AO 450 (Rev. 5/85) Judgment in a Civil Case

DOCKETED

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

WILLIAM T. CONNELLY,

Appellant,

JUDGMENT IN A CIVIL CASE

V.

BATH NATIONAL BANK and
GEORGE M. REIBER,

Appellees.

CASE NUMBER:

93-CV-6499L

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to ~~trial or~~ hearing before the Court. The issues have been ~~tried or~~ heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the order of Bankruptcy Court entered July 8, 1993 is hereby affirmed in all respects.

April 13, 1995
Date

RODNEY C. EARLY
Clerk

Leigh Ann Lester

LEIGH ANN LESTER
(By) Deputy Clerk

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WILLIAM T. CONNELLY,

Appellant,

DECISION AND ORDER

v.

93-CV-6499L

BATH NATIONAL BANK and
GEORGE M. REIBER, Trustee,

Appellees.

BACKGROUND

Appellant, William T. Connelly ("Connelly"), appeals from a decision of the United States Bankruptcy Court, Western District of New York, (Ninfo, J) dated July 6, 1993, that denied confirmation of his Chapter 13 plan based on bad faith and infeasibility, and dismissed the case pursuant to 11 U.S.C. § 109(g). The trustee, George Reiber, had moved to dismiss the Chapter 13 case before Judge Ninfo.

On appeal, Connelly claims: (1) the Bankruptcy Court erred in finding that the plan was filed in bad faith pursuant to 11 U.S.C. § 1325(a)(3); (2) the Bankruptcy Court erred as a matter of law in denying confirmation of the plan on the grounds that the plan was not feasible as required by 11 U.S.C. § 1325(a)(6); (3) the Bankruptcy Court erred as a matter of law in dismissing the case pursuant to 11 U.S.C. § 109(g); and (4) the trustee is not a

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"party in interest" for purposes of bringing a motion to dismiss a Chapter 13 Plan. For the reasons discussed, infra, the Bankruptcy Court's decision is affirmed in all respects.

FACTS

On April 16, 1993, Connelly filed his fourth Chapter 13 plan since 1985. It is the dismissal of this case, the 1993 Chapter 13 case, that is the subject of this appeal.

The first Chapter 13 case Connelly filed, in 1985, was dismissed in February 1989 because of his failure to make the payments required under the plan. A second case, filed 7 months after the dismissal of the 1985 case, was dismissed in December 1989, again because of Connelly's failure to make the payments required by a confirmed plan. On April 3, 1992, less than 7 months after the second case was dismissed, Connelly filed his third Chapter 13 case. By Connelly's admission, the 1992 case was filed to stop a pending state court mortgage foreclosure sale of his residence by the Bath National Bank ("Bath National"), and to prevent the possible loss of the residence because of unpaid real estate taxes, some of which had been unpaid since 1985. The residence consists of a multi-unit dwelling in the nature of an apartment building.

On June 25, 1992, the Trustee, George M. Reiber ("Reiber"), filed an objection to the confirmation of Connelly's proposed plan on the grounds that: (1) the plan was not filed in good faith and was not feasible; (2) Connelly had failed to provide various items requested by the Trustee in connection with the case; and (3) Connelly was not eligible to be a Chapter 13 debtor by reason of the provisions of 11 U.S.C. § 109(g)(1).

After a series of adjourned section 341 meetings and confirmation hearings, Reiber made a motion, pursuant to 11 U.S.C. § 1307(c), to dismiss the 1992 case for cause. On September 15, 1992, a conditional order of dismissal was entered providing that the case would be dismissed unless Connelly complied with certain requirements, including providing necessary information to Reiber.

At the October 30, 1992 confirmation hearing, Reiber renewed his objections to the plan, and Bath National requested that confirmation of the plan be denied and that the automatic stay provided by 11 U.S.C. § 362 be lifted so that it could continue its mortgage foreclosure. The Bankruptcy Court treated Bath National's request as a motion for relief from the automatic stay in accordance with Rule 9013.

After reviewing all of the facts and circumstances before the court, the Bankruptcy Court confirmed Connelly's plan. In response to the request of Bath National for relief from the stay, the Bankruptcy Court required that the confirmation order provide for the immediate lifting of the stay as to Bath National and the dismissal of the 1992 case should the debtor not cure all postpetition mortgage arrearages by November 30, 1992 and continue to make plan payments and postpetition mortgage payments when due, as well as to pay all future real estate taxes as they become due.

