UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Central Division

In re:	)	Bankr. No. 98-30004
	)	
CLIFFORD BUXCEL	)	Chapter 13
Soc. Sec. No. 504-56-5178	)	
	)	MEMORANDUM OF DECISION RE:
and	)	CONFIRMATION OF PLAN DATED
	)	JANUARY 23, 1998 AND FIRST
ELAINE BUXCEL	)	FIDELITY BANK'S MOTION TO
Soc. Sec. No. 504-56-3535	)	DISMISS AND OBJECTION TO
	)	CLAIM OF EXEMPTIONS
Debtors.	)	

The matters before the Court are the confirmation of Debtors' plan dated January 23, 1998 and the Motion to Dismiss and the Objection to Claim of Exemptions filed by the First Fidelity Bank. An evidentiary hearing was held April 2, 1998. Appearances included James E. Carlon for Debtors and Timothy M. Engel for the Bank. These are core proceedings under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying Orders shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that the case should be dismissed.

I.

Clifford and Elaine Buxcel (Debtors) filed a Chapter 13 petition on January 12, 1998. They filed their plan on January 27, 1998.

In their proposed plan, Debtors said they may have one priority unsecured creditor, Jones County, that would be paid outside the plan. Debtors stated all remaining [unnamed] creditors were unsecured and would be paid $27.38 per month pro rata through

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the case trustee and that they would also pay unsecured creditors disposable income.

First Fidelity Bank (the Bank) objected to the plan on February 3, 1998 on the grounds that the plan was not proposed in good faith and that the $27.38 monthly payment was less than Debtors' available disposable income. Trustee Dale A. Wein objected on March 9, 1998. He requested updated statements of Debtors' current income and expenses. He objected that the plan did not accurately set forth the real estate taxes due and that the disposable income statute was not accurately followed. Trustee Wein also requested that the plan provide that any money Debtors recover in a lawsuit against the Bank would be used to fund the plan as part of Debtors' disposable income. Debtors filed a response to the Trustee's objections on April 2, 1998 and agreed to meet them. They also stated that the plan already provided for disposable income. Debtors did not file a response to the Bank's objections.

The Bank filed objections to Debtors' claimed exempt property on February 6, 1998 on the grounds that Debtors did not have an ownership interest in the real property they claimed as their homestead and that Debtors had improperly valued their lawsuit against the Bank at only $1.00. Debtors filed a response on February 10, 1998. Therein, they explained that the Small Business Administration holds title to their homesite pending completion of some paper work but that they have continually resided there and

have maintained their homestead interest throughout SBA's foreclosure action. Debtors also stated that the value of their lawsuit against the Bank was irrelevant because they had agreed to treat any proceeds as disposable income under the plan.

Also on February 6, 1998, the Bank filed a motion to dismiss Debtors' case on the grounds that the case was not filed in good faith because Debtors were using the automatic stay to prevent the Bank from executing on a state court judgment pending an appeal to the South Dakota Supreme Court. The Bank also argued that dismissal was warranted because Debtors' plan proposed no meaningful repayment of debt and because Debtors' schedules were inaccurate. Debtors responded on February 10, 1998. They stated their schedules were accurate to the best of their knowledge, that the best repayment they can offer the Bank is disposable income, and that they have agreed to share any lawsuit proceeds from the Bank with all creditors. Debtors stated that a Chapter 13 is in the best interest of all their creditors except the Bank.

At the evidentiary hearing, Debtors' counsel advised the Court that Debtors had agreed to meet the Trustee's objections. Debtors and the Bank submitted by stipulation a conformed copy of the state court judgment regarding Debtors suit against the Bank and the SBA, the notice of appeal regarding that judgment, some of the appeal documents, including the issue on appeal, correspondence between SBA officials and Debtors' counsel regarding Debtors' homesite, a letter to Debtors' counsel regarding a valuation of Debtors' home

and the land on which it is located, a Marshal's deed regarding the homesite, a purchase agreement between Debtors and SBA regarding the homesite, and a copy of the stipulation between Debtors and the SBA and the foreclosure judgment for SBA.

No witnesses were presented. Debtors and the Bank stipulated that the Bank still has a valid mortgage on proceeds from the foreclosure sale of all of Debtors' non exempt real and personal property. They also agreed that if called to testify, Debtors would state that they filed this bankruptcy due to the large judgment that they owe the Bank and also because they wanted to thwart the Bank's effort to declare Debtors' appeal of the Bank's judgment as a property interest on which the Bank could levy.

II.

OBJECTION TO HOMESTEAD EXEMPTION. In the District of South Dakota, the bankruptcy court looks to state law to define the allowed exemptions. 11 U.S.C. § 522(b)(2)(A) and S.D.C.L. § 43-45-13. In South Dakota, certain personal property and a homestead are absolutely exempt under S.D.C.L. §§ 43-35-1, 43-45-2, and 43-45-3, A debtor who is a head of a family may declare exempt another $4,000.00 in personal property. S.D.C.L. § 43-45-4.

A homestead in South Dakota must be "owned" by the debtor to be declared exempt. *United States v. Nelson*, 969 F.2d 626, 631 (8th Cir. 1992). Though a debtor may possess a legal right to buy back a homestead after foreclosure, that right does not constitute an ownership interest that can be declared a homestead. *Id.*

A debtor's entitlement to an exemption is determined on the day he files his bankruptcy petition. *See Armstrong v. Peterson (In re Armstrong)*, 897 F.2d 935 (8th Cir. 1990)(debtor's post-petition death did not result in reversion of exempt property to estate); *Armstrong v. Harris (In re Harris)*, 886 F.2d 1011 (8th Cir. 1989)(cites therein); and *In re Myers*, 17 B.R. 339, 340 (Bankr. D.S.D. 1982).

DISCUSSION. According to the exhibits offered, Debtors did not timely redeem their foreclosed-upon property by the agreed date of January 1, 1998 and so a Marshal's Deed was recorded January 9, 1998. While Debtors were in discussion with SBA to repurchase their home and ten acres and had tendered $15,000.00 to SBA for that purpose before their petition date, a purchase agreement between Debtors and SBA was not signed by Debtors and the SBA until late January, *after* Debtors had filed bankruptcy. Therefore, on the petition date, Debtors did not have title to the real property, their redemption rights had expired, and they had no enforceable purchase agreement with SBA. Debtors were in possession of the home but that interest does not constitute an ownership interest that can be declared a homestead. *See Nelson*, 969 F.2d at 631.

The Court acknowledges that Debtors may have been caught in the paper work that needed to be completed with the SBA before they got back title to their home. However, neither state homestead laws nor the Bankruptcy Code permit exemptions to be claimed on

property in which the debtor has no ownership interest on the petition date.

OBJECTION TO THE LAW SUIT EXEMPTION. Debtors conceded at the evidentiary hearing that they get only $1.00 as their exempt portion of any proceeds they may receive from their lawsuit against the Bank. The balance will be treated as disposable income. The Bank may be correct that the lawsuit's actual value is something other than $1.00 but Debtors certainly were not misleading creditors when they said the total value of the lawsuit was unknown.

III.

CONFIRMATION OF A CHAPTER 13 PLAN. All Chapter 13 plans must meet several requirements. These requirements include that the plan must be proposed in good faith, that unsecured priority claims must be paid in full over the plan term, and that the debtors must pay creditors as much as they would receive in a Chapter 7 liquidation. 11 U.S.C. §§ 1325(a)(1), (2), (3), and (4).

Good faith. The good faith requirement under § 1325(a)(3) is a factual determination for the Bankruptcy Court. *Handeen v. LeMaire (In re LeMaire)*, 898 F.2d 1346, 1349 (8th Cir. 1990). The Court must consider whether the debtor has stated his debts and expenses accurately, whether the debtor has made any fraudulent misrepresentations to mislead the court, or whether the debtor has unfairly manipulated the Code. *Id.* (quoting therein *Education*

Assistance Corp. v. Zellner (In re Zellner), 827 F.2d 1222, 1227 (8th Cir. 1987)). The weight accorded each factor will vary with the circumstances of the case. *Id.* at 1353. Good faith should be evaluated on a case-by-case basis. *Id.* The totality of the circumstances perspective first recognized in *Zellner* remains. *Id.* at 1349. The purpose or spirit of Chapter 13 should not be abused. *Id.* at 1351.

