UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re: Chapter 13 Case

Kathleen M. Hager, BKY Case No. 3-91-3056

Debtor.

MEMORANDUM ORDER

This matter came before the Court on October 7, 1991 on confirmation of Debtor's Chapter 13 Plan, with objections filed by the Internal Revenue Service (IRS) and the Minnesota Department of Revenue (MDR). Vance O. Bushay appeared for the Debtor. Michael A. Urbanos appeared for the IRS. Kurt J. Erickson and Wayne L. Sather appeared for the MDR. Stephen J. Creasey appeared for the Chapter 13 trustee. This is a core proceeding under 28 U.S.C. Sections 1334 and 157(a), and Local Rule 201. The Court has jurisdiction to determine this matter under 28 U.S.C. Section 157(b)(2)(L). Based upon all of the files and records in this case, being fully advised in the premises, the Court now makes the following Order pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I.
FACTS

This is the Debtor's second Chapter 13 filing. In her first case, filed July 12, 1990, the IRS, MDR and the Chapter 13 Trustee objected to confirmation. The taxing authorities objected to confirmation based on bad faith, alleging that a substantial portion of their debts would be nondischargeable in a Chapter 7 case and, that the Debtor's treatment of unsecured creditors was unfair due to the proposed two percent distribution. The Chapter 13 trustee objected to confirmation because the Debtor insisted on a 36-month plan, refusing an extended plan of 60 months which provides greater distribution to unsecured creditors. On the basis of the Debtor's testimony and evidence presented at trial, the Bankruptcy Court concluded that her plan had not been filed in good faith, denied Debtor's request to file an amended plan, and dismissed the case on October 26, 1990. The Debtor appealed, and the District Court affirmed the decision of the Bankruptcy Court on April 3, 1991. See: Hager v. IRS (In re Hager), No. 4-90-923 (D. Minn. April 3, 1991).

In this Chapter 13 case, filed May 31, 1991, the Debtor lists priority taxes owed the IRS and MDR in the amount of $2,400, and secured claims to Norwest Bank and Wicks in the amount of $2,048. She lists unsecured claims in the total amount of $80,701, most of which existed in her prior case: $57,701 for income taxes owed the IRS and MDR for tax years 1983-1986; $1,900 to counsel who prosecuted her appeal to the District Court; $18,600 to various department stores and credit card companies; and $2,500 to Daniel Pilla, Jr., for preparation of her prior Chapter 13 petition and plan.(1)

Footnote 1
The Debtor filed her prior case pro se, admitting that she received assistance from a non-attorney in its preparation. She did not

disagree with the taxing authorities' characterization of him as a "tax protester," and admitted that such representation is properly provided by a licensed attorney.
End Footnote

The Debtor's Chapter 13 Statement lists monthly income available to the Debtor and her husband of $3,140.(2) Claimed expenses are $2,948, leaving $192 per month available to fund her plan of reorganization. Her first proposed plan, filed June 14, 1991, provided for payment of $192 per month for 60 months. The Debtor filed a modified plan August 9, 1991, increasing monthly payments during the last 48 months of the plan to $292 per month.

Footnote 2
Unlike her previous case, the Debtor's budget currently provides for all household income, including that earned by her husband, who has not filed for bankruptcy protection.
End Footnote

The Debtor argues that the amended plan is her best effort, that the infirmities of the plan filed in her first bankruptcy case have been cured, and that she is entitled to her relief. The Chapter 13 trustee does not object to confirmation of the amended plan, but concedes that the propriety of receiving a discharge will be at issue upon its completion, due to the large amount of tax remaining unpaid.

The IRS renews its ojbection that the amended plan is filed in bad faith, based upon the fact that the tax debt constitutes a nondischargeable obligation in a Chapter 7 case. It asserts that the Debtor should not be able to take advantage of the more liberal discharge provisions of a Chapter 13 without substantial repayment of her tax obligations. The IRS also objects to confirmation based upon feasibility, due to to MDR's claimed right to treatment as a priority unsecured creditor. If MDR is entitle to demand such treatment, the IRS contends there is insufficient income in the plan to provide unsecured creditors their proposed distribution.

MDR renews its objection filed in the Debtor's first case based upon bad faith, asserting that the District Court's decision in that case is res judicata on the issue of bad faith in this case. Therefore, according to MDR, the Debtor is collaterally estopped from arguing that the amended plan is filed in good faith, and further argues entitlement as a priority unsecured creditor. Accordingly, MDR contends, the plan is not adequately funded to treat MDR as a priority unsecured creditor if the proposed distribution to general unsecured creditors is made.(3)

Footnote 3
The claim filed by MDR asserted a right to payment as a secured creditor based upon a filed tax lien. At trial, there was acknowledgement that no nonexempt property existed to which the lien might attach.
End Footnote

II.
ISSUE

May the Court confirm the Debtor's Amended Plan over the objections of the IRS and MDR?

III.
DISCUSSION

The problem with this plan is not a question of good faith.(4) Even under the more restrictive analysis required after the 1984 amendments to the Code, the Debtor's amended plan complies with the good faith requirements of 11 U.S.C. Sections 1322(a)(1) and 1325(a)(3)5 and the good faith test in this jurisdiction: if, based upon the totality of the circumstances of the particular case, the Court concludes the plan violates the spirit and purposes of Chapter 13, it has not been proposed in good faith. See: Hager, p. 10. Here, the Debtor has proposed a 60-month plan which commits all of her disposable income received during the term of the plan to payments under the plan; there is no evidence that her present petition has not accurately and completely accounted for her assets; and, the Chapter 13 trustee does not object to its confirmation. The fact that her tax debt may be nondischargeable in a Chapter 7 case is not bad faith per se, and her credibility on the witness stand in this proceeding was not impeached. See: Hager, at p. 15. It should be noted that those cases in which a Debtor's Chapter 13 plan has been dismissed on the grounds of bad faith, in part due to the presence of a debt which would be nondischargeable in a Chapter 7 proceeding, concern facts which support a complaint under 11 U.S.C. Section 523(a)(6) for willful and malicious conduct. Those kinds of facts are not present in this proceeding.

Footnote 4
The decision of the Bankruptcy Court in the Debtor's prior case was premised on evidence and testimony unique to that proceeding. MDR's argument that the subsequent District Court decision in the Debtor's prior case is res judicata on the issue of good faith in this case, and that the Debtor is estopped from relitigating the issue in this case, is not well taken. Res judicata applies if a legal conclusion reached in a former cause of action prevents subsequent litigation between the parties, even if the former litigation did not address all potential claims and defenses. In this case, neither the Bankruptcy Court decision, nor the District Court affirmance, barred the Debtor from refiling a Chapter 13 case in compliance with the Code. Collateral estoppel applies in subsequent litigation which involves a different cause of action, but some or all of the same facts. The Honorable Barry Russell, Bankruptcy Evidence Manual, 1990 Ed., Section 1, citing Brown v. Felson, 442 U.S. 127 (1979).

Footnote 5
See: Handeen v. LeMaire (In re LeMaire), 898 F.2d 1346 (8th Cir. 1990). Education Assistance Corp. v. Zellner (In re Zellner), 827 F.2d 1222 (8th Cir. 1987). And see: USA v. Estus (In re Estus), 695 F.2d 311,
316 (8th Cir. 1982).
End Footnote

Here, the problem is the failure of the Debtor and MDR to resolve the issue of MDR's entitlement to treatment under the plan as a priority unsecured creditor under 11 U.S.C. Section 507(a)(7)(A)6 prior to confirmation. At trial, MDR made a colorable, if conclusory, claim to its rights as a priority unsecured creditor in the amount of approximately $12,500, including $11,503.66 for unpaid taxes for tax years 1983-1989, with additional tax due for tax year 1990. The claim is based first on commissioner-filed returns, later confirmed by returns filed by the Debtor. The Debtor's proposed plan provides for total distribution

of $16,320. The Chapter 13 trustee collects a percentage fee in accordance with 28 U.S.C. Section 586(e)(1)(B)(i)7 for administering the case. If the Chapter 13 trustee's fee is set at 10%, $1,632 must be paid to the Chapter 13 trustee. Even assuming a trustee fee of no more than 3%, $489.60 must be paid to the trustee. The Debtor agrees to pay the IRS $1,400 as a priority unsecured creditor. No objection is raised to the $2,048 in secured claims. Accordingly, only $12,382.40 remains available for distribution on MDR's claim (if allowed), assuming no distribution to general unsecured creditors.

Footnote 6
11 U.S.C. Section 507(a)(7)(A) reads in pertinent part:
(7) Seventh, allowed unsecured claims of governmental units, only to the extent that such claims are for--
(A) a tax on or measured by income or gross receipts--
(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last, due, including extensions, after three years before the date of the filing of the petition; (ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or (iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523 (a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreeent, after, the commencement of case;....
End Footnote

Footnote 7
28 U.S.C. Section 586(e)(1)(B)(i) reads in pertinent part: "The Attorney General, after consultation with a United States trustee that has appointed an individual under subsection (b) of this section to serve as standing trustee in cases under chapter 12 or 13 of title 11, shall fix--
(B) a percentage fee not to exceed--
(i) in the case of a debtor who is not a family farmer,
ten percent;...."
End Footnote

The Debtor indicated an intent to object to MDR's claim. Until this issue is joined and resolved, the Debtor's proposed plan may not be confirmed upon failure of the evidence to support a conclusion that the plan complies with the priority scheme contemplated by the Bankruptcy Code. First, the Code requires that the Court find the plan complies with 11 U.S.C. Section 1322(a).(8) Until a determination is reached concerning MDR's entitlement to payment as a priority unsecured creditor, the Court cannot make the requisite finding. Second, to confirm a Chapter 13 plan, the Court must find that the requirements of 11 U.S.C. Section 1325(a) have been met. The Court cannot find by a preponderance of the evidence on the present record that the Debtor can make all priority payments as required by Section 1322(a)(2) as well as payments otherwise required by the plan itself. See: 11 U.S.C. Section 1325(a)(6). The Debtor has not met her burden on confirmation, and the plan cannot be confirmed.

Footnote 9
11 U.S.C. Section 1325(a) reads in pertinent part:

> (a) Except as provided in subsection (b), the court shall confirm a plan if--
>
> (1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;
>
> (2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;
>
> (3) the plan has been proposed in good faith and not by any means forbidden by law;
>
> (4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;...
>
> (6) the debtor will be able to make all payments under the plan and to comply with the plan.

End Footnote

NOW, THEREFORE, IT IS ORDERED:

Confirmation of the Debtor's amended plan is hereby denied, but without prejudice to her refiling a plan which complies with the Code.

Dated:

Dennis D. O'Brien
U.S. Bankruptcy Judge