NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE:	:	
JAMES M. NUTTALL, JR.,	:	CHAPTER 13
Debtor.	:	CASE NO. 06-14233 (GMB)
	:	MEMORANDUM OPINION

APPEARANCES:

Nona L. Ostrove, Esquire
Subranni, Ostrove & Zauber
1020 Laurel Oak Road, Suite 100
Voorhees, NJ 08043
Attorney for Debtor

Joseph C. Grassi, Esquire
2700 Pacific Avenue
Wildwood, NJ 08260
Attorney for Creditor Stephen DeHorsey

This matter has come before the Court on the objection to confirmation filed by creditor Stephen DeHorsey. Mr. DeHorsey is the Debtor's sole creditor to be treated under the plan. The Debtor has only one other creditor, Chase Auto Finance, secured by the Debtor's 2001 Ford Expedition, which claims no arrears and is being paid outside the plan. Mr. DeHorsey's claim arises from an assault by the Debtor which resulted in serious injuries, and a guilty plea by the Debtor to criminal aggravated assault.

Mr. DeHorsey sought relief from the automatic stay to pursue the liquidation of his claim in state court contending that amount of his claim needed to be determined. The Debtor opposed

the motion for relief with the Debtor certifying that he would not object to Mr. DeHorsey's $300,000 claim and therefore stay relief was unnecessary. The Debtor also asserted that because there had been no judgment entered on the civil claim, the debt to Mr. DeHorsey had not been "awarded" and was therefore not subject to nondischargeability pursuant to §1325(a)(4). At this time, no adversary proceeding has been filed to determine dischargeability of this debt pursuant to Federal Rule of Bankruptcy Procedure 7001(6), and that issue is not before the Court at this time.

At the confirmation hearing, the creditor asserted that the plan was not filed in good faith. The Debtor testified as did his father, James Nuttall, Sr. The Court took this matter under advisement and now makes the following findings of fact and conclusions of law:

The Debtor is a 28-year old man who filed this case on May 15, 2006. In his chapter 13 plan, he proposes to pay $175 per month to the chapter 13 trustee for 36 months. This would result in a total payment in the plan of $6300. The Debtor proposes distribution to pay trustee commissions, $1500 in attorney fees to be paid to the Debtor's counsel, and then a pro rata distribution to unsecured creditors. Only one unsecured creditor has filed a claim, Mr. DeHorsey, in the amount of $300,000, which the Debtor is not contesting. The plan in essence proposes a distribution to Mr. DeHorsey on his claim of approximately 1.5%, assuming no additional administrative expenses are sought.

The debt to Mr. DeHorsey results from severe injuries he received after an assault by the Debtor on April 25, 2004. As a result of the incident, Mr. Nuttall pled guilty to criminal aggravated assault and was sentenced to six months in county jail, five years probation and restitution of $10,026.50. The Debtor sets forth in his Schedule J that he makes payments toward

that restitution award in the amount of $130.00 per month. He testified that the lawsuit by Mr. DeHorsey was the sole reason for filing this bankruptcy.

The Debtor is employed as a mechanic in his father's plumbing business, Jim Nuttall Plumbing and Heating, and has been for the past six years. Up until 2005, he was working as an independent contractor, and then shortly before filing, his status was changed to employee. The Debtor could offer no explanation for the change. In 2002, the Debtor filed a tax return as a sole proprietor, listing as expenses $7300 in car or truck expenses, $3000 for the purchase of tools, $600 in phone expenses, although he did not utilize his vehicle in the business.

Just before filing, in April 2006, he transferred to his father a 1999 Ford F150 work vehicle which his father had purchased and transferred to his name for insurance purposes, due to a DWI charge against the Debtor. The tools, which were listed on his 2002 tax returns as having been purchased for $3000, are listed on the Debtor's Schedule B as having a value of $75. At the hearing he indicated that the value should have been listed at $500. In 2005, the Debtor transferred an ATV to his father which he had previously purchased. The Debtor testified that the transfer was to repay his father for attorney fees paid by his parents for his legal defense. Neither the ATV nor the transfer of same was listed by the Debtor on his schedules or Statement of Financial Affairs.

The Debtor is employed by his father's business and earns $2600 gross per month. After deductions he retains $2006.29 as monthly net take-home pay. He lives at home and has continuously for his whole life. He asserts that he pays his parents $300 per month for both room and board. There is no written agreement and he pays in cash. Despite receiving board from his parents, he lists $250 per month for food expenses. He also lists $80.00 per month that he asserts

that he pays his father for a cell phone that is owned by the father's business and is claimed as a business expense by the father's business. His expenses also include a monthly payment of $440 for a 2001 Ford Expedition which he purchased in 2004. In addition, he lists $20 for haircuts and $100 for recreation. He shows monthly net income on Schedule J of $186.29 and proposes payments of $175.00 per month for 36 months.

I. JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(a) and 157(a), and the Standing Order of the United States District Court for the District of New Jersey dated July 23, 1984, referring all bankruptcy cases to the Bankruptcy Court. This is a core proceeding under 28 U.S.C. § 157(b)(2)(L) regarding the confirmation of plans. Venue of this case is proper in the District of New Jersey pursuant to 28 U.S.C. §§ 1408 and 1409.

II. DISCUSSION

This Court must decide (1) whether stay relief should be granted to allow the state court to fix Mr. DeHorsey's claim and (2) whether Mr. Nuttall's chapter 13 Plan may not be confirmed if it is found his Plan was proposed not in good faith under § 1325(a).

A. Whether Stay Relief Should Be Granted to Fix Creditor DeHorsey's Claim.

The Code provides for relief from the Automatic Stay provisions under section 362(d), "for cause, including the lack of adequate protection of an interest in property of such party in interest." 11 U.S.C. § 362(d) (2006). "Cause" is not a defined term in the Code but there is an

abundance of case law construing that which constitutes "cause" sufficient for the granting of stay relief. Creditor DeHorsey is seeking relief from the Automatic Stay in order to pursue his civil action in state court against debtor Mr. Nuttall in order to fix his claim for personal injury damages. Relief may be granted to permit litigation in another forum, "particularly if the nonbankruptcy suit involves multiple parties or is ready for trial." 3 COLLIER ON BANKRUPTCY § 362.07[3][a] (15th ed. 2006).

In this case, however, Mr. Nuttall has not objected to Mr. DeHorsey's claim in the amount of $300,000 and has proposed a – albeit *de minimis* – distribution to Mr. DeHorsey in his Plan. Mr. DeHorsey asserts in his motion that "cause" exists due to the fact that the debt arising from the personal injury claim was implicitly accepted by the Debtor as a debt arising from a civil judgment pursuant to willful or malicious conduct within the meaning of 11 U.S.C. § 523(a)(6) and therefore would be nondischargeable in chapter 7. Mr. DeHorsey argues that debtor's reading of § 1328(a)(4) that the debt is subject to discharge because it has not yet been reduced to a judgment, described infra, is "unduly restrictive and self-serving" and, therefore, he should be free to litigate that issue in either this Court or in the Superior Court of New Jersey.

This Court holds that because Mr. Nuttall has not objected to Mr. DeHorsey's claim in the amount of $300,000, "cause" does not exist sufficient to warrant relief from the Automatic Stay in order to fix the amount of personal injury damages. Moreover, for the reasons which follow, Mr. DeHorsey's reading of § 1328(a)(4) is not supported by the language of the statute, therefore this Court cannot hold that § 1328(a)(4) constitutes "cause" under § 362(d) sufficient to grant stay relief to pursue the civil litigation in state court.

B. Nondischargeability Under § 1328(a)(4)

The language of section 1328(a)(4) gives an exception to discharge which reads in part, "the court shall grant the Debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—(4) for restitution, or damages, *awarded* in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual." 11 U.S.C. § 1328(a)(4) (2005) (emphasis added).

