

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

ELDON C. WICHMANN,
RITA WICHMANN,

DEBTORS

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CASE NO. BK87-521

MEMORANDUM OPINION

Before Timothy J. Mahoney, United States Bankruptcy Judge, at Lincoln, a hearing on Confirmation of amended Plan was held.

APPEARANCES

Tom Briese, Attorney for BMA, Wheeler at 1st Street, P.O. Box 790, Grand Island, NE 68802

Eric Wood, Attorney for debtor, 300 Historic Library Plaza, 1823 Harney Street, Omaha, NE 68102

IT IS ORDERED that the plan, as amended, is confirmed. The objections of BMA are overruled. Debtor may submit an order of confirmation.

Findings of Fact and Conclusions of Law

1. Value. The evidence of value presented by the debtors is more persuasive than that of the creditor. Land value \$117,000.

2. Interest Rate. The interest rate proposed in the amended plan is the market rate as determined by this Court in the original Wichmann decision. Creditor's rate which would be offered to new borrowers is not the "market rate" for loans of this type and is not conclusive as to the rate these debtors should pay to give creditor the present value of its claim.

3. Chapter 7 Discharge - Eligibility. Debtors previously received a Chapter 7 discharge in BK84-1294. Such discharge does not make debtors ineligible as family farmers under Chapter 12. In addition to the mortgage debt to BMA, debtors may have incurred other "farm" debt after the Chapter 7 order for relief was entered. That new debt was not discharged in Chapter 7. Neither the Legislative history, nor the specific language of Chapter 12, indicate that debtors previously in Chapter 7 are prohibited from

receiving the benefits of Chapter 12. In addition, this creditor's argument would not be accepted as valid in a Chapter 13 proceeding, if these debtors met the debt limits for Chapter 13.

The Court reasons as follows: Section 101(11) defines "debt" as liability on a claim. Section 101(4) defines "claim" as a right to payment. Section 541(a)(1) defines property of the estate as all legal or equitable interest of the debtor in property as of the commencement of the case.

Debtors have legal title to the land. The BMA has a lien on the land. Therefore, BMA has a claim against property of the estate. Section 101(33) defines "lien" as a charge against . . . property to secure payment. BMA's lien is a claim and although BMA allege there is no debt to restructure, under the Code, a debt is a liability on a claim. Even though the debtors have no personal liability to BMA, their property is liable for the debt and so it follows, in the opinion of this Court, that the debtors have an obligation to BMA which may be restructured in Chapter 12.

4. BMA Unsecured Claim. Section 506(a) provides that an allowed claim of a creditor secured by a lien on property. . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in the property. Therefore, since the right of BMA to obtain a deficiency, personal judgment, against the debtors for any amount due from debtors to BMA in excess of the value of the property was discharged in Chapter 7, the creditor holds an allowed secured claim of \$117,000 and does not have any unsecured claim.

5. Feasibility. BMA suggests that a 20-year payoff of a mortgage obligation violates the statute and local rules and makes the feasibility determination by the Court unreliable. In addition, BMA alleges that the advanced ages of the debtors makes repayment unlikely.

All of the objections are rejected. The statute permits unsecured debt to be paid off "in the plan" over three to five years. It anticipates, as does Chapter 13, long-term obligations to be paid over a long term. If, after the three years expire, the debtors default, BMA will have the right to foreclose and sell.

Debtors are not over 65 years of age and BMA provides no evidence that persons of debtors' ages would be denied loans solely on the basis of age. Such objection, although considered by the Court, is found to have no basis, when other factors are considered.

Page 4 of the objection, Filing #60, itemizes specific problems BMA has with the plan. The Court finds that debtors have used, borrowed or rented machinery in the past, and may do so in the future. The Court finds that the actual rental rates for land leases are as suggested by debtors, not the rates BMA thinks they should be.

Debtors propose living expenses of \$500 per month and BMA says the amount is too low. Debtors should be given the opportunity to prove the amount is sufficient and this Court will not engage in speculation about the amount a motivated family farm unit should spend for living expenses.

The other objections on Page 4 of Filing #60 suggest debtors cannot make the income required to fund the plan. BMA will have three years to monitor the success of debtors and will have the right to move for dismissal if the plan projections are not met, or if the BMA payments are not met.

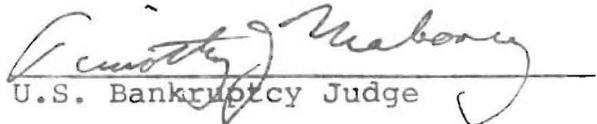
6. Jurisdiction. BMA appealed an earlier determination of value and interest rates. It now claims this Court lost jurisdiction as a result of the appeal. Such appeal was premature. The order appealed from denied confirmation, which was the issue before the Court. In the opinion, the Court told the parties the value that must be included in a plan and the interest rate which must be included. Until a plan with such value and rate is confirmed, this Court does not believe BMA had any right to appeal. No order harming the interest of BMA was entered as a final order. Therefore, this Court did not lose jurisdiction.

Motion to dismiss is overruled. Plan as amended confirmed. Debtors to submit confirmation order.

Journal entry confirming plan, as amended, shall be filed.

DATED: October 21, 1987.

BY THE COURT:


U.S. Bankruptcy Judge