

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

:

In the Matter of

:

BRENT M. WARNER,

: Case No. 91-492-C H

Debtor.

: Chapter 13

:

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ORDER DENYING CONFIRMATION OF PLAN

General Motors Acceptance Corporation's (hereinafter "GMAC") and Chapter 13 Trustee's Objection to Chapter 13 Plan came on for hearing on May 6, 1991. Debtor appeared by Michael L. Jankins, Murray, Davoren & Jankins, Attorneys at Law; GMAC appeared by Richard G. Book, Jones, Hoffmann & Hubner, Attorneys at Law; and, J. W. Warford appeared as the Chapter 13 Trustee. At the conclusion of the hearing, the court took the matter under submission upon a briefing schedule.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(L). The Court now enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. The Debtor was the co-owner of a vehicle in which General Motors Acceptance Corporation (GMAC) held a secured interest.

2. The vehicle was damaged in a motor vehicle accident

and was considered a total loss by the insurance company which insured the vehicle.

3. The insurance company issued a joint settlement check to the Debtor's co-owner of the vehicle and GMAC. The co-owner endorsed the check over to the Debtor who is now in possession of it.

4. The Debtor filed for Chapter 13 relief in this court on February 20, 1991. His schedules list three secured creditors and \$14,358.00 of secured debt. The schedules list five unsecured creditors and \$5,959.00 of unsecured debt.

5. The Debtor filed his Chapter 13 Plan on February 20, 1991.

6. The Plan provides for 53 monthly payments of \$300.00 each with unsecured creditors to be paid ten cents on the dollar.

7. The Plan provided the insurance proceeds would be used to purchase a new vehicle and the Debtor would grant GMAC a lien in the new auto as substitute collateral.

8. GMAC filed an objection to the Plan on March 15, 1991. It contends:

- a) The insurance proceeds are not property of the estate;
- b) The Plan fails to comply with § 1325(a)(5) because it fails to provide for the payment of interest on the value of its secured claim;
- c) The plan fails to require insurance coverage on the vehicle to be purchased with the insurance

proceeds; and

- d) The Plan was not filed in good faith. § 1325(a)(3).

9. On March 19, 1991, the Trustee filed an objection to confirmation. He contends:

- a) The Plan was not proposed in good faith;
- b) The plan does not meet the disposable income requirements of 11 U.S.C. § 1325(b)(1)(B) because the Plan provides for the retention of a watch, necklace, and dirt bike not necessary for the maintenance or support of the Debtor or dependents of the Debtor; and
- c) The Debtor should only be able to retain a sufficient amount of the insurance proceeds necessary to purchase dependable transportation.

DISCUSSION

The proceeds of insurance policies are property of the estate, Matter of Hawkeye Chemical Co., 71 B.R. 315, 320 (Bankr. S.D. Iowa 1987); see also In re Titan Energy, Inc., 837 F.2d 325, 329 (8th Cir. 1988) (insurance policy was property of estate). Property is not excluded from a bankruptcy estate merely because it is subject to liens or encumbrances. Hawkeye Chemical, 71 B.R. at 320. GMAC's assertion that the insurance proceeds are not property of the estate is rejected.

GMAC also objects to the Plan because it fails to provide for the payment of interest on the value of its secured claim.

At the hearing GMAC requested the contract rate of interest 15 percent, and the Debtor proposed interest at the rate of ten percent. The Court orders the Debtor to resubmit its Plan using the discount factor adopted in Matter of Lassiter, 104 B.R. 119, 123-24 (Bankr. S.D. Iowa 1989) (based upon treasury bond yield with 1 percent risk factor).

GMAC's objection to the Plan is sustained to the extent that the Plan fails to require the Debtor to maintain collision insurance coverage on the automobile to be purchased with the insurance proceeds. To be confirmed, the Plan must require the purchase and renewal (in six month intervals) of collision insurance coverage for the duration of the Plan with GMAC named as the loss-payee. The Court does not find this requirement unduly burdensome upon the Debtor and it is necessary to protect the value of GMAC's interest in the collateral.

GMAC claims the Plan was not filed in good faith. § 1325(a)(3). It asserts the Plan was filed for the purpose of forcing GMAC to agree to a substitution of collateral in lieu of receiving the insurance proceeds. The Trustee also objects to confirmation on the basis that the Plan was not proposed in good faith. A court has an obligation to make a determination of "good faith" in light of the totality of the circumstances. In re LeMaire, 898 F.2d 1346 (8th Cir. 1990). While the "good faith" determination was modified somewhat in response

to the enactment of § 1325(b), the factors set forth in In re Estus, 695 F.2d 311, 317 (8th Cir. 1982), are still relevant. See LeMaire, 898 F.2d at 1349.

In assessing "good faith" a court must determine whether a plan constitutes an abuse of the provisions, purpose or spirit of Chapter 13. Estus, 695 F.2d at 316. "Good faith" is evaluated on a case-by-case basis and there are no precise formulas or measurements to be deployed in a mechanical good faith equation. LeMaire, 898 F.2d at 1353.

The Debtor was facing financial difficulties and opted to file a plan of reorganization. Had his automobile still existed, its retention by the Debtor would unquestionably have been necessary for an effective reorganization. The fact that the Debtor was without his own transportation and wished to use the proceeds in his plan of reorganization to secure a new vehicle is not evidence of bad faith. The objections of GMAC and the Trustee based upon assertions of bad faith are denied.

The Trustee claims the Plan does not meet the disposable income requirements of § 1325(b)(1)(B) because it allows the Debtor to retain a watch, necklace, and dirt bike which the Trustee claims are not necessary for the maintenance or support of the Debtor or dependents of the Debtor.

Section 1325(b) encompasses the "ability to pay" criteria adopted in 1984. The "disposable income" definition of 11 U.S.C. § 1325(b)(2)(A) imposes upon the court a duty of

deciding whether a debtor's expenses are "reasonably necessary" for the maintenance or support of the debtor or a dependent of the debtor. 5 Collier on Bankruptcy ¶1325.08[b] (15th ed. 1991).

The Court finds Debtor's retention of the watch and necklace is reasonable and necessary for his support. However, his decision to retain the 1988 Honda dirt bike is not reasonable and necessary for his support and will preclude confirmation of his Plan. A number of factors persuade the Court to deny confirmation under § 1325(b)(2)(B). The Debtor is single and has no dependents. His income is used solely for his sustenance. The Debtor's schedules estimate the bike's fair market value at \$1,500.00--giving him \$703.00 in equity in it.

The dirt bike is for recreational use only. The Debtor does not assert the dirt bike provides for his basic transportation needs. In fact, it is the Debtor's alleged lack of a vehicle to transport him to work which convinced this Court to allow the Debtor to formulate a plan in which he is allowed to use the insurance proceeds to buy a new vehicle.

The Debtor presently makes monthly payments of \$115.00 on the dirt bike. His schedule of expenses lists \$20.00 per month for recreation. Since the dirt bike is solely a recreational vehicle, Debtor's schedules reflect a total of \$135.00 a month in recreational expenditures. Such a level is

unacceptably high in light of the low payout projected for the unsecured creditors (10%) over a proposed plan of 53 months. Were the Debtor to surrender the dirt bike and apply his equitable interest to the Plan he could double the amount paid to his unsecured creditors. Confirmation is denied because the Debtor's Plan fails to apply all of his projected disposable income to make payments under the Plan. § 1325(b)(2)(B).

The Trustee's final objection is based on his contention that the Debtor should only be allowed to retain part of the insurance proceeds to purchase dependable transportation. The Court finds application of the entire proceeds to purchase a vehicle is reasonably necessary for the acquisition of dependable transportation and the Trustee's objection on this ground is denied.

IT IS HEREBY ORDERED confirmation of the Debtor's Plan is denied because:

1) the Plan fails to provide for interest on GMAC's claim, § 1325(a)(5);

2) the Plan fails to require the Debtor to maintain insurance coverage on the vehicle purchased with the insurance proceeds; and

3) the Plan's proposed retention of the 1888 Honda dirt bike does not meet the disposable income requirements of §.1325(b)(1)(B). All other objections to confirmation are

overruled.

The Debtor has 15 days to submit a plan which conforms to the requirements of the Code and this Order.

Dated this 11th day of September, 1991.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE