

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI**

In re:)
)
MARVIN LEABERT GREEN and) Case No. 09-44481-13
MARILYN KAY GREEN,)
)
Debtors.)

MEMORANDUM ORDER

This matter comes before the Court on the Chapter 13 trustee’s objection to confirmation of the Debtors’ Chapter 13 plan. The Chapter 13 trustee (“Trustee”) contends that the plan has not been proposed in good faith as required by 11 U.S.C. § 1325(a)(3) because the Debtors’ schedules show a monthly net income of \$1,468.94, yet the Debtors propose paying only \$115 to fund their plan. The Debtors respond that the apparent surplus on their schedules is attributable entirely to benefits they receive under the Social Security Act (“Social Security benefits”), and that income should not be considered in evaluating good faith because Congress specifically excluded Social Security benefits from the amount debtors must pay to unsecured creditors under 11 U.S.C. § 1325(b)(1)(B). The facts in this matter are undisputed. Thus, the sole question presented by the Trustee’s objection is: “Should income specifically excluded from consideration under § 1325(b)(1)(B), *i.e.*, Social Security benefits, be considered in the assessment of good faith under § 1325(a)(3)?”

For the reasons stated below, the Court concludes that Social Security benefits may be considered in determining whether a debtor’s Chapter 13 plan has been proposed in good faith, but that a debtor’s failure to devote all or part of that income to the plan, standing alone, is insufficient to establish a lack of good faith. In other words, the Court declines to adopt a *per se* rule that a debtor’s failure to devote Social Security benefits toward a Chapter 13 plan constitutes bad faith under § 1325(a)(3). In this case, the Trustee has not offered any other evidence that the Debtors’ plan has been filed in bad faith. Therefore, the Court finds the Debtors’ Chapter 13 plan has been proposed in good faith and will overrule the Trustee’s objection.

FACTUAL BACKGROUND

The Debtors filed for protection under Chapter 13 of the Bankruptcy Code on September 15, 2009. According to the Debtors' Schedule I (Current Income of Individual Debtors), the Debtors have gross monthly income of \$7,643.67 – \$3,300 from Mr. Green's business, a vending machine sales route; \$1,830.67 from Ms. Green's employment as a sales associate at a department store (Dillard's); and \$2,513 in combined Social Security benefits. The Debtors have deducted \$6,174 in expenses, \$2,146.83 of which relate to the operation of Mr. Green's business. Thus, the monthly net income reported on the Debtors' Schedule J is \$1,468.94. If the Debtors' Social Security benefits are excluded from this calculation, however, the Debtors' schedules would show a monthly deficit of \$1,044.06. The Debtors' Form B22C (Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income), which automatically excludes Social Security benefits, shows that the Debtors have no disposable income (-\$1,106.18, to be exact).

The Debtors' Chapter 13 plan does not provide for any distribution to non-priority, unsecured creditors. The proposed \$115 monthly plan payment goes toward the payment of only the Debtors' attorney fees and two priority creditors (for tax claims).

The Court held a hearing on the Trustee's objection to confirmation on January 11, 2010, at which time the parties offered argument in support of their respective positions. Despite the Court's invitation, no evidence regarding the Debtors' good or bad faith (other than the undisputed facts recited above) was adduced. The Court took the matter under advisement at the conclusion of the hearing.

DISCUSSION

The few courts squarely addressing the issue of whether Social Security benefits should be considered in the assessment of good faith under § 1325(a)(3) are divided in their conclusions. One court has adamantly refused to consider Social Security benefits under § 1325(a)(3);¹ another has declined to consider them, but only because it felt constrained by the Bankruptcy Code not to do so;² and two courts have held that a debtor's retention of Social Security benefits to the detriment of

¹ *In re Barfknecht*, 378 B.R. 154 (Bankr. W.D. Tex. 2007).

² *In re Rotunda*, 349 B.R. 324 (Bankr. N.D. N.Y. 2006).

creditors may be an indicium of bad faith.³ The crux of the debate is whether Congress's explicit instruction in 11 U.S.C. §101(10A) excluding Social Security benefits from the definition of Current Monthly Income ("CMI") and, by implication, from the calculation of a Chapter 13 debtor's "projected disposable income" under § 1325(b)(1)(B), should be read as a general prohibition against considering such payments in the evaluation of a debtor's Chapter 13 plan or whether it applies only to provisions directly implicating a debtor's CMI, leaving courts free to consider Social Security benefits for other purposes, such as good faith in the Chapter 13 context, or abuse in the Chapter 7 context.⁴

In opposing the consideration of Social Security benefits under § 1325(a), the court in *Barfknecht* took the position that debtors should not be penalized under § 1325(a) for what they are specifically permitted to do under § 1325(b)(1)(B), *i.e.*, retain Social Security benefits.

