UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA

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| IN RE: | ) | |
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| Haywood M. Clayton | ) | Case No.: 00-81622 C-13W |
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## ORDER DENYING CONFIRMATION OF PLAN

**THIS MATTER** came on for hearing before undersigned Bankruptcy Judge on November 28, 2000, in Winston-Salem, North Carolina, after due and proper notice, upon the Confirmation of the Chapter 13 Plan of Reorganization filed by the Pro Se Debtor. The Chapter 13 Trustee, Kathryn L. Bringle, and Ameriquest Mortgage Company (hereinafter "Ameriquest"), the creditor holding the mortgage on the Debtor's homeplace, have both objected to confirmation on the grounds that the plan fails to meet all the requirements of 11 U.S.C. § 1325, specifically that the plan fails to meet the requirement under Section 1325 (a) (3) in that it was not proposed in good faith. Appearing before the court were Haywood M. Clayton, pro se (hereinafter "Debtor"), Stacy C. Cordes, attorney for Ameriquest, and Kathryn L. Bringle, the Chapter 13 Standing Trustee.

Ameriquest's objection was not heard by the court as it was not timely filed. The Notice of Proposed Plan and Time for Filing Objection Thereto was filed on October 18, 2000 and provided that "written, detailed objections must be filed within 25 days of the date of this notice with the Clerk of Court . . ." Thus, objections were required to be filed by Monday, November

13, 2000[1]. Ameriquest's objection to confirmation not filed until November 15, 2000. The Notice of Proposed Plan required that objections be filed, not served, within twenty-five (25) days of the date of the notice. Ameriquest did not have an additional three days pursuant to Rule 9006 (f) in which to file the objection as argued by counsel. In re Branch, 228 B.R. 831, n. 2 (Bankr. W.D. Va. 1998). Having determined that Ameriquest's objection was untimely, the court proceeded to hear only the Chapter 13 Trustee's objection to confirmation.

The good faith requirement of Section 1325 (a) (3) is a mandatory provision, and it is designed to insure that a party is not allowed to abuse the bankruptcy process. Good faith is not a defined term in the bankruptcy code. The Fourth Circuit has addressed the issue on several occasions and this Court is governed by the Fourth Circuit totality of the circumstances inquiry as set forth in Neufeld v. Freeman, 794 F.2d 149 (4th Cir. 1986). The Court is to focus on such factors as the percentage of proposed repayment to creditors, the debtor's financial situation, the period of time over which the creditors will be paid, the debtor's employment history and prospects, the nature and amount of the unsecured claims, the debtor's past bankruptcy filings, the debtor's honesty in representing the facts of the case, 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 proceeding, and any other unusual or exceptional problems the debtor faces . Id. at 152 (citing Deans v. O'Donnell, 692 F.2d 968, 972 (4th Cir. 1982)); Solomon v. Cosby (In re Solomon), 67 F.3d 1128, 1134 (4th Cir. 1995).

A good faith inquiry is intended to prevent abuse of the provisions, purpose, or spirit of

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[1]The deadline actually fell on November, 12, 2000; however, since the 12th was a Sunday, the deadline was extended to Monday, November 13, 2000 pursuant to Rule 9006 (a) of the Rules of Bankruptcy Procedure.

Chapter 13. In re Neufeld, 794 F.2d at 152. The Debtor is a serial bankruptcy filer having filed his most recent bankruptcy proceeding on June 30, 2000. His primary asset is a residence located in Chapel Hill, North Carolina which he owns as tenants by the entirety with his wife, Sylvia K. Clayton. The Debtor values the property at $410,000.00 and lists the mortgage holder indebtedness as "unknown and disputed."

The Note and Deed of Trust were executed by the Debtor and Mrs. Clayton on February 8, 1999 and the Deed of Trust was recorded in Orange County, North Carolina on February 15, 1999. The Note is in the principal amount of $267,000.00 with monthly payments of $2,314.56 with a variable interest rate. Payments were to commence April 1, 1999. The Debtor made only one payment under the terms and conditions of the mortgage and has contested the mortgage since that payment was made. Ameriquest has filed a proof of claim alleging they are due principal and interest as of the petition date in the amount of $32,403.84 representing fourteen monthly payments of $2,314.56 each from May 1, 1999 to June 1, 2000 and that they are due an appraisal fee of $325.00 and foreclosure fees of $706.62 for a total arrearage claim of $35,379.64. The Debtor has filed an objection to the proof of claim and has initiated a lawsuit against Ameriquest in which he asserts four claims: 1) breach of contract; 2) fraud; 3) unjust enrichment; and 4) tortious interference. The Debtor's wife, the co-owner of the property and the co-obligor under the note and deed of trust, is not a party to the lawsuit. Ameriquest had initiated a foreclosure proceeding at the time the present bankruptcy case was filed.

