IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ROGER LEE McMANN, et al.,	)	CV87-L-566
	)	
Appellants,	)	
	)	
vs.	)	MEMORANDUM ON APPEAL
	)	
OTOE COUNTY NATIONAL BANK,	)	
	)	
Appellee.	)	

The debtors, Roger and Linda McMann, appeal the bankruptcy court's order of July 2, 1987, wherein Judge Mahoney sustained an objection made by the Otoe County National Bank to the confirmation of a post-confirmation amended plan, dated November 25, 1986 ("November Plan"). The bankruptcy judge found that the November Plan was an attempt by the debtors to discharge their debt to the bank, and determined that such an attempt could not have been made in good faith by the debtors considering that all the previous plans provided that the bank was to be paid in full and considering that the bank relied on the McManns' promise to pay the bank the full amount.

The debtors contend that the bankruptcy court erred in sustaining the bank's objection to the November Plan. They contend that the November Plan was intended only to clarify the terms of the post confirmation amended plan of January 8, 1985 ("January Plan"). According to the debtors, the January Plan provided that the bank's claim, which was not satisfied out of the proceeds of the sale, became unsecured after the sale since the mortgage holders relinquished their mortgages as a condition to the sale. The debtors argue that the November Plan simply states that the bank should be treated in the same manner as the other nonsecured creditors are treated under the January Plan, receiving a pro-rata share of the debtors payments to the trustee until termination of the plan, whereupon the unsecured creditors' debts will be discharged under 11 U.S.C. § 1328.

The debtors argue that they have a right to seek discharge of the unsecured claims under section 1328(a) because the January Plan "provides for" the bank's claims as is required under that section. However, I agree with the bank that the bankruptcy court should have the first opportunity to resolve that issue.

The debtors also contend that the bankruptcy court's finding that the bank relied on the debtors' assurances of full payment was wrong considering that the bank purchased the farm and thereby could not have reasonably believed that their claim could remain secured by the land or proceeds from

the sale of the land. Additionally, the debtors argue that the court should distinguish between their civil liability that is dischargeable under section 1328 and the restitution, which Roger McMann must pay pursuant to the terms of his parole, that the debtors admit is not dischargeable.

The Otoe County National Bank argues that the bankruptcy court properly sustained its objection to the November Plan based upon the change in position that the Plan would have caused to the bank's detriment. The bank's main argument is that confirmation of the November Plan would effectuate a discharge of the debtors in violation of 1328. The bank argues that the January Plan contains no language to indicate that the bank's claim may be discharged before full repayment while the November Plan expressly provides for discharge of the bank's claim.

Under Rule 8013, this court may not set aside findings of fact, whether based on oral or documentary evidence, unless such findings are "clearly erroneous." The January Plan states that Otoe County National Bank is "to receive $124,627.67 with interest at 14% APR to be paid outside this plan." See January Plan at para. 6 (capitalization omitted). The January Plan also provides for the sale of the debtors' farm and residence, and that "[if] a mortgage holder agrees to release its mortgage for less than total payment due on its debt, that mortgage holder shall be entitled to an unsecured claim in the Debtors' bankruptcy following the release of its mortgage." Id. at para. 8.

Judge Mahoney determined that all the previous plans submitted by the debtors provided for full repayment of the bank's claim and he found that the bank relied upon the debtors' assurances of full repayment when it released its mortgage on the debtor's property. I find no basis for disagreeing with these findings. While the January Plan acknowledges the possibility that a mortgage holder might choose to release its mortgage in order to allow the sale to occur, even though it might receive less that the total amount due on its debt, I find nothing in the January Plan stating that a prior mortgage holder's entitlement to an unsecured claim after the sale precludes the prior mortgage holder from pursuing full repayment of its claim that is to be paid outside the plan. Confirmation of the November Plan would have such a preclusive effect.

Dated June 7, 1988.

BY THE COURT

United States District Judge