

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
NORMAN & BETTY KRAMER,) CASE NO. BK93-81137
)
)
DEBTOR) CH. 12
) Fil. 6, 12

MEMORANDUM

Hearing was held on September 3, 1993, on Motion for Relief filed by Farm Credit Bank. Appearing on behalf of debtors was Arlan Wine of McCook, Nebraska. Appearing on behalf of IRS was Al Kerkove of Omaha, Nebraska. Appearing on behalf of Farm Credit Bank was James McClymont of Kelley, Scritsmier & Byrne, P.C., North Platte, 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).

Background

The debtors in this action, Norman and Betty Kramer, filed a Chapter 11 petition for relief, BK87-03176, on Nov. 16, 1987. A Chapter 11 plan was confirmed on September 13, 1991, and a final decree was entered on November 3, 1992. In the plan, the debtors and the creditor, Farm Credit Bank of Omaha (FCB), entered into a Stipulation Concerning Treatment of Farm Credit Bank of Omaha Claim and a Stipulation and Consent. In the stipulation the parties agreed to the disposition of the FCB claim, and the stipulation contained a "drop dead" provision in the event of default under the plan. The "drop dead" provision entitled FCB to an Order of Sale in a state court foreclosure action and provided FCB the immediate lifting of the automatic stay so FCB may proceed with the foreclosure in the state district court.

The "drop dead" provision was operable upon any of the following occurrences:

- (1) Debtors fail to pay within 10 days of the due date a payment of principle or interest due pursuant to the terms of this stipulation, which failure shall automatically accelerate all sums due FCB without notice or demand; or
- (2) Debtors fail to pay within 15 days of

the delinquent date any real estate taxes or other taxes on the real estate securing sums due FCB; or (3) Debtors fail to provide proof of insurance for the improvements on the real estate securing FCB's debt insuring loss by fire or other casualties to the extent of their full insurance value, within 30 days of request by FCB or fail to list FCB as a loss payee on said insurance coverage; or (4) Debtors otherwise default in performance of any term or provision of this stipulation.

Exhibit 1, Stipulation dated March 27, 1990.

According to the Affidavits of Joseph Law, Exhibit 3 and 4, the debtors did not pay the installment under the Chapter 11 plan due on January 1, 1993. FCB applied \$41,030 to the installment upon receipt of the check from the debtors in the Spring of 1993, and Mr. Law gave the debtors notice that \$67,183.99 of the installment remained unpaid. Upon default of the installment, the loan was accelerated, and as of July 12, 1993, \$981,760.78 is due and owing to FCB. The default on the repayment of the loan is in violation of the stipulation that was entered into between the Debtors and FCB.

Pursuant to the stipulation, FCB filed the Stipulation and Consent with the state court and obtained an Order of Sale from the Chase County District Court of Nebraska which set July 14, 1993 as the date of the foreclosure sale. The debtors filed a Chapter 12 petition on July 12, 1993, which stayed the foreclosure proceedings.

Issues

1. May a debtor who stipulated with a creditor in a Chapter 11 case file a Chapter 12 case after the entry of a final decree in the Chapter 11 case?
2. Does a stipulation entered in a Chapter 11 case remain in effect and bind a debtor in a subsequent Chapter 12 case?
3. Have the debtors submitted sufficient evidence of a reasonable prospect of reorganization within a reasonable period of time which is their burden of proof under 11 U.S.C. § 362(g)(2)?

Decision

1. A debtor may file a Chapter 12 case subsequent to a final decree being entered in a Chapter 11 case.

2. A stipulation in a Chapter 11 case is a contract which may, under appropriate circumstances, be modified in a subsequent Chapter 12 case.

3. The debtors have failed to present sufficient evidence that there is a reasonable possibility of a successful reorganization within a reasonable time, and therefore, relief from the automatic stay is granted.

Discussion

A. AFTER A CHAPTER 11 PLAN HAS BEEN CONFIRMED, A DEBTOR MAY FILE A CHAPTER 12 BANKRUPTCY PETITION.

There is no per se rule against successive filings. Schuldies v. FHA (In re Schuldies), 122 B.R. 100 (D.S.D. 1990). In the absence of a specific statutory prohibition against filing a Chapter 12 case after a confirmed Chapter 11 case has received a final decree, such successive filings are permissible. Johnson v. Home State Bank, 111 S. Ct. 2150, 2156, 115 L.Ed.2d 66 (1991) (holding that a Chapter 13 case was permissible after a previous Chapter 7 case); United States v. Smith, 499 U.S. 160, 111 S. Ct. 1180, 182, 113 L.Ed.2d 134 (1991) (expressly enumerated exceptions presumed to be exclusive).

The validity of the second filing depends on whether the second case is filed in good faith and justified by a change in circumstances. Mortgage Mart, Inc. v. Rechnitzer, (In re Chisum), 847 F.2d 597, 597-98 (9th Cir. 1988). The question of good faith is a question of fact for the Bankruptcy Court to determine. Downey Sav. & Loan Ass'n v. Metz (In re Metz), 820 F.2d 1495, 1497 (9th Cir. 1987) (citing In re Baker, 736 F.2d 481, 482 (8th Cir. 1984)). A non-exhaustive list of factors to consider are: (1) the length of time between the discharge of the Chapter 11 and the filing of the Chapter 12 petition; (2) whether the filing of the Chapter 12 was made to invoke the protection of the automatic stay; (3) the effort made to comply with the previously confirmed and substantially consummated Chapter 11 plan; (4) consideration of the fact that Congress intended debtors to reach their bankruptcy goals with one case; and (5) any other facts the court finds relevant to the issue of good faith. In re Schuldies, 122 B.R. at 103.

For the purposes of this motion, although it is a close question, the Court finds that the debtors did file their case in good faith. The first Chapter 11 case was confirmed on September 13, 1991. Payments and transfers required by the plan were made in 1991 and 1992, and a final decree was entered on November 3, 1992. The first default occurred in January of 1993. A partial payment

was made in the spring of 1993. The Chapter 12 petition was not filed until July 12, 1993, after negotiations failed. Even though the petition was technically filed to secure the protection of the automatic stay, the property to be sold in the foreclosure sale was virtually all of the debtors' farm assets, without which the debtors could not effectively reorganize or continue payments to creditors other than FCB. The debtors were unable to make installment payments to creditors under the Chapter 11 plan due to low bean prices in 1991 and a late freeze in May 1992. Natural disasters are recognized as constituting unforeseen changed circumstances, Strey Enterprises, Inc. v. Farm Credit Bank, Neb. Bkr. 91:017, 19 (D. Neb. 1991)(citing In re Hagen, 95 B.R. 708 (Bankr. D.N.D. 1989) and In re Dittmer, 82 B.R. 1019 (Bankr. D.N.D. 1988)).

Based on the debtors' payment in the Chapter 11 case and the natural disasters affecting their operation, the Court finds the debtors are acting in good faith by attempting to reorganize their existing debts under Chapter 12 of the Bankruptcy Code.

B. THE STIPULATION ENTERED INTO DURING THE CHAPTER 11 CASE IS NOT NECESSARILY BINDING IN THE SECOND BANKRUPTCY CASE.

Under the provisions of the stipulation, FCB was entitled to proceed with its foreclosure in the state court upon default of the debtor. As demonstrated from FCB's pleading, FCB was able to enforce the stipulation by securing an Order of Sale from the state court to hold a foreclosure sale on July 14, 1993, but the debtors stayed the sale by filing a Chapter 12 petition. FCB argues that the stipulation is enforceable in the second bankruptcy, and FCB should be granted relief from the automatic stay to enforce its rights under the stipulation.

As discussed above, Congress permits successive bankruptcy filings and has not limited the rights of debtors to seek relief in a second bankruptcy case, except where expressed in the Bankruptcy Code. The debtors have shown that their Chapter 12 petition was filed in good faith, and for this reason, the debtors should be entitled to all of the protection available to all Chapter 12 debtors, including the automatic stay in a legitimately filed case.

The stipulation between FCB and the debtors was a contract that stemmed from the first Chapter 11 bankruptcy. The stipulation only addressed what would happen if the debtor defaulted under the terms of the Chapter 11 plan. When the debtors defaulted on the installment payment, FCB was not prohibited from carrying out the terms of the stipulation. It proceeded pursuant to the stipulation, and debtors did not attempt to modify the stipulation

in the Chapter 11 case. The FCB was required to stop the foreclosure process when the Chapter 12 case was filed, just as it would have been had a Chapter 7 case been filed.

There is no compelling reason to find that the Chapter 11 stipulation is so binding on the debtors that the existence of the stipulation alone is sufficient ground to grant relief from the automatic stay. FCB and the debtors entered into a stipulation that only addressed a default under the Chapter 11 case. Since Congress allows successive bankruptcy filings and since the debtors filed their case in good faith, there is no reason to treat the debtor's pre-Chapter 12 bankruptcy stipulation differently from other pre-bankruptcy agreements.

FCB cited Strey Enterprises v. Farm Credit Bank, Neb. Bkr 91:017 (D. Neb. 1991) as authority for its position that the stipulation alone is sufficient reason to grant relief from the automatic stay. However, Strey only addressed the ability of the debtor to avoid the terms of a stipulation through modification of a Chapter 11 plan. In addition, this Bankruptcy Court has interpreted Strey to stand for the proposition that on a motion to modify a plan the court may permit the debtor to deviate from the stipulation if a compelling reason exists. In re W. & R. Barger, Neb. Bkr 93:155 (Bankr. D. Neb. 1993). Since Strey and W. & R. Barger only address the issue of a modification within a single bankruptcy case, these cases are not directly on point because this Chapter 12 case is an entirely permissible new bankruptcy case. Furthermore, the debtors have creditors other than the FCB. Debtors apparently have been unable to satisfy those other claims and have a need to reorganize their debts beyond the purpose of interfering with FCB's efforts to recover collateral.

C. THE DEBTORS HAVE NOT PROVEN THAT THEY CAN REORGANIZE THEIR DEBTS WITH A FEASIBLE PLAN UNDER 11 U.S.C. § 362(d)(2).

As an alternative to the above-described positions of the FCB, the FCB argues that the Court should grant relief from the automatic stay because the property at issue here is not necessary for an effective reorganization because no such reorganization appears to be feasible. The Code, at 11 U.S.C. § 362(d)(2) states that the court may grant relief from the automatic stay with respect to a stay of an act against property if the debtor has no equity in the property and the property is not necessary to an effective reorganization.

The debtors' schedules show that they do not have any equity interest in the property. Schedule A lists the outstanding debt as \$918,858, but the value of the collateral as \$640,401. The

question then is whether the property is necessary to an effective reorganization.

In United Sav. Ass'n v. Timbers of Inwood Forest, a Chapter 11 case, Justice Scalia, writing for the Court, stated that under 11 U.S.C. § 362(d)(2) once the movant demonstrates that it is an undersecured creditor "it is the burden of the debtor to establish that the collateral at issue is "necessary to an effective reorganization." 108 S. Ct. 626, 632 (1988). The debtor must not only show that conceivably there will be an effective reorganization which will require the property, but in addition, that there is "a reasonable possibility of a successful reorganization within a reasonable time." Id. at 632. The Court went on to say that during the exclusivity period during which the debtor formulates a plan, bankruptcy courts demand less detailed showings, but even within that time period, lack of any realistic prospect of effective reorganization will require § 362(d)(2) relief. Id. at 632-33; see also Id. f.n. 2 (listing cases where relief was granted before the debtor's exclusivity period expired).

In this case, the debtors have not submitted proof that the debtors can effectively reorganize. The debtors assert in their pleading that they "have a reasonable chance to reorganize their farming business successfully" and that the land that is FCB's collateral is "virtually all the farming assets of this bankruptcy estate, and is absolutely essential to the effective reorganization thereof." (filing no. 12, paragraphs 7,8) In addition, the debtors state that they have sold a large portion of their land in satisfaction of debts owed to other secured creditors in order to downsize their operations and reduce other debts (filing no. 12, paragraph 13; Affidavit, August 27, 1993, paragraph 4,5). Finally, the debtors assert that they had tried unsuccessfully to work out a non-bankruptcy deal with FCB to turnover one-half of the property to FCB subject to the one-year alleged lease of Matt Kramer (Affidavit, August 27, 1993, paragraph 14).

While this information is useful to determine the direction the debtors want to take, the information falls short of showing that the Debtors can realistically reorganize their operation successfully. Under Timbers, mere statements regarding the debtors' belief or statements regarding the past handling of debts are not enough. This Court has been presented nothing resembling a plan that will deal with FCB or the debtors' other creditors. Section 1221 requires a plan to be filed within ninety days of the petition date. The petition was filed on July 12, 1993. The opportunity for filing a plan has not expired. However, under Timbers, even lacking a plan during the analogous exclusive period for filing the plan, the debtor has the evidentiary burden regarding potential reorganization.

The debtors show on Schedule I that they have zero regular income from the operation of the farm. The only income listed is their Social Security income of \$800 per month, while expenses are listed at \$800.50 in schedule J. The fact the debtors are not receiving any income from the farming business nor making any expenditures on the farming operation serves as one indication that the property is not necessary for an effective reorganization. The schedules are not conclusive on this matter because they were filed in August before farm income would have been earned. Therefore, an analysis of the Schedules is speculation at best.

Under the authority of Timbers, it is not necessary for this Court to guess or speculate on whether the debtors may successfully reorganize. Here, the debtors did not prove that the reorganization would satisfy the standards set forth in Timbers -- that the debtor may successfully reorganize with a reasonable time and that the property is necessary for the reorganization.

Relief from the stay under § 362(d)(2) is granted.

Separate journal entry to be entered.

DATED: September 20, 1993.

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 [X] Chapter 12 Trustee [] U.S.Trustee

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

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NORMAN & BETTY KRAMER,)	CASE NO. BK93-81137
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<u>DEBTOR(S)</u>)	
)	CH. 12
)	Filing No. 6, 12
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	DATE: September 20, 1993
<u>Defendant(s)</u>)	HEARING DATE: September
)	3, 1993

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Relief filed by Farm Credit Bank.

APPEARANCES

Arlan Wine, Attorney for debtors
Al Kerkove, Attorney for IRS
James McClymont, Attorney for Farm Credit Bank

IT IS ORDERED:

Motion for relief from automatic stay is granted. See memorandum 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 [X] Chapter 12 Trustee [] U.S.Trustee

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