

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

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

MEMORANDUM

Hearing was held on March 5, 1993, on the Motion to Modify Confirmed Plan filed by the Debtors; Objection by Farm Credit Bank of Omaha; Objection to Modification by First National Bank of McCook; and Amendment to Motion by Debtors. Appearing on behalf of debtors was Arlan Wine of Arlan Wine Law Office, McCook, Nebraska. Appearing on behalf of Bank was David Pederson of Murphy, Pederson & Waite, North Platte, Nebraska. Appearing as Trustee was Richard Lydick of Omaha, Nebraska. 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)(A).

These debtors are operating under a Chapter 12 plan which was confirmed based upon stipulations entered into between the debtors and the Farm Credit Bank of Omaha and the debtors and the First National Bank of McCook (McCook). Those stipulations, which were incorporated into the plan, provided for certain payment dates and default provisions, including an opportunity to cure default and a "drop-dead" clause by which the debtors agreed that the automatic stay of Section 362 of the Bankruptcy Code would be lifted if the defaults were not timely cured.

In November of 1992, the debtors realized that they were not able to make payments due the Bank and the Farm Credit system at the end of December, 1992, and in early 1993. They, therefore, filed a motion to modify the confirmed Chapter 12 plan, Filing No. 156, filed November 20, 1992. In the motion to modify, they proposed to move payment dates by a few months both to the Bank and to the Farm Credit Bank. Because they were acting on their own behalf and without the benefit of an attorney, they did not comply with the local procedures and, therefore, the matter was not set for a resistance date nor was a hearing scheduled on the motion.

The debtors did default on their December payment to the Bank. They also failed to cure the default within the thirty days provided by their stipulated plan. The Bank, acting pursuant to the stipulation, provided appropriate notices to the

debtors and filed the appropriate material with the Court and moved in state court for replevin on the basis that the automatic stay had been lifted.

The debtors, now with benefit of counsel, filed an adversary proceeding requesting a temporary restraining order and a preliminary and permanent injunction to stop the Bank from proceeding against its collateral pending the approval of the modification.

In that separate adversary proceeding, A93-8008, this Court did enter a temporary restraining order enjoining the Bank from proceeding with its state court collection activities while the modification motion was considered.

Hearing on the original and amended motion to modify was held on March 5, 1993. Both the Bank and the Farm Credit Bank resisted the modification. Each creditor takes the position that since this plan was confirmed only upon the agreement by the debtor to certain default provisions, it should not be modified simply because the debtors had adverse weather problems. In addition, the Bank argues that the debtors have not complied with that part of the stipulation which required annual financial statements and, therefore, the Bank is unable to determine the true financial condition of the debtors and cannot evaluate the feasibility of the modification.

The Farm Credit Bank urges the Court to deny the modification, not only because of the stipulated agreement, but because of the feasibility problem.

The debtors presented a projected cash flow as evidence in support of the modification. The cash flow is based somewhat upon historical data, but mostly upon what the debtors anticipate could occur if the debtors do not have adverse weather in the future and if they have sufficient funding for input and harvesting expense. However, it appears from the cash flow that they will require the use of some of the operational cash flow to make the annual payments under the plan therefore making such cash flow unavailable for input and harvest expenses.

As a matter of law, this case is controlled by the memorandum opinion of Senior Judge Urbom in Strey Enterprises, Inc. v. Farm Credit Bank, CV90-L-309, BK87-2255, Neb. Bkr. 91:017 (1990). In that case, Judge Urbom held that in the absence of a stipulation such as the stipulations in this case, extreme weather conditions should be viewed as sufficient reason to permit modification in accordance with Section 1229 of the Code. However, in Strey, as in this case, the debtors had entered into

a stipulation which required the debtors to make certain payments annually and, upon default, Farm Credit Bank had the right to proceed without further concern about the bankruptcy case itself. The debtors defaulted and moved to modify the plan on the basis that weather had caused the default.

In affirming Judge Minahan's decision to deny the modification, Judge Urbom stated at Neb. Bkr. 91-021:

I am inclined to agree that the terms of a stipulation must be given effect, even when modification of a confirmed plan might otherwise be appropriate. The stipulation at issue here was freely negotiated with each party giving up some legal right in exchange for another. . . .

This case is similar. It was confirmed only as a result of stipulations concerning payment and default rights. The stipulations should be given effect and the plan should not be modified.

Therefore, the motion to modify the plan post confirmation is denied.

Separate journal entry shall be filed.

Clerk shall provide one copy of this order to counsel for the debtor, counsel for the Bank, counsel for the Farm Credit Bank and the Trustee.

DATED: March 9, 1993.

BY THE COURT:

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

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<u>DEBTOR(S)</u>	)	
	)	CH. 12
	)	Filing No. 156, 163,
	)	172, 176
Plaintiff(s)	)	
vs.	)	<u>JOURNAL ENTRY</u>
	)	
	)	DATE: March 9, 1993
<u>Defendant(s)</u>	)	HEARING DATE: March 5,
	)	1993

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion to Modify Confirmed Plan filed by the Debtors; Objection by Farm Credit Bank of Omaha; Objection to Modification by First National Bank of McCook; Amendment to Motion by Debtors.

APPEARANCES

Arlan Wine, Attorney for debtors  
David Pederson, Attorney for Bank  
James McClymont, Attorney for Farm Credit Bank  
Richard Lydick, Trustee

IT IS ORDERED:

The motion to modify the plan post confirmation is denied.

BY THE COURT:

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