[I]t strikes this court at last as an odd reading of the Code indeed to conclude that a debtor's *following* the Code, without more, could constitute abuse of the bankruptcy process. That sort of over-reading of the good faith standard would allow a court, in the name of good faith, to ignore or overrule whole sections of the Code, an irresponsible approach to statutory construction if there ever was one.⁵

This Court is not as concerned as the *Barfknecht* court by the apparent contradiction between the exclusion of Social Security benefits in the calculation of projected disposable income under § 1325(b) and a consideration of those benefits for purposes of § 1325(a). It is not unusual (especially since the enactment of BAPCPA) for the Bankruptcy Code to require the application of ostensibly conflicting standards under different Code sections. For example, the "means test" of § 707(b)(2) specifically permits a debtor to deduct payments on secured debt from the debtor's CMI to calculate his disposable income, but under § 707(b)(3) a court is free to examine, and ultimately discount or disregard, expenditures on debt secured by luxury items or an extravagant home.⁶

³ *In re Allawas*, 2008 WL 6069662, *5-6 (Bankr. D. S.C. 2008); *In re Upton*, 363 B.R. 528, 536 (Bankr. S.D. Ohio 2007).

⁴ *See In re Booker*, 399 B.R. 662 (Bankr. W.D. Mo. 2009) discussed in greater detail below.

⁵ *In re Barfknecht*, 378 B.R. at 165 (emphasis in original).

⁶ *See, e.g., In re Honkomp*, 416 B.R. 647, 650 (Bankr. N.D. Iowa 2009) (discussing cases in which abuse was found under § 707(b)(3) because debtors were making large secured debt payments on luxury items).

Rather, the Court favors the approach taken in *Allawas* and *Upton*, wherein the good faith requirement of § 1325(a)(3) was found to operate independently from the disposable income requirements of §1325(b), unconstrained by § 101(10A)'s exclusion of Social Security benefits.⁷ Moreover, this approach is consistent with previous statements of this Court (Federman, J.) on this very issue, albeit in dicta,⁸ and the treatment of Social Security benefits under § 707(b)(3)(B) taken by this Court (Dow, J.) in the recent case of *In re Booker*.⁹

In *Ward*, as in this case, the debtor proposed to retain a significant amount of her Social Security benefits instead of paying them into a Chapter 13 plan. The Trustee in *Ward*, however, objected to confirmation under § 1325(b)(1)(B), not § 1325(a)(3). The Court overruled the Trustee's objection based on § 101(10A)'s specific exclusion of Social Security benefits from the calculation of projected disposable income, but went on to note that the debtor was still required to propose a plan which met the § 1325(a)(3) good faith requirement. "The question thus remains as to whether a debtor taking advantage of a BAPCPA benefit expressly authorized by Congress might still be unfairly manipulating the Code."¹⁰ Although the Court in *Ward* did not have an opportunity to rule on that question, inasmuch as the trustee in that case did not object to the plan on good faith grounds, the Court in this case does, and it will follow Judge Federman's suggestion that a debtor taking advantage of a BAPCPA benefit, *i.e.*, the exclusion of Social Security benefits from the calculation of projected disposable income, might still be unfairly manipulating the Code. This is the same conclusion Judge Dow arrived at in *In re Booker* in the Chapter 7 context.

In *Booker*, the United States Trustee moved to dismiss the case under § 707(b)(3)(A) and (B), in part on the grounds that the debtors had the ability to fund a Chapter 13 plan if their Social Security benefits were taken into account. Like the Debtors here, the debtor in *Booker* argued that Social Security benefits are excluded from consideration in determinations of abuse under §

⁷ *In re Allawas*, 2008 WL 6069662 at *5-6; *In re Upton*, 363 B.R. at 536.

⁸ *In re Ward*, 359 B.R. 741, 745 (Bankr. W.D. Mo. 2007).

⁹ 399 B.R. 662, (Bankr. W.D. Mo. 2009).

¹⁰ *Id.* at 745.

707(b)(2) (again, via § 101(10A)) so they should be off limits for purposes of § 707(b)(3)(A) and (B) as well. Judge Dow disagreed.

Under § 707(b)(3)(A), a Chapter 7 case may be dismissed if a court determines that the case was filed in bad faith. Under § 707(b)(3)(B), a case may be dismissed if the “totality of circumstances” of the debtor’s financial situation demonstrates abuse. Judge Dow concluded that the prohibition against considering Social Security benefits under § 707(b)(2) does not preclude a court from considering a debtor’s ability to pay, including Social Security benefits, under the § 707(b)(3)(B) totality of circumstances test. Although the analogy to § 1325(a)(3) is imperfect since § 707(b)(3) *separates* the good faith and totality of circumstance tests (subsections A and B, respectively), whereas § 1325(a)(3) employs a good faith test that *incorporates* a totality of circumstances analysis, the holding in *Booker* is still relevant here – § 101(10A)’s exclusion of Social Security benefits from CMI is limited to Bankruptcy Code provisions that specifically implicate CMI, *i.e.*, § 707(b)(2) and 1325(b)(1)(B).

Having determined that it is permissible to consider Social Security benefits under § 1325(a)(3), the Court must now consider the significance of the Debtors’ proposal to retain those benefits. On that point, the Court takes direction from the prevailing standard for good faith in the Eighth Circuit.

Prior to the addition in 1984 of a new section 1325(b),¹¹ which required a debtor facing an objection to confirmation to devote all of his disposable income for three years toward a Chapter 13 plan, the Eighth Circuit Court of Appeals enumerated eleven factors to consider in determining whether a debtor’s plan was proposed in good faith.¹² Notably, the first factor to be considered was

¹¹ Amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984.

¹² *In re Estus*, 695 F.2d 311, 316 (8th Cir. 1982). These factors are: (1) the amount of the proposed payments and the amount of the debtor's surplus; (2) the debtor's employment history, ability to earn and likelihood of future increases in income; (3) the probable or expected duration of the plan; (4) the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court; (5) the extent of preferential treatment between classes of creditors; (6) the extent to which secured claims are modified; (7) the type of debt sought to be discharged and whether any such debt is nondischargeable in Chapter 7; (8) the existence of special circumstances such as inordinate medical expenses; (9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act; (10) the motivation and sincerity of the debtor in seeking Chapter 13 relief; and (11) the burden which the plan's administration would place upon the trustee.

“the amount of the proposed payments and the amount of the debtor's surplus.”¹³ In *Education Assistance Corp. v. Zellner*,¹⁴ however, the Eighth Circuit concluded that the revised § 1325(b)'s “ability to pay” criteria subsumed many of the *Estus* factors.¹⁵ “Thus, our inquiry into whether the plan ‘constitutes an abuse of the provisions, purpose or spirit of Chapter 13’ has a more narrow focus. The bankruptcy court must look at factors such as whether the debtor has stated his debts and expenses accurately; whether he has made any fraudulent representation to mislead the bankruptcy court; or whether he has unfairly manipulated the Bankruptcy Code.”¹⁶ Consideration of a debtor’s finances as part of the good faith inquiry has not been abandoned,¹⁷ but the conclusion is inescapable that a debtor’s ability to pay is no longer a central or predominant factor in determining good faith under § 1325(a)(3). Therefore, the Court concludes that while it may be proper to consider the retention of Social Security benefits under § 1325(a), the retention of those benefits cannot serve as the sole basis for a finding of bad faith.

In this case, the only evidence offered by the Trustee purporting to show that the Debtors’ plan has not been proposed in good faith is that the Debtors have not committed all of the income from their Social Security benefits to make payments under the plan. That evidence, standing alone, is insufficient to warrant a finding of bad faith under § 1325(a)(3).

CONCLUSION

For the reasons stated above, the Trustee’s objection to confirmation of the Debtors’ Chapter 13 plan will be overruled.

SO ORDERED this 1st day of February 2010.

/s/ Jerry W. Venters _____

¹³ *Id.*

¹⁴ 827 F.2d 1222 (8th Cir. 1987).

¹⁵ *Id.* at 1226-27.

¹⁶ *Id.* (quoting *In re Estus*, 695 F.2d at 316).

¹⁷ See *In re Montry*, 393 B.R. 695 (Bankr. W.D. Mo.2008) (“BAPCPA does not direct a court to abandon viewing the totality of the circumstances, nor impose a requirement that a court blind itself to the full picture of the debtor's finances.... Satisfaction of § 1325(b) does not displace the good faith analysis as a prerequisite to confirmation.”).

HONORABLE JERRY W. VENTERS
UNITED STATES BANKRUPTCY JUDGE

A copy of the foregoing was mailed
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