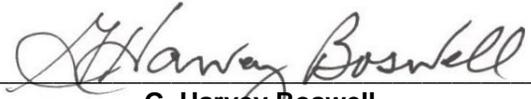




Dated: August 06, 2004
The following is SO ORDERED.


G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE

Tommy Davis,

debtor.

Case No. 04-10760

Chapter 13

MEMORANDUM OPINION AND ORDER RE
(1) MOTION TO CONVERT FILED BY DONNIE DAVIS and
(2) OBJECTION TO CONFIRMATION FILED BY DONNIE DAVIS

The Court conducted a hearing pursuant to FED. R. BANKR. P. 9014 on Donnie Davis's Motion to Convert and Objection to Confirmation on June 21, 2004. Resolution of these matters is a core proceeding. 28 U.S.C. § 157(b)(2). The Court has reviewed the testimony from the hearing and the record as a whole. This Memorandum Opinion and Order shall serve as the Court's findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

At issue in this case is a pre-petition consent order the debtor entered into with his brother Donnie Davis in Weakley County Chancery Court on August 11, 2003. The pertinent parts of that consent order are as follows:

The parties agree and the Court finds that the Plaintiff [Donnie Davis] shall have judgment against the Defendants, Tommy Davis, in the amount of \$261,408.00

The parties further agree and the Court further finds the Defendant did fraudulently convert the assets of the deceased Morine Davis to his own use and for his own personal benefit, therefore supporting the judgment.

Morine Davis was Donnie and Tommy Davis's aunt. Morine Davis died on November 14, 1999. In his individual capacity and on behalf of Morine Davis's heirs, Donnie Davis sued his brother for money and assets the debtor allegedly converted to his own use while in control of Morine Davis's affairs.

Tommy Davis did not testify at the hearing on Donnie Davis's Objection to Confirmation and Motion to Convert; however, Donnie Davis's attorney took Tommy Davis's deposition on November 13, 2002, in connection with the Chancery Court lawsuit. Donnie Davis introduced this deposition into evidence at the hearing on his objection and motion. Along with the other exhibits introduced into evidence by Donnie Davis at the hearing, the Court is basing its findings of fact on the testimony given by the debtor in his November 2002 deposition.

Tommy and Donnie Davis's father helped Morine Davis with her affairs until September 1997 when he passed away. After his death, Morine Davis asked Tommy Davis to take over helping her. TRIAL EXHIBIT 1, pp. 18 - 19. In furtherance of this request, Tommy Davis contacted attorney Max Speight about drawing up a power of attorney, ("POA"), for his aunt. TRIAL EXHIBIT 1, p. 20. Tommy Davis suggested Speight to his aunt. TRIAL EXHIBIT 1, p. 20. Speight drew up a POA based on his conversation with Tommy Davis and had his secretary take it to Morine Davis at her home for her signature. TRIAL EXHIBIT 1, p. 22. Morine Davis executed the Durable Power of Attorney in favor of Tommy Davis on November 14, 1997. TRIAL EXHIBIT 2. Morine Davis was 80 years old at the time of executing the document. TRIAL EXHIBIT 1, p. 22.

Within a month of executing the POA, Morine Davis redid her Last Will and Testament. Tommy Davis testified at his deposition that he did not have any input in the redrawing of the will except to (1) point out to his aunt that the only heirs she had were himself, his four brothers and his sister, and (2) help her make a list of her assets. TRIAL EXHIBIT 1, p. 23 - 25. Speight prepared the revised Will and brought it to Morine Davis at her house for executing.

In helping his aunt prepare her list of assets, Tommy Davis went and retrieved his aunt's lockbox from the bank.¹ TRIAL EXHIBIT 1, p. 25. Tommy Davis testified that "a lot of the stuff was missing" from the lockbox when he opened it. TRIAL EXHIBIT 1, p. 25. Upon discovering that items were missing,

¹None of the parties present at the deposition specified which bank Tommy Davis went to to retrieve the lockbox.

Morine Davis sent a letter to Donnie Davis requesting he return items she thought should have been in her lockbox. TRIAL EXHIBIT 1, p. 25 - 26. Donnie Davis turned those items over to Tommy Davis. TRIAL EXHIBIT 1, p. 26. These items included five certificates of deposit, savings bonds and other miscellaneous documents. TRIAL EXHIBIT 1, p. 26.

After the POA was executed, Tommy Davis had a talk with his aunt about his financial situation. Tommy Davis told his aunt that he could not wait on her full time without receiving some financial help from her. TRIAL EXHIBIT 1, p. 40. Apparently understanding Tommy Davis's situation, Morine Davis signed the following handwritten document on January 14, 1998:

I, Morine Davis, 211 Woodland St., Martin, TN, have discussed with my nephew and POA Tommy Davis, about his time and expense while caring for me. He has my permission to use my personal funds for his use and expenses while caring for me and managing my affairs.
Signed January 14, 1998
I have read this statement and approve.
Morine Davis

Tommy Davis wrote out this document for his aunt to sign. TRIAL EXHIBIT 1, p. 41. Tommy Davis testified that his aunt was not having any mental problems at the time of signing the document. TRIAL EXHIBIT 1, p. 41.

In March 1998, Morine Davis moved from her home at 211 Woodland in Martin, Tennessee, to an assisted living facility in Martin. On March 20, 1998, Dr. Michael Hines filled out a Social Security Administration form titled "Physician's/Medical Officer's Statement of Patient's Capability to Manage Benefits" for Morine Davis. TRIAL EXHIBIT 3. At the top of page 2, the form asks:

Do you believe the patient is capable of managing or directing the management of benefits in his or her own best interest? By capable we mean the patient:
-Is able to understand and act on the ordinary affairs of life, such as providing for her own adequate food, housing, clothing, etc., and
-Is able, in spite of physical impairments, to manage funds or direct others how to manage them.

Dr. Hines replied "No" to this question and indicated that Morine Davis suffered from "severe dementia." TRIAL EXHIBIT 3. Dr. Hines also replied "No" to the question "Do you expect the patient to be able to manage funds in the future?" According to information on the form, Dr. Hines examined Morine Davis on March 5, 1998. When questioned about the doctor's March 1998 statement, Tommy Davis stated that the form had to be filled out so that he could sign Morine Davis's social security checks and deposit them.

Tommy Davis paid for Morine Davis's assisted living bills by writing checks drawn on her checking account. TRIAL EXHIBIT 1, p. 29. He also used Morine Davis's money to purchase other miscellaneous items for his aunt. TRIAL EXHIBIT 1, p. 30. Tommy Davis purchased a wheelchair for Morine Davis while she was at the assisted living facility. TRIAL EXHIBIT 1, p. 33.

In 1998, Morine Davis allegedly told Tommy Davis to cash out all her savings bonds. Tommy Davis cashed out forty-nine of the bonds except for \$7,000.00 that he made payable to his brother, Jerry Davis. The total amount of money cashed out by Tommy Davis was \$35,186.46. Tommy Davis made a \$25,000.00 deposit into his aunt's checking account after cashing in the bonds. When asked in his deposition what he did with the remainder of the money, Tommy Davis replied "I used the money to pay a lot of my medical expenses. My personal medical expenses that had built up from 1998, 1997, and 1999." TRIAL EXHIBIT 1, p. 38. Tommy Davis further stated that when his aunt directed him to cash in the bonds, she told him to "take what [he] needed." TRIAL EXHIBIT 1, p. 38 - 39.

When Tommy Davis cashed his aunt's bonds, \$27,723.96 of the \$35,186.46 was interest. This fact caused Morine Davis to owe approximately \$12,000.00 in taxes to the IRS. TRIAL EXHIBIT 1, p. 45. In order to pay this liability, Tommy Davis, in his capacity as Morine Davis's POA, borrowed \$31,555.27 from Reelfoot Bank on January 20, 1999. The borrower on the note is listed as "Morine Davis." The signature reads "Morine Davis by Tommy Davis POA." As security for this loan, Tommy Davis pledged a certificate of deposit, ("CD"), belonging to Morine Davis in the amount of \$73,555.27. Tommy Davis testified that he used the loan proceeds to pay the \$12,000.00 in taxes to the IRS and deposited the rest in Morine Davis's checking account. Tommy Davis used some of the money that he deposited for his "personal needs." TRIAL EXHIBIT 1, p. 45.

On April 12, 1999, Tommy Davis, again in his capacity as Morine Davis's POA, borrowed an additional \$25,000.00 from Reelfoot Bank. Once again, the borrower on the note was listed as "Morine Davis" and the signature read "Morine Davis by Tommy Davis POA." As security for this note, the debtor pledged his aunt's \$73,555.27 CD. Tommy Davis paid off the \$31,555.27 and the \$25,000.00 loans in December 1999 when he redeemed his aunt's CD. After the loans were paid in full, Tommy Davis took \$1,573.00 as an administrator's fee. The balance was then divided evenly among Tommy Davis and his five siblings, with each person receiving \$2,360.32. TRIAL EXHIBIT 1, p. 69 - 72.²

On September 24, 1999, Tommy Davis borrowed \$25,525.00 from the Bank of Sharon as Morine Davis's POA. As with the Reelfoot Bank notes, Morine Davis was listed as the borrower and the

²Morine Davis passed away on November 14, 1999. Tommy Davis redeemed this CD after she had died.

signature reads “Morraine Davis by Tommy Davis POA.” Tommy Davis pledged an \$85,500.00 CD belonging to his aunt as collateral for this loan.

Tommy Davis borrowed an additional \$10,025.00 from the Bank of Sharon on November 4, 1999. This loan was also in his aunt’s name with the signature reading “Morraine Davis by Tommy Davis POA.” Tommy Davis once again pledged the \$85,500.00 CD as collateral for this note. Tommy Davis redeemed the certificate on December 13, 1999, and paid off the loans. Tommy Davis paid himself a \$4,920.00 executor’s fee out of the remaining proceeds and the balance was divided evenly between Tommy Davis and his siblings.³

In addition to the \$73,555.27 and the \$85,500.00 CDs Tommy Davis redeemed in 1999, Morraine Davis had three other CDs: one in the amount of \$61,518.00, one in the amount of \$36,457.20 and one in the amount of \$63,000.00. Tommy Davis liquidated the \$61,518.00 CD on February 7, 2000, and split the proceeds evenly among himself and his siblings. Each person received approximately \$10,620.00 from this CD. Tommy Davis liquidated the \$36,457.20 CD on October 18, 1997. Morraine Davis allegedly instructed Tommy Davis to cash this CD and divide the proceeds among himself and two of his brothers.

With respect to the final CD in the amount of \$63,000.00, Tommy Davis went to Union Planters Bank sometime in 1999 and had the bank amend the CD to reflect he was the payable on death co-beneficiary. Tommy Davis liquidated this CD in July 1999 and used some of the proceeds to pay down the mortgage on his house located at 2327 Hyndsver Rd., Martin, Tennessee. TRIAL EXHIBIT 1, page 53 - 55. Tommy Davis used the remainder of the proceeds for various expenses. TRIAL EXHIBIT 1, p. 56. The debtor testified that his aunt instructed him to use the proceeds in this manner. TRIAL EXHIBIT 1, p. 57

Up until January 1998, all of the interest on Morraine Davis’s CDs was being rolled back into the certificates. Per his aunt’s instructions, Tommy Davis changed this in January 1998 so that all of the interest income would come to him each month. TRIAL EXHIBIT 1, p. 60. Tommy Davis would cash these checks and take them to his aunt each month to ask her what she wanted him to do with the money. TRIAL EXHIBIT 1, p. 55. Typically, Tommy Davis used the money for his expenses and those of his aunt. TRIAL EXHIBIT 1, p. 62.

In addition to the bonds and CDs, Tommy Davis was also questioned about Morraine Davis’s checking account. Between December 1997 and November 1999, \$50,573.00 was either taken out of the account by Tommy Davis or was cashed when a deposit was made. Throughout the course of the

³As with the \$73,555.27 CD, Tommy Davis redeemed this CD after his aunt had passed away.

deposition, when he was questioned about the checking account money or the proceeds of the bonds and the CDs, Tommy Davis stated that he used the money to:

- (1) pay for his personal expenses. TRIAL EXHIBIT 1, p. 110, et. al;
- (2) put his children through school. TRIAL EXHIBIT 1, p. 117;
- (3) give his children spending money. TRIAL EXHIBIT 1, p. 117;
- (4) pay his children's medical bills. TRIAL EXHIBIT 1, p. 117;
- (5) make repairs to his aunt's house. TRIAL EXHIBIT 1, p. 110 et. al;
- (6) give his aunt rather large sums of cash which she kept. TRIAL EXHIBIT 1, p. 110; and
- (7) to pay for expenses for his aunt. TRIAL EXHIBIT 1 p. 118 et. al.

Tommy Davis stated "I didn't write a check to buy any tangible product or anything for my own personal gain." TRIAL EXHIBIT 1, p. 110. Tommy Davis also stated that "I didn't go out and buy anything in '98 or '99. There is nothing anywhere that I went out and bought or did with her monies, nowhere. There is nothing." TRIAL EXHIBIT 1, p. 47. Tommy Davis did admit using \$5,500.00 of the money to put a down payment on a Kubota tractor which he has now surrendered to the creditor. Tommy Davis did not present any receipts at the hearing in these matters evidencing his expenses. Tommy Davis paid cash for most of the expenses he claims to have had while he was Morine Davis's POA.

Tommy Davis filed his chapter 13 bankruptcy petition on February 23, 2004. Despite the fact that Tommy Davis had used the proceeds of the \$63,000.00 CD to pay down a significant portion of the mortgage on his residence at 2327 Hyndsver Road in Martin in July 1999, he listed a \$106,800.00 first mortgage and a \$5,265.48 second mortgage on the house on his Schedule A.

Pursuant to the terms of her Last Will and Testament, Morine Davis left her house at 211 Woodland Street in Martin to Tommy Davis. Although allegedly lien free while Morine Davis was alive, Tommy Davis listed a first mortgage of \$38,103.80 and a second mortgage of \$5,265.48 on the property on his Schedule A. Tommy Davis uses this house as rental property which generates monthly income of \$400.00. Tommy Davis's monthly payment on the two mortgages on the Woodland Street property is \$400.00.

According to his schedule I, Tommy Davis is currently earning \$1,000.00/month at his job with Texas Refinery Corporation. This is a significant increase from his income in 1997 - 2001. Tommy Davis testified at his deposition that he made \$5,170.57 in 1997; \$1,590.00 in 1998; \$1,863.39 in 1999; \$3,621.68 in 2000; and \$2,180.00 in 2001. Included within the 1997 - 2001 income amounts were residual insurance premiums of approximately \$200.00/month. TRIAL EXHIBIT 1, p. 10 - 12. According to his deposition testimony, Tommy Davis was not able to work very much in 1997, 1998, 1999, 2000 and 2001 as a result of disabilities. "I have days that I can't get up and go or get out and go. I can't do any duties. I have arthritic problems in my low back, my hip, my left shoulder, and in my neck." TRIAL

EXHIBIT 1, p. 9. Tommy Davis did not present any proof demonstrating or explaining why he is now able to earn \$1,000.00/month at his job with Texas Refinery when he was averaging around \$150.00/month in income from his job at Texas Refinery and residual insurance premiums in 1997 through 2001.

In addition to the \$1000.00/month he is earning at Texas Refinery, Tommy Davis is also earning \$670.00/month in SSI benefits, \$771.00/month from a “part-time job,” \$200.00/month in residual insurance premiums and the \$400.00/month in rent for the Woodland Street property. Tommy Davis did not provide any information about these benefits or this part-time job to the Court.

According to his schedules, Tommy Davis has a disposable income of \$601.00 after his monthly expenses are deducted from his income. Tommy Davis paid the trustee \$601.00 on February 23, 2004. Davis filed an amended plan on March 18, 2004, which increased his monthly plan payment to \$1,501.00. The debtor made a payment in this amount to the Chapter 13 Trustee’s office on April 29, 2004. The debtor made a third payment to the Chapter 13 Trustee on May 28, 2004 in the amount of \$1,327.00. According to the Chapter 13 Trustee, this payment is in line with an amended plan the debtor has submitted; however, a copy of this amended plan has not been filed with the Court. The Chapter 13 Trustee stated that based on the plan as it currently is, he is projecting a 5% payment to unsecured creditors. The debtor has informed the trustee that he intends to add the four mortgages on the Woodland Street and the Hyndsver Road properties to the plan. If this is done, the trustee stated that the debtor’s payout to unsecured creditors would decrease to 1%.

Although an accounting was apparently done by Tommy Davis during the Chancery Court case, neither party to this proceeding presented the Court with a copy. Without this document, the Court is unable to make any kind of determination as to how Tommy Davis spent his aunt’s money or if he still has any of the money. The Court takes notice of the fact that Tommy Davis was very adamant in his deposition that he did not misuse any of his aunt’s money; however, the Court fails to see how Tommy Davis can make this claim given the fact that he later consented to a state court judgment of fraud. Had the debtor testified or offered any proof on this matter in the case at bar, the Court may have been able to see how the two assertions are not contradictory or how the consent judgment does not nullify his earlier claims of innocence.

II. CONCLUSIONS OF LAW

The Sixth Circuit has consistently held that in determining whether or not good faith is present in the proposal of a debtor’s plan a court must investigate the totality of the circumstances. *Society Nat’l. Bank v. Barrett (In re Barrett)*, 964 F.2d 588 (6th Cir. 1992). The debtor’s pre-petition conduct is but one element a court must look to in deciding whether or not the plan was submitted in good faith. *In re Francis*, 273 B.R. 87, 91 (BAP 6th Cir. 2002).

The Sixth Circuit has set out twelve relevant factors a bankruptcy court should consider in making a good faith determination. The criteria include:

- (1) the amount of the proposed payments and the amount of the debtor's surplus;
- (2) the debtor's employment history, ability to earn and likelihood of future increase in income;
- (3) the probable or expected duration of the plan;
- (4) the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court;
- (5) the extent of preferential treatment between classes of creditors;
- (6) the extent to which secured claims are modified;
- (7) the type of debt sought to be discharged and whether any such debt is nondischargeable in Chapter 7;
- (8) the existence of special circumstances such as inordinate medical expenses;
- (9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act;
- (10) the motivation and sincerity of the debtor in seeking Chapter 13 relief;
- (11) the burden which the plan's administration would place upon the trustee; and,
- (12) whether the debtor is attempting to abuse the spirit of the Bankruptcy Code.

Hardin v. Caldwell (In re Caldwell), 895 F.2d 1123, 1126-27 (6th Cir. 1990); *see, Okoreeh-Baah*, 836 F.2d 1030, 1032 (6th Cir. 1988). These twelve factors can be supplemented with additional considerations:

- (1) whether the debtor is attempting to abuse the spirit of the Bankruptcy Code;
- (2) [that] good faith does not necessarily require substantial repayment of the unsecured claims;
- (3) [that] the fact a debt is nondischargeable under Chapter 7 does not make it nondischargeable under Chapter 13; and
- (4) the fact that a debtor seeks to discharge an otherwise nondischargeable debt is not, per se, evidence of bad faith but may be considered as part of the totality of the circumstances analysis.

Francis, 273 B.R. at 92 (citations omitted). 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 current Chapter 13 plan. *Caldwell*, 895 F.2d at 1126.

A determination of good faith must rest ultimately with the bankruptcy court’s common sense and judgment, remembering the purpose of Chapter 13 is sincerely-intended repayment of pre-petition debt consistent with the debtor’s available resources. *Okoreeh-Baah*, 836 F.2d at 1033. The inquiry by a bankruptcy Court is highly fact-specific and implementation of the Sixth Circuit’s twelve-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, and not an objecting creditor, who has the burden of proving that their plan was submitted in good faith. *In re Gir daukus*, 92 B.R. 373, 376 (Bankr. E.D. Wis. 1988).

Reviewing the totality of the circumstances in the case at bar, the Court finds that the debtor has not proven he acted in good faith in submitting his plan. The Court is most concerned with the debtor’s dramatic increase in income. Although he could not work much during the years 1997 - 2001 because he was disabled, the debtor is now earning in a month what he typically earned in a year at the same job. Although he could not work much during 1997 - 2001, he did not receive disability. Tommy Davis is now receiving disability and earning approximately eight times what he did when he was not receiving government assistance for his condition. The Court is assuming, based on the fact that he is now receiving disability, that Tommy Davis’s back problems have not improved. Unfortunately, Tommy Davis did not testify about his current disability status nor did he offer any proof concerning it. The debtor also did not offer the Court any proof as to why he is able to earn so much more at the same job.

The Court also has serious reservations about confirming the debtor’s plan based on his prepetition conduct in regard to his aunt’s money. Although repeatedly claiming he spent Morine Davis’s money in accordance with her wishes, Tommy Davis consented to a \$261,408.00 judgment in Chancery Court which found him guilty of “fraudulently convert[ing] the assets of the deceased Morine Davis to his own use and for his own personal benefit, therefore supporting the judgment.” The debtor did not offer any proof as to why he submitted to this judgment. Without that proof, the Court can only conclude that the debtor acted egregiously and in a manner that would most likely lead to a non-dischargeable judgment in a chapter 7 case.

Lastly, the Court is hesitant to confirm a plan where the debtor admitted to converting a large amount of his aunt’s money, but did not present proof as to where that money was spent. Had the debtor introduced the accounting prepared for the Chancery Court lawsuit, the Court might have some way of deciding whether or not the debtor actually used all of the money he took from his aunt. If the Court were to confirm the debtor’s plan without that proof, it could result in the debtor using the money he took from his aunt to make his payments. This would be entirely negligent and reprehensible on the Court’s part. Until an accounting is made of the funds taken, the Court has no other choice but to deny confirmation of the plan.

ORDER

It is therefore **ORDERED** that Donnie Davis’s Objection to Confirmation is **SUSTAINED** and Confirmation of the Debtor’s Amended Plan is **DENIED**.

It is **FURTHER ORDERED** that the debtor shall have thirty days from entry of this order to file an accounting of the \$261,408.00 he obtained from Morine Davis’s estate. Should the debtor fail to file the accounting, the case will be dismissed; and

It is **FURTHER ORDERED** that the debtor shall have thirty days from entry of this order to file an amended plan and amended schedules, including proof of his current income. Upon the filing of these documents, the Court will set a Confirmation Hearing on the second amended plan. Should the amended plans or schedules not be filed, the case will be dismissed.

It is **FURTHER ORDERED** that Donnie Davis’s Motion to Convert is **CONDITIONALLY DENIED**. Once the debtor files the accounting and amended plan and schedules, Donnie Davis may request that the Court reset his Motion to Convert.

IT IS SO ORDERED.

mailing information:

debtor
Lloyd Utley, attorney for debtors
Brad Sigler, attorney for Donnie Davis
Chapter 13 Trustee
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