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signed 1-14-99

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

**PATRICK MICHAEL NEUBURGER,
SUSAN MARIE NEUBURGER,**

DEBTORS.

**CASE NO. 98-40951-13
CHAPTER 13**

ORDER DENYING PLAN CONFIRMATION

On November 30, 1998, this case was before the Court on the objection of Lisa Sicola, a creditor of Mr. Neuburger only, to confirmation of the debtors' proposed chapter 13 plan. The debtors appear by counsel Kristen F. Heidenreich and Richard C. Wallace. Ms. Sicola appears by counsel Mark D. Murphy, R. Mark Nasteff, and Nancy K. Putman. The parties have submitted post-hearing briefs on two issues: (1) whether Mr. Neuburger's debt to Ms. Sicola would be nondischargeable in a chapter 7 case; and (2) whether the debtors' plan has been proposed in good faith as required by 11 U.S.C.A. §1325(a)(3). The Court has considered those briefs and other relevant matters and is now ready to rule.

FACTS

At one time, Mr. Neuburger and Ms. Sicola joined in a business to broker insurance policies. When they went their separate ways, each orally agreed not to contact and attempt to acquire the other's clients. Mr. Neuburger violated this agreement. Ms. Sicola sued him in state court, and on January 21, 1998, obtained a \$20,741.73 judgment against him for breach of contract and tortious

interference with prospective business relationships. The state court indicated the actual damages under each theory were the same, so it would not award any more such damages on the tortious interference theory than those it had awarded on the breach of contract theory. However, the court did find that Ms. Sicola was entitled to punitive damages on her tortious interference claim, and a hearing was scheduled on the amount to be awarded. The hearing was stayed when the debtors filed a chapter 13 bankruptcy petition on April 13, 1998. Ms. Sicola's tortious interference claim was based on Mr. Neuburger's actions of contacting at least five of her clients and acquiring them as his own. The trial court believed Ms. Sicola's testimony that Mr. Neuburger told her, "It's in my nature to steal business." Mr. Neuburger knew that the people he contacted were Ms. Sicola's clients and that he had agreed not to contact them, but did so anyway, intending to help himself and harm Ms. Sicola and succeeding in that effort.

When they filed for bankruptcy, the debtors owed the Internal Revenue Service over \$119,000. This tax obligation includes a secured debt of \$19,450, a priority debt of \$21,787, and an unsecured debt of \$78,319. The debtors also owed the Kansas Department of Revenue a priority tax of \$19,648, and a mortgage arrearage of \$5,480. Their other general unsecured debts totaled \$32,000, more than half of which is Ms. Sicola's judgment. A punitive damage award would obviously increase her percentage of the non-tax unsecured claims. Shortly before the debtors filed for bankruptcy, Ms. Sicola garnished Mr. Neuburger's wages, probably helping to motivate their bankruptcy filing.

The debtors have three children who range in age from 8 to 17. Mr. Neuburger works as an insurance agent while Mrs. Neuburger is a homemaker. Mr. Neuburger's gross monthly income is

expected to be \$8,000. Their monthly family and business expenses are projected to be \$6,990, and they propose to pay \$1,010 per month into a chapter 13 plan. According to the Court's records, at least one and probably both of the debtors obtained a chapter 7 discharge in 1993, making them ineligible for another such discharge until sometime in 1999. At least one of them had filed another bankruptcy case sometime before that one.

The monthly expenses the debtors listed in Schedule J of their bankruptcy schedules appear to be generous. However, other than intimating that the expenses are excessive, Ms. Sicola's counsel did not ask the debtors or anyone else any questions eliciting evidence that would allow the Court to make such a finding of fact. Mr. Neuburger is self-employed and testified that his business expenses were not all separated out from the debtors' personal ones on Schedule J, even though the schedule contains a line for reporting business expenses separately and \$150 was entered on that line. Given this mixing of business and personal expenses, it is impossible to say any of the personal expenses are overstated. If Mr. Neuburger were not self-employed but instead a wage earner, the Court would be willing to declare, based on its experience, that some of the listed expenses—for example, those for food and transportation—are excessive. The evidence did show, however, that Mr. Neuburger is self-employed and has business expenses that reduce the taxes, including Social Security taxes, on his \$96,000 annual income to \$12,000. The Court believes the self-employed Social Security tax alone would comprise most, if not all, of the reported tax liability. Mr. Neuburger's deductible business expenses must therefore be substantial, but the Court was not told what they are and is unwilling to speculate on the question.

The debtors propose to pay their secured and priority tax debts, the mortgage arrearage, and

administrative expenses through their chapter 13 plan. These items total approximately \$72,000. Their proposed monthly payment of \$1,010 is insufficient to pay these items, even if they offered to extend the plan to sixty months, rather than the thirty-six they originally proposed.

DISCUSSION AND CONCLUSIONS

Because the debtors' proposed monthly payments are insufficient to pay the debts and administrative expenses they propose to pay, their plan may not be confirmed. Their monthly payments would have to be at least several hundred dollars more to pay those debts within the sixty-month maximum allowed under 11 U.S.C.A. §1322(d).

Based on the evidence presented, the Court concludes that it is more likely than not that Mr. Neuburger's debt to Ms. Sicola would be nondischargeable under §523(a)(6) if this were a chapter 7 case because it resulted from his willful and malicious injury to her or her property. Generally, where a debtor has a debt that would be nondischargeable in chapter 7 but is dischargeable in chapter 13, and the debtor has the ability to pay at least some of that debt but has made little or no effort to do so, the Court has required the debtor to propose extending his or her chapter 13 plan beyond the 36-month minimum required under §1322(d) if the creditor holding the nondischargeable debt could thus be paid an amount that is substantial compared either to the debtor's available income or to the amount of the nondischargeable debt. The Court believes this is necessary to demonstrate the debtor's good faith effort to pay the debt through chapter 13. *See In re Jones*, 119 B.R. 996, 1003 (Bankr. N.D. Ind. 1990); *In re Todd*, 65 B.R. 249, 251-52 (Bankr. N.D. Ill. 1986); *In re Atchley*, Case No. 88-41370-13, Memorandum of Decision (Bankr.D.Kan. June 6, 1989). On the other hand, if the

debtor's disposable income is sufficient to pay only secured and priority debts and a homestead mortgage arrearage within the maximum sixty-month period, the Court will generally confirm the plan. Here, according to the evidence presented, the debtors' disposable income is insufficient to pay their secured, priority, and arrearage debts in sixty months, much less to pay anything to Ms. Sicola.

The Court concludes that the debtors' plan as presented cannot be confirmed because the debts they propose to pay exceed the total of the payments they propose to make, even if they were to amend their plan to extend it to sixty months. If the debtors file an amended plan to try to cure this deficiency, the Court hereby orders them to amend their schedules as well to separate Mr. Neuburger's business expenses from their personal expenses.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this ____ day of January, 1999.

JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE