

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of
JERRY L. EMERSON,
Debtor.

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Case No. 90-2375-D H
:
Chapter 13
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ORDER--MOTION TO DISMISS

On December 13, 1990, a hearing was held on the motion to dismiss. The following attorneys appeared on behalf of their respective clients: Jerry L. Emerson pro se; Joe W. Warford as Chapter 13 Trustee; Terry L. Gibson as Assistant U.S. Trustee; and Connie Sue Ricklefs as Jones County Attorney. At the conclusion of said hearing, the Court took the matter under advisement and the Court considers the matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The Court, upon review of the pleadings and arguments now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

FINDINGS OF FACT

1. Debtor filed his voluntary Chapter 13 petition on September 12, 1990.

2. Debtor is incarcerated at the Iowa State correctional facility in Fort Madison, Iowa, serving a lifetime term of imprisonment for murder in the first degree

of Debtor's spouse, Linda Emerson, in violation of Iowa Criminal Code § 707.2(1).

3. In the August 31, 1984 Order On Judgment and Sentence, the Iowa District Court for Jones County sentenced Debtor pursuant to Iowa Code §§ 707.2(1) and 902.1 as follows:

- 1). Defendant (Debtor) is committed to the Director of the Iowa Department of Corrections for the rest of his natural life.
- 2). The temporary custody of the defendant shall remain with the Sheriff of Jones County pending defendant's transfer to the custody of the Director. Jones County shall pay the costs of temporarily confining the defendant and transporting the defendant to the state institution where he is to be confined in execution of this judgment.
- 3). This Court recommends that the Board of Parole follow its usual rules, regulations and guidelines in determining, pursuant to Section 902.2, the Code, if, in the opinion of the Board, defendant should be considered for release on parole.
- 4). The following Plan of Restitution is established pursuant to Section 910.3, Iowa Corr. Code:
 - a). Defendant shall make restitution to the Department of Public Safety, Crime Victim Reparation Program, in the amount of \$1,000 paid to victim's family, burial expense.
 - b). Defendant shall make restitution to Jones County for court costs in the sum of \$6,460.17 and for court-appointed attorney fees of \$28,822.89.
 - c). A Restitution Plan of Payment shall be prepared by said Director or his designee as provided in Section 910.5, Iowa Corr. Code.

4. The only debts listed by Debtor in his Chapter 13 statement are the restitution obligations owing to Jones County for court costs and court-appointed attorney fees in the amount of \$34,966.99, and victim restitution owing to Linda Emerson's family in the amount of \$173.73.

5. Debtor has listed his occupation as "Iowa State industries furniture assembler" with a monthly gross income of \$80 and take-home pay of \$64. Debtor lists his total monthly expenses as \$84: telephone expense of \$30, food expense of \$20, clothing expense of \$9, personal hygiene supplies of \$10, periodicals of \$5, and medical and drug expenses of \$10.

6. Debtor's Chapter 13 plan provides for the submission of \$16 each month for a period of 36 months to the Chapter 13 Trustee for payment on the restitution claims concerned herein. After deducting the Chapter 13 Trustee fee, the Debtor's Chapter 13 payments total \$518.40, representing approximately 1.47 percent of the criminal restitution obligations of the Debtor.

7. United States Trustee and Jones County Attorney each filed a motion to dismiss Debtor's Chapter 13 plan, asserting lack of good faith as required by 11 U.S.C. § 1325(a)(3) and cause for dismissal under 11 U.S.C. § 1307(c).

DISCUSSION

11 U.S.C. § 1328(a) provides:

(a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under Chapter 13, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under 11 U.S.C. § 502, except any debt--

(1) provided for under 11 U.S.C. § 1322(b)(5); or

(2) of the kind specified in 11 U.S.C. § 523(a)(5).¹

In Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. ____, 110 S.Ct. 2126 (1990), the Supreme Court held that restitution obligations constitute debts within the meaning of 11 U.S.C. § 101(11) and are therefore dischargeable under Chapter 13 of the Bankruptcy Code. In Davenport, the Bankruptcy Court had confirmed the debtors' Chapter 13 plan without objection from any creditor and debtors subsequently fulfilled their obligations under the plan and received a discharge pursuant to 11 U.S.C. § 1328(a). Davenport, 110 S.Ct. at p. 2129.

¹Effective November 15, 1990, but not applicable to cases commenced under Title 11 of the U.S. Code before November 15, 1990, Congress amended 11 U.S.C. § 1328(a) to make restitution included in a sentence on a debtor's conviction of a crime non-dischargeable in a Chapter 13 case. See Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, § 3, 104 Stat. ____ (1990). Because Debtor filed his Chapter 13 case on September 12, 1990, this amendment to 11 U.S.C. § 1328(a) is not applicable to Debtor's case.

In the instant case, the U.S. Trustee and Jones County do not dispute the holding of Davenport. Rather, they assert that Debtor's Chapter 13 plan is not filed in good faith pursuant to 11 U.S.C. § 1325(a)(3) and thus should be dismissed for cause under 11 U.S.C. § 1307(c). 11 U.S.C. § 1307(c) provides that the court may dismiss a Chapter 13 case for cause, including denial of confirmation of a plan under 11 U.S.C. § 1325. 11 U.S.C. § 1325(a)(3) provides the requirement that the plan must be proposed in good faith and not by any means forbidden by law for the Court to confirm the Chapter 13 plan.

In In re Seig, 120 B.R. 533, 536 (Bankr. D.N.D. 1990), the court stated the current law on 11 U.S.C. § 1325(a)(3) good faith in the Eighth Circuit:

The Circuit in Education Assistance Corp. v. Zellner, 827 F.2d 1222 (8th Cir. 1987), determined that an analysis of whether a plan was filed in good faith is an inquiry focusing upon whether the plan constitutes an abuse of the provisions, purpose or spirit of Chapter 13. This analysis requires consideration of the totality of the circumstances with particular focus upon the type of debt to be discharged, whether the debt would be non-dischargeable in a Chapter 7, and whether the debtor has unfairly manipulated the Code. Id. at 122.

In the recent 1990 en banc decision of In re LeMaire, 898 F.2d 1346 (8th Cir. 1990), the court reiterated the necessity of reviewing the totality of the circumstances expressed in its earlier Zellner decision saying, "Factors such as the type of debt sought to be discharged, whether the debt is non-dischargeable in Chapter 7, and the

debtor's motivation and sincerity in seeking Chapter 13 relief are particularly relevant." Id. at p. 1346. In re Estus, 695 F.2d 311 (8th Cir. 1982), the court observed that the fact that the debt was to be non-dischargeable in a Chapter 7 is closely linked to the debtor's motivation and sincerity. This consideration, in turn, invokes a consideration of public policy as expressed in § 523 prohibiting the discharge of certain types of debts including student loans and which was again recognized in In re LeMaire, supra, at 1352, as an appropriate consideration in issues of good faith.

In the instant case, the only debts listed by the Debtor in his Chapter 13 statement are restitution obligations owing to the Jones County District Court for court costs and court-appointed attorney fees, and victim restitution owing to Linda Emerson's family. In Kelly v. Robinson, 479 U.S. 36, 107 S.Ct. 353, 93 L. Ed. 2d 216 (1986), the Supreme Court held that 11 U.S.C. § 523(a)(7) preserves from discharge *any* condition a state criminal court imposes as part of a criminal sentence. Thus, Debtor's restitution obligations would not be dischargeable in a Chapter 7 case. Further, because these restitution obligations are the only debts listed by Debtor, Debtor's motivation and sincerity in seeking Chapter 13 relief is suspect. The Court therefore finds that Debtor's plan has not been proposed in good faith under 11 U.S.C. § 1325(a)(3), and dismisses the case for cause under 11 U.S.C. § 1307(c).

ORDER

IT IS ACCORDINGLY ORDERED that the United States Trustee's Motion to Dismiss and Jones County Motion to Dismiss are granted.

IT IS FURTHER ORDERED that Debtor's Chapter 13 plan is dismissed for cause under 11 U.S.C. § 1307(c).

Dated this 5th day of April, 1991.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE