

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Central Division

In Re:)	Bankr. No. 95-30001
DONALD JOHN TUNNISSEN)	Chapter 12
CHARLENE JOAN TUNNISSEN,)	
)	DECISION RE: DEBTORS' MOTION
Debtors.)	TO MODIFY CONFIRMED PLAN
)	

The matter before the Court is the Motion to Modify Confirmed Plan filed by Debtors on July 28, 2000 and the objection thereto filed by the Farm Service Agency. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision and accompanying order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below more fully, the Court concludes that FSA's objection regarding the treatment of its claim under a shared appreciation agreement must be sustained.

I.

As part of the plan confirmation process, Debtors Donald J. and Charlene J. Tunnissen ("Debtors"), Sentinel Federal Credit Union ("Credit Union"), and the Farm Service Agency ("FSA") litigated, through an adversary proceeding, several issues, including the impact of a shared appreciation agreement that Debtors and FSA had made on July 26, 1989. In its decision, this Court addressed the value of FSA's and the Credit Union's secured claims:

Valuation of the Secured Claims. By the terms of the Shared Appreciation Agreement, the amount of Debtors' 50% appreciation recapture payment to FSA will occur upon expiration of the Agreement or when one of several conditions occurs. Until that event occurs, it is impossible to value precisely FSA's or the Credit Union's secured claims on Debtors' real property. Therefore, those final valuations will have to wait until the

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agreement expires or one of the conditions occurs.

That is not to say, however, that these values cannot be estimated earlier. Sections 502(c)(1) and 506(a) contemplate such estimated, tailored-to-the-purpose valuations so that the administration of the case will not be delayed. If these estimated values are incorrect, the plan can provide for a revaluation and appropriate modification in the plan payments to FSA and the Credit Union on July 26, 1999 or earlier, if one of the other conditions for the 50% appreciation recapture payment occurs.

Finally, the values of the FSA's and the Credit Union's claims that are secured by real property are to be estimated as of the date of the confirmation hearing, not the petition date. Section 1225(a)(5) requires secured claims to be valued as of the effective date of the plan. In this Circuit, the confirmation hearing date generally is used because it is proximate to the effective date of the plan. See *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). That more equity may have existed in the real property on the petition date is not considered when valuing a secured claim for plan treatment.

Sentinel Federal Credit Union v. RECD, et al. (In re Tunnissen), Adversary No. 95-3007, Bankr. No. 95-30001, letter op. (Bankr. D.S.D. March 4, 1996). A judgment to that effect was entered March 8, 1996. It provided, in pertinent part, that FSA and the Credit Union's

claims secured by the real estate and the mortgage that secures any amount due under the Shared Appreciation agreement shall not be finally valued at the time of confirmation of the Debtors' plan but that such claims may be estimated pursuant to 11 U.S.C. §§ 502(c)(1) and 506(c), subject to revaluation and modification in the plan payments to [FSA or the Credit Union] upon expiration of the Shared Appreciation Agreement on July 26, 1999, or earlier, if one of the other conditions for the 50% recapture payment under the agreement occurs.

Shortly after the decision and judgment were entered, Debtors

proposed a modified plan and the Credit Union requested a continued hearing on FSA's motion for valuation of its secured interest in Debtors' real property. An evidentiary valuation was held June 10, 1996. At the hearing, Debtors' counsel reported that the parties had agreed that \$469,000 was the present value of Debtors' real property and that this figure would be the "starting point" for the valuation included in the plan. He further stated that Debtors and FSA wanted to wait and value FSA's secured interest based on the shared appreciation agreement in 1999 when the agreement matured. The Credit Union, however, wanted to estimate the value of FSA's secured claim based on the shared appreciation agreement now.

Debtors filed another modified plan dated June 20, 1996. Under it, Debtors proposed to value FSA's contingent claim based on the shared appreciation agreement in 1999 and not estimate it at the time of confirmation. Both the Credit Union and FSA filed several objections. A confirmation hearing was held August 1, 1996. At the hearing, the Court heard the parties' respective arguments on whether FSA's secured claim under the shared appreciation agreement should be estimated now for plan purposes or whether that valuation, and payments under it, should wait until 1999. The Court directed Debtors to estimate the value of FSA's secured claim under the shared appreciation agreement now so that payments to the Credit Union based on that estimate could begin at confirmation. The Credit Union conceded that it probably was not fully secured. Confirmation of the June 20, 1996 plan was denied. Following negotiations after the hearing, the parties estimated the

Credit Union's secured claim at \$75,266.50 for plan purposes.

Debtors filed a third modified plan on August 12, 1996. The Credit Union, Tripp County, and FSA objected. An evidentiary confirmation hearing was scheduled for October 16, 1996. The objections of FSA and Tripp County were resolved before the hearing. Debtors and the Credit Union offered evidence. With some guidance by the Court, the parties eventually reached an agreement and Debtors were directed to prepare a Plan as Confirmed under Local Bankruptcy Rule 9072-1.

The Plan as Confirmed provided:

[FSA] has an undersecured claim of \$590,259.90. The claim is secured by a lien on real estate. The secured portion of the claim in the amount of \$224,831.00 will be paid over twenty-one (21) years with interest at 9.75% in annual payments of \$25,541.36. The first payment will be made one year from the date of confirmation. FSA has a contingent secured claim as a result of a Shared Appreciation Agreement. The actual amount of FSA's claim which will be secured as a result of the application of the Shared Appreciation Agreement will not be known until July 26, 1999. The amount, if any, which becomes a secured claim on July 26, 1999, will be treated by a modification to this Plan. The balance of FSA's claim is a contingent unsecured claim, the precise amount of which will be determined on July 26, 1999, and treated as an unsecured claim pursuant to Article VIII. Debtors will comply with applicable loan servicing regulations except to the extent the same are inconsistent with this Plan.

The Plan as Confirmed also provided:

[The Credit Union] has an undersecured claim of \$188,000.00. The claim is secured by livestock and equipment with a value of \$107,240.00. The claim is also secured by a real estate lien subordinate to Tripp County, the South Dakota Housing Authority, and FSA. The value of the real estate extending to [the Credit Union]'s second mortgage is \$74,701.50 as of September 12, 1996. The total secured claim is \$181,941.50 but is subject to modification on July 26, 1999, in accordance with this Shared Appreciation

Agreement and Article VI, Class 3 of this Plan. [The Credit Union]'s secured claim of \$181,941.50 will be reduced by application of proceeds presently held by the Credit Union in an escrow account in the amount of \$16,069.10. The balance of the claim in the amount of \$165,872.40 will be repaid with interest at eight (8%) percent in annual payments of \$20,000.00 over the next 14.2 years, subject to modification which may result from application of the Shared Appreciation Agreement on July 26, 1999. The first payment will be made on October 31, 1997.

Debtors' road following confirmation was not smooth due to late payments. Most problems were eventually resolved.

In April 2000, FSA moved to dismiss the case because Debtors had missed their December 1999 payment and had not paid real estate taxes. Tripp County also sought dismissal in June 2000 because Debtors had not paid real estate taxes, some dating back to 1986. On July 28, 2000, Debtors responded with a motion to modify their plan. They proposed to pay Tripp County's taxes of \$101,188.16 over three years beginning December 19, 2000. They also proposed to modify their confirmed plan to reflect the now-matured shared appreciation agreement with FSA.

[FSA] has an undersecured claim of \$590,259.90. The claim is secured by a lien on real estate and a Shared Appreciation Agreement. The Shared Appreciation Agreement provides that the FSA has a secured claim as of the date of that agreement (July 26, 1989) of \$252,040.00. The agreement further provides that after July 26, 1999, FSA will be entitled to increase the amount of its claim by one-half of the increase in the value of the property. One-half of the increase in value (recapture amount) is \$132,730.00, and results in a value of \$384,777.00 for the secured portion of FSA's claim.

The secured portion of the FSA claim in the amount of \$206,957.76 will be paid over eighteen (18) years with interest at 9.75% in annual payments of \$24,831.20. The first payment will be due on December 19, 2000. Debtors will comply with applicable loan servicing regulations

except to the extent the same are inconsistent with this Plan or the Bankruptcy Code.

The proposed modification also stated

Debtors and [the Credit Union] have agreed that modifications to the Plan to account for the Shared Appreciation Agreement with FSA do not affect the Credit Union. As a result, Debtors will continue to pay the Credit Union \$20,000.00 each year in accordance with the [Plan as Confirmed]. The payment date will, however, be changed from October 31 to April 15. The change in payment date results in an additional interest accrual of \$727.08, resulting in a payment on April 15, 2001 in the amount of \$20,727.08. Thereafter, payments will be made on April 15th in the amount of \$20,000.00.

Debtors proposed annual payment to unsecured creditors was also reduced slightly to \$6,000 but payments were extended to December 19, 2002.

In its objection to Debtors' proposed modification, FSA stated Debtors had

entered into an agreement to suspend payment of the [shared appreciation agreement] recapture amount of \$132,730 The agreement provides that interest accrues on the recapture amount . . . and suspends the debtors obligation to pay for one year and may be renewed for not more than twice. The suspension agreement allows for renewal until September 22, 2001. At the end of the suspension agreement the debtors must pay the recapture amount or enter into a Shared Appreciation Amortization Loan. Amortization of the recapture amount would be at the non-program rate of interest, currently 10.25% and a 25 year term with a balloon after 15 years[.] [Presently, t]he modification fails to treat the shared appreciation recapture amount as a secured claim and fails to incorporate the terms of the suspension agreement.

Tripp County objected to the proposed modification on the grounds that the plan as modified was not feasible and that the proposed modification extended the plan term beyond the limit imposed by 11 U.S.C. § 1229(c).

Debtors responded to FSA's objection. They argued that the amount of FSA's secured claim in the Plan as Confirmed already included an estimate of the recapture amount and that the estimate had been too high. They also argued that FSA's "claim should be determined pursuant to the Shared Appreciation Agreement and then reduced to reflect prior liens for taxes and the amount of payments previously made by Debtors."

