

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MARTIN L. OTTENSCHOT

Debtor

CASE NO. 00-60124

Chapter 13

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

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

Presently under consideration by the Court are several motions made at an evidentiary confirmation hearing (“Hearing”) held on September 21, 2000, in Utica, New York, opposing the confirmation of the second amended chapter 13 plan (“Plan”) of Martin L. Ottenschot (“Debtor”). Those opposing the confirmation of the Debtor’s plan include Manufacturers & Traders Trust Association (“M&T”), the Town of Lansing, New York (“Town”) and the Internal Revenue Service (“IRS”) (hereinafter jointly referred to as the “Opposition”).¹

The Opposition’s motions were made orally at the Hearing at the conclusion of the Debtor’s proof pursuant to § 1325 of the Bankruptcy Code, §§ 101-1330 (“Code”). The Court indicated that it would take the matter under submission and allow the parties until October 13, 2000, to file memoranda of law on the feasibility of the Debtor’s plan, as well as on the question of the Debtor’s eligibility pursuant to Code § 109 (e). The Court also indicated that it would schedule an adjourned evidentiary hearing in the event that it concluded that the Debtor was eligible to be a chapter 13 debtor and that the Debtor had met his burden of proof on the issue of the Plan’s feasibility.

JURISDICTIONAL STATEMENT

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At the Hearing, a motion to deny confirmation of the Debtors’ Plan was also made on behalf of HSBC Bank. However, by letter dated October 13, 2000, HSBC Bank withdrew its objection to the Debtor’s Plan with respect to feasibility.

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), (L) and (O).

FACTS

The Debtor filed a voluntary petition pursuant to chapter 13 of the Code on January 12, 2000. The Debtor is the president and sole shareholder of Cortland Paving Company, Inc. (“CPC”), which is engaged in excavation work and road construction.² The Debtor filed a chapter 13 plan on February 18, 2000, which was later amended and filed with the Court on April 24, 2000. The second amended plan, which is the one now before the Court, was filed on July 18, 2000. *See* Debtor’s Exhibit 2.

The Plan provides for monthly payments of \$2,803.14 per month for the first five months and \$3,100 per month thereafter for the remaining fifty-five months. M&T is to be paid \$1,972.03 per month for the first five months and then \$2,303.06 for the remaining months of the Plan on its mortgage on the Debtor’s business property at 17 Ridge Road, Lansing, New York (“Ridge Road Property”).³ Unsecured creditors are to receive less than 1% dividend.

In his original Schedules, the Debtor lists Federal tax liens totaling \$87,668.60. *See*

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On April 28, 1995, CPC filed a voluntary petition pursuant to chapter 11 of the Code. On February 4, 1999, the Court signed an Order confirming its plan of reorganization. On July 19, 1999, the Court signed an Order approving CPC’s application for a final decree and the case was closed on July 21, 1999.

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Stephen Farkas, Supervisor for the Town, testified that the M&T mortgage, as well as a judgment of foreclosure and sale on the Ridge Road Property, had been assigned to the Town by M&T. *See* Town’s Exhibits C, D and E.

Debtor's Exhibit 1 at Schedule D. The Debtor also identifies \$13,707.65 as "Responsible person" liability for corporate trust fund taxes. *See* Debtor's Exhibit 1 at Schedule E.⁴ When questioned by the Court concerning the responsible person liability, the Debtor testified that he was not sure how he would pay it, but he would. The Debtor testified that he has a permit to sell gravel located on property he owns in Groton, New York ("Groton Property"), which he considered to be a valuable asset from which he could generate income if necessary.

According to the Debtor's Amended Schedules, New York State Department of Taxation and Finance ("NYS") holds a disputed and contingent claim in the amount of \$17,415.95, which represents "Responsible officer" liability for corporate trust fund taxes. *See* Debtor's Exhibit 7, Schedule E.⁵

The Plan indicates that CPC is to make payments to the IRS and NYS. The Plan also states that CPC had submitted an Offer in Compromise to the IRS in connection with taxes owed by CPC. At the Hearing, the Debtor testified that before the IRS would consider the Offer, CPC had to remain current for two successive quarters. It was the Debtor's testimony that CPC had paid the taxes due for the first two quarters of 2000 but that the payments had been late. The Debtor also testified that the payment for the third quarter had been timely made and that it was anticipated that CPC would also make the payment for the last quarter of 2000 in a timely fashion. Accordingly, the Debtor anticipated that CPC would be resubmitting the Offer to the IRS after

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The Court takes judicial notice of the fact that the IRS filed a proof of claim in the Debtor's case on March 24, 2000, in the amount of \$199,133.28. The claim is comprised of \$118,327.38 in secured debt and \$79,875.98 in priority debt.

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NYS filed a proof of claim on August 14, 2000, in the amount of \$22,914.67, identified as unsecured priority debt.

December 2000. If accepted, CPC would pay the taxes. However, under the terms of the Debtor's Plan, if the Offer is rejected, the claim of the IRS is to be paid through the Plan.

