

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

CHARLES A. CHAPONIS,
d/b/a C.A.C. Company

CASE NO. 90-01925

Chapter 13

Debtor

APPEARANCES:

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

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

The Court considers herein the omnibus motion of Sawyer Industries, Inc., Potter & Rayfield, Inc. and Lank Machine & Tool Co. ("Movants") for an order dismissing the instant Chapter 13 case pursuant to §1307(c) of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code"). The instant motion also sought an order allowing Movants' claims as secured and terminating the

automatic stay to permit Movants to extend their judgment liens in accordance with applicable state law.

The motion first appeared on the Court's calendar on September 25, 1990 and by Orders dated October 12, 1990 and October 17, 1990, Movants motion, insofar as it sought secured status for their claims and relief from the automatic stay to extend their judgment liens was granted.

That portion of the motion seeking dismissal of the Chapter 13 case was thereafter adjourned and was ultimately scheduled for an evidentiary hearing before the Court on January 9, 1991. Following the hearing, the Court gave both parties the opportunity to submit memoranda of law and the motion was finally submitted on January 25, 1991.

JURISDICTIONAL STATEMENT

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

FACTS

The instant Chapter 13 case filed on August 6, 1990 (90-01925), is the fourth such case filed by the Debtor since July of 1987. Debtor previously filed Chapter 13 cases in this Court on July 27, 1987 (87-01047), April 14, 1988 (88-00569) and May 1, 1989 (89-00727). (See Movants' Exhibits 1, 2, 3 & 4).

In each of the petitions filed, Debtor indicated he was doing business under the name of the C.A.C. Company. In each of the petitions Debtor listed his address as 7021 Van Antwerp

Drive, Clay, New York and his business as "beverage industry supplier".

A review of the "Monthly Family Budget" page included in the 1987, 1988 and 1989 petitions, as well as Item #4 of the Chapter 13 Statement filed with the current petition entitled "Budget", indicates that between 1987 and 1990 the total monthly net income of the Debtor and his non-filing spouse ranged between \$2298 and \$2833 while their monthly expenses ranged between \$1460 and \$1940.

Debtor's 1987 Chapter 13 case was dismissed by an Order of this Court dated April 4, 1988 due to "Non-Payment By The Debtor"; Debtor's 1989 Chapter 13 case was also dismissed by an Order dated April 23, 1990 due to "non-payment by the debtor". (See Exhibits A & C attached to the Motion papers).

The Court will take judicial notice of its docket which indicates that the Debtor's 1988 Chapter 13 case was dismissed by an Order dated May 9, 1988, which provided that Debtor was prohibited from "re-filing for relief under this Title for 180 days from the date of entry of this Order." See Case No. 88-00569, docket entry #7).

In each of the first three petitions Debtor indicates that his spouse is a teacher employed by the City of Syracuse School District. In the 1990 petition currently before the Court, Debtor does not list his spouse's occupation or employer, only her monthly take-home pay, however, at the January 9, 1991 hearing, Debtor testified that his wife was still employed by the City of Syracuse School District as a teacher.

At the January 9, 1991 hearing, Debtor testified that he was the sole owner of the real property at 7021 Van Antwerp Drive, Clay, New York, which was listed in his 1987 and 1988 petitions as having a value of \$139,000, while in Debtor's 1989 and 1990 petitions, its value was listed at \$89,000.

The Chapter 13 plans filed in Debtor's 1987 and 1988 cases were identical providing for a monthly payment to the Chapter 13 Trustee of \$1,230.50 for thirty-six months, which would cure mortgage arrears and pay unsecured creditors a distribution of 10%.

The Chapter 13 plan filed in Debtor's 1989 case provided for a payment to the Chapter 13 Trustee of \$940.00 per month for sixty months with \$359.90 to a "Sophie Hunt" for a mortgage and "\$580.10 to all other creditors and administrative expenses." (See Movants' Exhibit 3). Attached to Movants' Exhibit 3 is a copy of the Order of Confirmation dated July 12, 1989, which provides for a monthly payment to the Chapter 13 Trustee of \$865.00 per month, with a 100% dividend to unsecured creditors after payment of numerous judgment creditors to include the Movants.

The Chapter 13 Plan in the current case proposes monthly payments to the Chapter 13 Trustee of \$890.00 per month for sixty months, out of which the Chapter 13 Trustee will pay priority taxes, judgments, including Movants', and a dividend of 100% to unsecured creditors.

Debtor testified that he has resided at the Clay, New York address for eight to ten years and that he has been a manufacturer's representative and procurer of beverage equipment, as well as a beverage equipment engineer for sixteen to seventeen years.

Upon review of the Monthly Family Budget pages of the 1987 and 1988 petitions, the Debtor acknowledged that Income and Expenses appeared identical, though upon reflection at the hearing, he testified that his income and expenses had changed from the 1987 case to the 1988 case, and the Debtor was unable to explain why the change was not reflected in the Monthly Family Budget filed in the later case.

Debtor offered in evidence at the hearing a summary of his business activity during the three months preceding the hearing. (Debtor's Exhibit A). He testified that he had generated

some \$12,000 in receivables during that three month period and that he presently owned beverage equipment that could be sold for a price between \$25,000 and \$30,000.

Debtor credited his alleged recent success to an expansion of the customer base of his business beyond the beverage industry to farmers and manufacturers of vinegar and mustard. He testified that his business expenses are nominal because he is able to acquire equipment by word of mouth, using very limited advertising, operating basically out of his home and utilizing his customers' funds rather than his own to acquire equipment.

Debtor testified that he is no longer indebted to Marine Midland Bank ("Marine"), as their secured notes had been paid in full. Debtor offered in evidence a Limited Release dated August 10, 1988 executed by Marine, a Satisfaction of Mortgage dated August 10, 1988 executed by Marine, which referred to a mortgage assigned to Marine by a Sophie Hunt, and a Discharge of Mortgage dated August 8, 1988 executed by Marine. (See Debtor's Exhibit B). It did not appear that any of these instruments had been recorded. Debtor identified Sophie Hunt as his mother and testified that she recently forgave the debt due her because she now resides with Debtor and his wife.

Debtor proposed at the hearing that he "quit claim" the property on Van Antwerp Drive, Clay, New York to his wife and she will apply for a mortgage at a local bank. With the mortgage proceeds, Debtor will then pay off all of his creditors.

The Chapter 13 Trustee testified that as of December 1990 Debtor was current in making his monthly Plan payments of \$890.

ARGUMENTS

The Debtor contends that repetitive or serial filings in Chapter 13 are not per se bad faith and where a debtor can show a bona fide objective change of circumstances between filings, a court should not dismiss a Chapter 13 simply because it is the latest in a number of filings by the same debtor.

As proof of a change in circumstances vis-a-vis the instant Chapter 13 case, Debtor refers the Court to the fact that the \$40,000 indebtedness to his mother, Sophie Hunt, has now been forgiven, that Marine no longer has a claim secured by mortgages on his real property, that he presently possesses inventory worth \$25,000 to \$30,000, that he has generated \$12,000 of accounts receivable from a broadened customer base, and that upon the proposed transfer of his residence to his wife, she will obtain a loan from Merchants Bank secured by the residence, which loan will be utilized to pay off his Chapter 13 creditors.

The Movants argue that the change of circumstances must have occurred between the filing of the cases and that it is obvious here that any significant changes in circumstances occurred after the filing of the instant case on August 6, 1990.

DISCUSSION

A review of the proof indicates that at the time Debtor filed his 1989 Chapter 13 case, as well as his current case, he listed Sophie Hunt as an unsecured creditor in the amount of \$40,000, and noted in the latter case that she was "To be paid outside the plan." It should also be noted that while Marine appeared as a secured creditor in both the 1987 and 1988 cases, it does not appear as a creditor in any of the schedules filed in the 1989 and 1990 cases. (See Movants' Exhibits 3 & 4, Unsecured Debts).

With regard to the \$12,000 in accounts receivable, Debtor testified that those accounts had been generated in the "last three months" which presumably included the post-filing period of October through December 1990. (See Debtor's Exhibit A). An examination of the Debtor's 1990 petition and schedules makes no reference to any accounts receivable as an asset of the Debtor. It should be noted that the 1989 Chapter 13 petition and schedules filed by the Debtor did, however, include in Schedule B-2(p) Other liquidated debts owing bankrupt or debtor "commissions due" the Debtor in the sum of \$6,000. (See Movants' exhibit 3).

Debtor's 1990 Chapter 13 petition and schedules make no reference to any inventory and equipment owned by Debtor. Again, however, the 1989 petition and schedules at Schedule B-2(e) Inventory lists "coping machine, conveyors, bottle change parts" with a value of \$16,000. (See Movants' Exhibit 3). Debtor's testimony at the January 9, 1991 hearing identified the current equipment primarily as "stainless steel tanks and case packers" and it is not clear if the current inventory and that referred to in the 1989 petition are one and the same.

Finally, Debtor's 1990 Chapter 13 petition continues to list his occupation solely as a beverage industry supplier and there is no reference in any of the Debtor's plans filed with any of his Chapter 13 cases, including the current case, that he proposes to convey his residence to his wife as a means of generating additional income to fund a plan.

Debtor's 1987 and 1988 Chapter 13 petitions appear to be exact copies of each other, though approximately nine months elapsed between filings. The Chapter 13 plans, the Monthly Family Budgets and the schedules of creditors appear to be identical though the Debtor expressed doubt at the January 9, 1991 hearing that his Monthly Budget in 1987 was the same as in 1988, contending that "everything changed" and he was without an explanation why the 1988 Monthly Family Budget mirrored the 1987 Monthly Family Budget. As indicated, a review of the Monthly

Family Budgets filed in all four cases reflect a range of approximately \$500 to \$600 per month fluctuation in both income and expenses.

It is also apparent that none of the prior Chapter 13 cases have been of any substantial duration, with the 1987 case lasting approximately nine months, the 1988 case lasting less than one month, and the 1989 case lasting approximately one year, with both the 1987 and 1989 cases being dismissed due to non-payment by the Debtor.

While serial filings in Chapter 13 are not prima facie evidence of "bad faith" or a lack of "good faith" within the meaning of Code §1325(b)(3), a majority of courts that have examined such conduct have concluded that absent a change of circumstances between filings, dismissal of the current petition is warranted. See Johnson v. Vanguard Holding Corporation (In re Johnson), 708 F.2d 865 (2d Cir. 1983); Isafaroff v. Taylor (In re Taylor), 884 F.2d 478 (9th Cir. 1989); In re Jones, 105 B.R. 1007 (N.D.Ala. 1989); In re Hundley, 103 B.R. 768 (Bankr. E.D.Va. 1989); In re Belt, 97 B.R. 962 (Bankr. N.D.Ind. 1989); In re McKissie, 103 B.R. 189 (Bankr. N.D.Ill. 1989); In re White, 72 B.R. 169 (Bankr. D.S.C. 1986); In re Bolton, 43 B.R. 48 (Bankr. E.D.N.Y. 1984); but cf. In re Barrett, 105 B.R. 385 (Bankr. N.D.Ohio 1989); In re Samuel, 77 B.R. 520 (Bankr. E.D.Pa. 1987); In re Smith, 43 B.R. 319 (Bankr. E.D.N.C. 1984).

There is, however, no fast and hard rule regarding a lack of "good faith" in spite of the fact that the majority of courts who have examined serial filings have concluded that in such a scenario there appears to be a lack of good faith. Each case appears to be fact specific.

The Second Circuit Court of Appeals in In re Johnson, supra, 708 F.2d at 868, observed "'Good faith' while not defined by statute or legislative history, see 5 COLLIER ON BANKRUPTCY ¶1325.01[2][c] (15th ed. 1982), certainly does, however, require 'honesty of intention' Barnes v. Whelan, 689 F.2d at 200, in the sense of focusing on the debtor's conduct in the

submission, approval and implementation of a Chapter 13 bankruptcy plan."

The Second Circuit further directed that "The Bankruptcy Judge should determine whether Johnson had a bona fide change in circumstances that justified both her default on her first plan and her second filing." Id.

Some courts have suggested that under appropriate circumstances the honest debtor should seek to modify his or her prior plan when difficulties arise rather than allowing the ill fated plan to be dismissed by creditors, only to re-file a second petition. It is suggested that plan modification as opposed to serial filing was envisioned by Congress in enacting Code §1329 where unforeseen plan difficulties arise. See In re Johnson, supra 708 F.2d 868; In re Bolton, supra 43 B.R. 50.

The Court here analyzes the Debtor's repetitive filings that have brought the question of dismissal of the Debtor's fourth Chapter 13 case in three years before it on the instant motion.

