

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
WILLIAM M. BARGER and) CASE NO. BK90-40629
RANDEE L. BARGER,)
)
)
DEBTOR) CH. 12

MEMORANDUM

Hearing was held on Filing No. 182 on Motion to Alter or Amend Judgment, on March 30, 1993. Appearing on behalf of the debtors was Arlan Wine of Arlan Wine Law Office, McCook, Nebraska. Appearing on behalf of Bank was Susan Williams. Appearing on behalf of the Trustee was Ruth Hamilton. This memorandum contains finding 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).

On March 10, 1993 at filing no. 179 and 180 this Court denied the debtors' motion to modify their confirmed Chapter 12 plan post-confirmation. The Court found that such modification was barred as a matter of law. That finding was based upon an interpretation of a memorandum opinion of Senior Judge Urbom in Strey Enterprises, Inc. v. Farm Credit Bank, CV-L-309, BK87-2255, Neb. Bkr. 91:017 (1990). The Court construed Judge Urbom's opinion to mean that if parties stipulated to treatment under a Chapter 12 plan and provided for particular default provisions, if a default occurred the debtors were prohibited from modifying the treatment which had been agreed to in the stipulation.

The debtors have filed a motion to alter or amend the judgment. They suggest a more proper interpretation of Judge Urbom's opinion is that it was limited to the facts of the particular case and that Judge Urbom reached his conclusion barring modification only after a factual analysis of the reasonable expectation of the parties when they entered into the stipulation.

After a review of Judge Urbom's opinion this Court concludes that it agrees with the position of the debtors. On Page 91-020 of the opinion as found in the Nebraska Bankruptcy Opinions, Judge Urbom states: "Were the confirmed plan the only "participatory" instrument in this case, I would be inclined to

permit modification. However, the special circumstances of this case require an inquiry into what expectations were created by the stipulation and whether a compelling reason exists to deviate from the terms of the stipulation".

In this case the stipulation and the plan as confirmed are in evidence. It is clear from a review of the stipulation and the plan that the reasonable expectation of the bank was that it would get paid on a timely basis and that it would give up a certain amount of its claim if it was paid on a timely basis. The reasonable expectation of the debtors is that they would be free to continue the farming operation and attempt to earn sufficient income to pay claims of creditors. However, it is also clear that the reasonable expectation of the bank was that if a default occurred and was not cured on a timely basis, it would have relief from the automatic stay, a reinstatement of its full claim, and an ability to immediately foreclose on its collateral.

The debtors were represented by counsel when the stipulation was entered into and the plan was confirmed. Until the hearing on the motion to alter or amend the judgment the debtors presented no evidence that they misunderstood the terms of the agreement. At that hearing the debtors presented an affidavit in which they allege that their understanding of the default provisions was that in addition to a 30-day cure of a default they would be given a written notice and 15 days thereafter to cure. Although somewhat confusing, the Court concludes that the stipulation, if read as a whole, does not provide for the notice and additional 15 days if the sole default is failure to pay. Written notice is required if the default is something other than failure to pay. Nevertheless, although the Court is able to differentiate between the bank remedies and debtor rights depending upon the type of default, it is possible from a review of the language of the document that the debtors could have misunderstood the rights of the parties.

Assuming, however, that both parties bargained for certain rights and remedies and their reasonable expectations were as specifically written in the agreement, the Court is required to then determine "whether a compelling reason exists to deviate from the terms of that stipulation".

To determine if a compelling reason for deviation from the stipulation exists, the proposed modification, as it affects the bank, must be considered. The debtors were obligated to pay to the bank, on December 31 of 1992, and on the 31st day of December each year thereafter for a certain number of years, the approximate amount of \$13,000.00. In November of 1992 the

debtors determined that they would be unable to make the December 31, 1992 payment to the bank unless they sold yearling cattle prior to the time that the cattle would actually be ready for market. Such a sale would cause the debtors to significantly miss additional profit on the sale of the animals.

Therefore, the debtors filed a motion to modify the confirmed plan which, as far as it affected the bank, moved the bank payment date from December 31, 1992 to February 28, 1993. The debtors did not propose to change the amount of the payment and agreed to pay interest to the date of payment. No other change to the bank's claim treatment was proposed. So, if the appropriate procedures had been followed and the bank had acquiesced in the change of the date of payment, the bank would have been paid in full for its December 31, 1992 payment, with interest as of February 28, 1993. Although the changed payment date would have been a change from the stipulation, the bank would not have been financially harmed.

