

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
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EVERETT & ETHEL MUCK,) CASE NO. BK87-80283
) A
DEBTOR(S))

MEMORANDUM

Hearing was held on September 3, 1993, on Debtors' Application to Modify Payment of Plan and Objection by First National Bank of Gordon, Nebraska. Appearing on behalf of debtors was Dale Kuhlmann of Omaha, Nebraska. Appearing on behalf of First National Bank was Michael Smith of Gordon, Nebraska. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b) (2) (G) and (L).

Background

Debtors are operating under a confirmed Chapter 11 plan. Confirmation took place in 1990 and payments were made to the First National Bank of Gordon, and others, in 1991 and 1992. However, the debtors failed to make the payments due the First National Bank of Gordon in May of 1993.

The Bank filed a motion for relief from the automatic stay because of the failure to make payments on a timely basis and because the debtors allegedly had sold cattle in their own name or in the name of another and had not either informed the Bank of such sale or delivered the proceeds of the sale to the Bank.

In response to the motion for relief from the automatic stay, the debtors filed a motion to modify the confirmed plan. The debtors cite a section of the plan which provides that they may modify the plan if they defaulted because of a crop failure or other cause beyond their control.

The two matters were combined for hearing and evidence was presented.

Automatic Stay

The Court finds that there is no automatic stay in place once the plan is confirmed. Section 362(c) provides that the automatic stay terminates at the time property is no longer property of the estate and a discharge is granted. Section

1141(b) provides that property of the estate vests in the debtor as of confirmation and Section 1141(d) provides that the debtor is discharged upon confirmation unless the plan or the order confirming the plan state otherwise. Neither the plan nor the order confirming the plan interfered with the normal operation of the statute. Therefore, the automatic stay terminated and the parties were left to their state court remedies if a default occurred.

Modification

The Court finds that it has no authority to permit the modification of this plan. The Bankruptcy Code at 11 U.S.C. § 1127(b) permits the debtor to modify a confirmed plan before substantial consummation of such plan. Substantial consummation is defined at 11 U.S.C. § 1101(2) as a transfer of all or substantially all of the property proposed by the plan to be transferred, an assumption by the debtor of all or substantially all of the property dealt with by the plan and commencement of distribution under the plan. Upon the effective date of this plan, the debtors became vested with the property of the estate. They commenced distribution under the plan by making payments for at least two years to most, if not all, of the creditors. The vesting of the property and the payments to creditors indicate to this judge that the plan has been substantially consummated.

There is some authority in this circuit for the proposition that if the plan did not provide for a transfer of property from the estate to some other entity, substantial consummation doesn't take place simply because property vested in the debtors and payments were made after the effective date of the plan. See In re Olson, 861 F.2d 188 (8th Cir. 1988). However, in Olson, the plan was made nonfeasible shortly after its confirmation because of a change in the law with regard to government payments, upon which the plan depended for its feasibility. In contrast, this case presents a situation where weather related problems five years after the petition date and two years after confirmation supposedly have caused the debtors to be unable to make payments to one creditor. The Olson facts are distinguishable.

In addition, the evidence presented at the hearing is that the debtors have transferred some assets to a separate business either operated as a partnership or a corporation. They have sold cattle branded under a brand owned by their son or under brands which apparently are owned by the separate business. They sold thousands of dollars worth of cattle between January of 1993 and May 1, 1993, the due date for the payment to the bank, and have not applied any of the proceeds to the bank payments. The bank officer has testified, by affidavit, which has not been

rebutted, that the son of the debtors brought at least one cattle proceeds check to the bank, requested that it be endorsed by the bank and promised that, once it was properly negotiated and deposited in the checking account, the proceeds would be applied to the bank debt. The bank complied with the endorsement request and redelivered the check to the son of the debtors, but no money has been received from the proceeds of the check.

Finally, there is evidence in this record that the son of the debtors sold cattle in which this creditor had a security interest and the buyer was directed to make payment to an entity other than the debtors.

Therefore, even if the Court found that modification was permissible under the statute, the evidence convinces this Court that the debtors had funds available for making the required payments but diverted those funds to some other use in violation of their security agreements and in violation of the plan terms, which specifically acknowledged the lien rights of the creditor.

For all of the above reasons, the request to modify is denied. There is no automatic stay in effect and, therefore, the Court is not required to grant relief from such stay.

Separate journal entry shall be filed.

BY THE COURT:

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

CC: Movant, Debtor(s) Atty. and all parties appearing at hearing
[] Chapter 13 Trustee [] Chapter 12 Trustee [] U.S.Trustee

Movant is responsible for giving notice of this journal entry to any parties in interest not listed above.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

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EVERETT & ETHEL MUCK,)
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DEBTOR(S))
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Plaintiff(s))
vs.)
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Defendant(s))
_____)

CASE NO. BK87-80283
A

CH. 11
Filing No. 188, 196,
173, 185

JOURNAL ENTRY

DATE: September 24, 1993
HEARING DATE: September
3, 1993

Before a United States Bankruptcy Judge for the District of
Nebraska regarding Debtors' Application to Modify Payment of
Plan; Objection by First National Bank of Gordon, Nebraska.

APPEARANCES

Dale Kuhlmann, Attorney for debtors
Michael Smith, Attorney for Bank

IT IS ORDERED:

Request to modify is denied. There is no automatic stay in
effect and, therefore, the Court is not required to grant relief
from such stay. See memorandum entered this date.

BY THE COURT:

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

CC: Movant, Debtor(s) Atty. and all parties appearing at hearing
[] Chapter 13 Trustee [] Chapter 12 Trustee [] U.S.Trustee

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