

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:) Bankr. No. 96-40354
) Chapter 13
GARY J. STRATMEYER)
Soc. Sec. No. [REDACTED]-8660) MEMORANDUM OF DECISION RE:
) DEBTOR'S MOTION FOR RELIEF
Debtor.) FROM STAY AND CREDITORS'
) MOTION TO DISMISS CASE
)

The matters before the Court are the Motion for Relief From Stay filed by Debtor on July 9, 1996 and the Amended Motion to Dismiss Case filed by creditors Richard J. Stratmeyer and John V. Engberg on July 16, 1996. These are core matters under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying Order 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.

On April 12, 1996, a judgment was entered in favor of Richard J. Stratmeyer and John V. Engberg and against Gary J. Stratmeyer for \$50,416.00 in actual damages and \$91,250.00 in punitive damages arising from Gary Stratmeyer's sexual abuse of Richard Stratmeyer and John Engberg when they were children. On April 18, 1996, Gary Stratmeyer appealed the judgment to the South Dakota Supreme Court. Gary Stratmeyer had thirty days after the judgment to file and serve a supersedeas bond in the amount of the judgment or Richard Stratmeyer and John Engberg could execute on their judgment. S.D.C.L. §§ 15-6-62(a), 15-26A-25, and 15-26A-26. Without the

bond, the judgment would not be stayed during the pendency of the appeal. S.D.C.L. § 15-26A-25. The undertaking required under S.D.C.L. § 15-26A-26 must equal the judgment plus interest from the date of the judgment.

Shortly before the 30-day stay of execution would have expired, Gary Stratmeyer completed several financial transactions using substantial insurance proceeds arising from his wife's death.¹ He paid \$4,425.00 to his mother on May 10, 1996 for hay and pasture rent. That day Gary Stratmeyer also signed a contract for deed with his mother that allowed him to purchase 21 acres, which included her farm's building site and trees, for \$80,000.00 over 15 years at 7.5% interest. Gary Stratmeyer gave her a down payment of \$30,000.00 on May 10, 1996, although she did not request one.² On May 10, 1996, Gary Stratmeyer also paid \$4,200.00 to his bankruptcy counsel, he paid his civil suit counsel \$12,800.00, he advanced Jubilee Foods \$4,800.00 to create an account from which he could purchase food in the coming months, he advanced \$2,000.00 to United Pride for future fuel for farming, and he advanced \$1,500.00 to Koopman Gas for future home heating fuel. Around this time,

¹ Debtor's wife died in 1993. He received approximately \$180,000.00 in life insurance benefits and he continues to receive \$228.53 monthly from a policy provided by his wife's employer.

² Debtor filed the contract for deed with the local registrar of deeds on May 16, 1996, which was after he filed his bankruptcy petition.

Gary Stratmeyer also increased by \$20,000.00 the cash value of the life insurance policy on himself with Aid Association for Lutherans and he began to annuitize a \$20,000.00 annuity he had purchased a few years earlier. He elected to receive monthly annuity payments of \$212.91 over the next ten years beginning immediately.

On May 13, 1996, Gary Stratmeyer (Debtor) filed his Chapter 13 petition. Debtor filed the petition on the advice of counsel so that he could continue to farm and keep track of his assets while the state court appeal was pending.

After the petition was filed, Debtor requested additional time to file his plan because he wanted to review the civil trial transcript to verify financial information. Debtor also asked the Court for permission to employ counsel to handle the state court appeal. Debtor's motion to employ appeal counsel was approved. Debtor's motion for additional time to file his plan was granted to the extent that Debtor was given until July 12, 1996 to file a plan.

At the time of his petition, Debtor worked part-time at a building supply store in Sioux Falls and farmed. He rented 90 acres of pasture, 80 acres of hay ground, and buildings, including a home, from his mother where he lived, put up hay, and kept a 40-head cow herd. Debtor and his family had lived there and used the pasture and hay ground for several years but he and his mother had never formalized any rent terms. While in some years he had

farmed more of his mother's and a neighbor's land, Debtor currently did not raise any grain crops.³ Debtor's mother had never demanded any rent payments for the building site and hay and pasture land because of Debtor's limited finances and because of the earlier illness and death of Debtor's wife. Debtor stated that he and his mother discussed the appropriate rent more pointedly after the Richard Stratmeyer and John Engberg civil action began and he made his first pasture and hay ground rent payment shortly before he filed his bankruptcy petition.

Debtor filed his schedules on May 28, 1996. He listed assets totaling \$163,282.75 and liabilities totaling \$226,096.00. His only secured creditor was his mother, who was fully secured by the May 10, 1996 contract for deed on the farm homesite. Debtor listed two unsecured creditors besides Richard Stratmeyer and John Engberg, who held the \$142,846.00 civil judgment. Debtor estimated that he owes his mother \$23,250.00 in back rent for the farm building site at \$250.00 per month for August 1988 through April 1996 when the contract for deed was created. Debtor stated that his other unsecured creditor, Ken Johnson, is a good friend whom he owes for farm labor performed in the last two or three years. He said he probably owes Mr. Johnson more than \$10,000.00 but that was

³ In past years, when Debtor farmed some of his mother's and a neighbor's land, he paid rent for the farm ground or share cropped it. His mother has other tenant farmers now for the farm ground.

the amount to which they had agreed. At the time of his petition, Debtor conceded that his "creditors are pretty well paid except for a few small bills."

On his schedule of exempt property and a subsequent amendment, Debtor claimed the food, farm fuel, and home fuel that he pre-paid on May 10, 1996. He also claimed the contract for deed property as his homestead with an exempt value of \$30,000.00, the same amount as the down payment to his mother. Debtor also claimed exempt the \$19,831.00 cash surrender value of his life insurance policy with Aid Association for Lutherans.

On June 25, 1996, Richard Stratmeyer and John Engberg filed a motion to dismiss the case on the grounds that Debtor filed the bankruptcy petition only as a substitute for the supersedeas bond. Debtor filed a response on July 9, 1996 and claimed his petition was filed in good faith.

Also on July 9, 1996, Debtor filed a motion for relief from stay wherein he asked for court approval of his continued appeal of the state court civil action. Debtor argued therein that the appeal was not stayed by § 362 but that he wanted a comfort order nonetheless. Richard Stratmeyer and John Engberg filed a response to Debtor's motion on July 10, 1996 and an amended response on July 16, 1996. They argued the stay did apply to the appeal under the "original proceeding rule" and they urged the Court to deny Debtor's motion because the appeal was only in Debtor's personal

best interest and not in the best interest of the estate and unsecured creditors because of increased administrative costs.

Debtor filed a plan on July 12, 1996. It provided that Debtor would give the trustee \$1,100.00 per month for eight months and \$500.00 per month for the next fifty-two months for total plan payments of \$34,800.00. The plan also provided that net livestock income for five years, with a total minimum of \$25,000.00, would be paid. Debtor agreed to liquidate some investments and an IRA to make additional plan payments and agreed to pay creditors up to 100% of their claims if he recovered on any civil lawsuits. While payments to the trustee were to commence August 10, 1996, the plan also provided that the trustee would not pay any creditors until a final, nonappealable judgment had been entered in the lawsuit commenced against Debtor by Richard Stratmeyer and John Engberg. On or before September 4, 1996, Debtor made the initial \$1,100.00 plan payment to the case trustee as required by 11 U.S.C. § 1326(a)(1).

Richard Stratmeyer and John Engberg filed an amended motion to dismiss on July 16, 1996 to correct a statute citation. Debtor filed a response that incorporated his response to the original motion.

A hearing was held September 4, 1996.⁴ Appearances included Clair R. Gerry for Debtor and Patrick T. Dougherty for Richard Stratmeyer and John Engberg. The Court received several exhibits related to the state court judgment and the bankruptcy filing and Debtor's July 12, 1996 deposition, which are incorporated in the facts stated above. Counsel offered oral arguments. The Court then took Debtor's Motion for Relief from Stay and Richard Stratmeyer and John Engberg's Amended Motion to Dismiss Case under advisement.

II.

Under 11 U.S.C. § 1307(c), a party in interest may seek dismissal of a Chapter 13 case or conversion of a Chapter 13 to a Chapter 7 case for cause. A non exhaustive list of circumstances constituting cause are set forth in § 1307(c). Cause also may include the debtor's failure to file his petition in good faith. *Simmons v. Simmons (In re Simmons)*, 149 B.R. 586, 588-89 (Bankr. W.D. Mo. 1993) (citing *In re Belden*, 144 B.R. 1010, 1019, n.14 (Bankr. D. Minn. 1992)). Further, the Chapter 13 plan itself must be filed in good faith. 11 U.S.C. § 1325(a)(3).