The issue is whether the fact that the statute specifies that the exception is for damages "awarded" would preclude creditor Mr. DeHorsey from asserting nondischargeability in this case because the action in state court is stayed and no judgment against Mr. Nuttall was awarded to Mr. DeHorsey prepetition. Section 1328(a)(4) was added to the Code as part of BAPCPA last year and there are no reported decisions yet construing the meaning or applicability of section 1328(a)(4). The fact scenario as presented here today was considered in Collier on Bankruptcy, with very little in the way of resolution: "It is also unclear whether a debt would be nondischargeable if no award had yet been made in a civil action when the bankruptcy petition was filed. If Congress had intended for a debt to be nondischargeable even if not yet awarded, the words "awarded in" would appear to be surplusage." 8 COLLIER ON BANKRUPTCY § 1328.02[k] (15th ed. 2006).

Although Congress may not have intended for victims of intentional torts to be subject to discharge of their debts where the Debtor beats them in a race to the courthouse, this Court finds that the plain language of the statute requiring that the debt be "awarded" means that the debt is

subject to discharge until there has been a determination of liability, which has not yet occurred in the matter before this Court.

This Court is guided by the statements of the Supreme Court that, "when the statute's language is plan, the sole function of the court—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." Lamie v. U.S. Trustee, 540 U.S. 526, 533 (2004). And moreover, that "a statute must be construed in such a fashion that every word has some operative effect." U.S. v. Nordic Village, Inc., 503 U.S. 30, 36 (1992). To hold other than to require a determination of liability in order to find the debt nondischargeable under § 1328(a)(4) would be to render the word "awarded" mere surplusage, which this Court cannot do.

Therefore, Mr. DeHorsey's claim for $300,000 cannot be held to be nondischargeable because it is a contingent and unliquidated claim, not yet reduced to judgment and awarded by a court of competent jurisdiction, and therefore outside of the statutory exception to discharge created by the plain language of § 1328(a)(4). Consequently, Mr. DeHorsey's argument, that § 1328(a)(4) provides the "cause" sufficient for the granting of stay relief to pursue his civil action in state court, is unavailing.

C. Good Faith Under Section 1325(a)(3)

Creditor DeHorsey asserts that the Debtor's chapter 13 plan is not filed in good faith, which would preclude confirmation of his Plan under section 1325(a)(1), which requires a court to confirm a plan where, "the plan complies with the provisions of this chapter and with the other

applicable provisions of this title."[1] Section 1325(a)(3) specifies that the plan will be confirmed where, "the plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1325(a)(3) (2005).

1. Totality of the Circumstances Standard

Courts often employ a totality of the circumstances approach in making determinations of good faith under the Bankruptcy Code. In re Falotico, 231 B.R. 35, 41 (Bankr. D.N.J. 1999). The cases make clear that protection under chapter 13 is intended for those debtors to provide a meaningful repayment of debt to their creditors. Failure to provide substantial repayment to creditors is a factor to be considered by the courts when determining whether a plan was proposed in good faith. Other factors to be considered include whether the debtor "misrepresented facts in his [petition or] plan, unfairly manipulated the Bankruptcy Code, or otherwise [filed] his Chapter 13 [petition or] plan in an inequitable manner." Id. (citations omitted).

Particularly persuasive to this Court under the facts presented in this case, is the analysis presented in In re Goddard, 212 B.R. 233 (D.N.J. 1997), that courts must look at "the debt sought to be discharged, the debtor's motivation and sincerity in seeking chapter 13 relief to determine whether a debtor proposed his chapter 13 plan in good faith." Id. at 240. Finding a chapter 13

[1] In his papers, Mr. DeHorsey cited to cases construing and applying section 1307(c), which provides for the dismissal of a petition "for cause," which has been interpreted to include filings made not in good faith. As this matter is before this Court on confirmation of debtor's chapter 13 plan, and as Creditor DeHorsey has not sought dismissal under section 1307(c) (other than to cite to cases where such dismissal was sought), this Court will analyze and determine whether Mr. Nuttall's chapter 13 plan was filed in good faith under section 1325(a)(3), the issue presently before this Court.

plan is not filed in good faith is a fact determination by the bankruptcy court and will only be disturbed on appeal where clearly erroneous. Goddard, 212 B.R. at 237.

The Third Circuit has not had an occasion to interpret section 1325 with respect to its good-faith requirement, but has interpreted "good faith" in a section 1307(c) context in In re Lilley, 91 F.3d 491, 494 (3d Cir. 1996), directing the lower courts to examine "good faith" in light of the totality of the circumstances, on a case-by-case basis:

> Good faith is a term inescapable of precise definition. As a result, we believe that the good faith inquiry is a fact intensive determination better left to the discretion of the bankruptcy court. We therefore join the Seventh, Ninth and Tenth Circuits in holding that the good faith of Chapter 13 filings must be assessed on a case-by-case basis in light of the totality of the circumstances. Factors relevant to the totality of the circumstances may include, among others, the following: the nature of the debt . . .; the timing of the petition; how the debt arose; the debtor's motive in filing the petition; how the debtor's actions affected creditors; the debtor's treatment of creditors both before and after the petition was filed; and whether the debtor has been forthcoming with the bankruptcy court and the creditors.

Lilley, 91 F.3d at 496 (citations omitted).

The Third Circuit imbued the bankruptcy courts with broad discretion in determining whether or not the totality of the circumstances justify the dismissal or conversion under section 1307(c). Similarly it would appear that if the Third Circuit were faced with interpreting section 1325's good-faith requirement, it would adopt a similar "totality of the circumstances" approach, requiring the lower courts to determine, on a case-by-case basis, whether the Plan was filed in good faith.

The district court in In re Goddard reversed a bankruptcy court decision where that court had refused to consider the debtor's pre-filing conduct in confirming a chapter 13 plan. The

matter was remanded to the bankruptcy court for a determination, in light of the totality of the circumstances, as to whether or not the debtor's plan was filed in good faith. The Goddard court also found that the Bankruptcy Court was clearly erroneous in finding that a debtor accurately stated his debts and expenses where the debtor, whether intentionally or not, artificially raised his debts and expenses by claiming responsibility for a substantially higher portion of his family's living expenses than was warranted, thereby lowering his plan payments. Goddard, 212 B.R. at 241–42. The district court mandated that the bankruptcy court determine whether the inaccuracy was made for the purpose of misleading the bankruptcy court and/or manipulating the Bankruptcy Code. Id. at 242.

The Eighth Circuit, in an en banc decision, reversed a bankruptcy court's confirmation of a plan under facts strikingly similar to this case. In re LeMaire, 898 F.2d 1346 (8th Cir. 1990). The debtor in LeMaire had only one unsecured creditor and the debt arose from an intentional tort committed by the debtor as the creditor held a civil judgment for an intentional shooting. Like Mr. DeHorsey, the tort creditor in LeMaire objected to the confirmation of the chapter 13 plan, asserting that the civil judgment was not dischargeable. Instead, the court confirmed the plan which provided for a 42% distribution.

The tort creditor appealed the confirmation of the plan to the district court. The district court and a panel of the circuit court of appeals affirmed the bankruptcy court's decision. The circuit court granted a rehearing en banc, vacated the panel opinion and heard oral argument. The 8th Circuit, sitting en banc, reversed the lower court decisions confirming the plan, after weighing the debtor's motivation and sincerity with the fresh start goals of title 11. Lemaire, 898 F.2d at 1351. The court considered the pre-filing conduct of the debtor, including the

maliciousness of the injury which the debtor inflicted upon the victim-creditor. The court acknowledged that a chapter 13 plan may be confirmed, despite the most egregious pre-filing conduct, where other factors suggest that the plan nevertheless represents a good faith effort by the debtor to satisfy his creditor's claims. LeMaire, 898 F.2d at 1352–53.

2. Totality of the Circumstances Analysis

At approximately 1.5% after fees and commissions (if there are no further administrative expenses claimed and allowed), this Court cannot find that the Debtor proposed his Plan with the motive of providing a meaningful repayment of his debt to his creditor. This Plan proposes a mere pittance – certainly no substantial payments – be paid to his creditor, the victim of a malicious injury inflicted by the Debtor, an injury for which Mr. Nuttall pled guilty to criminal aggravated assault and is making small restitution payments of $130.00 per month. This Court is persuaded that Mr. Nuttall filed his Plan with the intention of paying as little as possible on the personal injury claim and receiving the benefit of a discharge of that which he does not wish to pay.

While this Court is relying in large part on the fact that Mr. Nuttall filed his Plan in order to essentially wipe out any civil liability on the debt owed to the creditor-tort victim Mr. DeHorsey, the fact that Mr. Nuttall's income and expenses were not credibly scheduled and/or explained, does not escape this Court and is part of a totality of the circumstances analysis.

The Debtor's schedules reflect suspect, at best, income and expense statements. Mr. Nuttall lives at home and has been wholly supported by his parents for his entire life. The

Debtor is employed by his father's company and, therefore, receives the entirety of his income from his father. Debtor claims he gives his parents $300 for room and board and yet also claims $250 per month for food expenses, none of which are documented. He also lists an $80 per month cell phone that is owned by his father's company, for which his father claims a business expense on his tax returns. The Debtor has $2006.29 per month as net take-home pay and spends $440 per month on a 2001 Ford Expedition, which exceeds his room and board expenses and has not been shown to be necessary for his work or otherwise for his reorganization. There is also evidence of a transfer which occurred and was not disclosed on the Debtor's Statement of Financial Affairs or elsewhere in his Schedules. Moreover, Mr. Nuttall listed tools on his Schedule B as having a value of $75, which were claimed on the Debtor's 2002 income taxes as having been purchased for $3000. Mr. Nuttall, at the hearing, admitted that the tools should have been scheduled as having a value of $500. Although such omissions and misstatements might not be significant in cases where the Debtor has scheduled numerous assets and liabilities, in this case, the omission of such information where the Debtor has claimed very few assets, is significant. There is an abundance of evidence which belie Mr. Nuttall's contention that he has been forthcoming with this Court.

III. CONCLUSION

This Court, in examining the facts of this case under a totality of the circumstances analysis, finds that Mr. Nuttall lacked good faith in filing his chapter 13 Plan. Mr. Nuttall admits that he filed this bankruptcy solely to deal with the impending state court civil judgment sought by Mr. DeHorsey. Debtor proposes to pay a pittance on the $300,000 claim, the only claim to be

dealt with under the Plan. The small distribution proposed by Mr. Nuttall –1.5% – is persuasive to this Court of the Debtor's lack of good faith in filing his Plan. This Court is also convinced that Mr. Nuttall's failure to accurately schedule his few assets or to disclose transfers of his property is further evidence that Mr. Nuttall has not been fully candid with this Court. That Mr. Nuttall has been less than honest with this Court is also supported by evidence that he has artificially increased his monthly expenses in order to justify paying a pittance on Mr. DeHorsey's claim. This Court cannot confirm the Plan proposed by Mr. Nuttall.

Lacking "cause," creditor DeHorsey's motion for relief from the automatic stay to pursue the state court civil litigation is DENIED, without prejudice. In addition, this Court finds that Mr. Nuttall did not propose his Plan in good faith under § 1325(a). Creditor DeHorsey's objection to confirmation is SUSTAINED, and confirmation is DENIED.

The creditor shall submit an Order to the Court in accordance with this Opinion.

BY THE COURT:

GLORIA M. BURNS
United States Bankruptcy Judge