

FILED

Lucinda B. Rauback, Clerk
United States Bankruptcy Court
Augusta, Georgia
By agreeen at 3:01 pm, Jan 24, 2013

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Statesboro Division

IN RE: AARON S. ROBERTS)	
)	
Debtor)	Chapter 13 Case
)	Number <u>11-60690</u>
<hr/>		
O. BYRON MEREDITH III, TRUSTEE)	
)	
Objecting Party)	
)	
vs.)	
)	
AARON S. ROBERTS)	
)	
Debtor/Respondent)	

OPINION AND ORDER OF DISMISSAL WITH PREJUDICE

The continued objection to confirmation by the chapter 13 Trustee ("Objection") having come on for hearing, at the close of the hearing I sustained the Objection and dismissed the case with prejudice on the ground of the Debtor's bad faith in failing to disclose approximately \$20,000 in income earned by his wife during the pendency of the case. My ruling from the bench is incorporated by reference into this Order and supplemented as follows.

FINDINGS OF FACT

This bankruptcy case was filed by Debtor Aaron S.

Roberts on November 2, 2011. Initially filed under chapter 7, the case was converted to a case under chapter 13 on May 4, 2012.

Along with his chapter 7 petition, Roberts filed a Schedule I - Current Income of Individual Debtor(s). The Schedule I listed his wife's occupation as "Homemaker" and "0.00" as her income. (ECF No. 1 at 28.)

Approximately two months later, in January 2012, Roberts's wife, who was enrolled in a master's degree program, began substitute teaching part-time in the school district that she hoped would offer her full-time employment after her expected graduation in May 2012. Roberts did not amend his Schedule I to show his wife's new employment and income.

Roberts's wife continued substitute teaching until the school year ended. On May 14, 2012, Roberts filed an amended Schedule I in conjunction with a chapter 13 plan filed after the case's conversion. Notwithstanding that Roberts's wife had been working for the preceding four-and-a-half months and was still working, the Amended Schedule I listed his wife's occupation as "Homemaker" and her income as "0.00." (ECF No. 53 at 1.) Moreover, the space on the schedule to "[d]escribe any increase or decrease in income reasonably anticipated to occur within the year following the filing of this document" was left blank. (Id.)

Relying on the information in this Amended Schedule I, which Roberts had sworn was "true and correct" (id. at 5), the

Trustee moved for confirmation (ECF No. 80) of a proposed amended plan ("Plan") under which Roberts would pay \$50.00 per month and unsecured creditors would get nothing (ECF No. 66).

After graduating, Roberts's wife did in fact get a teaching contract in August 2012 in the district where she had "subbed" the previous school year. The fact of her new full-time job and income—and the fact she had already earned approximately \$20,000 during the pendency of this case—came to light in September 2012 when Roberts moved for permission to incur debt to buy a house. (ECF No. 85.) In addition to a Proposed Amended Schedule I showing his wife's new full-time monthly income, the motion included as an attachment a copy of his wife's pay stub with year-to-date earnings (ECF No. 85-2 at 26). At that point, the Trustee put the case back on the calendar for confirmation. At the hearing, the Trustee argued for dismissal on the ground of the Debtor's bad faith in concealing his wife's income.

CONCLUSIONS OF LAW

"The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) (quoting Grogan v. Garner, 498 U.S. 279 (1991)). Accordingly, the debtor's good faith, or lack thereof, is a recurring theme throughout the Bankruptcy Code, including in the two sections

implicated here concerning confirmation of a chapter 13 plan and the dismissal of a case for cause.

A plan that is not proposed in good faith does not meet an essential requirement for confirmation under § 1325(a). See 11 U.S.C. § 1325(a)(3). Lack of good faith also is sufficient cause for dismissal of a case under § 1307(c). Orcutt v. Crawford, 2011 WL 4382479, at *2 (M.D. Fla. 2011). Under both sections, the good faith analysis is the same: The court considers the totality of the circumstances of the individual case. In re Jacobs, 2005 WL 6742490, at *2 (Bankr. S.D. Ga. 2005). The debtor bears the burden of proof at confirmation under § 1325, and the movant bears the burden of proof on motion to dismiss under § 1307. Id. But because dismissal is a harsher penalty than denial of confirmation, a more stringent showing of the debtor's lack of good faith is required. Id.

