NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. EP 07-068

Bankruptcy Case No. 07-20882-JBH

CATHERINE A. NESBIT,
Debtor.

FRANK J. KRISTAN
Appellant,

v.

CATHERINE A. NESBIT,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Maine
(Hon. James B. Haines, Jr., U.S. Bankruptcy Judge)

Before
Lamoutte, de Jesús and Hillman, United States Bankruptcy Appellate Panel Judges.

Frank J. Kristan, *pro se*, on brief for Appellant.

James F. Molleur, Esq., on brief for Defendant-Appellee.

June 17, 2008

HILLMAN, U.S. Bankruptcy Appellate Panel Judge.

The Appellant, Frank J. Kristan ("Kristan"), appeals from the bankruptcy court's December 12, 2007, order confirming the Appellee Catherine A. Nesbit's (the "Debtor") Chapter 13 plan (the "Plan"). At issue in this appeal is whether the bankruptcy court erred in confirming the Plan over Kristan's objection where he asserts that the Plan is not viable and that the Debtor has committed a fraud upon the court in misstating her assets, liabilities, and income. For the reasons set forth below, the Panel vacates the order confirming the Debtor's Chapter 13 plan and remands the matter back to the bankruptcy court for further proceedings.

BACKGROUND

The Debtor filed a Chapter 13 petition on September 27, 2007. In her Summary of Schedules, the Debtor listed assets totaling $1,373,700 and liabilities in the amount of $1,001,005.11. On Schedule A - Real Property, the Debtor disclosed interests in four parcels of real estate located in Kennebunkport and Kennebunk, Maine. On Schedule B - Personal Property, the Debtor listed the following liquidated debts owing to the Debtor:

Robert McCormick	-	$151,505.00
Frank Kristan	-	$110,000.00
Suzanne Randall	-	$ 38,000.00
Adam Goulette	-	$ 4,200.00

The Debtor indicated on Schedule I - Current Income of Individual Debtor(s), that she has an average monthly income of $9,846, with $2,300 coming from family contributions and $3,350 from rental income. In schedule J - Current Expenditures of Individual Debtor(s), however, the Debtor listed a monthly net income of only $500.

On that same date, the Debtor filed the Plan, which provides in relevant part:

> 1. **Plan Payments**.
>
> a. Commencing within 30 days from the date this case was commenced, the debtor will make plan payments of **$500.00** per month for **6 months**, then payment shall increase to **$1,500.00** per month for 50 months, for **a total of 56 months.**
> b. The applicable commitment period is 36 months.
> c. In addition, the debtor will pay the following: **lump sum payment before month 18 in the approximate sum of $105,000.00 the source of which is proceeds of a litigation judgment**.
> d. Total amount to be paid by the debtor to the trustee is **$183,000.00**
> e. The debtor will contribute all tax refunds (combined federal and state) in excess of $1,200 per year, per debtor.

In paragraph seven of the Plan, the Debtor indicates that in a Chapter 7 case the unsecured creditors would receive $300,000, and as such, the Debtor certified that at least that much would be paid to the Chapter 13 trustee. The Plan, however, provided for the payment of only $39,535.11 of the $55,535.11 in unsecured claims reflected in the Debtor's Schedule F - Creditors Holding Unsecured Nonpriority Claims.

On October 29, 2007, Kristan filed his Objection to Chapter 13 Plan (the "Objection"). In the Objection, Kristan asserted, *inter alia*, that the Plan was not viable as the Debtor's schedules and Plan were based on materially false statements and that the funding of the Plan relies on litigation which has not yet been resolved and against which Kristan asserted a setoff. Specifically, Kristan stated that he, Robert McCormick, and Suzanne Randall do not owe any amount to the Debtor, and attached two affidavits to the Objection to that effect. Moreover, Kristan argued that according to the Debtor's schedules, more than 50% of the Debtor's monthly income would come from rental income from her real estate in "direct violations [sic] of the laws

in the Towns of Kennebunk, Town of Kennebunkport, mortgages and existing deeds," as well as "unsubstantiated family members."

On November 2, 2007, the Debtor filed a response to the Objection. In her response, she asserted that the information contained in her schedules was accurate and that the receipt of funds from Kristan and others were reasonably expected contributions to the Plan. The Debtor also indicated that she expected her family contributions to decrease in the future based upon an expected increase in her income. On November 13, 2007, Kristan filed a Response to Answer to Objection to Chapter 13 Plan, wherein he alleged that the Debtor's response merely alters her "materially false income statements" by stating that she will substitute her "unsubstantiated income from family" with "unsubstantiated employment income." Moreover, he argued that the Debtor had done nothing to substantiate any assets or income sufficient to implement the Plan.

Three other objections to confirmation were filed. The Town of Kennebunk (the "Town") and PHH Mortgage Corp. ("PHH") objected to the Plan's treatment of their respective claims. The Chapter 13 trustee objected on the basis that the Plan did not meet the best interests test under 11 U.S.C. § 1325(a)(4), presumably because the amount of unsecured claims provided for was $16,000 less than scheduled. The Debtor responded to these objections and on December 7, 2007, filed a revised confirmation order correcting the treatment of the Town's and PHH's claims and clarifying that all unsecured creditors would receive a 100% dividend up to $300,000.

The bankruptcy court conducted a hearing on confirmation of the Plan on December 12, 2007 (the "Confirmation Hearing"). At the Confirmation Hearing, the Chapter 13 trustee withdrew his objection, and he, along with the Town and PHH, indicated their consent to the plan based upon the revised confirmation order. Kristan, however, reiterated his assertions that neither

he nor McCormick owed the Debtor any money and that any claim she has against Kristan is subject to pending litigation which had not yet gone to trial and his right to offset his claim against her. The bankruptcy court observed that the Debtor's ability to collect the funds allegedly owed to her by others, including Kristan, could speak to the Plan's feasibility. The bankruptcy court found that the Plan, not unlike any other plan, was in jeopardy from an ultimate lack of funding. Recognizing that feasibility could be revisited at a later date, the bankruptcy court stated that validity of Kristan's claim against the Debtor and her collection efforts against others would be subject to subsequent hearings or trials. As such, the bankruptcy court entered an order confirming the Plan at the conclusion of the hearing. Kristan then filed a timely notice of appeal of the order of confirmation on December 21, 2007.

POSITION OF THE PARTIES

I. Kristan

On appeal, Kristan makes two central arguments: that the Plan is not "viable," and that the Debtor has committed fraud upon the bankruptcy court. With respect to viability, Kristan again asserts that neither he, nor Robert McCormick or Suzanne Randall, owe the Debtor any money. Further, Kristan argues that there is currently no judgment against him, and that such litigation is ongoing and subject to setoff by his claim against the Debtor. With respect to her assets and liabilities, Kristan contends that there is no equity in the Debtor's real estate, that she has provided no evidence to substantiate her claims against third parties or sources of income, and that she has failed to disclose substantial liabilities in her schedules, including his $128,000 debt for "advisory services." To the extent that the Debtor objects to "viability" being construed as "feasibility" on appeal, Kristan asserts that they are synonyms. In his brief, he also notes that

the amount of property to be distributed under the Plan is less than the amount of the unsecured claims and that the Debtor is not devoting all her monthly disposable income to repayment.

With respect to fraud, Kristan again suggests that the amounts allegedly owed to her in Schedule B are intentional misrepresentations. He further argues that the Debtor admitted to intentionally misstating her income on her schedules and Plan by filing amendments.[1]

II. The Debtor

The Debtor contends that the issue of feasibility is not on appeal, despite her concession that the bankruptcy court considered feasibility based upon the Objection. Construing Kristan's Bankruptcy Code citations as determinative, the Debtor understands his objection to the viability of the Plan as one contesting whether the Plan was proposed in good faith under 11 U.S.C. § 1325(a)(3).[2] In response, the Debtor states that under the totality of the circumstances, her Plan was proposed in good faith because she has an "honest purpose" and her schedules are accurate. To the extent that Kristan disputes this, the Debtor argues that his objections are nothing more than unsupported allegations with respect to the valuation of the Debtor's assets, which the bankruptcy court found would be determined at a later hearing.

The Debtor requests that the Panel order Kristan to pay the Debtor's costs and counsel fees associated with this appeal based upon its frivolous nature.

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[1] Kristan also argues that the Plan cannot be confirmed because the Debtor has not filed all applicable tax returns in accordance with 11 U.S.C. § 1325(a)(9). This issue was not raised below and is not properly before the Panel.

[2] The Debtor also understands Kristan to have raised an issue with respect to 11 U.S.C. § 1325(a)(9), but argues that it is inapplicable. For reasons stated in footnote 1, this argument is irrelevant.

JURISDICTION

A bankruptcy appellate panel may hear appeals from "final judgments, orders and decrees." 28 U.S.C. § 158(a)(1). Confirmation of a Chapter 13 plan is a final order. Mountain Peaks Fin. Servs. v. Shepard (In re Shepard), 328 B.R. 601, 605 (B.A.P. 1st Cir. 2005).

STANDARD OF REVIEW

On appeal, the bankruptcy court's findings of fact are reviewed pursuant to the clearly erroneous standard, and its conclusions of law *de novo*. Groman v. Watman (In re Watman), 301 F.3d 3, 6 (1st Cir. 2002); Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 30 (1st Cir. 1994). Findings of good or bad faith are reviewed for clear error. See, e.g., Cabral v. Shamban (In re Cabral), 285 B.R. 563, 573-74 (B.A.P. 1st Cir. 2002). Similarly, "[f]easibility is a factual determination and the bankruptcy court's decision will not be disturbed absent a firm conviction that clear error has been committed." First Nat. Bank of Boston v. Fantasia (In re Fantasia), 211 B.R. 420, 422-23 (B.A.P. 1st Cir. 1997). The confirmation of a Chapter 13 plan, however, is a discretionary ruling reviewed for abuse. Id.

DISCUSSION

As a threshold matter, we find the issue of feasibility to be properly before the Panel. As the bankruptcy court considered feasibility under 11 U.S.C. § 1325(a)(6) at the Confirmation Hearing in response to the Objection's use of the word "viable," the Panel will similarly construe Kristan's use of the word "viable" on appeal (as synonymous to feasible).

Section 1325 provides in relevant part:

(a) Except as provided in subsection (b), the court shall confirm a plan if–

* * *

(3) the plan has been proposed in good faith and not by any means forbidden by law;

* * *

(6) the debtor will be able to make all payments under the plan and to comply with the plan;
(7) the action of the debtor in filing the petition was in good faith;
(8) the debtor has paid all amounts that are required to be paid under a domestic support obligation and that first become payable after the date of the filing of the petition if the debtor is required by a judicial or administrative order, or by statute, to pay such domestic support obligation; *and*
(9) the debtor has filed all applicable Federal, State, and local tax returns as required by section 1308.

11 U.S.C. § 1325(a) (emphasis supplied). Section 1325(a) is phrased in the conjunctive and a bankruptcy court must find all provisions satisfied before confirming the debtor's plan.

"Good faith," as required for confirmation of a Chapter 13 plan, has been held to mean simple honesty of purpose. Keach v. Boyajian (In re Keach), 243 B.R. 851, 868 (B.A.P. 1st Cir. 2000). Determinations of good faith are made from the totality of the circumstances on a case by case basis. In re Cabral, 285 B.R. at 573-74; In re Hadsell, 327 B.R. 520, 525 (Bankr. D. Mass. 2005). In determining good faith under the totality of the circumstances test, bankruptcy courts consider whether the debtor misrepresented facts in the petition and schedules. In re Fleury, 294 B.R. 1 (Bankr. D. Mass. 2003). In the present case, however, there is no evidence that the Debtor proposed the Plan in bad faith or misstated any information contained in her schedules. Kristan's dispute as to the liabilities and income disclosed in the Debtor's schedules, by itself, simply does not rise to the level of fraud and as such, the bankruptcy court did not err.

The Panel previously considered the standard for feasibility with respect to the confirmation of Chapter 13 plans in In re Fantasia, 211 B.R. 420. In that case, the Panel stated:

> Confirmation of a Chapter 13 plan requires more than a ministerial review; rather, bankruptcy judges should exercise their judicial discretion and assess the evidence to ensure that it meets the guidelines established by section 1325. Fidelity & Casualty Co. of N.Y. v. Warren (In re Warren), 89 B.R. 87 (9th Cir. BAP 1988). To satisfy feasibility, a debtor's plan must have a reasonable likelihood of success, i.e., that it is likely that the debtor will have the necessary resources to make all payments as directed by the plan. 11 U.S.C. § 1325(a)(6); In re Brunson, 87 B.R. 304, 312 (Bankr. D.N.J. 1988). The debtor carries the initial burden of showing that the plan is feasible. In re Felberman, 196 B.R. 678, 685 (Bankr. S.D.N.Y. 1995); In re Endicott, 157 B.R. 255, 263 (W.D. Va. 1993). Before confirmation, the bankruptcy court should be satisfied that the debtor has the present as well as the future financial capacity to comply with the terms of the plan. In re Crotty, 11 B.R. 507, 511 (Bankr. N.D. Tex. 1981) (a definite declaration as to the source and amount of funds necessary to enable debtors to make payments under the plan is required).

Id. at 423. The Panel further suggested that "[a]lthough it is impossible to predict a plan's success with absolute certainty, an examination of the potential problems in a plan is useful." Id. at 424.

In the present case, the Plan contains several "potential problems" which were properly raised in the Objection prior to confirmation and could significantly impact the Plan's feasibility. First, it is undisputed that at present the Debtor's ability to fund the Plan payments comes solely from family contributions in the amount of $2,300 per month. Many bankruptcy courts have held that unsubstantiated expectations of financial contributions from third parties are insufficient to meet the feasibility requirement of 11 U.S.C. § 1325. See In re Goodwin, 328 B.R. 868 (Bankr. M.D. Fla. 2005) (plan funded by gratuitous contributions from the debtor's unnamed son was unfeasible); In re Williams, No. Civ.A. 97-00824-W, 1998 WL 2016786

(Bankr. D.S.C. Jan. 13, 1998) (donations to the debtor's ministry were insufficiently stable and regular to fund the debtor's plan); In re Lyons, 193 B.R. 637 (Bankr. D. Mass. 1996) (gifts which are legally unenforceable cannot be a source of proposed payment for plan); In re Crowder, 179 B.R. 571 (Bankr. E.D. Ark. 1995) (without a showing of specific amounts or assistance which is committed for the duration of the plan, payments are not sufficiently stable or regular to support a plan); In re Norwood, 178 B.R. 683 (Bankr. E.D. Pa. 1995) (contributions provided to the debtor "as needed" were not sufficiently stable and regular). "[I]t is incumbent on the debtor to satisfactorily establish that the contributions are sufficiently 'stable and regular to enable [the debtor] to make payments under a plan . . . .'" Norwood, 178 B.R. at 691. There is nothing in the record substantiating the family contributions to the Debtor and the bankruptcy court made no express findings at the Confirmation Hearing.

Second, the Plan proposes a lump sum payment of approximately $105,000 within eighteen months. While a plan providing for a lump sum payment, also referred to as balloon payment, is not unfeasible per se, it is suspect until some proof is offered to show that the funds will be available at the time the payment is due. Fantasia, 211 B.R. at 423. The Panel has previously stated:

> To avoid potential abuse, debtors must show by definite and credible evidence that they will have the financial ability to make the balloon payment. Crotty, 11 B.R. at 511. While it is impossible to predict with absolute certainty, mere speculation as to the source of funds is not sufficient to satisfy feasibility. In re Harris, 199 B.R. 434, 436-37 (Bankr. D.N.H. 1996).

Id. Here, the Debtor anticipates receiving a judgment of $105,000 from a pending litigation, presumably against Kristan. The record, however, is devoid of any findings that indicate that such a judgment is reasonably certain to occur or is anything more than speculation.[3]

Third, the revised confirmation order provides that the Debtor will pay a 100% dividend to all timely filed claims by general unsecured creditors up to $300,000 in order to satisfy the best interests test of 11 U.S.C. § 1325(a)(4), but the Plan as filed states that the total amount paid to the Chapter 13 trustee is $183,000. While the Chapter 13 trustee withdrew his objection, the cost of the Plan is actually $16,000 more than is reflected. At the Confirmation Hearing, however, the source of the remaining $16,000 and the method by which it would be paid to the unsecured creditors was not addressed.

Despite these "potential problems," the bankruptcy court's only finding on the record with respect to feasibility was that "the plan always is in jeopardy - like any plan - of an ultimate lack of funding, and that'll play out in time." Further, the bankruptcy court acknowledged that if the Debtor could not collect the funds she alleges are owed to her, then "the case [would] die and go away." Ultimately, the bankruptcy court did not make sufficient findings on the record with respect to feasibly that would enable it to confirm the Plan. In fact, by stating that Kristan's claim against the Debtor and her claims against him and others would be resolved by subsequent proceedings, it appears the bankruptcy court deferred consideration of the Plan's feasibility.

Although the Debtor argues that the bankruptcy court found the Plan sufficiently feasible at that stage of the case, such a finding is not supported by the record. Kristan raised a valid

[3] We also note that the bankruptcy court made no findings with respect to the Debtor's ability to fund such litigation as it is not listed as an expense in her schedules.

objection with respect to the Plan's feasibility, and the Debtor did not carry her burden to respond with evidence to support confirmation at the Confirmation Hearing. In the face of an objection, the bankruptcy court's findings, if any, should be expressed on the record. Accordingly, the bankruptcy court's confirmation of the Plan was an abuse of discretion.

Because the Panel finds this appeal well taken, the Debtor's request for costs and fees is denied.

CONCLUSION

The Panel **VACATES** the bankruptcy court's order confirming the Plan and **REMANDS** the matter back to the bankruptcy court for further proceedings.