

Not intended for publication

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

IN RE

**RICKY D. ALSTON
PENNY M. ALSTON,**

Debtors.

CASE NO. 98-12504

CHAPTER 13

**MEMORANDUM OPINION AND ORDER RE
OBJECTION TO CONFIRMATION OF THE PLAN
FILED BY GENERAL MOTORS ACCEPTANCE CORPORATION**

The current Chapter 13 case is the debtor's third in this district.¹ The two previous cases were dismissed for different reasons. Upon the filing of the instant case, GMAC filed an objection to confirmation of the debtor's Chapter 13 plan, alleging, among other things, that the current filing represented an abuse of the bankruptcy system and the debtor's plan of repayment lacked the requisite good faith of § 1322(b)(5).

The Court conducted a hearing on GMAC's Objection to Confirmation on October 8, 1998. FED. R. BANKR. P. 7001. Pursuant to 28 U.S.C. § 157(b)(2)(L), 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 FACTS

Sometime in 1996, the debtors entered into a contract with GMAC for the purchase of a 1993 Cadillac Seville. The purchase price was \$18,994.23 with an annual percentage rate of 19%. The terms of the contract called for fifty-four monthly installments of \$530.00, with the first payment being due on October 5, 1996. The last payment on the car was to be made on March 5, 2000.

On January 22, 1997, the debtor, Ricky D. Alston, filed for relief under Chapter 13 of the Bankruptcy Code, case number 97-10244. The case was voluntarily dismissed by Mr. Alston on February 12, 1997.

¹ Only Ricky D. Alston was a debtor in the two previous cases. To the best of this Court's knowledge, this is the first filing for Penny M. Alston.

Two months after voluntarily dismissing his first case, Ricky D. Alston filed his second Chapter 13 petition, case number 97-11221. During the pendency of this case, Mr. Alston was separated from his wife and experienced what appears to have been a rather rocky employment history. He was fired from Muller Copper Fitting for reasons of which he is unaware. He then was employed at World Color Press, but eventually was fired because he quit going to work.² Ricky Alston then obtained employment at Tennessee Die Casting, but was later terminated because of an altercation he had with another employee. As a result of these hirings and firings, Mr. Alston's payment history in case number 97-11221 was irregular. On June 8, 1998, the court dismissed case number 97-11221 for failure to pay. Prior to and during the pendency of Mr. Alston's two Chapter 13 petitions, GMAC only received five payments on the 1993 Cadillac.

The case at bar was filed by Ricky D. and Penny M. Alston on July 2, 1998. Mr. Alston is currently unemployed. Mrs. Alston works at Walmart making \$7.25/hour for a 40 hour work week. Since the filing, the case has been on payroll deduction and as of November 2, 1998, the payments are current. The Alstons have surrendered the 1993 Cadillac to GMAC since filing the instant petition. According to the Alston's as-yet unconfirmed Chapter 13 plan, the plan payments are \$316.00 every two weeks and the term of the plan is sixty months. GMAC is included within the plan as an unsecured creditor.

II. CONCLUSIONS OF LAW

GMAC has asserted in the instant proceeding that the debtor's current 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. 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, *Society Nat'l. Bank v. Barrett (In re Barrett)*, 964 F.2d 588 (6th Cir. 1992). In the case of serial filings by a debtor, the "good faith analysis requires an examination of the totality of the circumstances of *each particular case.*" *Friend v. Chem. Residential Mortgage Corp. (In re Friend)*, 191 B.R. 391, 394 (Bankr.

² According to a 2004 examination taken during the pendency of case no. 97-11221, Mr. Alston testified that he quit going to work because his superiors refused to give him the raises in wages he felt he was entitled to.

W.D.Tenn. 1996) *citing Barrett*, 964 F.2d at 591.

The Sixth Circuit has set out twelve relevant factors in 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 the 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 the current Chapter 13 plan. *In re Caldwell*, 895 F.2d 1123, 1126 (6th Cir. 1990).

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. *Okareeh-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 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).

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. The debtors have also surrendered the collateral to GMAC since the filing of the current case. Since filing their case, the Alstons have made all of their required plan payments. This fact demonstrates the Alstons' sincerity with regard to the current Chapter 13 petition.

At the hearing on its Objection to Confirmation, GMAC presented no evidence to the Court of the Alstons' bad faith. It is true that Ricky Alston has unsuccessfully sought out Chapter 13 relief twice before; however, the mere fact that his payment history was unstable in case number 97-11221 does not demonstrate the lack of bad faith the Code requires in order to deny confirmation. Mr. Alston's own testimony in the 2004 examination proves that his failure to make regular payments was the result of a

lack of money with which to make his payment based on his tendency to be terminated from a job. Without more proof, this Court simply does not feel that this past payment history evinces bad faith as contemplated by the Sixth Circuit. As a result of this conclusion, the Court has no choice but to deny GMAC's Objection to Confirmation. An order will be entered accordingly.

III. ORDER

It is therefore **ORDERED** that GMAC's Objection to Confirmation of the Plan is **DENIED**.
IT IS SO ORDERED

By the Court,

G. Harvey Boswell
United States Bankruptcy Judge
Date: November 5, 1998