

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
R & J BARGER FARMS, INC.,) CASE NO. BK93-80702
) A
)
DEBTOR(S))
)
) CH. 12
) Filing No. 12, 19

MEMORANDUM

Hearing was held on July 8, 1993, on Motion to Dismiss filed by First National Bank of McCook; Resistance by Debtor. Appearing on behalf of debtor was David Hahn of Hahn Law Office, Lincoln, Nebraska. Appearing on behalf of First National Bank of McCook was David Pederson of Murphy, Pederson, Waite & Williams, North Platte, Nebraska. Richard Lydick appeared as Trustee. 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)(A).

This Chapter 12 case was filed on the eve of a foreclosure. The First National Bank of McCook, a major secured creditor in this case, has filed a motion to dismiss, for cause, for the reason that this is the fourth in a series in bankruptcy filings which have been designed to frustrate the effort of the Bank and other creditors to recover collateral.

Hearing was held on July 8, 1993, and evidence in the form of an affidavit of an officer of the Bank was received.

The Bankruptcy Code at 11 U.S.C. § 1208(c) provides that a court may dismiss a case for cause and then gives a non-exclusive list of reasons which may be considered cause. Although the facts in this case do not yet fall under any of the items listed in Section 1208(c), except unreasonable delay that is prejudicial to creditors, the Court finds that the facts that will be itemized below are sufficient to enable the Court to find that the case should be dismissed. Although the Court does not believe it has authority under 11 U.S.C. § 109(g) to prohibit a refiling by the debtor, if a refiling of a Chapter 11, Chapter 12 or Chapter 13 occurs within the next 180 days, the Court will direct the Clerk of Court to schedule an expedited hearing on any motion for relief from the automatic stay that is filed by this creditor in such a subsequent case.

The facts upon which this Court supports the dismissal of this Chapter 12 case are contained in the following paragraphs.

The debtor has filed four bankruptcy cases since September 25, 1986. A Chapter 11 case, BK86-2776, was filed on September 25, 1986, and was dismissed by the debtor after reaching a settlement agreement with the Bank on June 29, 1988. A Chapter 12 case, BK90-40395, was filed on March 27, 1990, after the debtor defaulted on the settlement agreement described above. That case was dismissed by the Court on March 20, 1991. A Chapter 11 case, BK91-40668, was filed April 26, 1991, after the Bank filed a replevin action. That case was dismissed April 13, 1993. The currently pending Chapter 12 case, BK93-80702, was filed April 27, 1993, after the Bank reinstated its replevin action.

Since the filing of the first case, the real estate taxes owed by the debtor have increased from \$13,400.00 to \$97,583.00. In addition, if the debtor is still liable for taxes on certain real property conveyed by the debtor in the interim, an additional \$58,855.00 is due to one or more counties.

In the first Chapter 12 case the schedules showed secured claims in the amount of \$585,634.00. In this Chapter 12 case the schedules show basically the same secured creditors with claims in the scheduled amount of \$775,745.00. However, the actual secured claims in this case will be approximately \$186,000.00 more because the schedules in this case do not reveal claims by Production Credit Association, Farm Credit Bank or approximately \$74,000.00 more on the claim held by this Bank.

Since the first case, the real estate taxes have increased between \$84,000.00 and \$143,000.00. In the last three years in which the debtor has filed two Chapter 12 cases and one Chapter 11 case, the total debts have continued to increase, perhaps as much as \$355,000.00.

No payments have been made to this creditor since the first Chapter 12 case, BK90-40395, was filed on March 27, 1990. Proofs of claim filed by the Bank in the various cases began in the amount of \$441,912.00 in BK90-40395, increased to \$477,968.00 in BK91-40668, and the current claim is in the amount of \$549,911.00 in BK93-80702.

The first Chapter 12 case, BK90-40395, was on file for approximately one year before it was dismissed due to debtor's failure to prosecute the case, and the debtor was prohibited from refileing under Chapter 12 for a period of 180 days. After the dismissal of the first Chapter 12 case, the Bank instituted a replevin action and the debtor responded thirty-seven days after the Chapter 12 case had been dismissed, by filing a Chapter 11 case.

The Bank eventually moved for dismissal of the Chapter 11 case and the debtor did not resist. It was dismissed on April 13, 1993. The Bank then reinstated the replevin action and the debtor filed this Chapter 12 case on April 27, 1993, two weeks after the Chapter 11 case was dismissed.

The debtor has presented no evidence that circumstances have changed between the time of the dismissal of the last two cases and the filing of this case. The Court concludes from the evidence that the only reason this case is on file is to stop the replevin action by the Bank. In the immediately preceding three-year period, this debtor has been under the protection of the Bankruptcy Code in three separate bankruptcy cases for all but fifty-one days.

The Court finds that this filing, as well as the last two filings, were not in good faith but are an attempt by the debtor to frustrate the statutory requirements of the Code and abuse the bankruptcy process simply to stop the collection efforts of one creditor, which the debtor apparently is unable to pay.

The Court finds, based upon the facts recited above, that this Chapter 12 filing is in bad faith and should be dismissed for cause.

It is, therefore, ordered that this case is dismissed for cause.

Clerk shall provide a copy of this memorandum and order to counsel appearing at the hearing.

Separate journal entry shall be filed.

DATED: September 7, 1993.

BY THE COURT:

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

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
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R & J BARGER FARMS, INC.,)
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DEBTOR(S))
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Plaintiff(s))
vs.)
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Defendant(s))

CASE NO. BK93-80702
A

CH. 12
Filing No. 12, 19

JOURNAL ENTRY

DATE: September 7, 1993
HEARING DATE: July 8,
1993

Before a United States Bankruptcy Judge for the District of
Nebraska regarding Motion to Dismiss filed by First National Bank
of McCook; Resistance by Debtors.

APPEARANCES

David Hahn, Attorney for debtor
David Pederson, Attorney for movant
Richard Lydick, Trustee

IT IS ORDERED:

The Court finds that this Chapter 12 filing is in bad faith
and orders that this case is dismissed for cause. See memorandum
entered this date.

BY THE COURT:

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