UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

In re	Case No. 05-91185-A-13G
BAXTER and TAMARA GILTON,	Docket Control No. CBC-1
Debtors.	Date: December 12, 2005 Time: 2:00 p.m.

On December 12, 2005 at 2:00 m.m. the court considered the motion of Armelim and Maria DeSousa to dismiss the above-captioned chapter 13 case. The text of the final ruling is appended to the minutes of the hearing follows. That final ruling constitutes a "reasoned explanation" for the court's decision and accordingly is posted to the court's Internet site, www.caeb.uscourts.gov, in a text-searchable format as required by the E-Government Act of 2002. The official record of this ruling remains the ruling appended to the minutes of the hearing.

FINAL RULING

The motion will be denied.

The movant voluntarily dismissed the request for relief from the automatic stay at the first hearing on the motion.

The remainder of the motion argues the petition was not filed in good faith and therefore should be dismissed.

Prior to the filing of this case, the debtor and the movant allegedly entered into a contract obligating the debtor to sell real property to the movant. The movant asserts that the debtor breached this agreement, both by contracting to sell it to another person, Wendel Trinkler, and by refusing to consummate

the sale. The movant commenced an action in state court approximately one year ago to compel the debtor to sell the property to the movant. In the course of that litigation, the debtor threatened to file bankruptcy if the movant did not settle the state court action on terms favorable to the debtor.

When there was no settlement, the debtor filed this case on June 10, 2005. The movant was listed on Schedule F (general unsecured claims) and on Schedule G (executory contracts and unexpired leases). The trustee served the proposed plan together with the Notice of Commencement of Case, etc., and a proof of claim form. The trustee's proof of service reveals that the movant was served with these documents on July 5, 2005.

The Notice of Commencement of Case informed all parties in interest, including the movant, that objections to the plan had to be filed and served no later than the 14 days following the first meeting. The plan itself contained the same notice. The first meeting was concluded on July 27, 2005. The trustee's report of the first meeting reveals that an attorney for the other party, Wendel Trinkler, claiming to have an executory contract for the purchase of the subject property attended the first meeting.

Thus, assuming the movant and counsel were not earlier told of the petition, the movant received notice that the case had been filed shortly after July 5. They had 36 days notice of the deadline for objecting to the plan, well in excess of the 25 days of notice mandated by Fed. R. Bankr. P. 2002(b).

The plan, as permitted by 11 U.S.C. § 1322(b)(7), provided for rejection of the executory contract between the debtor and

the movant for the purchase of the subject property. No objection to confirmation of the plan and rejection of the executory contracts with the movant or Mr. Trinkler were raised. Consequently, on September 26, 2005, the plan was confirmed. No appeal was taken from the confirmation order.

This motion argues that the petition was filed in bad faith and should be dismissed. The factual underpinnings of the motion arose before the plan was confirmed. Indeed, the relevant facts end with the filing of the petition and the proposing of a plan that rejected the executory contract with the movant.

Specifically, the movant asserts that the petition should be dismissed because its purpose is to unnecessarily reject the executory contract for the sale and purchase of the subject property to the movant. The movant views this rejection as unnecessary because the property is encumbered by only $116,163 in debt. The movant fears that this will leave the movant with nothing and the debtor with $528,120 in remaining equity.

The first response to this is that the debtor will not be left with $528,120 in equity. The schedules also list $155,717 in unsecured debt [which is classified in Class 7 of the confirmed plan] that must be paid in full and with interest. Also, the movant and Mr. Trinkler have the right to file proofs of claim for any damages caused by the rejection of their contracts. See 11 U.S.C. § 502(g). Assuming their claims are allowed, their claims would also be in Class 7. Like the other $155,717 in unsecured claims, the claims arising from the rejection will be paid in full and with interest.

///

In order to service the secured debt encumbering the property, to pay the Class 7 claims in full, and to pay the rejections claims, if any, in full, the confirmed plan requires the debtor to sell subject property.

In short, the debtor is not simply rejecting the contracts and then walking out of bankruptcy court with the property or $528,120. It will be sold and used to pay all unsecured debts, including any debts owed to the movant and to Mr. Trinkler.

Because no deadline has been set for filing claims by those persons, such as movant and Mr. Trinkler, whose executory contracts with the debtor have been rejected, the court will set a deadline of January 12, 2006. See Fed. R. Bankr. P. 3002(c)(4). The debtor is to give notice of this deadline to all persons who are parties to rejected unexpired leases or executory contracts.

The second response to the dismissal motion is that it comes too late. While the motion attempts to draw a distinction between a motion seeking dismissal because the petition, as distinguished from the chapter 13 plan, was filed in bad faith, this distinction, in the context of the facts of this case, is irrelevant. The important distinction is whether the basis for dismissal arose prior to the confirmation of the plan. See Duplessis v. Valenti (In re Valenti), 310 B.R. 138, 151 (B.A.P. 9th Cir. 2004). Only when the debtor has concealed facts that prevent a creditor from seeking dismissal of the case prior to confirmation may a creditor seek dismissal based on preconfirmation conduct. In Valenti the Bankruptcy Appellate Panel held that "res judicata will not necessarily defeat a

future motion to convert or dismiss . . . under Section 1307(c) based on preconfirmation matters, where the debtor's own conduct (such as concealment) would amount to estoppel to bar that defense." Id.

When a debtor is not eligible for chapter 13 relief under 11 U.S.C. § 109(e) [which sets debt limits for chapter 13 debtors], or is misusing the bankruptcy process, creditors must immediately seek dismissal. The court will not confirm plans in such cases. But, if a creditor, despite notice of the bankruptcy case and knowledge of the relevant facts warranting dismissal, waits until after a plan has been confirmed to seek dismissal, they have waited too long.

Eisen v. Curry (In re Eisen), 14 F.3d 469 (9th Cir. 1994), is instructive. In Eisen, a debtor entered into a contract to sell real property to a third party. The debtor reneged and the third party filed a state court action for specific performance. On the eve of trial, the debtor filed his first chapter 13 petition. In that bankruptcy case, the debtor falsely claimed he had no interest in the property and he attempted to reject his contract with the third party. The bankruptcy court concluded the plan had been proposed in bad faith and dismissed the petition. Less than two months later, after the state court trial had been dismissed, the debtor filed another chapter 13 petition and again attempted to reject the contract. The bankruptcy court found that the petition had been filed in bad faith and dismissed it. In affirming the dismissal of the second case, the Ninth Circuit held:

///

> *"A Chapter 13 petition filed in bad faith may be dismissed 'for cause' pursuant to 11 U.S.C. § 1307(c). In re Powers, 135 B.R. 980, 991 (Bankr. C.D. Cal.1991); In re Love, 957 F.2d 1350, 1354 (7th Cir. 1992); In re Gier, 986 F.2d 1326, 1329 (10th Cir. 1993). To determine if a petition has been filed in bad faith courts are guided by the standards used to evaluate whether a plan has been proposed in bad faith. 11 U.S.C. § 1325(a)(3); Powers, 135 B.R. at 994; Gier, 986 F.2d at 1329."*

See also U.S. v. Edmonston, 99 B.R. 995, 998-99 (E.D. Cal. 1989) (post-confirmation challenge to Chapter 13 eligibility "is precluded by the doctrine of res judicata unless there is a showing of fraud by the debtor.").

This court does not cite Eisen for the proposition that a motion to dismiss a chapter 13 petition must be prosecuted before for a plan is confirmed. The opinion in Eisen is silent on this issue. The decision in Valenti disposes of that issue. Rather, Eisen is important to this case because it holds that a petition filed in bad faith necessarily means that any plan is proposed in bad faith. So, when a plan is confirmed, something that can only occur if the plan has been proposed in good faith, it follows that the petition must have been filed in good faith. Whenever a creditor wishes to dispute a debtor's good faith in filing a petition or proposing a plan based on the debtor's preconfirmation conduct, it is incumbent on that creditor to raise the issue before the plan is confirmed, at least when the debtor's preconfirmation conduct has not been concealed. Otherwise, if the assertion of bad faith is not raised prior to confirmation, the confirmation of the plan precludes the creditor from raising the issue.

///

In this case, the movant was given notice of the filing of the petition and the proposed plan. No challenge was made to the debtor's eligibility or to the confirmability of the plan. The plan was confirmed. There is no evidence of any concealment that precluded or impeded the movant in raising timely objections. The motion to dismiss comes too late.

The movant's reliance on 11 U.S.C. § 305(a)(1) as well as 11 U.S.C. § 1307(c) does not change the result. Section 305 give the court the power to abstain from taking jurisdiction over a bankruptcy petition. It is usually invoked when the debtor and the creditors have agreed to an out-of-court workout. Whatever the basis, a dismissal under section 305(a)(1) must be in the interests of both the debtor and the creditors. See e.g., In re Schur Management Co., Ltd., 323 B.R. 123, 129 (Bankr. S.D.N.Y. 2005). It is not a substitute for a motion under section 1307 and the other dismissal provisions applicable in the chapters 7, 11, and 12. Id. The issue of bad faith must be addressed under section 1307(c). Cf. In re Schur Management Co., Ltd., 323 B.R. at 129, n. 5.