UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:	)	Bankr. No. 99-50185
	)	
GERALD JAMES GESINGER	)	Chapter 12
Soc. Sec. No. 504-40-8695	)	
	)	
and	)	MEMORANDUM OF DECISION RE:
	)	BANKWEST'S MOTION TO DISMISS
HEIDI MARIE GESINGER	)	
Soc. Sec. No. 537-58-9755	)	
	)	
Debtors.	)	

The matter before the Court is the motion to dismiss filed by BankWest. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that this case must be dismissed.

I.

Gerald J. and Heidi M. Gesinger ("Debtors") filed a Chapter 12 petition on April 14, 1999. In their schedules filed April 15, 1999, Debtors included BankWest as a creditor with a claim of $875,000, which Debtors stated was secured to $585,792. Debtors listed themselves as parties to three executory contracts: the first as buyers of 3,540 acres in Dewey County from BankWest, on which the final payment is scheduled to be made in February 2000; the second as sellers of the same 3,540 acres to Rick and Nancy Schrempp, on which annual payments of $74,514 are to be paid through early 2003; and the third as buyers from James M. Voorhees of 140 acres in Lawrence County, on which thirteen annual payments of $9,859.50, plus real estate taxes, remain.

83.

Debtors' first plan was filed July 13, 1999 (dated July 12, 1999). Two creditors filed objections. Confirmation was delayed pending resolution of Adversary Proceeding No. 99-5015, that BankWest had commenced.

In Adversary No. 99-5015, BankWest sought a determination of their secured status and a valuation of its security. The parties have now stipulated to the value of Debtors' machinery that is secured to BankWest. Issues regarding the Bank's secured interest in Debtors' real property (value), post-petition crops, and the Gesinger-Schrempp contract for deed are unresolved.

BankWest filed a second adversary proceeding on December 27, 1999. It sought a determination of its secured interest in post-petition farm program payments that Debtors have received and during the past year without the Court's or the Bank's approval. That matter was recently submitted on briefs.

On December 21, 1999, BankWest filed a motion to dismiss.[1] It argued Debtors cannot propose a confirmable plan and that there is no reasonable likelihood of rehabilitation. They also argued Debtors have not acted in good faith in the administration of the bankruptcy estate because they have made unnecessary purchases and because they have failed to accurately disclose crop insurance

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[1] On October 22, 1999, BankWest moved to dismiss Debtors' case on the grounds that Debtors had failed to provide proof that the Bank's collateral was insured and because a sale of machinery and equipment had not been timely completed. A hearing on shortened notice was held November 2, 1999, at which time the Bank withdrew that motion since Debtors had resolved the two problems.

proceeds they had received. Debtors responded on December 27, 1999. They argued feasibility should be determined at confirmation, not through a motion to dismiss. They denied the Bank's allegations of bad faith.

An evidentiary hearing was held January 25, 2000. Appearances included Timothy M. Engel for BankWest and James P. Hurley for Debtors.

Larry Deiter, a former Farm Credit Bank officer and presently the manager of a central South Dakota farm implement dealership, testified that Debtors' plan will not cash flow. In reaching his conclusion, he reviewed Debtors' monthly post-petition reports, Debtor's proposed July 1999 plan, depositions, and appraisals. He computed that BankWest's claim secured by real property is $248,405 (the balance after Debtors' make payments totaling $84,414 in early 2000), which would require a payment of $25,300 annually at 8% interest for twenty years. Deiter also calculated that BankWest's unsecured claim is $188,362, which, if paid over the plan term with 6% interest, would require an annual payment of $70,468. He used the same repayment terms (length and interest rate) on these claims that Debtors had proposed in their July 1999 plan.

Deiter did not calculate an annual plan payment that Debtors would have to make on the Bank's claim secured by personalty. He relied on Debtors' July 1999 plan in which Debtors intended to pay this claim is full by having a second machinery sale in late 2000 and paying BankWest in full plus 8% interest. Deiter did note that the parties have now stipulated that the value of Debtors'

remaining machinery (after the first court approved sale of some machinery on September 27, 1999) is $116,525, on which some liens prior to the Bank's attach.

Deiter calculated that Debtors could net $28,015 from crops in 2000. This figure, however, did not include expenses for fertilizer, trucking, crop insurance, or any crop input financing. The crops to be planted and the acreage planted were obtained from Debtors' projections. Deiter used county averages for the yield per acre.

Deiter also prepared a cash flow for a five-year plan (2000-2004). He used the numbers Debtors provided in their plan for income from Social Security and the Schremmp contract for deed, crop income from his own analysis, debt service from Debtors' and his calculations, and living expenses from Debtors' plan. The analysis resulted in a net loss of $45,751 in 2000, $24,047 in 2001, 2002, and 2003, and $21,809 in 20004. He did not quantify Debtors' beginning cash balance or unsold grain, but he assumed Debtors had enough cash on hand or grain to sell in order to avoid having to obtain operating credit.

Deiter's cash flow analysis did not include any income from government farm program payments. Deiter estimated that Debtors would receive, if they have 800 wheat base aces (a somewhat "best case" scenario), $10,500 in 2000, $9,000 is 2001, and $8,000 in 2002, when the current farm program ends. Based on his calculations, the government payments would be insufficient to put Debtors' operation in the black.

Deiter also estimated that Debtors could run only 20 head of cattle on their 140 acres in Lawrence County. He said such a small number would not generate significant income for the operation.

The Bank introduced several of Debtors' recent federal income tax returns. Excluding depreciation as an expense, these returns showed that Debtors' farm operation lost $73,360 in 1995, gained $8,766 in 1996, lost $48,397 in 1997, and lost $73,054 in 1998. The returns also showed that Debtors had an average expense of $39,202.75 for contract labor, hired labor, and/or custom hire work in each of these years. And, the returns showed that for veterinary care Debtors expended $1,545 in 1995, $2,029 in 1996, $8,697 in 1997, and $7,912 in 1998. In those years, Debtors farming operation was larger than present and they had a cattle herd (size not in record).

Debtors offered a new cash flow beginning in 2000. As compared to the 1999 cash flow attached to their July 1999 plan, in 2000 they projected additional income of $27,962 from crops, an additional $11,900 from government payments, an additional $35,000 from custom farm work, and decreased income of $100,000 since they no longer planned to sell the remainder of their machinery. Of their 2000 crop income total of $115,462, $48,750 was slated to come from stored grain harvested before 2000. There was limited testimony on the kind and amount of stored grains Debtors have, their cash on hand, and whether they would need operating credit or crop input financing during the plan term.

Debtors' new projected income for 2001 reflected an increase

in crop production of $18,212 (corn was added to winter wheat as a crop). In 2001, their income also reflected an increase of $11,250 from the proceeds of 36 calves Debtors would have available to sell from a joint venture with Debtor Gerald Gesinger's brother. Debtors' new income projections for 2000 and 2001 also included small increases each year in the Social Security payments the family receives.

Debtors' new projected farm expenses for 2000 increased by $40,080 from the expenses projected in their July 1999 plan. This included additions for machinery repair, building repair, seed, fertilizer, land rent, veterinary care, and insurance, but less for farm chemicals. Projected expenses for 2001 and beyond increased by another $2,820. This amount reflected increased seed, feed, and vet expenses, but a decrease for farm ground or pasture rent. It was in 2001, however, that Debtors expected to need to rent more pasture since their cattle numbers would then exceed the carrying capacity of their Lawrence County property. It also was in 2001 that Debtors expected their crop income to increase by $18,212 from 2000 levels.

Debtors' new projected family living expenses for 2000 and 2001 reflected an increase of $4,500 from their July 1999 plan projection. The increase was attributed to $4,600 more for health insurance and $100 less for life insurance.

In their new 2000 projected debt payments, Debtors included $244 for a pickup lease ($36 more than the lease payment projected in 1999), $84,415 to BankWest on the Dewey County land contract for

deed (final payment), but no payment to BankWest on its claim secured by personalty or on its unsecured claim. Debtors also included payments for two trailers they have or will purchase, $1,100 for another horse, and another vehicle lease. These new capital purchases total $13,950. No trustees fees are included.

In their 2001 debt payments, Debtors projected an unsecured creditor payment to MBNA of $5,000, no new capital purchases, and trustee fees of $1,500. They also include secured debt payments of $31,007 to BankWest for its claim secured by realty and $33,833 to BankWest for its claim secured by personalty. No unsecured creditor payments to BankWest were included in 2001.

In response to the Bank's concerns about some 1999 and early 2000 expenses, Debtor Gerald Gesinger acknowledged that in June 1999 they spent $440.37 for a copy machine and in September 1999 they purchased a young horse for $1,115. Debtor stated they intend to raise and train the horse for resale. He testified that they had purchased young horses in previous years as part of the same venture but had not yet sold any. He also acknowledged writing several checks for cash during the past year. Debtor testified that he has no present income from a gravel pit, but that he hopes to negotiate a contract.

Regarding the custom farm work that Debtors intend to do to generate $42,500 in income, Debtor Gerald Gesinger testified that has done this amount of work in the past in trade for like work with his neighbors. He expects to put up hay for his Black Hills neighbors and he expects to do farm work for his brother and

brother-in-law at Ridgeview. He testified that he presently has the machinery necessary to do the custom work. He acknowledged that he did not receive any income from custom farming in 1999, but said it was because it was too wet in the area to get into the fields.

Of the joint cattle venture with his brother, Debtor Gerald Gesinger said his brother will provide him with forty first-year heifers each year and that Debtor will raise and calve out. He will get a share of the steer calves and will retain the heifer calves to increase his herd size. There will no income from this venture until November 2001. He states that for 2000, he can use his own pasture for the first forty heifers. As the herd size increases in 2001 and beyond, he will need to lease additional pasture land. He says this cattle income will replace the income that will be lost when income from the Schrempp contract for deed ends in 2003.

Debtor stated he received around $40,000 in government farm program payments in 1999. He expects to receive a like amount during the plan term.

II.
A. Dismissal of a Chapter 12 Case.

A Chapter 12 case in which a plan has not yet been confirmed may be dismissed for cause, including unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors; the failure to file a plan timely; or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation. 11 U.S.C. § 1208(c). A "multiplicity of factors

may be considered in the aggregate to meet the cause requirement" for dismissing a Chapter 12 case. *Euerle Farms, Inc. v. State Bank in Eden Valley (In re Euerle Farms, Inc.)*, 861 F.2d 1089, 1091 (8th Cir. 1988). A Chapter 12 case may be dismissed when the creditors have "no more than an uncertain prospect that [a] plan would ever result in payment on their claims. *Id.* Where payment of creditors is conjectural at best, the case is properly dismissed. *Id.* at 1092. Feasibility of a plan is tested as a factual issue; the court must determine the probability of the debtor's actual performance under the plan terms. *Mosbrucker v. United States (In re Mosbrucker)*, 227 B.R. 434, 437 (B.A.P. 8th Cir. 1998)(cites therein).

Cause for dismissal may include lack of good faith since a petition to reorganize and a debtor's proposed plan of reorganization each must be filed in good faith. *See Schuldies v. United States (In re Schuldies)*, 122 B.R. 100, 102 (D.S.D. 1990). Good faith is a factual determination. *Id.* Factors to consider include the status of any previous bankruptcy case and the length of time since the last filing, whether the filing was made to obtain the benefits of the automatic stay, the debtor's effort to comply with any previously confirmed and consummated plan, recognition that Congress intended a debtor to achieve the goals of bankruptcy through the filing of a single case, and any other relevant facts. *Id.* at 103 (cites therein); *Barger v. Hayes County*

Non-stock Co-op (In re Barger), 233 B.R. 80, 83-84 (B.A.P. 8th Cir. 1999)(good faith factors in confirmation context); *In re Utne*, 146 B.R. 242, 248 (Bankr. D.S.D. 1992)(good faith consideration when the debtor files successive cases). "The court should examine the 'totality' of the circumstances surrounding the filing." *Schuldies*, 122 B.R. at 103.

The movant bears the burden of proof. *In re French*, 139 B.R. 476, 479 (Bankr. D.S.D. 1992)(Ecker, J.). The burden may shift to the debtor, however, to explain discrepancies or omissions in schedules and statements. *In re Caldwell*, 101 B.R. 728, 735 (Bankr. D. Utah 1989). The standard of proof is clear and convincing evidence. *Id.* at 733-35 (cited with approval in *In re Reinbold*, 110 B.R. 442, 446 (Bankr. D.S.D 1990)(Hoyt, J.).

B. CONFIRMATION OF A CHAPTER 12 PLAN.

To be confirmed, a plan must: (1) comply with Chapter 12 and other provisions of the Bankruptcy Code; (2) provide for the payment of all fees established by 28 U.S.C. § 1911 on or before confirmation; (3) be proposed in good faith; (4) the value, on the effective date of the plan, of the property to be distributed under the plan is equal or greater than what those creditors would get under Chapter 7 liquidation (commonly referred to as the "best interest of creditors" test); (5) secured creditors must receive their collateral or be paid the value of the collateral over time with interest (unless they consent to something less), and (6) the plan must be feasible. Only good faith may be presumed if no

objection is filed. F.R.Bankr.P. 3015(f).

Under the best interest of creditors test at § 1225(a)(4), unsecured claim holders must be paid at least as much as they would get if the estate were liquidated in a Chapter 7 bankruptcy proceeding. The valuation of the estate must be made at or near the date of confirmation. *Ahlers v. Norwest Bank Worthington (In re Ahlers)*, 794 F.2d 388, 398 (8th Cir. 1986), *rev'd on other grounds*, 485 U.S. 197 (1988). This helps insure that the value of secured property used to value a creditor's secured claim mirrors the value used in the best interest of creditor's test. *In re Buxcel*, Bankr. No. 94-30036, slip op. at 3 (Bankr. D.S.D. June 19, 1995). Costs associated with the Chapter 12 proceeding, such as attorney fees or appraiser fees, should not be included in the hypothetical liquidation analysis, but costs of administration by a Chapter 7 trustee should be included. *In re Eagle*, Bankr. No. 92-30071, slip op. at 2 (Bankr. D.S.D., August 10, 1995).

Proper valuation of the secured creditor's claim is central to the resolution of any dispute under § 1225(a)(5). *In re Weldin-Lynn, Inc.*, 79 B.R. 409, 412 (Bankr. E.D. Ark. 1987). Under § 506(a), the valuation should be determined in light of the purpose of the valuation and proposed distribution. If the debtor proposes to retain the collateral, the replacement value should be applied to the property rather than the liquidation value because the property is not being sold. *Associates Commercial Corp. v.*

Rash, 117 S.Ct. 1879, 1884-86 (1997).

Feasibility is fundamentally a question of fact. *In re Foertsch*, 167 B.R. 555, 566 (Bankr. D.N.D. 1994). A Chapter 12 plan must offer a reasonable prospect of success and be workable. *Id.* at 565. An "iron clad guarantee" is not required, but the plan should not be overly optimistic nor belabor the inevitable demise of a hopelessly insolvent debtor. *Id.* at 565-66 (cite therein); *In re Oster*, 152 B.R. 960, 964 (Bankr. D.N.D. 1993). Future income and expense projections, including crop production and market rate predictions, should be rooted on objective fact. *Foertsch*, 167 B.R. at 565-67. Off-farm income may be considered. *In re Barnett*, 162 B.R. 535, 538 (Bankr. W.D. Mo. 1993). "The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts." *Clarkson v. Cooke Sales & Service Co. (In re Clarkson)*, 767 F.2d 417, 420 (8th Cir. 1985)(quoting *In re Bergman*, 585 F.2d 1171, 1179 (2d Cir. 1978)). A plan must be probable, not merely technically possible. *Foertsch*, 167 B.R. at 566. The Court may, however, resolve conflicts in the evidence in the debtor's favor due to the underlying purpose of Chapter 12. *Id.*

III.

Based on the record before the Court and applicable law, this Chapter 12 case must be dismissed. Foremost, Debtors are not

presently able to propose a confirmable plan. Debtors' new 2000 and 2001 projections[2] do not include any payments to BankWest on their unsecured claim pursuant to the best interest of creditors test at § 1225(a)(4). As former Farm Credit officer Larry Deiter testified, this payment will need to be around $70,468 for a three-year plan. Debtors do not have sufficient income to pay that debt, even if Debtors' income projections from their proposed livestock venture and custom farm work are accepted as reasonable.

Second, Debtors have not come into this bankruptcy ready to reorganize. This lack of good faith has been manifested in several ways.

The value of cash on hand on the petition dates that Debtors' scheduled was incorrect.[3] The bank statement for their checking account at First Western, no. 6101620, had $17,898.89 on the April 14, 1999 petition date, not the $500 that Debtors reported. In fact, the account stayed well above $1,000 until September 1999.

Debtors' checking account statement for April 12, 1999 through May 10, 1999 included debits for: $1,084.17, $6,043.50, $471.92, and $830.00 on April 14, 1999, the petition date; $11,000 on April 16, 1999; and $6,002.28 on May 3, 1999. None of these large

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[2] The Court did not consider as evidence the attachments to either party's post-hearing briefs since the opposing party did not have the opportunity to respond to them.

[3] Debtors' schedules did not disclose a small savings account at First Western Bank, no. 90169889, and a second small checking account in the name of Ridgeview Grain, at Community First Bank, no. 7711007797. Debtors have, however, filed statements for these accounts with the case trustee.

payments is disclosed on Debtors' monthly reports. No pre-petition payments to creditors that matched were listed in their statement of financial affairs. Their statement only included some pre-petition creditor payments in March 1999 and the $9,968 that they paid their bankruptcy attorney on April 12, 1999.