In his Plan, the Debtor indicates that any real property taxes in arrears are to be paid over the life of the Plan. At the time he filed his Petition and Schedules, the Debtor listed town and county taxes on the Groton Property totaling \$3,000 and on the River Road Property totaling \$5,000. The Debtor was uncertain whether the latter taxes were included in the payments to M&T on its mortgage.⁶

The Debtor testified that the funds with which he is making payments under the Plan are derived from his salary from CPC of \$600 per week and from rental income paid by CPC in connection with its lease of the Ridge Road Property. The Debtor testified that the checks written on CPC's account in the amount of \$2,400 or \$2,500 per month are paid directly to the chapter 13 trustee ("Trustee").⁷

At the Hearing, the Debtor testified that he had not filed a Form 1040 for 1999 personal income taxes. Debtor also acknowledged that he had approximately \$100 per month in excess income after payment of his monthly expenses and payment to the Trustee. It was the Debtor's testimony that he would be willing to give up his house in order to have sufficient funds to cover any unexpected expenses in connection with the River Road Property. He also acknowledged that he had no equity in his residence, but that if it became necessary to surrender it to HSBC Bank,

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The proof of claim filed on April 12, 2000, by the Tompkins County Department of Finance identifies \$15,619.50 being owed on five parcels of real property owned by the Debtor.

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At a prior hearing in this case held on July 6, 2000, the Debtor testified that CPC was paying approximately \$2,500 per month in rent on the Ridge Road Property. At the present Hearing, the Debtor testified that the monthly payments were \$2,400 per month.

he would simply sleep in his truck and eliminate expenses associated with housing.

The Debtor testified that prepetition CPC had not made all rent payments to him. He was uncertain about the extent of the arrears.⁸ He did note that since he had filed his Plan, CPC had remained current on its rent payments. The Debtor did not have any financial statements with respect to CPC, and he testified that he did not have recent tax returns for CPC because the corporation had received an extension to file its 1999 corporate taxes. He estimated that CPC's gross revenues for 1999 amounted to approximately \$1.2 million. He had no estimate of expenses for 1999 or 2000 and also did not know what CPC's gross revenues were for 2000.

In his Amended Summary of Schedules, the Debtor identifies \$662,115.84 in secured claims; \$31,123.60 in unsecured priority claims, and \$242,163.86 in unsecured non-priority claims. *See* Debtor's Exhibit 7. Of the \$242,163.86 identified as general unsecured debt, \$198,231.88 is listed as a contingent obligation owed to Tompkins County Trust Company ("TCTC"). At the Hearing, the Debtor testified that he is a guarantor on the debt and that at the time he filed his Petition, CPC, which is the primary obligor, was current in its payments to TCTC. He also testified that the debt is secured by property of CPC, including equipment, accounts receivables and certain mortgages.

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According to the Debtor's Statement of Financial Affairs, at the time he filed his Petition, CPC owed the Debtor 24 months in back rent.

DISCUSSION

Eligibility pursuant to Code § 109(e)

Counsel for the IRS argues that the Court need not address the issue of feasibility of the Debtor's Plan because the Debtor is not eligible to proceed in chapter 13 pursuant to Code § 109(e). Code § 109(e) sets a limit on the amount of noncontingent, liquidated, unsecured debt of \$269,250 and secured debt of \$807,750. The Debtor lists \$662,115.84 in secured debt, \$31,123.60 in unsecured, priority debt and \$242,163.88 in unsecured, nonpriority debt. The combined unsecured debt totals \$273,287.46, which is above the limit set forth in Code § 109(e).

It is the Debtor's position that \$198,231.86 of the general unsecured debt is actually owed to TCTC by CPC, and that he is only secondarily liable based on his personal guarantee. Debtor's counsel argues that because CPC was current on January 12, 2000, when the Debtor filed his Petition, the debt is contingent and not to be included when determining the Debtor's eligibility pursuant to Code § 109(e). In addition, the Debtor, relying on *In re Belknap*, 174 B.R. 182 (Bankr. W.D.N.Y. 1994), argues that the loans made by TCTC are secured by property of CPC and "[f]or purposes of determining the debt limitations of sec. 109(e), a loan which is secured by property of a corporation which is wholly owned by the debtor can be considered as 'secured' for the purposes of sec. 109(e)." See Debtor's Memorandum of law, filed October 13, 2000.

With respect to the latter argument, this Court is not inclined to adopt the conclusions reached in *Belknap*, finding the reasoning of Chief Judge Jim D. Pappas in *In re Brown*, 250 B.R. 382, 384-385 (Bankr. D. Idaho 2000) much more persuasive. As discussed in *Brown*, a claim is

secured “to the extent of the value of such creditor’s interest in the estate’s interest in such property” 11 U.S.C. § 506(a). CPC is a distinct and separate legal entity which apparently owns the property securing TCTC’s loans. The fact that the Debtor is the president and sole shareholder of CPC does not render the corporate assets property of his estate. *See Brown*, 250 B.R. at 385.

Furthermore, even if the Court were to accept the Debtor’s argument that \$198,231.88 represented secured debt, that would only reduce the amount of unsecured debt to an amount within the limits set forth in Code § 109(e). At the same time, it would increase the amount of secured debt from \$662,115.84 to \$860,347.72,⁹ which is over the limit set forth in Code § 109(e) for secured debt. In either case, the Debtor would be ineligible to seek relief pursuant to chapter 13 of the Code.

The question then is whether the debt identified as being owed to TCTC is contingent, as listed in the Debtor’s Petition and Schedules. “[A] debt is contingent if it does not become an obligation until the occurrence of a future event, but is noncontingent when all of the events giving rise to liability for the debt occurred prior to the debtor’s filing for bankruptcy.” *In re Mazzeo*, 131 F.3d 295, 303 (2d. Cir. 1997) (citations omitted). For purposes of this discussion, the Debtor’s liability to TCTC as guarantor is noncontingent only if CPC was in default at the time the Debtor filed his Petition.

At the Hearing, the Debtor testified that CPC was current with its payments to TCTC at the time he filed his Petition on January 12, 2000. No evidence was offered to contradict this

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\$662,115.84 plus \$198,231.88 equals \$860,347.72.

testimony. Accordingly, the Court views the obligation to TCTC as contingent and not to be included in the calculation of unsecured debt for purposes of Code § 109(e). Nor had TCTC filed a proof of claim in the Debtor's case as of the date of the Hearing. Accordingly, the Debtor's non-contingent unsecured debt, both priority and nonpriority, totals \$75,055.58. Even if the Court were to include the additional amounts listed in the proofs of claim filed by the IRS (\$79,875.98 - 13,707.65 = \$66, 168.33 in priority debt) and NYS (\$22,914.67 - 17,415.95 = \$5,498.72 in priority debt), the Debtor would still be eligible for chapter 13. Therefore, based on the evidence as presented at the Hearing, the Court concludes that the Debtor was eligible to file his Petition pursuant to chapter 13 of the Code.

Feasibility of the Plan

In order to be confirmed, a chapter 13 plan must comply with the requirements set forth in Code § 1325(a). Of particular relevance to this proceeding is Code § 1325(a)(6), which requires that the Debtor show that the Plan is feasible. The Debtor need not prove that the plan is guaranteed to be successful. Rather, the Debtor must establish that the Plan has a reasonable likelihood of success. *In re Ross*, 231 B.R. 635, 639 (Bankr. S.D. Ohio 1999); *see also In re Keach*, 225 B.R. 264, 269 (Bankr. D.R.I. 1998) (noting that the debtor must show ““that it is likely that the debtor will have the necessary resources to make all payments as directed by the plan””, quoting *First Nat'l Bank v. Fantasia (In re Fantasia)*, 211 B.R. 420, 423 (1st Cir. BAP 1997)); *Federal Nat'l Mortgage Ass'n v. Ferreira*, 223 B.R. 258, 263 (D.R.I. 1998) (stating that “[t]he test is whether the expectations of income reflected in the Plan are ‘sufficiently realistic that [the debtors] should be given an opportunity to carry out the plan they propose.’”, quoting *In re Compton*, 88 B.R. 166, 167 (Bankr. S.D. Ohio 1988)).

The Debtor rests all his expectations of income on the successful operation of CPC. In addition to a net monthly salary of approximately \$1,733, the Debtor anticipates that he will also receive approximately \$4,211 in rental income. All the Court has before it is the self-serving testimony of the Debtor to support these expectations. The Debtor offered no evidence to substantiate the income which he expects to use to fund the Plan. The Debtor was unable to provide the Court with evidence of CPC's income and expenses for 1999 and 2000 and testified that as yet no tax returns had been filed on behalf of the corporation. There was also no evidence of future contracts awarded to CPC that would give some indication of the stability of its income going forward that would be available to the Debtor.

The Debtor's Plan not only relies on the successful operation of CPC, he also relies on acceptance of CPC's Offer in Compromise by the IRS. If rejected by the IRS, the Plan provides that the Debtor will assume the responsibility for such payments. Yet, the Debtor admitted that he has only approximately \$100 per month in excess income. The Debtor testified that if necessary, he would surrender his house to HSBC Bank and live in his truck. He also mentioned the possibility of extracting gravel from the Groton Property but offered no estimates of potential income to be generated from such mining.¹⁰ Neither of these solutions provide the Court with any confidence in the Debtor's ability to carry out the Plan provisions.

Upon review of the testimony and the evidence presented, it is impossible for the Court to determine whether the Debtor's expectations of income are realistic and whether he has a

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According to the Debtor's Schedules, the Groton Property is encumbered by claims of approximately \$400,000, and the Debtor places a value on the property at \$90,000. There is nothing in the record to indicate whether any of the listed creditors have rights to any proceeds should the Debtor begin to mine the Groton Property.

reasonable likelihood of being successful in completing his Plan.

Based on the foregoing, it is hereby

ORDERED that the confirmation of the Debtor's Plan is denied.

Dated at Utica, New York

this 22nd day of February 2001

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge