

In re David Allan Burgess

Case No. 393-33011-psh 13

October 30, 1995

PSH

Unpublished

The Small Business Administration (SBA) moved to dismiss the debtor's Chapter 13 based on allegations that the debtor had materially defaulted in his plan payments, unreasonably delayed the case and filed his plan in bad faith. The plan required nominal payments but required the debtor to market commercial real property located in Montana. Although the debtor had entered into a timely contract to sell the property the buyer had failed to close the transaction and the debtor did not insist that he do so or declare the contract in default. Further, the debtor failed to make adequate protection payments as ordered by the court. The court concluded that the factors listed in § 1112(c)(1) - (10) justifying dismissal was not an exclusive list and that, the totality of the circumstances in this case warranted dismissal.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

IN RE)
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DAVID ALLAN BURGESS) Case No. 393-33011-PSH13
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Debtor.) MEMORANDUM OPINION

This matter came before the court on the motion of the Small Business Administration to dismiss the debtor's Chapter 13 case and the motion of the trustee to amend the debtor's Chapter 13 plan. The case was originally filed on May 21, 1993. At that time the debtor's schedules indicated that he owed \$211,281.00 in secured debt, no priority debt and slightly less than \$6,000 in non-priority unsecured debt. \$157,281 of the secured debt was secured by liens on real property located in Hamilton, Montana. The remainder was owed to Pace Credit Union and secured by liens on the debtor's trailer, boat, vehicles and a lien on a co-signer's residence.

The debtor's schedules indicated that he had an income of \$2,450. \$2,050 of this amount was derived from the debtor's disability pension. The remainder was income from the debtor's

roommate. The debtor's monthly expenditures totaled \$2,350. This included two car payments which totaled \$220, a boat payment in the amount of \$435 and a travel trailer payment in the amount of \$180. The debtor's plan called for payments of \$100 per month. Payments to all secured creditors were to be made outside the plan. Pace Credit Union was to receive monthly payments directly from the debtor. The debtor was to sell the Montana property and use the proceeds to pay the remaining secured creditors, all of whom held security interests in that property. The plan did not specify a time within which the sale of the Montana property was to be completed. The plan was confirmed in July, 1993.

In January, 1994 the Small Business Administration, ("SBA") which holds a first position security interest on the Montana property, brought a motion to dismiss the debtor's Chapter 13 case due to the debtor's delay in selling the Montana property. As of that time the debtor had not listed the Montana property for sale, although he was apparently negotiating with a potential buyer for the property. The motion was denied. However, the debtor was ordered to begin making adequate protection payments of \$800 per month to the SBA.

In early spring of 1995 the debtor became aware of the fact that he might have a claim against the disability insurance that he carried on his Pace Credit union loans. The debtor filed a claim and received a lump sum reimbursement for all payments that he had

made on the loans since his disability, which occurred in 1990. In addition, the insurance coverage continued for the payments on those loans. As a result, as of the date of the hearing on these motions the vehicles were paid in full. Due to the fact that the debtor's cosigner refinanced her home and the debtor did not sign the new note, that debt had also been retired as of the date of the hearing. In addition, beginning in the spring of 1995 the debtor began receiving \$431.88 in disability payments which he was using to make the payments on his boat.

Using the lump sum funds received from the insurance the debtor negotiated settlements with two of the junior lienholders on the Montana property. He paid these junior lien holders a total of \$36,000 to settle claims in the amount of \$70,000. These payments took place in late spring of 1994. As a result of these settlements the junior liens, which were scheduled at close to \$60,000 at the time of the bankruptcy filing, were reduced to \$5,500. Neither the trustee nor the court was aware of the changes in the debtor's income or the payments being made to secured creditors.

On March 30, 1994 the debtor entered into a Contract for Deed with Warner Development Corporation ("Warner") giving Warner the right to purchase the Montana property. The contract provided for a base purchase price of \$250,000 subject to upward adjustment based on an appraisal to be conducted by an MAI appraiser. Warner was required to pay the sum of \$250,000 not later than September

26, 1994. Any additional sums due under the contract were due within one year of the original payment, or by September 26, 1995. At the time the debtor signed the Contract for Deed he executed a Notice of Purchasers interest which Warner recorded. The contract required that Warner given the debtor a quit claim deed which could be recorded to defeat the interest created under the Notice of Purchasers Interest. Warner did not do so.

Warner was unable to close in September, 1994. At that time the debtor and Warner entered into an agreement whereby Warner could purchase an extension on the closing date at a cost of \$2,500 per month. Warner made "eight or nine" payments under that agreement. As of the date of the hearing on these motions Warner was four payments in default, having made no payment since July, 1995.

Because Warner recorded the Notice of Purchasers Interest and because the debtor did not obtain a quit claim deed from Warner, the debtor will have to foreclose on the property in order to defeat Warner's interest. To date the debtor has made no effort to do so. The debtor states that he is confident that the sale will close not later than January 1, 1996. However, at the hearing he refused to stipulate to an order that would allow the SBA's motion to dismiss if the sale was not consummated by that date. The debtor did agree to a stipulated order stating that if the sale was not consummated by January 1, 1996 he would begin foreclosure

proceedings against Warner and renew his efforts to market the property himself.

In January, 1995 the debtor defaulted on his obligation to make adequate protection payments to the SBA. In August the SBA filed a renewed motion for dismissal under § 1112(b). At approximately the same time the trustee learned about the contract extension payments that the debtor had been receiving from the buyer of the Montana property and moved to amend the debtor's chapter 13 plan to require the debtor to include those payments in his payments to the trustee. The court held this hearing on both issues on September 28, 1995. Since the resolution of the motion to dismiss dictates whether the motion to amend the plan will be necessary, the court will first address the SBA's § 1112(b) motion.

Section 1112(b) allows the court to dismiss a case for cause. Subsections (1) - (10) of that section set forth a nonexclusive list of possible "causes" justifying dismissal of a case. The list, which includes "unreasonable delay by the debtor that is prejudicial to creditors" § 1112(b) (3) and "material default by the debtor with respect to a confirmed plan." Further "courts may consider other factors as they arise and use its powers to reach appropriate results in individual cases." In re Gonic Realty Trust 909 F2d 624 (1st Cir 1990). Thus, for example, it is generally recognized that § 1112(b) empowers the court to dismiss a case for

cause that has been filed in bad faith for cause. In re Arnold, 806 F.2d 937, 939 (9th Cir. 1986).

In this case the SBA argues that dismissal is warranted because the debtor has unreasonably delayed carrying out the plan provisions to the detriment of his creditors; materially defaulted with respect to his confirmed plan by failing to make adequate protection payments and filed his petition in bad faith. The debtor denies that there has been an unreasonable delay in the sale of the Montana property. He argues that it is reasonable to expect that it would take a lengthy period of time to market the commercial property in light of the economic climate in Hamilton, Montana. He further argues that the delay in the sale, if any, was not caused "by the debtor" and is therefore not grounds for dismissal under § 1112(b)(3). The debtor's argument that the economic climate in Hamilton, Montana would make it difficult to sell commercial property located there assumes a fact that is not in evidence. Nonetheless, the court recognizes that a reasonable period of time is needed to market commercial property, regardless of where that property is located. In this case, however, the debtor's failure to list the property with a commercial real estate broker undoubtedly increased the time necessary to market this property.

Ultimately the debtor did locate a buyer without the use of a real estate broker. However, the contract between the debtor and

the buyer allowed the buyer six months from the contract date to close the sale. In return the debtor allowed the buyer to file a Notice of Purchasers Interest which serve to cloud title to the property pending closure. When the buyer was unable to close on schedule the debtor allowed the buyer to purchase extensions of the closing date, apparently indefinitely, for \$2,500 per month. In addition, when the buyer defaulted in the extension payments, the debtor did nothing to push the sale forward and took no action to rescind the contract and foreclose his interest in the property. This conduct, standing alone, rises to the level of "unreasonable delay by the debtor" sufficient to justify a dismissal under § 1112(b)(3).

The debtor also denies that he has materially defaulted in his plan payments. The debtor concedes that he has not made adequate protection payments to the SBA since December, 1994 despite a court order requiring him to do so. He argues, however, that the order is not a part of the confirmed plan and that his default in making the payments required by that order is not, therefore, a default "with respect to a confirmed plan." This argument has merit. The court order requiring payments of \$800 per month to the Small Business Administration is not part of the confirmed plan. Under the plan the debtor is only required to make monthly payments of \$100 to the trustee. Therefore failure to make the adequate protection payments is not a material default "with

respect to a confirmed plan." Nonetheless, the debtor's failure to comply with the court's adequate protection order is another factor which the court may consider in determining whether dismissal is appropriate in this case.

The debtor also denies that his petition was filed in bad faith. A court may dismiss a bankruptcy case for cause if filed in bad faith. In re Arnold, 806 F.2d 937, 939 (9th Cir. 1986). The applicability of good faith requires examination into any abuses of the provisions, purpose, or spirit of bankruptcy law and into whether the debtor honestly needs the liberal protection of the Bankruptcy Code. In re Bingham, 68 B.R. 933, 935 (Bankr. M.D. Pa. 1987) (citing In re Setzer, 47 B.R. 340 (Bankr. E.D. N.Y. 1985)).

Whether required good faith exists in any bankruptcy case depends on its facts and circumstances. In re Thirtieth Place, Inc., 30 B.R. 503, 505 (Bankr. 9th Cir. 1983). No one factor dominates. Rather the courts have looked at a long list of factors in making this determination. These factors include:

1. The debtor has few or no unsecured creditors.
2. There has been a previous bankruptcy petition by the debtor or a related entity.
3. The prepetition conduct of the debtor has been improper.
4. The petition effectively allows the debtor to evade court orders.
5. There are few debts to nonmoving creditors.

6. The petition was filed on the eve of foreclosure.
7. The foreclosed property is the sole or major asset of the debtor.
8. There is no possibility of reorganization.
9. Debtor's income is not sufficient to operate.
10. There is no pressure from nonmoving creditors.
11. Reorganization essentially involves the resolution of a two party dispute.
12. The debtor filed solely to obtain the automatic stay.

In re Grieshop, 63 B.R. 657, 663 (N.D. Ind. 1986). Other appropriate considerations include whether the debtor's schedules and other pleadings filed with the court are accurate and whether the debtor has incurred significant medical expenses prior to filing. In order for the court to find bad faith the court is not required to find, as a prerequisite, either malice or actual fraud. Some of these indicia of bad faith applicable to dismissal may be identical to the indicia of bad faith applicable to confirmation of a debtor's Chapter 13 plan. However, what the former requires of the court is to identify the debtor's motive for filing the bankruptcy case. Thus it is particularly important for the court to look at the events leading up to the filing. Thus the court cannot consider events that occurred in 1994 and 1995 to determine whether the debtor acted in bad faith in filing his petition in 1993.

The evidence presented here, without more, does not provide a basis for a finding of a bad faith filing. Although the debtor had few unsecured creditors, he had filed no other bankruptcy petitions and his prepetition conduct was not improper. The filing did not allow him to evade a court order. The petition was filed on the eve of a foreclosure and the property to be foreclosed is the debtor's major asset. However, he had significant debts with non-moving creditors, his income was sufficient to fund the plan and there was a reasonable possibility of reorganization. There was insufficient evidence presented for the court to determine whether the debtor had filed solely to obtain the automatic stay or whether the petition was filed to resolve essentially a two party dispute. At filing the debtor's schedules were essentially accurate and listed all creditors. The debtor did not have any significant pre-filing medical debt. Since there is insufficient evidence of the debtor's bad faith, dismissal for bad faith filing is not warranted.

The fact that dismissal is not warranted based on any one of the "causes" listed in § 1112(b)(1) - (10) does not end the court's inquiry as to whether this case should be dismissed for cause. As noted above, the list of causes set forth in § 1112(b) is not intended to be exhaustive. Rather the court should consider the facts of each individual case and determine whether, given the totality of the circumstances, the case should be dismissed.

In this case the court has already noted that the debtor has failed to take any action to move the sale of the Montana property forward despite the fact that a year has passed since the original scheduled closing date. That delay alone justifies dismissal under § 1322(b). The court has also noted the debtor's default in his obligation to make adequate protection payments in accordance with this court's order. In addition the court notes that in January, 1995 when the debtor first defaulted in his \$800 per month adequate protection payments he was receiving the sum of \$2,500 per month from the buyer as a fee for extending the closing date on the Montana property. In other words, not only did he fail to make his adequate protection payments but he also used the income arising from the use of the SBA's collateral for his own purposes.

Another matter of concern to the court is the debtor's failure to disclose to the trustee the payments he received from his disability insurance and his decision to use those payments to pay creditors who held junior liens on the Montana property.

The Bankruptcy Code contemplates an orderly payment of creditors in accordance with an established scheme of priority. In this case the debtor ignored that requirement of the Code and independently decided which creditors he would pay, how much he would pay them and when he would pay them. It appears from the debtor's actions that he believes he should be free to disregard those provisions of

the Code that are inconvenient for him while retaining the benefits he enjoys while in a Chapter 13.

The court is also troubled by the fact that the debtor has apparently received significant funds during the life of this plan that were not disclosed to the trustee and that were not paid to any of his creditors. The debtor testified that he received eight or nine monthly extension payments from the buyer of the Montana property. Each payment was \$2,500. Thus since September, 1994 the debtor has received at least \$10,000 that was not disclosed to the trustee. During that same time the debtor made four adequate protection payments of \$800 to the SBA for a total of \$3,200. In other words, \$6,800 of the money received by the debtor as part of the sale extension agreement is unaccounted for. The debtor contends that this money was used for his necessary expenses. However, the debtor has never amended his schedules to reflect any increase in his living expenses or change in his income. In fact at this same time the debtor's expenses decreased by \$200 per month with the payoff of two vehicle loans and increased by \$431 per month with the addition of disability payments on one of his credit union loans.

To summarize, the court notes that the debtor's financial picture has changed greatly since the inception of this case. At the time of the filing the Montana property was encumbered by four liens. The three junior liens totaled almost \$60,000. Since that

time that amount due on those liens has been reduced to \$5,500. At the time of filing the debtor had five loans with Pace credit union. The total due on those loans was \$54,000. During the two and one half years that this plan has been in place three of those loans have been retired and the balance due on the remaining loans has been reduced to \$14,000. The vast majority of the reduction in debt was the result of extraordinary payments that were not contemplated in the original plan.

Based on the above facts this court concludes that there is cause to dismiss this case. The debtor has allowed the payments due under the plan to be delayed by failing to take any action to force closing of the sale of the Montana property or to foreclose his interest in that property and seek another buyer. He has defaulted in his court ordered obligation to make adequate protection payments to the SBA. He has ignored the provisions of the Code governing priority of payments to creditors, selecting which creditors he would pay, how much he would pay them and when they would be paid. He has failed to report significant income increases to the trustee and has apparently disposed of significant sums of money without accounting for where the money was spent. He has reduced his secured debt by over \$90,000 primarily by payments that were outside the contemplation and scope of the plan. In short, he has ignored all of the strictures placed on him by the Code while continuing to enjoy the benefits of the

automatic stay. This constitutes cause for dismissal within the contemplation of § 1112(b). The SBA's motion to dismiss will, therefore, be granted. In light of this decision the court need not address the trustee's motion to amend the debtor's Chapter 13 plan.

An order consistent herewith shall be entered.

POLLY S. HIGDON
Bankruptcy Judge