UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
RONALD & CAROL PATTERSON,	)	CASE NO. BK84-251
	)	
DEBTORS	)	Chapter 11
	)	
and	)	
	)	
RONALD & CAROL PATTERSON,	)	CASE NO. BK87-3419
	)	
DEBTORS	)	Chapter 12

MEMORANDUM OPINION

Hearing was held on February 19, 1988, on motions filed by Bank of Papillion (Bank) requesting the Court to order that the confirmation order in the Chapter 11 case be set aside, to compel compliance with the terms and provisions of a stipulation entered into between the Bank and debtors in the Chapter 11 case, for the imposition of sanctions in the Chapter 11 case, for relief from the automatic stay in the Chapter 12 case and for an order dismissing the Chapter 12 case. Appearing on behalf of the Bank were Steven Turner and William Dittrick of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim of Omaha, Nebraska. Appearing on behalf of the debtors was William Hadley of Hauptman, O'Brien, Wolf & Hadley, P.C., of Omaha, Nebraska. The parties agreed that all of the issues could be heard at one evidentiary hearing even though the motions had been filed in separate Chapter 11 and Chapter 12 cases.

Facts

In 1984 the debtors filed Chapter 11 bankruptcy and, after much litigation with the Bank and other parties, they were successful in obtaining confirmation of a Chapter 11 plan by agreement. That agreement was reached with all of the parties, including the Bank, in June or July of 1987. Notice of various amendments to the plan was provided to all creditors and interested parties and an order confirming the Chapter 11 plan was entered in October of 1987.

As part of the Chapter 11 plan the debtors incorporated an agreement with the Bank which provided that the Bank had a valid security interest in certain real estate and personal property and the financial obligations to the Bank were divided into two

portions. The first portion was due and payable in the amount of $165,000 on December 1, 1987. The second portion was a lesser amount and was payable over a number of years. Both obligations were cross collateralized, meaning that default on one triggered a default on the other.

The agreement further provided that upon default the Bank would not be required to request further relief from the Bankruptcy Court and would be permitted to proceed in State Court with whatever state law remedies existed.

Finally, the agreement and the confirmed plan provided that the debtors would not attempt to modify the terms of the agreement with the Bank.

At the time the agreement was entered into, both parties realized that the debtors would need alternate financing in order to be able to pay the December 1, 1987, installment to the Bank. Apparently, both the debtor and the Bank officers believed that such financing would be available and both supported confirmation of the plan.

Debtors were unable to make their payment on December 1, 1987, and creditor began state law replevin actions.

Debtor then filed a Chapter 12 bankruptcy petition which resulted in a stay of the state law replevin action and resulted in the motions being filed which are the subject of this opinion.

The Bank argues strenuously that this Chapter 12 case is a bad faith filing and was filed solely for the purpose of obtaining the benefits of the automatic stay under Section 362 of the Bankruptcy Code and stopping the Bank's legitimate exercise of its rights pursuant to the Chapter 11 confirmation order and plan. From the Bank's point of view and from the evidence presented by the banker who is an officer of the Bank, the terms of the Chapter 11 plan were negotiated and were agreed upon only after the Bank agreed to write off several hundred thousand dollars in debt. As part of those negotiations, the Bank took new mortgages and security interests in various properties, both real and personal, agreed to give up any deficiency and agreed to write off a significant portion of the obligation owed by the debtors to the Bank. In return, the debtors were to make payments by specific dates and were not to modify the agreement any further.

The position of the debtors is that all parties knew that the debtors would need third party financing to make the payment on December 1, 1987. When the debtors attempted to obtain such financing from another bank in the community, the President of the Bank of Papillion made seriously disparaging remarks about the debtors which resulted in a refusal by the third party lender to advance funds, thereby causing the default on December 1, 1987.

Debtors urge the Court to find that the Bank caused the default and, therefore, debtors should be excused from the terms of the plan and be permitted to modify the Bank's rights in a new Chapter 12 case.

An officer of the third party lender testified that prior to talking to the President of the Bank of Papillion, he was aware that the Pattersons were in a Chapter 11 bankruptcy and that the Bank of Papillion had written off several hundred thousand dollars in debt. He was still interested in providing funds to the debtors if a Chapter 11 plan was approved and if the financial information provided by the debtors made a lending relationship feasible based upon his own evaluation of the asset and liability picture of the debtors, as well as the proposed cash-flow.

As part of his loan investigation, he contacted the President of the Bank of Papillion and specifically asked him how much debt the Bank of Papillion had written off during the Chapter 11 case. The President refused to give a specific answer but did suggest that the Bank "took a bath." In addition, in response to a question concerning the character of Mr. Patterson, the President of the Bank of Papillion stated, "He's a character."

After putting together the financial information and his opinion of the feasibility of the lending relationship, the third party lending officer presented the matter to his loan committee. The loan committee declined to advance funds. The representative of the third party lender suggested, on vigorous cross examination by the debtors, that the loan was turned down because of the existence of the Chapter 11 case, the belief by the members of the loan committee that the cash flow projections of the debtor were not supported by the financial information provided and that the statements of the President of the Bank of Papillion had nothing to do with the decision.

The debtors find it inconceivable that the third party lender refused to loan money to them based upon the "numbers" rather than upon the disparaging remarks by the President of the Bank of Papillion. However, they present no evidence that the representative of the third party lender has any reason to testify falsely concerning the matter. They also present no evidence concerning why the Bank of Papillion would try to harm the debtors' ability to obtain third party financing which would have paid actual cash to the Bank. The default by the debtors does not appear to be of benefit to the Bank. The Bank now has the opportunity to pursue a replevin action and real estate foreclosure action in state court, and if successful, sell assets and hope that the proceeds from such sale are at least equal to the amount it agreed to take in the Chapter 11 plan.

Although the debtors hint that certain assets of the debtors are worth a great amount of money and that the banker has a special interest in obtaining those assets for himself or his organization, there is no credible evidence to support that position.

This Court finds as a fact that the evidence presented by the debtors is not sufficient to excuse their default on December 1, 1987.

The Court further finds that the filing of Chapter 12 bankruptcy to obtain an automatic stay under Section 362 is not a bad faith filing. From the evidence presented, the Court concludes that the debtors had a legitimate concern that the Bank of Papillion, for whatever reason, had contributed significantly to their inability to make their payment on December 1, 1987, and had a legitimate reason to attempt to stop the state court replevin action until this Court had an opportunity to review the evidence.

Counsel for the debtors suggested upon inquiry from the Court that he did not believe he had the right to attempt a modification of the Chapter 11 plan post confirmation and that his only opportunity to bring the issue before the Court would be by the filing of a Chapter 12 petition. Although this Court finds counsel's conclusion erroneous, it does not find that the filing of the Chapter 12 petition is in bad faith.

This Court does conclude, however, that the Chapter 12 case must be dismissed. All of the assets and all of the obligations of the debtors were treated by the Chapter 11 plan which was confirmed in the fall of 1987. Although those assets are vested in the debtor pursuant to Section 1141(b), until the plan is completely consummated, the debtor is still under the jurisdiction of this Court and the assets and the liabilities of this debtor are to be treated pursuant to the terms of the Chapter 11 plan. See 11 U.S.C. § 1141(a) (the provisions of a confirmed plan bind the debtor).

It may well be that the Chapter 11 plan should not have been confirmed without a definite financial arrangement being provided so that the risk of default would have been minimal. However, the Chapter 11 plan was confirmed and the debtors are required to live with it.

Conclusions of Law and Discussion

As part of the Chapter 11 plan, the debtors negotiated a settlement with the Bank and the Bank wrote off several hundred thousand dollars in debt in return for a receipt of a lien on certain property as well as a direct conveyance of certain property. The agreement was binding upon the parties and was

approved by this Court after notice and a hearing. The agreement included a "no modification" clause, a "drop dead" clause which provided that upon default the Bank would not be required to pursue its remedy in the Bankruptcy Court but could go directly to state court to enforce its rights. Both parties were represented by sophisticated counsel at all times during the negotiation of the terms of the plan.

The plan binds the parties and will be enforced.

The Court finds that relief from stay should be and is hereby granted to the Bank in the Chapter 12 case and in the Chapter 11 case. The Bank is authorized to pursue its replevin action or whatever state court remedies it has. The Chapter 12 case is dismissed. Pursuant to the plan and the order confirming the Chapter 11 plan, this Court orders the debtors to comply with the terms of that plan. The debtors are to comply within twenty days of service of this order.

Concerning the opinion of counsel for the debtor that there was no alternative to the filing of a Chapter 12 case to bring the evidentiary matters before the Court, the Court directs counsel's attention to Section 1127 of Title 11. That Section allows post-confirmation modification of a plan if the plan has not been substantially consummated. Substantial consummation is defined in Section 1101 and means that all of the property proposed by the plan has been transferred, the debtor has assumed the management of all of the property dealt with in the plan and distribution under the plan has commenced. This Court finds that this plan has not been substantially consummated because although the assets have been transferred to and vested in the debtors, the distribution under the plan has not even begun. Therefore, a motion to modify the Chapter 11 plan would have been the appropriate motion under the circumstances.

No sanction shall be imposed upon either counsel or the debtors for choosing the Chapter 12 route rather than a motion for post-confirmation modification of the plan under Chapter 11.

Separate Journal Entry shall be entered.

DATED: March 16, 1988.

BY THE COURT:

Timothy J. Mahoney

Chief Judge