

FILED

OCT 4 1995

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

William F. Elger
CLERK

IN RE:	*	BK #87-10275
	*	
HOFFMAN FARMS,	*	
	*	
Debtors.	*	

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HOFFMAN FARMS,	*	CIV 94-1028
	*	
Appellant,	*	
	*	
-vs-	*	MEMORANDUM OPINION
	*	AND ORDER
A. THOMAS POKELA,	*	
Chapter 12 Trustee,	*	
FARMERS HOME ADMINISTRATION,	*	
and INTERNAL REVENUE SERVICE,	*	
	*	
Appellees.	*	

Debtors Joel Allen Hoffman, Sheila Diane Hoffman and Milton "Pete" Hoffman [Hoffmans] appeal from the Order of the United States Bankruptcy Court for the District of South Dakota converting their Chapter 12 farm reorganization to a Chapter 7 liquidation upon a finding of fraud. Designated Record for Appeal, Docket No. 278 [App.Doc.]. Hoffmans moved for a stay pending appeal which was denied by the Bankruptcy Court, App.Doc.303, and by the District Court by Order dated August 2, 1994. Hoffmans Notice of Appeal was timely filed. App.Doc.282. Hoffmans argue that the conversion is barred by the doctrines of laches, waiver, and estoppel. Doc.7 at 5.

The facts of this case are set out in detail in the Bankruptcy Court's Memorandum Decision re: Motions to Dismiss or Convert, App.Doc.277. Milton "Pete" Hoffman filed a Chapter 12 petition on September 21, 1987. His son and daughter-in-law, Joel A. and Sheila D.

Hoffman, also filed a Chapter 12 petition on September 21, 1987. The cases were consolidated under the name In Re Hoffman Farms, Bankr. No. 87-10275, and a plan was confirmed on January 26, 1989.

After Hoffmans filed their final report and account, the Chapter 12 Trustee, the Internal Revenue Service, and the Farmers Home Administration filed individual Motions to Dismiss. The motions alleged a failure to make all plan payments, failure to pay a priority claim for \$7,237.58, and failure to pay current real estate taxes on property secured to FmHA as required under the confirmed plan.

An evidentiary hearing on the Motions to Dismiss was held on March 22, 1994. The evidence established that Hoffmans had not paid \$27,402.49 in post-petition real estate taxes and that post-confirmation judgments totaling over \$16,000.00 had been obtained against Hoffmans and some had become liens on real estate. App.Doc.262 at 61; Hearing Ex.13 & 5-11. Hoffmans were two to eleven months late with every payment to FmHA required by their plan. App.Doc.262 at 8; Hearing Ex.1. The evidence established that Hoffmans had obtained release of \$9700.00 of an insurance settlement held jointly with FmHA on the pretense of purchasing a tractor, but had instead used the money to pay another debt and miscellaneous expenses, including a "commission" paid to Milton Hoffman for negotiating the purchase of the tractor. Hoffmans actually paid for the tractor with \$6000.00 worth of hay. App.Doc.262 at 26-30, 98-100, 120-24. Debtors also testified to several potential leases of farmland designed to create cashflow for payment of their obligations; one was an arrangement whereby Milton's girlfriend would lease 450 acres from Hoffmans for \$26,000.00 and Hoffmans would farm it for her. App.Doc.262 at 104, 111-12, 118-19.

Following the evidentiary hearing, FmHA filed a Motion to Amend, requesting the case be converted to Chapter 7 for fraud pursuant to 11 U.S.C. § 1208(d). The Trustee also filed a Motion to Convert, also alleging fraud. A hearing was held on these two motions on April 26, 1994. The Bankruptcy Court subsequently granted FmHA's motion and converted the case. App.Doc.278.

The Court reviews the Bankruptcy Court's findings of fact under a clearly erroneous standard of review. In re Bloomington HH Investors, Ltd. Partnership, 114 B.R. 174, 175 (Bkrcty.D.Minn.), aff'd, 938 F.2d 188 (1990). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). The Court reviews issues of law *de novo*. In re Bloomington HH Investors, 114 B.R. at 175. The decision to convert a Chapter 12 to a Chapter 7 upon a finding of fraud is at the discretion of the Court.¹ 11 U.S.C. § 1208(d); In re White, 126 BR 542, 546 (N.D. Ill. 1991) (interpreting the parallel provision in Chapter 13).

Chapter 12 "offers family farmers the important protection from creditors that bankruptcy provides while, at the same time, preventing abuse of the system and ensuring that farm lenders receive a fair repayment." In re Graven, 936 F.2d 378, 385 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 1499 (1982) (quoting H.R. Conf. Rept. No. 99-958, 99th Cong., 2d Sess. 48, *reprinted in U.S. Code Cong. & Admin. News* 5246, 5249).

The purpose of the bankruptcy code is to provide a "fresh start" for insolvent debtors. The opportunity for a "completely unencumbered new beginning," however, is not available to all, but is limited to the "'honest, but unfortunate debtor.'"

In re Graven, 936 F.2d at 385 (citing Grogan v. Garner, ___ U.S. ___, 111 S.Ct. 654, 659 (1991)). The purpose of Chapter 12 has been described as "balanc[ing] farmers' needs with creditors' rights." In re Graven, 936 F.2d at 385.

As one means of achieving this purpose, a bankruptcy court may dismiss or convert a

¹ The statute reads:

On request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter or convert a case under this chapter to a case under chapter 7 of this title upon a showing that the debtor has committed fraud in connection with the case.

11 U.S.C. § 1208(d).

Chapter 12 to a Chapter 7 upon a finding of fraud. 11 U.S.C. § 1208(d). This section was expressly added to Chapter 12 in order to encourage good faith and honest dealings. In re Graven, 936 F.2d at 385 (citing 132 Cong. Rec. 28,593 (1986)).

A finding of fraud is a factual determination which will be reversed only if clearly erroneous. In re Reinbold, 942 F.2d 1304, 1306 (8th Cir. 1991); In re Graven, 936 F.2d at 382; Norwest Bank Nebraska v. Tveten, 848 F.2d 871, 874 (8th Cir. 1988). Good faith requires an examination of the totality of the circumstances, In re Shuldies, 122 B.R. 100, 103 (D.S.D. 1990), and "fraudulent intent may be inferred from the circumstances of the transactions." In re Graven, 936 F.2d at 383.

Appellants argue that the conversion of their Chapter 12 to a Chapter 7 is barred under the doctrines of laches, waiver and estoppel, and those arguments are intertwined in their briefs. Appellants now argue that in a hearing before the Bankruptcy Court on April 26, 1994, on a Motion to Convert this Chapter VII filed by Trustee Pokela that at page 8 these defenses were raised. The argument by Appellants' counsel on page 8 was an attempt to distinguish two other reported decisions where it was stated:

Again, distinguishing it from Graven and Reinbold. So we think there is also some consideration to be given there that Farmers Home didn't make any motions for conversion at the time it learned of this. It continued to accept payments.

Local Bankruptcy Rule No. 304, as effective September 1992, was in effect at the operative times and required that the contents of an objection or other response to a motion "shall substantially comply with Federal Rules of Civil Procedure 8 and 10." The doctrines of laches, waiver and estoppel are all affirmative defenses as is stated in Rule 8(c) of the Federal Rules of Civil Procedure. The resistances filed by Debtors-Appellants, Docket 257 and 260, do not even mention any of these three affirmative defenses nor do they allege any facts constituting those defenses. There was no compliance nor was there any substantial compliance with Rule 8(c) of the Federal Rules of Civil Procedure. Docket 257 indicates a resistance on the basis that "Debtors have not committed fraud in connection with their Chapter 12 case" and Docket 260, incorporates that allegation. Accordingly, I find that Appellants did not raise these affirmative

defenses before the Bankruptcy Court and they are not preserved for consideration in this appeal.

I find that the Bankruptcy Court's finding of fraud is clearly supported by the record. Although conversion to Chapter 7 is a harsh penalty as compared to the more egregious facts of, for example, In re Graven, 936 F.2d at 378, its imposition in this case is not an abuse of discretion on the part of the Bankruptcy Court.

The Bankruptcy Court opinion is well-reasoned and fully supported by the record. For these reasons, therefore,

The judgment is affirmed.

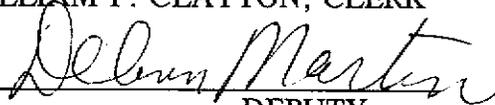
Dated this 4th day of October, 1995.

BY THE COURT:


Lawrence L. Piersol
United States District Judge

ATTEST:

WILLIAM F. CLAYTON, CLERK

BY 

DEPUTY

(SEAL)