

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

IN RE:)
)
GREGORY L. HUNTER) CHAPTER 13 BANKRUPTCY
EVYONE G. HUNTER,) CASE NO. 93-41649
)
)
DEBTORS)

BEFORE

JAMES D. WALKER, JR.

UNITED STATES BANKRUPTCY JUDGE

COUNSEL:

For the Debtors: R. WADE GASTIN
Post Office Box 8012
Savannah, Georgia 31412

For the Movant: GARY M. WISENBAKER
Post Office Box 13426
Savannah, Georgia 31416

For the Chapter 13 Trustee: KARROLLANNE CAYCE
Post Office Box 10556
Savannah, Georgia 31412

MEMORANDUM OPINION

A Motion For Stay Relief and, in the alternative, a Motion To Dismiss was filed by Commercial Credit Plan, Incorporated ("Movant"), a creditor in this case.¹ A hearing was held before the Court on December 16, 1993. After considering the evidence and arguments of counsel, the Court publishes these Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

This Chapter 13 case is the fourth in a series filed by Gregory Hunter in this Court. The first case was filed on November 18, 1988, as Case Number 88-41276. It was voluntarily dismissed fourteen months later on February 1, 1990. The second case was filed on January 26, 1990 as Case Number 90-40165. It was voluntarily dismissed thirty-four months later on October 29, 1992. The third case was filed on October 28, 1992, as Case Number 92-42208. It was voluntarily dismissed nine months later on September 29, 1993. This case, the fourth in the series, was filed on September 24, 1993, five days before the dismissal of the previous case. Unlike the previous cases, this case is a joint petition filed by both Gregory Hunter and Evyone Hunter

¹ It is unclear whether Movant has withdrawn its motion. Two identical motions were filed with the Court on November 5, 1993, and November 12, 1993. The Court's file indicates that one of the motions was withdrawn in open court. The file further indicates that this Chapter 13 case was confirmed on February 23, 1994. Because the results reached herein are consistent with the withdrawal of the motion and confirmation of the plan, the Court issues this memorandum opinion and order for the purpose of resolving outstanding issues in this case.

("Debtors").

The Court held a hearing on the motion three months following the filing of this case. Movant proved that Gregory Hunter has spent fifty-one months under the protection of this court during the pendency of these four cases. Over the course of Gregory Hunter's previous cases, he paid a total of Two Thousand Three Hundred Forty Dollars and Seventy-One Cents (\$2,340.71) towards Movant's claim.

The balance of Movant's claim in the amount of Three Thousand Four Hundred Twenty-Four Dollars and Nineteen Cents (\$3,424.19) is secured by a 1979 Summit Mobile Home manufacturer's identification number H14337G. Debtors have proposed to pay Movant's claim in full with interest.

CONCLUSIONS OF LAW

Movant has requested stay relief or in the alternative dismissal of this case. As for the request for stay relief, it does not appear that Movant has satisfied the requirements of 11 U.S.C. § 362(d).² While the Court has considered the question

² Section 362(d) provides:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the automatic stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay...

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under subsection (a) of this section, if...

(A) the debtor does not have any equity in such property; and

(B) such property is not necessary to an effective reorganization.

of whether the stay relief should be granted "for cause"³, it does not appear that the "for cause" language in that section is addressed to the conduct of Gregory Hunter in preceding cases. This concept is especially inappropriate in this case where the evidence shows that Movant's claim will be paid in full with interest if the plan is confirmed. The jeopardy to Movant, based on Gregory Hunter's bankruptcy history, is not sufficient to serve as a basis for relief from the automatic stay in this case.

The next question is whether Mr. Hunter's bankruptcy history warrants a dismissal of this case. As to that question, the Court concludes that serial filings, as a singular evidentiary matter, can not serve as a basis for dismissal of a case. While it is possible that serial filings would cause Movant to suffer an economic loss, there is no evidence to show that Movant has actually suffered any such loss as a consequence of this case or the three previous filings. While movant may consider Debtors' activities to be a nuisance, and while that attitude may be an understandable by product of serial filings, it is not a basis sufficient to support a grant of the relief requested by Movant.

