UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:

David Bryant Werden,
Debtor

Bk. No. 99-11764-JMD
Chapter 13

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MEMORANDUM OPINION

I. BACKGROUND

On January 28, 2000, this Court held a hearing on numerous motions and applications related to the above-captioned Chapter 13 bankruptcy case. Two matters – Louise Werden's motion for relief from the stay and Attorney Cornell's interim fee application – were disposed of by orders of this Court issued shortly after the hearing. Three matters remain, which are the subject of this opinion. First, John F. Vance and Judith T. Vance (the "Vances"), creditors of David Bryant Werden (the "Debtor"), argue that the Debtor's case should be dismissed pursuant to 11 U.S.C. § 1307(c).[1] Second, Louise Werden, the

[1] Unless otherwise noted, all section references hereinafter are to Title 11 of the United States Code.

Debtor's estranged spouse, also seeks to have the case dismissed pursuant to § 1307(c).[2] Finally, there remains the issue of whether the Debtor's Chapter 13 plan (the "Plan") is confirmable pursuant to § 1325(a). The Vances, Louise Werden, and Granite Bank (the "Bank") all object to confirmation.

The Debtor filed a petition under Chapter 13 on May 26, 1999. The Debtor's financial difficulties are primarily a result of a troubled subdivision owned by him and his estranged wife. The claims of both the Vances and the Bank are derivative of the subdivision operation. The subdivision is not yet complete and most lots remain unsold. All of the lots are subject to various attachments and liens. The subdivision is still in need of a completed road and underground utilities, among other things. The Plan envisions new financing for completion of the subdivision, although there is no evidence that commitments regarding such financing have yet been made. The Plan anticipates granting a mortgage on numerous lots to the potential lender providing financing, and subordinating existing liens to such a lender. The Plan also contemplates the sale of various lots free and clear of liens with the proceeds to be used to assist in the completion of the road and underground utilities for the subdivision. If financing proves unavailable, the Plan relies on the sale of lots exclusively.

The Vances, Louise Werden, and the Bank (collectively, the "Objectors") all object to confirmation of the Plan on the ground that it does not comply with the requirements of § 1325(a) and, more specifically, that it is not feasible. In essence, the Objectors maintain that the Debtor's completion of the subdivision through the Plan is speculative at best. Lawrence P. Sumski, the Chapter 13 trustee (the "Trustee"), is also of the view that the Plan as proposed is not feasible.

In addition to objecting to confirmation of the Plan, the Vances and Louise Werden maintain that the Debtor's case should be dismissed pursuant to § 1307(c). In essence, both parties argue that the Debtor's bankruptcy filing was in bad faith, thereby warranting dismissal under § 1307(c). Because the dismissal arguments of the Vances and Louise Werden are the same, they will be discussed together.

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[2] Louise Werden's motion to dismiss is also premised on the ground that the Debtor does not qualify as a debtor under Chapter 13 pursuant to § 109(e). At the January 28, 2000 hearing, the Court denied Louise Werden's motion to dismiss insofar that it was based upon § 109(e).

Moreover, because dismissal of the Debtor's case would render the issue of confirmation moot, the motions to dismiss shall be addressed first.

The Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. DISCUSSION

A. Dismissal

Section 1307(c) provides, inter alia, that a case filed under Chapter 13 may be dismissed for "cause." See 11 U.S.C. § 1307(c). Section 1307(c) enumerates ten possible instances of cause, although they are not intended to be inclusive. See id. Accordingly, for purposes of § 1307(c), cause includes a lack of good faith in filing a Chapter 13 bankruptcy petition. See Cardillo v. Andover Bank (In re Cardillo), 169 B.R. 8, 10 (Bankr. D.N.H. 1994). Whether a case has been filed in bad faith is determined based upon the totality of the circumstances. See In re Jones, 174 B.R. 8, 13 (Bankr. D.N.H. 1994). The Court notes, however, that the following directives are to be heeded in passing on the question of whether a case has been filed in bad faith for purposes of § 1307(c):

1. The moving party has the burden of showing a lack of good faith;
2. There is no presumption of a lack of good faith;
3. Dismissal for lack of good faith is reserved only for extraordinary circumstances; and
4. A court should be more reluctant to dismiss a case under § 1307 than to deny confirmation under § 1325.

See Cardillo, 169 B.R. at 10 (citing In re Love, 957 F.2d 1350 (7th Cir. 1992)); Jones, 174 B.R. at 13. The Court finds that the moving parties have not shown that the Debtor filed his bankruptcy petition in bad faith.

For purposes of § 1325(a)(3), the Bankruptcy Code provision requiring that a plan be proposed in good faith before it can be confirmed, the term "good faith" has recently been defined as "simple honesty of

purpose." See Keach v. Boyajian (In re Keach), BAP No. 99-005, 2000 WL 107301, at *13 (B.A.P. 1st Cir. Jan. 27, 2000). The evidence presented does not show that the Debtor's filing was done without a simple honesty of purpose. Although speculative, the Plan does attempt to resurrect a failed subdivision for the benefit of all of the Debtor's creditors. It appears that the Debtor has conscientiously attempted to obtain financing to complete the subdivision since the inception of this case. Accordingly, it does not appear that bad faith, for purposes of § 1325(a)(3), is present. Therefore, because a court should be more reluctant to dismiss a case for bad faith than deny confirmation, the Court concludes that the moving parties have not established bad faith for purposes of § 1307(c).

This conclusion is strengthened by the Court's observation that extraordinary circumstances warranting dismissal under § 1307(c) are not present. Although the feasibility of the Plan is questionable, such a concern is better addressed in the context of confirmation rather than dismissal. Moreover, the Court notes that, pursuant to representations made by the Trustee at the hearing, the Debtor is essentially current with respect to his plan payments. Although not determinative, the Court finds that being current in plan payments cuts against a finding of bad faith. Accordingly, based upon the totality of the circumstances, the Court finds that the moving parties have failed to show a lack of good faith warranting dismissal pursuant to § 1307(c). Because the Court finds that the circumstances do not support dismissal, the issue of confirmation will be addressed.

B. Confirmation

Section 1325(a) provides that a court shall confirm a Chapter 13 plan if six general substantive requirements are satisfied. See 11 U.S.C. § 1325(a). The Objectors argue that confirmation is not possible primarily because the last requirement of § 1325(a) is not satisfied. At the hearing, the Trustee agreed with this assertion. This last requirement is found in § 1325(a)(6), which provides that before a court may confirm a plan, it must be shown that "the debtor will be able to make all payments under the plan and to comply with the plan." 11 U.S.C. § 1325(a)(6). Section 1325(a)(6)'s directive is colloquially termed the "feasibility requirement." See In re Gavia, 24 B.R. 573, 574 (B.A.P. 9th Cir. 1982). See also 8 King et al.,

Collier on Bankruptcy ¶ 1325.07 (15th rev. ed. 1998). Indeed, the issue of feasibility appears to be the undoing of the Plan.

The linchpin of the Plan is future third-party financing or the use of proceeds from the sale of lots, or a combination of the two, for the purpose of completing the subdivision's infrastructure. The Court agrees with the position of the Objectors and the Trustee that this strategy is highly speculative. No evidence was presented indicating that commitments exist regarding outside financing or that any such commitment is likely. Moreover, testimony at the hearing by a real estate broker (the "Broker") employed by the Debtor regarding the likelihood and timing of lot sales was inconclusive and vague. Although the Broker testified that confirmation would increase the likelihood of sales, he offered no persuasive reasons for his opinion. The Debtor's own testimony that the sale of lots would be more likely following confirmation was equally unpersuasive. The Plan is a 36 month plan that would require the sale of substantially all of the lots in the subdivision to make the payments provided under the Plan. However, the Debtor did not present any evidence on which the Court could find that such lots sales would occur within 36 months.

