

In re Chang

Bkrcty.D.Hawai'i,2004.

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No. 03-00922.

Nov. 30, 2004.

Bradley Tamm, Honolulu, HI, for Debtor.

FARIS, Bankruptcy J.

*1 The debtor in this case tests the outer limits of the “good faith” requirement for chapter 13 plan confirmation. The objecting creditors argue that the debtor fails the good faith test because of his reprehensible pre-petition conduct and his alleged misrepresentations in the course of this case. The debtor admits that his pre-petition conduct was “negligent-even grossly negligent,” but he denies making any material and intentional misstatements in this case and argues that, because his second amended plan represents an honest attempt to repay his creditors to the best of his ability, he has filed his plan in good faith. Based on the totality of the circumstances, I find that the debtor did file the plan in good faith. (The objecting creditors do not challenge the debtor's satisfaction of the other requirements for plan confirmation.)

The history of the dispute between Debtor Fred Wai Mun Chang and the objecting creditors, Gima Termite Control, Inc. (“Gima Termite”), and Sharon Y.J. Won, is described in detail in the Findings of Fact and Conclusions of Law on Objection to Confirmation of Chapter 13 Plan, filed on September 23, 2004, which are incorporated in this decision by reference. In a nutshell, the Debtor and Ms. Won were equal shareholders of Honolulu Termite & Pest Control Company, Inc. (“Honolulu Termite”). Gima Termite funded Honolulu Termite for some years. Although Honolulu Termite never made a significant profit, a large national corporation offered to buy it for approximately \$1,500,000. The sale collapsed, however, and the relations between the Debtor, Ms. Won, and Gima Termite became acrimonious. The Debtor allowed Honolulu Termite to collapse and transferred most of its remaining assets to his new employer, Diamond Head Termite, Inc. (“Diamond Head Termite”). Gima Termite and Ms. Won sued the Debtor in state court. While the litigation was pending, the Debtor commenced this chapter 13 case.

The Debtor's first amended plan provided (in summary) that the Debtor would pay \$130.00 per month for thirty-six months plus a single lump-sum payment of \$15,000.00 from the liquidation of exempt assets within one year of plan confirmation. Ms. Won and Gima Termite objected to confirmation of the plan. After an evidentiary hearing which consumed five full or partial court days, I denied confirmation of the first amended plan, concluding (for the reasons set out in detail in the First Decision) that the Debtor had not filed the first amended plan in good faith.

The Debtor's second amended plan provides (in summary) that the Debtor will pay \$130.00 per month for sixty months, rather than thirty-six months, and an additional lump-sum payment of approximately \$70,000.00, rather than \$15,000.00. Ms. Won and Gima Termite object again, arguing primarily ^{FN1} that the second amended plan also fails the good faith test.

^{FN1}. The objecting creditors also renew their argument that the Debtor is ineligible for chapter 13 relief because his debts are too large. I rejected this argument in the First Decision and the objecting creditors

offer no new information or argument on this subject. (They acknowledge that they reiterate their contention to preserve their rights on appeal.)

In order to confirm a chapter 13 plan, the court must find that the debtor proposed the plan in good faith. 11 U.S.C. § 1325(a)(3). The debtor has the burden of showing that the plan is proposed in good faith. *Fidelity & Cas. Co. v. Warren (In re Warren)*, 89 B.R. 87, 93 (B.A.P. 9th Cir.1988).

*2 In order to assess the plan's good faith, the court must survey the totality of the circumstances. Relevant factors include, but are not limited to:

1. The amount of the proposed payments and the amounts of the debtor's surplus, *In re Padilla*, 213 B.R. 349, 352-353 (B.A.P. 9th Cir.1997), (citing *In re Warren*, 89 B.R. 87, 93 (B.A.P. 9th Cir.1988));
2. The debtor's employment history, ability to earn, and likelihood of future increases in income, *id.*;
3. The probable or expected duration of the plan, *id.*;
4. The accuracy of the plan's statements of the debts, expenses and percentage of repayment of unsecured debt, and whether any inaccuracies are an attempt to mislead the court, *id.*;
5. The extent of preferential treatment between classes of creditors, *id.*;
6. The extent to which secured claims are modified, *id.*;
7. The type of debt sought to be discharged, and whether any such debt is nondischargeable in Chapter 7, *id.*;FN2

FN2. See also *Washington Student Loan Guaranty Assoc. v. Porter (In re Porter)*, 102 B.R. 773, 776 (B.A.P. 9th Cir.1989) (citing *In re Warren*, 89 B.R. at 94);

8. The existence of special circumstances such as inordinate medical expenses, *id.*;
9. The frequency with which the debtor has sought relief in bankruptcy, *id.*;
10. The motivation and sincerity of the debtor in seeking Chapter 13 relief, *id.*;
11. The burden which the plan's administration would place upon the trustee, *id.*; and
12. Whether the debtor "has engaged in pre-filing conduct that is criminal and/or repugnant to societal standards," *id.*

Applied to this case, these factors point in varying directions.

