

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

In Re:

**SANDY MICHAEL PARLATO d/b/a
Parlato Eye Associates and
SANDRA JEANNE PARLATO,**

Debtor.

BK. NO. 91-20179

CHAPTER 13

DECISION AND ORDER

BACKGROUND

On July 27, 1989 the debtors, Sandy Michael Parlato and Sandra Jeanne Parlato (the "Debtors"), filed a petition initiating a Chapter 7 case which was assigned case number 89-21352. On October 31, 1989 an Order discharging the Debtors was entered in their pending Chapter 7 case. On January 23, 1991, while the Chapter 7 case was still pending, the Debtors filed a voluntary petition initiating a Chapter 13 case which was assigned case number 91-20179. The only creditors listed by the Debtors in their Chapter 13 Statement were: (1) the Monroe County Treasurer for delinquent real estate taxes on their residence; (2) the Internal Revenue Service for delinquent income taxes; (3) the New York State Department of Taxation and Finance for delinquent income taxes; (4) the claims of the first and second mortgage holders on their residence; and (5) three unsecured creditors which are suppliers to Mr. Parlato's business (Mr. Parlato is an optician) for debts incurred subsequent to the filing of the Debtors' Chapter 7 case. Along with the Chapter 13 petition the Debtors filed a plan (the "Plan") which provides for: (1) the payment of \$950.00 per month to the Trustee for a period of 60 months; (2) full payment of the claims of each of the taxing authorities in deferred cash payments; (3) full payment of the first mortgage arrearages plus the contract rate of interest; (4) full payment of the second mortgage plus the contract rate of interest; and (5) full payment of the claims of unsecured creditors.

Confirmation hearings on the Plan were held on February 27, 1991 and again on March 27, 1991. In accordance with a January 25, 1991 case, In re Bodine, in which District Court Judge David G. Larimer of the Western District of New York allowed simultaneous proceedings under Chapter 7 and Chapter 12 and held that such simultaneous filings would be only one factor to consider in making a finding as to whether the petition was filed in good faith (a finding that the plan was filed in good faith is required under 11 U.S.C. § 1325 in order to confirm a Chapter 13 plan), the Court required a current appraisal of the Debtors' residence and reserved on confirmation to determine the issues of good faith and the best interests of creditors.

Bankruptcy Judge Edward D. Hayes did not decide this matter before retiring in early January, 1992 and a further hearing was held by this Court on May 27, 1992.

At the May 27, 1992 hearing the Chapter 13 Trustee confirmed that all of the required \$950.00 monthly Plan payments had been made since the date of the filing of the Chapter 13 petition. He stated that after reviewing the appraisal of the Debtors' residence it appeared that the Plan, as proposed, met the best interests of creditors test (11 U.S.C. § 1325(a)(4)). No objections to con-confirmation were filed and all of the other requirements for confirmation under 11 U.S.C. § 1325 were met. Therefore, the only issue to be decided in connection with confirming the Plan is whether the Plan has been proposed in good faith, as required by 11 U.S.C. § 1325(a)(3).

From the facts and circumstances of this case the Court finds that the Plan was proposed in good faith and that all of the requirements of 11 U.S.C. § 1325 for confirmation have been met. In this case it appears that the Debtors' pending Chapter 7 case, commenced on July 27, 1989, had remained open for administrative closing purposes. In January of 1990, more than a year before the Chapter 13 filing, the Chapter 7 Trustee had filed and served a Statement of Intent to Sell certain of the Debtors' miscellaneous personal property back to the Debtors for \$1,500. This amount was paid to the Trustee on or about January 22, 1990. However, it was not until March 13, 1991, after the Court became aware that the Chapter 7 case had not been closed, that an asset case notice was forwarded to creditors. From the record, it is clear that the Debtors had done everything required of

them in their Chapter 7 case by January, 1990. In fact, the Chapter 7 Trustee had acknowledged that "the Debtors have been extremely cooperative with me and the Chapter 13 will not interfere with the distribution." (Pls. Exhibit 6)

At the various hearings on confirmation, Mr. Parlato testified that the principal reasons for filing the Chapter 13 case were that the holder of the first mortgage on the Debtors' residence had threatened to commence mortgage foreclosure proceedings because of continuing defaults and the Internal Revenue Service had fixed a tax lien against the Debtors. Mr. Parlato testified that at the time of the Chapter 7 case the Debtors believed that they would be able to bring the mortgage payments on their residence current within an acceptable time period to avoid a foreclosure and that subsequent to their Chapter 7 filing they would be able to pay the non-dischargeable amounts owed to the Internal Revenue Service, State of New York and County of Monroe for taxes pursuant to arrangements which would be acceptable to those creditors. However, the Debtors were unable to enter into such agreements with all of the creditors and in some cases to meet agreed upon payment schedules.

