UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE

Luis Rossi and Evelyn Rossi, **Case No. 02-12407**

Debtors. **Chapter 13**

MEMORANDUM OPINION AND ORDER RE
"OBJECTION TO CONFIRMATION" BY BAXTER CREDIT UNION

The Court conducted a hearing on Baxter Credit Union's "Objection to Confirmation" on September 19, 2002. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. § 157(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

At the September 19, 2002, hearing on this matter, the parties stipulated to the following facts. In 1998, Luis Rossi owned a 1996 Infiniti in which Baxter Credit Union, ("Baxter"), had a valid perfected security interest. In February of that year, Luis Rossis' daughter was driving the Infiniti to school when she was rear-ended by another individual. The parties concluded that Luis Rossis' daughter was not at fault in the accident and the other party's insurance company settled the claim for $14,000.00. For an unknown reason, the insurance company made the $14,000.00 check payable to Luis Rossi only and not to Baxter as well. At the hearing in this matter, Baxter did not allege that Luis Rossi asked the insurance company to make out the check in this manner nor did Baxter allege that Luis Rossi knew this was an error on the part of the insurance company. Luis Rossi was out of work at the time of the accident. Consequently, he decided to cash the insurance check and use the money for ordinary living expenses. According to Baxter's attorney, the $14,000.00 would have almost paid their lien in full. Luis Rossi did not inform the credit union of the accident or the damage to the car.

Even though the Infiniti had been totaled by the insurance company, Luis Rossi decided to keep the vehicle because it was still "driveable." At the hearing in this matter, neither party provided the Court with a description of the current condition of the car. Because Luis Rossi testified that he has continued to drive the car since the 1998 accident, the Court presumes that the vehicle is still in working order.

Luis and Evelyn Rossi filed their chapter 13 petition on June 4, 2002. Between the time of the accident in 1998 and the time of filing their chapter 13 petition, the Rossis continued to make payments to Baxter on the Infiniti. The approximate payoff balance on the car at the time of the hearing was $7,118.00. Debtor's amended chapter 13 plan proposes to surrender the Infiniti to Baxter.

II. CONCLUSIONS OF LAW

Baxter Credit Union has alleged that in proposing to surrender the damaged 1996 Infiniti, after receiving and keeping the insurance proceeds in 1998, the debtors' chapter 13 plan does not satisfy § 1325(a)(3)'s requirement of good faith and, as such, should be denied confirmation. The Bankruptcy Code does not define the meaning of "good faith." As a result, Bankruptcy Courts around the nation have had the task of setting the boundaries of such term. 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,* 274 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 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, Baxter did not present any proof that the debtor is proposing to surrender the Infiniti in bad faith. The only proof presented with regard to the vehicle is that the debtor has continued making the monthly payment on the vehicle since the time of the accident. Mr. Rossi has continued to drive the car since 1998 so presumably the car is in working condition.

In analyzing the Rossis' chapter 13 plan pursuant to the Sixth Circuit's twelve factor test, the Court can find nothing which points to bad faith on the Rossis' part. They are proposing to surrender or sell their home. They are surrendering a boat and a 1997 Voyager. They are rejecting a lease on a 1999 Ford Cougar. They have one priority unsecured claim for 2001 Illinois state taxes in the amount of $785.00. No proof was presented as to the number of unsecured creditors who have filed claims in the Rossis' case. The debtors appear to be devoting all of their disposable income to their chapter 13 plan. The Rossis have not proposed to make any preferential treatment to any class of creditors. No proof has been presented that any of the debts the Rossis are attempting to discharge would be non-dischargeable in a chapter 7 proceeding. The Rossis have not, to the Court's knowledge, previously filed for bankruptcy relief.

Although Mr. Rossi's failure to remit the insurance proceeds to Baxter *could* lead a court to conclude that Mr. Rossi deceived Baxter, there simply was no proof that Mr. Rossi did so in this case. Inexplicably, the insurance company of the at-fault party in the 1998 accident made the insurance check out solely to Mr. Rossi. As the Court stated previously, Baxter did not present any proof, nor did they allege, that Mr. Rossi played any part in the way in which the check was made out. Mr. Rossi testified that he was out of work at the time he received the funds and so he decided to keep the proceeds to pay bills. Although the insurance company paid Mr. Rossi $14,000.00 for the damage done to the Infiniti, the car was still in working order and has been in a "driveable" condition for the last five years. Mr. Rossi made all of his payments to Baxter during this time as well. While it might have been preferable if

Mr. Rossi had informed Baxter of the damage to the vehicle, the Court cannot conclude, based on a totality of the circumstances, that the failure to do so gives rise to a finding of bad faith in now proposing to surrender the vehicle.

III. ORDER

It is therefore **ORDERED** that Baxter Credit Union's "Objection to Confirmation" is **DENIED.**

It is so ordered.

By the Court,

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G. Harvey Boswell
United States Bankruptcy Judge

Date: October 25, 2002

cc:

Lloyd Utley
Attorney for Debtor
425 E. Baltimore
Jackson, TN 38301

Brad Sigler
Attorney for Baxter Credit Union
P.O. Box 1117
Jackson, TN 38302

Tim Ivy
Chapter 13 Trustee
P.O. Box 1313
Jackson, TN 38302-1313