

Anthony D'Agnese, Case No. 15-61167-fra13

12/15/15

FRA

Unpublished (2015 WL 9981840)

Debtor filed bankruptcy under chapter 13 along with a proposed Chapter 13 Plan of Reorganization. Debtor's former wife objected to confirmation of the Plan on the grounds that it was not filed in good faith. Evidence was presented at an adjourned confirmation hearing and the parties submitted stipulated facts. The matter of confirmation was taken under advisement.

Debtor sold his business in 2011 for \$129,000, of which \$14,000 was reserved to pay business creditors, with the remaining \$115,000 in cash paid to the Debtor. Some of the money was used to pay a debt owed to the Debtor's aunt, but none of the proceeds were transferred to Debtor's former wife, notwithstanding the requirement of the judgment of dissolution that the balance of the equalizing money judgment be paid in full upon the sale of the business.

The Chapter 13 Plan will pay approximately 1% of the unsecured claims, including that of the former wife who has claims of \$251,136, roughly 98% of the total. The Debtor acknowledged that confirmation and completion of his plan will result in discharge of his former wife's claim, whereas proceeding in chapter 7 would not.

Bankruptcy Code § 1325(a)(3) requires as a condition of confirmation that the Chapter 13 Plan has been proposed in good faith. While the Bankruptcy Code does not define the term "good faith," the Ninth Circuit has held that a court must inquire as to whether the debtor has "misrepresented facts in his plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed his chapter 13 plan in an inequitable manner." In re Goeb, 675 F.2d 1386, 1390 (9th Cir. 1982).

Given the facts of this case, that Court found that the Chapter 13 Plan was not proposed in good faith. Debtor was required by the judgment of dissolution to pay the proceeds of the sale of his business to his ex-wife, but failed to do so, while paying other obligations. The Judgment required that Debtor secure the obligation with the assets of his business, but he did not do so. The Chapter 13 Plan proposed by Debtor would discharge the bulk of the obligation Debtor voluntarily chose not to pay by his inequitable conduct. Confirmation of the Plan was denied. Debtor thereafter chose to convert the case to Chapter 7.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

IN RE)
ANTHONY GERARD D'AGNESE,)
Debtor.) Bankruptcy Case
No. 15-61167-fra13
MEMORANDUM OPINION

Debtor Anthony D'Agnese has filed a petition to reorganize under Chapter 13 of the Bankruptcy Code, and filed a proposed plan of reorganization dated June 9, 2015. Susanne D'Agnese, Debtor's former wife, objects to confirmation, asserting that the plan was not proposed in good faith, as required by 11 U.S.C. § 1325(a)(3).

An adjourned confirmation hearing was convened on November 10, 2015. Based on the evidence presented at the confirmation hearing, and the extensive stipulated facts submitted by the parties (docket #44) the Court finds that the Debtor has failed to sustain his burden of proof that his plan complies with the good faith requirement of the Code.

I. BACKGROUND

Anthony and Susanne D'Agnese were married in 1979. During the course of their marriage they established and operated a small business called The Bagel Tree Cafe. The marriage was dissolved in 2006. A stipulated general judgment of dissolution was entered in the Circuit Court for Douglas County, Oregon, on August 25, 2006 (hearing Exhibit A, and stipulated statement of facts, paragraph 2).

///

1 The stipulated judgment provides, at paragraph 7, that “Husband and Wife acknowledge that the
2 disposition of the property, whether or not equal, is just and proper under all of the circumstances. The
3 parties intend this Stipulated General Judgment of Dissolution of Marriage; Money Award (‘Stipulated
4 Judgment’) to settle all claims each may have had against the other prior to this Stipulated Judgment.” The
5 judgment goes on to award to the Debtor all of the parties’ business interest in The Bagel Tree Cafe,
6 “including but not limited to all equipment, fixtures, inventory, accounts, and goodwill, but subject to all
7 debts thereon, and the ‘offsetting payment’, described below.” (Dissolution Judgment, paragraph 6.E.). The
8 judgment also required Debtor to pay all debts of the business, and hold Ms. D’Agnese harmless therefrom.
9 An additional provision (paragraph 7.A.(2)) required the Debtor to pay a debt owed to Ms. D’Agnese’s
10 mother’s trust, in the sum of \$50,000, and a debt owed to his aunt, Rosemary Murray, in the sum of \$50,000.

11 Finally, the judgment of dissolution, at paragraph 8, contained the following:

12 EQUALIZING MONEY JUDGMENT/OFFSETTING PAYMENT TO WIFE. In
13 consideration of the award of the Bagel Tree business to Husband, and the other terms of this
14 judgment, Husband shall pay to Wife and Wife shall have a judgment against Husband for the
15 additional sum of \$175,000 (called the “offsetting payment”) payable as follows: In equal
16 monthly payments of \$1987.68, including 6.5% interest, payments commencing on the 20th
17 day of the month following the execution of this judgment, and every month thereafter until
18 paid in full, and interest commencing on the same date. Husband shall also execute a
19 promissory note commemorating this debt within 30 days of execution of this Stipulated
20 Judgment. The entire outstanding balance shall be due 5 years after the note date except that
21 the note amount shall be paid in full upon any sale or transfer to any person or business of the
22 Bagel Tree business, or taking on a partner therein, should any of these events occur before
23 the debt would otherwise be payable pursuant to the note. Husband shall execute or facilitate
24 the execution, or both, a UCC financing statement, securing the promissory note with the
25 Bagel Tree and any property, fixtures, accounts and like property, as collateral thereto.
26 Husband shall comply with this provision within 90 days of execution of this judgment.
There is no penalty for prepayment of this offsetting payment. There is a 3% late fee for each
installment not paid by the monthly due date (20th of the month). Husband shall secure a life
insurance policy with Wife as beneficiary to secure this section of the Stipulated Judgment as
set forth in the life insurance sections set out above.

