

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

LARRY REISER and
NORMA REISER,

DEBTORS

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CASE NO. BK87-2550

CH. 12

MEMORANDUM

All matters regarding the objection by Federal Land Bank to the Chapter 12 plan were submitted on stipulation and written argument. Richard Birch of North Platte, Nebraska, represents the debtors. David Pederson of North Platte, Nebraska, represents the Federal Land Bank.

The Farm Credit Bank (FCB) objects to confirmation of this Chapter 12 plan, as amended, because debtors immediately prior to bankruptcy sold all of their unencumbered cattle herd and invested the proceeds in annuities which qualified as exempt assets under Nebraska law at the time of such investment. FCB had no lien on the cattle but did have a mortgage on certain real property and had begun foreclosure on such mortgage at the time of the investment.

Debtors proposed a Chapter 12 plan which provides that all of the annuity value resulting from the cattle sale proceeds will be used by the debtors for operating capital to fund the plan. As of the date of debtor Larry Reiser's deposition on March 29, 1988, the annuity had been cashed and sold to purchase cattle which would be fed and sold for plan income.

FCB filed a late objection to the treatment of the annuity as exempt. Judge Minahan overruled the objection.

FCB now claims the plan is filed in bad faith because the debtors should be required to treat the value of the annuity as an asset of the estate distributable to creditors through the plan as the value of other non-exempt assets would be treated.

The FCB objection strains the meaning of good or bad faith. Judge Minahan overruled the objection to the exempt status of the annuity. Therefore, the value is exempt and is not treated as an amount which must be distributed in a Chapter 12 plan nor is it an amount which creditors would receive in a Chapter 7 distribution scheme.

There is no evidence of fraud here. Debtors acknowledge that they were aware of the FCB foreclosure action and were informed of their right under Nebraska and federal law to invest unencumbered assets in a form of exempt assets. However, Mr. Reiser testified that he and his wife are willing to and have used the exempt assets for the benefit of the Chapter 12 plan. Just such a procedure was authorized by this Court in the Chapter 12 case of In re McKeag, 77 B.R. 716 (Bankr. D. Neb. 1987).

Since the exemption has been approved by the Court, the debtors are actually giving the creditors more than would be received in Chapter 7 because under that chapter debtors would keep the total annuity value.

The good faith requirement is found at 11 U.S.C. 1225(a) which states in relevant part:

Except as provided in subsection (b) the court shall confirm a plan if--

(3) the plan has been proposed in good faith and not by any means forbidden by law.

Here, the debtors have exempt assets and are using them to fund a plan. This is not fraud. This is not bad faith. This is permitted by Nebraska law, federal law and prior case law in this district. Absent fraud, this Court should not refuse confirmation of a plan which uses exempt assets to operate no matter the source of the exempt assets. See Hanson v. First National Bank, 848 F.2d 866 (8th Cir. 1988); In re Armstrong, ___ B.R. ___, (slip op. Bankr. D. Neb. filed November 28, 1988, BK86-3714).

Therefore, the Court finds the plan to be proposed in good faith and not by any means forbidden by law. The plan as amended, including the stipulation regarding the FCB allowed claim, is confirmable. Debtor may submit a proposed confirmation order.

Separate journal entry shall be filed.

DATED: December 2 , 1988.

BY THE COURT:


Chief Judge