

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 99-12383-MWV
Chapter 13

John Kafanelis,
Debtor

MEMORANDUM OPINION

The Court has before it the Chapter 13 Plan of Reorganization (the “Plan”) filed by John Kafanelis (the “Debtor”). Creditor Dean Kenneson, who holds a claim against the Debtor resulting from a civil judgment for injuries sustained in an assault by the Debtor, filed an objection to the Plan asserting that it was filed in bad faith. For the reasons set out below, the objection is denied and the Debtor’s Plan is confirmed.

This 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).

BACKGROUND

The Debtor filed his bankruptcy petition and Plan simultaneously on July 27, 1999. On his schedules, the Debtor lists no real property and lists personal property having a value of only \$1,205.00, all of which qualifies as exempt pursuant to NH RSA 511:2. The Debtor lists no secured or priority claims and lists a total of \$48,200.00 in unsecured claims, consisting of a \$6,000.00 “personal loan,” \$200.00 in legal fees owed to former counsel and a \$42,000.00 debt owed to Mr. Kenneson. The Debtor reports total monthly income for himself and his non-debtor spouse of \$661.87 and expenses of \$639.38, leaving

disposable income of \$22.49. The Debtor's thirty-six month plan proposes to pay the Chapter 13 Trustee only \$25.00 per month over the first thirty months of the Plan and \$350.00 per month over the final six months. If the Plan is confirmed, unsecured creditors will receive a total of \$1,564.92, representing approximately 3.2% of their claims.

The claim of Mr. Kenneson arises out of a criminal conviction for Second Degree Assault entered against the Debtor in the Superior Court for Grafton County, New Hampshire. Mr. Kenneson subsequently brought a civil action for damages against the Debtor for his injuries and judgment was entered in the amount of \$45,000.00. Understandably, Mr. Kenneson has attempted to avoid the discharge of his debt that the Debtor would receive upon the completion of the Plan payments. On November 8, 1999, he sought relief from the automatic stay in order to proceed to enforce the civil judgment in state court. The motion was denied. On December 22, 1999, Mr. Kenneson filed an objection to the Debtor's Plan on the grounds that it was filed in bad faith and thus may be dismissed pursuant to 11 U.S.C. § 1325(a)(3)¹, which requires all Chapter 13 Plans to be proposed in "good faith."²

A confirmation hearing was held on March 10, 2000, at the close of which the Court continued the matter to May 31, 2000, and invited Mr. Kenneson to present evidence that the Debtor is hiding assets. At the May 31, 2000 hearing, the Debtor testified that he works as a cook in a pizza restaurant owned by his mother and that he has only a seventh grade education. He also testified that he lives with his mother rent-free, who pays most of the household bills and provides childcare for his two-year old son, and that he eats all of his meals at the restaurant. He estimated that he could earn approximately \$400 to \$450 per week if he were able to obtain work outside of the restaurant but that he would lose the benefits of free meals, free housing and child care. Mr. Kenneson was not able to produce evidence that the Debtor is hiding assets,

¹ Unless otherwise noted, all statutory references hereafter refer to Title 11 of the United States Code.

² A Chapter 13 plan cannot be confirmed unless the court first finds that "the plan has been proposed in good faith and not by any means forbidden by law . . ." 11 U.S.C. § 1325(a)(3).

but argued that the Debtor failed to include the value of the benefits he receives from his mother in his schedules. The Court denied confirmation of the Debtor's Plan without prejudice on the grounds that the schedules did not accurately reflect the value of benefits the Debtor receives other than his take-home pay. The Debtor was invited to file new schedules.

The Debtor did not file new schedules, but on August 18, 2000 refiled his Plan accompanied by a memorandum providing an analysis of the value of the benefits he receives from his mother and providing a hypothetical budget showing his income and expenses if he were to obtain alternate employment. His hypothetical budget assumes he and his wife can earn \$9.00 per hour, which is slightly above what similarly situated employees earn at the same job, and assumes that he will work 40 hours per week and she 15 hours per week. Therefore, their hypothetical after-tax income would be \$1,931.01 per month. These hypothetical earnings were then compared to three hypothetical expense budgets: (1) a budget based on the actual cost of his current household expenses; (2) a budget based on the Internal Revenue Service's Collection Financial Standards; and (3) a budget based on a livable wage study performed by the Josiah Bartlett Center for Public Policy. The hypothetical expense budgets totaled \$1,977.96, \$2,551.00 and \$2,168.00 respectively. Thus, under each of the hypothetical scenarios, the Debtor would have no disposable income from which to fund a Chapter 13 Plan.