1. *Amount of proposed payments and surplus.*

The plan payments are modest in absolute terms and in comparison to the amount claimed by the objecting creditors, but the monthly payments are equal to the surplus of the Debtor's income over his reasonable expenses, and the lump sum payment will nearly exhaust the Debtor's exempt assets.

2. *Debtor's earning history and potential.*

The Debtor appears to be earning as much as he reasonably could earn given his education, training, skill, and experience, and it is not likely that his income will increase substantially in the future.

3. Plan duration.

The plan has the maximum sixty month term, rather than the required minimum term of thirty-six months.

4. Accuracy of plan statements and projections.

The plan itself contains no misstatements. The objecting creditors argue, however, that the Debtor has made numerous other misrepresentations in the course of this case.

The objecting creditors argue that the Debtor made misstatements about his interest in the Gold Wing motorcycle. As noted in the First Decision, the Debtor's testimony and assertions in the Statement of Financial Affairs on this topic were inconsistent, incorrect, and material. There was not (and is not) sufficient information in the record to establish whether the Debtor made these misstatements knowingly and intentionally. The inconsistencies in his testimony arguably suggest that he was confused rather than deceitful. In any event, the second amended plan treats the asset correctly so the creditors will not be adversely affected by the inconsistencies in the Debtor's account.

*3 The objecting creditors also argue that the Debtor made misstatements about the transfer of Honolulu Termite's business to Diamond Head Termite. The Debtor's testimony on this issue was confusing and somewhat inconsistent but when he was asked direct and explicit questions his answers appear to have been honest.

Finally, the objecting creditors point out that the Debtor admittedly took cash from Honolulu Termite's customers and did not report the cash on his income tax returns until he filed amended returns shortly before he filed his bankruptcy petition. The Debtor admits that this occurred but denies that it precludes confirmation of a plan.

All in all, I find that the Debtor's testimony counts against him in the determination of good faith but is not so egregious that it precludes a finding of good faith.

5. Preferential treatment of creditors.

The plan does not prefer any creditors except to the extent required by bankruptcy law.

6. Modification of secured claims.

The plan does not provide for the modification of any secured claims.

7. Superdischarge.

The objecting creditors argue that, in a chapter 7 case, their claims would not be dischargeable under sections 523(a)(4) and (a)(6). As noted in the First Decision, it is not clear that the objecting creditors would prevail under those sections, but the Debtor's misconduct in connection with the collapse of Honolulu Termite still weighs heavily against him in the good faith calculation.

8. Special circumstances.

The Debtor faced litigation, the expense of which likely would have consumed all of his assets even if he won.

9. *Frequency of filing.*

This is the Debtor's first bankruptcy case.

10. *Debtor's motivation and sincerity.*

Although the Debtor's conduct and motives in connection with the failure of Honolulu Termite were dishonorable, his motivation in this case appears to be legitimate and sincere.

The objecting creditors argue that the Debtor's "admitted purpose in avoiding creditors' claims" preclude a finding of good faith. All debtors in bankruptcy are attempting to avoid creditor claims to some extent. The question is whether the debtor is making an honest attempt to secure needed relief. The Debtor faces financial problems which he cannot solve except through a bankruptcy proceeding. His conduct in connection with this case has been acceptable.

11. *Administrative burden.*

This plan would not create any unusual administrative problems for the trustee.

12. *Prefiling conduct.*

The Debtor's conduct in connection with the failure of Honolulu Termite was probably not "criminal" but surely was "repugnant." The fact that the Debtor converted substantially all of his nonexempt assets to exempt form on the eve of bankruptcy, and proposed to restore only a fraction of the value of those assets to his creditors, also weighed against confirmation of the first amended plan. Under the second amended plan, however, the creditors will receive \$70,000 of the approximately \$85,000 which the Debtor converted to exempt form. This sizable contribution of exempt assets (even considering that the debtor converted them to exempt form shortly before bankruptcy) weighs in favor of a finding of good faith.

*4 The bottom-line question of good faith is "whether the debtor misrepresented facts in his/her plan, unfairly manipulated the Bankruptcy Code or otherwise proposed his/her chapter 13 plan in an inequitable manner." *Goeb v. Heid (In re Goeb)*, 675 F.2d 1386, 1390 (9th Cir.1982). In this case, the Debtor finds himself in an impossible financial predicament. He brought that predicament upon himself by violating his obligations to his business associates. This fact does not necessarily disqualify him from chapter 13 relief; most debtors bear some responsibility for their plight. The overriding consideration in this case is that the Debtor has proposed a plan which represents his best effort to resolve the predicament and pay his creditors as much as he can.

Based on the totality of the circumstances, including but not limited to the factors identified in *Padilla* and other appellate cases in this circuit, I conclude that the Debtor proposed his Second Amended Chapter 13 Plan in good faith.^{FN3} The standing trustee is directed to submit a separate order, in the usual form, confirming the Second Amended Chapter 13 Plan.

FN3. The objecting creditors also claim that the debtor's estimated attorneys' fees are excessive. I will rule on the reasonable amount of those fees when the Debtor's attorney files an application. This dispute is not a bar to plan confirmation.

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