

**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA**

In the Matter of	:	Case No. 95-1417-CH
	:	Chapter 13
DENNIS W. HARKER,	:	
	:	
Debtor.	:	

ORDER--MOTION TO DISMISS AND CONFIRMATION OF PLAN

On September 18, 1995, hearing was held on the Confirmation of Chapter 13 Plan and the Motion to Dismiss case filed by the Chapter 13 Trustee and joined in on by the United States of America. Debtor, Dennis Harker, was represented by his attorney, Jerrold Wanek. Kevin R. Query and Mary Ann Waters were present for the creditor, USA. Creditor, Earlham Savings Bank, was represented by its attorney, Donald F. Neiman. Elizabeth E. Goodman appeared for the Chapter 13 Trustee. At the conclusion of the hearing, the court took this matter under advisement upon a briefing schedule. Briefs have been filed in the case and the court now considers this matter fully submitted.

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

FINDINGS OF FACT

1. Debtor, Dennis Harker, was formerly an agent with the Drug Enforcement Administration. In 1989, criminal charges of tax evasion were brought against Debtor and his then wife, Mary A. Harker. Debtor pled guilty to a charge of evasion for the year of 1987, and Mary Harker pled guilty to a charge of evasion for 1985.

2. The Internal Revenue Service (IRS) determined that the Harkers were liable for deficiencies in tax, as well as additions to tax for fraud and financial understatement for the taxable years 1985, 1986, and 1987. The statutory deficiency was issued to the Harkers who filed a petition with the United States Tax Court.

3. In December 1994, the Tax Court issued its opinion sustaining the determinations of the IRS. On May 1, 1995, the Tax Court entered its decision which set forth the amount of deficiencies and additions to tax that were to be assessed against the Harkers.

4. Debtor filed his petition for bankruptcy relief under Chapter 13 of the U.S. Bankruptcy Code on May 16, 1995. The IRS had not yet made assessments in accordance with the Tax Court decision or filed notices of federal tax liens.

5. The bankruptcy schedules listed one secured creditor, Earlham Savings Bank, who was listed as holding a secured claim in the amount of \$32,884.09.

6. The bankruptcy schedules also listed one creditor holding an unsecured priority claim. This creditor was listed as the IRS with a claim in the amount of \$785,855.60. The schedule stated that the claim is "fixed and liquidated."

7. On June 1, 1995, Debtor filed a Chapter 13 Plan.

8. The IRS objected to confirmation of Debtor's Chapter 13 Plan. The creditor Earlham Savings Bank, also objected to the Chapter 13 Plan.

9. The Chapter 13 Trustee filed a Motion to Dismiss on the grounds that Debtor did not qualify for relief under Chapter 13 of the U.S. Bankruptcy Code pursuant to 11 U.S.C. § 109(e).

10. Debtor objected to Trustee's Motion to Dismiss arguing that the original schedules had a clerical error setting forth a "fixed and liquidated" unsecured priority debt in excess of \$785,000.00. Debtor also filed on July 14, 1995, an amendment to Schedule E amending his schedules to reflect that the claim held by the IRS was "contingent and unliquidated."

11. On July 26, 1995, Debtor filed an appeal of the Tax Court decision to the United States Court of Appeals for the Eighth Circuit.

12. On September 12, 1995, the IRS filed a joinder to the Trustee's Motion to Dismiss.

13. These matters came on for hearing on September 18, 1995. Upon conclusion of the hearing the court took this matter under advisement.

14. On January 25, 1996, Debtor moved to modify the automatic stay to allow oral argument in his appeal pending before the Eighth Circuit Court of Appeals. On February 9, 1996, the court found that if the automatic stay applies in this case that the stay should be modified for cause pursuant to § 362(d)(1) to allow the appeal of the case with the IRS to go forward.

15. On May 16, 1996, the IRS filed a status report in support of their motion to dismiss. The status report stated that the Eighth Circuit Court of Appeals entered on May 3, 1996, its decision affirming the federal tax claim in this case. The decision of the Eighth Circuit Court of Appeals was attached to the report.