This bankruptcy is a two party dispute. The Debtor's schedules do not reflect any other debt other than the disputed debt of Ameriquest. The Debtor has never amended his schedules to add any tax creditor or any unsecured creditor. To date, no claims have been filed by any party but Ameriquest.

Ameriquest became a creditor of the Debtor and Mrs. Clayton when they loaned them the funds to payoff their mortgage held by First Union National Bank (hereafter, "First Union"). While this is the first bankruptcy filing involving the Debtor and Ameriquest, a review of all prior filings by both Mr. Clayton and Sylvia K. Clayton reflect the following:

(1) Mr. Clayton's first Chapter 13 petition was filed on April 15, 1991, while First Union's foreclosure was pending, and was dismissed on May 22, 1992, for failure to make required monthly payments.

(2) Mr. Clayton's second Chapter 13 petition was filed on November 23, 1992, while First Union's foreclosure was pending, and was dismissed on July 26, 1993, for failure to make required monthly payments.

(3) Mrs. Clayton filed a Chapter 13 petition on September 21, 1993, the day a First Union foreclosure sale was scheduled, in which the court on July 12, 1994, granted relief from the automatic stay to First Union to foreclose on its Deed of Trust. Mrs. Clayton voluntarily dismissed this Chapter 13 case on July 13, 1994.

(4) Mr. Clayton filed his third Chapter 13 case on July 12, 1994[2], while a First Union foreclosure was pending, which was consolidated with a second Chapter 13 case filed by Mrs. Clayton. This consolidated case was dismissed with prejudice on May 30, 1995.

(5) Mr. Clayton filed his fourth Chapter 13 petition on December 8, 1995, while a First Union foreclosure was pending. That petition was dismissed on December 5, 1996, with prejudice for one year from October 2, 1996.

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[2]This filing occurred within the six-year period prior to the present filing but was not listed on the Debtor's schedules.

(6) Mr. Clayton filed a Chapter 7 petition on January 2, 1997, while a First Union foreclosure was pending with sale scheduled for January 3, 1997. Relief from the automatic stay was granted to First Union effective March 25, 1997. Mr. Clayton received a discharge and is no longer personally liable to First Union.

(7) Sylvia K. Clayton filed her third Chapter 13 petition on July 8, 1997, again while a foreclosure was pending, in the Middle District of North Carolina. That case was transferred to the Eastern District of North Carolina and was dismissed with prejudice on September 25, 1997. The court's order also provided that the automatic stay was lifted to permit First Union to foreclose on the property and went on to provide that if the Debtor (referring to Sylvia Clayton) should file a petition under another Chapter, the automatic stay should automatically be lifted.

(8) Mr. Clayton's fifth Chapter 13 petition was filed on March 23, 1998. At that time, First Union had again commenced a foreclosure proceeding as the Claytons had not made a payment since July 12, 1997 and were delinquent in interest in excess of $39,000.00. The payment made on July 12, 1997, was applied to the payment due and outstanding for December, 1992. The Debtor disputed the debt with First Union and had a lawsuit pending against them in Superior Court when he filed his Chapter 13 petition. In April of 1998, this Court found that the Debtor's fifth Chapter 13 and his sixth bankruptcy filing was filed in bad faith and that cause existed to lift the automatic stay. The Debtor then took a voluntary dismissal from Chapter 13.

It is apparent from the record that Mr. and Mrs. Clayton were able to frustrate First Union's foreclosure efforts by filing a series of unsuccessful bankruptcy petitions. The Debtors

were able to pay off First Union and now seek to employ the same dilatory tactics with Ameriquest. Since April 1991, the Claytons, together, have filed a total of ten bankruptcy petitions to forestall foreclosure on their homeplace. Serial filings even on the eve of foreclosure are not per se bad faith plans under Section 1325 but clearly warrant close scrutiny by the Court.

Additional factors indicating bad faith on the part of the Debtor are as follows:

(1) The Debtor is proposing to pay all allowed unsecured claims 100%. There are no listed unsecured claims. The deadline to file a proof of claim except for a governmental unit is November 9, 2000. There are no filed claims in this case other than the claim of Ameriquest. The Debtor has filed an objection to the Ameriquest claim requesting that the claim of Ameriquest be designated as unsecured. (See amendment to proposed plan filed September 15, 2000). Assuming that the Court were to find Ameriquest was an unsecured creditor, the claim would be paid in full given the Debtor's equity in the property. The plan proposed by the Debtor *only* proposes to pay Ameriquest $775.00 per month (on the arrearage claim) and $2,314.56 a month outside the plan. If the plan stayed in place for sixty months the Debtor would only have paid Ameriquest $185,373.60 violating 11 U.S.C. § 1325 (a)(4), which imposes a best interests of creditors prerequisite for confirmation of a Chapter 13 plan.

(2) The Debtor proposes to make ongoing payments outside the plan to Ameriquest but has not made any payments to the creditor since the petition was filed in June, 2000. The Debtor's proposed plan treatment to commence payments to Ameriquest in November, 2000, violates the provisions of 11 U.S.C. § 1322. Despite the fact that the plan treatment proposed by the Debtor violates § 1322,

the Debtor has not complied with the treatment he proposed. Payments due under the mortgage were due on November 1, 2000. Ameriquest has not received a payment since April 1, 1999.

(3) The Debtor proposes to pay the Trustee $750.00 per month. The Debtor filed his initial plan within fifteen days of the filing of the petition stating that the plan payments would be $3,000.00 per month. Pursuant to 11 U.S.C. § 1326, unless the court orders otherwise, the debtor should commence making payments proposed by a plan within thirty days after the plan is filed. The Court has not ordered otherwise. The Debtor's initial plan was filed on July 17, 2000 and as such the Debtor had until August 18, 2000, to commence plan payments. The Debtor made his first and only payment to the Trustee on November 20, 2000, with said payment being in the amount of $775.00.

(4) Sylvia Clayton, co-owner of the property and the co-debtor under indebtedness to Ameriquest, has not joined in this bankruptcy or in the Adversary Proceeding. The Debtor failed to give adequate disclosure or consideration to the non-debtor spouse's income or her share of reasonable expenses. The Debtor's testimony at the hearing disclosed that Ms. Clayton is gainfully employed and earns an annual income of approximately $50,000.00. The failure to consider these issues does not meet the good faith test of 11 U.S.C. § 1325 (a)(3). In re Bottorff, 232 B.R. 171 (Bankr. W.D. Mo. 1999).

(5) The Debtor has only made one payment on his debt to Ameriquest. The arrearage claim filed by Ameriquest is $35,379.64. Despite not making the fourteen prepetition payments of $2,314.56 per month to Ameriquest, the Debtor only

shows cash on hand as of the date of filing at $250.00 and shows checking, savings, and certificate of deposit of less than $10.00. The Debtor testified that some monies have been used to make improvements to his residence, including a new roof. Nevertheless, the Debtor should have significant cash as he has not made a mortgage payment for over fourteen months. This too causes the Court to question whether the plan was proposed in good faith.

(6) Pursuant to 11 U.S.C. § 1322 (c) the plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period which period cannot exceed five years. The Debtor has a significant amount of equity in his home and the Debtor has failed to show cause why he should be allowed a period greater than three years to payoff any pre-petition arrearage on his mortgage.

(7) The Debtor's schedules fail to reflect all prior bankruptcy filings filed within six years of this filing - specifically, Debtor fails to list his third Chapter 13 which was filed on July 12, 1994.

The party who seeks a discharge under Chapter 13 bears the burden of proving good faith under 11 U.S.C. § 1322. In re Herndon, 218 B.R. 821, 824 (Bankr. E.D. Va. 1998); In re Harrison, 203 B.R. 253, 255 (Bankr. E.D. Va. 1996); Hardin v. Caldwell (In re Caldwell), 895 F.2d 1126 (6th Cir. 1990); In re McMillan,251 B.R. 484, 486 (Bankr. E.D. Mich. 2000) (Chapter 13 debtor must prove by preponderance of the evidence that plan satisfies each of confirmation requirements); In re McNichols, 254 B.R. 422, 427 (Bankr. N.D. Ill. 2000); In re Haskell, 252 B.R. 236, 242 (Bankr. M.D. Fla. 2000); In re Girdaukas, 92 B.R. 373, 376 (Bankr. E.D. Wis. 1988).

In reviewing the totality of the circumstances, items in the Debtors favor are (1) the Debtor has not attempted to discharge a debt in a Chapter 13 that would be nondischargeable in a Chapter 7 proceeding, and (2) the Debtor has maintained a job as a self-employed chemical manufacturer and distributor for a period of twenty-seven years. These factors do not overcome the negative factors. The only debt in this case is the mortgage. The Debtor disputes the validity of the mortgage. "To use the Bankruptcy Court solely as an alternative forum for the resolution of a [tax] dispute is not a proper use of the Bankruptcy Code." In re Greatwood, 194 B.R. 637, 640 (9th Cir. BAP 1996).

After a review of the totality of the circumstances, the Court finds that the plan fails to meet the good faith requirements of 11 U.S.C. §1325 and will not be confirmed.

This Court notes that there is no pending motion to dismiss for lack of good faith under 11 U.S.C. § 1307(c) and that it is the movant and not the debtor that bears the burden of proof for lack of good faith under § 1307(c). In re Love, 957 F.2d 1350, 1356 (7th Cir. 1992). The standard for good faith for dismissal under § 1307(c) is similar but not precisely the same as the standard of good faith with respect to the plan under § 1325(a)(3).

THEREFORE, IT IS ORDERED ADJUDGED AND DECREED that this plan will not be confirmed and is hereby DENIED. The Debtor will be given until December 10, 2000, to propose an amended plan.

Date: DEC 04 2000

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge