UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
WARDLOU FARMS, INC.,	)	CASE NO. BK91-40729
	)	
DEBTOR	)	CH. 12
	)	Fil. 113, 117, 124

MEMORANDUM

Hearing was held on April 28, 1994, on the Motion to Modify Plan filed by the debtor. Appearing on behalf of debtor was Douglas Quinn of McGrath, North, Mullin & Kratz, P.C., Omaha, Nebraska. Appearing on behalf of Prudential Insurance was Kathryn Derr of Dixon & Dixon, P.C., Omaha, Nebraska. Appearing on behalf of Fremont County Bank was Judith Spindler of Omaha, Nebraska. Appearing on behalf of the Chapter 12 Trustee was David Thompson of Omaha, Nebraska. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(a)(2)(L).

Background

Wardlou Farms, Inc. (the debtor) is operating under a Chapter 12 plan that was confirmed on March 13, 1992. Filing no. 55. The debtor was established by Ward and Louella Adams as a farm management corporation for approximately 890 acres of farm land in Fremont County, Iowa, that was purchased in 1990. The farm's primary products are corn and soybeans.

Prudential Insurance Company (Prudential) is the debtor's largest secured creditor. Prudential loaned the debtor $800,000 in 1990 and secured the promissory note with the debtor's real property. The debtor filed a petition for bankruptcy relief shortly after failing to pay the first installment due to Prudential in 1991. With accruing interest, the current total of the debt owed to Prudential is $1,096,200. The current value of the real estate securing Prudential's debt is $1,228,000. Additionally, pre- and post-petition unpaid real estate taxes are currently outstanding in the amount of $94,439.61.

Under the debtor's Chapter 12 plan, Prudential was to receive a $50,000 payment on January 1, 1992, and every year thereafter,

Prudential was to receive an installment payment, ending with a balloon payment on December 31, 2000. The plan also contains a negotiated "drop dead" clause. The debtor has sixty days to cure any default under the plan, but after the expiration of the sixty days, Prudential was deemed to have relief from the automatic stay. The plan states that Prudential retains its lien in the real property of the debtor, and in addition, the debtor was required to place a deed to the real estate in escrow for Prudential's benefit in the event of default. Filing no. 55, ¶ V, a, i- iv. A separate warranty deed was executed by Ward and Louella Adams and placed in escrow to carry out this provision of the plan.

In 1991 and 1992, the farm produced strictly soybeans. In 1993, the debtor planned to balance the soybeans with corn. However, the debtor was wiped out, but for 20 acres of corn, due to the devastating flooding that occurred over much of Iowa during the summer of 1993. Federal crop insurance only amounted to $50,000 in total for the loss of both crops because crop insurance was based on planted acres and the flooding prevented the debtor from planting soybeans.

In addition to the flood, the debtor suffered another major problem. Ward Adams, the primary coordinator of the debtor's operations, suffered major medical problems at the end of 1992 through 1993. Currently, Mr. Adams is incapacitated and is no longer able to participate in the debtor's operations.

The debtor failed to make its required installment payment to Prudential on December 31, 1993. Pursuant to the terms of the plan, Prudential served the debtor its notice of default on January 10, 1994. The debtor did not cure or attempt to contact Prudential during the sixty day cure period that ended on March 11, 1994. Therefore, on March 21, 1994, Prudential, having been granted relief from the automatic stay under the plain terms of the negotiated plan, obtained the deed to real property in accordance with the terms of the plan and the escrow agreement and filed the deed in the appropriate county office.

The debtor filed a Third Amended Plan of Reorganization (the Modification) on March 21, 1994. Filing no. 106. The debtor is current on all payments due to creditors under the Second Amended Plan, except those payments due to Prudential and the Fremont County Treasurer. The debtor proposes to skip the December 31, 1993, payment due to Prudential and extend the term of the loan three more years to January 1, 2004. The Modification proposes that the warranty deed be placed back into escrow and that the transfer of title to Prudential be set aside.

The debtor proposes to pay all arrearage due to the Fremont County Treasurer by January 1, 1995, and thereafter, pay the Treasurer pursuant to the terms contained in the Second Amended Plan.

Ag Services of America, Inc., a corporation that provides agricultural input financing, is willing to finance the debtor's operating expenses for 1994. The debtor has a separate motion pending requesting authority to incur secured debt. Filing no. 118. Ag Services has offered to lend $75,000 to the debtor in exchange for a first priority lien on the crops grown. The infusion of operating funds is necessary for the debtor to cure the defaults under the existing confirmed plan and to be able to plant and harvest the 1994 crop.

Prudential and Fremont County objected to the debtor's motion to modify the confirmed plan. Prudential alleges that the Modification violates 11 U.S.C. § 1229(a) because the filing of the warranty deed by Prudential extinguished the debtor's interest in the estate, and Prudential alleges that the proposed Modification is not feasible. Filing no. 124. Fremont County alleges since purchasing the property, the debtor has only paid $1,851 in property taxes, and under the confirmed plan, the debtor failed to make any payments on real estate taxes. Filing no. 117.

Decision

The Motion to Modify Plan is denied.

(1) In this jurisdiction, confirmed plans containing drop dead clauses may be modified in the event of unforseen weather catastrophes. However, when Prudential filed the warranty deed pursuant to the terms of the confirmed plan, the estate's interest in the property was extinguished pursuant to the procedures agreed to in the confirmed plan.

(2) Even if the transfer of title of the property by filing the escrowed deed was not an absolute sale and amounted to an equitable mortgage, the debtor's plan is not feasible and cannot be confirmed.

Discussion

In the District of Nebraska, a debtor may move to modify a confirmed plan. Strey Enterprises, Inc. v. Farm Credit Bank, Neb. Bkr 91:17 (D. Neb. 1991); In re Barger, Neb. Bkr 93:155 (Bankr. D. Neb. 1993). Strey Enterprises opined that a stipulation contained in a modified plan may be modified if a compelling reason exists, such as an unforseen weather disaster. Neb. Bkr 91: at 20 (denying

modification based on expectations of parties upon entering into the stipulation); Barger, Neb. Bkr 93: at 155-54 (granting modification and noting that stipulations in plans will generally be upheld but for compelling circumstances).

As represented by Strey and Barger, it appears that neither the bankruptcy court or federal district court in Nebraska adhere to the strict rule advocated by Prudential and set forth in In re Grogg Farms, Inc., 91 B.R. 482 (Bankr. N.D. Ind. 1988). Grogg held that stipulations including drop dead clauses could not be modified in any circumstance after the debtor defaults under the confirmed plan because the legitimate expectations negotiated for in the plan are frustrated by the modification.

The floods that occurred during the summer of 1993 were particularly disastrous for property located close to major rivers in the Midwest, such as the debtor's property. The debtor did not foresee the "hundred year" flood when it entered into the stipulation with Prudential, so the debtor could not have expected this massive flood to occur. It is this type of natural disaster that compels Nebraska federal courts to prefer a flexible approach over the strict rule contained in Grogg. It would upset the policy considerations that lie behind Chapter 12 Bankruptcy not to recognize the most widespread and disastrous flooding in one hundred years as a compelling reason to permit modification of the debtor's plan.

A. The recording of the deed terminated the debtor's interest in the real property.

Prudential argues that the recording of the deed by Prudential on March 24, 1994, terminated the debtor's interest in the property because the recording was an absolute sale of the property to Prudential. Therefore, the transfer of title completed payments to Prudential under the plan, which prevents the debtor from modifying the plan pursuant to 11 U.S.C. § 1229(a) ("At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, ...")(emphasis added). The debtor agues that under Iowa law, deeds executed in lieu of foreclosure are disapproved of by Iowa courts and are treated as equitable mortgages, subject to foreclosure proceedings. The debtor requests that the deed be placed back into escrow and that the transfer of title be set aside.

The general rule under Iowa law is well-settled and provides that when a mortgagor and a mortgagee enter into an agreement that requires the mortgagor to surrender its interest in the property, the courts will view the transaction suspiciously and scrutinize the transaction closely because equity law in Iowa favors a result

by which mortgagors are entitled to the rights granted under the law governing the foreclosure and redemption process. Guttenfelder v. Iebsen, 300 N.W. 299, 301 (Iowa 1941). To prove an absolute conveyance, the mortgagee must show that both parties clearly and unequivocally intended that the deed should operate in lieu of the mortgagor's redemption rights and not as an equitable mortgage. Id.

Iowa courts weigh several factors before determining whether a mortgagee, such as the debtor, agreed to the absolute conveyance. First, was the agreement free and clear from any element of advantage or oppression? Guttenfelder, 300 N.W. at 301. To determine whether the secured creditor has an undue advantage, the Court should examine whether an attorney was present on behalf of the debtor, or whether the debtor's financial condition was an inducement for entering into the agreement. Steckelberg v. Randolph, 404 N.W.2d 144, 149 (Iowa 1987).

Second, was the agreement for more than nominal consideration? Guttenfelder, 300 N.W. at 301; Steckelberg, 404 N.W.2d at 149. Third, did the debtor retain possession of the property after the deed was executed and placed in escrow? Steckelberg, 404 N.W.2d at 149. Fourth, was an option to repurchase the property available? Id. See also Greene v. Bride & Son Construction Company, 106 N.W.2d 603 (Iowa 1960) (listing several of the same factors to determine whether an equitable mortgage existed). If, after a review of these factors, the transaction appears fair and is based upon adequate consideration and if it is clear that the parties contemplated an absolute sale and not a transfer for security, the transfer of the property should be upheld. Guttenfelder, 300 N.W. at 301-02.

Unlike the circumstances that existed in the non-bankruptcy cases Guttenfelder and Steckelberg, this debtor was fully aware of the repercussions of entering into a plan that contained a drop dead provision. The debtor had counsel at all times during the negotiation process and during the execution of the plan. The plan containing the drop dead clause, which proposed to place the deed in escrow, was filed by the debtor, not Prudential. Once a debtor submits a plan for confirmation, the debtor may not contradict the plain language of the plan and state that it did not understand the result that is clearly written in the plan.

The debtor filed a bankruptcy plan because the debtor was having financial difficulties. However, this situation is distinguishable from the Iowa cases because this debtor entered into this plan under the protection and supervision of the bankruptcy court. Prudential was not in a position to unduly force the debtor to agree to the "drop dead" provision. The provision

was a result of a negotiation process, not the result of Prudential oppressing the debtor's rights under Iowa law.

There was adequate consideration given by Prudential to the debtor for this stipulation. The debtor filed bankruptcy before even making a single installment payment on its debt to Prudential. In the almost three years since the debtor has been in bankruptcy, the debtor has only paid Prudential $50,000. Meanwhile, the loan amount has been increasing as interest accrues, while the value of Prudential's security cushion has, arguably, decreased due to unpaid real estate taxes. Prudential has gone from being a greatly oversecured creditor to being close to undersecured at this time. In negotiating the plan with the debtor, the debtor was permitted to reorganize, and Prudential refrained from seeking relief from the automatic stay despite the erosion of its security.

There are some factors that favor finding that an equitable mortgage existed. The debtor has retained possession of the property since Prudential filed the deed, and no option to repurchase the land existed in the plan or the deed. However, these factors are not significant enough to outweigh the conclusion that the debtor understood and agreed to the terms of the plan that would permit Prudential to record the deed after the cure period expired. The debtor's ongoing possession of the property following the filing of the deed may be because the debtor filed this Modification and Prudential wisely refrained from enforcing its possessory rights pending this decision. The lack of a repurchase option is significant but does not outweigh other more important factors, such as the fact that there was no undue oppression and there was legally significant consideration for the agreement.

Prudential has properly recorded the warranty deed and has title to the real property. The extinguishment of the debtor's interest in the property is the equivalent of "the completion of payments" under 11 U.S.C. § 1229(a) because the transfer of title extinguished Prudential's claim. Under Section 1229(a), the debtor may not modify the plan once the payments are complete.

Even if the transaction was found to be an equitable mortgage, the debtor may not have the transaction set aside. When Prudential filed the warranty deed, the only right the debtor would retain, assuming the transaction creates an equitable mortgage, would be the right to redeem. Guttenfelder, 300 N.W. at 303 ("Likewise, if the transfer was for security, the stipulation in the escrow agreement was ineffectual to cut off the right of redemption.") The debtor has not demonstrated that it can redeem the land by the deadline and pursuant to the conditions set forth under Iowa law. Justice v. Valley National Bank, 849 F.2d 1078 (8th Cir. 1988) (holding that state law controls the rights of parties regarding

redemption and that Chapter 12 debtors had failed to demonstrate that they could redeem land within time period established by state law). The debtor's remaining redemptive interest under the equitable mortgage would not enable this court to set the transfer of title to Prudential aside.

B. The Modification is not feasible.

Even if the warranty deed and "drop dead" provision resulted in an equitable mortgage under Iowa law, the Modification will still be denied because the plan is not feasible. The debtor has not demonstrated that it can provide a sufficient cash flow to pay the claim holders under the plan.

The debtor has never had sufficient cash flow since it purchased this property in 1989 to pay all of its creditors. Besides the 1992 $50,000 payment, Prudential has not received any money from the debtor. Fremont County, except for receipt of a token amount, has likewise not received any money from the debtor. The debtor argues that the flooding in 1993 is responsible for the confirmed plan failing. However, the facts are that even during productive crop years, such as 1991 and 1992, the debtor has not been able to pay its creditors.

The Modification proposes to change the payments to Prudential and to Fremont County. The arrearage to Prudential is to be made up by extending the term of the loan from the year 2000 to the year 2004. Modification installments will remain the same as under the confirmed plan at 10.75% of the balance. The real estate tax claim will be paid the same as under the confirmed plan, plus the debtor proposes to pay the amount in default under the confirmed plan by 1995, through its operating loan.

The debtor has financing available and intends to plant only soybeans under the Modification. Using a cash flow based upon crop yields from 1991 and 1992, the debtor believes that it will have $187,300 available this year to service debts. Exhibit 1, Affidavit of Richard Hruza, p. 6. A summary of the proposed cash payout under the Modification is set forth in Exhibit 1, attached Exhibit C. A detailed description of the projected cash flow is set forth in Exhibit 1, attached Exhibit B.

The debtor's plan is not feasible because the best case scenario that will result under the Modification is that the debtor will break even on its plan payments. The Modification does not provide any cushion for weather contingencies or for other problems commonly associated with farming. The debtor was not able to make payments to Prudential or to Fremont County under the cash flow that resulted from 1991 and 1992 crop seasons, upon which the

proposed yields in the Modification are based. The debtor operated in 1992 under the confirmed plan, and even though the $50,000 payment was made to Prudential, Fremont County was not paid.

The Modification proposes to make an even higher installment payment to Prudential for the year 1995. The Motion to Modify states that Fremont County will be brought current by January 1, 1995, in addition to proposing an annual payment of $11,198.41. The Modification is not feasible because there is no margin of error. The debtor's own numbers show that an error in crop prices, a weather problem causing a yield decrease, or any increase in expenses over projections will cause the Modification to fail.

The proposed Modification is not feasible.

Conclusion

The Modification is denied. Separate journal entry shall be entered.

DATED: May 2, 1994.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

CC: Movant, Debtor(s) Atty. and all parties appearing at hearing
[ ] Chapter 13 Trustee [ ] Chapter 12 Trustee [ ] U.S.Trustee
Movant is responsible for giving notice of this journal entry to all other parties if required by rule or statute.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	
WARDLOU FARMS, INC.,	CASE NO. BK91-40729 A
DEBTOR(S)	
	CH. 12
	Filing No. 113, 117, 124
Plaintiff(s)	
vs.	JOURNAL ENTRY
	DATE: May 2, 1994
Defendant(s)	HEARING DATE: April 28, 1994

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion to Modify Plan filed by the Debtor; Objection by Fremont County; Objection by Prudential Insurance.

APPEARANCES

Douglas Quinn, Attorney for debtor
Kathryn Derr, Attorney for Prudential
Judith Spindler, Attorney for Fremont County Bank
David Thompson, Attorney for Trustee

IT IS ORDERED:

Plan Modification denied. See memorandum this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

CC: Movant, Objector/Resistor (if any), Debtor(s) Atty. and all parties appearing at hearing
[ ] Chapter 13 Trustee [X] Chapter 12 Trustee [ ] U.S.Trustee

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IN THE MATTER OF	
WARDLOU FARMS, INC.,	CASE NO. BK91-40729 A
DEBTOR(S)	
	CH. 12
	Filing No. 118 & 123
Plaintiff(s)	
vs.	JOURNAL ENTRY
	DATE: May 2, 1994
Defendant(s)	HEARING DATE: April 28, 1994

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Authority to Incur Secured Debt and Request to Expedite Hearing filed by the Debtor.

APPEARANCES

Douglas Quinn, Attorney for debtor
Kathryn Derr, Attorney for Prudential
Judith Spindler, Attorney for Fremont County Bank

IT IS ORDERED:

The motion for authority to incur secured debt is denied.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

CC: Movant, Objector/Resistor (if any), Debtor(s) Atty. and all parties appearing at hearing
[ ] Chapter 13 Trustee [X] Chapter 12 Trustee [ ] U.S.Trustee

Movant is responsible for giving notice of this journal entry to all other parties if required by rule or statute.