IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

IN RE: MAHLIN FARMS, INC.,

Debtor.

CV. 87-0-386
BK. 87-515

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Metropolitan Life Insurance Company's (hereinafter Metropolitan) objections (Filing No. 7) to the magistrate's findings and recommendations (Filing No. 6). Pursuant to 28 U.S.C. 636(a), the Court has conducted a de novo review of those portions of the findings and recommendations to which Metropolitan has objected.

Mahlin Farms, Inc., (hereinafter debtor) filed for protection from its creditors under Chapter 12 of the Bankruptcy Code in February, 1987. The Second Amended Plan of Reorganization was approved by the Bankruptcy Court in April, 1987. Metropolitan objects to the Plan and has appealed the confirmation of the Plan. The magistrate has recommended that Metropolitan's appeal be denied and dismissed. The issue presented on appeal is whether the plan complies with 11 U.S.C. § 1225(a)(5)(B).

Metropolitan holds a mortgage as security for a mortgage note executed by debtor. This mortgage covers two non-contiguous parcels of agricultural property located in Butler

County, Nebraska. Under debtor's Second Amended Plan, it is proposed that this mortgage be "split" into two separate liens, with each lien to secure separate portions of the mortgage note. This, in effect, would create two loans, each loan secured by one of the two properties. If debtor defaulted on one of the loans, Metropolitan would be allowed to look only to the property to which that loan was allocated for recovery. Under the original note and mortgage, Metropolitan may look to either one or both properties for recovery.

Since Metropolitan is the holder of a secured claim who has objected to the Plan, the Court cannot confirm the Plan unless: (1) the Plan provides that Metropolitan retain the lien securing its claim; and (2) the value, as of the effective date of the Plan, of any property to be distributed to Metropolitan under the Plan is not less than the amount of Metropolitan's secured claim. 11 U.S.C. § 1225(a)(5)(B)(i) and (ii). In other words, when viewing a secured claim under § 1225(a)(5)(b), there are two items with which the Court must be concerned: (1) the "qualitative aspect" of the claim and (2) the "quantitative aspect." **In re Johnson**, 63 Bankr. 550, 551 (Bankr. D.Colo. 1986)(court held that a Chapter 13 Plan failed to satisfy the requirements of 11 U.S.C. § 1325(a)(5)(B), which is identical to 11 U.S.C. § 1225(a)(5)(B)). The "quantitative aspect" deals with the determination of whether the Plan provides for the secured

creditor to be paid the full amount of the secured claim. **Id.** In this case, there is no problem with this aspect. The secured creditor, Metropolitan, is not objecting to the manner in which the Plan provides for payment of the debt. It is with respect to "qualitative aspect" of the Plan, i.e., the manner in which the plan protects Metropolitan's lien, that Metropolitan objects.

"The qualitative aspect speaks to the relative degree of assurance that the debt will be paid, and it is equally as important to the creditor as the quantitative aspect." **Id.** The Court must be concerned with the problem of protecting Metropolitan's "interest in the collateral, including the right to foreclose and realize the cash value of the collateral." **Id.** at 551. By "splitting" the mortgage, Metropolitan will be forbidden from looking to both properties should debtor fail to fulfill its obligation and its claims as split by the plan. While the parties have stipulated to the present value of the properties, their value in the future is unknown, and will not be known, until and unless the properties are sold. **See In re Durr,** 78 Bankr. 221, 224 (Bankr. D.S.D. 1987). In order for debtor's Plan to be confirmed it must deal fairly with Metropolitan's claim and provide Metropolitan with "adequate protection" of its interests in the collateral, "not only as of the date of confirmation, but on an ongoing basis." **In re Johnson,** 63 Bankr. at 554 (**citing In re Tucker,** 35 Bankr. 35 (Bankr. M.D.Tenn. 1983)).

The parties agree that the newly created loans would be adequately collateralized initially. However, it should be remembered that the "lien retention requirement" of § 1225(a)(5)(B) protects Metropolitan until it receives the full value of its claim. **In re Durr**, 78 Bankr. at 222. Thus, Metropolitan must be allowed to look to either property should debtor default on any part of Metropolitan's claim.[1/]

Finally, debtor argues that "splitting" the mortgage is permissible pursuant to 11 U.S.C. § 1222(b)(2). Section 1222(b)(2) allows debtor to alter "rights of holders of secured claims," which includes the rights of Metropolitan. Clearly, this allows debtor to alter a number of items pertaining to Metropolitan's claim, which is Metropolitan's "right to payment." 11 U.S.C. § 101(4). However, § 1225(a)(5)(B)(i) mandates that Metropolitan retain its lien, which is Metropolitan's "charge or interest in property to secure payment." 11 U.S.C. § 101(33). Thus, while the payment terms may be altered, Metropolitan's rights in the properties, which secures that the payments will be made, may not be altered.

1/ The Court notes here that at least one case exists where a secured creditor's claim was divided into two classes. **In re Webster**, 66 Bankr. 46 (Bankr. D.N.D. 1986). However, this decision was based upon the "fair and equitable" requirement of the "cram down" provisions of Chapter 11. **See**, 11 U.S.C. § 1129(b)(1). The language of § 1129(b)(1) does not appear in Chapter 12 or Chapter 13. Further, the "lien retention requirement" does not appear in Chapter 11. For other cases discussing "cram down" under § 1129(b)(1), **see In re Sandy Ridge Development Corp.**, 77 Bankr. 69 (Bankr. M.D.La. 1987); **In re Walat Farms, Inc.**, 70 Bankr. 330 (Bankr. E.D.Mich. 1987); **Matter of Sun Country Development, Inc.**, 764 F.2d 406 (5th Cir. 1985); and **In re Fursman Ranch**, 38 Bankr. 907 (Bankr. W.D.Mo. 1984).

For these reasons, the Court cannot adopt the magistrate's findings and recommendations. This matter is remanded to the Bankruptcy Court for proceedings in conformity with this memorandum opinion.

DATED this 5th day of March, 1988.

BY THE COURT:

LYLE E. STROM, Chief Judge
United States District Court