22 After the dissolution of the parties’ marriage, the business’s prospects declined, and eventually
23 Debtor was forced to invade retirement savings and other resources to keep it afloat. On March 31, 2011, the
24 Debtor sold the business for \$129,000, of which amount \$14,000 was reserved to pay business creditors,
25 with the balance of \$115,000 cash paid directly to the Debtor. The Debtor applied some of the proceeds to
26 pay the obligation owed to his aunt. Significantly, he did not pay any of the sale proceeds to Ms. D’Agnese,

1 notwithstanding the requirement of the judgment of dissolution that the balance of the equalizing money
2 judgment be paid in full upon the sale of the business.¹

3 The Debtor now proposes a plan of reorganization which will pay his legal fees, and approximately
4 1% of the claims of unsecured creditors, including Ms. D’Agnese. According to the claims register, Ms.
5 D’Agnese, in her own right and as successor to the claim of the Ruby Osborn Trust, has total claims of
6 \$251,136.49, roughly 98% of the total. The Debtor acknowledges that confirmation and completion of his
7 plan will result in a discharge of Ms. D’Agnese’s claim, whereas proceeding in chapter 7 would not.

8 II. DISCUSSION

9 In order to be confirmed, a plan of reorganization must be proposed in good faith. 11 U.S.C.
10 § 1325(a)(3). The debtor bears the burden of proving that his plan satisfies the criteria of Code § 1325,
11 including the good faith requirement. *In re Wolff*, 22 B.R. 510 (BAP 9th Cir. 1982); *In re Hall*, 268 B.R.
12 545, (BAP 9th Cir. 2001).

13 Code § 1325 provides no explanation or definition of the term “good faith.” The Court of Appeals
14 for the Ninth Circuit has noted that “[g]iven the nature of bankruptcy courts and the absence of congressional
15 intent to specially define ‘good faith,’ we believe that the proper inquiry is whether the [debtor] acted
16 equitably in proposing [his] chapter 13 plan. A bankruptcy court must inquire whether the debtor has
17 misrepresented facts in his plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed his
18 chapter 13 plan in an equitable manner.” *In re Goeb*, 675 F.2d, 1386, 1390 (9th Cir. 1982).

19 The Court of Appeals applied the *Goeb* standard where the purpose of a plan was to defeat state court
20 litigation. In *In re Chinichian*, 784 F.2d 1440 (9th Cir. 1986), the court, citing to *Goeb*, affirmed a
21 bankruptcy court’s decision not to confirm a plan which the court found was filed for the sole purpose of
22 preventing consummation of a state court specific performance judgment. The court noted that “a good faith

23 // // //

24 test...should examine the intentions of the debtor and the legal effect of the confirmation of a chapter 13 plan

25
26 ¹ It appears, moreover, that the Debtor did not comply with the requirement that repayment be secured by the assets of the business.

1 in light of the spirit and purposes of chapter 13.”

2 In a case similar to this one, the Bankruptcy Court in New Mexico denied confirmation of a chapter
3 13 plan by which debtor sought to discharge debt arising from his misappropriation of retirement funds in
4 which his ex-wife had been granted a part interest by the dissolution court. *In re Rodriguez*, 487 B.R. 275
5 (Bankr. D. N.M. 2013).

6 The terms of the judgment dissolving Debtor’s marriage, which was stipulated to by the parties,
7 required him to make and deliver to Ms. D’Agnese a promissory note for the amount of the equalizing
8 judgment to secure payment of the note by the business property, and to pay the balance of the obligation at
9 such time as the business was sold. None of these things were done: when the Debtor sold the business he
10 applied none of the proceeds to his obligation to his former wife, while paying other obligations and
11 retaining the balance for his own use. There was testimony that the Debtor attempted to reach a compromise
12 with Ms. D’Agnese after the fact, which she declined to agree to. This does not matter: she had every right
13 under the judgment to demand payment in full, or at least payment of all the proceeds of sale, and the Debtor
14 cannot now argue that he is proceeding in good faith because of her disinclination to accept a forced
15 discount.

16 III. CONCLUSION

17 Debtor’s plan of reorganization was not proposed in good faith, and therefore cannot be confirmed.
18 Ms. D’Agnese asserts that, because the Debtor did not propose his plan in good faith, and because his action
19 in filing the petition was not in good faith (as required by § 1325(a)(7)), the case should be converted to one
20 under chapter 7, or dismissed with an order barring the Debtor from filing for at least two years. I do not
21 find that the petition was filed in bad faith. At the time the petition was filed, the Debtor’s income was
22 minimal, he had no equity in any real property, and virtually nothing in the way of nonexempt personal
23 assets. It is clear that some form of relief under Title 11 is warranted. What the Court does find is that this
24 particular plan was not proposed in good faith, since it proposes to pay virtually nothing on an obligation
25 which remains unpaid in large part due to the Debtor’s inequitable conduct, and further seeks to discharge
26 that obligation.

1 The Court will enter an order dismissing the Debtor's case within 28 days of the date of the order,
2 unless, prior to that time, the Debtor files a modified plan which provides for equitable treatment of Ms.
3 D'Agnese's claim (including waiver of any discharge of the claim), or files a motion to convert the case to
4 one under chapter 7.

5 The foregoing constitutes the Court's findings of fact and conclusions of law. As noted, an order
6 consistent with the foregoing will be entered.

7
8 

9 FRANK R. ALLEY, III
10 Bankruptcy Judge
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26