

Not intended for publication

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE

TERRY LYNN PATRICK

CASE NO. 97-11788

VERONICA PATRICK

CHAPTER 13

MEMORANDUM OPINION AND ORDER RE
OBJECTION TO CONFIRMATION

Dyersburg Credit Union filed an objection to confirmation of the debtor's chapter 13 plan, alleging 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 August 7, 1997. FED. R. BANKR. P. 9014. Pursuant to section 152(b)(2) of Title 28 of the United States Code, this is a core proceeding. After reviewing the testimony from the trial 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 debtor in this case, Veronica Patrick, applied for an unsecured loan with Dyersburg Credit Union ("Dyersburg") in the fall of 1995. In completing the "Loanliner Application and Credit Agreement" for such loan, Mrs. Patrick listed three assets: a checking account at First Tennessee Bank, miscellaneous furniture, and the debtor's residence in Halls, TN. Mrs. Patrick listed the market value of the house as "approximately \$136,000.00." Mrs. Patrick also indicated that the house was lien-free by checking the "No" box under the question "Pledged as Collateral for Another Loan?"

Although Mrs. Patrick listed the house as a lien-free asset in her application, she also listed a monthly mortgage payment of \$534.00 as her primary debt on such application. Mrs. Patrick listed the recipient of such payment as First Financial Loan Services. Based upon the information provided in this application, Dyersburg approved Mrs. Patrick for a loan in the amount of \$4750.00. The proceeds were disbursed to Mrs. Patrick on October 19, 1995.

Over eighteen months after receiving the Dyersburg loan, Mrs. Patrick and her husband filed for chapter 13 bankruptcy relief in the Western District of Tennessee. Their chapter 13 petition filed on May 21, 1997, listed Dyersburg as a general unsecured creditor with a claim of \$3800.00. The petition also listed First Financial Bank, FSB, in El Dorado, AR, as a secured creditor with a home mortgage claim of \$61,000.00. The Patricks listed their monthly income as \$2669.00, monthly expenses as \$2172.00 and

total indebtedness as \$97,276.00.

Along with their chapter 13 petition, the Patricks filed their chapter 13 plan. In this plan, Dyersburg is listed as a general unsecured creditor with a claim of \$3800.00 and First Financial Bank is listed as a secured creditor with a claim of \$61,000.00. According to this plan, the Patricks are to make monthly plan payments of \$500.00 through payroll deduction of \$116.00 per week. In addition to this amount, the debtors are going to remain in their house and continue to make the monthly mortgage payment to First Financial. The proposed termination date of the plan is sixty months.

On June 20, 1997, Dyersburg filed an objection to confirmation of the Patricks' plan. Dyersburg alleged in such objection that the debtor should be required to pay 100% to unsecured creditors. At the confirmation hearing for the Patricks' plan, the chapter 13 trustee, William Guy, indicated that the percentage to be paid to unsecured creditors would not be determined until after the bar date for filing claims had passed; however, Guy estimated that the percentage unsecured creditors would receive was somewhere between 30 to 35%.

At the confirmation hearing, Dyersburg asserted that Mrs. Patrick was guilty of making a materially false financial statement in completing the "Loanliner" application in September of 1995. Dyersburg further alleged that listing the house with a significantly higher market value and as a lien-free asset rose to the level of bad faith and, therefore, should disqualify the Patricks' plan under 11 U.S.C. § 1325(a)(3). On direct examination by Dyersburg's attorney, Mrs. Patrick admitted that the house was listed as a lien-free asset on the application, but asserted that in so doing she had made a mistake. Mrs. Patrick testified that she had thought she was listing the house as a mortgaged property and had even asked a Dyersburg loan officer if she had done so. According to Mrs. Patrick's undisputed testimony, the loan officer indicated to Mrs. Patrick that she had indeed filled out the application correctly.

II. CONCLUSIONS OF LAW

Dyersburg has asserted in the instant proceeding that the debtors' 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 meaning of "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 12 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 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 Girdaukas, 92 B.R. 373, 376 (Bankr. E.D. Wis. 1988).

In the case at bar, the debtors are proposing to pay into their chapter 13 plan for the maximum duration allowed by the Bankruptcy Code. 11 U.S.C. § 1322(d). This is a factor which weighs heavily in their favor. To the best of this Court's knowledge, this is the debtors first time in bankruptcy court. Additionally, the debtors have managed to repay nearly \$1000.00 of the Dyersburg loan in the last eighteen months.

There was no evidence presented at trial that Mrs. Patrick acted with a deliberate intent to deceive Dyersburg in filling out the loan application. Mrs. Patrick's undisputed testimony was that she simply made a mistake in answering "No" to the question of whether the house was pledged as collateral for another loan. Such a mistake does not rise to the level of fraud. Loan applications can be extremely confusing to the common layperson. Had Mrs. Patrick written out "This house does not have a mortgage" or "We do not owe any money on this house," the situation would be different. Similarly, if Mrs. Patrick had omitted the amount of the monthly mortgage payment from the application, the result would perhaps be different.

Despite the factors that weigh in favor of the debtors, however, the Court has difficulty in understanding why the percentage to be paid to unsecured creditors is so low. According to the debtors' bankruptcy petition, they are taking home over \$32,000 a year in wages. The debtors live in a house which has a monthly mortgage payment of under \$600.00. Their car payments are not excessive. With such a high income and reasonable expenses, there must be a way to raise the percentage unsecured creditors will receive under the chapter 13 plan.

This Court finds that the Patricks' chapter 13 plan was submitted in good faith. This Court further finds that Mrs. Patrick did not intentionally misrepresent the status of her house and the mortgage. The Court does find, however, that the estimated percentage to be paid to unsecured creditors is too low at 30-35%. As a result, the Court is denying confirmation of the debtors' chapter 13 until such time as the percentage to be paid to unsecured creditors is raised to at least 70%.

III. ORDER

It is therefore **ORDERED** that the debtors' chapter 13 plan is denied confirmation until such time as the percentage to be paid to unsecured creditors is increased to 70%.

IT IS SO ORDERED.

BY THE COURT,

G. HARVEY BOSWELL
United States Bankruptcy Judge

Date: September 5, 1997