

Confirmation of Chap. 13 plan
11 U.S.C. § 1325
Good faith

In re Robert and Sharon Lee

Case No. 695-64213-fra13

3/22/96

FRA

Unpublished

The debtors filed for relief under Chapter 13 on 12/27/91 and their plan was confirmed. That bankruptcy was dismissed on 10/30/95 on the trustee's motion for failure to make plan payments. The debtors did not attempt to modify the previous plan or seek a hardship discharge. On 10/27/95, the debtors filed a second Chapter 13 petition which differed from the first in only two material respects: lower monthly payments and greatly reduced values assigned to collateral. Shirtcliffe Oil Co., a creditor, objected to confirmation of the debtors' proposed Chapter 13 plan, arguing that the plan was not proposed in good faith.

The court denied confirmation of the debtors' plan on two grounds: debtors had not established good faith in filing the second petition and the court did not feel the second plan was feasible. The court characterized the plan as a modification of a failed plan, holding that declining fortunes do not give the debtor the right to allow dismissal of their bankruptcy only to refile as though no breach had occurred, with the added bonus of an additional four years of bankruptcy protection. This does not satisfy the good faith element of § 1325. Also, based on the facts of the case, the court could not conclude that the debtors would be able to make the payments called for by the proposed plan. Confirmation was denied and the debtors given seven days to convert to Chapter 7 before the case would be dismissed.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 695-64213-fra13
ROBERT M. LEE and)
SHARON J. LEE,) MEMORANDUM OPINION
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)
_____ Debtors.)

INTRODUCTION

Shirtcliffe Oil Company objected to confirmation of Debtors' proposed plan of reorganization under Chapter 13 of the Bankruptcy Code. The matter came on for hearing on March 12, 1996. Based on the testimony received at the hearing, and the record of this and Debtors' prior Chapter 13 case, I conclude that the plan cannot be confirmed.

FACTS

1991 case

For the time in question, Debtors operated a small trucking company. They filed a petition for relief in this Court under Chapter 13 on December 27, 1991, under Case No. 695-65603-fra13.¹ After some modifications, a plan was confirmed on May 18, 1992.

¹ The Court takes judicial notice of the record of the 1991 case. FRE 201; In re Cobb, 56 B.R. 440 (Bankr. N. D. Ill. 1985)

This plan provided for payments of \$3,755 per month for 12 months, and \$3,915 thereafter. The Plan provided for debt secured by tractors and trailers, a Blazer truck, and a boat and trailer, and tires. It also provided for priority unsecured debt, which consisted of taxes, PUC fees, and administrative expenses. No payments were to be made to general unsecured creditors.

The case was dismissed on October 30, 1995, on the Trustee's motion alleging failure to make plan payments from June 1995 onward. The Debtors did not contest the motion. In the hearing in the case now pending Mrs. Lee testified that the earlier plan failed due to accidents involving the Debtors' trucks. It appears from the record of the first case that Debtors did not try to modify the plan or seek a hardship discharge under Code § 1328(b).

The report filed by the trustee in the first case shows payments to secured creditors of \$89,401, and to priority creditors of \$3,744.27. (Schedule E showed priority claims totaling \$40,191.)

1995 case

The instant case was commenced on October 27, 1995 -- three days before the first case was dismissed. However, the proposed plan was not filed until November 13, 1995. The second plan differed from the first in only two respects: lower monthly plan payments (\$1,100), and greatly reduced values assigned to collateral, much of which was the same as was featured in the first case. The general structure was the same: payment of secured and
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priority tax debt (some of which was incurred during the first

case), and nothing for general unsecured creditors.

DISCUSSION

Good Faith

To be confirmed a Chapter 13 plan must satisfy the elements of Code § 1325. One element is that a debtor propose the plan in good faith. § 1325(b)(3). The burden of establishing good faith, and the other elements under § 1325, is on the debtors.

A plan of reorganization may not extend for more than five years. Code § 1322(d). The objecting creditor correctly argues that the plan proposed here amounts to little more than the second installment of a nine-year plan. Apart from further stripping of the value of remaining secured claims, this plan does nothing more than continue the Debtors' reorganization for another five years. Moreover, the effect of the plan(s) has not been to reorganize so much as to maintain Debtors' use of their aging fleet despite their increasing operational problems (of which more below.)

Declining fortunes do not give the debtor the right to dismiss, or allow dismissal of a case, only to refile immediately as though no breach of the plan had occurred. In re Huerta, 137 B.R. 356, 368 (Bankr. N. D. Cal. 1992). What the Debtors are attempting to do here is modify a failed plan, with the added bonus of an additional four years of bankruptcy protection. This does not satisfy the good faith element of Code § 1325.

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Feasibility

A plan must be feasible: that is, the Debtors must show that they can make the payments proposed by the plan. § 1325(a)(6). The Debtors have not demonstrated such ability in this case.

The proposed Plan calls for payments of \$1,000 per month. They estimate an average monthly income from their business of \$3,000. (Exhibit "D" of Schedule I). No provision is made for unemployment taxes, utilities, or similar expenses. \$1,000 is set aside for maintenance. Mrs. Lee testified that Debtors pay \$600 per month rent for storage space for their vehicles: this obligation does not appear in the schedules.

Debtors estimate that they incur personal expenses of \$1,900 per month (Schedule J). The difference between that amount and their \$3,000 monthly income is dedicated to the plan. However, they make no allowance for personal income taxes.

From the record before me it is impossible to conclude that the Debtors can sustain plan payments of \$1,100 per month.

CONCLUSION

Debtors' plan was not proposed in good faith, and is not feasible. Under the circumstances of this case it does not appear to me that a plan can be presented which satisfies Code § 1325. An order will be entered denying confirmation of the plan. Debtors may, within seven days of the date of the order denying confirmation, file a motion to convert this case to one under Chapter 7. If no motion is filed, the case will be dismissed without further notice.

This opinion contains the Court's findings of fact and

conclusions of law, which will not be separately stated.

FRANK R. ALLEY, III
Bankruptcy Judge