

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
TERRY ALAN LEHRMAN,) CASE NO. BK99-82308
)
DEBTOR(S)) CH. 12

MEMORANDUM

Hearing was held on August 7, 2000, on Motion to Dismiss Chapter 12 Case and Objection to Debtor's Second Amended Chapter 12 Plan. Appearances: Michael Heavey for the debtor and Michael Mallaney for Sandra Gau. 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)(L).

Sandra Gau, the former spouse of the debtor, has filed an objection to the debtor's second amended Chapter 12 plan and a motion to dismiss the case. The motion to dismiss is deferred. The objection to the second amended plan is sustained. The debtor shall file an amended plan to deal with the items discussed below on or before October 16, 2000. The debtor shall provide appropriate notice to all parties in interest with a required resistance date. If a resistance is filed and hearing held, and the court determines that the debtor has failed to properly deal with the matters discussed below, this case will be dismissed as a bad faith filing.

Ms. Gau has a variety of objections, some of which appear to be based on a misunderstanding of the terms of the plan. However, others are valid and prohibit confirmation. First, Ms. Gau points out that the only debt which this plan attempts to modify is a debt arising from a dissolution of marriage action between Ms. Gau and Mr. Lehrman. The dissolution of marriage action was settled on the day of trial by the parties entering into an oral stipulation concerning a division of property and payments to be made by Mr. Lehrman to Ms. Gau within a very short period of time after the entry of the Decree of Dissolution ("Decree").

The Decree, which was entered in July of 1999, provided that the debtor was to pay Ms. Gau \$25,000.00 on or before June 30, 1999; \$25,000.00 on or before July 31, 1999; and the remaining balance of \$80,923.00 was to be paid on or before October 31, 1999. The obligation from Mr. Lehrman to Ms. Gau was to be secured by a mortgage on real estate which was

awarded to Mr. Lehrman by the terms of the Decree. Interest was to accrue on the obligation remaining after June 30, 1999, at the judgment rate of 5.732% until paid.

The debtor paid the first \$25,000.00 installment, but has failed to pay the balance. Ms. Gau took action in the District Court of Douglas County, Nebraska, to collect the remaining balance. Prior to a hearing on her motion for contempt, Mr. Lehrman filed this Chapter 12 bankruptcy petition in early October of 1999.

As mentioned above, the second amended plan proposes to pay, according to the terms of various notes and mortgages, all farm-related secured debt. In addition, the plan proposes to pay attorney fees to all farm-related oversecured creditors and to do so within a short period of time after the fees are allowed.

In contrast to the treatment of all of the "farm creditors" Mr. Lehrman proposes to amortize the obligation to Ms. Gau over twenty years and to pay it in monthly installments beginning in January of 2001 with a ten-year balloon. Concerning attorney fees that might be owed on Ms. Gau's "oversecured" claim, the plan proposes to pay the attorney fees in full, but amortized over a twenty-year period and paid in installments with a balloon payment, if necessary, at the end of ten years.

Treatment of Ms. Gau's claim in such a manner is discriminatory, inequitable and not permitted by the Bankruptcy Code. It is discriminatory because it treats her short-term obligation in a manner significantly different from the manner in which it treats all other long-term obligations. Specifically, it makes her debt a long-term debt which is not being paid according to its terms, while treating other long-term debt exactly according to the contractual terms. In addition, it provides for payment of attorney fees on the other long-term debts within a very short period of time after those attorney fees are allowed, but provides that the attorney fees on her short-term debt now turned to long-term debt, shall be paid over the long term. There is absolutely no factual or legal justification for such differences in the treatment of the farm debts from the treatment of the marital debt.

The treatment of Ms. Gau's claim as proposed in the plan is inequitable because it stretches out a short-term obligation that was agreed to not less than four months prior

to the bankruptcy filing to settle a dissolution of marriage action. Had Ms. Gau anticipated that Mr. Lehrman would renege on his in-court agreement to pay her off within six months of the settlement, she could have opted to present her case to the state district court judge who may have required that all of the real property used for farming be sold to equitably divide the marital property between the parties. She certainly did not bargain for long-term contractual relationship with her former husband.

Finally, the treatment of Ms. Gau's claim is not authorized by the Bankruptcy Code. The obligation owed to her is memorialized in the Decree. It is a short-term obligation with payments beginning at the end of June of 1999 and being completed by the end of October, 1999. The plan provides that this short-term obligation will be paid over a period of time in excess of three years and purports to justify such treatment based upon 11 U.S.C. § 1222(b)(9). However, that section, by its reference to 11 U.S.C. § 1225(a)(5), permits long-term payments on secured claims on which the "last payment is due after the date on which the final payment under the plan is due." For example, if the debt is a thirty-year note secured by a thirty-year mortgage, the plan may provide that it will be paid off in thirty years, even though the plan itself will be completed within three to five years. Ms. Gau's claim is not a thirty-year mortgage. It is a short-term debt on which the last payment was due thirteen days after the petition date.

For the above-listed reasons alone, the plan cannot be confirmed. In addition, there are other problems with this case which will be discussed below.

The debtor has admitted in a deposition taken in May, 2000, that since the date of the bankruptcy petition, he has made numerous payments on prepetition secured and unsecured obligations. He has not assumed a prepetition lease but remains in possession of the land subject to the lease, and apparently is farming this leased land without court approval. He has also entered into one or more leases for the year 2000 farming season, without court approval. He has not specifically accounted for the distribution of the proceeds of the 1999 crop. He has not provided detailed information about the year 2000 crop or the proposed distribution of the proceeds of that crop. He has not accounted for the distribution of the bonus money he received from his employer in 1999 and the plan does not, except in general "disposable income" terms, discuss the distribution of any bonuses to be

earned and received in the future. His cash flow plan, because he does not acknowledge the possibility of future bonuses, purports to show him barely breaking even on a cash flow basis.

Mr. Lehrman, once the bankruptcy case was filed, was not operating in the ordinary course of business. Chapter 12 debtors are required to obtain court approval, after notice, for any major purchases or lease/contractual obligations being incurred post petition and preconfirmation. There is nothing in Chapter 12 of the Bankruptcy Code that permits a Chapter 12 debtor to continue to pay some, but not all, prepetition unsecured or prepetition secured obligations prior to confirmation, without approval of the court. These matters are mentioned, not because they deal directly with the confirmability of any plan, but because they deal directly with the companion motion to dismiss and, the "good faith" of this debtor. The "good faith" issue will be revisited at a later date.

Chapter 12 was not designed to give authority to a bankruptcy judge to modify a Decree resulting from a state court dissolution of marriage action. If Mr. Lehrman made a bad bargain or if his agreement with Ms. Gau was not feasible in the inception or became not feasible as a result of changes in circumstances, he has available a court of competent jurisdiction, the Douglas County District Court, to request relief from his burden. This court does not entertain requests for modification of decrees of dissolution of marriage and will not confirm a plan that does not fairly, and within the letter of the Code, treat the claim of Ms. Gau.

As mentioned above, the debtor is granted to October 16, 2000, to file an amended plan.

Separate journal entry to be filed.

DATED: September 15, 2000.

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

PISTILLO, MICHAEL	330-9911
LYDICK, RICHARD	4
HEAVEY, MICHAEL	107

Copies mailed by the Court to:

Steven H. Shindler and Michael P. Mallaney, 604
Locust, Suite 1000, Des Moines, IA 50309-3715
United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

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FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
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TERRY ALAN LEHRMAN,) CASE NO. BK99-82308
) A
DEBTOR(S))
) CH. 12
) Filing No. 79, 81
Plaintiff(s))
vs.) JOURNAL ENTRY
)
)
)
) DATE: September 15, 2000
Defendant(s)) HEARING DATE: August 7, 2000

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion to Dismiss Chapter 12 Case and Objection to Debtor's Second Amended Chapter 12 Plan.

APPEARANCES

Michael Heavey, Attorney for debtor
Michael Mallaney, Attorney for Sandra Gau

IT IS ORDERED:

The objection to confirmation is granted. See Memorandum entered this date.

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

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