

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
CARR LAND & CATTLE, CO., a)
Nebraska corporation,) CASE NO. BK87-1028
)
ROSCOE E. CARR, JR., and)
LUCILLA M. CARR, husband and)
wife,) CASE NO. BK87-1029
) (Administrative consolidated
) with BK87-1028)
)
DEBTOR) CH. 12
) Fil. No. 184, 185 & 186

MEMORANDUM

Hearing on the Second Motion for Post confirmation Modification of Plan was held on June 12, 1992. Appearing on behalf of the debtor was Joseph Postnikoff of McWhorter, Cobb and Johnson, L.L.P., Lubbock, Texas. Appearing on behalf of the Farm Credit Bank was Terrence Michael of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, Omaha, Nebraska. Appearing on behalf of Commodity Credit Corporation was Laurie Barrett of Omaha, Nebraska.

The debtors, operating under a confirmed Chapter 12 plan, have filed their second proposed modification. This plan was confirmed in June of 1988. The debtors were unable to make their payments to Commodity Credit Corporation or Farm Credit Bank in March of 1990. They filed a proposed modification which was approved over objection of the Farm Credit Bank and Commodity Credit Corporation in December of 1990. They made the 1991 payments to the Farm Credit Bank and to Commodity Credit Corporation. However, they were unable to make the March 1, 1992, payments to those entities.

The 1990 failure to pay was a result of drought. The 1992 failure to pay allegedly is the result of flooding.

If approved, this modification will result in the debt to the Farm Credit Bank increasing from \$630,000.00 on confirmation date to \$671,000.00 on the first modification date and to \$720,000.00 on the date payment should have been made in March of 1992.

The second request for modification of a confirmed Chapter 12 plan is denied.

This judge is not convinced that the inability to pay Commodity Corporation or Farm Credit Bank in 1992 is a direct result of flooding in 1991. The evidence before the Court is that the most likely loss of income from the flood totalled no

more than \$14,000.00. Such a small loss directly attributable to the flooding could not have been the cause for failing to pay approximately \$100,000.00 to the Farm Credit Bank.

Modification of a Chapter 12 plan is permitted under 11 U.S.C. § 1229. However, most courts that have permitted such modification have done so because there has been an unanticipated change in circumstances from the time of confirmation to the time of the requested modification. See In re Grogg Farms, 91 Bankr. 482, 485 (Bankr. N.D. Ind. 1988); In re Cooper, 94 Bankr. 550 (Bankr. S.D. Ill. 1989); In re Hagan, 95 Bankr. 708 (Bankr. D.N.D. 1989).

The debtors have many years of experience in the farming business. They are aware of the problems with weather. Each Chapter 12 case is confirmed based upon its feasibility. Feasibility is determined by considering the ability of management, the amount of the debt, the historical cash flow, the legitimacy of the projections of cash flow, and the plan provisions concerning the potential for default, as a result of weather or otherwise. This original plan did anticipate default and gave the debtors ninety days after default to cure.

The debtors were unable to cure the original default within ninety days and exercised their rights under Section 1229 to request an extension of time for payment. That extension was granted. One payment was made under the extension and the very next payment was not made.

This Court commented in the earlier order approving confirmation of the modified plan that the debtors should have and probably did anticipate weather problems at the time of confirmation. This Court commented that an inability to make the payments to the creditors two years in a row would be strong evidence that the plan was not feasible. Although the debtors have not had defaults two years in a row, they have had a default every other year since the plan was confirmed. To this judge, such default is evidence of the non-feasibility of a plan of reorganization in this case.

According to the evidence of the debtors, adverse weather wiped them out each year. They are able to make some payments, but not the big payments. In addition to the Farm Credit Bank and Commodity Credit Corporation, they have failed to pay pre-petition and post-petition real estate taxes pursuant to the requirements of their plan as originally confirmed and as modified.

This modification appears to propose subordination of the interest of the Commodity Credit Corporation to current crop financing entities. The Commodity Credit Corporation, after originally objecting to such a provision in the earlier

modification, acquiesced in the provision, apparently on the basis that payment would be made timely in the future. Such payment has not been timely made and Commodity Credit Corporation has once again objected to subordination of its interest. Such objection is valid.

The debtors presented evidence in support of the original modification that their production would be sufficient to generate revenues to enable them to make the payments as required by the modification. The Court accepted such evidence and found this modification feasible. This time around, the debtors have presented additional evidence that their projections of income based upon production will be sufficient to make payments in the future. This time the Court does not accept the evidence as reliable. The projections do not appear to take into consideration the effects of adverse weather. They mention adverse weather, but do not make adequate, if any, reductions in yield or cash flow for the weather contingency. The projections are not reasonable under the circumstances and history of this case.

Chapter 12 was designed to give the family farmer the opportunity to restructure debt obligations and maintain possession of the family farm. In this case, the debtors had the opportunity to restructure the debt obligations. Such obligations were fixed at confirmation with a definite interest rate to be paid over time. The debtors were unable to make the payments. They had the right to and did take advantage of the opportunity to modify the plan. Such modification increased the debt obligations that were to be restructured under the plan. The Court accepted such modifications as feasible and fair.

Now the debtors are asking for a third chance. They are still unable to make the payments and, through the proposed restructuring, will owe significantly more to the Farm Credit Bank than they did on the date of confirmation. Such a procedure does not seem fair to the creditor, and, in this case, the Court finds that the debtor does not have the ability to make the payments as proposed.

Therefore, the proposed modification is denied. Journal Entry to be filed.

DATED: August 7, 1992.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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)	(Administratively Consolidated
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)	A
<u>DEBTOR(S)</u>)	
)	CH. 12
)	Filing No. 184, 185 & 186
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	
<u>Defendant(s)</u>)	DATE: August 7, 1992
)	HEARING DATE: June 12,
)	1992

Before a United States Bankruptcy Judge for the District of Nebraska regarding Second Motion for Post confirmation Modification of Plan; Objection by Farm Credit Bank of Omaha; Objection by USA.

APPEARANCES

Terrence Michael, Attorney for Farm Credit Bank
Laurie Barrett, Attorney for Commodity Credit Corporation
Joseph Postnikoff, Attorney for debtor

IT IS ORDERED:

Proposed modification denied. See memorandum this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge