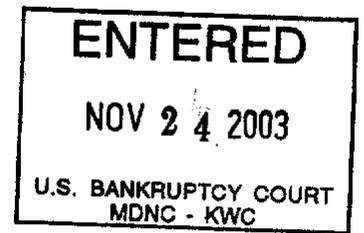


UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION



IN RE:)
)
John F. Thompson, III,) Case No. 03-12574C-13G
)
Debtor.)
)

ORDER

This case came before the court on October 28, 2003, for a confirmation hearing regarding Debtor's proposed plan of reorganization and for consideration of an objection to confirmation that was filed on behalf of General Motors Acceptance Corporation ("GMAC") William O. Moseley, Jr. appeared on behalf of the Debtor, Pamela P. Keenan appeared on behalf of GMAC and Anita Jo Kinlaw Troxler appeared as Chapter 13 Trustee.

The matter for determination by the court is whether Debtor's proposed plan satisfies the requirement under § 1325(a)(3) that the plan be proposed in good faith and not by any means forbidden by law. GMAC asserts in its objection that the proposed plan does not satisfy this requirement because in this case, Debtor's second Chapter 13 filing, the Debtor proposes to value GMAC's collateral (a 2001 Chevrolet Suburban) as of the petition date in this case rather than as of the date of Debtor's first case which GMAC characterizes as constituting a "repeat cram-down".

Debtor's first Chapter 13 case (Case No. 03-10193) was filed on January 17, 2003, and was voluntarily dismissed prior to confirmation on May 8, 2003. When Debtor's first case was filed,

Debtor was current in his payments to GMAC through December of 2002. However, following the filing of the first Chapter 13 case, Debtor commenced making monthly payments to the Trustee as required by § 1326(a) of the Bankruptcy Code and made no further direct payments to GMAC. Upon the dismissal of Debtor's first Chapter 13 case, the Trustee returned to the Debtor the sum of approximately \$4,000.00 pursuant to § 1326(a), representing the amount which Debtor had paid to the Trustee during the pendency of the first Chapter 13 case. Debtor's current Chapter 13 case was filed on July 29, 2003, approximately two and one-half months after the dismissal of the first Chapter 13 case. In the proposed plan now before the court, the Debtor has valued the 2001 Suburban which is subject to GMAC's lien at \$23,300.00 based upon the value of the 2001 Suburban on the petition date in the present case and has proposed allowing GMAC a secured claim in that amount which Debtor proposes to pay at the rate of \$575.00 per month, increasing to \$675.00 per month in November of 2004, increasing to all funds available in September of 2006.

GMAC asserts that as of the petition date in Debtor's first Chapter 13 case, the 2001 Suburban had a retail value of \$27,157.50, that Debtor retained and used the vehicle throughout the pendency of the first Chapter 13 case and for an additional two and one-half months following the dismissal without any payments being made to GMAC, resulting in the depreciation of the vehicle,

and that Debtor's plan in the present case was not proposed in good faith as to GMAC as a result of Debtor having proposed to use the depreciated value which existed when the present case was filed.

Whether a Chapter 13 plan has been proposed in good faith is an elastic concept that requires a factual determination on a case-by-case basis. See In re Cushman, 217 B.R. 470, 475 (Bankr. E.D. Va. 1998). In making the good faith determination, the court must consider the totality of the circumstances presented rather than focusing on any single factor. See Deans v. O'Donnell, 692 F.2d 968, 972 (4th Cir. 1982). In Neufeld v. Freeman, 794 F.2d 149 (4th Cir. 1986), the court provided a non-inclusive list of factors which maybe considered in determining whether a plan was proposed in good faith which include the percentage of proposed repayment to creditors, the debtor's financial situation, the period of time over which creditors will be paid, the debtor's employment history and prospects, the nature and amount of unsecured claims, the debtor's past bankruptcy filings, the debtor's honesty in representing the facts, the nature of the debtor's pre-petition conduct that gave rise to the debts, whether the debts would be dischargeable in a Chapter 7 case and any other unusual or exceptional problems faced by the debtor. In making the good faith analysis and reviewing these and any other pertinent factors involved, the court should be "mindful of the fact that the good faith inquiry is intended to prevent abuse of the provisions,

purpose, or spirit of Chapter 13." See In re Solomon, 67 F.3d 1128, 1134 (4th Cir. 1995). Also, in the context of a confirmation hearing, it is the debtor who has the burden of proof on the issue of good faith. See Cushman, 217 B.R. at 476.

To the extent that GMAC contends that valuation of a secured creditor's collateral as of the filing date of a second Chapter 13 filing constitutes a lack of good faith per se, such contention is rejected. Whether there is a lack of good faith on the part of a Chapter 13 debtor in utilizing the subsequent valuation date depends upon the totality of the circumstances of the case and includes consideration of such factors as the amount which was paid to the secured creditor during the first Chapter 13 case, the circumstances surrounding the dismissal of the first Chapter 13 case, whether there has been a change in such circumstances and the terms proposed for the secured creditor in the proposed plan in the second filing.

Having considered the evidence offered by the Debtor and the totality of the circumstances revealed by such evidence and the matters of record in this case, the court has concluded that the Debtor has failed to show that the plan now before the court was proposed in good faith insofar as GMAC is concerned. In the present case, the Debtor's two Chapter 13 filings were preceded by a Chapter 7 filing by the Debtor approximately six months prior to the filing of the first Chapter 13 case in which the Debtor's

personal liability to GMAC was discharged. The Debtor was able to retain possession of the 2001 Suburban following the Chapter 7 filing by keeping the payments to GMAC current. However, once the Chapter 13 case was filed in January of 2003, payments to GMAC ceased while Debtor apparently negotiated with creditors regarding a proposed plan of reorganization. During these negotiations which extended over approximately five months, the Debtor retained and continued to use the 2001 Suburban even though GMAC was receiving no payments. In May of 2003, the Debtor voluntarily dismissed his case which resulted in the funds that he had paid to the Trustee being returned to the Debtor. Debtor offered no plausible explanation for why he elected to voluntarily dismiss his case rather than proposing a plan which would provide acceptable treatment for the secured claim of GMAC. It is clear, however, that Debtor's voluntary dismissal resulted in the payments which had been made to the Chapter 13 Trustee being refunded to the Debtor. Thus, no payments were made to GMAC during the pendency of Debtor's first Chapter 13 case even though Debtor retained and used the 2001 Suburban during the pendency of the case. Further, as of the date when the second Chapter 13 case was filed, GMAC still had not received any payments even though the Debtor had continued to retain and use the 2001 Suburban during approximately three months between the voluntary dismissal of the first Chapter 13 case and the filing of the case now before the court. Under these

circumstances, the court is unable to conclude that Debtor's proposed plan under which the Debtor proposes to value the 2001 Suburban as of July 9, 2003, the petition date in Debtor's second Chapter 13 case, is a good faith plan proposal. Accordingly, the GMAC objection will be sustained and confirmation of the Debtor's plan will be denied.

IT IS SO ORDERED.

This 20th day of November, 2003.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge