

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

GARY F. LOPRESTE

CASE NO. 00-63972

Debtor

Chapter 13

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APPEARANCES:

DANIEL J. BARRETT, ESQ.

Attorney for Debtor

610 South Main Street

Athens, Pennsylvania 18810

FRANK COMO, ESQ.

Attorney for Creditor

440 Waverly Street

P.O. Box 111

Waverly, New York 14892-0111

LYNN HARPER WILSON, ESQ.

Staff Attorney for Chapter 13 Trustee

250 S. Clinton St. #504

Syracuse, New York 13202

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

This matter is before the Court by way of an objection filed by Beverly Yetter (“Creditor”) on March 8, 2001. Creditor requests that the Court deny confirmation of Gary F. Lopreste’s (“Debtor”) chapter 13 plan (“Plan”). She asserts that the Plan has not been proposed in good faith as required by § 1325(a)(3) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (“Code”). The

hearing to determine confirmation of Debtor's Plan was held on April 10, 2001.<sup>1</sup> At the close of oral argument, the Court determined that an evidentiary hearing would be necessary to determine the issue regarding Creditor's objection to confirmation. On August 23, 2001, the evidentiary hearing took place. Upon its conclusion the Court afforded the parties an opportunity to file additional memoranda of law, and the matter was taken under submission for decision on September 28, 2001.

### **JURISDICTION**

This Court has core jurisdiction over the parties and the subject matter of this contested matter pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(a), (b)(1), (b)(2)(A) and (L).

### **FACTS**

On August 10, 2000, Debtor filed a voluntary petition ("Petition") for relief pursuant to chapter 7 of the Code. His Petition indicates ownership of a parcel of real property in which Debtor actually has only a leasehold interest. He also listed personal property totaling \$2,898.66.<sup>2</sup>

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<sup>1</sup>An objection to the confirmation of the Plan was also filed by the chapter 13 trustee, Mark W. Swimelar, Esq. ("Trustee"), on March 7, 2001. At the hearing on April 10, 2001, Trustee indicated that the concerns expressed in his objection had been addressed by Debtor's amended plan ("Amended Plan"), filed on March 23, 2001.

<sup>2</sup>The equipment that Debtor uses in his part-time occupation as a disc jockey was not included in the Petition when it was filed on August 10, 2000. The disc jockey equipment is discussed in greater detail *infra*.

According to Schedules D and E, Debtor did not have any secured creditors or any unsecured creditors holding priority claims. Altogether, his unsecured nonpriority debt was stated as \$35,598.73. Among the unsecured nonpriority claims was listed a disputed claim in the amount of \$14,000 regarding a pending lawsuit between Debtor and Creditor.<sup>3</sup> Schedule I of the Petition stated Debtor's monthly income to be \$1,766.67, which he earned solely from his occupation as a self-employed disc jockey. His expenses were indicated on Schedule J as \$2,136.<sup>4</sup>

On November 1, 2000, Debtor filed a motion to convert his case from chapter 7 to chapter 13, which was granted by Order dated January 22, 2001. Debtor filed his Plan on February 5, 2001. The sixty-month Plan proposed to pay a total of \$6,000. Nonpriority unsecured creditors would receive \$4,400. Also filed on February 5, 2001, were amended Schedules B, I and J. Schedule B added \$4,360 of disc jockey equipment which had not been included in Debtor's Petition.<sup>5</sup> The amended Schedule I indicated that Debtor's disc jockey work had been conducted in both a self-employed capacity and as an employee of "Bobby K Entertainment."<sup>6</sup> The amended

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<sup>3</sup>According to Creditor, she is Debtor's mother and she co-signed a loan application on January 8, 1999, which allowed Debtor to obtain a loan with Citizens and Northern Bank in the amount of \$16,258.80. *See* Creditor's Memorandum of Law, filed September 28, 2001, at p.2. Creditor further asserts that she gave Citizen and Northern Bank a mortgage on her home as security for Debtor's repayment of the loan. *See id.* She commenced a lawsuit in the Supreme Court of New York, Tioga County in an effort to recover from Debtor for his failure to properly remit his mortgage payments. Creditor argues that, as a result of Debtor's delinquency, she has been forced to remortgage her home to satisfy the loan to Debtor.

<sup>4</sup>Debtor amended Schedule B of his Petition to include two small items of personal property on September 21, 2000; he claimed an exemption in both.

<sup>5</sup>It appears that Debtor decided to convert to chapter 13 when he realized that he would not be able to retain his disc jockey equipment in a chapter 7 liquidation.

<sup>6</sup>As of February 5, 2001, Debtor was laid off from his position with "Bobby K Entertainment." At the evidentiary hearing held on August 23, 2001, Debtor testified that he had

Schedule I also indicated that Debtor had been employed by the “After Hours Bar.” Testimony at the evidentiary hearing revealed that Debtor had been working at the “After Hours Bar” to repay a debt owed to the owner of that establishment. Despite the increased sources of Debtor’s income, his amended Schedule I reveals a reduction of monthly income to \$1,715.24. The amended Schedule J, however, indicates that Debtor’s expenses had likewise decreased since the Petition was filed. As of February 5, 2001, they were now \$1,615 per month. The Plan proposes to pay Trustee’s compensation and Debtor’s attorney’s fees as priority unsecured claims.

Debtor’s confirmation hearing was scheduled for March 13, 2001, and was adjourned to April 10, 2001. On March 8, 2001, Creditor filed the Objection to Confirmation which is the subject of the dispute presently before the Court. Creditor’s objection is based on allegations of bad faith pursuant to Code § 1325(a)(3). Before the confirmation hearing took place, Debtor filed an amended plan (“First Amended Plan”) on March 23, 2001. The First Amended Plan was reduced in duration to thirty-six months, but it proposed to pay disposable income in the significantly greater amount of \$11,700. Of this amount, \$6,108 was to be paid to priority unsecured creditors. Debtor now included his “divorce” attorney as a priority unsecured creditor based on unpaid fees totaling \$2,400, which had been incurred post-petition. He also included the Commonwealth of Pennsylvania as a priority unsecured creditor in the amount of \$938, and he increased the amounts to be paid to his bankruptcy attorney and the Trustee. Debtor proposed to pay nonpriority unsecured creditors \$5,592.

Annexed to Debtor’s First Amended Plan were his Schedules I and J, which he had again

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not resumed working for “Bobby K Entertainment.”

amended. Schedule I indicated that Debtor's current monthly income was \$1,914.18, which was an increase from the Schedule I filed on February 5, 2001. Although Debtor continued to work as a self-employed disc jockey, Schedule I indicated that he had also obtained a position as a laborer at Harvard Manufacturing ("Harvard") on March 5, 2001. As a laborer at Harvard, Debtor was required to work forty hours per week, receiving wages of \$8.75 per hour. His net monthly income from this newly-acquired position was projected as \$1,089.<sup>7</sup> According to Schedule I, Debtor continued to work as a disc jockey, but that income decreased with the commencement of his employment at Harvard. According to Debtor's amended Schedule J, his expenses had decreased to \$1,588 per month. The difference between his income and expenses provided him with \$325 per month to pay the Trustee.

At the evidentiary hearing held on August 23, 2001, Debtor testified about his divorce and custody proceedings which were pending in a Pennsylvania state court. Based on those proceedings, Debtor testified that his ability to obtain custody of his child would improve if he reduced the amount of time he spent working at night in bars as a disc jockey. In an effort to meet the concerns expressed in the Pennsylvania state court proceedings, Debtor testified that he was planning to voluntarily reduce his disc jockey work by fifty percent.

After this matter was taken under submission for decision, Debtor filed another amended plan ("Second Amended Plan") on October 5, 2001. Although Debtor's payments would remain the same, the disposable income to nonpriority unsecured creditors would decrease to \$3,493.50 pursuant to the Second Amended Plan. The reason for the reduced income to nonpriority

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<sup>7</sup>At the time the First Amended Plan was filed, Debtor had not yet received a paycheck from Harvard. Thus, he could only estimate his income from that source in his First Amended Plan.

unsecured creditors was that Debtor's bankruptcy attorney's fees were increased from \$1,600 to \$3,698.50. Because the Second Amended Plan was the latest version filed before entry of this Memorandum-Decision and Order, it replaces the First Amended Plan as the subject of the Court's good faith analysis.

### **ARGUMENTS**

Creditor argues that Debtor's Plan was not filed in good faith as is required by Code § 1325(a)(3). Consequently, Creditor asserts that Debtor's Plan should not be confirmed. This argument focuses on two primary points. First, Creditor asserts that Debtor does not satisfy the requisite elements for demonstrating good faith, as set forth by caselaw addressing chapter 13 confirmations. In support of this position, she alleges that Debtor has made preferential transfers to certain creditors and manipulated his Schedules with respect to income and expenses. Creditor also asserts that Debtor's motivation for filing his bankruptcy petition on August 10, 2000, was a pending summary judgment motion by Creditor in the Tioga County Supreme Court. That motion was returnable on August 11, 2000. Finally, Creditor asserts that Debtor is attempting to mislead the Court. In particular, Creditor focuses on the various expenses listed in Schedule J. According to Creditor, Debtor has improperly attempted to designate various expenses as business expenses, and he has exaggerated the amount of income needed to operate as a self-employed disc-jockey.

Creditor's second major argument is that Debtor is precluded from voluntarily reducing the income he receives from his disc jockey work. According to Creditor, Debtor's responsibility

to propose a chapter 13 plan in good faith requires that he make every effort to maximize his earning capacity. Debtor testified that his disc jockey work does not interfere with his employment at Harvard because his position at Harvard requires a forty-hour weekly schedule from Monday through Friday and his disc jockey occupation requires him to work only at nights and on weekends. Thus, Debtor is able to maintain both his work as a self-employed disc jockey and his position as a laborer for Harvard. Creditor asserts that he ought to be required to do so in order to meet the requirements of good faith.

In response, Debtor argues that the inconsistencies and alleged evasiveness regarding his Plan are actually the unavoidable realities of Debtor's financial predicament as a self-employed disc jockey. According to Debtor, the unstable relationship between income and expenses will become more consistent as a result of his recent commencement of full-time employment. He asserts that his good faith is underscored by his attempt to maintain a steady income. He also argues that any of the dealings, alleged by Creditor to be deceptive, have been addressed and explained in his chapter 13 Plan. Thus, he asserts that they cannot serve as a basis for arguing that Debtor is attempting to mislead the Court. Finally, Debtor asserts that he has not voluntarily reduced his income. To the contrary, he notes that his total monthly income is greater now than it has been in years. He confirms that he is reducing his disc jockey income for the sole purpose of obtaining custody of his daughter. He argues, however, that his total income has increased as a result of his relatively secure position with Harvard. According to Debtor, it is, therefore, improper for Creditor to rely on his minimal reduction of income from his disc jockey work as a basis for asserting bad faith.

## DISCUSSION

At the close of the evidentiary hearing on August 23, 2001, the Court identified two issues which must be addressed before Debtor's Second Amended Plan can be confirmed. The first issue is whether Debtor's voluntary reduction of his disc jockey income is evidence that Debtor's Plan is not proposed in good faith. The second is whether Debtor's pre-Petition conduct and his allegedly inconsistent statements in his Petition and subsequent amendments indicate an absence of good faith.

Where Courts have addressed the voluntary reduction of income or refusal to maximize income, the analysis has been conducted in the context of the entire good faith inquiry. *See State Educ. Assistance Auth. v. Johnson*, 43 B.R. 1016, 1021 (E.D. Va. 1984); *In re Jobe*, 197 B.R. 823, 828 (Bankr. W.D. Tex. 1996); *In re Sullivan*, 40 B.R. 914, 917 (Bankr. E.D.N.Y. 1984). Thus, the Court must address the inquiry regarding Debtor's voluntary reduction of income as one of the various factors considered in the good faith analysis. An absence of good faith is found in circumstances where the debtor has voluntarily reduced his income shortly before or during his bankruptcy case but is unable to proffer any reasonable explanation for doing so. *See Sullivan*, 40 B.R. at 917. A debtor's unwillingness or inability to explain his income reduction leaves the Court with the inference that the debtor was motivated by his intent to reduce the income available to creditors under his plan. *See id.* In the matter *sub judice*, Debtor has provided a sensible, even commendable reason for reducing his income. Although the disc jockey work is available to Debtor every weekend, Debtor has chosen to reduce the number of jobs he accepts in order to improve his chances of obtaining custody of his daughter. The Court understands that Debtor's interests in his Pennsylvania state court custody action and those in his



bankruptcy case are somewhat at odds. Debtor's proposal to reduce his disc jockey work by fifty percent improves his appearance as a responsible parent. Concurrently, he proposes to maintain fifty percent of his disc jockey work in order to meet the requirements of his Plan and repay his creditors. Consequently, the Court finds that Debtor's voluntary reduction of income does not mandate a conclusion of bad faith. The resolution of this issue, however, only satisfies one element of the good faith analysis. All of the considerations regarding Debtor's good faith must be addressed before the Second Amended Plan can be confirmed.

