

UNITED STATES BANKRUPTCY COURT
DISTRICT OF South Dakota
Central Division

In re:

JAMES FLOYD ANDERSON,
Social Security No. 504-36-9295)
and)
DOROTHY JOYCE ANDERSON,
Social Security No. 517-46-5107)
Debtors.)

Bankr. Case No. 86-30044
Chapter 12
MEMORANDUM OF DECISION RE:
DEBTORS' DISCHARGE

The matter before the Court is Debtors' request for a discharge and the objections thereto filed by Chapter 12 Trustee John S. Lovald and the Farmers Home Administration. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum and accompanying Order shall constitute findings and conclusions under F.R.Bankr.P. 7052.

I.

Debtors James F. and Dorothy J. Anderson filed a Chapter 11 petition for reorganization on May 28, 1986. Among their scheduled secured debts, Debtors included a \$75,000.00 debt to the Charles Palmer Trust and stated the debt was secured by a purchase money mortgage on 880 acres of land. Debtors' schedule A-2 stated the original debt with the Palmer Trust was for \$189,000.00 at 7% interest. Debtors also acknowledged in their statement of financial affairs that they had made a \$5,700.00 payment to "Palmer" within one year before their petition. Debtors scheduled 1920 acres of real property with a total value of \$288,000.00, including the 880 acres of Palmer Trust land that was valued at \$132,000.00.

On May 19, 1987, the Palmer Trust filed a Motion for Acceptance or Rejection of Executory Contract. Therein, it sought an order compelling Debtors to assume or reject the contract for deed dated July 30, 1976 because Debtors had failed to make scheduled payments. If Debtors accepted the contract, the Palmer Trust further asked that Debtors cure the default within ten days of acceptance.

On May 20, 1987, Debtors filed a motion to convert to Chapter 12 or to have their case dismissed. Several objections to that motion were filed.

A hearing on Debtors' motion to convert, the Palmer Trust's motion to compel Debtors to accept or reject the land contract, and Federal Land Bank of Omaha's (FLBO's) motion for relief from the automatic stay was held August 3, 1987. An agreement was reached between Debtors and FLBO whereby FLBO withdrew its objection to conversion.

Debtors and the Palmer Trust also reached an agreement as stated by Brent A. Wilbur, counsel for FLBO and the Palmer Trust:

[D]ebtors have indicated and will stipulate that they will accept the [Palmer Trust] contract and will bring the contract current within 90 days of the date for today's hearing unless other accommodations are reached between them and the beneficiaries and the trustees in this matter.

The debtors apparently feel that they could, that they may be able to obtain some concessions and therefore, we have given them 90 to at least discuss it. If further stipulations aren't reached 90 days from today, they would, the debtors would either make a payment or the Norwest Bank through the Palmer estate

would be entitled to relief from the automatic stay, if payment has not been made at that time.

By Order entered August 27, 1987, the Court¹ approved a subsequent written agreement between the Palmer Trust and Debtors. Under the agreement, Debtors accepted the contract for deed and agreed to bring current all payments due. The Order included a provision that gave the Trust immediate relief from the automatic stay if Debtors failed to cure the default or make future payments. The agreement also stated that any Chapter 12 plan filed by Debtors would provide for the acceptance of the Palmer Trust contract for deed. Debtors' motion to convert to Chapter 12 was granted by Order entered November 5, 1987.²

Debtors filed a Chapter 12 plan on October 22, 1987. The plan stated the purchase price of \$189,200.00 for the Palmer Trust contract for deed originally was to be paid as follows:

- 1) The sum of \$54,700.00, payable November 15, 1976;
- 2) The balance of One Hundred Thirty-four Thousand Five Hundred Dollars (\$134,500.00) payable in 15 equal, annual installments of Fourteen Thousand Seven Hundred Sixty-eight Dollars and Ten Cents (\$14,768.10) each.

The first of said payments to be made on November 15, 1977, and on the 15th day of November of each year thereafter until the full purchase price has been paid. Said payments include interest at the rate of seven percent (7%) per annum.

The plan stated Debtors last made a regular payment on the Palmer Trust contract on November 15, 1984, which left a balance of

¹ The Hon. Peder K. Ecker, presiding.

² The Hon. Irvin N. Hoyt, presiding.

\$79,578.25, and that Debtors paid \$5,570.40 in interest only on November 16, 1985. On the effective date of the plan, Debtors proposed to bring current the interest payments for 1986 and 1987, which totaled \$11,140.00. Debtors further proposed to pay the remaining balance of \$79,578.25 over fifteen years with annual payments of \$5,305.00 in principle and \$5,570.00 in interest on each December 30 with the final payment on December 30, 2002. Under this plan, Debtors reserved "the right after three (3) years to prepay any claim or portion thereof in a priority or first mortgage or first lien position." Based on an appraisal made September 11, 1987, Debtors valued the Palmer Trust land at \$90,288.00.³ Several objections to the plan were filed.

On November 16, 1987, the Palmer Trust filed an Affidavit of Default and requested ex parte an order for relief from the automatic stay because Debtors had not complied with the terms of the Court's Order dated August 27, 1987. An Order granting the Trust relief from the stay was entered November 16, 1987.

By motion filed November 18, 1987, Debtors asked the Court to "reconsider its Order of August 27, 1987, and any further Order entered at the request of counsel for [the Palmer Trust.]" In the motion, Debtors said counsel for the Palmer Trust had agreed at the August 3, 1987 hearing to allow Debtors to contact one of the Palmer Trust trustees to seek a modification of the payment

³ This value was computed by multiplying the average per acre value of Debtors' land as established by the appraiser, \$102.60, by the 880 acres under the Palmer Trust contract for deed.

schedule. Debtors said they reached an agreement with Mrs. Palmer, one of the trustees, in August 1987 after she got out of the hospital and that the agreement ultimately reached with her was reflected in Debtors' proposed Chapter 12 plan.

The Palmer Trust filed a resistance to Debtors' motion for reconsideration on December 8, 1987. The Trust argued Debtors' motion was untimely and that the only options open for Debtors under the Code were to accept the contract and cure the default or reject the contract.

A hearing on Debtors' Motion for Reconsideration was held January 7, 1988. Appearances included John W. Keller for Debtors and Brent A. Wilbur for the Palmer Trust. At the beginning of the hearing, Attorney Keller clarified that Debtors were actually seeking a reconsideration of the Court's November 16, 1987 Order that granted the Palmer Trust relief from the automatic stay.

Debtor James Anderson testified that he met with Barbara Palmer, one of the Palmer Trust trustees, and with Mrs. Palmer's daughter and son-in-law in late August 1987 after Mrs. Palmer returned home from the hospital. He further testified that Mrs. Palmer and her family agreed to let Debtors bring current the taxes on the land and the interest on the contract and that a year thereafter Debtors could resume making annual payments. This, he said, was the agreement that Debtors put into their proposed Chapter 12 plan. Debtor stated that Mrs. Palmer had made a similar concession in 1985 allowing Debtors to pay interest only that year

and that Norwest Bank, the other trustee, had agreed with this change as stated in a letter dated October 23, 1985. Debtor testified that he had always dealt with Mrs. Palmer regarding the Palmer Trust contract for deed and that his only contact with Norwest Bank had been to send his payments there.

Debtors argued they paid their real estate taxes and drafted their Chapter 12 plan in reliance on their agreement with Mrs. Palmer. They also said that this proposed plan was served on Norwest and the trust's counsel before the 90-day deadline established by the Court's August 27, 1987 Order.

The Court took that matter under advisement and requested briefs. In their brief, Debtors argued that since there are only two trustees, South Dakota law does not provide for a tie-breaker mechanism if the co-trustees do not agree on a course of action. Debtors, however, admitted that both trustees must concur to bind the trust property, as provided by S.D.C.L. § 55-3-8.

By letter decision dated April 11, 1988, the Court denied Debtors' motion to reconsider the November 16, 1987 Order granting the Palmer Trust relief from the automatic stay because Debtors had defaulted on their August 27, 1987 agreement. The Court concluded that only a consensus of Norwest Bank and Mrs. Palmer could bind the Palmer Trust under South Dakota law. Therefore, Debtors were bound by the terms of the August 27, 1987 Order because Mrs. Palmer could not unilaterally modify the terms of the contract for deed.