Most of Debtors' post-petition monthly reports have accurately reflected their bank statements. There have been some problems, however. Expenses have not always been properly divided between household and farming. Later reports included little or no itemization for household expenses. Some reports appear unrealistic, with household expenses under $400 one month but over $2,000 in others, even though Debtors have not had to make any post-petition payments on their home mortgage.

Debtors' December 10, 1999 monthly report, which included disbursement from mid-October through December 9, 1999, and corresponding bank statements offered more specific problems. Reported farm expenses were $22,771.17 and family living expenses were $2,000 (not itemized). The October and November checking account statements, however, indicate Debtors spent $40,158.73 during this period. Debtors have not accounted for the additional $15,387.56 in expenditures. Only $3,831.30 in farm and home expenses were reported in Debtors' monthly report ending January 10, 2000, and thus, this report does not cover the unreported expenditures for October, November, and early December 1999.

Resolution of issues with BankWest have been extremely slow.

This is most troublesome when it comes to the determination of the Bank's secured interest in post-petition government payments and whether Debtors had the authority to spend these funds without a cash collateral order.

Code requirements for a debtor in possession have not been followed. While Debtors have continued at least one post-petition lease on a vehicle[4] and at least one land lease and are parties to three executory contracts, Debtors have not yet sought court approval to accept them.[5] Further, Debtors sold grain and paid FSA/CCC's pre-petition claim without court approval. Also without court approval, Debtors sold a 1999 Dodge pickup in the fall of 1999 and paid Community First Bank's pre-petition claim. Finally, without court approval, Debtors either met with and paid a consultant post-petition without the consultant's employment being approved or they paid a consultant's pre-petition claim without approval.

Their 1999 grain on hand or to be harvested listed in Debtors' July 1999 liquidation analysis does not correspond with the grain on hand projected to be sold in 2000. While wheat available for sale in 2000 is about the same, Debtors' July 1999 liquidation

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[4] A debtor-in-possession cannot "reaffirm" a debt as Debtors tried to do with their agreement filed April 30, 1999. Court approval is required by 11 U.S.C. § 365.

[5] While acceptance or rejection of some executory contracts and unexpired leases can wait until confirmation, *see* 11 U.S.C. § 365(d)(2), approval for assumption or rejection should be sought earlier when payments are being made or received by the debtor in possession.

analysis did not recognize the $27,000 worth of sunflowers they had to harvest, which is property of the Chapter 12 estate under § 1207(a). Their liquidation analysis contained liquidation costs that are excessive and would not be incurred in a Chapter 7 liquidation.

Finally, over the course of the past year, Debtors have failed to put pencil to paper and compose a plan that is more than conjecture. In the interim, the bankruptcy estate was depleted of cash and some grain. While a proposed modified plan may have had to wait until the adversary proceedings with the Bank are resolved, Debtors could and should have finalized plans for their revamped operation and how they would maximize income. They have not compiled any historical or county average income and costs per acre numbers to substantiate their projected crop production and custom farm income numbers. They have not demonstrated how they will get all the work done with just their three family members, especially when outside labor costs in recent for contract labor, hired labor, and/or custom hire work averaged nearly $40,000. They have not identified from whom they will rent the additional pasture and farm ground they will need and they have failed to sufficiently increase expenses for these rental payments. Debtors' projected income from farm programs are not sound based on the federal government's current program. Tax projections are confusing. They have not specifically included any real property taxes, which in 1999 were $3,800.74. There is a an expense entry on their new cash flows for $3,200 under "Pers. Ins./Taxes," but that amount is insufficient to

pay the real property taxes in full, plus any federal income taxes and the insurance for their home and personalty. They have failed to show that their farm insurance costs include crop insurance. Their projected veterinarian expenses of $200 in 2000 and $800 in 2001 are not reasonable, especially when they spent $470 for vet care from May 16, 1999 to September 16, 1999 for only a few horses and no cattle and when they spent an average of $5,045.75 per year when they did run cattle.

After a case is filed, a debtor must promptly work with creditors to addresses and negotiate plan treatment, and a debtor must make the necessary changes to their operation to make it feasible. A debtor's first proposed Chapter 12 plan should be their best effort. A case in which a plan is hastily proposed before a debtor and their counsel have done their homework and a case that drags on without progress cannot continue.

An appropriate order will be entered.

Dated this 9th day of February, 2000.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: Shan Stroup
Deputy Clerk

(SEAL)

UNITED STATES BANKRUPTCY COURT SEAL

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

FEB 09 2000

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

FEB 09 2000

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By

Case: 99-50185 Form id: 122 Ntc Date: 02/09/2000 Off: 3 Page : 1
Total notices mailed: 9

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