Even if the testimony of the Broker and the Debtor is viewed as persuasive, factors apart from confirmation create significant barriers to completion of the subdivision through financing or the sale of lots, thereby maintaining the speculativeness, and therefore infeasibility, of the Plan. First, a letter filed with this Court from the Board of Selectmen of the Town of the Dublin, the town in which the subdivision is located, indicates that the planning board may seek revocation of the Debtor's subdivision approval. Although the Debtor presented evidence that such revocation may not be legally possible, the Debtor provided no evidence regarding how he would fund negotiations or a legal skirmish with the Town of Dublin. Second, all parties agreed at the hearing that the Debtor's estranged wife holds a one-half interest in all of the real property comprising the subdivision. Accordingly, it is not at all clear how the Debtor could sell the lots if his wife refuses to consent to such sales. Such a concern gains significance when one considers the contentious nature of current divorce proceedings between the Debtor and his wife. Moreover, the Debtor and his wife disagree as to their respective ownership of lot 17, which is not part of the failed subdivision.

The Plan proposes to subdivide lot 17 and sell the resulting lots to pay creditor claims. However, the disagreement as to the status of the title to lot 17 raises the question of whether lot 17 can even be governed by the Plan or subdivided by the Debtor in the first instance. Finally, an expert called by the Vances testified that completion of the subdivision's main road would likely entail significantly greater expenditures than as represented by the Debtor.

When the speculativeness of financing and the sale of lots is supplemented by the secondary uncertainties discussed above, it becomes clear that the Plan, as currently drafted, is not feasible. Numerous courts have held that a Chapter 13 plan is not feasible when it envisions the sale or refinancing of significant property sometime in the future when such a sale or refinancing appears highly speculative. See, e.g., In re Hogue et al., 78 B.R. 867, 872-74 (Bankr. S.D. Ohio 1987) ("Bankruptcy Courts have consistently denied confirmation of Chapter 13 plans containing . . . speculative contingencies."); In re Gavia, 24 B.R. at 574. The Plan's goal of obtaining financing and/or selling lots is highly speculative in nature given the lack of evidence presented indicating the likelihood of such actions. Accordingly, the Plan is not feasible. Indeed, the Trustee said it best when, at the hearing, he stated that a finding of feasibility would require a leap of faith by the Court. It is the Court's view that such a leap would likely be into a financial abyss, a result that would be of no benefit to the Debtor or his creditors.

Although the Court finds that the Plan as currently drafted is not feasible, and therefore cannot be confirmed pursuant to § 1325(a)(6), the remaining requirements of § 1325(a), as applied to the instant case, will be briefly discussed. First, § 1325(a)(1) requires that the Plan comply with the provisions of Chapter 13 and the Bankruptcy Code in general. See 11 U.S.C. § 1325(a)(1). The Plan envisions subordinating all security interests of existing creditors to a mortgage granted in connection with new outside financing. Based upon the evidence and arguments so far, it is not clear whether such subordination complies with the directives of § 364(d), which requires, inter alia, that it be shown that there is adequate protection of the lien or interest to be subordinated. See 11 U.S.C. § 364(d)(1)(B). There is little consequential evidence concerning the value of the lots. Accordingly, it is difficult, if not impossible, for the Court to determine whether the existing creditors' security interests would be adequately protected following subordination and

therefore whether the mandates of § 364(d) would be satisfied. Moreover, it is not clear whether the Plan's alternative strategy – to sell the lots and use the proceeds to fund completion of the infrastructure – passes muster under § 363(f). Section 363(f) provides that property of the estate may be sold free and clear of third-party interests, but only if at least one of five delineated conditions are present. See 11 U.S.C. § 363(f). No persuasive evidence was provided by the Debtor that any of the five conditions exist with respect to the security interests of his various creditors. Moreover, it is generally accepted that adequate protection is provided by having existing security interests attach to the proceeds of a § 363(f) sale. See Circus Time, Inc. v. Oxford Bank & Trust (In re Circus Time, Inc.), 5 B.R. 1, 3 (Bankr. D. Me. 1979). See also Collier on Bankruptcy, at ¶ 363.06 ("It has long been recognized that the bankruptcy court [pursuant to § 363(f)] has the power to authorize the sale of property free of liens with the liens attaching to the proceeds . . . ."). The Plan envisions the proceeds of any lot sales to be directed toward the completion of the subdivision rather than to the interests of existing creditors. It is not clear how this strategy can be squared with the requirements of § 363(f).

Section 1325(a)(2) requires that certain fees be paid before confirmation, a requirement that appears to be satisfied in the instant case. See 11 U.S.C. § 1325(a)(2). In addition, as discussed above, it appears that the Plan has been proposed in good faith, as required by § 1325(a)(3). See 11 U.S.C. § 1325(a)(3). Section 1325(a)(4) is the so-called "best interests of creditors" test, under which it must be shown that each unsecured claim will receive an amount of property under the Plan at least equal to what the claim would receive under Chapter 7. See 11 U.S.C. § 1325(a)(4). The Plan provides that unsecured claims will receive a 100 percent dividend under the Plan. The liquidation analysis included in the Plan indicates that the distribution to unsecured creditors under Chapter 7 cannot be determined. At the hearing, the Debtor argued that unsecured creditors and some secured creditors would receive nothing in a Chapter 7 liquidation. No contrary evidence or argument was presented. Accordingly, it appears that the Plan technically satisfies § 1325(a)(4). The Court expressly notes, however, that this statement is merely an

observation and not a conclusion given that, in any event, the Plan does not meet § 1325(a)'s feasibility requirement.[3]

Finally, § 1325(a)(5) provides that one of three conditions must be satisfied with respect to secured claims: (1) the secured claim holder has accepted the Plan; (2) the secured claim holder retains his or her lien and receives property at least equal to the amount of the secured claim; or (3) the Debtor surrenders the relevant property to the secured claim holder. See 11 U.S.C. § 1325(a)(5). The largest secured creditors of the Debtor have not accepted the Plan. Accordingly, with respect to such creditors, the first option of § 1325(a)(5) is not available. In addition, the Debtor does not intend to surrender any of the property subject to his creditors' security interests. Consequently, at least with respect to the Debtor's largest secured creditors, he must "cram-down" the Plan. As discussed above, the Plan anticipates subordinating the security interests of existing creditors for the benefit of a new lender. At the hearing, the Debtor did not address the question of whether subordination can satisfy the cram-down requirements of § 1325(a)(5). The Court expresses no opinion regarding this issue.

[3] The Court also notes that all of the parties objecting to the Plan appear to agree that completion of the infrastructure and the sale of lots in the subdivision is the only method for creditors to recover on their claims. Their objections appear to be based upon a lack of confidence in the ability of the Debtor to manage the development of the subdivision. In view of the apparent difficulties that would confront the objecting parties in carrying out a development plan outside of bankruptcy (e.g., the one-year redemption period under RSA 529:14 for attaching creditors seeking control and junior creditors seeking to invoke the equitable doctrine of marshaling of assets against senior creditors) and the obvious interests of the Debtor and his estranged spouse to maximize the value of the subdivision, it would appear to be in the best interests of all parties to attempt to formulate a consensual plan that would vest control of the development in someone other than the Debtor and would avoid further delays. However, any such discussions are for the parties to undertake of their own volition.

III. CONCLUSION

For the reasons stated above, the Court finds that: (1) the Debtor did not file his Chapter 13 case in bad faith for purposes of § 1307(c) and that, therefore, his case shall not be dismissed for that reason; and (2) the Plan is not feasible and therefore does not satisfy the requirements of § 1325(a)(6) and, thus, is not confirmable as currently drafted. The Debtor shall have 15 days from the date of entry of this opinion to file an amended plan that addresses the confirmation concerns raised by this opinion. If an amended plan is not filed within such time-period, the Court shall dismiss this case unless the Debtor moves to convert it to Chapter 7 within such time-period.

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order in accordance with this opinion shall be entered.

DONE and ORDERED this 8th day of February, 2000, at Manchester, New Hampshire.

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J. Michael Deasy
Bankruptcy Judge