Although the term "good faith" is not defined in the Code, it has been described "'as a juridical tool of remarkable flexibility' . . . by which the Court measures intent." *In re Klevorn*, 181 B.R. 8, 10 (Bankr. N.D.N.Y. 1995) (B.J. Gerling) (quoting *In re Heard*, 6 B.R. 876, 883 (Bankr. W.D. Ky. 1980)). In determining whether a petition is filed in good faith or a plan is proposed in good faith, courts must consider the "totality of the circumstances." *In re Goeb*, 675 F.2d 1386, 1391 (9th Cir. 1982). The bankruptcy court's analysis must include an inquiry of whether the debtor has "misrepresented facts in his [petition or] plan, unfairly manipulated the Bankruptcy Code, or otherwise [filed] his Chapter 13 [petition or] plan in an inequitable manner." *Klevorn*, 181 B.R. at 10 (quoting *Goeb*, 675 F.2d at 1390). "The court must make its good-faith determination in the light of all militating factors." *Id.* Technical compliance with the Code alone is not sufficient to establish good faith. *See id.* at 11. The debtor must also be able to demonstrate that he has invoked the reorganization provisions of the Code "with the purpose of accomplishing the aims and objections of the bankruptcy philosophy and policy." *Id.* (citations omitted).

Because Creditor's objections concern the possibility of denying confirmation pursuant to Code § 1325(a)(3) or dismissing Debtor's case pursuant to Code § 1307(c), the Court must

address the inquiry of good faith as it relates to both of these Code provisions. Courts generally apply the same standards in evaluating whether a debtor has filed his petition in bad faith or has proposed his plan in bad faith. *See id.* at 10. Dismissal of Debtor's case pursuant to Code § 1307(c) is the harsher of the two remedies. Therefore, the Court's analysis will primarily rely on law addressing the filing of the petition. *See id.* at 11.

As required, the Court conducts its good faith inquiry by considering a number of variables. Specifically, the following factors are relevant to the analysis: (1) whether the debtor has few or no unsecured creditors; (2) whether there has been a previous petition filed; (3) whether the debtor's conduct pre-petition was proper; (4) whether there are few debts to non-moving parties; (5) whether there is any pressure from non-moving creditors; (6) whether the debtor's income is sufficient such that there is a likely possibility of reorganization; (7) whether the petition was filed on the eve of foreclosure; (8) whether the reorganization essentially involves the resolution of a two party dispute, and (9) whether the debtor filed solely to obtain the protection of the automatic stay. *See generally In re Powers*, 135 B.R. 980, 992 (Bankr. C.D. Ca. 1991). Considering each of these factors individually, the Court makes the following conclusions:

With regard to the first factor, Debtor has listed multiple unsecured creditors with debts totaling \$35,598.73. According to his Petition, however, he has no secured debt.

As to the second factor, Debtor has not previously filed for bankruptcy relief. Although his present chapter 13 case was originally filed under chapter 7 and then converted to chapter 13, he has only filed one petition.

Creditor notes a transaction between Debtor and Debtor's landlord which was allegedly a pre-petition attempt by Debtor to protect his disc jockey equipment from liquidation. Thus,

Creditor argues that Debtor fails to satisfy the third factor of the good faith test. To substantiate this assertion, Creditor has filed a Purchase Agreement and Lease Agreement with the Court. *See* Objectant's Exhibit 1. The Purchase Agreement proposes a sale of the landlord's real property in exchange for monthly payments by Debtor in the amount of \$425. The Lease Agreement proposes an exchange of the use of the real property by Debtor for a period of twenty-four months, in return for the landlord's use of the disc jockey equipment. The evidence indicates, however, that the disc jockey equipment remained in Debtor's possession, and he paid a monthly rental fee of \$425 for use of the real property. Thus, the result of the transactions appears to be that Debtor leased real property from his landlord, paid rent in the amount of \$425 per month and retained his disc jockey equipment. When Debtor first filed his Plan on February 5, 2001, he amended Schedule B to include the disc jockey equipment. He also includes the rent of \$425 per month as an expense. Thus, everything provided for by the pre-petition agreements between Debtor and his landlord has been accounted for in Debtor's bankruptcy case. Though the crude forms of the agreements render them confusing and possibly even suspect, the Court is unable to discern any persuasive evidence of improper conduct.

The Court considers factors four and five together. As stated above, Debtor lists multiple unsecured creditors in his petition. Although the largest claim stated in the Petition is the \$14,000 disputed debt to Creditor, Debtor has also listed other unsecured creditors whose debt totals almost \$20,000 altogether. None of these creditors has objected to confirmation of Debtor's Plan.

The analysis above regarding Debtor's voluntary reduction of income applies in this evaluation of factor number six. Although Debtor has reduced his income from his disc jockey work, he has obtained stable employment with Harvard. He works forty hours per week and

receives a regular paycheck. He also continues to work as a disc jockey at night and on the weekends in order to supplement his income. The Court finds his attempt to ensure that his income stabilizes to be evidence of an honest effort to reorganize his debt and repay his creditors. Moreover, even without the additional income from his work as a disc jockey, Debtor's total income has increased as a result of his employment with Harvard.

Creditor asserts that Debtor filed his chapter 7 petition one day before a summary judgment motion was to be heard in Creditor's state court action to recover the amount owed to her by Debtor. The Court has no confirmation that a summary judgment motion was actually scheduled to be heard on August 11, 2000. Nonetheless, dismissal of Debtor's case will only be ordered if Debtor's filing on the eve of trial, in combination with all of the other relevant factors, leads the Court to conclude that Debtor acted in bad faith and dismissal is the proper remedy. *See Eisen v. Curry (In re Eisen)*, 14 F.3d 469, 470 (9th Cir. 1994) (dismissing debtor's case for lack of good faith where petition was filed on the eve of state court trial, debtor submitted contradictory and misleading descriptions of his interest in property and he failed to disclose an earlier bankruptcy filing which had been dismissed for bad faith).

As to the eighth factor, this reorganization does not appear to involve only a two party dispute. Although Creditor's dispute with Debtor is the most pronounced in this bankruptcy case, Debtor's reorganization also involves debts to the Commonwealth of Pennsylvania, payments to Debtor's attorneys regarding his divorce and custody action, utility companies, credit card companies, health services, and more. His bankruptcy appears to be the result of an earnest desire for a fresh start.

Finally, as stated above, it is possible that Debtor timed the filing of his petition such that

he would gain the benefit of the automatic stay and preclude Creditor's state court summary judgment motion from proceeding. It appears, however, that Debtor's ultimate reliance on the automatic stay has provided him with the "breathing space" he needs to reorganize his debt. This is the very purpose for which the automatic stay is intended. His deliberate timing in filing his Petition does not overshadow his otherwise genuine attempt to reorganize.

The Court's review of the above nine factors results in the conclusion that Debtor filed his Petition and Plan in good faith. The established test of good faith, however, does not provide for consideration of Creditor's concerns regarding Debtor's allegedly inconsistent statements of income and expenses as set forth in his multiple amended Schedules I and J. Thus, the Court is required to separately address the issue regarding income and expenses. *See Klevorn*, 181 B.R. at 12 (reviewing the issue of good faith beyond the factors set forth by caselaw for use in the good faith analysis). The Court notes that Debtor has filed multiple amendments to his Schedules I and J. Creditor asserts that this practice is confusing and even misleading. She argues that Debtor conforms his statements to his current whim, and he alters the appearance of his financial predicament to benefit his bankruptcy case regardless of what his income and expenses actually are. The Court acknowledges that Debtor's multiple amendments have proven somewhat confusing for all parties involved. The Court finds, however, that Debtor's continually changing financial statements are not indicative of dishonesty or impropriety. Rather, they are the unavoidable result of Debtor's *sui generis* occupation as a self-employed disc jockey. The Court concludes that this continuous fluctuation and instability should be reduced with Debtor's employment at Harvard. Consequently, Debtor will not be penalized at this time for bad faith

based on his statements regarding his income and expenses.<sup>8</sup>

Based on the foregoing, it is hereby

ORDERED that Creditor's objection to confirmation is denied, and it is further

ORDERED that Debtor's Second Amended Plan is hereby confirmed.

Dated at Utica, New York

this 23rd day of May 2002

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge

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<sup>8</sup>While this matter has been under submission, on or about January 2, 2002, the Trustee filed a motion to dismiss the case for non-payment and a Conditional Order of Dismissal was executed on February 15, 2002. By correspondence dated April 14, 2002, the Trustee notified the Court that Debtor had complied with the Conditional Order.