A confirmation hearing was held July 27, 1988. Trustee John S. Lovald recited an agreement by interested parties on the record. Debtors agreed to reduce the settlement into an amended plan. At the hearing, Trustee Lovald specifically asked Debtors' counsel⁴ whether any unsecured property existed for unsecured creditors. The Trustee also asked Debtors to include a liquidation analysis in the amended plan "that clearly reflects that there is no asset excess that otherwise should be available for the unsecured creditors." The Court granted confirmation based on the plan terms stated on the record.

Debtors filed a final amended Chapter 12 plan on August 3, 1988. This plan stated Debtors owned 1920 acres of farm property but it did not acknowledge that Debtors still had a contract for deed with the Palmer Trust. Further, the final plan did not include any payments to the Palmer Trust in its projection of expenses nor did it list the Palmer Trust as a secured creditor in the plan's liquidation analysis.⁵ Debtors valued their real property at \$124.87 per acre or \$109,885.60 for the 880 acres under the Palmer Trust contract. Debtors served the final plan on all creditors and other parties in interest on August 1, 1988. An

⁴ The Court approved the substitution of Thomas M. Tobin for John W. Keller as counsel for Debtors on February 26, 1988.

⁵ In Debtors' final plan, the total for projected debt payments has the words "+ Contract" appended to it. This appears to relate not to the Palmer Trust contract, which is never mentioned in the plan, but to an unknown expense Debtors would owe ASCS on a contract, which is acknowledged immediately above the total.

Order confirming the final amended plan was entered August 11, 1988.⁶

Debtors filed their final report and final account on January 13, 1993. It included a copy of their 1988, 1989, 1990, and 1991 annual reports. The final report did *not* specifically identify any payments that Debtors had made on the Palmer Trust contract. Debtors' annual report for 1988 had an expense entry of \$51,025.55 described as "Contract for deeds brought up to date." Debtors' 1989 annual report listed an expense of \$18,942.00 for "contract for deeds." Debtors' 1990 annual report acknowledged they had made a \$12,900.14 principal payment and a \$1,867.96 interest payment to the Palmer Trust. Debtors' 1991 annual report did not identify to whom Debtors had made operating expense or loan payments.

Objections to discharge were filed by Trustee Lovald and FmHA on the grounds that all disposable income had not been paid to the Trustee for the benefit of unsecured creditors.⁷ The Palmer Trust also objected to Debtors discharge and said it had commenced a

⁶ On December 8, 1989, Debtors and FmHA filed a Stipulation for Modification of Amended Plan of Reorganization. The Stipulation amended only the treatment of FmHA's secured claim. It was approved by Order entered May 3, 1990.

⁷ FmHA also filed supplemental objections to Debtors' discharge on April 29, 1993 that argued a discharge should not be granted until a federal civil suit initiated against FmHA by Debtors pro se was resolved. That suit was dismissed by the United States District Court for the District of South Dakota, the Hon. John B. Jones, Chief Judge, presiding, on September 23, 1993.

foreclosure proceeding against Debtors on February 4, 1993. Contrary to Debtors' contention in that foreclosure proceeding, the Palmer Trust said the foreclosure action did not violate the automatic stay because the Trust had been granted relief from the automatic stay on November 16, 1987 and because Debtors' Chapter 12 plan nowhere mentions the Palmer Trust. The Trust further argued that if any disposable income is available, it should be paid to the Palmer Trust because the Trust had not received all sums due under the contract for deed.

An initial hearing on Debtors' discharge was held May 11, 1993. The hearing was continued at the request of the parties to allow additional discovery. At the continued hearing on June 15, 1993, Trustee Lovald and Debtors agreed to present stipulated facts and briefs on whether Debtors' rapid payment of the Palmer Trust contract for deed constitutes disposable income. The matter was taken under advisement on July 30, 1993 after receipt of the briefs and stipulated facts. Subsequently, the Court ordered Debtors to file a statement of the amounts and dates of the payments they made to the Palmer Trust. Debtors filed that statement on September 17, 1993 and Trustee filed a response on October 21, 1993. The matter was again taken under advisement.

According to their records, Debtors did not make all the

regular payments on the Palmer Trust contract for deed.⁸ By the confirmation hearing on August 11, 1988, Debtors had paid \$208,595.31 on the contract and had established equity in the property of approximately \$30,307.35.⁹ If Debtors had abided by the original terms of the contract terms, they would have paid \$217,149.10 by confirmation and would have acquired an equitable interest of approximately \$59,876.79.¹⁰

The Palmer Trust withdrew its objection to discharge on June 18, 1993 because the Trust and Debtors agreed that Debtors were not attempting to discharge the contract for deed debt.

⁸According to the checks and receipts submitted by Debtors, the following payments were made:

Actual Payments:		Scheduled payments:	
November 15, 1976	\$54,700.00	November 15, 1976	\$54,700.00
November 14, 1977	14,768.10	November 15, 1977	14,768.10
November 14, 1978	14,768.10	November 15, 1978	14,768.10
November 11, 1979	14,768.10	November 15, 1979	14,768.10
November 17, 1980	14,768.10	November 15, 1980	14,768.10
November 10, 1981	14,768.10	November 15, 1981	14,768.10
November 15, 1982	14,768.10	November 15, 1982	14,768.10
November 15, 1983	14,768.10	November 15, 1983	14,768.10
November 14, 1984	14,768.10	November 15, 1984	14,768.10
December 6, 1985	5,570.48	November 15, 1985	14,768.10
	<i>(Debtors filed their petition on May 28, 1986.)</i>	November 15, 1986	14,768.10
		November 15, 1987	14,768.10
June 7, 1988	30,180.03		
	<i>(Debtors' Chapter 12 plan was confirmed on August 11, 1988.)</i>		
November 14, 1988	16,354.94	November 15, 1988	14,768.10
November 1, 1989	14,768.10	November 15, 1989	14,768.10
November 9, 1990	14,768.10	November 15, 1990	14,768.10
November 1, 1991	14,768.10	November 15, 1991	14,749.93
TOTALS	\$269,254.55		\$276,203.33

⁹ This equity was computed based on the value of the real property at \$109,885.60 less the principal of \$79,578.25 that was due after Debtors made their last regular payment in 1984.

¹⁰ This equity is computed based on a land value of \$109,885.60 less the projected principal due of \$50,008.81 if Debtors had made their regular plan payments through 1987.

The stipulated facts filed by Trustee Lovald and Debtors contained only two additional facts that do not appear in the Court's file. First, the Palmer Trust and Debtors made an addendum to the contract for deed on June 23, 1988 that settled a foreclosure action that the Palmer Trust had commenced on January 10, 1988. The details of this addendum were not disclosed. Second, Debtors claim they have paid the Palmer Trust in full while the Palmer Trust contends it is still owed \$14,768.10 plus interest and attorneys' fees.

Trustee Lovald argues Debtors' "rapid" increase in equity in the Palmer Trust land between the petition date and discharge should be considered disposable income. He reasons that if the \$79,578.25 balance due at confirmation (after curing the arrearage) had been amortized over fifteen years at seven percent interest, Debtors would have made only four payments during the plan term and the contract would have had a balance due of \$65,517.87 after the final payment during the plan term on August 11, 1992. The remaining funds would have been available for unsecured claim holders. He concludes that Debtors' disposable income is the difference between the amount still owed, if any, and the \$65,517.87 principal balance that would be due under a new fifteen-year amortization. Trustee Lovald calculates this amount to be at least \$50,749.77 (the \$65,517.87 15-year amortization balance less \$14,768.10, the amount Debtors owe on the contract according to the Palmer Trust).

Debtors argue that any payments they made to cure the contract default were reasonable and necessary to protect Debtor's substantial equity in the property and, thus, were a necessary expense.

II.

Under 11 U.S.C. § 1225(b)(2), disposable income is the income that a debtor receives which is not reasonably necessary to pay for (1) the support of his family or a dependent or (2) the continuation, preservation, and operation of the debtor's business. The question presented here is whether Debtors' post-confirmation payments on the Palmer Trust contract for deed diverted disposable income from unsecured claim holders where Debtors cured the contract arrearage post-petition and repaid the remainder of the contract on its original terms but where these payments were not disclosed or projected in their confirmed plan.

III.

The Court concludes that the post-petition payments that Debtors made on the Palmer Trust contract for deed did not divert disposable income. While there is no suitable explanation of why Debtors did not recognize the Palmer Trust contract payments in their confirmed plan, they were not obligated to do so. Under 11 U.S.C. § 1222(b)(2), a Chapter 12 debtor may leave unaffected the rights of secured claim holders and only those debts dealt with in the plan may be discharged. 11 U.S.C. § 1228(a).

If Trustee Lovald or creditors were concerned that Debtors were providing more favorable treatment to the Palmer Trust or that these land contract payments would jeopardize feasibility, they could have filed objections to the plan. See *In re Pearson*, 96 B.R. 990 (Bankr. D.S.D. 1989). The Court approved Debtors' assumption of the contract. Debtors thereafter cured the arrearage and continued to make payments under the original contract, the only option available under 11 U.S.C. § 365(b). Debtors could not force the Palmer Trust to negotiate a better contract as Trustee Lovald's argument implies.

Most important, Debtors fully disclosed the debt to the Palmer Trust in their schedules. The contract for deed was also the subject of substantial litigation in the case. The Court ruled that the Trust was not bound by any subsequent agreement that Debtors had allegedly made with Mrs. Palmer alone. Thus, Debtors had to amend the plan that had included the alleged agreement with Mrs. Palmer. There was no evidence that Debtors omitted the Palmer Trust from their final plan for fraudulent reasons. Finally, Debtors served their final plan on all creditors and other parties in interest and the confirmation order was not entered until several days after service of the final plan. Compare *In re Harrison*, Bankr. No. 87-50250, slip op. (Bankr. D.S.D. May 21, 1993).

The facts presented here are dissimilar to those presented in *Harrison* where the Court reformed the written confirmation order to

comport with its oral findings and conclusions at the confirmation hearing and the Trustee's plan summary. In *Harrison*, the debtors' final plan differed substantially -- and without explanation -- from the plan presented at the confirmation hearing and from the Trustee's plan summary that was filed at the confirmation hearing. Further, the debtors in *Harrison* failed to serve their final plan on all creditors and other parties in interest. Further, in *Harrison* there was over a three-month delay between the confirmation hearing and the entry of the confirmation order and when the debtors filed their final plan.

In contrast, Debtors here were required to amend their plan after the confirmation hearing, only a few days elapsed between the confirmation hearing and the date Debtors served their final plan, and Debtors served their final plan on all creditors and other parties in interest.

Debtors have abided by the terms of their confirmed plan and the Court's orders entered August 27, 1987 and April 11, 1988. After curing a default on that contract, they paid the Palmer Trust contract for deed under the original terms of the contract. Any argument that Debtors could accumulate more disposable income during the plan term if they reamortized the balance due on the Palmer Trust contract for deed should have been raised at confirmation.

An order will be entered overruling Trustee Lovald's and FmHA's objections to discharge arising from Debtors' post-confirmation payments on the Palmer Trust contract for deed. Counsel for all parties shall promptly inform the Court by letter whether any other objections to discharge are unresolved.

Dated this ____ day of November, 1993.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Central Division

In re:)
) Bankr. Case No. 86-30044
JAMES FLOYD ANDERSON,)
Social Security No. 504-36-9295) Chapter 12
)
and)
) ORDER OVERRULING OBJECTIONS
DOROTHY JOYCE ANDERSON,) TO DEBTORS' DISCHARGE
Social Security No. 517-46-5107)
)
Debtors.)

In compliance with and recognition of the Memorandum of Decision Re: Debtors' Discharge entered this day,

IT IS HEREBY ORDERED that the objections to discharge filed by Trustee John S. Lovald and Farmers Home Administration (FmHA) arising from Debtors' post-petition payments on the Palmer Trust contract for deed are OVERRULED; and

IT IS FURTHER ORDERED that the Trustee, counsel for FmHA, and counsel for Debtors shall promptly inform the Court by letter whether any other objections to discharge are unresolved.

So ordered this ____ day of November, 1993.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy
(SEAL)