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IT IS SO ORDERED.

Dated: March 09, 2007



C. Kathryn Preston
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In re
Michael A. Reid
Lisa W. Reid
Debtor(s)

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:
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Case No. 06-57080
Chapter 13
Judge Preston

OPINION AND ORDER ON CONFIRMATION OF CHAPTER 13 PLAN

This cause came on for hearing on Tuesday, March 6, 2007, upon the Court’s own motion, for the purpose of taking testimony on good faith in connection with confirmation of the Debtors’ Third Amended Chapter 13 Plan (Doc #28)(the “Plan”). Present at the hearing were counsel for the Debtors Edward Foley, and the Debtors Lisa and Michael Reid.

The Debtors are a family of two. Both are employed and live in South Delaware County in Westerville, Ohio. Mr. Reid is a technical writer; Mrs. Reid is a realtor. In 1999, the Debtors

purchased a home consisting of over 3780 sq. ft. of living space in an upscale neighborhood; they paid the sum of approximately \$375,000.00 for the home. According to an appraisal filed in their Chapter 13 case, the home currently has a value of \$470,000.00.¹ The Debtors' financial difficulties are precipitated largely by unpaid income taxes owed to the Federal government in the total amount of approximately \$147,479. The tax debt is partially secured by liens on the Debtors' home. The Debtors also owe income taxes to state and local governmental authorities.

The Debtors have filed their Chapter 13 Plan, proposing to pay the tax debt in full and 3% to their unsecured creditors. The Plan also modifies the debt secured by their vehicle and pays the secured value of that claim over the life of the Plan. The Plan specifies that the Debtors will retain the home and pay the mortgage outside of the Plan. Apparently there are no arrearages due the mortgage holder, and no delinquent real estate taxes. In light of the Debtors' contemplation to keep the home while paying unsecured creditors 3%, the Court set the hearing to determine the good faith of the Debtors' proposed Plan.

To be confirmed, a Chapter 13 plan must be proposed in good faith. 11 U.S.C. § 1325(a)(3). The debtor bears the burden of proving good faith. The Sixth Circuit Court of Appeals has suggested a twelve-part test to determine whether the debtor's Chapter 13 plan is proposed in good faith. The elements of the test are:

- (1) the amount of the proposed payments and the amount of the debtor's surplus;
- (2) the debtor's employment history, ability to earn and likelihood of future increase in income;
- (3) the probable or expected duration of the plan;

¹The Debtors dispute this value, believing that the true market value of the home is approximately \$440,000.00.

- (4) the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court;
- (5) the extent of preferential treatment between classes of creditors;
- (6) the extent to which secured claims are modified;
- (7) the type of debt sought to be discharged and whether any such debt is nondischargeable in Chapter 7;
- (8) the existence of special circumstances such as inordinate medical expenses;
- (9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act;
- (10) the motivation and sincerity of the debtor in seeking Chapter 13 relief;
- (11) the burden which the plan's administration would place upon the trustee; and,
- (12) whether the debtor is attempting to abuse the spirit of the Bankruptcy Code.

Hardin v. Caldwell (In re Caldwell), 895 F.2d 1123, 1126 (6th Cir. 1990); *Metro Employees Credit Union v. Okoreeh-Baah*, 836 F.2d 1030, 1033 (6th Cir. 1990). However, the Sixth Circuit Court of Appeals emphasized in both *Caldwell* and *Okoreeh-Baah* that the Bankruptcy Court must look to the totality of the circumstances in determining a debtor's good faith in filing a Chapter 13 petition and plan. As stated by the Court in *Okoreeh-Baah*, good faith is an amorphous notion, largely defined by factual inquiry. "The Bankruptcy Court must ultimately determine whether a debtor's plan...satisfies the purposes undergirding Chapter 13: a sincerely intended repayment of prepetition debt consistent with the debtor's available resources." *Okoreeh-Baah*, 836 F.2d at 1033.

The Debtors' monthly payments to service the home mortgage is \$2525.00 per month. According to the Debtors' Schedule J, servicing the real estate tax debt requires \$600 per month; however, Exhibit 1 presented at the hearing includes a copy of the Delaware County Auditor's website page pertaining to their home and reflects a tax of \$7,810.00 per year, or approximately \$650.00 per month. The Debtors' Schedule J also includes an entry of \$50 per month for homeowner's insurance. Thus, the Debtors' total housing cost is \$3,225.00 per month.²

Based on the testimony elicited at trial, the Debtors satisfied many of the criteria that were articulated by the Sixth Circuit: the Debtors are dedicating all of the disposable income reflected on Schedule J to the Plan, the probable duration of the Plan is close to 60 months, the Plan and Schedules appear to be accurate; there is no apparent attempt to mislead the Court, and secured claims are modified as is reasonable under the circumstances and permitted under the Bankruptcy Code. Moreover, the record indicates that the Debtors have not filed any previous bankruptcy proceedings, and nothing in the Plan appears to impose an unusual burden on the Trustee.

However, the Debtors failed to justify or explain why they must retain a house which rises to the level of a lavish lifestyle while paying their creditors a diminimus dividend of 3%. The Debtors did not demonstrate any special circumstances which warrant retaining the home, such as the need to house a large or extended family, or the existence of circumstances outside of their control. The Court is also troubled by Mrs. Reid's response to her counsel's inquiry regarding why the Debtors feel they should keep the house: Mrs. Reid's only response was that they can now afford it. She also stated that the home is near family, including her aged father. However, there was no

² The Debtors did not enter any amount on Schedule J for home repairs and maintenance. Any such expense would be added to the total costs of housing.

indication that they can't find housing nearby more reasonable for their circumstances, and quite frankly, the Court doubts such an assertion could honestly be made.

In fact, it appears that the Debtors cannot afford this home in light of the accrual of very substantial income tax debt after they acquired the home. As quoted by Judge Keith Lundin in his treatise *Chapter 13 Bankruptcy* §181.1 at 181-4 (3d ed. 2000 & Supp. 2004), quoting *In re Mathenia*, 220 B. R. 427, 433 (Bankr. W.D. Okla. 1998), "It is simply not right for debtors to voluntarily obligate themselves for the purchase of property which they clearly can not afford, ... and then expect to retain the property and force their creditors to pay for their folly, or their guile, as the case may be, by having their claims discharged, in whole or material part, in a subsequent bankruptcy." Additionally, Mrs. Reid's response belies the Debtors' sincerity and smacks of improper motivation in the filing of this case.

Finally, the Debtors' testimony illustrates that they have potential for significantly higher earnings. Mrs. Reid testified that in past years she has earned an annual income well in excess of \$100,000.00 per year; it is only in the past two or three years that her income significantly decreased. She further testified that she is seeing significant increase in business, and believes she can attain the earning levels previously experienced. While no one can predict the future, it is reasonable for the Debtors to expect to achieve the high income level commensurate with their past earning capacity. Any such good fortune should be shared with the unsecured creditors in exchange for the discharge the Debtors will receive upon successful completion of the Plan.

There is no *per se* requirement that a Chapter 13 plan provide for a substantial repayment to unsecured creditors in order to be proposed in good faith. This Court confirms low dividend plans on occasion, but the debtor in such instances is invariably of limited means, modest income and/or

maintains an economical lifestyle. In this instance, the totality of the circumstances dictate the Debtors make a greater effort.³ As was observed by the court in a similar case, “[T]he Debtors have an ability to make significant distributions to unsecured creditors. A good faith effort would require that Debtors find replacement housing for themselves at a [lesser] cost.... If the Debtors elect to maintain their Property, it is they that should bear the cost of the unusual and improvident expenses which unfairly discriminate against unsecured creditors.” *In re Leone*, 292 B.R. 243, 245 (Bankr. W.D. Pa. 2003). Similarly, in the case of *In re Rice*, 72 B.R. 311, 312 (D.Ct. Del. 1987), the court held that the debtors with a high housing cost did have the ability to make higher plan payments although it would require adjustments on their part which are greater than keeping their home at the expense of their unsecured creditors.

While this case is not as factually egregious as the situations presented by the *Okoreeh-Baah* and *Caldwell* cases, the Debtors’ proposal shocks the conscience of this Court. The Debtors’ total unsecured claims total approximately \$87,000.00. Under the Debtors’ proposal to pay 3% to unsecured creditors (for a total of \$2610), Debtors will be paying significantly less than the cost of their upscale, lavish housing for one month (\$3225). Under these circumstances, the Court cannot find that the Debtors proposed the current Plan in good faith.⁴

In light of the foregoing, it is ORDERED and ADJUDGED that:

³ Counsel for the Debtors suggested that Debtors’ tax liability for the income projected on Schedule J would require that they set aside \$2800.00 per month in order to pay the tax bill at the end of each year. However, no evidence was submitted to support that notion. The Court further notes that the Debtors only budget \$900.00 per month for taxes on Schedule J, which belies the feasibility of the proposed Plan if counsel’s representation is true.

⁴ This is not to say that the Debtors don’t have any alternatives: They can propose a step plan which will result in greater payments to their unsecured creditors, they can surrender the home and find more economical housing creating greater disposable income, or they can propose to sell their house within a reasonable period of time (*e.g.*, perhaps six months) which will result in reduction of their monthly housing expense as well as the IRS debt that they must pay during the term of the Chapter 13 Plan, again resulting in greater disposable income to pay unsecured creditors. These are just a few of the alternatives that are available to the Debtors.

1. Confirmation of the Debtors' second amended Chapter 13 Plan is denied;
2. Debtors may file an amended chapter 13 plan on or before April 8, 2007;

and

3. A continued confirmation hearing shall be held on **May 17, 2007, at 2:00 p.m.**

in Courtroom C, Fifth Floor, United States Bankruptcy Court, 170 N. High St., Columbus, Ohio 43215.

IT IS SO ORDERED.

Copies to:

Michael A. Reid, Lisa W. Reid, 6463 Pine Needle Drive, Westerville, OH 43082

J. Edward Foley, Attorney for Debtors (Electronic Service)

Frank M. Pees, Chapter 7 Trustee (Electronic Service)

Office of the U.S. Trustee (Electronic Service)

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