At the hearings Mr. Parlato also indicated that a number of the suppliers whose debts had been discharged in the Chapter 7 case had been fully paid. He further testified that his business circumstances were significantly better now than at the time of the filing of the Chapter 7, since he had engaged other opticians to work in the business on a part-time basis thus increasing the overall cash flow of the business. The record also indicates that at the time of their Chapter 7 filing, the Debtors may not have been eligible for Chapter 13 because their scheduled unsecured debts, although the largest one was disputed, were in excess of the maximum amount allowed by 11 U.S.C. § 109(e) and that because of the performance of the Debtors' business a Chapter 13 plan which would have paid a meaningful distribution to creditors may not have been feasible.

The Debtors are not precluded from confirmation of a Chapter 13 plan based solely on the fact that they had a pending or prior Chapter 7 case. As the Supreme Court held in Johnson v. Home State Bank, 111 S.Ct. 2150 (1991), serial filings in Chapter 7 and Chapter 13, the so-called "Chapter

20" filings, are not precluded merely because they are serial in nature. The Court was convinced that "Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization to a debtor who previously has filed for Chapter 7 relief." 111 S.Ct. at 2160.

However, under 11 U.S.C. §1325(a)(3) a debtor must propose a Chapter 13 plan in good faith. "Good faith" in a Chapter 13 proceeding must be identified and defined on a case-by-case basis. In re Rimgale, 669 F.2d 426, 431 (7th Cir. 1982). The initial inquiry is whether "[u]nder the circumstances of the case there has been an abuse of provisions, purpose or spirit of [the Chapter] in the proposal." Id.

The "good faith" requirement contemplates a broad judicial inquiry into the conduct and state of mind of the debtor. Matter of Yavarkovsky, 23 B.R. 756, 759 (S.D.N.Y. 1982). Many courts have used a totality of the circumstances test to determine good faith and analyzed both the prior conduct of the bankruptcy petitioner as well as the petitioner's present circumstances. In re Barrett, 964 F.2d 588 (6th Cir. 1992). The many factors which courts have used to determine good faith were compiled by the Bankruptcy Court in In re Easley, 72 B.R. 948 (Bankr. M.D.Tenn. 1987) after review of over 300 reported decisions.¹ One additional and important factor when the Court is presented with multiple or serial filings is whether the debtor's circumstances have changed so markedly that he can pay creditors in full and that the plan will be successful. In re Barrett, 964 F.2d 588 (6th Cir. 1992).

¹The "good faith" factors are: 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 non-dischargeable, 9) the amount of attorney's fees, 10) the burden of administration, 11) special circumstances like medi-cal costs, 12) the Debtor's degree of effort, 13) the Debtor's ability to learn, 14) the Debtor's employment history and likeli-hood 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'." 72 B.R. 948, 950-55 (Bankr.M.D.Tenn. 1987)

The Debtors bear the burden of proving good faith and in cases of multiple and serial filings, this Court will very closely scrutinize the facts and circumstances of the case in connection with the required determination of good faith. In this regard, the Court will consider a number of factors including those enumerated in In re Easley, with special emphasis on changed circumstances and the totality of the circumstances test, and will make a determination of good faith on a case-by-case basis.

CONCLUSION

Based on the facts and circumstances presented in this case, especially the significant changed circumstances of the Debtors' business, the Court finds that all of the requirements of 11 U.S.C. § 1325(a), specifically that the Plan is proposed in good faith, have been met. The Plan is confirmed. In accordance with the provisions of 11 U.S.C. § 1322(c), the Court finds that there is cause for the Plan to have a 60-month term.

IT IS SO ORDERED.

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

Dated: August 4, 1992