

Not intended for publication

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE

JAMES F. POLK,

Debtor.

CASE NO. 98-10568

Chapter 13

MEMORANDUM OPINION AND ORDER RE
CONFIRMATION AND OBJECTION TO CONFIRMATION
BY MERCHANTS & PLANTERS BANK

Merchants & Planters Bank ("Bank") filed an objection to confirmation of the debtor's Chapter 13 plan, alleging, among other things, that the debtor did not propose such plan in good faith as required by 11 U.S.C. § 1325(a)(3). The Court conducted a hearing on this matter on June 25, 1998. Fed. R. Bankr. P. 9014. Pursuant to 28 U.S.C. § 152(b)(2), 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

This chapter 13 case is the debtor's fifth in the Western District of Tennessee since 1993. Polk's first case, case number 93-11112, was filed on June 2, 1993, and was dismissed on December 8, 1993, for non-payment. Polk's second chapter 13 case, case number 93-12665, was filed on November 2, 1993, and was dismissed on October 18, 1994, for failure to make the full monthly plan payment. Polk filed his third chapter 13 petition on October 28, 1994, case number 94-12279. This case was voluntarily dismissed by the debtor on August 5, 1996. Polk's chapter 13 case, case number 97-14930, was filed on December 23, 1997, and was dismissed on February 4, 1998, for failure to pay. The chapter 13 case currently before the court, case number 98-10568, was filed by Polk on February 10, 1998.

Prior to the filing of any of his chapter 13 bankruptcy cases, Polk executed a promissory note with Merchants & Planters Bank in the amount of \$2709.88. The note was executed on August 26, 1991. As collateral for this loan, Polk granted the Bank a security interest in a 1979 Ford Thunderbird and a 1973 Chevrolet Impala. The monthly payments on this note were set at \$100.00, with a final payment of \$109.88 due on November 26, 1993.

In the case at bar, the Bank filed a proof of claim with the Chapter 13 Trustee's office as a secured creditor for \$3692.73. This amount includes the outstanding balance on the promissory note along with interest, late charges and attorney's fees. The testimony offered at the hearing on the Bank's objection demonstrated that few, if any payments have ever been made by the debtor on this note.

Polk's chapter 13 plan payment is set at \$83/every two weeks. According to the Chapter 13 Trustee's office, the percentage to be paid to unsecured creditors will be between 7% and 9%. The term of the plan is thirty-six months. On February 17, 1998, the Trustee's office issued an income deduction order to the debtor's employer, Corrections Corp. of America. The trustee's office did not receive any money from Polk's employer in March or April. As a result, the income deduction order was reissued on April 30, 1998. The Trustee's office received the first payment from Corrections Corp. in May 1998. The debtor did not make the plan payments in March or April.

Polk's chapter 13 plan in the current case lists the Bank as an unsecured creditor with a claim of \$3,000. The Bank has not directly objected to this classification or to the amount of the claim. The Bank has objected, however, to the valuation of the collateral proposed by the debtor, the interest rate proposed by the debtor, as well as the term of the plan. Additionally, the bank has alleged that the plan was filed in bad faith and is not feasible.

At trial, the debtor testified that he received an income tax refund of \$2482.84 in 1994. Despite the fact that he was in a chapter 13 case at the time he received these funds, Polk admitted that he did not remit the money to the Chapter 13 Trustee's office. When questioned by the Bank's attorney as to what he did with the refund, Polk testified that he could not remember.

II. CONCLUSIONS OF LAW

Merchants & Planters has asserted in the instant proceeding that the debtor's chapter 13 plan was not submitted in good faith as required by 11 U.S.C. § 1325(a)(3) and, as such, should be denied confirmation. Unfortunately, the Bankruptcy Code does not define the term "good faith." As a result, the Bankruptcy courts around the nation have had the task of setting the boundaries of such 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. Such test requires an investigation into the totality of the circumstances. *In re Barrett*, 964 F.2d 588 (6th Cir. 1992). The Sixth Circuit has further set out twelve relevant factors a bankruptcy court should consider in making a good faith 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 earning; (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 a 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.

In re Okareeh-Baah, 836 F.2d 1030 (6th Cir. 1988). 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 their chapter 13 plan. *In re Caldwell*, 895 F.2d 1123, 1126 (6th Cir. 1990). 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 Girdaukus*, 92 B.R. 373, 376 (Bankr. E.D. Wis. 1988). Serial filings are not, in and of themselves, evidence of bad faith, but they are a factor for a court to consider when making a totality of the circumstances investigation of a chapter 13 plan. *Johnson v. Home State Bank*, 501 U.S. 78, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991); *Barrett*, 964 F.2d at 591.

The chapter 13 petition currently before the Court for confirmation is the fifth one the debtor has filed in the Western District of Tennessee since 1993. Three of Polk's four previous cases were dismissed for failure to pay. Polk's second case, case number 93-12665, was filed one month before his first case, case number 93-11112, was dismissed. Since 1993, the Bank has not received any payments on their loans. The projected payment to unsecured creditors in this case is 7% to 9%. Polk is currently on payroll deduction; however, between the time that Polk's employer received the income deduction order and the time his employer began sending the withheld money to the Chapter 13 Trustee's office, Polk did not make his monthly plan payments. Additionally, Polk failed to remit the proceeds of his 1994 tax refund to the chapter 13 trustee despite the fact that he was in bankruptcy at the time he received the refund.

Judging from the totality of the circumstances, this Court finds that Polk's chapter 13 plan lacks the requisite good faith. As a result, the Court grants the Bank's objection and denies confirmation of Polk's current chapter 13 plan. Polk will have fifteen days from the entry of this order to submit an amended chapter 13 plan which provides for a more significant payment to unsecured creditors.

III. ORDER

It is therefore **ORDERED** that Merchants & Planters Objection to Confirmation is **GRANTED**.

It is further **ORDERED** that confirmation of the debtor's chapter 13 plan is denied. The debtor shall have fifteen days from the entry of this order to submit an amended plan.

IT IS SO ORDERED.

BY THE COURT,

G. HARVEY BOSWELL
United States Bankruptcy Judge

Date: July 29, 1998