"Broadly speaking, the basic inquiry should be whether or not under the circumstances of the case there has been an abuse of the provisions, purpose or spirit of [the Bankruptcy Code]" Kitchens v. Ga. R.R. Bank & Trust Co. (In re Kitchens), 702 F.2d 885, 888 (11th Cir. 1983). The inquiry under Kitchens originally was guided by a non-exclusive list of fifteen factors,¹ some of which have since been superseded by amendments

¹ The original Kitchens list comprised the following factors:

to the Code, as courts have noted. See, e.g., In re Johnson, 346 B.R. 256, 262-264 (Bankr. S.D. Ga. 2006) (concluding that the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) narrowed the scope of judicial discretion concerning the first two factors of the Kitchens test).

Notwithstanding the number and variety of possibly relevant factors, "the easiest way to fail the good faith test . . . is for a debtor to 'misrepresent, lie or otherwise mislead the court.'" In re Thomas, 443 B.R. 213, 218 (Bankr. N.D. Ga. 2010) (quoting In re Shelton, 370 B.R. 861 (Bankr. N.D. Ga. 2007)). That is precisely what has happened here.

Roberts tried to game the system. He failed to disclose

(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 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 [Code]; (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

. . .
[(12)] the extent to which claims are modified and the extent of preferential treatment among classes of creditors . . . [(13)] substantiality of the repayment to the unsecured creditors . . .

. . .
[(14)] the type of debt to be discharged and whether such debt would be nondischargeable under chapter 7

. . . [and]
[(15)] accuracy of the plan's statements of debts and expenses and whether any inaccuracies are an attempt to mislead the court.

702 F.2d at 888-89.

his wife's part-time income at two different junctures: when she first began substitute teaching and when the case was converted. Further, he failed to disclose on his Amended Schedule I the reasonable anticipation of an increase in household income when he knew that chances were good his wife would be working full-time within the next few months.

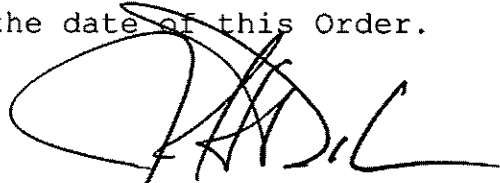
Roberts, who attended college and is employed as a manager, testified that he was not aware of the requirement to disclose changes in total household income until he filed the motion to incur debt. I find that testimony not credible.

When a debtor misrepresents, lies, or otherwise misleads the court, there is no "Oops defense." Marrama, 549 U.S. at 370 (stating the ruling of the bankruptcy court below on the debtor's concealment of assets) (internal quotation marks omitted). Here, Roberts had an additional \$20,000 in household income during the first five months of 2012 that he did not disclose. Failure to disclose \$20,000 is not an "oversight," as Roberts's attorney characterized it. Roberts has therefore failed to meet his burden to prove the Plan was proposed in good faith under § 1325(a)(3).

"Failure to make accurate disclosure in bankruptcy documents, making fraudulent representations to the court, or an unfair manipulation of the Bankruptcy Code is sufficient cause for dismissal." Orcutt, 2011 WL 4382479, at *2. Here, the Trustee

has conclusively shown that Roberts failed to make accurate disclosure in his bankruptcy documents; the Trustee has thus met the burden of proof for dismissal of the case under § 1307(c).

IT IS THEREFORE ORDERED that the chapter 13 case of Aaron S. Roberts is **DISMISSED WITH PREJUDICE**, barring refiling for a period of 180 days from the date of this Order.



JOHN S. DALIS
United States Bankruptcy Judge

Dated at Brunswick, Georgia,
this 24th day of January, 2013.