It is essential to recognize that Movant is an over secured creditor that is projected to receive full repayment of its debt with interest. The duration of the repayment could have been the subject of an objection to confirmation. Nothing stated

³ 11 U.S.C. § 363(d)(1).

here should be construed as endorsement of the duration of this Chapter 13 repayment plan. What is decided here is that this case will not be dismissed and the stay relief will not be granted. Those two remedies are extreme and are available only to prevent abuse. Movant has failed to present any evidence that would warrant imposition of either of these remedies on the grounds stated.

The last question is whether the relief should be granted "for cause" or the case dismissed because of the inability of Debtors to obtain confirmation of a Chapter 13 Plan. Movant cites two cases to the Court in support of the position that Debtors only have nine months from the date of the hearing to complete payments under this Chapter 13 Plan. The two cases cited are In re Huerta, 137 B.R. 356 (Bankr. C.D. Cal. 1992) and In Re Thomas, 123 B.R. 552 (Bankr. W.D. Tex. 1991).

Huerta and Thomas are part of a line of cases which would limit the total amount of time a debtor could stay in bankruptcy to the statutory limit of the life of a single plan. These courts view serial Chapter 13 filings as a single plan, and state that the time limits imposed by 11 U.S.C. § 1322(c)⁴ prohibit any series of plans which would, taken together, last longer than five years. Those courts reasoned that for a plan to be proposed in good faith, it must not be devised to

⁴ Section 1322(c) provides:

(c) The plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than the five years.

circumvent the requirements of the Bankruptcy Code. In re Jackson, 91 B.R. 473, 474 (Bankr. N.D. Ill. 1988). Serial filings which allowed a debtor to accomplish in two cases that which could not be achieved in one were therefore held to be bad faith per se. Id.

The Jackson court, later cited in both Huerta and Thomas, relied principally upon Matter of Troutman, 11 B.R. 108 (Bankr. E.D.N.Y. 1981), and In re Diego, 6 B.R. 468 (Bankr. N.D. Cal. 1980), which held that it is bad faith to file a serial "chapter 20" case. Good faith, according to the court in Jackson, was not equated with honesty, but rather meant that a proposed plan was within the requirements of the Code. Both of the cases cited by Jackson were decided prior to the Supreme Court's decision in Johnson v. Home State Bank, 111 S.Ct. 2150 (1991). Although the Supreme Court in Johnson rejected the proposition that serial filings are bad faith per se, the rationale which lead courts to find bad faith in Chapter 20 serial filings is now used to require serial Chapter 13 debtors to complete any series of plans within five years. This Court declines to adopt such a rationale.

The only appellate court to address the decisions in Huerta, Thomas and Jackson held that section 1322(c) of the Code refers to a single plan in the pending case, not a series of plans, and that the Code does not state, and neither does its legislative history support, the tacking of plans together for the purposes of section 1322(c) analysis. United California Savings Bank v. Martin (In re Martin), 156 B.R. 47 (Bankr. 9th

Cir. 1993). Although serial filings may result in abuse in certain cases, the court in Martin reasoned that existing requirements of good faith can more effectively address abuse than a bright line rule which has no basis in the Code. This Court agrees with the rationale of the appellate court in Martin that a debtor's good faith is not defined merely by the total length of a series of plans. See also In re Oglesby, 161 B.R. 917, 923-926 (Bankr. E.D. Pa. 1993).

"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 re Kull, 12 B.R. 654, 658 (D.Ga. 1981), aff'd. sub nom., Kitchens v. Georgia Railroad Bank and Trust Co. (In re Kitchens), 702 F.2d 885 (11th Cir. 1983). The term "good faith" is defined in neither the Bankruptcy Code, nor its legislative history. Matter of Smith, 848 F.2d 813, 817 (7th Cir. 1988). Courts considering what constitutes good faith have concluded that "no precise definition is possible." Id. at 817, quoting In re Hawes, 73 B.R. 584, 587 (Bankr. E.D. Wis. 1987).

A number of tests based on a "totality of the circumstances" approach have been created to evaluate a debtor's good faith. See In re Estus, 695 F.2d 311, 317 (8th Cir. 1982); Matter of Smith at 818; In re Kitchens at 888. Although no list can be complete considering the "potentially infinite" number of relevant factors⁵, the principle question the court must ask

⁵ In re Jones, 119 B.R. 996, 1002-1003 (Bankr. N.D. Ind. 1990).

under the totality of the circumstances test is "whether the debtor has dealt fairly with his creditors." In re Schaitz, 913 F.2d 452 (7th Cir. 1990).

The factors set forth in Estus, Smith and Kitchens address serial filings. The court in Estus stated that "the frequency with which the debtor has sought relief under the Bankruptcy Reform Act" and "the motivation and sincerity of the debtor in seeking Chapter 13 relief" are both relevant considerations to a debtor's good faith. Estus at 317; see also In re Nash, 765 F.2d 1410, 1415 (9th Cir. 1985) ("A debtor's history of filings and dismissals is relevant in determining whether a plan has been proposed in good faith"); Deans v. O'Donnell, 692 F.2d 968 (4th Cir. 1982) (A debtor's past bankruptcy filings are a factor to be considered in determining good faith). Moreover, the court may consider a debtor's pre-petition conduct in determining good faith. Matter of Smith at 819.

Although a debtor's history under the protection of the Bankruptcy Code is relevant to good faith, a per se rule establishing bad faith solely by the length of time a debtor has spent under Chapter 13 is both unnecessary and lacks support in either the Code or case precedent. As the court in Martin stated "...avoiding...abuse could more effectively be achieved by denying confirmation of the plan for lack of good faith than by adopting a bright line rule that the cumulative time frame of multiple Chapter 13 filings cannot exceed five years, especially where the Bankruptcy Code does not require such an interpretation." Martin at 51.

Although this Court disagrees with the per se rule adopted in Thomas, Huerta and Jackson, the approach of those courts is sound inasmuch as they view all serial cases together when determining good faith. See also Matter of Metz, 820 F.2d 1495 (9th Cir. 1987). This Court finds that if a proposed plan in a series would allow a debtor to remain under the protection of Chapter 13 for longer than the statutory limit for a single plan, this is evidence of bad faith.

In the case before the Court, Movant has proven that Gregory Hunter has been in a series of Chapter 13 cases for a total of fifty-one months. Although the length of time Mr. Hunter has been in Chapter 13 is evidence of bad faith on his part, other facts presented to the Court outweigh this evidence. The Court is persuaded by the fact that Mr. Hunter paid a substantial sum towards satisfaction of Movant's claim in his prior cases, and further, by the fact that Debtors' plan proposes to pay Movant's claim in full with interest.

In sum, the Court finds that no cause exists for granting relief from stay or dismissing Debtors' case. The Court rejects any per se rule finding bad faith based on the length of time a debtor stays in Chapter 13. The facts in this case viewed under a totality of the circumstances test, demonstrate good faith sufficient to warrant confirmation of Debtors' plan.

An order in accordance with this memorandum opinion will be entered.

Dated this 31st day of March, 1994.

JAMES D. WALKER, JR.
United States Bankruptcy Judge

CERTIFICATE OF SERVICE

I, Cheryl L. Spilman, certify that a copy of the attached and foregoing was mailed to the following:

R. WADE GASTIN
Post Office Box 8012
Savannah, Georgia 31412

GARY M. WISENBAKER
Post Office Box 13426
Savannah, Georgia 31416

KARROLLANNE CAYCE
Post Office Box 10556
Savannah, Georgia 31412

This 31st day of March, 1994.

Cheryl L. Spilman

Deputy Clerk
United States Bankruptcy Court

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

IN RE:)
)
GREGORY L. HUNTER,) CHAPTER 13 BANKRUPTCY
EYVONE G. HUNTER,) CASE NO. 93-41649
)
)
DEBTORS)

ORDER

In accordance with the memorandum opinion entered this date, it is hereby

ORDERED that the Motion for Stay Relief and in the alternative, Motion to Dismiss filed by Commercial Credit Plan, Incorporated is hereby DENIED.

SO ORDERED this 31st day of March, 1994.

JAMES D. WALKER, JR.
United States Bankruptcy Judge

CERTIFICATE OF SERVICE

I, Cheryl L. Spilman, certify that a copy of the attached and foregoing was mailed to the following:

R. WADE GASTIN
Post Office Box 8012
Savannah, Georgia 31412

GARY M. WISENBAKER
Post Office Box 13426
Savannah, Georgia 31416

KARROLLANNE CAYCE
Post Office Box 10556
Savannah, Georgia 31412

This 31st day of March, 1994.

Cheryl L. Spilman

Deputy Clerk
United States Bankruptcy Court