

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

IN RE:

KEITH BROWN,

BK. NO. 91-21391

Debtor.

DECISION AND ORDER

BACKGROUND

In this case, the debtor is proposing a second Chapter 13 plan for confirmation while a prior Chapter 13 case is still pending and payments under a confirmed plan in that prior case are still being made. The Chapter 13 trustee (the "Trustee") has objected to the confirmation of the second Chapter 13 plan on two grounds: feasibility and good faith.

On July 11, 1984 Keith Brown (the "Debtor") and his former wife filed a petition initiating a Chapter 11 case. On June 16, 1986 the case was converted to Chapter 13 (the "1986 Case"). The Debtor operates a grocery store, Supreme Foods, which has been doing business since 1981. The Chapter 13 Schedules filed in 1986 listed priority tax claims of \$20,096. However the tax claims when actually filed totalled \$33,687. These included claims filed by the Internal Revenue Service of \$13,096, New York State of \$16,700, and the City of Rochester of \$3,571.

On August 11, 1986, the Trustee made a motion to dismiss the 1986 Case for failure to file a plan. This motion resulted in an August 20, 1986 Conditional Order which provided for dismissal of the case if the Debtor did not file a plan within 30 days. The Debtor did file a plan (the "1986 Plan") within the time limitation which proposed to pay \$450 per month for four years. The unsecured creditors were to be paid 100%, and the secured creditors were to be paid outside the plan. The 1986 Plan, as proposed, was confirmed on October 22, 1986. The Order was signed on January 7, 1987. After confirmation it was

discovered that an additional \$9,106 in priority tax claims were due which were treated and paid as priority claims. Because of the payment of these additional priority claims and missed plan payments, the 1986 Plan will not be completed within five years of confirmation. On January 1, 1992 the Trustee made a motion to dismiss the 1986 Case for failure to make payments. This motion was withdrawn after two payments of \$500, which had been paid in the Chapter 13 case filed by the Debtor in 1991, were applied to the 1986 Plan.

On May 16, 1991 the Debtor filed a motion to amend his Schedules to include additional post-petition priority tax claims of \$70,000 -- \$40,000 due to New York State, \$20,000 due to the City of Rochester, and \$10,000 due to the County of Monroe. The Trustee opposed this motion and the motion was withdrawn on June 10, 1991.

The second Chapter 13, designated as case number 91-21391, was filed on May 16, 1991 (the "1991 Case"). On June 26, 1991 the Trustee moved to dismiss the 1991 Case for failure to file a plan. By Order dated July 16, 1991, the Debtor was given 14 days to file a plan or the case would be dismissed. The Debtor did file a plan (the "1991 Plan") which proposed payments of \$1,450 per month over a five year period, with a 100% dividend to unsecured creditors. The Schedules filed in 1991 listed tax claims for 1986 through 1991 of over \$77,000 -- \$34,897 in sales taxes due to New York State, \$6,013 in real estate taxes due to Monroe County, and \$36,750 in real estate taxes due to the City of Rochester. A hearing on confirmation was scheduled for September 9, 1991 and was adjourned several times. The Honorable Edward D. Hayes, now retired, reserved on the matter and gave the parties time to submit memorandums of law. The memorandums submitted by the parties were received on February 19, 1992. On June 29, 1992 the confirmation hearing for the 1991 Plan was set down for oral argument before newly appointed Judge John C. Ninfo II. At that time additional testimony was also given by the Debtor.

At the hearings on confirmation in 1991 and 1992, the Trustee took the position that, as Trustee for the Debtor's 1984 bankruptcy estate, his claim of \$13,968 should be included in the 1991 Plan as a partially secured claim by virtue of the Trustee's statutory lien under Section 544(a)(1). If the Trustee's claim were so allowed, the Debtor would have to pay as much as \$2,500 per month under the 1991 Plan (at the 1992

hearing it was determined that this payment would be between \$2,050 and \$2,500) rather than the proposed \$1,450, and the 1986 Plan would extend for more than five years. The Trustee argued that the Debtor was not able to manage his business to generate the necessary monthly payments of \$2,500 and also pay the various taxes and other business and living expenses he was incurring. The Trustee pointed to the fact that the 1991 Plan was filed in order to pay the accumulated taxes of over \$77,000 which the Debtor had incurred since the 1986 Plan. In addition, at the June 29, 1992 hearing the Trustee stated that the Debtor was delinquent in his payments under the 1986 Plan and had not successfully made even the \$1,900 monthly payment currently required under both plans as proposed by the Debtor. In fact from October 1991 to June 1992 the Debtor's payments were delinquent by at least \$950 per month. Finally, the Trustee argued that there was a flaw in the Debtor's profit and loss projections for the years 1991 to 1995 which showed sufficient monthly income to make the necessary \$2,500 payments. The Trustee contended that since the accountant based his projections on only two months worth of summer sales figures in 1991, the best months for the business, there was not an adequate foundation for projecting future business income, especially in light of the fact that there are seasonal variations in the grocery business and the Debtor had not demonstrated the ability to consistently meet these projections prior to the summer of 1991 or thereafter.

The Debtor testified at the hearing on June 29, 1992 that the 1991 Case was necessitated by additional personal expenses from a matrimonial action and by the prosecution by the City of Rochester of Code violations at the Debtor's building where he operates his grocery store and has other tenants. The Debtor stated that going forward he could make payments under the two plans of between \$2,050 and \$2,500.

In order to confirm a Chapter 13 plan, the Court must make an independent judgment on whether all the requirements for confirmation set forth in 11 U.S.C. §1325(a) have been satisfied. In re Hockaday, 3 B.R. 254, 255 (Bankr. S.D.Cal. 1980). Although this Court, as other courts, is very concerned about the filing of simultaneous Chapter 13 cases, the Court does not have to reach the issue of good faith under Section 1325(a)(3) since the 1991 Plan fails on feasibility.

Feasibility of a plan is an absolute prerequisite to confirmation and "[b]y far the most important criterion for the confirmation of a chapter 13 plan." 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. A Chapter 13 debtor bears the burden of proving that his plan meets the feasibility requirement. In re Rose, 101 B.R. 934, 942 (Bankr. S.D.Ohio 1989). The debtor must not only have the present ability, but the future ability to comply with the proposed plan. In re Hockaday, 3 B.R. at 255. Although the Debtor should be given a chance to attempt a proposed plan even if the Court has doubts about feasibility, hopeless or unrealistic plans must be rejected from the onset as infeasible. In re Capodanno, 94 B.R. at 65. This is especially true in the case of a business Chapter 13.

In this case, the Debtor has proposed a second Chapter 13 plan in order to pay taxes of over \$77,000 which he had incurred since the confirmation of a prior Chapter 13 plan. Even though the Debtor gave an explanation for incurring this very substantial amount of delinquent taxes, expenses from a divorce and curing of code violations on his business real estate, he has not demonstrated that he would be able to remain current on his tax obligations, other business and living expenses, and required plan payments. Although he is now current on his taxes, he has had continuous difficulty in making even the proposed plan payments since October of 1991. The Trustee has confirmed that the Debtor has been repeatedly delinquent on his 1991 Plan payments and is currently in arrears on his 1986 Plan payments. The Debtor has not shown that he has the ability to make the proposed aggregate \$1,900 monthly plan payment for the 1986 Plan and the proposed 1991 Plan, and therefore, has not demonstrated any ability to be able to continue to pay ongoing taxes and expenses and an increased monthly payment of between \$2,050 and \$2,500, the amount now determined to be necessary to fund both plans.

This Court agrees with the Trustee that the profit and loss projections based solely on two months of 1991 summer sales figures are not adequate to meet the Debtor's burden of proving feasibility, and clearly the actual experience of the business since 1986 and especially over the last eight months has demonstrated

that the projections are not valid. From the Debtor's demonstrated inability to make even the proposed plan payments and the substantial delinquent taxes, which he has accrued since he has been operating the business over the past eight years, this Court finds that the 1991 Plan is unrealistic and infeasible.

This Court denies confirmation of the Debtor's proposed Chapter 13 plan, since it is not feasible as required by Section 1325(a)(3).

IT IS SO ORDERED.

/s/

HON. JOHN C. NINFO, II
UNITED STATES BANKRUPTCY JUDGE

Dated: August 26, 1992