

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
CIVIL MINUTES**

Case Title : Steven Allen Korn **Case No :** 11-91339 - D - 13G
Date : 6/7/11
Time : 10:00

Matter : [10] - Motion/Application to Dismiss
Case/Proceeding [DJC-1] Filed by Creditor
[REDACTED] (msam)

Judge : Robert S. Bardwil
Courtroom Deputy : Sharon Baker
Reporter : Diamond Reporters
Department : D

APPEARANCES for :

Movant(s) :
(by phone) Creditor's Attorney - David J. Cook repr. [REDACTED]

Respondent(s) :
(by phone) Debtor(s) Attorney - Patrick B. Greenwell
Lorraine Crozier (for the Trustee)

HEARING CONTINUED TO: 8/9/11 at 10:00 AM

The hearing was continued for the following reason(s):
to allow the debtor to file an amended plan.

Tentative ruling:

This is the motion of [REDACTED] (Ms. W [REDACTED]) to have the debtors Chapter 13 case dismissed or converted to Chapter 7 (the Motion). Ms. W [REDACTED] was sexually assaulted by the debtor and this assault resulted in the filing of a criminal proceeding in the State Court against the debtor. Thereafter, an order for restitution was issued against the debtor in the amount of \$50,000 (the Restitution Order). The debtor failed to pay the Restitution Order and instead filed the instant bankruptcy case.

The nub of the Motion is that the debtors Chapter 13 case, and his Chapter 13 plan, have not been filed in good faith. The debtor has filed opposition to the Motion asserting that dismissal or conversion of his case would result in his financial demise. The debtor asserts that dismissal or conversion will result in the sale of property from which he receives approximately \$2,000 per month in rental income, and that this income is necessary for his support. The debtor has proposed a plan which provides for terming out the Restitution Order over 60 months. Based on the foregoing, the debtor asserts his case, and his proposed plan, were filed in good faith.

It is the debtors burden to establish by a preponderance of the evidence that his case was filed in good faith and that his plan has been proposed in good faith. See *In re Warren*, 89 B.R. 87, 90 (9th Cir. BAP 1988). Also see Fed. Rule Bankr. Pro. 3015(f). Although the Bankruptcy Code (Code) does not define good faith, the court should inquire whether a debtor has acted equitably in filing the case and in proposing a plan. And, the court should engage in a case-by-case analysis to assess the good faith issue. See *In Goeb*, 675 F.2d 1386 (9th Cir. 1982). In assessing good faith the court should consider: (1) whether the debtor misrepresented facts, unfairly manipulated the Code, or otherwise acted inequitably in filing a petition or plan; (2) past history of bankruptcy filings; (3) whether the sole purpose of the debtors petition or plan was to defeat state court litigation; and (4) whether egregious behavior was present. See *In re Leavitt*, 171 F.3d 1219 (9th Cir. 1999).

As Ms. W [REDACTED] has squarely raised the good faith issue, it is the debtors burden to establish by a preponderance of the evidence that both his Chapter 13 case and his plan have been proposed in good faith. The only evidence that the debtor has submitted in regard to this issue is his declaration filed May 25, 2011. That declaration, while it indicates that the plan will pay 100% on creditors claims and that the debtor needs the income from his rental property for support, merely concludes that the plan has been proposed in good faith and not by any means forbidden by law. The debtors conclusory statement is simply not sufficient to meet his evidentiary burden to establish that his case has been

filed, and his plan has been proposed, in good faith.

The record makes it clear that this Chapter 13 was filed for the sole purpose of preventing enforcement of the Restitution Order issues. It is also clear that the debtors plan tries to term out the Restitution Order over the maximum time allowed by the Code, at a time when the debtor is solvent and the debtors conduct that resulted in the Restitution Order was highly dubious. The court finds this proposed treatment is inequitable.

Ms. W [REDACTED] has also objected to the debtors plan asserting the plan is facially unconfirmable because: (1) Ms. W [REDACTED] claim is secured, but the plan treats her claim as unsecured; (2) the plan does not provide for interest on unsecured claims, and as a result, the plan does not comply with §§ 1325(a)(4) and (5) of the Code; and (3) the debtor is solvent, and as such, any plan should include a sale of the debtors assets to pay creditors. Ms. W [REDACTED] objections are well-taken. The debtors plan is facially unconfirmable because it improperly classifies Ms. W [REDACTED] claim as unsecured when it is secured by an abstract of judgment and because it violates §§ 1325(a)(4) and (5). Notwithstanding that the plan is facially unconfirmable, the debtor has not filed an amended plan.

In considering the totality of the circumstances and the origin of Ms. W [REDACTED] claim, the court finds that the terming-out her claim over sixty months is an attempt to avoid compliance with the Restitution Order and inequitable. The court may look more favorably on a plan that provides for an expedited re-finance or sale of the debtors property and provides for payment of claims within a reasonable time frame.

Based on the foregoing, the court concludes that the debtor has not met its evidentiary burden that the case, and plan, have been filed in good faith. As such, the court will dismiss or convert the case, or alternatively, allow the debtor to submit an amended plan which provides for a prompt sale or re-finance of his property.

The court will hear the matter.