DISCUSSION

Motion To Dismiss

The Chapter 13 Trustee has filed a Motion to Dismiss this case on the grounds that Debtor is ineligible for Chapter 13 relief pursuant to 11 U.S.C. §§ 109(e) and 1307(c). The USA has joined in this motion. The movants argue that the case should be dismissed because Debtor is ineligible for Chapter 13 relief as his unsecured debt exceeds the debt limitations and because Debtor filed the petition in bad faith. The Court shall first consider the argument of bad faith.

11 U.S.C. § 1307(c) provides in relevant part as follows:

Except as provided in subsection (e) of this section, on request of a party in interest or of the United States Trustee and after notice and hearing, the court may convert . . . or dismiss a case under this chapter . . . for cause

Although bad faith is not listed as a cause for dismissal under § 1307(c), the Eighth Circuit specifically held in a recent decision that “a Chapter 13 petition filed in bad faith may be dismissed or converted “for cause” under 11 U.S.C. § 1307(c).” In re Molitor, 76 F.3d 218, 220 (8th Cir.1996) (citations omitted). In Molitor, the Eighth Circuit found that a bad faith determination should focus on the totality of the circumstances. Id. The court went on to list three specific circumstances of bad faith including:

- (1) whether the debtor has stated his debts and expenses accurately;
- (2) whether he has made any fraudulent misrepresentation to mislead the bankruptcy court; or
- (3) whether he has unfairly manipulated the bankruptcy code.

Id.

The following factors were also found by the Seventh Circuit to be relevant to a good faith determination under § 1307(c):

- (1) whether the debt would be nondischargeable under Chapter 7;
- (2) the timing of the petition;
- (3) how the debt arose;
- (4) the debtor's motives in filing the petition;
- (5) the treatment of creditors; or
- (6) whether the debtor has been forthcoming with the court and creditors.

In re Love, 957 F.2d 1350, 1357 (7th Cir.1992) (citations omitted).

Despite the listing of specific circumstances, the lists were not intended to be an exhaustive list, but instead the totality of the circumstances must be determined based on the facts of the case at hand. Id. at 1355 (7th Cir.1992) (citation omitted). The burden of showing lack of good faith under § 1307(c) is on the party moving for dismissal. Id. Courts should be more reluctant to dismiss a petition under § 1307(c) for lack of good faith than to fail to confirm a plan for lack of good faith under § 1325(a). Id. at 1356. However, the focus of a good faith inquiry under either § 1307(c) or § 1325(a) is whether the filing is “fundamentally fair to creditors and, more generally, is the filing fundamentally fair in a manner that complies with the spirit of the Bankruptcy Code’s provisions.” Id. at 1357.

Bankruptcy provides a federal remedy and safe harbor for poor but honest creditors by permitting reorganization of their financial affairs and a fresh start. See Grogan v. Garner, 498 U.S. 279, 286, 111 S.Ct. 654, 659, 112 L.Ed.2d 755 (1991); In re LeMaire, 898 F.2d 1346, 1352 (8th Cir.1990). This means that Chapter 13 bankruptcy petitions must be filed with a sincere effort to repay creditors. In re Schaitz, 913 F.2d 452, 454 (7th Cir.1990).

Several courts have found that a filing of a Chapter 11 bankruptcy petition to avoid posting an appeal bond constitutes bad faith as it is merely a litigating tactic

unrelated to the legitimate goal of reorganization. In re Boynton, 184 B.R. 580, 583-84 (Bankr.S.D.Cal. 1995); In re Karum Group, Inc., 66 B.R. 436, 438 (Bankr.W.D.Wash. 1986); In re Smith, 58 B.R. 448, 451, (Bankr.W.D.Ky. 1986) (citation omitted); In re Wally Findlay Galleries (New York), Inc., 36 B.R. 849, 851 (Bankr.S.D.N.Y.1984); But see In re Alton Telegraph Printing Co., 14 B.R. 238 (Bankr.S.D. Ill.1981) (permitting a Chapter 11 proceeding filed to avoid posting an appeal bond to go forward). The Ninth Circuit has declined to decide whether bankruptcy laws can be used to avoid the posting of an appeal bond when enforcement would result in severe business disruption. In re Marsch, 36 F.3d 825, 829 (9th Cir. 1994) (finding that such a debtor may not file a petition to avoid posting an appeal bond where the debtor had the financial means to pay and business was not in danger of disruption).

Other courts have applied the reasoning of these Chapter 11 cases to Chapter 13 cases and have held that the filing of a Chapter 13 petition to avoid payment of an appeal bond is indicative of bad faith. In re Ramji, 166 B.R. 288, 290 (Bankr.S.D.Tex. 1993); In re Roberts, 117 B.R. 677, 678 (Bankr.N.D.Okla.1990). One bankruptcy court has held that a Chapter 13 petition filed by a solvent debtor as an attempt to prevent the IRS from levying on a tax lien was filed in bad faith and subject to dismissal. In re Meisner, 155 B.R. 519, 520 (Bankr.D.Neb.1993); But see In re Verdunn, 160 B.R. 682 (Bankr.M.D.Fla. 1993) (stating that the debtors attempt to discharge tax claims which are potentially nondischargeable in a Chapter 7 is not *per se* bad faith).

In looking at the particular facts of the case at hand and taking into account a totality of the circumstances, this court finds that the Chapter 13 petition filed by Debtor was not filed in good faith and must therefore, be dismissed for cause pursuant to

§ 1307(c). This case was filed approximately two weeks after a Tax Court decision setting forth the amounts to be assessed against the Harkers for tax deficiencies and penalties for fraud and financial understatements. This petition was filed before any assessment was made by the IRS. The IRS, with a claim in the amount of \$785,855.60, is the only unsecured creditor listed on the bankruptcy schedules. In fact, the only other creditor listed was Earlham Savings Bank, holding a secured claim. Debtor did not file his appeal of the Tax Court decision until after the filing of the bankruptcy petition. No appeal bond was filed. Debtor's Chapter 13 plan proposes payments of \$500.00 per month to the Trustee. The Plan also proposes that if the IRS claim is allowed that Debtor will liquidate the farmland in Boone County. Such property is listed in the schedules as having a value in the amount of \$200,000.00.

The court finds that Debtor filed this Chapter 13 bankruptcy as a litigation tactic to avoid posting an appeal bond that would have been required to postpone assessment by the IRS pending appeal. Furthermore, the debt owed to the IRS, who was the only unsecured creditor listed, is potentially nondischargeable in a Chapter 7. The court finds that using Chapter 13 in such a manner is inconsistent with the spirit of the Bankruptcy Code and with the fundamental goal to reorganize debts. Such usage of Chapter 13 reorganization will not be allowed. The court finds that this Chapter 13 petition was filed in bad faith and is subject to dismissal or conversion for cause pursuant to § 1307(c).

The court has determined that this case should be dismissed or converted for cause pursuant to § 1307(c) due to the bad faith filing of the Chapter 13 petition. The court, therefore, need not reach the issue of whether Debtor's unsecured debt exceeds the debt limitations imposed by § 109(e).

Objections to Confirmation

The Chapter 13 Trustee, USA and Earlham Savings Bank have each filed Objections to the Confirmation of the Chapter 13 Plan. The court has determined that this case should be dismissed or converted for cause pursuant to § 1307(c). Therefore, the Objections to Confirmation are denied as moot.

ORDER

IT IS THEREFORE ORDERED that the Chapter 13 petition was not filed in good faith and is subject to dismissal or conversion for cause pursuant to § 1307(c). Debtor is given twenty days from the date of the filing of this order in which to file a Motion to Convert this case. Failure to timely file said motion shall result in this order to be self-executing and the case shall be dismissed without further notice and hearing.

IT IS FURTHER ORDERED that the Objections to Confirmation of the Chapter 13 Plan are denied as moot.

Dated this _____ day of June, 1996.

RUSSELL J. HILL, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT