

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ROBERT J. COSGRIFF

Debtor

CASE NO. 97-64699

Chapter 13

APPEARANCES:

O'CONNOR, GACIOCH, POPE & TAIT, LLP
Attorneys for Creditor
One Marine Midland Plaza
East Tower - Seventh Floor
P.O. Box 1964
Binghamton, NY 13902

KURT D. SCHRADER, ESQ.
Of Counsel

JOHN A. BLACK, ESQ.
Attorney for Debtor
1107 Monroe Street
Endicott, NY 13760

MARK W. SWIMELAR, ESQ.
Chapter 13 Trustee
250 S. Clinton St., 5th Floor
Syracuse, New York 13202

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Presently before the Court is an objection filed by Shirley L. Cosgriff ("S. Cosgriff") on November 5, 1997, to the confirmation of Robert J. Cosgriff's ("Debtor") chapter 13 plan. The Court heard oral argument on the objection on February 10, 1998,¹ as well as March 10, 1998,

¹The chapter 13 trustee, Mark Swimelar, Esq., ("Trustee") filed an objection to the plan on November 24, 1997, asserting that the Debtor was not committing all his disposable income to the plan. On February 10, 1998, however, the Trustee withdrew his objection.

and the matter was adjourned on both of these dates on the consent of the parties to allow them the opportunity to file memoranda of law. This Court heard final oral argument on the objection April 14, 1998, in Binghamton, New York. The matter was submitted for decision on April 21, 1998.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1) and (b)(2)(A) and (L).

FACTS

The following facts are not in dispute.² On or about December 20, 1995, S. Cosgriff obtained a judgment of divorce entered by the Honorable Robert W. Coutant, Justice of the New York State Supreme Court (“State Court”).³ Pursuant to the judgment of divorce, the marital assets were distributed among the Debtor and S. Cosgriff (the “parties”). One of the assets awarded to the Debtor was the marital residence. Among the assets S. Cosgriff received was a distributive award in the amount of \$8267. Additionally, S. Cosgriff was awarded spousal

²S. Cosgriff provided the Court with a statement of facts in her memorandum of law, filed March 9, 1998. The Debtor indicated his agreement with the statement. *See* Debtor’s Memorandum of Law (“Debtor’s Memo.”), filed April 14, 1998, at 2.

³S. Cosgriff attached a copy of the judgment of divorce to her proof of claim filed on November 5, 1997, listing a claim in the amount of \$4,566 based upon a marital obligation.

maintenance and child support as well as attorneys' fees payable to her counsel. The Debtor defaulted on his obligations under the judgment of divorce and S. Cosgriff filed a petition in the New York State Family Court, Broome County, ("Family Court") seeking to enforce these obligations. Robert J. Eberz, Hearing Examiner of the Family Court, signed an order, dated February 4, 1997, ("Family Court Order") which granted S. Cosgriff a judgment against the Debtor for \$7,721 representing the amount due on the distributive award as well as judgments for spousal support.⁴ *See* Exhibit "B" of S. Cosgriff's Reply Affidavit, filed April 14, 1998. Additionally, the Family Court Order provided that "all past present and future medical bills including any deductible for the children of the parties herein shall be the sole exclusive responsibility of [the Debtor]." *See id.*

On August 4, 1997, the Debtor filed a voluntary petition ("Petition") seeking relief under chapter 13 of the Bankruptcy Code (11 U.S.C. §§ 101-1330 ("Code")). In his Petition, the Debtor listed his address as 28 Roosevelt Ave., Binghamton, New York ("Residence").⁵ In Schedule A, the Debtor indicated an interest in the Residence which had a market value of \$30,000.⁶ As set forth in the Summary of Schedules, the Debtor's total assets were \$33,410 with liabilities in the amount of \$44,957.57. The Debtor indicated a monthly income of \$2,229.78 and monthly

⁴Specifically, S. Cosgriff's judgments were as follows: \$4,566.84 for spousal support arrears through May 2, 1996; \$65.88 for spousal support arrears for the period of May 2, 1996 to January 22, 1997. *See* Exhibit "B" of S. Cosgriff's Reply Affidavit, filed April 14, 1998. Additionally, the Family Court Order provided for two judgments against the Debtor for attorneys' fees in the amounts of \$281.30 and \$957.68. *See id.*

⁵The Debtor indicated that the Residence is the former marital residence. *See* Debtor's Mem. at 3.

⁶The Debtor filed Schedules A, B, C, G, H, I, and J on October 15, 1997, along with a Summary of Schedules.

expenses in the amount of \$2,456.50. *See* Schedules I and J. In Schedule D attached to the Petition, the Debtor listed one secured creditor holding a mortgage on the Residence in the amount of \$17,217.22. The Debtor listed unsecured priority claims in the amount of \$13,592.70⁷ and unsecured nonpriority claims totaling \$14,147.65. *See* Schedules E and F, attached to the Petition. The Debtor filed amended Schedules I and J on February 11, 1998, which indicated a monthly income of \$2,229.78 with monthly expenses in the amount of \$2,231.50.⁸

On October 15, 1997, the Debtor filed a proposed chapter 13 plan (“Plan”). The Plan proposes no payment of future earnings of the Debtor through the Plan and indicates that approximately \$10,000 deriving from the sale of the Residence will fund the Plan.⁹ The Plan provides for a dividend of 100% to priority unsecured creditors. The nonpriority unsecured creditors will receive a 3.4% distribution.¹⁰

⁷The Debtor identified two creditors holding priority claims. Specifically, S. Cosgriff holds the following claims: \$7,721 for a distributive award pursuant to a court order; \$4,566.84 for spousal support; and \$65.88 for spousal support. Richard M. Hill, Esq. was listed as holding two claims for attorneys’ fees totaling \$1238.98.

⁸The Debtor indicates a monthly payment of \$896.50 for alimony, maintenance and support.

⁹The Residence was sold pursuant to an Order of this Court, dated December 3, 1997, for \$30,000. The Order provided that the Debtor pay off the balance of the mortgage on the Residence with the proceeds of the sale.

¹⁰The Plan indicates that unsecured creditors hold claims in the amount of \$19,951.01. The Court notes that this figure differs from the amount originally listed in Schedule F of \$14,147.65. The difference is due in part to the inclusion of S. Cosgriff’s claim for \$7,721 based upon the distributive award as a nonpriority unsecured claim pursuant to the Plan. Additionally, medical providers who collectively hold claims in the amount of \$1917.64 were originally listed as holding unsecured nonpriority claims but are treated as priority creditors in the Plan.

ARGUMENTS

S. Cosgriff argues that the Debtor's Plan was filed in bad faith pursuant to Code § 1325(a)(3). S. Cosgriff points out that the Plan provides for the full payment of obligations to her which are nondischargeable pursuant to Code § 523(a)(5) but only a 3.4% distribution on her arguably nondischargeable claim for \$7,721 based upon the distributive award. Therefore, S. Cosgriff contends that the Plan effectively permits the Debtor to use the protection of the Code to fully pay otherwise nondischargeable debts while paying very little of the Debtor's dischargeable debts. S. Cosgriff further asserts that by filing for relief pursuant to chapter 13 instead of chapter 7, she was deprived of the opportunity to litigate the issue of whether her claim for \$7,721 is nondischargeable pursuant to Code § 523(a)(15).

In opposition, the Debtor argues that his Plan was filed in good faith. The Debtor points out that he has not previously sought relief under the Code. According to the Debtor, all of his major disposable assets and income are paid into the Plan with no available surplus. The Debtor maintains that he has no disposable income to contribute toward the Plan because he must pay approximately \$900 per month to his ex-wife for support and maintenance pursuant to the Family Court Order. While acknowledging that the Plan attempts to discharge a debt potentially nondischargeable in a chapter 7, the Debtor contends that this does not mean that the Plan was filed in bad faith. The Debtor points out that the Plan provides for full payment to S. Cosgriff for priority claims based upon spouse and child support and a percentage distribution on her distributive award along with all the other unsecured nonpriority creditors. According to the

Debtor, the Plan is more equitable to the unsecured creditors than a chapter 7 liquidation where the Debtor could claim \$10,000 of the proceeds from the sale of the Residence pursuant to his homestead exemption.

DISCUSSION

The issue before the Court is whether the Debtor filed his Plan in good faith pursuant to Code § 1325(a)(3). Good faith is determined on a case-by-case basis in light of the totality of the circumstances. *See In re Klevorn*, 181 B.R. 8, 10 (Bankr. N.D.N.Y. 1995) (citing *Eisen v. Curry (In re Eisen)*, 14 F.3d 469, 470 (9th Cir. 1994)). The following factors are considered in an analysis of whether a debtor proposed a plan in good faith: (1) the amount of the proposed payments and the amount of the debtor's surplus; (2) the debtor's employment history, ability to earn, and likelihood of future increases in income; (3) the duration of the plan; (4) the accuracy of the plan's statement of the debts, expenses and percentage repayment of unsecured debt, and whether any inaccuracies are an attempt to mislead the court; (5) the extent of preferential treatment of creditors; (6) the extent to which secured claims are modified; (7) the type of debt sought to be discharged, and whether any such debt is potentially nondischargeable in chapter 7; (8) the existence of special circumstances such as inordinate medical expenses; (9) the frequency with which the debtor has sought relief under the Code; (10) the motivation and sincerity of the debtor in seeking chapter 13 relief; and (11) the burden which the plan's administration would place upon the chapter 13 trustee. *See In re Corino*, 191 B.R. 283, 289 (Bankr. N.D.N.Y. 1995). The Debtor bears the burden of establishing his good faith in proposing

a Plan. *See Hardin v. Caldwell (In re Caldwell)*, 895 F.2d 1123, 1126 (6th Cir. 1990); *National School Bus, Inc. v. Carignan*, 190 B.R. 739, 741 (N.D.N.Y. 1996). The policy supporting a good faith analysis is to ensure that debtors are not abusing the provisions, purpose, or spirit of the Code. *See In re Love*, 957 F.2d 1350, 1357 (7th Cir. 1992). The purpose and spirit of chapter 13 is rehabilitation and the repayment of debt. *See In re Carver*, 110 B.R. 305, 308 (Bankr. S.D. Ohio 1990).

The type of debt sought to be discharged and whether that debt is potentially nondischargeable in a chapter 7 proceeding are relevant factors for the Court to consider. As a preliminary matter, the Court notes that a chapter 13 discharge is broader in scope than a chapter 7 discharge which means that fewer exceptions to discharge apply in a chapter 13. *See Handeen v. LeMaire (In re LeMaire)*, 898 F.2d 1346, 1353 (8th Cir. 1990). The Debtor's Plan provides for the partial payment of S. Cosgriff's claim for \$7,721 based upon a distributive award made pursuant to a judgment of divorce. While this debt is dischargeable upon completion of the Plan, *see* 11 U.S.C. § 1322(b), it is potentially nondischargeable in a chapter 7 bankruptcy as an exception to discharge pursuant to Code § 523(a)(15). *See* 11 U.S.C. § 727(b). A chapter 13 plan is not filed in bad faith simply because a debt paid in part through the plan is a debt potentially nondischargeable in a chapter 7 proceeding. *See In re Schaitz*, 913 F.2d 452, 454 (7th Cir. 1990). Therefore, the fact that the Debtor filed a chapter 13 Petition which had the effect of depriving S. Cosgriff of the chance to litigate the issue of nondischargeability with respect to her claim for \$7,721 is not per se bad faith. It is necessary to examine other factors to determine whether the Debtor filed his Plan in bad faith.

Another factor for the Court to consider is the amount of the proposed payments. The

Debtor's Plan proposes to pay in full the unsecured creditors holding priority claims and provides for a 3.4% distribution to the unsecured nonpriority creditors holding claims in the amount of \$19,951.01. Although the percentage of payment to unsecured creditors is also a factor to consider in analyzing good faith, a minimal repayment to the unsecured creditors alone does not constitute bad faith. *See In re Makarchuk*, 76 B.R. 919, 922 (Bankr. N.D.N.Y. 1987) (citing *Deans v. O'Donnell*, 692 F.2d 968, 972 (4th Cir. 1982); *In re Tobiason*, 185 B.R. 59, 63 (Bankr. D. Neb. 1995) (holding that a plan proposing a .0035 percent repayment to unsecured creditors was not filed in bad faith). S. Cosgriff argues that Debtor's bad faith is evident from the fact that the Plan proposes to pay in full the obligations to her based upon spousal maintenance and child support which are nondischargeable pursuant to Code §§ 523(a)(5) and 1328(a)(2) but will only pay a percentage of her arguably nondischargeable claim based upon a distributive award.¹¹ A debt based upon alimony, maintenance or support is a priority claim, *see* 11 U.S.C. § 507(7), which must be paid in full pursuant to Code § 1322(a)(2). Therefore, the fact that the Debtor seeks to pay 100% of his debt to his ex-spouse based upon alimony, maintenance or support is not bad faith but is in fact required by statute.

The duration of the Plan is a relevant factor for the Court to consider. The Debtor's Plan proposes to make one lump sum payment in the amount of approximately \$10,000.¹² The Court

¹¹The Debtor states the Plan provides for priority payments to S. Cosgriff, or on her behalf, which are for spouse and child support. *See* Debtor's Mem. at 7. The Plan provides for full payment to the following priority unsecured creditors: \$5343.38 (\$4632.72 based upon spousal support) to the S. Cosgriff, \$1238.98 to Richard M. Hill, attorney; \$1917.64 to medical providers in lieu of support. Although not specifically cited by the Debtor, it appears that the Debtor acknowledges that these debts are nondischargeable pursuant to Code § 523(a)(5).

¹²On April 14, 1998, the Trustee indicated to the Court that he was holding over \$11,000 available for distribution to the creditors.

addressed the issue of a single payment plan in the case *In re Klevorn* and determined that “there is nothing in the language [of Code § 1322(d)] to prevent a debtor from proposing a plan which is for a period that is less than 3 years as long as the debtor is acting in good faith.” 181 B.R. at 10; *see also In re Stone* 145 B.R. 38, 39 (Bankr. C.D. Ill 1992) (noting that plans providing for a lump sum payment are not prohibited); *In re Mitruka*, 19 B.R. 516, 518 (Bankr. E.D. Pa. 1982) (holding that a single lump sum payment does not prohibit confirmation of a plan). The debtor in *Klevorn* proposed a plan which provided for one payment consisting of a 100% dividend to the only unsecured creditor. *Id.* at 9-10. The chapter 13 trustee argued that the plan should not be confirmed as the debtor was attempting to manipulate the Code by filing a Plan of such a short duration. *Id.* at 10. This Court found that the debtor proposed a plan that was fundamentally fair to the creditors thereby denying the trustee’s objection to the confirmation of the plan. *Id.* at 12. In the matter before the Court, however, the one lump sum payment will pay all of the priority claims but leave only a 3.4% distribution to the nonpriority unsecured creditors.

S. Cosgriff argues that the Debtor’s bad faith is evident from the fact that the Debtor’s Plan obligates no future income and is essentially a liquidation plan. The Court notes that the funding for the Plan derives solely from the proceeds from the sale of the Debtor’s Residence and the Debtor obligates no future income towards the Plan.¹³ A debtor can liquidate real property to fund a plan. *See* 11 U.S.C. § 1322(b)(8); *Turner v. Citizens Nat’l Bank v. Turner (In re*

¹³According to the Debtor’s Amended Schedules I and J, he has no disposable income to commit towards the Plan. S. Cosgriff contends that some of the Debtor’s expenses are unreasonable. *See* S. Cosgriff’s Reply Affidavit, filed April 14, 1998, at ¶ 4. In opposition, the Debtor asserts that his expenses are reasonable. *See* Debtor’s Affidavit, filed April 23, 1998, at ¶ 7. For purposes of this decision, the Court need not address the reasonableness of the Debtor’s expenses.

Turner), 207 B.R. 373, 376 (B.A.P. 2d Cir. 1997). Courts have found that plans providing for the liquidation of property were proposed in good faith where the Debtor also committed some additional monthly income into the plan. *See, e.g., In re Anderson*, 18 B.R. 763, 764-65 (Bankr. S.D. Ohio 1982) (confirming a plan providing for the sale of the debtor's real property and lasting for approximately twenty-five months), *aff'd*, 28 B.R. 628 (S.D. Ohio 1982). A plan funded *entirely* from the sale of real estate was found to have been proposed in good faith in the unique circumstance where the only creditor in the case objected to the original plan which had provided for payments out of the debtor's future income. *See In re Smith*, 51 B.R. 273, 275 (Bankr. D.C. 1984). It necessarily follows that a plan funded solely from the liquidation of property is evidence of bad faith. Therefore, the fact that the Debtor proposes to fund his Plan solely from the proceeds of the sale of his Residence thereby obligating no future income indicates a lack of good faith.

The motivation and sincerity of the Debtor in seeking relief under chapter 13 is another factor to consider. The Court notes that the Debtor has not previously filed a petition for relief under the Code. S. Cosgriff contends that the Debtor's Plan was proposed in bad faith as an attempt to avoid full payment of her claim based upon the distributive award. The fact that a debtor seeks to discharge a debt otherwise nondischargeable in a chapter 7 closely relates to the debtor's motivation and sincerity in seeking chapter 13 relief. *See In re LeMaire*, 898 F.2d at 1350; *In re Zaleski*, 216 B.R. 425, 431 (Bankr. D.N.D. 1997) ("The concept of sincerity is closely related to the approach the debtor takes, through the Chapter 13 plan, to pay the debts that might otherwise be nondischargeable."). The Debtor indicates that when the distributive award was made, the Residence was valued at \$45,000. *See Debtor's Affidavit*, filed April 23, 1998, at ¶

6. Therefore, it is the Debtor's position that the State Court would not have made the award if it had known that the Residence was worth only \$30,000. *See id.* These statements by the Debtor indicate a lack motivation in repaying S. Cosgriff's claim based upon the distributive award. Chapter 13 permits a debtor to repay his debts over a period of time and in return the debtor obtains the benefit of a broad discharge. *United Carolina Bank. v Hall*, 993 F.2d 1126, 1129 (4th Cir. 1993); *In re LeMaire*, 989 F.3d at 1353 (noting that the purpose behind the broad chapter 13 discharge is to "encourage more debtors to attempt to pay their debts under bankruptcy court supervision") (citation omitted). The Court finds a lack of sincerity on the part of the Debtor based upon his Plan which proposes no future income and a low percentage distribution to the unsecured creditors while seeking to discharge a debt potentially nondischargeable in a chapter 7. In order to obtain the benefits of the broad chapter 13 discharge, the Debtor should *attempt* to contribute some amount of his future income towards the Plan even if his contributions result in a minimal monthly payments and pay only a portion of a debt potentially nondischargeable in a chapter 7.

The Court finds that all the factors when considered together weigh in favor of finding that the Debtor filed his Plan in bad faith. The policy supporting good faith is to ensure that a debtor is not abusing the protections offered in bankruptcy. The Court finds that the following facts constitute sufficient grounds to find a lack of good faith on the part of this Debtor in filing his Plan: the Debtor obligates no disposable income towards the repayment of his debts, pays a low percentage of distribution to unsecured creditors, and seeks to discharge a debt potentially nondischargeable in a chapter 7. *See In re Bush*, 120 B.R. 403, 409 (Bankr. E.D. Tex. 1990) (finding a lack of good faith where debtor seeks to discharge otherwise nondischargeable debt

and the plan provides for the minimal duration of three years and low payments to unsecured creditors); *United States v. Etus (In re Estus)*, 695 F.2d 311, 317 (1982) (noting that a plan may have been filed in bad faith which lasts only fifteen months, seeks to discharge nondischargeable debt in a chapter 7, and ignores future income increases). In light of the totality of the circumstance, the Court finds that the Debtor has not made a good faith attempt to repay his debts pursuant to the Plan.

Based upon the foregoing, it is hereby

ORDERED that S. Cosgriff's objection to confirmation of the Plan on the ground of bad faith pursuant to Code § 1325(a)(3) is hereby granted thereby denying the confirmation of the Plan without prejudice; and it is further

ORDERED that unless the Debtor files and notices for confirmation an amended plan within thirty (30) days of the date of this Order, his case will be dismissed on separate order to be presented by the Trustee.

Dated at Utica, New York

this 19th day of August 1998

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge