

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Central Division

In re:)
) Bankr. Case No. 87-30059
 ELLIS BROTHERS,)
 a South Dakota Partnership;) Jointly Administered
)
 Bankr. No. 97-30059,) Chapter 12
 Employer's Tax ID No.46-0360726)
)
 and)
)
 DOROTHY FAYE ELLIS;)
)
 Bankr. No. 97-30060)
 Social Security No. 504-88-0776)
)
 Debtors.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE:
OBLIGATION OF DEBTORS TO PAY DISPOSABLE INCOME

The matter before the Court is the discharge of Debtors and the objections thereto filed by Chapter 12 Trustee John S. Lovald, Tri-County State Bank of Chamberlain, and Farm Credit Bank of Omaha.

FINDINGS OF FACT

1.Ellis Brothers, a partnership, filed a Chapter 12 petition on April 3, 1987 (Bankr. No. 87-30059). Dorothy Faye Ellis filed a Chapter 12 petition on April 3, 1987 (Bankr. No. 87-30060).

2.On April 14, 1987, the Court ordered the cases to be jointly administered under case number 87-30059.¹ The Court also allowed the Debtors to file a joint Chapter 12 plan.

¹ The Hon. Peder K. Ecker, Presiding.

3. Debtors filed a Chapter 12 plan on July 1, 1987. That plan provided the following treatment for unsecured claims:

- (a) No dividend or distribution of any kind is projected for the members of this class.
- (b) If the Chapter 12 trustee or the holder of any allowed secured claim objects to confirmation of the plan, then, as of the effective date of the plan:
 - (1) all of the debtors' projected disposable income to be received in the subsequent three years period, beginning on the effective date of the plan, will be applied to make payments under the plan.

Attached to the plan were a liquidation analysis and a schedule of estimated plan payments but no income and expense projections for the life of the plan were included.

4. Farm Credit Bank of Omaha (FCBO) [then Federal Land Bank of Omaha) filed an objection to the plan on July 20, 1987. It argued, among other things, that the "plan fails to effectively provide that the debtors' projected disposable income received during the pendency of the plan will be applied to make payments under the plan, as required by 11 U.S.C. [§] 1225(b)(1)(B)" and that the "plan presented by debtors fails to include any provision to provide that income realized above projections for all plan years must be distributed 'to the unsecured creditors on a pro rata basis until such time as the unsecured creditors are paid in full without interest.' In Re: Ahlers, 794 F.2d 388 (8th Cir. 1986)."

5. Tri-County Bank of Chamberlain filed an objection to the plan on July 21, 1987. It stated, "This Claimant is the holder of an allowed unsecured claim, and the Plan does not provide that all the Debtors' projected disposable income to be received within the next three-year period will be applied to make payments under the Plan, as required by Section 1225(b)(1)(B)."

6. Trustee Lovald filed an objection on July 29, 1987. He stated, "Pursuant to Section 1225(b)(1)[B], the trustee objects to the confirmation of the plan on the basis that the plan as proposed does not contain an unconditional commitment by the debtors that all disposable income to be received in the first three years of the plan will be utilized to make payments under the plan for the benefit of unsecured creditors."

7. Confirmation was denied by Order entered August 20, 1987.

8. Debtors filed a Restated Chapter 12 Plan on April 14, 1988. The portion that recited the treatment proposed for unsecured claims remained identical to that provision in the original plan. Debtors attached a copy of Ellis Brothers' federal income tax Schedule F, Farm Income and Expenses, for 1986. It showed Ellis Brothers' expenses exceeded income by \$27,073.00 when depreciation of \$32,761.00 is included as a farm expense.

9. On May 2, 1988, Debtors and Tri-County State Bank entered into a Stipulation for Continuing Use of Cash Collateral, for Adequate Protection, for Repayment of Indebtedness and Plan Treatment. The Stipulation provided:

Debtors agree to propose their Chapter 12 Plan in all manners and respects consistent with the provisions of this Stipulation. Provided that said Plan is consistent Bank agrees to refrain from objecting to said Plan, except as to any dispute relating to the payment of the unsecured claim.

The Court approved the Stipulation by Order entered May 12, 1988.

10. On June 1, 1988, Tri-County State Bank objected to Debtors' restated plan because Debtors had defaulted on the terms of their earlier stipulation.

11. Trustee Lovald objected to Debtors' restated plan on June 1, 1988. He again stated the plan failed to clearly establish that disposable income will be paid to unsecured and undersecured creditors as provided by § 1225(b)(1)(B).

12. FCBO objected to Debtors' restated plan on June 1, 1988 because the parties had not reached a stipulation as stated in the plan.

13. Debtors and FCBO entered into a Stipulation on June 8, 1988 that provided for the plan treatment of FCBO's secured claim.

14. A confirmation hearing on the restated plan was held June 8, 1988. Confirmation was granted. On June 14, 1988, Debtors filed a Restated Chapter 12 Plan As Confirmed. The portion that recited the treatment proposed for unsecured claims remained identical to that provision in both the original and restated plan. The only attachment was a schedule of plan payments. Two other exhibits mentioned in the Restated Chapter 12 Plan As

Confirmed were not attached.

15. An Order Confirming Restated Chapter 12 Plan was entered June 17, 1988. It stated that "the Chapter 12 Trustee and ... the Federal Land Bank and Tri-County State Bank, holders in part of allowed unsecured claims, have withdrawn their objections to confirmation of the plan."

16. On June 17, 1988, the Court entered an Order Approving [FCBO and Debtors'] Stipulation of Settlement.² It stated the Order was to be considered an amendment to the confirmed plan and it provided that upon entry, FCBO would withdraw its objections to the plan. The Order recited the treatment to be given to FCBO's secured claim of \$260,000.00. The disposition of FCBO's remaining unsecured claim was not specifically mentioned. A copy of the Stipulation was filed with the Order. An Amended Order Approving Stipulation of Settlement was entered June 27, 1988. It clarified some repayment terms for FCBO's secured claim but did not alter the provisions recited above.

17. Trustee Lovald filed his Chapter 12 Plan Summary on July 14, 1988. The summary acknowledged that "Debtor(s) have offered to pay all of their net disposable income over the life of the Plan, pursuant to 11 U.S.C. [§] 1225(b)(1)[B]."

18. On July 14, 1988, Debtors, through their attorney J. Bruce Blake, and Trustee Lovald filed a Stipulation for: 1) Agreement as to Compensation for Chapter 12 Trustee [and] 2) Withdrawal of

² The Hon. Irvin N. Hoyt presiding.

Objections to Confirmation. The Stipulation recited an agreement regarding Trustee Lovald's commission and stated "the Chapter 12 trustee withdraws his objections to the Restated Chapter 12 Plan dated June 2, 1988."

19. Debtors filed their Final Report and Final Account and notice thereof on July 24, 1992.

20. Trustee Lovald filed an objection to Debtors' discharge on July 31, 1992 on the grounds that Debtors had failed to account for and pay to the unsecured creditors all net disposable income received during the term of the plan.

21. FCBO joined Trustee Lovald's objection to Debtors' discharge on August 14, 1992.

22. Tri-County Bank joined Trustee Lovald and FCBO's objection to discharge on September 21, 1992 and stated, "Tri-County Bank has an unsecured claim of \$421,755.65 as set forth in the Stipulation for Continuing Use of Cash Collateral, for Adequate Protection, for Repayment of Indebtedness and Plan Treatment, between Debtors and Tri-County State Bank dated March 15, 1988, and approved by Order of the Court . . . dated May 2, 1988."

23. Upon Debtors' Motion to Bifurcate Issues and a stipulation related thereto made by Debtors and Trustee Lovald, the Court by Order granted December 7, 1992 limited the issues to be addressed at the December 8, 1992 discharge hearing to the following:

1. Whether the "disposable income" test was properly raised; and if so, whether the objections were determined and resolved before the Court confirmed the Chapter 12 plan; and

2. Whether the "projected disposable income" requirement was resolved at the time of confirmation.

The Court further ordered that if it should determine that Debtors are obligated to pay disposable income prior to entry of discharge, a separate hearing would be held to determine the amount of disposable income owed by Debtors.

24. A hearing on the non monetary issues was held December 8, 1992. Appearances included J. Bruce Blake for Debtors, Trustee Lovald, and Brent A. Wilbur for FCBO.

25. At the hearing, Debtors argued that pursuant to the provisions of the confirmation order Trustee Lovald, FCBO, and Tri-County State Bank had all withdrawn their objections to confirmation of the plan. They claimed that since the confirmation order had not been revoked within the 180 days allowed by 11 U.S.C. § 1230(a), the confirmation order stood as entered. Further, they argued any projected disposable income issue would now be *res judicata*.

26. Trustee Lovald responded at the hearing that his initial objection to the Debtors' original plan "triggered" the disposable income provision under § 1225(b) (1) (B) and should be considered a continuing objection because there was no specific, known waiver of disposable income. He stated, "[W]e shouldn't have to worry about any further device that would be submitted to the court on

behalf of the debtors' counsel to take something away that he has said you can have if you object." He further noted that his plan summary filed at the time of confirmation represented to the Court that disposable income had been offered. Finally, Trustee Lovald said that the stipulation between Debtors and Tri-County State Bank would be meaningless unless the Court recognized that the Bank intended to preserve its claim to any disposable income payments. FCBO joined in Trustee Lovald's argument that their triggering disposable income objections were not clearly, knowingly, voluntarily, and intentionally waived and, thus, remained valid.

27. Debtors responded that the Trustee and creditors did not "waive" their objections but did "withdraw" them and that the only relevant documents are the Restated Chapter 12 Plan As Confirmed and the confirmation order.

28. Debtors' second argument at the hearing was that the restated plan as confirmed projected Debtors would not have any disposable income and, therefore, no disposable income need be paid now.

CONCLUSIONS OF LAW

In response to Debtors' first argument regarding the survival of any triggering objection, the Court concludes that:

1. Trustee Lovald withdrew his objections to the plan, including any triggering disposable income objection, as provided in the July 14, 1988, Stipulation for: 1) Agreement as to Compensation for Chapter 12 Trustee [and] 2) Withdrawal of Objections to

Confirmation. This withdrawal was consistent with the confirmation order.

2.FCBO withdrew its objections to the plan, including any triggering disposable income objection, as provided in the June 8, 1988 stipulation between Debtors and FCBO and the June 17, 1988, Order Approving Stipulation of Settlement. This withdrawal was consistent with the confirmation order.

3.Tri-County State Bank did not withdraw its triggering disposable income objection to the plan made July 21, 1987. As recited in the May 2, 1988 Stipulation for Continuing Use of Cash Collateral, for Adequate Protection, for Repayment of Indebtedness and Plan Treatment, Tri-County State Bank preserved any objections it had regarding treatment of its unsecured claim. The Restated Chapter 12 Plan As Confirmed did not alter this partial waiver because it incorporated the Stipulation. Further, there was nothing in the confirmation order that indicated that the treatment of Tri-County State Bank's claims should be altered from that set forth in the Restated Chapter 12 Plan As Confirmed. To conclude that Tri-County State Bank had waived its triggering disposable income objection would necessitate that the Court erroneously conclude that the Stipulation was not incorporated into the Restated Chapter 12 Plan As Confirmed.

In response to Debtors' second argument that the plan projected zero disposable income had to be paid, the Court concludes that:

1. Once a triggering objection survives confirmation, any projections Debtors made in their plan as to the amount of disposable income they will have are superfluous. If the confirmed plan contains a disposable income provision, disposable income payments are to be made based on Debtors' actual disposable income over the term of the plan, not any projections made at confirmation. See In re Kuhlman, 118 B.R. 731 (Bankr. D.S.D. 1990).

2. The Restated Chapter 12 Plan As Confirmed did not contain any disposable income projection calculation for the parties to litigate at confirmation so that issue is not **res judicata** at the time of discharge.

3. Interested creditors or the Trustee may move to modify any "no dividend" or zero unsecured claim treatment that the confirmed plan provides. 11 U.S.C. § 1229. Since disposable income payments obligated under the plan have not been made, all plan payments have not been completed and the modification remedy provided by § 1229 is still available.

An order shall be entered that recognizes that Tri-County State Bank's July 21st, 1987 objection, which triggered the disposable income provision of 11 U.S.C. § 1225(b) (1) (B), survived confirmation and that the Restated Chapter 12 Plan As Confirmed may be modified under 11 U.S.C. § 1229.

Dated this 26th day of January, 1993.

BY THE COURT:

Irvin N. Hoyt

ankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

Deputy

(SEAL)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Central Division

In re:)
) Bankr. Case No. 87-30059
 ELLIS BROTHERS,)
 a South Dakota Partnership;) Jointly Administered
)
 Bankr. No. 97-30059,) Chapter 12
 Employer's Tax ID No.46-0360726)
)
 and)
) ORDER DETERMINING DEBTORS '
 DOROTHY FAYE ELLIS;) OBLIGATION TO PAY
) DISPOSABLE INCOME
 Bankr. No. 97-30060)
 Social Security No. 504-88-0776)
)
 Debtors.)

In compliance with and recognition of the Findings of Fact and Conclusions of Law Re: Obligation of Debtors to Pay Disposable Income entered this day, and

IT APPEARING that Tri-County State Bank's July 21, 1987 objection that triggered the disposable income provision of 11 U.S.C. § 1225(b)(1)(B) survived confirmation; and

IT FURTHER APPEARING that Debtors' Restated Chapter 12 Plan As Confirmed may be modified under 11 U.S.C. § 1229;

IT IS HEREBY ORDERED that Debtors are obligated to pay disposable income that accrued during the three years from the date of the first payment under their Restated Chapter 12 Plan As Confirmed; and

IT IS FURTHER ORDERED that an interested party may under 11 U.S.C. § 1229 move to modify any "no dividend" or zero payment on unsecured claims provided in Debtors' Restated Chapter 12 Plan As Confirmed.

Dated 26th day of January, 1993.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

Deputy