A hearing on the two pending motions to dismiss and on Debtors' proposed modification of their confirmed plan was held August 24, 2000. The parties offered their respective oral arguments regarding the treatment of the shared appreciation agreement in the modification. Each then filed a brief on the issue.

In their brief, Debtors argued that FSA's proposed method of calculating the value of the shared appreciation agreement treats it like a balloon payment in addition to the value to which the parties agreed at confirmation.

In its brief, FSA reviewed the pleadings leading to confirmation and the Plan as Confirmed to support its argument that the Plan as Confirmed did not include any estimate of the value of the shared appreciation agreement, but that it provided this contingent claim would be valued when it matured in July 1999.

All these documents provide several agreed figures:

7-26-89 Debtors owed FSA principal of \$82,794.20 with interest at 8% (note A) and Debtors owed FSA principal of \$113,898.30 with interest at 3% (note B).

- 7-26-89 Debtors' real property securing FSA's claim was valued at \$252,040.
- 7-26-89 The amount of debt written down by FSA when the shared appreciation agreement was made was \$381,611.
- 1-30-95 FSA filed a proof of claim indicating Debtors owed: \$103,696.99 in principal and interest on note A (daily interest accrual of \$7.9284); \$104,951.91 in principal and interest on note B (daily interest accrual of \$18.1467); and \$381,611 (the write-down amount) as the unpaid balance for the shared appreciation agreement.
- 6-10-96 Present value of Debtors' real property is \$469,000.
- 12-19-96 Plan as Confirmed provides FSA has a secured claim of \$224,831 based on the two notes and mortgages given in July 1989.
- 7-26-99 Value of Debtors' real property is \$517,500.

II.

After reviewing the file and the taped transcripts of all relevant hearings, the Court is satisfied that Debtors' December 19, 1996 Plan as Confirmed did **not** account for any value attributable to the shared appreciation agreement with FSA. The amount of FSA's secured claim at confirmation, \$224,831, is consistent only with the principal and accrued interest (to the date of confirmation) on the two notes. No portion of the \$224,831 reflected a projection of what additional amount Debtors would owe FSA when the shared appreciation agreement matured. At most, FSA's contingent claim under the shared appreciation agreement was informally estimated at confirmation by Debtors and the Credit Union only for determining the Credit Union's claim.

The language of the Plan as Confirmed is also quite clear.

FSA has a contingent secured claim as a result of a Shared Appreciation Agreement. The actual amount of FSA's claim which will be secured as a result of the application of the Shared Appreciation Agreement will not be known until July 26, 1999. **The amount, if any, which becomes a secured claim on July 26, 1999, will be treated by a modification to this Plan.** The balance of FSA's claim is a contingent unsecured claim, the precise amount of which will be determined on July 26, 1999, and treated as an unsecured claim pursuant to Article VIII. [Emphasis added.]

No value was attributed to the shared appreciation agreement at that time; it was to be valued in July 1999 and payments under it were to be included in a post-confirmation modification of Debtors' plan.

Based on the agreed July 1999 value of Debtors' real property and the terms of the shared appreciation agreement, the amount that now needs to be included in a modification to Debtors' confirmed plan is \$132,730 (fully secured to FSA). This reflects one-half of the present market value of the real property (\$517,500) less the market value on July 26, 1989 (\$252,040) $[(\$517,500 - \$252,040) \div 2 = \$132,730]$.

Debtors' argue that the \$469,000 value of Debtors' real property at confirmation in December 1996 already reflected some of the increase in value from July 1989 to the date the shared appreciation agreement matured in July 1999. That is true. But the valuation at confirmation was only to determine the amount of FSA's claim arising from the unpaid principal and interest on the two July 1989 notes. The Plan as Confirmed treated the shared

appreciation agreement as a separate, contingent claim by FSA; it specifically did not provide for any valuation of or payment on that contingent claim until the agreement matured.

Debtors now have apparently entered into another agreement with FSA to delay or defer payment(s) under the shared appreciation agreement. That new agreement has not yet been approved by the Court. For it to be binding on the bankruptcy estate, it must be included in any proposed modification to Debtors' confirmed plan. 11 U.S.C. § 1229 and Fed.Rs.Bankr.P. 2002(a)(6) and 9019. Otherwise, Debtors need to propose payments on the now matured \$132,730 secured claim that comply with Code requirements.

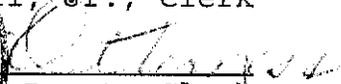
An order sustaining FSA's objection will be entered.

So ordered this 27 day of September, 2000.

BY THE COURT:


Irvin N. Hoyt
Bankruptcy Judge



ATTEST:
Charles L. Nail, Jr., Clerk

Deputy Clerk

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

SEP 27 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.

SEP 27 2000

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

Case: 95-30001 Form id: 122 Ntc Date: 09/27/2000 Off: 3 Page : 1

Total notices mailed: 9

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