

11 U.S.C. §1325(a)(3)
11 U.S.C. §1325(b)(1)(B)
Best Effort
Good Faith

Pacific First Corporation v. Merrill BAP No. OR-89-1526 MeVJ
In Re Merrill Bk. No. 388-03360-H13

4/20/90 BAP (affirming J. Hess) Unpublished

The debtor's proposed chapter 13 plan paid no dividend to nonpriority unsecured creditors. One such unsecured creditor held a claim which had been determined nondischargeable in a prior chapter 7 case. That creditor objected to confirmation, alleging that the plan was not proposed in good faith as required by §1325(a)(3). The bankruptcy court confirmed the plan, finding it in good faith.

The BAP affirmed, stating that where a creditor objects to a Chapter 13 plan that proposes zero payment on a debt which would be nondischargeable in a chapter 7, careful scrutiny of the debtor's good faith is appropriate. In making that determination, the court must look at the debtor's entire circumstances. Here, the creditor failed to demonstrate that the procedures of the trial court were flawed or that the good faith issue was judged by improper criteria.

The elements of the plan suggest good faith. All the debtor's disposable income was committed to the plan for a five year period. All secured and priority debts were to be paid in full.

P90-19(7)

NOT FOR PUBLICATION

FILED

APR 20 1990

Jed G. Weintraub, Clerk
U.S. BKCY. APP. PANEL
OF THE NINTH CIR.

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re)
MICHAEL F. MERRILL,)
Debtor.)
FIRST PACIFIC CORPORATION,)
an Oregon corporation, dba)
CENTRAL DATA SYSTEMS,)
Appellant,)
v.)
MICHAEL F. MERRILL, aka)
MICHAEL F. MERRILL, D.M.D.,)
P.C.,)
Appellee.)

BAP No. OR-89-1526 MeVJ
BK No. 388-03360-H13

MEMORANDUM

Argued and Submitted
October 19, 1989 at Portland, Oregon

Filed: APR 20 1990

Appeal from the United States Bankruptcy Court
for the District of Oregon
Honorable Henry L. Hess, Jr., Chief Bankruptcy Judge, Presiding

Before: MEYERS, VOLINN and JONES, Bankruptcy Judges

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I.

Alleging a lack of good faith by debtor in proposing his repayment plan under Chapter 13 of the Bankruptcy Code ("Code"), Appellant creditor objected to its confirmation. The trial court confirmed the plan and thereafter denied creditor's Motion to Reconsider. We AFFIRM.

II.

FACTS

Michael F. Merrill ("Merrill"), the Appellee and debtor, instituted Chapter 7 proceedings in 1986. As part of those proceedings, the \$54,000 debt then owing by Merrill to Appellant Central Data Systems ("Central Data") was reduced to judgment by an Order of the bankruptcy court. The Order held that this debt was not dischargeable in Chapter 7 since it stemmed from Merrill's embezzlement of Central Data funds.

Merrill made small periodic payments on the debt to Central Data but in 1988 he filed under Chapter 13 of the Code. His plan proposes payment in full to secured and priority creditors in amounts totalling \$276,000 over a 60 month period. Merrill asserts that throughout this period he would be devoting all of his current disposable earnings to the plan, a claim apparently not disputed by Central Data.

1 Merrill's plan was confirmed following a telephonic hearing
2 in which neither Central Data nor its Counsel participated.
3 Central Data moved to reconsider the confirmation on grounds
4 that it never received formal notice of the Chapter 13
5 proceedings and learned informally of the confirmation hearing
6 too late to file objections to the plan. After a
7 reconsideration hearing, Central Data's motion was denied. No
8 transcript is supplied by Appellants of either the confirmation
9 hearing or the hearing on the motion to reconsider.
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11 III.

12 STANDARD OF REVIEW

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14 Confirmation of a Chapter 13 plan is reviewed in two steps
15 where a creditor argues that the debtor lacked good faith in
16 proposing the plan. First, since the procedures and criteria
17 used by the bankruptcy court are derived from statutes and their
18 construction, they are assessed de novo. See In re Porter, 102
19 B.R. 773, 775 (9th Cir. BAP 1989); In re Klein, 57 B.R. 818, 819
20 (9th Cir. BAP 1985). If the procedures and criteria are held to
21 have been properly formulated by the trial court, findings of
22 fact made pursuant to them may be overturned only if clearly
23 erroneous. Bankruptcy Rule 8013; Porter, supra, 102 B.R. at
24 775; In re Metz, 67 B.R. 462, 466 (9th Cir. BAP 1986), aff'd
25 Matter of Metz, 820 F.2d 1495, 1497 (9th Cir. 1987).
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IV.

DISCUSSION

Where a creditor objects to a Chapter 13 plan that proposes zero payment on a debt that would not be dischargeable under Chapter 7, careful scrutiny of the debtor's good faith is appropriate. According to In re Warren, 89 B.R. 87, 91-92 (9th Cir. BAP 1988), the creditor must be afforded the opportunity to raise issues speaking to the "totality of circumstances" surrounding the nature and reorganization of the debt. See In re Chinichian, 784 F.2d 1440, 1445-46 (9th Cir. 1986); In re Goeb, 675 F.2d 1386, 1391 (9th Cir. 1982); In re Metz, supra, 67 B.R. at 464.

It is Appellant's responsibility to provide a record that is adequate for assessing whether these procedures were followed. In re Burkhart, 84 B.R. 658, 660-61 (9th Cir. BAP 1988). See also In re Pederson, 875 F.2d 781, 784 (9th Cir. 1989). In this case no transcript appears in the record by which such a determination might be made. In the absence of properly framed arguments or documentation, we decline to reverse on the basis of inadequate procedures below. See In re Anderson, 69 B.R. 105, 109 (9th Cir. BAP 1986).

Substantively, the good faith of a debtor in a "superdischarge" case under Chapter 13 is governed by the factors outlined in Warren, factors which we specifically

1 reaffirm. Under those standards a nominal payment by the debtor
2 to a creditor with a Chapter 7 nondischargeability claim does
3 not necessarily constitute bad faith. Warren, supra, 89 B.R. at
4 92. Accord, Porter, supra, 102 B.R. at 776; Goeb, supra, 675
5 F.2d at 1391; In re Slade, 15 B.R. 910, 912 (9th Cir. BAP
6 1981). On the other hand, the fact that the debtor's plan
7 represents the debtor's "best efforts" under Code Section
8 1325(b)(1)(B) is not conclusive toward establishing good faith;
9 rather, the Warren inquiry involves consideration of a number of
10 guideline elements. Warren, supra, 89 B.R. at 93. Accord,
11 Goeb, supra, 675 F.2d at 1390-91; Matter of Kull, 12 B.R. 654,
12 659 (S.D.Ga. 1981).

13 Although the instant Record does not reveal the factors
14 used by the trial court in determining good faith, the case of
15 In re Rimgale, 669 F.2d 426 (7th Cir. 1982) was cited by the
16 court. Rimgale is not inconsistent with Warren. In particular,
17 it holds that the good faith requirement:

18 ... imposes a considerable responsibility
19 on bankruptcy judges. ... The legislative
20 history suggests that Congress intended
21 Chapter 13 for the benefit of debtors who
22 could, given time, satisfy their creditors
23 in full or in substantial measure [although
24 they did not set an arbitrary minimum
25 payment percentage]. ... The correct
26 approach ... is to treat the issues of
substantiality and best efforts as elements
of good faith. Unless the courts have
discretion to consider such factors, the
danger exists that Chapter 13 plans could
become shams that would emasculate the
safeguards that Congress has included in

Chapter 7 to prevent debtor abuse of the bankruptcy laws. The courts retain discretion to prevent such abuse, and that discretion can be exercised effectively through a meaningful interpretation of the good faith requirement of § 1325(a)(3). In each case, the bankruptcy court must consider the debtor's entire circumstances to determine whether his plan proposes to make meaningful payments to unsecured creditors.

Rimgale, supra, 669 F.2d at 431-32 (see also good faith factors listed at n. 14).

Central Data has not demonstrated on appeal that the court failed to consider these factors. Appellant does not dispute, for example, that the debtor would be devoting his best efforts to repayment of debts by paying out 100% of his disposable income. Code Section 1325(b)(1)(B). This full payout of disposable income is ensured by the plan's income escalation provision that calls for larger payments to be made by Merrill later in the plan period. Also beyond question are the facts that the five years of the plan is well beyond the statutory minimum period and that all secured and priority debts are to be paid in full under the plan.

V.

CONCLUSION

Appellant has failed to demonstrate either that the procedures of the trial court were flawed or that the good faith

1 issue was judged by improper criteria. On the contrary,
2 elements of the plan suggest good faith and are sufficient to
3 meet our review of the ruling of the trial court.

4 AFFIRMED.
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