value, as of the effective date of the plan of property to be distributed under the plan on account of such claim to be less than the allowed amount of such secured claim, 11 U.S.C. §1325(a) (5) (B) (ii); and

4. The plan fails to comply with the provisions of Chapter 13 in that the plan fails to provide for assumption or rejection of executory contracts between the debtors and Barnett Bank, 11 U.S.C. §1322(b) (7) and §1325(a) (1).

Based upon the testimony presented at the continued confirmation hearing and the pleadings of record in this case, this court makes the following findings of fact and conclusions of law.

Barnett Bank is a secured creditor and a party in interest in this Chapter 13 proceeding as the holder of a note and security agreement executed by the debtor Edward C. Smith dated October 6, 1989 pursuant to which Barnett Bank is the holder of a perfected first priority purchase money security interest in the debtor's 1987 Chevrolet S-10 Blazer truck. The debtor Edward C. Smith failed to make any payments to Barnett Bank and filed for relief under Chapter 13 of Title 11 United States Code on December 20, 1989. Under the debtor's initial proposed plan the

collateral, the truck, securing the loan of Barnett Bank was valued at Nine Thousand and No/100 (\$9,000.00) Dollars.

According to the unobjected to claim of

Barnett Bank, as of the date of filing, the pay off balance due Barnett Bank was Twelve Thousand Four Hundred Fifty Three and 32/100 (\$12,453.32) Dollars. Under the proposed plan Nine Thousand and No/100 (\$9,000.00) Dollars of the allowed claim will be treated as secured and the balance, Three Thousand Four Hundred Fifty Three and 32/100 (\$3,453.32) Dollars, will be treated as unsecured. Prior to the initial confirmation hearing, the debtors modified their plan and the confirmation hearing was continued to June 29, 1990. At the first continued confirmation hearing the debtors proposed an increase in payments to the Chapter 13 trustee to Three Hundred Seven-Seven and No/100 (\$377.00) Dollars monthly for a period of sixty (60) months. Barnett Bank pursuant to its objection to confirmation filed June 19, 1990 appeared and announced ready to pursue their objection. At the request of the debtors confirmation was again continued.

At the final continued confirmation hearing, the trustee announced that she was receiving regular disbursements from the debtor's employer. The trustee further announced that at the now proposed payment a 71% dividend was projected to the unsecured creditors. The trustee opposed Barnett Bank's request to be paid the contract rate of 17.5% on the secured portion of its claim.

According to the modified budget filed May 18, 1990, the debtors have total income into their household from all sources of One Thousand Six Hundred Fifteen (\$1,615.00) Dollars and require One

Thousand Two Hundred Eighty-Two and No/100 \$1,282.00) Dollars for living expenses which includes a direct payment to Goldome Credit Corporation ("Goldome") of Five Hundred Forty-Three and 35/100 (\$543.00) Dollars per month on their home. According to the debtors, this Chapter 13 filing was caused by a period of unemployment of debtor Edward C. Smith from November 1989, until January, 1990. Mr. Smith is now employed and the current modified budget represents the pre-unemployment income and living expense level of the household. As of the final hearing on confirmation, the debtors were delinquent at least three (3) post-petition payments to Goldome. According to the debtors' budget, they have excess income of Three Hundred Thirty-Three and No/100 (\$333.00) Dollars above necessary living expenses. According to the allowed and unobjected to proofs of claim filed in this proceeding, in the time frame after the purchase of the truck on October 6, 1989 and before filing on December 20, 1989, the debtors had the following monthly debt payment obligations:

Security Finance Corp.	\$84.00
Covington Credit Corp.	45.00

Farmers Furniture Company	66.00
W.S. Badcock Corp.	81.00
Federal Diversified Services	64.12
Barnett Bank	341.26
Union Mortgage Company, Inc.	102.86
Total monthly payments	784.24

On October 5, 1989 and November 20, 1989 the debtors entered into loan transactions with Security Finance Corporation resulting in the

extension of new credit totaling Three Hundred Ninety-Seven and 09/100 (\$397.09). On September 9, 1987 the debtor's executed a note and security agreement now held by Federal Diversified Services reflecting an amount financed of Two Thousand Five Hundred Twenty Eight and 96/100 (\$2,528.96) Dollars. On October 6, 1989 the debtor Edward C. Smith purchased the Blazer truck. On December 1, 1989 the debtors entered into a note and security agreement now held by Union Mortgage Company, Inc. reflecting an amount financed of Four Thousand Fifty-Two and 79/100 (\$4,052.00) Dollars.

The first issue presented is whether this filing meets the good faith criteria for confirmation under 11 U.S.C. 1325(a) (3).¹ This court is charged with the duty of making a case

¹11 U.S.C. §1325(a) (3) provides;

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

(3) the plan has been proposed in good faith

by case inquiry to determine whether the proposed Chapter 13 plan meets the statutory criteria of good faith. In re: Hale, 65 B.R. 893 (Bankr. S.D. Ga. 1986); In re: Steele, 34 B.R. 172 (Bankr. M.D. Ala. 1983). 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 or spirit of Chapter 13 in the proposed plan.

Kitchens v. Georgia Railroad Bank & Trust Co. 702 F.2d 885 (11th Cir. 1983). The Kitchens decision basically sets forth 13 factors to be considered on the question of 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 attorneys 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 expenses;
9. The frequency with which the debtor has sought relief under the Bankruptcy Reform Act and its predecessor;
10. The circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack or same, in dealing with his creditors;
11. The burden which the plan's administration would place upon the trustee;
12. The substantiality of repayments; and
13. The potential nondischargeability of debt in a Chapter 7 proceeding.

Kitchens v. Georgia Railroad Bank & Trust Company, supra at 888.

and not by any means forbidden by law.

In applying the non-exclusive Kitchens criteria in any good faith determination, one adverse factor standing alone usually is insufficient to establish a lack of good faith in filing; however, under certain circumstances, such as found in this case, one single criteria may establish a bad faith filing. In this case, the circumstances under which these debtors contracted their debts and their demonstrated lack of bona fides in dealing with their creditors establishes bad faith. Between September 1, 1989 and November 1, 1989 during which the debtors had disposable income

available to pay monthly debt obligations of Three Hundred Thirty-Three and No/100 (\$333.00) Dollars, the debtors incurred new debts totaling Fourteen Thousand Three Hundred Seven and 18/100 (\$14,307.18) Dollars with monthly payments totaling Four Hundred Thirty-Nine and 38/100 (\$439.38) Dollars. According to the debtors, after November 1, 1989 they experienced a substantial drop in monthly income into their household which caused this filing; but when faced with this drop in income they incurred additional debts totaling Four Thousand Four Hundred Twenty-Three and 11/100 (\$4,423.11) Dollars with additional monthly payment obligations of One Hundred Fifty-Two and 86/100 (\$152.86) Dollars.

Clearly, the actions of these debtors in the few months immediately preceding their Chapter 13 filing demonstrate a complete lack of commitment to the spirit and purpose of Chapter 13. These debtors could not possibly repay the debts incurred in the few months immediately proceeding the bankruptcy filing even before the drop in income. This filing is not for the purpose of affording the debtors an opportunity to set forth a plan of repayment of debts to the extent possible in an orderly fashion from distributions from future income while retaining assets and maintaining a reasonable standard of living, see In re: Higginbotham, Chapter 13 Case No. 88-60192 (Bankr. S.D. Ga. March 22, 1989); In re: Hatcher, Chapter 13 Case No. 89-10834 (Bankr. S.D. Ga. March 14, 1990); but reflects an effort on the part of these debtors to use the provisions of

Chapter 13 to force the renegotiation of debt obligations which they could never have honored and apparently never intended to honor. 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 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 concepts 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: Waldron, 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: Rimgale, 669 F.2d 426, 431-32 (7th Cir. 1982).

In addition to a finding of bad faith, this court determines that the debtors cannot make all payments under the plan in compliance with 11 U.S.C. §1325(a)(6).² The

²11 U.S.C. 1325(a)(6) provides:

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

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

plan is not feasible. According to the modified budget filed by the debtors all disposable income is being provided to the Chapter 13~trustee; however, as of the date of the final continued hearing on confirmation the debtors admit at least three (3) post-petition payment arrearage to Goldome. At their current level of income, the debtors are not capable of meeting the payment to the Chapter 13 trustee and the payment directly to Goldome.

This court having determined that the debtors filed their Chapter 13 proceeding in bad faith and failed to set forth a feasible plan of repayment, consideration of the remaining grounds for objection of Barnett Bank is unnecessary. In addition to denial of confirmation, this court may issue any order that is necessary or appropriate to prevent an abuse of process. See, 11 U.S.C. §105(a).

It is therefore ORDERED that the objection to confirmation of Barnett Bank is sustained and confirmation of the debtors' plan is denied. Further ORDERED that pursuant to 11 U.S.C. §105(a) and the prayer for such other relief as this court deems just and proper in the objection to confirmation of Barnett Bank, this Chapter 13 proceeding shall be dismissed by appropriate

order.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 10th day of August, 1990.