

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

DONALD J. PORTER
CHIEF JUDGE
413 U.S. COURTHOUSE
PIERRE, SOUTH DAKOTA 57501

NORTHERN DIVISION

December 22, 1989

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RE: FARM CREDIT BANK OF OMAHA, Plaintiff/Appellant
vs.
MARTIN FRANK, JR. and ERNESTINE D. FRANK, Defendants/Appellees
CIVIL NO. 89-1027

MEMORANDUM OPINION

This case involves the Bankruptcy Court's dismissal of an involuntary petition under Chapter 7 of the Bankruptcy Code. Pursuant to 28 U.S.C. § 158, appellant appeals the dismissal on the grounds that the debtors/appellees are not family farmers and can therefore be subject to an involuntary petition.

BACKGROUND

Appellees Martin and Ernestine Frank (the Franks) reside in Timber Lake, South Dakota. Martin Frank has owned a farm and ranch operation in that area nearly all his adult life. Until 1987, Mr. Frank had run approximately ninety head of mother cows and their offspring on land owned or leased by him. Mr. Frank voluntarily

liquidated all but four cattle from this herd at the behest of a creditor in 1987. In 1988, Mr. Frank pastured sixty head of cattle owned by another person for which he received \$3,780. In that same year, Mr. Frank took a part-time position with the Timber Lake Cheese Company and earned approximately \$4,000. Despite the apparent failure of his ranch operation and subsequent off-farm employment, at all times Mr. Frank stated that he intended to remain in the business of farming and ranching. Ernestine Frank is a long-time Community Health Representative for the Cheyenne River Sioux Tribe and earned more than \$11,000 in 1988. She also received income from other sources totalling approximately \$3,000. Mrs. Frank has never been involved in the farming and ranching operation.

Appellant Farm Credit Bank of Omaha (FCB) filed an involuntary Chapter 7 petition against the Franks on January 10, 1989. As averred by the Bankruptcy Court, FCB holds a first mortgage on certain pasture land of the Franks which currently exceeds \$41,000. Other debts of the Franks total approximately \$23,000, including a \$19,997 loan from American Indian Ag Credit Consortium (Indian Credit). The FCB and Indian Credit loan obligations were signed by both Mr. and Mrs. Frank and secured by land which was jointly owned by them.

On July 6, 1989, the Bankruptcy Court dismissed the involuntary petition concluding that, because "only Martin is engaged in farming and Ernestine has been employed away from the farm for the past sixteen years," "only the income of Martin should

be considered in determining whether the definition of family farmer has been met." The Bankruptcy Court found that Martin Frank was a family farmer and, under 11 U.S.C. § 303(a), could not be subject to an involuntary Chapter 7 petition.

DISCUSSION

I. "Family Farmer" Issue was Properly Before the Bankruptcy Court.

Initially, appellant FCB argues that it was error for the Bankruptcy Court to grant the motion to dismiss upon the debtors' defense that Martin Frank was a "family farmer" when that defense had not been specifically pleaded by them. FCB claims that the debtors' response to the involuntary petition and its motion to dismiss set forth an affirmative defense that debtors were "farmers" as that term is defined in 11 U.S.C. § 101(19).¹ A

¹11 U.S.C. § 101(19) provides:

"farmer" means (except when such term appears in the term "family farmer") person that received more than 80 percent of such person's gross income during the taxable year of such person immediately preceding the taxable year of such person during which the case under this title concerning such person was commenced from a farming operation owned or operated by such person....

The definition of a farming operation is provided at 11 U.S.C. § 101(20). That subdivision states:

"farming operation" includes farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state....

review of the bankruptcy file shows that the "family farmer" defense was not expressly raised until the debtors filed their brief in support of the motion to dismiss on March 9, 1989, approximately ten days after the hearing conducted on this motion. In its findings of fact and conclusions of law, the Bankruptcy Court premised its decision on Martin Frank's status as a family farmer.

Paragraph 1 of the debtors' response to the involuntary petition states "[t]hat debtors are farmers and ranchers within the meaning of 11 USC 303 and are exempt from involuntary petition under Chapter 7." The debtors' motion to dismiss simply asserted that "the Debtors are farmers within the meaning of 11 USC 303." The Court recognizes the difficulties encountered when a party fails to present its defenses or objections with the clarity and particularity required by Rule 12 of the Federal Rules of Civil Procedure. Fed.R.Civ.P 12; Bankr. Rule 1011. However, the debtors' responsive pleading and motion do cite to 11 U.S.C. § 303 which excludes farmers and family farmers. It is not unreasonable to find that the debtors intended to rely on either definition in defending against the petition. Moreover, approximately four months passed from the date the debtors first raised the "family farmer" defense and the date the Bankruptcy Court dismissed FCB's petition. FCB had ample time in which to move for a more definite statement and request a supplemental hearing. Therefore, the Court concludes that it did not work a manifest injustice against FCB to recognize the "family farmer" defense.

II. Is the Debtor a "Family Farmer"?

To be a family farmer as that term is defined by 11 U.S.C. § 101(17)(A), the debtor must meet four requirements. Those requirements are as follows:

1. Individual or individual and spouse engaged in a farming operation;
2. Whose aggregate debts do not exceed \$1,500,000;
3. Not less than 80 percent of whose aggregate noncontingent, liquidated debts arise out of a farming operation owned or operated by such individual or individual and spouse; and
4. Such individual or individual and spouse receive from such farming operation more than 50 percent of such individual's or such individual and spouse's gross income for the taxable year preceding the taxable year in which the case concerning such individual or such individual and spouse was filed.

This Court holds that, under the facts presented at the hearing on the motion to dismiss, Mr. Frank did not earn more than 50 percent of his gross income for 1988 from the farming operation. The uncontroverted evidence shows that in 1988 Mr. Frank earned no more than \$3,780 from his farming operation and \$4,000 from his off-farm employment. There is nothing in the record before the Court which would support a finding that Mr. Frank's total farm income for 1988 exceeded \$3,780.² This figure was set forth in the

²The Bankruptcy Court relied upon an estimation by FCB that Martin Frank earned \$4,500 in gross farm income for 1988. This higher figure, according to FCB, was to be used for "illustrative purposes" when FCB believed that the eighty percent test of § 101(19) was "wholly unattainable by the debtors." Appellant's Brief, pp. 25-26. Although FCB was careless in using this "approximated", "estimated" and "rounded-up" figure [Appellant's Brief, p. 26], Martin Frank's testimony should not be ignored in

brief in support of the debtors' motion to dismiss.³ More significantly, Mr. Frank testified at the dismissal hearing that, in 1988, he earned approximately \$3,700 from Mr. Jeff Weber for custom cattle feeding, including payment for hay fed to the cattle. This same figure was utilized by FCB's farm credit expert, Mr. Craig Carson, without objection from debtors' counsel. Although Mr. Frank testified that he expected to receive a disaster payment for the 1988 crop year, apparently none has been forthcoming.

The Court sympathizes with the hardships that can result from a rigid application of § 101(17)(A), especially following a year visited by severe economic and drought conditions. The debtors correctly point out that the drafters of the Bankruptcy Code were necessarily concerned with the cyclical nature of a "risk-ridden enterprise" like farming.⁴ However, it appears from the hearing

light of the fact-specific inquiry required by § 101(17).

³The Franks' brief in support of their motion to dismiss provides:

During the year 1988 Martin Frank, Jr. took in approximately sixty (60) head of cattle to care for at the price of nine (9) dollars per head per month which generated gross income of approximately three thousand seven hundred and eighty dollars (\$3,780.00).

Debtors' Brief in Support of Motion to Dismiss, p. 2.

⁴See In re Armstrong, 812 F.2d 1024 (7th Cir. 1987). In discussing the exemption given farmers from involuntary Chapter 11 cases under § 303(a), the Seventh Circuit Court of Appeals noted the legislative history of the statute:

Farmers are exempted "... because of the cyclical nature of their business. One drought year or one year of low prices, as a result of which a farmer is temporarily unable to pay his creditors, should not subject him

transcript that both 1987 and 1988 were economically dismal for Mr. Frank's farming operation. In 1987, Mr. Frank voluntarily acceded to demands from Indian Credit to liquidate his herd. The following year realized less than \$3800 in gross farm income. Although debtors like Mr. Frank should be given some assurance that they will not be haled into bankruptcy court at the first sign of difficult times, creditors, on the other hand, should not be required to watch helplessly as secured collateral diminishes in value and loan payments come due and then pass by unpaid. With this in mind, § 101(17)(A) is uncharacteristically clear in requiring that ". . . such individual or individual and spouse receive from such farming operation more than 50 percent of such individual's or such individual and spouse's gross income for the taxable year preceding the taxable year in which the case concerning such individual or such individual and spouse was filed...." (Emphasis supplied.) It is this last phrase, of course, which provides the farmer with a one year cushion to soften the effects of a depressed year.

to involuntary bankruptcy." See Senate Report No.95-989, U.S. Code Cong. & Admin. News 1978, p. 5787 as found in the Historical & Revision Notes of Title 11. This rationale is steeped in the concept of risk; farmers are caught in a risk-ridden enterprise.

Id. at 1027.

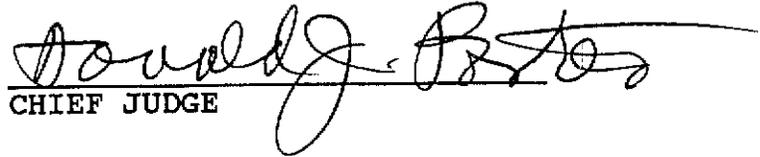
Support for strict adherence to the "family farmer" definition of § 101(17)(A) can be found in In re LaFond, 791 F.2d 623 (8th Cir. 1986). The Eighth Circuit Court of Appeals agreed with the district court that "'Congress intended the definition of 'farmer' at § 101(17) [now § 101(19)] was to be applied only where the word 'farmer' itself was used in the Bankruptcy Code, as, for instance, in 11 U.S.C. § 303(a).'" Id. at 625. Similarly, because both §§ 101(17) and 303(a) now use the phrase "family farmer," the Court is faced with a clear instance in which the definition of "family farmer" is applicable. This Court cannot ignore the unambiguous language employed by § 101(17).

As the involuntary Chapter 7 petition was filed on January 10, 1989, § 101(17)(A) requires Mr. Frank to establish that he received more than 50 percent of his gross income from his farming operation in 1988. Having failed to establish the requisite amount, Mr. Frank is not a family farmer so as to be exempt from involuntary cases under Chapter 7. Hence, the involuntary petition should not have been dismissed. It follows, therefore, that the petition naming Mrs. Frank is also proper because she clearly is not a family farmer so as to be exempt from involuntary petitions under § 303(a).

Further actions on this petition must comport with the requirements of § 303(h). Accordingly, the decision of the Bankruptcy Court dismissing the involuntary petition against the Franks is reversed as they are not exempt from such petitions. The

case is remanded to the Bankruptcy Court for further proceedings in accordance with § 303(h) and Chapter 7 of the Bankruptcy Code.

BY THE COURT:


CHIEF JUDGE