A hearing was held on September 22, 2000, at which the Debtor's mother testified that the Debtor has no current financial interest in the restaurant. She also confirmed that in exchange for minimal wages, she provides free housing and pays for most of his family's living expenses.

DISCUSSION

Because of the nature of this case, the Court has placed the burden on the Debtor to show that he is entitled to Chapter 13 relief and to show that his disposable income is what he purports it to be. The Court finds that he has met his burden. The Court also finds the testimony of the Debtor's mother credible and her actions, as a parent, understandable under the circumstances.

Mr. Kenneson argues that the Debtor's plan should not be confirmed because the debt owed to him, which is the most significant claim against the debtor, would be excepted from discharge by § 523(a)(6)³ if this case were filed under Chapter 7 rather than Chapter 13. Mr. Kenneson acknowledges that the exception to discharge provisions of § 523(a) do not apply to a Chapter 13 Debtor's right to discharge under § 1328(a) if all Plan payments are made. However, Mr. Kenneson argues that Debtor's attempt to use Chapter 13 to discharge an otherwise nondischargeable debt should preclude confirmation under § 1325(a)(3)'s "good faith" standard.

This court has previously considered whether a Debtor's attempt to use Chapter 13 to obtain discharge of a debt that might be excepted from discharge by § 523(a) in a Chapter 7 case violates § 1325(a)(3)'s "good faith" standard in the unpublished opinion In re Nisbet, Bk. No. 98-11670-MWV, (Nov. 1, 1999). In that case, which was also before the Court on a creditor's objection to confirmation, I followed the decisions of several courts from inside and outside this Circuit in applying a "totality of the circumstances" test to determine if the plan was filed in good faith. I held that the fact that a particular debt might be excepted from discharge in a Chapter 7 case was not, by itself, sufficient to establish that a plan lacked good faith. Nisbet at 4.

My holding in Nisbet would be similarly applicable in this context and I would overrule Mr. Kenneson's objection to the Plan on the grounds that the fact that his debt might be excepted from discharge in a Chapter 7 case is not sufficient grounds to deny confirmation of the plan under the totality of the circumstances. However, I am also guided by the decision of the First Circuit Bankruptcy Appellate Panel in In re Keach, 243 B.R. 851 (1st Cir. BAP 2000), where the Panel rejected the "totality of the circumstances" test for determining whether a plan is filed in good faith, instead holding that "[t]he meaning of good faith is simple honesty of purpose." Id. at 868. The Panel found that in enacting §

³ Section 523(a)(6), which applies to discharges under §§ 727, 1141, 1228(a), 1228(b) and 1328(b), excepts from discharge debts "for willful and malicious injury by the debtor to another entity or to property of another entity." 11 U.S.C. § 523(a)(6).

1325(a)(3) of the Bankruptcy Code, Congress showed no intent to deviate from the previous Bankruptcy Act, under which courts “looked only to the honesty of the debtor’s postfiling conduct [and] did not concern themselves with the debtor’s prefiling conduct or with the ‘purpose or spirit’ of bankruptcy law.” Id. Thus, the Panel found that § 1328 expressly grants a debtor a discharge from debts that would otherwise be excepted from discharge in a Chapter 7 case. Id.

Whether the holding of Keach withstands further scrutiny or whether the Court of Appeals for the First Circuit follows the rationale of other circuits and opts for an approach akin to “totality of the circumstances” or some other standard remains to be seen. See, e.g., United States v. Estus (In re Estus), 695 F.2d 311 (8th Cir. 1982); Goeb v. Heid (In re Goeb), 675 F.2d 1386 (9th Cir. 1982); Deans v. O’Donnell (In re Deans), 692 F.2d 968 (4th Cir. 1982); Revenot v. Rimgale (In re Rimgale), 669 F.2d 426 (7th Cir. 1982). However, this Court finds that under either the standard adopted by the Bankruptcy Appellate Panel in Keach or under a “totality of the circumstances” standard, the creditor has failed to establish that the Debtor’s Plan was not filed in good faith. Accordingly, the Court must overrule the objection of Mr. Kenneson and confirm the Debtor’s Plan.

CONCLUSION

The Court finds that the Debtor’s attempt to discharge a debt that might otherwise be excepted from discharge in a Chapter 7 case does not establish that the Debtor failed to propose his Chapter 13 Plan of Reorganization in good faith. The Court also finds that the Plan generally satisfies the requirements of § 1325 and that the Debtor is entitled to a discharge pursuant to § 1328. Accordingly, the Debtor’s Plan will be confirmed upon the filing of a proposed confirmation order by the Chapter 13 Trustee.

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 will be entered.

DONE and ORDERED this ____ day of November, 2000, at Manchester, New Hampshire.

Mark W. Vaughn
Chief Judge

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