

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

IN RE

RUTHIE M. PERRY,

CASE NO. 97-12480

Debtor.

Chapter 13

**MEMORANDUM OPINION AND ORDER RE
TRUSTEE'S OBJECTION TO CONFIRMATION,
THE BANK OF MILAN'S OBJECTION TO CONFIRMATION,
AND THE BANK OF MILAN'S MOTION TO DISMISS WITH PREJUDICE**

The debtor in this case, Ruthie Perry ("Perry"), filed her chapter 13 plan with numerous factual and financial omissions. In response to such deficiencies in information, the chapter 13 trustee and the Bank of Milan filed objections to confirmation, asserting that the omissions amounted to bad faith on the part of the debtor. The Bank of Milan also filed a Motion to Dismiss with Prejudice as a result of the debtor's alleged bad faith.

The Court conducted a hearing on this matter on September 3, 1997. FED. R. BANKR. P. 9014. Pursuant to § 157(b)(2) of Title 28 of the U.S. Code, this is a core proceeding. After reviewing the testimony from the hearing and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

The instant case is not Ruthie Perry's first bankruptcy filing in this Court. On December 29, 1993, Perry filed a joint petition with her husband, Ellis D. Perry, case number 93-12720. Such case was originally filed as a chapter 13 individual reorganization, but was later converted

to a chapter 7 liquidation on June 6, 1995. Nearly five months after the conversion, on October 27, 1995, the Perrys' chapter 7 case was discharged.

Sometime in January or February 1997, the Perrys separated; however, they joined together in the spring of 1997 for the purpose of completing several real estate transactions. First, the Perrys sold their marital home in early April 1997. Ruthie Perry received \$6300.89 from the proceeds of this sale. The next transaction the Perrys entered into occurred on April 18, 1997, when the Perrys purchased a tract of land in Milan, TN, from William R. and Elizabeth Rogers for \$7,000.00. The Perrys then contracted with Jim Walter's Homes for the construction of a house on the Milan property. The Perry's financed \$89,000 with Jim Walter's for this construction. At the time of Ruthie Perry's confirmation hearing, the house was still in the process of being completed, but when finished, Ruthie Perry and the couple's daughter are to reside there. Perry and her daughter currently live with Perry's mother in an apartment in Trenton, TN.

Despite the Perrys' purchases in April 1997, or perhaps as a result of them, economic hardship struck the Perrys once again and Ruthie Perry turned to the bankruptcy system for relief for a second time. The instant chapter 13 petition and plan were filed on May 12, 1997. As a result of the couple's marital separation, Perry filed this case as an individual and did not include her husband, Ellis, as a debtor. Although Perry's own documents listed her present address as being in Milan, TN, Perry employed a Memphis attorney to handle her current bankruptcy and filed her petition and plan in Memphis. The case was subsequently transferred to this Court, upon the Bank of Milan's motion for a change of venue, on June 5, 1997.

As originally filed, Perry's petition omitted several key pieces of factual and financial information. Under the heading "Prior Bankruptcy Case Filed Within Last 6 Years" on page 2 of her petition, Perry's response reads "None." Perry's attorney, David James, offered to take the blame for this omission at the hearing and presented the information sheet filled out by Ruthie Perry in his office as evidence. On this sheet, in response to the question "Have you ever filed bankruptcy before?," Perry answered "Yes, 1993. Jackson, Tenn."

The next two major omissions on Perry's petition relate to Schedule A, on which debtors are to list any type of real property in which they have an interest, and Schedule D, on which debtors are to list all of their secured creditors. Although the Perrys had recently purchased the plot of land in Milan and were in the process of building a house there, Perry did not list the property interest on Schedule A, nor did she list Jim Walter's Homes as a secured creditor on Schedule D. These omissions had two drastic effects. First, by not listing the house on Schedule A, Perry appeared to have an asset base of only \$14,200.00.¹ In reality, Perry's assets total \$106,200.00. The second effect this omission had was misstating Perry's secured debt to be \$21,500.00 in lieu of the actual figure of \$110,500.00.

The fourth major omission committed by Perry occurred on her "Form 7-Statement of Financial Affairs." Under section 3 of this form, debtors are to list any and all payments made to creditors within 90 days of filing a bankruptcy petition. Although Perry had received over \$6000.00 within four weeks of filing the instant chapter 13 petition, she neither listed this money

¹ The majority of this \$14,200.00 represents Perry's interest in a 1994 Nissan Altima financed by the Bank of Milan.

as an asset still in her possession at the time of filing nor did she list any payments of this money to creditors under this section on Form 7. Additionally, Perry failed to list the sale of her and Ellis Perry's marital home on this Statement of Financial Affairs under section 10. Such section requires debtors to list all property transferred by the debtor within one year before the filing of the bankruptcy petition.

The fifth and last major factual misstatement made by Perry on her bankruptcy petition occurred on "Schedule J - Current Expenditures of Individual Debtor(s)." On this schedule, Perry listed her current rent as \$250.00/month. At her confirmation hearing, Perry admitted that this figure was actually \$43.50. Additionally, Perry listed her utilities cost per month to be \$400.00. Perry also admitted at the hearing that this figure was closer to \$200.00.

After Perry's inaccurate schedules and statements were filed with this court, Perry filed an adversary proceeding against the Bank of Milan ("Bank"), seeking to recover her 1994 Nissan Altima which had been repossessed by the Bank. On July 18, 1997, this Court conditionally granted Perry's motion to compel turnover, provided that (1) Perry allow the Bank to have a secured claim for \$10,825.00 with 15% interest and (2) Perry tender \$100.00 to the Bank to cover repossession expenses. Perry did tender this \$100.00 by way of a check written on a joint checking account she held with her husband, Ellis. When the Bank tried to cash this check, however, it was refused by the Perrys' bank because the account had been closed.

In response to this bounced check and the omissions and misstatements made by Perry on her petition, the Bank of Milan filed an objection to confirmation of Perry's plan and a motion to dismiss with prejudice. Also in response to the omissions made by Perry, the chapter 13 trustee

filed an objection to confirmation. Both objections and the motion to dismiss asserted that Perry's factual and financial misstatements amounted to bad faith on the part of the debtor and thereby disqualified her plan from confirmation. The Bank's motion to dismiss was filed on July 18, 1997, and its objection to confirmation was filed on August 14, 1997. The trustee's objection was filed on August 18, 1997.

On the same day that the trustee filed his objection, the debtor filed an amended schedule A and B and an amended statement of financial affairs to reflect her interest in the Milan property and house and to reflect the payments she made to creditors with the \$6000.00 she received from the sale of the Perrys' marital home. Additionally, the first page of Perry's petition was amended on this date to reflect Perry's prior bankruptcy from 1993. The remaining schedules were amended on September 5, 1997, to fully show Perry's interest in the Milan property and to show the correct amount of rent and utilities Perry was paying per month.² At the time of the confirmation hearing, the check which Perry wrote to the Bank on the closed account had been made good also.

As it currently stands, Perry's chapter 13 plan proposes a monthly payment of \$330.00 for sixty (60) months. Perry's unsecured creditors who have filed claims total \$13,174.69. The payment terms proposed by Perry have the effect of paying unsecured creditors approximately 13%. Perry has been employed as a school teacher by the Trenton Special District for the last five years. It is estimated that for this calendar year, she will earn approximately \$26,400.00.

² Perry also made some other amendments to her schedules, but they are so minor as to be inconsequential to the decision at bar.

At the hearing on the present motion and objections, the chapter 13 trustee, William Guy, stated to the court that the amendments which have been made by Perry to her petition and statement of financial affairs resolve his objection. As a result, the trustee's objection stands withdrawn.

II. CONCLUSIONS OF LAW

Pending before this Court are two pleadings filed by the Bank of Milan: an objection to confirmation and a motion to dismiss with prejudice. Although each of these pleadings asserts its authority for the relief requested under different statutory sections of the Bankruptcy Code, they are both addressed by the same analysis--that of the good faith of the debtor. Pursuant to 11 U.S.C. §1325(a)(3), a plan which is not proposed in good faith is not entitled to confirmation. 11 U.S.C. § 1325(a)(3) (1994). Similarly, a chapter 13 petition which is filed in bad faith may be dismissed or converted "for cause" under 11 U.S.C. § 1307(c). See In re Griffith, 203 B.R. 422, 424 (Bankr. N.D. Ohio 1996); Molitar v. Eidson, 76 F.3d 218, 220 (8th Cir. 1996).

Although both § 1325(a)(3) and § 1307(c) speak to the "good faith" of the debtor, the concept of "good faith" is not one which the Bankruptcy Code defines. As a result, the bankruptcy courts around the nation have had the task of setting the boundaries of such a term. In so doing, the Sixth Circuit has delineated a test for determining whether or not good faith is present in the proposal of a debtor's plan and in the debtor's conduct overall. Such test requires an investigation into the totality of the circumstances, which includes both pre-petition and post-petition conduct. In re Barrett, 964 F.2d 588 (6th Cir. 1992); In re Okoreeh-Baah, 835 F.2d 1030 (6th Cir. 1988); In re Lilley, 91 F.3d 491, 496 (3rd Cir. 1996).

In fashioning this “totality of the circumstances” test, the Sixth Circuit has further set out twelve relevant factors a bankruptcy court should consider in making a “good faith” (or lack thereof) determination:

(1) the debtor’s income; (2) the debtor’s living expenses; (3) the debtor’s attorney fees; (4) the expected duration of the Chapter 13 plan; (5) the sincerity with which the debtor has petitioned for relief under chapter 13; (6) the debtor’s potential for future earnings; (7) any special circumstances the debtor may be subject to, such as unusually high medical expenses; (8) the frequency with which the debtor has sought relief before in bankruptcy; (9) the circumstances under which the debt was incurred; (10) the amount of payment offered by debtor as indicative of the debtor’s sincerity to repay the debt; (11) the burden which administration would place on the trustee; and (12) the statutorily-mandated policy that bankruptcy provisions be construed liberally in favor of the debtor.

Id. The bankruptcy court is not required to find in favor of the debtor on each factor. Instead, as already stated, the court must find by a totality of the circumstances that the debtor acted in good faith in submitting the chapter 13 plan and in filing their chapter 13 petition. In re Caldwell, 895 F.2d 1123, 1126 (6th Cir. 1990); In re Inmon, 208 B.R. 455, 458 (Bankr. E.D. Ark. 1996).

A determination of good faith must rest ultimately with the bankruptcy court’s common sense and judgment, remembering that the purpose of Chapter 13 is sincerely-intended repayment of pre-petition debt consistent with the debtor’s available resources. Okareeh-Baah, 836 F.2d at 1033. The inquiry by a bankruptcy court is highly fact-specific and implementation of the Sixth Circuit’s 12-factor test will most definitely vary on a case-by-case basis. When addressing an objection to confirmation, it is the debtor seeking the protection and benefits of chapter 13 who has the burden of proving that their plan was submitted in good faith. In re Gir daukas, 92 B.R. 373, 376 (Bankr. E.D. Wis. 1988). In analyzing a motion to dismiss, however, it is the creditor

seeking the dismissal who bears the burden of proving the debtor's petition was not submitted in good faith. Griffith, 203 B.R. at 424.

In the case at bar, there is no possible way for this Court to find that Perry either filed her petition in good faith or proposed her repayment plan in good faith. Perry is a well-educated woman with a stable job that provides her and her daughter with a relatively decent income. Every year Perry has worked for the Trenton School, she has received a "career ladder" bonus and her salary has increased also. Should she continue in this job, there would seem to be no reason why these pay increases will not continue.

Another factor which forbids this Court from finding good faith on Perry's part is her necessary monthly expenses. They are modest indeed. A monthly rental payment of \$43.50 is a rarity in today's world of rising costs of housing. Additionally, according to Perry's own testimony at trial, once Perry and her daughter move into the Milan house, this monthly expense will cease altogether.³ Perry's utility expenses also make up a small portion of her total monthly outgoing cash-flow. There was no proof introduced at the hearing that Perry's daughter attends private school or that there is a need to do so. Perry regained possession of her car from the Bank of Milan and the monthly expense of a car payment is being handled through Perry's chapter 13 plan payments.

In addition to the debtor's healthy income and relatively small amount of monthly expenses, this Court further finds the debtor's recent chapter 7 discharge to be a factor which

³ Perry testified at the confirmation hearing that because her husband, Ellis Perry, does not pay child support for the couple's daughter, he has agreed to pay for the Milan house and provide that as a means of support for Perry and their child.

weighs heavily against her. It was only two years ago, in 1995, that the debtor received a total discharge of her debts in her chapter 7 case. Since that time, Perry has managed to amass over \$100,000.00 in new debt, which she is now attempting to discharge through the bankruptcy system once again. This frequent invocation of the protections of the bankruptcy system persuades this Court that Perry has filed her petition and plan with less than the requisite good faith.

Although it has been proven by a totality of the circumstances that Perry lacked good faith in both filing her petition and proposing her plan, the Court feels that dismissal of her case would be too harsh of a punishment for Perry. She did make the omissions and misstatements spoken of in this memorandum, but she was candid with the court about so-doing and, at present, she has made all of the amendments which the Bank has requested. This candor and honesty, however, does not entirely satisfy the court. The Court still does not find that Perry's chapter 13 plan was proposed in good faith and, therefore, the Court is denying confirmation of the plan until such time as Perry can propose a repayment plan which makes a greater monthly payment to her unsecured creditors. Judgment shall be entered accordingly.

III. ORDER

It is therefore ORDERED that the Bank of Milan's Motion to Dismiss with Prejudice is DENIED.

It is further ORDERED that the Bank of Milan's Objection to Confirmation is SUSTAINED and confirmation of Ruthie Perry's chapter 13 plan is DENIED until such time as the percentage to be paid to unsecured creditors is raised to a level commensurate with Perry's ability to pay. The debtor shall have fifteen days from the entry of this order to submit a new chapter 13 plan. If the debtor fails to do this within the proscribed time, her case shall be dismissed.

IT IS SO ORDERED.

BY THE COURT,

G. HARVEY BOSWELL
United States Bankruptcy Court

Date: October 8, 1997