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NOV 17 2005

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

United States Bankruptcy Court
Columbia, South Carolina (7)

IN RE:

Randy Eugene Whitaker and
Vickie Gay Whitaker,

Debtor.

C/A No. 05-09998-W

JUDGMENT

Chapter 13

ENTERED

NOV 17 2005

S. R. P.

Based upon the Findings and Conclusion of Law as recited in the attached Order of the Court, the Motion to Dismiss case filed by Coastal Federal Bank is granted and case is dismissed with prejudice to bar a refiling under chapter 13 for a period of 180 days from entry of this Order.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
November 17, 2005

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

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C/A No. 05-09998-jw

ORDER

Chapter 13

ENTERED

NOV 17 2005

S. R. P.

THIS MATTER comes before the Court upon a Motion to Dismiss Case filed by Coastal Federal Bank ("Creditor") and the response filed by Randy Eugene Whitaker and Vickie Gay Whitaker (collectively hereinafter referred to as "Debtors"). In the Motion to Dismiss, Creditor seeks to dismiss Debtors' Chapter 13 case pursuant to 11 U.S.C § 1307(c) and bar Debtors from refiling for 180 days. After considering the arguments of the parties and the evidence presented, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure 52, which is applicable in bankruptcy proceedings under Federal Rule of Bankruptcy Procedure 7052.¹

FINDINGS OF FACT

1. Debtors filed their first Chapter 13 case (case no. 05-03817-wb) on April 1, 2005.
2. During the administration of the first case, this Court sanctioned Debtors \$386.25 for failing to respond to Creditor's Interrogatories or Requests for Production.
3. On June 21, 2005, this Court dismissed the Debtors' first Chapter 13 case for exceeding the jurisdictional limits prescribed by 11 U.S.C. §109(e).
4. After Debtors' first case was dismissed, Creditor foreclosed on two parcels of property and

¹ To the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of fact they are so adopted.

collected approximately \$209,000.00.² However, Creditor did not complete foreclosure upon its mortgage on Debtors' home. Creditor's mortgage is second in priority to ABN AMRO's first mortgage.

5. On September 3, 2005, Debtors filed this second Chapter 13 case. Debtors concede that they filed this second case in order to prevent Creditor from foreclosing its mortgage on Debtors' home.

6. Both Debtors are self-employed. Mr. Whitaker is a contractor that builds and installs cabinetry. Mrs. Whitaker runs a in-home children's day care.

7. Debtors' Schedule J reflects joint net income of \$15,412.00 per month, expenses of \$15,109.10 per month and net excess income of \$302.90. However, Debtors' Schedule I reflects no withholding of taxes from Mr. Whitaker's self-employment income of \$13,226.00 per month, and Schedule J reflects no expense for income taxes.

8. Debtors did not list any accounts receivable on their Schedule B. However, an attachment to the Debtors' Schedule I and Schedule J reflects that Mr. Whitaker has two accounts receivable totaling \$8,137.00. Debtors did not claim the accounts receivable as exempt.

9. Creditor also holds a lien on a FG 15 Komatsu Forklift that was in the possession of Debtors. However, Mr. Whitaker sold the FG 15 Komatsu Forklift and did not remit the proceeds to the Creditor.

10. The proposed plan payment to the Chapter 13 Trustee is \$300.00 per month for 57 months with an estimated distribution to unsecured creditors of 1%.

11. On September 19, 2005, ABN-AMRO, a creditor holding a first mortgage on Debtors'

² Creditor collected approximately \$175,000.00 and \$34,000.00 upon the foreclosure of the two parcels of real property.

residence, filed a claim for \$124,663.45 with an arrearage of \$19,374.47. Debtors' plan proposes to pay this arrearage at \$230.00 per month. However, Debtor's proposed \$230.00 monthly payments would require a payment period of 84.24 months to repay ABN-AMRO's arrearage. In order to repay ABN-AMRO's arrearage with no interest over the 57 months provided by Debtors' plan, Debtors must increase their payments to ABN-AMRO from \$230.00 per month to \$339.91 per month, an amount that exceeds the \$300.00 monthly payments proposed in Debtors' plan.

12. Mr. Whitaker asserts that he suffers from certain serious health problems that require medical treatment. However, Debtors' Schedules do not reflect additional expenses for health insurance premiums and only \$50 per month for uncovered medical expenses.

13. Debtors have not filed their 2003 or 2004 state or federal personal income tax returns.

14. On September 22, 2005, Creditor served Requests for Admission, Interrogatories and Requests for Production on Debtors' attorney. On October 28, 2005, Debtors' attorney responded to Creditor's Requests for Admission. However, Debtors did not timely provide responses to Creditor's Interrogatories or Requests for Production. Because Debtors failed to provide timely responses, Creditor filed a motion to compel discovery on October 31, 2005.

15. Because of Debtors' failure to provide timely responses to Creditor's discovery requests in this case, the Court awarded Creditor discovery costs and fees, which were payable by Debtors.

16. Debtors failed to produce the information required by the Chapter 13 Trustee in order for the Trustee to consider confirmation. At the confirmation hearing, the Trustee asked that confirmation of the Debtors' plan be denied and that the case be dismissed. Creditor also objected to confirmation and any continuance of the confirmation hearing. Confirmation of the Debtors' plan was denied on November 17, 2005.

CONCLUSION OF LAW

The filing of a Chapter 13 case in bad faith is cause for dismissal or conversion of the case. See In re Marett, No. 96-75003-jw, 1996 WL 33340790 at *7 (Bankr. D.S.C. Nov. 13, 1996) (citing cases). See also In re McLeod, C/A No. 04-03536-jw, slip op. at 3 (Bankr. D.S.C. May 14, 2004) (“The Court has inherent authority to dismiss a case for cause when a debtor files a Chapter 13 petition in bad faith.”). Debtors have the burden of demonstrating that a sufficient change in circumstances has occurred between their prior case and the current case so that the new case would appear feasible and likely to fulfill the goal of reorganization, as opposed to being a device to delay creditors. Id. at 3. Furthermore, “[a] debtor filing a second or third bankruptcy case must prove by detailed testimony and convincing evidence an entitlement to relief under the Bankruptcy Code.” In re Brown, 04-10616-jw, slip op. at 4 (Bankr. D.S.C. Dec. 10, 2004).

Normally, the question of bad faith is associated with plan confirmation and the good faith requirements prescribed by 11 U.S.C. § 1325(a)(3). In re Brunner, C/A No. 92-71010, slip op. at 3 (Bankr. D.S.C. June 10, 1992). The factors considered in determining whether a plan is proposed in good faith are worthy of consideration in the context of determining whether Debtors filed this second case in bad faith. Id.

The Fourth Circuit has held that determining whether a debtor proposed a Chapter 13 plan in good faith requires an examination of the “totality of the circumstances” on a case-by-case basis. Deans v. O’Donnell, 692 F.2d 968, 972 (4th Cir. 1982). In examining the “totality of the circumstances,” courts may consider the following non-exclusive list of factors: (1) percentage of proposed repayment; (2) debtor's financial situation; (3) period of time payment will be made; (4) debtor's employment history and prospects; (5) the nature and amount of unsecured claims; (6)

debtor's past bankruptcy filings; (7) debtor's honesty in representing facts; (8) the nature of debtor's prepetition conduct that give rise to the case; (9) whether debts would be dischargeable in a Chapter 7 proceeding; and (10) any unusual or exceptional problems the debtor faces. In re Bridges, 326 B.R. 345, 349 (Bankr. D.S.C. 2005) (citing Solomon v. Cosby (In re Solomon), 67 F.3d 1128, 1134 (4th Cir. 1995)). The object of the inquiry is to determine whether considering "all militating factors" if there has been "an abuse of the provisions, purpose, or spirit" of Chapter 13. Deans v. O'Donnell, 692 F. 2d at 972.

I. Application of Factors

A. Percentage of Proposed Repayment & Period of Time for Plan Payments

Debtors plan to make payments under their Chapter 13 plan for 57 months. Under the terms of the plan, Debtors intend to value Creditor's lien at \$0.00 because the \$125,000.00 first mortgage held by ABN AMRO exceeds the value of their home. Furthermore, Debtors plan to surrender a 2000 Ford Truck, a trailer, and a 1997 Isuzu to Creditor. Debtors also propose to provide a 1% dividend to unsecured creditors. The current plan before the Court does not appear to provide sufficient funds to pay such a dividend. Because Debtors only propose a 1% dividend to unsecured creditors under a fifty-seven (57) month plan, the percentage of proposed repayment and period of time for plan payments do not favor Debtors. Since the hearing on this Motion, Debtors have not amended their plan, even though the confirmation hearing is imminent.

B. Debtors' Financial Situation, Employment History and Prospects, & Other Unusual Circumstances

Debtors' income earning ability is not clearly defined. It is difficult to assess the financial situation of Debtors in the absence of some type of forecasted profit and loss statements for their

business ventures. Debtors provided a supplement to their Schedule J in which Mr. Whitaker indicated that he held two accounts receivable in the amount of \$8,167.00. Although Debtors' Schedule I indicates that they earn \$15,412.00 per month, Debtors did not subtract any withholding taxes. Thus, their income may be overstated to a certain extent.

Debtors are self-employed. Mr. Whitaker is a contractor that builds cabinetry. Ms. Whitaker runs an in-home daycare. Currently, Mr. Whitaker leases workspace in a wood shop to construct the cabinets that he installs; while Ms. Whitaker cares for 8 children at her home. In order to earn additional income if necessary, Ms. Whitaker states that she can also provide child care services in the evening. However, there was no additional evidence providing details of the availability of such work and the certainty of that income. Mr. Whitaker's income earning ability is also difficult to discern. Although Mr. Whitaker's Schedule I indicates that he has the ability to earn \$13,226.00 per month as an independent contractor, Mr. Whitaker has not presented any evidence indicating that he has other contracts that will provide him with the ability to earn sufficient income in the future to fund the proposed Chapter 13 plan. Furthermore, Mr. Whitaker suffers from a serious heart condition that has caused him to miss work and incur additional expenses in completing certain projects. Since Mr. Whitaker does not maintain health insurance, he has also incurred additional unsecured obligations in the form of health care costs.

In light of Debtors' financial situation; employment history and prospects; and the significant health problems facing Mr. Whitaker, such factors appear to weigh in favor of Creditor.

C. Debtors' Past Bankruptcy Filings

Debtors filed a prior Chapter 13 case which the Court dismissed for exceeding the jurisdictional limits prescribed by 11 U.S.C. § 109(e). Debtors' prior filing delayed collection by

Creditor; and it is evident that Debtors re-filed this second case in order to prevent foreclosure on their home. Accordingly, Debtors' serial attempts to delay Creditor indicate bad faith.

D. Debtors' Honesty in Representing Facts & Non-Dischargeable Obligations

In their prior case and this case, Debtors have failed to file timely responses to Creditor's discovery requests; and thus, they do not appear to be acting in a forthright manner. In both of their bankruptcy filings, the Court awarded Creditor's discovery costs against Debtors for their failure to file timely discovery responses.

In light of the fact that Debtors have failed to file timely responses to discovery requests and have been required to pay discovery costs on two occasions, Debtors' honesty in representing facts do not weigh in their favor.

Debtors also sold a forklift, which served as security for Creditor's loan, without remitting the proceeds of the sale to Creditor. Such circumstances give rise to the inference that Debtors were not dealing with Creditor in an honest and forthright manner. Debtors, however, counter that they received Creditor's permission to sell the forklift. Nevertheless, Debtors' sale of Creditor's collateral without remitting the proceeds of the sale to Creditor is indicia of bad faith.

E. Nature and Amount of Unsecured Claims & Nature of Debtors' Prepetition Conduct giving rise to Case

Debtors have listed \$86,603.34 in unsecured obligations on their Schedule F. Whether such unsecured obligations are the product of Debtors' consumer purchases or are associated with expenses arising from Debtors' operation of their businesses is not clear. Debtors testified that when Mr. Whitaker purchased his previous business enterprise that it did not have the potential revenue streams, in the form of established construction contracts, that he was led to believe. Accordingly,

it appears that the nature and amount of Debtors' unsecured claims and their prepetition conduct in remaining debt do not appear to indicate that they filed for bankruptcy in bad faith.

F. Conclusion

In this second bankruptcy case, Debtors have the burden of demonstrating that this current bankruptcy case is feasible and likely to fulfill the goal of reorganization, as opposed to being a device to delay creditors. However, after examining the "totality of the circumstances" through the foregoing analysis provided herein, the Court finds that the majority of factors to be analyzed in making a determination of bad faith weigh against Debtors. Accordingly, Creditor's Motion to Dismiss is granted. This case is dismissed with prejudice to bar a refiling under chapter 13 for a period of 180 days from entry of this Order.³

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
November 17, 2005.

³ The Trustee's request to dismiss this case is therefore moot.