IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	BK 83-1536
	)	CV 84-0-616
MURRAY D. MELLOR and JEAN M. MELLOR,	)	
	)	
Debtors.	)	MEMORANDUM AND ORDER

This matter is before the Court on appeal from a final order of the Bankruptcy Court, dated September 6, 1984, dismissing debtors' Chapter 11 case. The issue raised on appeal is whether the Bankruptcy Court erred in granting appellee O'Neill Production Credit Association's (PCA) motion to dismiss without having received evidence as to claimed depreciation of assets, prejudice to creditors, and likelihood of failure in rehabilitation. After careful review and consideration of the submitted materials, this Court finds that this matter must be reversed and remanded to the Bankruptcy Court for further proceedings.

I.

On September 7, 1983, debtors filed for bankruptcy under Chapter 11, seeking to reorganize their farming business. They filed their disclosure statement and plan of reorganization on January 24, 1984. At a disclosure statement hearing on March 22, 1984, the Bankruptcy Court sustained PCA's objections to the disclosure statement. As a result, debtors could not go forward with the confirmation process until their disclosure statement was amended. Thereafter, on August 9, 1984, PCA filed a motion to dismiss the bankruptcy case, pursuant to 11 U.S.C. § 1112(b), claiming (1) that debtors had failed to prepare any additional

disclosure statement or to attempt to confirm their proposed plan of reorganization, (2) that the proposed plan failed to deal with PCA's foreclosure judgment,[1] (3) that estate assets had declined in value, (4) that there was an absence of reasonable likelihood of rehabilitation, and (5) that there had been unreasonable delay by debtors.

PCA's motion was set for a status hearing on September 4, 1984. At the hearing, after having heard arguments of counsel but without receiving any evidence, the Bankruptcy Court sustained the motion and dismissed the case pursuant to section 1112(b)(1)[2] on the basis that (1) there was no significant dispute as to the diminution of the estate assets since the petition date, and (2)

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[1] Prior to commencement of the case, on June 29, 1983, appellee PCA was granted partial summary judgment against debtors in a foreclosure action in the District Court of Holt County, Nebraska. Such judgment ordered debtors to pay PCA the sum of $603,995.52 due on certain promissory notes, plus interest and costs, within twenty (20) days, and provided that in the event debtors failed to make such payment foreclosure would result and certain mortgaged real estate and personal property would be sold. A sheriff's sale of debtors' property, apparently scheduled for September 7, 1983, was stayed by debtors' Chapter 11 filing.

[2] 11 U.S.C. 1112(b) provides in relevant part that:

> [O]n request of a party in interest, and after notice and a hearing, the court . . . may dismiss a case under this chapter, [if] in the best interest of creditors and the estate, for cause, including --
>
> (1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation; . . .

there was no chance, in the Court's view, of rehabilitation because the value of the estate assets in this case was less than the outstanding debt of almost one million dollars.

II.

On appeal, debtors argue that the Bankruptcy Court erred in dismissing their Chapter 11 case without having received evidence on the matters asserted by PCA. Debtors point out that no evidence was presented to or received by the Court at the September 4, 1984, status hearing, because the Court's order for status hearing, issued August 10, 1984, specifically stated, "No evidence shall be received at the hearing." Debtors argue that the Bankruptcy Court granted the motion to dismiss based solely on counsels' statements, not evidence, and that under the circumstances they were entitled to an evidentiary hearing prior to dismissal of their case.

Appellee PCA admits that no evidence was received on the motion at the status hearing. It argues, however, that the Bankruptcy Code does not require a hearing, let alone an evidentiary hearing, in every case. It argues that under 11 U.S.C. § 1112(b) a case may be dismissed "after notice and a hearing," and that under the rule of construction set forth in 11 U.S.C. § 102 "hearing" is defined as "such opportunity for a hearing as is appropriate in the particular circumstances . . . ." PCA claims that the status hearing in this instance was "appropriate in the particular circumstances" because "the case had been pending for approximately one year and the debtors had

made no significant progress toward effectuating a plan of reorganization. [Further], the debtors did not dispute the fact that assets had declined in value. Rather, they disputed only the extent to which the assets had declined." Brief at 6. PCA argues that in light of these circumstances the Bankruptcy Court properly concluded that no purpose would be served by an additional hearing.

III.

At the outset, this Court recognizes that Bankruptcy Rule 8013 provides:

> On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

It is also well established that what constitutes cause for dismissal of a Chapter 11 petition, pursuant to 11 U.S.C. § 1112(b), is subject to the bankruptcy court's discretion under the circumstances of each case. See Matter of Levinsky, 23 B.R. 210, 217 (Bankr. E.D. N.Y. 1982). Thus the district court is bound to accept the bankruptcy court's factual findings of cause for dismissal under section 1112(b), unless they can be found to be clearly erroneous. A clearly erroneous determination is proper where the district court finds that there is insufficient evidence

in the record to support the bankruptcy court's findings of fact. See Prudential Credit Services v. Hill, 14 B.R. 249, 250-51 (S.D. Miss. 1981).

After a careful reading of the transcript of the September 4, 1984, status hearing and the record on appeal, this Court concludes that the Bankruptcy Court's findings are clearly erroneous, because there is insufficient evidence in the record to support dismissal of the case. First, although there was no dispute that there had been some diminution of estate assets, there remained considerable dispute as to the extent of such diminution and whether such diminution greatly prejudiced the creditors. Second, there was no specific evidence before the court that rehabilitation was unlikely to succeed. Debt in excess of estate assets, without something more, i.e., some evidence that the circumstances render rehabilitation unlikely, is an insufficient basis for finding that there is an "absence of reasonable likelihood of rehabilitation."

While appellee is correct that the Bankruptcy Code does not require a hearing in every case, 11 U.S.C. § 102 and § 1112(b), the Court notes that evidentiary type hearings are generally conducted on section 1112(b) motions to dismiss where matters, such as valuation of assets and likelihood of rehabilitation, are in dispute. See, e.g., In re Clemmons, 37 B.R. 712, 713 (Bankr. W.D. Mo. 1984); In re Besler, 19 B.R. 879, 880 (Bankr. D.S.D. 1982); Matter of Levinsky, 23 B.R. 210, 212 (Bankr. E.D.N.Y.

1982); In re Tolco Properties, Inc., 6 B.R. 482, 484-85 (Bankr. E.D. Va. 1980). The Court finds that an evidentiary hearing was warranted prior to dismissal of debtors' Chapter 11 petition.

Accordingly,

IT IS HEREBY ORDERED that this matter is reversed and remanded to the Bankruptcy Court for further proceedings consistent with this Memorandum and Order.

DATED this 15th day of July, 1985.

BY THE COURT:

C. ARLEN BEAM
UNITED STATES DISTRICT JUDGE