

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

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IN RE:

MARY LUCY COOPER,

Debtor.

BK # 95-26401-WHB

Chapter 13

MARY LUCY COOPER,

Plaintiff,

v.

Adversary Proceeding

NO. 95-0757

ROGERS USED CARS,

Defendant.

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**OPINION AND ORDER DENYING TURNOVER**

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This adversary proceeding was filed by the debtor as plaintiff on July 14, 1995, and the plaintiff seeks to recover a 1985 Buick Skylark automobile that was purchased on April 5, 1995, from the defendant, Rogers Used Cars ("Rogers"). The defendant opposed the requested turnover, and at the trial of this adversary proceeding on August 1 and 8, 1995, the defendant relied upon the debtor's lack of good faith in filing the current Chapter 13 case.

This is a core proceeding under 28 U.S.C. §157(b)(2)(E), and this opinion contains findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

The debtor's Chapter 13 petition was filed on June 22, 1995, and the Clerk's filing stamp on the original petition states that it was "Received After Closing" on that date. The Clerk's office maintains a drop box for use by the public when the Clerk's office is not open, and the practice of the

Clerk is to stamp pleadings that are received after closing with the date stamp for the prior day but with the "Received After Closing" notation.

The debtor's petition lists Rogers Used Cars as a secured creditor holding a debt of \$2,500 to be paid at 15%, with \$100 monthly payments through the proposed Chapter 13 plan. There is a payroll deduction in place pending the confirmation hearing, and that hearing was adjourned until August 22, 1995, in order to permit the Court to decide the issues of this turnover proceeding. The Court took this adversary proceeding under advisement in order to consider the evidence presented and to consider the totality of the circumstances. When the debtor's good faith is an issue, the law of this Circuit is that the bankruptcy court must consider the totality of the circumstances in that particular case. In re Okoreeh-Baah, 836 F. 2d 1030 (6th Cir. 1988); In re Barrett, 964 F. 2d 588 (6th Cir. 1992).

The Chapter 13 Trustee participated in the trial and pointed out that no objection to confirmation had been filed; thus, good faith or lack thereof had not been raised formally in pleadings. That is correct; however, good faith in the filing of a case is an implicit requirement under 11 U.S.C. §1307(c), and good faith in the proposal of a plan is a mandatory requirement for confirmation under 11 U.S.C. §1325(a)(3). Thus, the Court may *sua sponte* consider good faith. In fact, the Code's mandatory good faith for plan confirmation requires that the Court find the existence of good faith in the plan proposal. When, as in this case, the absence of good faith in the plan proposal is suggested by a creditor or by the Trustee, the Court must evaluate all of the facts and circumstances in order to determine if good faith exists. Good faith in filing the case and in the plan proposal are distinct issues; however, because they are fact intensive inquiries, they may overlap in a given case. Matter of Love, 957 F.2d 1350, 1354 (7th Cir. 1992); In re Smith, 848 F.2d 813 (7th

Cir. 1988). It is true that the typical turnover complaint does not involve good faith issues; instead, issues of adequate protection and benefit to the estate are typically involved. 11 U.S.C. §542. However, turnover of a vehicle to the debtor may not be appropriate in a Chapter 13 case when it is obvious that the debtor's plan is not confirmable.

Because of the particular facts and circumstances in the present case, the Court has found an absence of good faith in the debtor's plan proposal as to Rogers. As a result, the plan, absent Rogers' consent, may not be confirmed so long as it retains a proposal to force Rogers into the plan. The same facts and circumstances also indicate a lack of the debtor's good faith in filing the present case; however, there is no motion to dismiss before the Court and the debtor had no notice of a hearing to dismiss her case. Moreover, there may be no need to dismiss the case so long as Rogers is not forced into the plan as a secured creditor. The Court wishes to make it clear that if the debtor and Rogers can negotiate a consensual plan, the Court will have no objection to its confirmation.

However, the present plan may not be forced upon Rogers for the following reasons:

1. The debtor was a Chapter 13 debtor in a prior case, number 94-24887. That case was filed on May 18, 1994, confirmed on August 15, 1994, and voluntarily dismissed by the debtor on June 17, 1995. That case was actually closed on July 19, 1995.

2. While a debtor in the prior case, Ms. Cooper, without permission of the Chapter 13 Trustee or of the Court, purchased the Buick at issue from Rogers on April 5, 1995. The debtor testified that she advised the salesman, Mr. Rogers, that she was a Chapter 13 debtor at the time of the purchase; however, the owner of Rogers Used Cars, Shirley Rogers, testified that she did not know of the pending Chapter 13 at the time of the sale. The debtor has the burden of proof on all issues in the turnover complaint, as well as the burden of proof of good faith in her plan proposal.

The debtor did not produce Mr. Rogers as a witness. Thus, the Court has a conflict in evidence, and the evidence at best is evenly balanced with no preponderance in favor of the debtor's version that the entity Rogers Used Cars, which was sued by the debtor, was aware of the debtor's Chapter 13 at the time of the sale to her.

3. Moreover, the debtor has an affirmative obligation to obtain permission of the Chapter 13 Trustee or of the Court prior to incurring post-petition consumer debt. 11 U.S.C. §1305. This debtor did not do that. Instead, she put her confirmed plan and her creditors in the prior case at risk by incurring secured debt for an automobile, which she soon determined that she could not afford. Being unable to make her prior plan payments as well as pay for the automobile, and knowing that she could not force a post-petition creditor such as Rogers into the prior plan, the debtor made a decision to voluntarily dismiss that case and to immediately file her new case.

4. At the trial, the debtor's attorney acknowledged that he advised the debtor to take this course of action, because it was the only way to convert Rogers' debt into a prepetition claim that would be treatable in a Chapter 13 plan. Reliance on advice of counsel does not shield the debtor from a bad faith finding. The Court is not finding that counsel acted in bad faith, rather, that the debtor can not use her counsel's advice as a justifiable excuse for what was an improper decision of the debtor. There was no proof that counsel participated in the debtor's initial improper decision to purchase the automobile without prior permission of the Trustee or the Court.

5. At the trial, the debtor's proof suggested that Rogers' repossession of the car may have been in violation of the automatic stay imposed by the filing of this case. As stated, this case was filed on June 22, 1995, after the Clerk's normal office hours. The proof established that the car was repossessed on June 22, 1995, and the debtor testified that the time of repossession was just

before 5:00 p.m. Thus, there is no proof that the repossession occurred after the filing. No technical violation of the stay was proven. And, there is no proof that the repossession was taken with knowledge of the bankruptcy filing or even with knowledge that a bankruptcy filing was imminent. The Court can not find a willful violation of the automatic stay in this case.

6. The debtor testified that she needed this car, and the Court has no doubt that the debtor needs transportation. However, the debtor's need for transportation can not overcome the debtor's absence of good faith in her dealings with Rogers. The Court also observes that the debtor had been able to obtain necessary transportation, for example, by paying family or friends to take her to work.

### **CONCLUSION**

It is the Court's conclusion from the total facts and circumstances that the debtor realized that she could not afford the monthly obligations on the car after she purchased it; that she purchased the car without prior permission of the Chapter 13 Trustee or of the Court; that it was purchased while her prior Chapter 13 case was pending; that the debtor, with an improper motive of forcing Rogers into her bankruptcy plan at a cram down interest and payment rate, then voluntarily dismissed her prior case and immediately refiled the present case; that the debtor then filed a plan that proposed to pay Rogers less than its contractual interest or periodic terms; and that these actions of the debtor constitute a lack of good faith in her dealings with Rogers and in her proposal of a plan in this case.

Among the many factors that the Court has considered are the timing of the incurring of this debt, the timing of the dismissal of the prior case, the timing of the filing of this case, the debtor's motive, the circumstances surrounding how this debt arose, how the debtor's actions affected her creditors, and the lack of the debtor's forthrightness in her prior case. See In re Barrett, 964 F. 2d at

592; Matter of Love, 957 F.2d at 1357. Essentially, a good faith analysis often comes down to whether the case filing or the plan proposal "is fundamentally fair to creditors and, more generally, is the filing fundamentally fair in a manner that complies with the spirit of the Bankruptcy Code's provisions." Matter of Love, 957 F. 2d at 1357. This plan, with its surrounding circumstances, is fundamentally unfair to Rogers Used Cars because it would improperly cram Rogers into plan provisions that would have been impermissible in the prior case.

The Court does not have before it a motion to lift or otherwise modify the automatic stay, and this Order does not address whether such relief will be granted if such a motion is filed. A copy of this Order will be entered in the case file, with the original being entered in the adversary proceeding.

**IT IS THEREFORE ORDERED** that the debtor's turnover complaint is denied and the debtor's plan may not be confirmed so long as it includes Rogers Used Cars as a secured creditor absent Rogers' consent. This order is without prejudice to the debtor amending her plan to provide for creditors other than Rogers.

**SO ORDERED** this 9<sup>th</sup> day of August, 1995.

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WILLIAM HOUSTON BROWN  
UNITED STATES BANKRUPTCY JUDGE

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