

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)

ANDREW MANES,)

DEBTOR)

CASE NO. BK82-774)

MEMORANDUM

Before the court are two objections to confirmation of the Chapter 13 plan of Andrew Manes, one filed by First Savings Company, and one filed by First National Bank of Fremont. In general, the evidence deals with the claims of First National Bank, and I address those primarily.

The first of two claims held by the First National Bank is a debt secured by a second mortgage on real estate. Here First National Bank has a second mortgage on real estate which is the debtor's principal residence. The property is subject to a prior mortgage. 11 U.S. Code, Section 1322(b)(2) would suggest that that claim cannot be modified in this Chapter 13 proceeding because it is a claim secured only by a security interest in the debtor's principal residence. The debtor, however, suggests that the claim document which was filed in this Chapter 13 by First National Bank discloses two claims, this mortgage note and also a note secured by collateral which is personal property. Thus, the debtor asserts, the physical claim document filed in this proceeding is literally a claim which is secured by a security interest in the residence and other property. The debtor would argue that if one reads §1322(b)(2) and the word "claim" to mean the physical claim, that the security interest of the second mortgage can be modified in this Chapter 13 proceeding. I do not so interpret the statute.

I read the word "claim" in 1322(b)(2) to mean the debt or the obligation, and not the physical document filed with the court, and I reject the suggestion by the debtor that this second mortgage can be modified in this Chapter 13 proceeding.

The other question which is involved is one of valuation. The facts in evidence show that First National Bank has a security interest in personal property and leasehold interests which are used by the debtor in his restaurant business in Fremont, Nebraska. First National Bank holds a security interest in the equipment, dishes, silverware, leasehold improvement, vehicles and inventory. The dispute here revolves around the proper method of valuation. Seldom in Chapter 13 does there arise a problem of the concept of valuation, but here the concepts which are at war with each other are whether the items of personal property used in the business operation should be valued, according to the debtor's position, at

liquidation value, but according to the bank's position, at going concern value. Rarely do those two come into conflict, but under Chapter 13 of the Bankruptcy Code which was expanded to authorize rehabilitation of small businesses under Chapter 13, it can be expected that occasionally this conflict will occur.

Section 506(a) of the Bankruptcy Code provides, in part, that the valuation of an allowed secured claim shall be made in light of the purpose of the valuation and of the proposed disposition or use of the property. Under the facts as I find them, the going concern value in the evidence before me is different from and higher than the evidence which discloses liquidation value. I find the going concern value to be roughly \$33,000, an amount exceeding the \$30,518.50 debt owed the First National Bank. The debtor suggests that the liquidation value is substantially less than the debt owed First National Bank, is the appropriate figure.

My view is that Chapter 13 exists for the rehabilitation of the debtor. The debtor, if he meets the requirements and eligibility requirements for Chapter 13, may attempt to reorganize his financial world, his debt structure and his assets, to preserve to himself those items and those things which are dear to him, in this case, the restaurant business.

If he attempts to preserve and rehabilitate that business under Chapter 13, keeping those assets in tact, and attempts to emerge from Chapter 13 rehabilitated, he is in essence, attempting to preserve to himself the going concern value of his business. If he chooses to do that, I hold that he must pay to a secured creditor the going concern value. While that may seem harsh to the debtor, I suggest that if the debtor chooses not to preserve the going concern value and chooses instead to liquidate his assets under Chapter 7, he may purchase those assets from the proper representative of the estate at liquidation value. But should he attempt to preserve the value of his business under Chapter 13, he thereby becomes bound to pay to the secured creditor the going concern value which he is attempting to maintain through the use of the provisions of Chapter 13.

I, therefore, hold that the going concern value is the appropriate figure to be used here, that it exceeds the amount due First National Bank, and as a result, the debtor's proposed plan does not comply with the provisions of Chapter 13, which require that the secured creditor be paid the allowed amount of its secured claim. The objection to confirmation must be sustained on both claims, and will, by separate journal entry, be sustained.

DATED: _____

6-27-83

BY THE COURT:

