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3 UNITED STATES BANKRUPTCY COURT
4 EASTERN DISTRICT OF CALIFORNIA
5 MODESTO DIVISION
6

7)
8 In re) Case No. 07-90189-A-13G
9 JOSEPH ABONI,) Docket Control No. None
10 Debtor.) Date: August 13, 2007
11) Time: 2:00 p.m.
12)

12 On August 13, 2007 at 2:00 p.m., the court considered the
13 debtor's motion for reconsideration of orders denying
14 confirmation of his chapter 13 plan and terminating the automatic
15 stay objection to confirmation of the Hackett 2004 Revocable
16 Trusts. The court's ruling on this motion is appended to the
17 minutes of the hearing. Because that ruling constitutes a
18 "reasoned explanation" of the court's decision, it is also posted
19 on the court's Internet site, www.caeb.uscourts.gov, in a text-
20 searchable format as required by the E-Government Act of 2002.
21 The official record, however, remains the ruling appended to the
22 minutes of the hearing.

23 **FINAL RULING**

24 The motion will be denied.

25 Although somewhat unclear from the text of the motion, the
26 debtor, without the assistance of his attorney of record, asks
27 the court to reconsider the denial of the confirmation of his
28 chapter 11 plan as well as its May 8, 2007 and June 12, 2007
orders (which were entered on the docket on May 9 and June 13,
respectively) in favor of Julie Oak, etc., et al, (hereafter,
"Oak Group") providing adequate protection and ultimately
terminating the automatic stay. The hearing on the motion to
confirm that plan took place on June 11 and an order denying

1 confirmation was entered on the docket on June 15, 2007.
2 Counting time pursuant to Fed. R. Bankr. P. 9006(a), this motion
3 for reconsideration was filed within 10 days of entry of the June
4 12 order terminating the automatic stay as well as the June 14
5 order denying confirmation.

6 The motion asserts that "pertinent, new material facts as
7 established by documentary proof support" confirming the plan.
8 However, no evidence, or even allegations, are included in the
9 motion. At the hearing, the debtor basically argued that because
10 his plan payments were current on June 11, 2007, the date of the
11 hearing on the confirmation of the plan, the court should have
12 concluded that his plan was feasible as required by 11 U.S.C. §
13 1325(a)(6) and confirmed it.

14 Prior to the June 11 hearing, the court issued a tentative
15 ruling. That tentative ruling ultimately became the court's
16 final ruling and it is appended to the minutes of the hearing.
17 The debtor was represented by his attorney of record at the
18 hearing. That ruling follows:

19 The motion will be denied and the objections will
20 be sustained in part.

21 The debtor failed to timely provide the trustee
22 with a copy of his 2006 income tax return. 11 U.S.C. §
23 521(e)(2)(B) & (C) requires the court to dismiss a
24 petition if an individual chapter 7 or 13 debtor fails
25 to provide to the case trustee a copy of the debtor's
26 federal income tax return for the most recent tax year
27 ending before the filing of the petition. This return
28 must be produced seven days prior to the date first set
for the meeting of creditors. The failure to provide
the return to the trustee justifies dismissal and
denial of confirmation. In addition to the requirement
of section 521(e)(2) that the petition be dismissed, an
uncodified provision of the Bankruptcy Abuse Prevention
and Consumer Protection Act of 2005 found at section
1228(a) of BAPCPA provides that in chapter 11 and 13
cases the court shall not confirm a plan of an

1 individual debtor unless requested tax documents have
2 been turned over. This has not been done.

3 After initially failing to provide the trustee
4 with a copy of debtor's 2006 profit and loss statement
5 for his business, this was provided. Unfortunately for
6 the debtor, it shows that the debtor has had gross
7 receipts of \$14,000 with expenses of \$9,504. Further,
8 no expenses were reported for advertising, fuel, the
9 debtor's draw or wage, sales taxes, or self-employment
10 taxes. Thus, the debtor's recent financial track
11 record, as reflected in the statement as well as his
12 response to question #1 on the Statement of Financial
13 Affairs, demonstrates that his business income has been
14 minimal. The debtor has not come forward with any
15 convincing evidence that this state of affairs is
16 likely to improve to a point that the plan will be
17 feasible. The debtor has not met his burden of proving
18 that the plan is feasible.

11 It was explained to the court at the hearing on the
12 reconsideration motion that, although the debtor did not produce
13 his 2006 income tax return for the trustee, it was not produced
14 because the return has not been filed with the IRS. The debtor
15 obtained an extension to file it and that extension has not yet
16 expired. Thus, had the court denied confirmation solely because
17 the 2006 return had not been produced, it would reconsider its
18 refusal to confirm the plan. But, as indicated in the quoted
19 final ruling, and made clearer below, it was not the sole basis
20 for denial of confirmation.

21 The court denied confirmation primarily because it concluded
22 that the proposed plan was not feasible. The court came to this
23 conclusion even though the debtor made plan payments in March,
24 April, and May 2006. At that time, these payments represented
25 all of the plan payments the debtor was required to make to the
26 trustee. Nonetheless, the court found and concluded that the
27 plan was not feasible because the debtor's 2006 profit and loss
28 statement showed that he had total business income (the debtor is

1 self-employed) of \$14,000 and business expenses of \$9,504. This
2 left the debtor with total net income in 2006 of approximately
3 \$4,500.

4 However, there was, and is, reason to suspect that the
5 debtor's 2006 net income was actually less than \$4,500. For one
6 thing, and as noted by the trustee at the June 11 hearing on
7 confirmation, the debtor's 2006 profit and loss statement
8 included no expenses for advertising, fuel, the debtor's draw or
9 wages, sales taxes, or self-employment taxes. Such expenses were
10 likely given that the debtor presumably was able to support
11 himself during 2006, even if only at a minimal level, and given
12 that he was likely to incur such expenses as advertising, sales
13 taxes, and fuel costs in connection with his business. The
14 debtor operates a used car lot.

15 Also, the debtor's low business income is corroborated by
16 admissions in response to Question 1 on the Statement of
17 Financial Affairs. According to the debtor's response, the
18 debtor had "minimal" gross business income for the portion of
19 2007 falling before the February 26, 2007 filing of the petition,
20 \$11,600 for 2006, and \$25,000 for 2005.

21 Contrast this to what the debtor was projecting for the
22 post-petition period. According to Schedule I, the debtor
23 believed he would have gross income from his business of \$5,000
24 per month. This would be \$60,000 a year, not quite two and one-
25 half time more than the debtor's gross income in 2005 and more
26 than five times his gross income in 2006. The court received no
27 evidence, either in connection with confirmation of the plan, the
28 Oak Group's motion for relief from the automatic stay, or the

1 motion for reconsideration that explained how the debtor might be
2 able to so significantly and dramatically increase his business
3 income.

4 And, to perform this plan, the debtor's finances would have
5 to improve very dramatically. His proposed plan required him to
6 pay an average monthly plan payment of \$3,041.50 over a five-year
7 plan duration. This is an average annual plan payment of
8 \$36,498. When one considers that for the prior two years, the
9 debtor's highest gross annual income was \$25,000, and in 2006 his
10 net income was approximately \$4,500, his ability to net the
11 \$36,498 necessary to make plan payments is very much in doubt.

12 Given the disparity between the debtor's recent financial
13 performance and his projection of future income, and given the
14 trustee's objection to the debtor's ability to perform the plan,
15 it was incumbent on the debtor to prove to the court that his
16 plan was feasible. See Meyer v. Hill (In re Hill), 268 B.R. 548,
17 552 (B.A.P. 9th Cir. 2001). He did not carry this burden and
18 convince the court that the plan was feasible. While the court
19 understood that the debtor was able to make three consecutive
20 monthly plan payments, this did not persuasively establish the
21 plan's feasibility. Most debtors are able to stretch their
22 financial resources and make their plan payments during the short
23 duration (usually 2 to 4 months) between the filing of the
24 petition and confirmation of the plan. However, as soon as a
25 plan is confirmed, the incidence of default can be quite high.
26 In the court's experience, at least 50% of all cases are
27 dismissed because the debtor is unable to maintain regular plan
28 payments.

1 There is another circumstance that reinforces the court's
2 concern regarding the debtor's ability to consummate a plan.
3 This is not the first petition filed by the debtor. On September
4 21, 2006, he filed an earlier chapter 13 petition in this court,
5 Case No. 06-90552. It was dismissed on February 23, 2007 because
6 the debtor had failed to make plan payments totaling in excess of
7 \$6,500. The debtor's second petition was filed three days later.

8 Turning to the order in favor of the Oak Group and
9 terminating the automatic stay, the court also concludes that
10 there is no basis for reconsideration of that order. At a
11 hearing on April 30, after noting that the debtor had filed a
12 previous chapter 13 petition that had been dismissed because of
13 the failure to make plan payments, the court found that "the main
14 issue is the debtor's ability to confirm a feasible plan." See
15 Minutes of April 30, 2007 hearing. Because the hearing on
16 confirmation of the plan was set May 29, the court concluded:

17 It is the debtor's burden to establish at that
18 hearing that his plan is feasible and otherwise
19 complies with 11 U.S.C. §§ 1322 and 1325. Therefore,
20 as a measure of adequate protection of the movant, the
21 court will terminate the automatic stay if the debtor
22 fails to obtain a ruling from the court on May 29 that
23 the plan will be confirmed or if the debtor fails to
24 maintain plan payments pending confirmation of the
25 plan. In either event, the movant may request ex parte
26 termination of the stay provided the request is
27 supported by evidence that one of these two conditions
28 has been satisfied.

24 Id.

25 The order providing this adequate protection was filed on
26 May 8, 2007 and entered on the docket on May 9, 2007.

27 At the May 29 confirmation hearing, the court continued the
28 confirmation hearing, and also extended the above deadline for

1 termination of the automatic stay, to June 11. This was done
2 because the debtor had not timely provided his 2006 profit and
3 loss statement to the trustee. The trustee obtained it at or
4 shortly before the May 29 hearing and requested additional time
5 to review it. Unfortunately, as explained above, the 2006 profit
6 and loss statement did not support the plan's feasibility and so
7 at the June 11 hearing the court issued a ruling that the plan
8 would not be confirmed.

9 Consistent with this ruling and the May 8 adequate
10 protection order, the Oak Group filed an ex parte request for an
11 order terminating the automatic stay. That order was filed on
12 June 12 and entered on the docket on June 13. That order did not
13 waive the 10-day stay of Fed. R. Bankr. P. 4001(a)(3). As a
14 result, the Oak Group could not act in reliance on the order for
15 10 days. A foreclosure could come no earlier than June 23.
16 According to the debtor, the Oak Group caused the real property
17 securing its claim to be foreclosed upon on June 28, more than 10
18 days after entry of the order. Its foreclosure, then, was not
19 premature.

20 The debtor believes that this foreclosure was improper
21 because, during the 10-day period, he filed a motion for
22 reconsideration. However, the mere filing of a motion for
23 reconsideration does not stay the effect of, or the enforcement
24 of, an order terminating the automatic stay beyond the 10-day
25 stay imposed by Rule 4001(a)(3). A further stay of the order had
26 to be imposed by the court. The court was not asked to issue
27 such a stay and it issued no such stay. Hence, the Oak Group was
28 entirely within its rights to proceed to foreclosure on June 28.

1 The court finds no basis for reconsidering its decision to
2 terminate the automatic stay. Because it found and concluded
3 that the debtor did not have the ability to propose, confirm, and
4 consummate a chapter 13 plan, there was, and is, cause to
5 terminate the automatic stay in favor of the Oak Group. If the
6 debtor could not propose a feasible plan, he would be unable to
7 maintain the regular monthly installment payment of \$550 to the
8 Oak Group and cure the pre-petition arrearage of approximately
9 \$3,850 owed to the Oak Group while making plan payments to the
10 trustee. This was good cause to terminate the automatic stay.
11 See 11 U.S.C. § 362(d)(1).

12 The court hastens to add, however, that even if there was
13 some reason to reconsider the order terminating the automatic
14 stay, because the foreclosure has occurred, reconsideration of
15 its prior orders and confirming a plan would have no impact on
16 the completed foreclosure.

17 There is nothing in the motion for reconsideration that
18 causes the court to second guess its findings regarding the
19 debtor's ability to perform a chapter 13 plan or the existence of
20 cause for terminating the automatic stay. The debtor did not,
21 and has not, convinced the court regarding the feasibility of his
22 plan and his ability to reorganize the debt formerly owed to the
23 Oak Group.