When determining a Chapter 13 debtor's good faith, the Court

⁴ The confirmation of Debtor's plan dated July 12, 1996 and Richard Stratmeyer and John Engberg's objection to Debtor's claimed exemptions were also scheduled for hearing that day. Both matters were continued pending resolution of Debtor's Motion for Relief from Stay and Richard J. Stratmeyer and John V. Engberg's Amended Motion to Dismiss Case.

should consider the totality of the circumstances. *Molitor v. Eidson (In re Molitor)*, 76 F.3d 218, 220-21 (8th Cir. 1996); *Noreen v. Slattengren*, 974 F.2d 75, 76 (8th Cir. 1992) (citing *United States v. Estus (In re Estus)*, 695 F.2d 311, 316 (8th Cir. 1982); *Education Assistance Corp. v. Zellner*, 827 F.2d 1222, 1227 (8th Cir. 1987); and *In re LeMaire*, 898 F.2d 1346, 1349 (8th Cir. 1990)). Factors to consider include whether the debtor has stated accurately his debts and expenses, made any fraudulent representations to the Court, or manipulated the Bankruptcy Code unfairly. *Noreen*, 974 F.2d at 76-77 (cites therein); see also *In re Lilley*, 91 F.3d 491, 496 (3rd Cir. 1996) (cites therein; totality of the circumstances inquiry adopted in Third, Seventh, Ninth, and Tenth Circuits; specific factors in Third and Seventh Circuits set forth). Abuse may be indicated where a debtor offers only a meager payment or where a major portion of the claims sought to be discharged arises out of pre-petition, wrongful conduct by the debtor and the debtor proposes only minimal repayment of these claims. *Noreen*, 974 F.2d at 77. Moreover, the Chapter 13 plan should constitute a serious attempt to repay debts. *Zellner*, 827 F.2d at 1227.

Several cases have specifically discussed whether a petition filed in lieu of a supersedeas bond is one filed in good faith. As in other cases where the debtor's good faith is questioned, the courts looked to the debtor's intent and the surrounding

circumstances to determine whether the case should proceed. See, e.g., *In re Ramji*, 166 B.R. 288, 290-91 (Bankr. S.D. Tex. 1993); *In re Roberts*, 117 B.R. 677, 678 (Bankr. N.D. Okla. 1990); *In re Clinton Centrifuge, Inc.*, 72 B.R. 900, 903-08 (Bankr. E.D. Pa. 1987); and *In re Smith*, 58 B.R. 448, 450-51 (Bankr. W.D. Ky. 1986).

III.

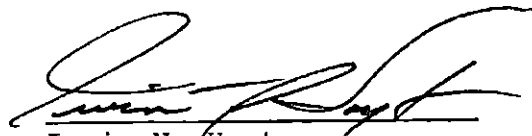
This case shall be dismissed because, in its present posture, it constitutes an abuse of the provisions, purpose, and spirit of Chapter 13. *Estus*, 695 F.2d at 316. Debtor has not come into the bankruptcy system ready to repay his adjusted debts. Instead, Debtor has filed his petition and plan merely to hold two judgment creditors at bay while an appeal of the judgment is pending and to avoid posting a bond to protect the creditors' interests.

Other areas where Debtor's good faith may be in doubt -- his eve of bankruptcy transactions with insiders and his creation of additional potentially exempt property -- are not addressed herein. The parties agreed to leave those matters to another day. Therefore, so has the Court. Further, the circumstances leading to the state court judgment are not material to this decision. What is important here is Debtor's abuse of the Chapter 13 process by filing a petition and proposing a plan when he has no present intent to pay his creditors. See also *Mueller v. Sparklet Devices, Inc. (In re Sparklet Devices, Inc.)*, 154 B.R. 544 (Bankr. E.D. Mo. 1993).

An order shall be entered dismissing this case. Debtor's Motion for Relief From Stay is moot.

Dated this 29th day of November, 1996.

BY THE COURT:



Irvin N. Hoyt
Chief Bankruptcy Judge

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

DEC 02 1996

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

ATTEST:
Charles L. Nail, Jr., Clerk

By: Charolette L. Spauld
Deputy Clerk

(SEAL)



CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was sent to each of the creditors, or their attorneys, and other parties to the case identified on the list attached to this list.

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

By: [Signature]
Date: 12-02-96

Case: 96-40354 Form id: 122 Ntc Date: 12/02/96 Off: 4 Page : 1
Total notices mailed: 6

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