At the time the debtors' filed the proposed modification they were not represented by counsel and they did not follow the local procedures. When the motion was filed the Court directed that the debtors provide notice to all parties and give a specific date for objection. The debtors did not comply with that notice requirement. Therefore, no objection date was provided to any creditor. Although the bank had received a copy of the proposed modification, since it did not receive an objection date deadline, it did not respond. It was not until after the December 31, 1992 due date that the debtors realized there was some type of a problem with obtaining a hearing on the modification. They then employed counsel who very quickly thereafter obtained an objection deadline and served notice on the bank. The objection deadline was after January 31, 1993. Pursuant to the terms of the stipulation the debtors had 30 days from December 31, 1992 to cure the monetary default and if they failed to do so the bank had relief from the automatic stay and the ability to foreclose.

The bank eventually objected to the modification. In the meantime, the bank proceeded pursuant to the terms of the stipulation as if it had relief from the automatic stay and began a replevin action in state court with regard to machinery and livestock. The debtors then filed an adversary proceeding requesting a temporary restraining order to stop the replevin action pending a hearing on the modification. Shortly before the hearing on the modification the debtors filed a "amendment" to the motion to modify Filing No. 176. In that amendment to the motion the debtors moved the payment date to March 10, 1993, a few days after the hearing on modification, and proposed that all

future payment dates would be moved to March 10 of the particular years involved. Once again the debtors proposed to pay interest so that the bank would not be financially harmed.

As mentioned above, following the hearing on the modification the Court denied the modification, as a matter of law, based upon Judge Urbom's decision. Thereafter, the debtors and the Farm Credit Bank, another party that had objected to the modification, entered into a stipulation which modified the terms of repayment to the Farm Credit Bank in a manner basically consistent with what the debtors had proposed in their modification.

The Court finds that there are compelling reasons to deviate from the terms of the stipulation. Those compelling reasons are severalfold. First, the bank had notice of the proposed change of payment dates.

Second, the proposed change of payment date for the 1992 payment would have done no harm to the interest of the bank. It would receive the principal plus full accrued interest of payment less than 60 days after the original due date and less than 30 days after the cure date.

Third, it had such notice more than 60 days before the cure date.

Fourth, the debtors had sufficient assets available to liquidate to pay the bank payment on December 31, 1992, but to liquidate the livestock assets would have caused the proceeds on those livestock assets to be significantly less than if they were liquidated as proposed in the modification, several weeks after the payment due date.

Fifth, part of the reason the debtors were short on cash in December of 1992 and therefore unable to fully pay all creditors as of that date, pursuant to the terms of the plan, was because of a weather disaster declared by state and federal agencies resulting from late frost in May with regard to the wheat crop and cold weather in August with regard to the bean crop. Weather problems, although anticipated by farmers and bankers, as well as by bankruptcy judges, if severe enough are, even under Judge Urbom's memorandum decision, a legitimate basis for permitting modification of plans.

Sixth, the debtors had, on the date of the hearing on modification and on the date of the hearing on the motion to alter or amend the judgment, sufficient funds available to make the payment requested.

Seventh, the debtors have in the past arranged for adequate credit from other sources to take care of irrigation and crop input needs. There is no evidence that they are unable to obtain similar credit in 1993.

Therefore, for all of the above reasons, the Court does grant the motion to alter or amend judgment and it does find that the proposed modification of the payment date should be allowed. Debtors are ordered to pay the bank the December 31, 1992 payment plus accrued interest by April 16, 1993 to the bank.

The bank has incurred substantial legal fees as a result of the actions by the debtors. Since the debtors did not obtain the appropriate objection date prior to the default date and since the debtors did not obtain a hearing date on the modification prior to the expiration of the cure date, the bank reasonably acted within its rights pursuant to the terms of the stipulation. It moved forward with filing the appropriate documents in the bankruptcy court and the petition in replevin in the state court. It then was required to participate in a hearing on a temporary restraining order. After it was stopped from proceeding in the state court, it participated in a hearing on the modification. After it was successful in the hearing on the modification it moved forward in the state court and then was once again required to participate in a bankruptcy court hearing on the motion to alter or amend judgment.