On November 30, 1992, before the stay would have been lifted and the case dismissed because of Connelly's failure to cure all postpetition mortgage arrearages,

Connelly made a motion pursuant to 11 U.S.C. § 1307(b), to voluntarily dismiss the 1992 case. The Bankruptcy Court granted Connelly's motion. In the ten months that the 1992 case had been pending, Connelly paid no postpetition mortgage payments to Bath National and no postpetition real estate taxes.

Connelly filed this 1993 Chapter 13 case within 74 days after the entry of the Order dismissing the 1992 case and within three days of a rescheduled sale in the pending state court mortgage foreclosure proceeding. The Bankruptcy Court denied confirmation of Connelly's proposed plan, finding that Connelly's case and his plan had not been proposed in good faith within the meaning of § 1325(a)(3) and that the proposed plan was not feasible within the meaning of § 1325(a)(6). In addition, the Bankruptcy Court found that Connelly was not eligible to be a debtor in the 1993 case, since he had obtained a voluntary dismissal of the 1992 case following the making of a request by Bath National for relief from the § 362 stay. Further, in its order of dismissal, the Bankruptcy Court included a provision that if Connelly filed another bankruptcy petition under any Chapter at any time prior to the Bath National mortgage being made current and the full payment of all real estate taxes due and owing on said property at the point of filing, that any foreclosure proceeding commenced by any entity could be continued and would not be considered a violation of the automatic stay, provided Bath National applied to the court for confirmation within ten days of the completion of any sale.

DISCUSSION

I. Standard of Review

Bankruptcy Rule 8013 states: "On an appeal the district court . . . may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree or remand with instructions for further proceeding. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witness." Bankruptcy Rule 8013.

In reviewing a decision of the bankruptcy court, this Court "'must accept the Bankruptcy court's findings of fact unless clearly erroneous', and will reverse the Bankruptcy court 'only if [it is] left with the definite and firm conviction that a mistake has been committed.'" In re Schubert, 143 B.R. 337, 341 (S.D.N.Y. 1992), citing, In re Mansville Forest Prods. Corp., 896 F.2d 1384, 1388 (2d Cir. 1990). Conclusions of law are reviewed de novo. In re Mansville, 896 F.2d at 1388, citing Brunner v. New York State Higher Educ. Services, Corp., 831 F.2d 395, 396 (2d Cir. 1987).

Under these standards, there is no basis to reverse Judge Ninfo's decision and order and this appeal must be denied.

II. Denial of Confirmation Pursuant to 11 U.S.C. § 1325(a)(3)

One of the requirements for confirmation of a Chapter 13 plan under § 1325 is that the court find that the plan is proposed in "good faith." 11 U.S.C. § 1325(a)(3). The Bankruptcy Code does not define that term. In re Dunning, 157 Bankr. 51 (W.D.N.Y.

1993). There is no set formula to determine whether a plan is proposed in good-faith; it is to be judged by the totality of the circumstances on a case by case basis. In re Rasmussen, 888 F.2d 703, 704 (10th Cir. 1989). However, a good-faith determination does require "honesty of intention" on the part of the debtor and requires a bankruptcy court to inquire whether the debtor has misrepresented facts in his plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed his plan in an inequitable manner. In re Johnson, 708 F.2d 865, 868 (2d Cir. 1983); In re Goeb, 675 F.2d 1386, 1389-91 (9th Cir. 1982).

Some courts have enumerated factors to consider in determining whether a plan was filed in good-faith.[1] Additionally, both pre-petition conduct and prior bankruptcy filings by the debtor are relevant to a determination of whether a Chapter 13 plan was proposed in good-faith. In re Rasmussen, 888 F.2d at 704; Neufeld v. Freeman, 794 F.2d 149, 150 (4th Cir. 1986); Matter of Yavarkovsky, 23 B.R. 756, 759 (S.D.N.Y. 1982).

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[1] For example, in In re Sutliff, 79 B.R. 151 (N.D.N.Y. 1987), citing In re Easley, 72 B.R. 948, 950-55 (M.D. Tenn. 1987), the court set forth numerous factors to be considered in determining whether a Chapter 13 plan was filed in good-faith. These factors include: (1) the probable duration of the plan; (2) the frequency of bankruptcy filing; (3) the accuracy of bankruptcy papers; (4) the debtor's motivation and sincerity of Chapter 13 filing; (5) the degree of preferential treatment between classes of creditors; (6) the circumstances of incurring debt; (7) the nature and quantity of unsecured debt; (8) if the debt was otherwise nondischargeable; (9) the amount of attorney's fees; (10) the burden of administration; (11) special circumstances like special medical costs; (12) the debtor's degree of effort; (13) the debtor's ability to learn; (14) the debtor's employment history and likelihood of future raises; (15) the percentage of debt repayment; (16) the amount of proposed payments; (17) the amount of budget surplus; and (18) the general tests of "fundamental fairness," "totality of circumstances," and "honesty of intention." In re Sutliff, 79 B.R. at 154.

