

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

CHARLES A. KEARNS

Case No. 96-11000 K

Debtor

At the Confirmation Hearing on April 22, 1996, the Court took under submission the question of whether to confirm this plan which proposes a 3% repayment to \$77,000 in unsecured debt.

As noted at hearing, and as was duly disclosed in the March 13, 1996 voluntary petition, this Debtor had an earlier case - 93-11131 - a Chapter 13 case that had been filed on April 8, 1993, and that was dismissed for failure to make payments in November of 1995. What was not disclosed in the March 13, 1996 petition, was the fact that this Debtor had a third case. That was case number 90-13715. That too was a Chapter 13 case. It was filed on December 7, 1990 and it too was dismissed for failure to make payments called for by the plan on March 17, 1993, barely three weeks before the filing of the 1993 case.

Further examining the 1996 case, we find that the Debtor has scheduled numerous debts that he claims were incurred in 1994, but which in fact appeared in the schedules of his 1993 case and were then reported to have been incurred at various earlier dates, many between 1990 and 1992. Thus, the current petition not only fails to disclose the 1990 filing, but

misstates the dates on which numerous obligations were incurred.

When focusing on the dates that these debts - many of which are credit card debts - were incurred, we find that whether they were incurred in 1991, 1992 or 1994, for example, they were incurred while the Debtor was a Chapter 13 Debtor in this Court, and those obligations may, then, have violated the provision of the Confirmation Order that directs that "Except for emergency medical or hospital care, the Debtor shall not incur any new debts over \$250 outside the ordinary course of the Debtor's financial affairs or business without the prior approval of the Trustee unless such prior approval is impracticable and therefore cannot be obtained."

Further, a proof of claim filed by the Internal Revenue Service in the 1993 case asserted "estimated liability" claims for income taxes for calendar years 1989, 1991 and 1992 "because the debtor has failed to file the returns for the estimated periods". If that assertion was correct at the time it was made, then the Debtor failed to file tax returns for two years in which he was operating under the protection of this Court in the Chapter 13 case filed in 1990.

On the payment side of the equation, the Court notes that the Trustee's Final Report and Account in the 1993 case, discloses that over the course of the two and one-half years from the filing of that case to the filing of the Final Report and Account, and despite the Debtor's promise, under his plan, to pay

\$236 per month to the Chapter 13 Trustee, a grand total of only \$3,622 was paid by the Debtor, and was disbursed as follows: \$2,697.51 on the claim secured by the Cadillac, \$220 to the Trustee in commissions and expenses, \$700 to the Debtor's attorney, and \$5 returned to the Debtor. Of the meager \$670 that the plan proposed to distribute as a 1% dividend to nearly \$57,000 of unsecured debt, not a single penny was paid. Yet, as noted above, new debts were incurred during the pendency of the 1993 case, including a scheduled claim of \$7200 in favor of a Robert and Janet Moxley for "rent," and various significant unpaid utility bills such as Niagara Mohawk for \$1,012, Frontier Cellular for \$625, and even \$250 to the Buffalo News for "news service" (not advertising or other commercial purpose), leaving the Court wondering if even the paper carrier remained unpaid.

Examining the record of the 1990 case, the Court discovered that from the time that case was commenced on December 7, 1990 to the time it was concluded on March 19, 1993, the Debtor paid in almost \$9,000 (less \$498.70 that was returned to him), of which approximately \$7400 was paid on the Cadillac, approximately \$650 was paid in Trustee fees and expenses, and not enough was paid in even to pay a penny either to priority tax claims or to general unsecured claims at the time the case was dismissed for failure to make payments. Again, one or two of the debts listed in the 1996 schedules as having been incurred far more recently, were scheduled in the 1990 case. For example,

First Card filed a \$2,668.21 claim in the 1990 case and in the 1996 case we find an entry for F.C.C. National Bank, in the amount of \$2,669, supposedly incurred in 1994 for credit card purchases. Some of the other creditors scheduled in the 1990 case are for amounts quite close to the amounts for which those same creditors are scheduled in the 1996 case.

Further still, the 1990 schedules disclose yet another bankruptcy filing in 1970, discharged in 1971. This prior filing was not disclosed in either the 1993 petition or the 1996 petition.

Significantly, the Debtor's scheduled unsecured debt in the 1990 case was \$32,766, which grew to \$56,796 in the 1993 case, and \$77,395 in the 1996 case.

In sum, then, we have a Debtor who has lived under the protection of this Court steadily for the past five years, has incurred massive new unsecured debt during that period of time (more than doubling it), has failed to complete two prior Chapter 13 plans, has yet to pay a penny to unsecured creditors under any of his plans, failed in the 1996 petition to disclose the existence of two of his three previous bankruptcies, failed in the 1993 filing to disclose one of his prior bankruptcies (the 1970 filing), and has signed 1996 schedules and statements that contain numerous inaccuracies regarding not only the dates on which the various obligations were incurred, but also contains other aberrations such as his reference to having been employed

at "CK Sales" for six months when in fact he testified that CK Sales does not exist as a separate entity and (according to his other filings) the Debtor has been a self-employed sales rep for thirty years or more. We also find that for at least two of the years that the Debtor was operating under the protection of this Court, he did not file income tax returns in a timely fashion.

There is much here that requires further examination under oath before the Court could conclude that the present plan is both feasible (in light of the steadily increasing unsecured debt under the protection of this Court) and filed in good faith.

The Confirmation Hearing was continued to May 13, 1996 at noon for tracking purposes, so that the Court could take the matter of confirmability under submission. The Court now concludes that it should reschedule that matter. Rather than placing the continued confirmation hearing on an adjourned confirmation calendar, this confirmation hearing will continue at 2:00 p.m. on May 9, 1996, in the Part I Courtroom, 3rd floor U.S. Courthouse. The Debtor and his counsel are directed to appear. The Chapter 13 Trustee is requested to attend if he is available.

SO ORDERED.

Dated: Buffalo, New York
April , 1996

/s/Michael J. Kaplan

U.S.B.J.