Best interests of creditors test. To satisfy § 1325(a)(4), the debtor's plan must provide that all creditors will receive as much as they would if the debtor's non exempt assets were liquidated in a Chapter 7 case. The estate to be hypothetically liquidated under this section includes all pre and post-petition estate property under §§ 541 and 1306 that is not exempt. *Zellner*, 827 F.2d at 1225. Ideally, a liquidation analysis should be attached to the proposed plan. *See* Local Bankr. R. 3015-1(a).

Discussion. The Court concludes that Debtors' present plan is not confirmable because it was not filed in good faith, it does not appropriately treat an unsecured priority claim, and the best interest of creditors test is not met.

After considering all the circumstances, the Court finds several factors that indicate Debtors' lack of good faith in filing their plan. First, based on Debtors' past performance and present schedules, their prospect for a successful plan is bleak. Debtors were unable to successfully fund a plan while they still owned a

business. Based on their Schedules I and J, one debtor is unemployed and they have limited income. They have barely enough income to meet basic necessities let alone successfully fund a plan. There has been no evidence regarding how that situation will improve. The Court is also concerned that their monthly expenses are understated since Debtors project no housing cost and no real estate taxes[1] and their food, clothing, and home maintenance allowances are unreasonably low. Were more realistic expenses set forth, Debtors would not likely have any funds available for debt repayment.

Second, assuming Debtors can make their offered $27.38 monthly plan payment, that amount will not provide a meaningful repayment of debt. Priority unsecured debt, as now scheduled, is $11,542.28. General unsecured debt is $126,644.17. A $27.38 monthly plan payment over 36 months will repay only $985.68.

Third, Debtors appear to have preferentially paid some select unsecured creditors pre-petition. While the Bank's large judgment against them may have dictated that they seek bankruptcy relief, all similarly situated creditors should have been treated the same. Debtors have not justified the pre-petition discrimination. *See Mickelson v. Lesser (In re Lesser)*, 939 F.2d 669, 672 (8th Cir.

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[1] If Debtors repurchase their home, they will need funds for the purchase and they will incur real estate taxes post-petition. Neither of these costs is reflected in the statement of expenses. If they do not repurchase their home or another home, a monthly rent payment for a home or apartment would be expected.

1991); *In re Storberg*, 94 B.R. 144, 146 (Bankr. D. Minn. 1988).

Fourth, Debtors apparently have incorrectly scheduled the amount of real estate taxes due. The Court would presume that all real estate taxes should have been paid during the foreclosure process. Jones County's proof of claim filed February 9, 1998 with an "all paid" notation supports that presumption. However, the Trustee's plan objections indicate that taxes in excess of $11,000.00 may be owed. Accordingly, the Court concludes that the scheduled amount is incorrect. Debtors offered to provide Trustee Wein with current income and expense statements and to correct the amount of real estate taxes owed. None of that information has been made available to the Court.

Finally, when all circumstances are considered as a whole, Debtors' plan does not indicate that they came into this case ready to pay their creditors in the manner provided by the Code. Instead, it appears that this case and plan were filed only to subject the Bank, and not all creditors, to the automatic stay while Debtors appeal the Bank's judgment to the South Dakota Supreme Court. As this Court discussed in *In re Gary J. Stratmeyer*, Bankr. No. 96-40354, slip op. at 9 (Bankr. D.S.D. Dec. 2, 1996), a debtor must come into a Chapter 13 ready to put forth their best efforts. That is not what Debtors have done.

Debtors' plan also is not confirmable because Jones County's scheduled unsecured priority claim for real estate taxes is not treated as required by the Code. Assuming that Debtors' schedules

are accurate -- that the amount due is $11,542.28 *and* that the County actually holds an unsecured priority claim[2] -- it must be paid in full over the plan term. 11 U.S.C. §§ 1322(a)(2) and 507(8)(B). Debtors' plan does not provide for that. Moreover, Debtors do not have sufficient income to pay an unsecured priority claim as the Code requires. Their income exceeds expenses by only $88.00. Even over a five-year plan with all $88.00 paid to the County each month, Debtors' scheduled real estate tax debt could not be paid in full.

Finally, Debtors' plan is not confirmable because it does not meet the best interest of creditors test. Debtors have unencumbered, non exempt property valued at $4,970.00 [1989 Ford F350, non exempt value of $3,770.00; 1981 Ford Van, $500.00; and one-half interest in a boat and trailer, $700.00]. Contrary to 11 U.S.C. § 1325(a)(4), they have not offered to pay creditors at least that much through their plan.

IV.

DISMISSAL. Under 11 U.S.C. § 1307(c), a party in interest may seek dismissal of a Chapter 13 case. Cause may include, but is not

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[2] Assuming that Debtors owe pre-petition real estate taxes to Jones County, it is unlikely that they are all an *unsecured* priority claim. State law gives the County a lien for unpaid taxes, interest, and penalty. S.D.C.L. § 10-21-33. Therefore, a county's claim for unpaid taxes is generally a secured claim that must be paid in full in compliance with 11 U.S.C. § 1325(a)(5). For the purpose of this discussion, however, the taxes have been treated as Debtors have scheduled them - an unsecured priority claim.

limited to unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1). It is also cause for dismissal if the debtor did not file his petition in good faith. *Molitor v. Eidson (In re Molitor)*, 76 F.3d 218, 220-21 (8th Cir. 1996).

When considering whether a Chapter 13 case was filed in good faith, the Court must consider essentially the same factors as it does when the a debtor's good faith in filing a Chapter 13 plan is at issue. *Compare LeMaire*, 898 F.2d at 1349 (historical discussion of good faith as a confirmation requirement), and *Molitor*, 76 F.3d at 220-21. A showing of actual fraud is not required. *Molitor*, 76 F.3d at 220; *Ladika v. I.R.S. (In re Ladika)*, 215 B.R. 720, 725 (8th Cir. B.A.P. 1998) (quoting *LeMaire*, 898 F.2d at 1352 n.8).

DISCUSSION. The several factors that established Debtors' plan was not filed in good faith also establish that Debtors' Chapter 13 petition was not filed in good faith. Feasibility of a plan is very uncertain since Debtors were unable to fund a plan earlier, their present income is very low, and their expenses appear to be underestimated. No justification has been offered regarding Debtors' payment of some creditors in the month preceding their second bankruptcy. The proposed repayment amount is minuscule. Jones County's pre-petition claim, if any, may not have been correctly scheduled. If it was correctly scheduled, it was not appropriately treated in the plan. The petition and plan both appear to be essentially a tool for keeping the automatic stay in

place while Debtors appeal the Bank's judgment. Accordingly, dismissal of the case is appropriate.

The delay caused by Debtors' petition and unconfirmable plan have also delayed creditors to their prejudice. Only after the state court appeal is decided will Debtors be in a position to accurately assess whether a Chapter 13 is feasible. Creditors should not have to sit idle in the interim. Moreover, a state court should determine whether Debtors' state court appeal is a property interest subject to levy in execution of the Bank's judgment. A bankruptcy petition should not sideline that issue.

Orders will be entered sustaining the Bank's objection to Debtors' homestead claim, denying confirmation of Debtors' plan dated January 23, 1998, and dismissing the case.

Dated this 17 day of June, 1998.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: Shari Chea Nail
Deputy Clerk

(SEAL)

UNITED STATES BANKRUPTCY COURT
SEAL

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

JUN 17 1998

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

CERTIFICATE OF SERVICE
hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to those creditors and other parties in interest identified on the attached service list.
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

By: JH
Date: 6-17-98