An analysis of the Debtor's first two cases in 1987 and 1988 indicates that there was no change in circumstances and that the petition, schedules and plan in each case were nearly identical to one another. The Court notes that the 1988 case was of extremely short duration, filed on April 14, 1988 (just ten days following the dismissal of the 1987 case), and dismissed on May 9, 1988, with the requirement that no further petitions could be filed by Debtor for 180 days strongly suggesting bad faith.

The 1989 filing appears to have followed a significant change in circumstances involving Debtor's release in August 1988 from the secured debt of Marine, including indebtedness originally due Sophie Hunt, which apparently had been assigned to Marine. (Debtor's Exhibit B).

Neither the 1989 nor the 1990 petitions reflect any indebtedness to Marine, presumably as the result of 1988 releases, however, both the 1989 and 1990 petitions added Sophie

Hunt, Debtor's mother, as an unsecured creditor in the sum of \$40,000. At the January 9, 1991 hearing, however, Debtor testified that Sophie Hunt had "forgiven" the debt in consideration of her now residing with Debtor and his wife.

The Court also notes in comparing the Debtors 1987, 1988 and 1989 petitions to his 1990 petition that a number of judgment creditors, as well as the Internal Revenue Service and the New York State Department of Taxation and Finance, while consistently listed as creditors in the prior petitions have been omitted from the 1990 petition. While this would be a significant change in Debtor's total debt picture, there was no explanation offered by either party as to how the Debtor was able to satisfy these debts between May 1, 1989, the filing date for the 1989 case and August 6, 1990, the date of filing the instant case, or in fact, they were satisfied.

The remaining incidents of changed circumstances previously referred to herein, even if accepted as true, are not particularly compelling, and the apparent centerpiece of Debtor's latest proposal, conveyance of the marital residence to his wife in return for her agreeing to obtain a mortgage loan in an amount sufficient to pay off all of the debtor's creditors, is somewhat speculative, and was apparently an afterthought, since nowhere in the Chapter 13 plan filed in the instant case is such an arrangement proposed.

Nevertheless, assuming the Debtor's marital residence has a value of \$89,00 as listed in the instant petition, and Debtor's spouse who appears to have both a significant and steady income, could obtain a mortgage of at least 80% of its value upon a conveyance by the Debtor to her, free and clear of liens and encumbrances, there would be sufficient funds to pay all of the secured, priority and unsecured debt listed in the Debtor's instant case.¹

¹ The Court, in reaching this conclusion, relies upon the Debtor's contention that Sophie Hunt has forgiven her claim against the Debtor and that his schedule of debts filed with the instant

A Chapter 13 plan with a provision for conveyance of the Debtor's property to his non-debtor spouse for a sum sufficient to pay all of Debtor's creditors, though perhaps a conveyance for something less than fair market value, would not impact detrimentally on anyone other than perhaps minimally the Debtor. However, the Court is of the opinion that this is the only viable alternative to a fourth and final dismissal of Debtor's "fling" with Chapter 13 and it will accomplish an orderly payment of all creditors while not divesting Debtor of at least physical possession and enjoyment of the marital residence.

The modification and implementation of the plan suggested herein cannot be without parameters, however, and, therefore, the Court will ORDER:

1. That Debtor shall file and notice a motion to modify the current Chapter 13 plan, pursuant to Code §1323(a) and Bankruptcy Rule 2002(a)(6), within twenty (20) days of the entry of this Order, to provide for the sale of Debtor's property at 7021 Van Antwerp Drive, Clay, New York, to Debtor's spouse for a sum sufficient to pay all of the Debtor's creditors, with the exception of Sophie Hunt, who have timely filed claims in the current (1990) case, in full.

2. That upon confirmation of the modified plan, Debtor shall make every effort to expedite the transfer of the marital residence to the non-debtor spouse.

3. That in the event that the Debtor shall be unable or unwilling to consummate a transfer of the marital residence to the non-debtor spouse, and turnover the proceeds to the Chapter 13 Trustee within sixty (60) days following confirmation of the modified plan, the Movants' or the Chapter 13 Trustee may submit to the Court an ex parte order dismissing the Chapter 13 case pursuant to Code §1307(c)(1) and (5), which order shall prohibit further filing of any petition

petition is accurate.

pursuant to Title 11 of the United States Code for a period of 180 days, in accordance with Code §109(g)(1).

IT IS SO ORDERED.

Dated at Utica, New York

this day of , 1991

STEPHEN D. GERLING
U.S. Bankruptcy Judge