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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
Savannah Division

In the matter of:
JAMES McCRAY EDWARDS, JR.
LENORA LYNN EDWARDS

Debtor

GEORGE TRUMAN MOORE

Movant

v.

JAMES McCRAE EDWARDS, JR.

Respondent

Chapter 13 Case

Number 488-00022

FILED

at 12 O'clock & 18 min. P.M

Date 6/1/89

MARY D. BICTON, CLERK
United States Bankruptcy Court
Savannah, Georgia *ps*

MEMORANDUM AND ORDER ON MOTION FOR RELIEF FROM STAY
AND OBJECTION TO PLAN

FINDINGS OF FACT

1) Debtors' case was filed January 7, 1988, seeking relief under Chapter 13 of the Bankruptcy Code. The initial plan provided for payments of \$890.00 per month for a period of sixty months which was anticipated to yield less than 100% distribution to their creditors but the distribution was anticipated to be substantial.

2) Debtors were not able to maintain current payments in the plan and on July 29th the Pembroke State Bank filed a Motion for Relief from Stay seeking the right to foreclose under state law on certain real property which had been pledged to secure the Debtors' loans by George T. Moore, the Debtor/Husband's father-in-law, and further sought relief from stay for the purpose of repossessing certain personal property which Debtors had pledged as collateral to Pembroke State Bank. After an evidentiary hearing on September 2, 1988, an Order was entered on September 14, 1988, granting the Pembroke State Bank's Motion for Relief from the Co-Debtor Stay in order to foreclose upon the real estate pledged by George T. Moore. However, said Order denied the Motion insofar as it sought to pursue the personal property which was pledged as collateral. The evidence at the hearing revealed that the undertaking of Mr. Moore was not in connection with a consumer transaction inasmuch as the proceeds were used by the Debtor/Husband for business purposes. Specifically, Debtor was the owner of a dump truck which he used as a self-employed person in hauling dirt, working for hire to various subcontractors in the coastal Georgia area. Although the Court concluded at that time that there was no equity in the Debtor's dump truck, said vehicle was necessary to his effective reorganization and the Motion for Relief was denied on that basis. There was evidence that Debtor was delinquent in the

amount of \$3,209.59 as of the time of that hearing, but Debtor's testimony was that he had the money in hand to bring the case current at that time.

3) Subsequent to the granting of the stay relief, Pembroke State Bank commenced a foreclosure action against the real property pledged by Mr. Moore. Thereupon Mr. Moore went to another financial institution and refinanced certain indebtedness he had which was secured by his property and paid off the indebtedness which he had co-signed at Pembroke State Bank and took from the Bank an assignment of its interest in the notes and the collateral which secured the indebtedness.

4) The only remaining asset owned or in the possession of the Debtor/Husband as to which Mr. Moore holds a collateral security interest is the 1974 dump truck. Mr. Moore's payoff of the Pembroke State Bank liability results in a total claim in his favor, by assignment, of an amount in excess of \$45,000.00. It is clear that the dump truck is not worth that much money. The purchase price of the dump truck in 1985 when it was an eleven year old vehicle was \$16,000.00. At some point during the pendency of this case the Debtor/Husband and the Debtor/Wife becamed estranged and a divorce action was filed and the parties are now divorced and living separate and apart. The former Debtor/Wife is now residing with her father, Mr. Moore.

Thereafter on January 9, 1989 George T. Moore filed a Motion to Lift Stay alleging that the Debtor had not been making his promised payments to the Chapter 13 Trustee since September 6, 1988 and that a delinquency of \$3,502.59 existed. The Motion further asserted that the value of the collateral pledged to the Movant was depreciating and that irreparable harm would occur if the relief was not granted.

5) When the Motion was called for hearing on January 24, 1989, Debtor's counsel who was involved in a jury trial obtained a continuance and the matter was rescheduled. On January 23, 1989, Lenora Lynn Edwards, the Debtor/Wife, had been voluntarily dismissed as a co-debtor. The continued hearing on George T. Moore's Motion for Relief from Stay was held on January 30, 1989. The Motion for Relief was again denied based on this Court's finding that the dump truck was necessary to the effective reorganization of the Debtor notwithstanding the fact that there was no equity in it. A factor in this Court's denial of the Motion for Relief from Stay at that time was the Debtor's testimony that he had filed a Modified Chapter 13 Plan on January 17, 1989, proposing a reduction in plan payments to \$250.00 per month. Debtor projected that this reduction would still yield payment in full of all allowed secured claims and some pro-rata distribution to unsecured creditors based on Debtor's effort to value the secured claim of Mr. Moore at \$7,000.00 and the secured

claim of The Citizens and Southern National Bank at \$3,000.00. Debtor's counsel argued successfully that because of the change in the Debtor's marital status he should be permitted the opportunity of restructuring his Chapter 13 Plan. The practical effect of the amendment was to propose to pay to Mr. Moore only the value of the collateral held by him rather than 100% of the debt which he had co-signed, since Debtor no longer had any personal considerations which would lead him to repay more than the value of the collateral. The reduction of Mr. Moore's secured claim from over \$45,000.00 to \$7,000.00 would arguably permit a reduction in the monthly payment of the magnitude sought by the Debtor in the amended plan.

6) On March 29, 1989, Mr. Moore filed another Motion to Lift Stay alleging that Debtor had failed to make payments in accordance with this new Amended Chapter 13 Plan and sought permission to foreclose on the dump truck. Also on March 29, 1989, Mr. Moore filed an objection to confirmation of the modified plan based on the Debtor's under valuation of his collateral, on the ground that the plan did not reflect the Debtor's best effort, and that the Debtor was not proceeding in good faith. A hearing was scheduled on the stay relief motion for April 25, 1989, at which point Debtor had commenced making some payments to the Chapter 13 Trustee. At the hearing on April 25th, neither party had competent extrinsic evidence of the value

of the dump truck and the Court orally declined to grant the Motion for Relief and reserved all issues until the date of confirmation at which time a lengthy hearing on the creditor's objection was held.

7) The dump truck was purchased for \$16,000.00 in 1985. Debtor is of the opinion that the truck is worth \$10,000.00 while Mr. Moore testifies that the value is substantially more to him since he would be able to take it, convert it to make it suitable for hauling containerized freight trailers and make substantial sums of money as a result of his effort. Because of the value it has to him Mr. Moore is willing to forgive the entire indebtedness which the Debtor owes of some \$45,000.00 in exchange for return of the vehicle.

8) Debtor has not worked full-time during the time the Chapter 13 case has been pending. There was evidence that the work he engages in can be seasonal and sometime sporadic since it depends on construction activity in the area. However, there was also evidence that the Debtor was not aggressive about looking for work when times were slow.

9) Debtor from time to time was offered jobs hauling dirt which he turned down. He also took approximately \$2,000.00 of proceeds from one job which he received at a time

when his payments to the Trustee were substantially in arrears and spent the proceeds rather than applying any of it to the Trustee. Subsequently, without Court approval, he borrowed \$3,000.00 to make a payment in September of 1988.

10) Debtor has previously been employed for a number of years as a forklift operator in a local industry and has other marketable job skills. Debtor testified under oath at a previous hearing that a tractor which he had pledged to the Pembroke State Bank as collateral for one of the other notes which Mr. Moore was required to pay off was worthless because it had rusted out. In reality, he now admits that he had sold that tractor and converted the proceeds to his own use without accounting to the secured creditor for the same. Debtor earns \$30.00 per hour when he is working, out of which he has to pay his operating expenses and retains the net as his income. He reported income to the Internal Revenue Service of \$11,000.00 during 1988. He further testified that he considers himself to be getting "steady work" from various contractors if he is able to work four days a week. Given the testimony of his income during 1988 it appears that the Debtor had only twelve weeks of steady work during 1988.

CONCLUSIONS OF LAW

11 U.S.C. Section 1325 sets forth the criteria for confirmation of a plan. Included in that section is the requirement that "the plan has been proposed in good faith and not by any means forbidden by law." Whether or not a plan is proposed in good faith involves a case-by-case analysis. In this Circuit, a number of factors have been approved as constituting criteria on which to make the good faith determination. See In re Kitchens, 702 F.2d 885 (11th Cir. 1983); Matter of Hale, 65 B.R. 893 (Bankr. S.D. Ga. 1986), aff'd without opinion, No. 87-8549 (11th Cir. April 29, 1988).

As applied to the facts in this case I conclude that the Debtor's plan has not been proposed in good faith for the following reasons:

- 1) Debtor's payments to the Chapter 13 Trustee have been extremely irregular. He has developed a pattern of making payments generally just prior to or at the time of hearings that have been scheduled in this case in a transparent attempt to make his efforts appear in a more positive light than they deserved to be viewed. It is questionable whether Debtor has exerted the maximum effort to obtain steady work during the time his case has been pending. As previously

indicated, his income reveals only approximately twelve weeks of fulltime work for the calendar year 1988. This leads inescapably to the conclusion that he is either not making an honest effort to obtain work sufficient to support himself and pay the maximum possible to his creditors or that work is so uncertain in the field which he desires to work that his plan cannot meet the feasibility requirement of 11 U.S.C. Section 1325(a)(6).

- 2) Between January 7, 1988, and March 9, 1989, Debtor made less than \$2,500.00 in payments other than the \$3,000.00 payment he made with borrowed funds. In other words for a period of fourteen months the Debtor made the equivalent of approximately three monthly payments as required by his plan. The fact that his \$3,000.00 September payment was made with borrowed funds was revealed for the first time at the hearing on April 28, 1989. When the Debtor filed his amended plan on January 17, 1989, he failed to make the new proposed monthly payment of \$250.00 for a period of approximately seven weeks.

- 3) Debtor has failed to maintain insurance on the vehicle which he is using for his livelihood which constitutes the only security for Mr. Moore's claim thus placing Mr. Moore's already inadequate security substantially at risk. Debtor has further operated the vehicle without making regular plan

payments for a period of sixteen months. Debtor would have this Court take a retroactive view of the extent to which he is delinquent based on the fact that he now proposes a \$250.00 monthly payment and the sums he has paid in exceed the sum of \$250.00 monthly from the beginning of the case. This Court, however, cannot take such a technical view of the status of his payments.

Initially the Pembroke State Bank and subsequently Mr. Moore have been held at bay by the automatic stay of 11 U.S.C. Section 362 for a period of many months when Debtor was proposing payments of \$890.00 per month. In some respects they may have delayed or withheld taking action in reliance on the fact that Debtor proposed payments of that amount and proposed to pay their claims to the extent of 100 cents on the dollar. When they did take action to force the issue, this Court inevitably considered the adequacy of Debtor's proposed payments to pay all his debt in assessing whether to dismiss the case or grant relief from the stay. Having made the representation and commitment to make this payment which was not forthcoming on a regular basis for twelve months, the Debtor cannot now be permitted to hide behind the argument that had he initially proposed a \$250.00 monthly he would now be, in effect, "paid ahead". Looking at Debtor's obligation in terms of \$890.00 per month for one year and \$250.00 per month since then, the

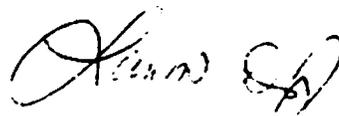
Debtor is delinquent in payments to the Chapter 13 Trustee in the amount of \$5,422.59. During this period time, regardless of the level of activity in his employment it is clear that the Debtor has put substantial wear and tear on the vehicle held by Mr. Moore as a result of the delinquent payments and lack of insurance, the interest of Mr. Moore is not adequately protected. It is undisputed that there is no equity in the dump truck, and given Debtor's history there is no prospect of an effective reorganization in this case. Therefore, pursuant to 11 U.S.C. Section 362, relief from stay should be granted.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law IT IS THE ORDER OF THIS COURT that the Motion for Relief from Stay of George T. Moore is hereby granted.

FURTHER ORDERED Mr. Moore's Objection to Confirmation is sustained. Debtor is Ordered to file an amended Chapter 13 Plan within fifteen (15) days from the date of entry of this Order or else by separate Order and without further

notice the case will be dismissed with prejudice.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 26th day of May, 1989.