Other courts have enumerated similar factors to consider in the determination of good-faith. See Flygare v. Boulden, 709 F.2d 1344 (10th Cir. 1983).

A bankruptcy court's good faith determination based on the totality of circumstances must be reviewed under the clearly erroneous standard. In re Barrett, 964 F.2d 588, 591 (6th Cir. 1992).

In the present case, the Bankruptcy Court found that Connelly's Chapter 13 plan was not proposed in good-faith based on its findings that: (1) Connelly had filed four cases under Chapter 13 of the Bankruptcy Code since 1985; (2) the real estate taxes on Connelly's property had not been paid since 1985; (3) Connelly had basically enjoyed the protection of the Bankruptcy law's automatic stay for more than five years, taking into consideration the filings of the various Chapter 13 plans and their duration; (4) the instant Chapter 13 case was filed within three days of a scheduled foreclosure sale by Bath National; (5) the filing of the instant petition was within 180 days of the filing of the request by Connelly for a voluntary dismissal of his previous case; and (6) Bath orally requested a lifting of the automatic stay in the prior bankruptcy proceeding filed by Connelly and the Bankruptcy Court issued an order which afforded to Bath relief from the automatic stay if certain conditions were not met.

The Bankruptcy Court considered appropriate factors in its determination that Connelly's plan was not filed in good faith. Based on the record, Judge Ninfo's finding was certainly warranted and is not clearly erroneous. The procedural history of Connelly's filings certainly suggests a manipulation of the system. There is no basis for reversal here.

III. Denial of Confirmation Pursuant to 11 U.S.C. § 1325(a)(6)

In any event, even if Connelly's plan had been filed in good faith, the Bankruptcy Court was not clearly erroneous in finding that Connelly's Chapter 13 plan was not feasible pursuant to 11 U.S.C. § 1325(a)(6).[2]

Feasibility of a plan is an absolute prerequisite to confirmation and "by far the most important criterion for the confirmation of a Chapter 13 plan." In re Brown, Bk. No. 91-21391 (Bankr., W.D.N.Y., August 26, 1992), citing 5 Collier on Bankruptcy, ¶ 1325.07, at 1325-47 (15th Ed. 1992); In re Capodanno, 94 B.R. 62, 64 (Bankr. E.D.Pa. 1988).

"Under Section 1325(a)(6), the Court must determine whether the Chapter 13 debtor will be able to make all payments under the plan and comply with all other provisions of the plan." In re Brown, supra; In re Rose, 101 B.R. 934, 942 (Bankr. S.D. Ohio 1989). The debtor has the burden of proving that the plan is feasible. In re Brown, supra; In re Hogue, 78 B.R. 867, 872 (Bankr. S.D. Ohio 1987), citing In re Crago, 4 B.R. 483 (Bankr. S.D. Ohio 1980); In re Goodavage, 41 B.R. 742 (Bankr. E.D. Va. 1984); In re Smith, 39 B.R. 57 (S.D. Fla. 1984); Matter of Pontieri, 31 B.R. 859 (Bankr. D. N.J. 1983).

In the present case, the Bankruptcy Court determined that, based upon the prior filings of Connelly, it did not appear that Connelly could carry out the requirements of his proposed plan at that time. The record indicates that: (1) Connelly had not made payments of $ 413 per month on the 1992 plan; (2) the current, 1993, plan would have required

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[2] 11 U.S.C. § 1325(a)(6) provides: "(a) Except as provided in subsection (b), 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."

payments of $ 502 per month; (3) the papers in support of the 1993 plan indicated that Connelly could afford to pay only $ 400 per month; and (4) the only changed financial circumstances of Connelly related to the possible future establishment of a flea market on Connelly's property to generate additional income. Given the facts, it was entirely appropriate for the Bankruptcy Court to find that the 1993 Chapter 13 plan proposed by Connelly was not at all feasible.

IV. Dismissal of Case Pursuant to 11 U.S.C. § 109(g)

In addition to finding that Connelly's 1993 Chapter 13 plan was not filed in good faith and was not feasible, the Bankruptcy Court also determined that Connelly was not eligible to be a debtor under 11 U.S.C. § 109(g), which provides in part that:

> ...no individual . . . may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if-- . . . (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

The Bankruptcy Court found as a fact that Bath National had made an oral request that the automatic stay in the prior bankruptcy proceeding filed by Connelly be lifted and the Court had issued an order memorialized in the confirmation order of the 1992 plan which afforded relief from the automatic stay if certain conditions were not met.

Connelly contends that Bath never made such a request. Although this Court has not been provided with a transcript from the confirmation hearing at which Bath National allegedly made the request, the fact that Reiber recollected such a request and that the

Bankruptcy Court conditionally granted the requested relief is strong evidence that Bath National did in fact orally request the relief. Thus, this Court can not find that the Bankruptcy Court was clearly erroneous in finding that Bath National did make a request for relief from the automatic stay.

Connelly alternately argues that even if Bath did make an oral request for relief from the automatic stay, it was insufficient because it was required to be in the form of a written motion with notice to Connelly and an opportunity for him to be heard. Bankruptcy Rule 4001(a) provides that a motion for relief from an automatic stay imposed under 11 U.S.C. § 362 must be made in accordance with Bankruptcy Rule 9014, which provides that in contested matters under the Bankruptcy Code, relief shall be requested by motion. In re Stanton, 121 B.R. 438 (Bankr. S.D.N.Y. 1990). However, Bankruptcy Rule 9013 states that "A request for an order . . . shall be by written motion, unless made during a hearing." (emphasis added). Thus, under bankruptcy procedure, while a request for relief from an automatic stay is to be treated as a motion, if it is made during the course of a hearing, it can be made orally. Bath National made the request for relief from the automatic stay at a confirmation hearing. Connelly was present at the hearing and there is no indication that he was prevented from responding to Bath National's request for a lifting of the automatic stay. In any event, the Bankruptcy Court did in fact confirm the Chapter 13 plan, with the proviso that the stay would be automatically lifted and the case dismissed if Connelly did not fulfill certain requirements of the confirmation order.

It is clear that Connelly made a motion pursuant to 11 U.S.C. § 1307(b) to voluntarily dismiss the 1992 plan on November 30, 1992. At that time, Connelly had failed

to comply with the terms of the 1992 confirmation order. In fact, in the ten months during which the 1992 case was pending, Connelly made no postpetition mortgage payments to Bath National and paid no real estate taxes on the property.

Connelly filed the 1993 case seventy-four days after his voluntary dismissal of the 1992 case, and just three days prior to the scheduled sale of the property in the pending state court mortgage foreclosure proceeding.

As Judge Ninfo properly observed in his decision denying Connelly's motion for a stay of the mortgage foreclosure sale of his residence pending appeal of the Order dismissing the Chapter 13 case,

> . . . Section 109(g)(2) is designed to prevent the very series of actions taken by this Debtor in the 1992 Case and in the filing of the 1993 Case. Not to dismiss the 1993 case pursuant to Section 109(g)(2) would allow the Debtor to frustrate the legitimate attempts of Bath National and Steuben County to exercise their rights as secured creditors, especially when, as here, the Debtor has continued to fail to make payments to Bath National or the real estate taxing authorities.

In re Connelly, B.K. No. 93-20873 (Bankr., S.D.N.Y., August 6, 1993). I agree with that conclusion.

Connelly also takes issue with that portion of the Bankruptcy Court's order dismissing the case that provided that if Connelly filed another bankruptcy petition at any time prior to the Bath National mortgage being made current and the full payment of all real estate taxes due and owing on the property, then any foreclosure proceeding commenced by the entity could be continued and would not be considered in violation of the automatic stay, provided that the entity apply to the court within 10 days of the completion of said sale for an order

confirming the sale. Given the factual background of this case, the Bankruptcy Court did not abuse its discretion in including this provision in its order of dismissal.

One last issue that needs to be resolved is Connelly's contention that the trustee, who initiated the motion to dismiss, is not a "party in interest" for purposes of bringing a Chapter 13 motion to dismiss. However, the trustee does have authority under the Code to bring a motion to dismiss a Chapter 13 case pursuant to 11 U.S.C. § 1307(c), which provides ". . . on request of a party in interest or the United States trustee ... the court may ... dismiss a case under this chapter . . ." Furthermore, Bath National, as a creditor and a party in interest joined in the trustee's motion to dismiss the Chapter 13 case.

CONCLUSION

Connelly's motion to expand the record in this Court, filed on October 24,1994, is hereby denied in all respects.

The order of the Bankruptcy Court entered July 8, 1993, is hereby affirmed in all respects.

IT IS SO ORDERED.

David G. Larimer

DAVID G. LARIMER
UNITED STATES DISTRICT JUDGE

Dated: Rochester, New York
April 13, 1995.