To assure the bank that the modification as proposed in November and amended in February does not cause it a financial cost, this Court believes it is fair to require the debtors to pay the attorney fees and expenses of the bank involved in the enforcement of its rights from and after January 31, 1993. Counsel for the bank has provided the Court with a partial statement of fees as of the date of the hearing on the modification. That amount is \$1,518.00. Since that date the bank has participated in other hearings. The bank is permitted to supplement its attorney fee and expense application by May 1, 1993. The Court will then review such application and enter a final order on the amount allowed. The debtors are to pay the amount allowed in the following manner: \$500.00 on or before August 16, 1993, \$500.00 on or before November 16, 1993, \$500.00 on or before January 17, 1994, and the balance on or before March 10, 1994.

This Court is concerned that this memorandum opinion will send a message to debtors and creditors that stipulations are worthless. That is an erroneous perception. This Court takes very seriously the concerns of Judge Urbom expressed in the Strey case referred to above. Modification is allowed in this case

reluctantly and only after a consideration of the analysis required by the Strey case and the specific facts of this case. Stipulations are to be encouraged and, for the most part, should be and will be enforced.

A separate order will be entered in the related adversary proceeding, A93-8008, which will reinstate the restraining order and preliminary injunction prohibiting the bank from proceeding further to liquidate the collateral or collect the debt outside of the framework of the Chapter 12 plan as modified.

A separate journal entry shall be entered in this case.

(X) Clerk to give immediate notice of the Court's ruling to counsel appearing at the hearing. Counsel for the debtors shall give notice to all other parties in interest.

DATED: April 5, 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)	
WILLIAM M. BARGER and)	
RANDEE L. BARGER,	)	CASE NO. BK90-40629
<u>DEBTOR(S)</u>)	
	)	CH. 12
	)	Filing No. 156, 157, 176,
	)	179, 180, 182
Plaintiff(s))	
vs.	)	<u>JOURNAL ENTRY</u>
	)	DATE: April 5, 1993
<u>Defendant(s)</u>	)	HEARING DATE: March 30,
	)	1993

Before a United States Bankruptcy Judge for the District of Nebraska regarding Debtors' Motion to Alter or Amend the Court's Order of March 9, 1993.

APPEARANCES

Arlan Wine : Debtors'
Susan Williams: First National Bank of McCook
Ruth Hamilton: Trustee

(X) Copy to Law Clerk (X) Exhibits received
() SETTLED. No further action necessary.
() WITHDRAWN. No further action necessary.
IT IS ORDERED:

() Taken under Advisement (X) Granted () Denied

The debtors' motion to alter or amend judgment is granted. The debtors' motion to modify a confirmed plan as amended on February 26, 1993 by Filing No. 176 is granted, except to the extent that it differs from the stipulation entered into between the debtors and the Farm Credit Bank after the order denying modification was entered.

Clerk to give immediate notice of the Court's ruling to counsel appearing at the hearing. Counsel for debtors shall give notice to all other parties in interest.

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)	
WILLIAM M. BARGER and)	
RANDEE L. BARGER,	)	CASE NO. BK90-40629
	)	A93-8008
<u>DEBTOR(S)</u>)	
WILLIAM M. & RANDEE L. BARGER,	)	CH. 12
	)	Filing No. 182
Plaintiff(s))	
vs.	)	<u>JOURNAL ENTRY</u>
FARM CREDIT BANK OF OMAHA, ET	)	DATE: April 5, 1993
AL.	)	HEARING DATE: March 30,
<u>Defendant(s)</u>	)	1993

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion to Alter or Amend Judgment.

APPEARANCES

Arlan Wine : Debtors
Susan Williams: First National Bank of McCook
Ruth Hamilton : Trustee

(X) Copy to Law Clerk () Exhibits received

() SETTLED. No further action necessary.
() WITHDRAWN. No further action necessary.
IT IS ORDERED:

() Taken under Advisement (X) Granted () Denied

The Motion to Alter or Amend Judgment is granted. The restraining order is reinstated. By separate order in the Bankruptcy case, BK90-40629, the Court has allowed a modification to a confirmed plan. In this Adversary proceeding the bank is enjoined from proceeding with liquidation of its collateral or collection activities against the debtor outside the terms of the modified plan as amended.

Clerk to give immediate notice of the Court's ruling to counsel appearing at the hearing.

BY THE COURT:
/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

CC: MOVANT