

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO**

In re:)	
)	
RANDALL CLARENCE CROMER,)	Bankruptcy Case No. 03-23512-HRT
SSN: 000-00-5578)	Chapter 13
)	
Debtor.)	
_____)	

ORDER REGARDING CONFIRMATION OF CHAPTER 13 PLAN

THIS MATTER is before the Court on the Debtor's Motion to Confirm Amended Chapter 13 Plan (Document #48) and the Objection filed by creditor Rocky Mountain Ready Mix Concrete, Inc. ("Rocky Mountain").

The factual background is as follows:

1. On or about January 15, 2003, the Debtor filed a chapter 7 case in this Court as Case No. 03-10741-HRT
2. Rocky Mountain was listed as a creditor in the amount of \$43,252.52, having supplied materials to the Debtor for use in various concrete construction projects.
3. Rocky Mountain timely filed an adversary complaint, Adversary Proceeding No. 03-1177 HRT, alleging that the Debtor's obligations to it were non-dischargeable pursuant to 11 U.S.C. § 523(a)(4) and (6).
4. The Debtor received a chapter 7 discharge on May 21, 2003.
5. The Debtor failed to answer the complaint and the Court entered a default on June 19, 2003.
6. An evidentiary hearing was held on July 15, 2003 to consider Rocky Mountain's Motion for Entry of a Default Judgment and to establish damages. The Debtor did not respond or appear.
7. On July 16, 2003, the Court awarded Rocky Mountain a non-dischargeable, Default Judgment of \$135,767.17 (representing treble damages as allowed under applicable Colorado statutes), plus costs of \$188, attorney's fees of \$1,217, pre-judgment contract interest of \$3,774.87 and post-judgment interest at the applicable federal rate.

8. Unknown to the Court and to Rocky Mountain at the time of the Default Judgment hearing, the Debtor filed this chapter 13 case, No. 03-23512-HRT, on July 11, 2003.

9. The Debtor has moved to vacate the Default Judgment as a violation of the automatic stay in this chapter 13 case. This Court has stayed that request pending the results of this hearing.

10. The Debtor's chapter 13 case schedules list his primary obligations as: 1) priority tax liabilities of \$48,296: the Internal Revenue Service being owed \$44,040 and the Colorado Department of Revenue, the rest; and, 2) unsecured claims totaling \$142,930.64: Rocky Mountain's judgment of \$140,947.04 and a bill of \$1,983.60, apparently for use of a dump truck. The Debtor later amended its Schedule D to add Qwest as a judgment lien holder whose listed debt of \$6,091 was discharged in the chapter 7 case.

11. On November 5, 2003, the Court entered its Order granting relief from stay to Washington Mutual Bank, concerning the Debtor's residence at 3137 Cimarron Place, Superior, Colorado, to allow the Bank to foreclose or otherwise exercise its rights and remedies under state law. The Debtor did not contest this Motion for Relief.

12. On January 22, 2004, the Debtor filed his Amended Chapter 13 Plan (the "Plan") providing for sixty (60) monthly payments, consisting of \$4,625 for months 1-6 (approximately \$771 per month) and of \$965.00 per month for months 7-60. The Plan will pay the priority tax liabilities in full and provide, in the 60th month, a pro-rata payment of \$458.55 to unsecured creditors. At the time of the hearing, the Debtor was down one Plan payment to the chapter 13 Trustee.

Rocky Mountain asserts that the Debtor's chapter 13 Plan has been filed in bad faith and is not feasible. The Debtor believes that the Plan meets the requirements for confirmation. At hearing, the Debtor's counsel admitted that, given the previous chapter 7 case and the current chapter 13, this is a "chapter 20" case situation, such as *In re Young*, 237 F.3d 1168 (10th Cir. 2001). The Debtor asserts that, in *Young*, the Tenth Circuit approved the confirmation of a chapter 13 plan under circumstances similar to this case. The Debtor also stipulated that Rocky Mountain's Judgment would be non-dischargeable in a chapter 7 and stated that the payment of priority taxes is the main reason for filing the chapter 13.

DISCUSSION

As an initial matter, by separate order in the adversary proceeding, the Court will vacate the Default Judgment, dated July 16, 2003, in favor of Rocky Mountain as having been entered in violation of the automatic stay created upon the filing of this chapter 13 case. The Debtor remains in default in Adversary Proceeding No. 03-1177 HRT for his failure to respond or defend and final disposition of that matter will continue to be held in abeyance. The Court will also defer the issue of any sanctions, which may be imposed in that proceeding, for the Debtor's failure to advise the Court and/or Rocky Mountain of his chapter 13 filing prior to the Default

Judgment hearing. Such matter is not before the Court, no appropriate motion having been filed, at this time.

As to the Debtor's Motion to Confirm his Amended Chapter 13 Plan, the Debtor has the burden of proof concerning the elements of 11 U.S.C. § 1325(a). *In re Anderson*, 173 B.R. 226, 229 (Bankr. D. Colo. 1993); *Lincoln v. Cherry Creek Homeowners Ass'n (In re Lincoln)*, 30 B.R. 905, 910 (Bankr. D. Colo. 1983). Those elements may be summarized as follows:

1. The Plan complies with the provisions of chapter 13 and Title 11;
2. Any required statutory fee or charge has been paid;
3. The Plan is proposed in good faith;
4. The Plan pays unsecured creditors more than they would get in chapter 7, the "best interests test";
5. Using one of two listed alternatives, secured creditors are treated fairly and equitably in the Plan; and
6. The Debtor can make all the payments under and comply with the Plan, the "feasibility test".

Since Rocky Mountain, an allowed unsecured creditor, has objected, the Court may not approve the Plan, unless the requirements of § 1325 (b) are also met. 11 U.S.C. § 1325(b)(1); *Anes v. DeHart (In re Anes)*, 195 F.3d 177, 180 (3rd Cir. 1999); *Commercial Credit Corp. v. Killough (In re Killough)*, 900 F.2d 61, 64 (5th Cir. 1990); *In re Packham*, 126 B.R. 603, 607 (Bankr. D. Utah 1991). The Plan clearly does not meet the requirements of § 1325(b)(1)(A), since the value to be distributed under the Plan on account of Rocky Mountain's claim is much less than the amount of its unsecured claim. Therefore, the Court finds that the provisions of § 1325(b) applicable here concern whether the Plan provides that all of the Debtor's projected disposable income for the first three years will be applied to payments under the Plan, pursuant to § 1325(b)(1)(B).

"[D]isposable income" means income which is received by the debtor and which is not reasonably necessary to be expended -- (A) for the maintenance or support of the debtor or a dependent of the debtor, including charitable contributions . . . ; or (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

11 U.S.C. § 1325(b)(2).

By far, the most important criterion for the confirmation of a chapter 13 plan in terms of promoting the success of chapter 13 proceedings is subsection 1325 (a)(6)'s requirement that the court determine whether the chapter 13 debtor will be able to make all payments under the plan and comply with all other provisions under the plan.

8 COLLIER ON BANKRUPTCY ¶1325.07 at 1325-42 (Laurence P. King ed., 15th ed. rev. 2003).

The Debtor has been a self-employed concrete construction contractor since 1989. He is currently providing services to Affordable Garages, LLC.

At the hearing, the Debtor submitted copies of his federal tax returns (Form 1040) for the years 2001 and 2002. He stated he expected that 2003 will result in about the same net income and tax liabilities as 2002 – \$44,400 and \$8,850 respectively. No Colorado state tax returns were offered for the Court's consideration. Since a tax return for 2003 has not yet been filed, the Debtor provided a 2003 Form 1099 - Miscellaneous Income issued by Affordable Garages, LLC, showing gross revenues paid to him of \$149,139. Except for the Debtor's chapter 13 Schedule I and Amended Schedule J, little or no information concerning expenses incurred for the 2003 operations of the Debtor's business was submitted.

The Debtor's Schedule I shows a monthly gross income of \$3,700 and, after accounting for payroll and Social Security taxes of \$738, results in a monthly net income of \$2,962. The Debtor's Amended Schedule J shows total monthly expenses of \$1,997, allowing \$965 per month to be paid into the proposed 60 month plan.

The Court finds that the Debtor's support for the Plan's feasibility to be rather thin, at best. Besides the 2001 and 2002 tax returns and Debtor's Schedule I and J, the only evidence of the Debtor's income and expenses is the Debtor's testimony. He stated that an accountant prepared his tax returns and that he maintains books and records for his business. However, such records were not provided to the Court, and so, no copies of these records or evidence by way of receipts, cancelled checks or other supporting documentation appear in evidence. Quite simply, the Debtor's testimony is largely uncorroborated and does not provide the Court with sufficient detail. Therefore, the Court is placed at a severe disadvantage in attempting to determine: 1) whether the Debtor will be able to make all payments under and comply with all provisions of the Plan as required by § 1325(a)(6); and 2) whether the Plan provides that all of the Debtor's projected disposable income has been devoted to the Plan, after accounting for funds necessary for the continuation, preservation and operation of the Debtor's business as required by § 1325(b)(1) and (2).

Rocky Mountain's cross-examination of the Debtor raised many concerns regarding the completeness, accuracy and credibility of the Debtor's proposed Plan budget, which also cast substantial doubt on the Debtor's ability to meet the plan confirmation requirements of §§ 1325(a)(6) and 1325(b):

1. The Debtor testified that he did not make mortgage payments to Washington Mutual on his residence of \$2,356 per month for the months of March through November, 2003, when that creditor received relief from the stay. It appears he lived in the house rent-free until January, 2004, when the house was sold. The Debtor received no money from the sale. But, by not making any mortgage payments for that nine to ten month period, the Court estimates that a total of about \$21,000 to \$24,000 of cash income designated in the Debtor's initial budget for that purpose was possibly available for other uses.

Upon the sale of the house, the Debtor filed, on or about January 22, 2004, an Amended Schedule J, listing a monthly rent or home mortgage obligation of \$1,000. The Debtor testified

that he and his daughter have temporarily moved in with his ex-wife, and he has paid her rent of \$200 per week, or \$800 per month, for January and February 2004. He eventually expects to find a more permanent housing arrangement for the \$1,000 per month budgeted.

The Court recognizes that the Debtor probably just did not have the income and cash flow to pay the monthly mortgage on the house. The Debtor now argues that the \$1,000 per month for housing is within his means. However, the Court does not believe that the Debtor has adequately explained or accounted for the funds budgeted for, but not used to pay, mortgage payments in 2003. Even using the \$1,000 per month revised housing expense for the five to six month period since the chapter 13 filing in July, 2003, results in a total of approximately \$5,000 - \$6,000 budgeted for housing that should have been available for other uses. Such amount would be in addition to the \$965 per month, which the Debtor scheduled as available disposable income to make the Plan payments to the chapter 13 Trustee.

2. As previously indicated, the Debtor testified that he expects to make the same net taxable income and pay about the same amount of taxes in 2003 that he did in 2002. The Court notes that Amended Schedule J lists an amount of \$738 per month to cover "payroll and Social Security taxes," resulting in an annualized amount of \$8,856. Such amount appears sufficient to cover most, if not all, of the Debtor's federal taxes. It does not appear to account for any Colorado state tax obligations of the Debtor.

In addition, on cross-examination, the Debtor admitted that he has not made any estimated, quarterly payments for his anticipated 2003 tax liabilities and that he has not made any tax payments since the beginning of the case. So, apparently since filing this chapter 13 case in July, the Debtor has not paid or segregated estimated tax payments listed on his Schedule I in the amount of \$738 per month for the five to six months he has been in chapter 13, or approximately \$3,700 to \$4,400. This also represents funds accounted for in the budget, but which have not been paid or reserved for their designated purpose. The Debtor stated that he intends to use approximately \$6,500 in revenues that he will receive from a construction job to be completed in March, 2004 to cover his 2003 tax liabilities. This causes the Court to wonder why the budgeted, but unpaid, tax amounts are not available to pay these taxes. Again, the Debtor has not offered an explanation on how those funds may have been actually used. The Court must conclude that the Debtor currently does not have the necessary cash on hand, having used such funds for other purposes. Such actions appear at odds with the Debtor's stated primary purpose for filing this Chapter 13 case, to pay priority tax claims. In any event, the anticipated March revenue does not appear sufficient to fully cover the expected \$8,850 in federal tax obligations to which the Debtor testified plus any state tax obligations owing. When made, such payment would obviously reduce the funds available to the Debtor to pay his 2004 budgeted, ongoing expenses, especially those funds which may be necessary for the payment of 2004 taxes.

3. Debtor's testimony demonstrates that he is a frugal person trying to make a good home for his 16 year old daughter. He does not gamble and has not given any property away before or during the pendency of his chapter 7 and 13 cases. In the words of the Debtor's counsel, there is no "fluff" in his chapter 13 budget. The Court agrees. However, under the scrutiny of cross-examination, the budget appears to be much too tight. There is no margin for error, or this 60 month Plan cannot be successfully consummated.

Based upon the Court's consideration of the evidence and arguments presented at hearing, the Court finds that the Debtor has not met his burden and the Plan cannot be confirmed. The Court is not persuaded that the Debtor will be able to make all of the proposed payments under the Plan and to comply with the other provisions of the Plan as required by § 1325(a)(6). Although the Debtor budgeted for monthly housing expenses of \$1,000 and tax liabilities of \$738, these funds were not used for those designated purposes. These two budget categories total between \$8,700 and \$10,400. If they did in fact exist, no explanation of their actual use has been provided. And, if used for other purposes, the Court wonders whether all of the Debtor's projected expenses have been accurately provided for. If the funds never existed, then the Court's grave doubts about the feasibility of the Debtor's Plan, given the present sketchy record before it, are confirmed.

Nor can the Court find that the Debtor has committed all of his disposable income to the Plan as required by § 1325(b)(1) and (2). There are questions concerning the \$8,000 to \$10,000 in budgeted funds that, in not being used for their designated purpose, were available to further fund the Plan in excess of the \$965 per month disposable income payments. Also, the Debtor has not provided the Court with sufficient supporting information to determine the full nature and amount of his business and personal expenses. They may be more, they may be less than represented. The Court cannot know for sure on this record. Therefore, the Court cannot determine what expenses are necessary for the continuation, preservation and operation of the Debtor's business;¹ and the Court cannot determine if the Debtor is committing all disposable income to the Plan.

The Bankruptcy Code gives the Court broad discretion to confirm chapter 13 plans. This Court could confirm the Debtor's plan and let the chapter 13 Trustee and Rocky Mountain monitor if the Debtor can continue to make the payments for 60 months, under what is at best a very tight, frugal budget. However, while certainly permissible, "chapter 20" cases are frequently subject to a heightened scrutiny. *See, e.g., In re Keach*, 225 B.R. 264, 267 (Bankr. D. R.I. 1998) ("In the absence of close scrutiny, this procedure [chapter 20] invites abuse of the system."); *In re Cushman*, 217 B.R. 470, 475 (Bankr. E.D. Va. 1998) ("While it is clear that chapter 20's are not prohibited per se, such cases are not favored and must be closely scrutinized."). Moreover, the Court has seen no evidence that this Debtor is capable of living within the frugal budget he has proposed. To the contrary, the Court has before it substantial evidence that the Debtor has not lived within the confines of that budget since the chapter 13 case was filed. Given this "chapter 20" situation and the frugal, but largely uncorroborated, budget the Court must hold the Debtor to its burden of proof. That burden has not been met.

Finally, the Court has reviewed *In re Young*, 237 F.3d 1168 (10th Cir. 2001), with respect to whether the Debtor's plan is filed in good faith pursuant to 11 U.S.C. § 1325(a)(3). The Court is aware that the *Young* case is persuasive authority to confirm plans in "chapter 20" case situations. However, some Courts have opined that a debtor's failure to pay post-petition taxes while under chapter 13 is a basis for finding bad faith. *See, e.g., In re Koval*, 205 B.R. 72, 76

¹ The Court notes that Debtor failed to file a detailed statement of business income and expenses which schedule I calls for when a debtor's income is derived from operation of a business, profession or farm.

(Bankr. N.D. Tex. 1996) (“It is not good faith for Debtors to file Chapter 13 bankruptcy and then continue to earn income but not pay the post-petition taxes on that income.”). The Court need not address such issues at this time, since the Debtor has not met his burden under 11 U.S.C. §§ 1325(a)(6) and 1325(b)(2)(B).

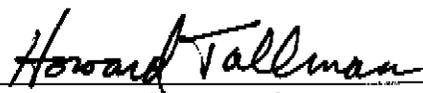
In accordance with the foregoing discussion, it is

ORDERED that Debtor’s Motion to Confirm Amended Chapter 13 Plan is hereby **DENIED**; it is further

ORDERED that Debtor is directed to file an amended plan and a motion to confirm such amended plan consistent with and within 15 days after the date of this order. In the event that the Debtor fails to comply with the Court’s directive to so file an amended plan and motion to confirm, this case will be dismissed without further proceedings.

DATED this 1st day of March, 2004.

BY THE COURT:



Howard R. Tallman, Judge
United States Bankruptcy Court