

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA  
NORTHERN DIVISION

IN RE:	)	CASE NO. 90-10168
	)	
MARVIN CHARLES BECKLER and	)	
SALLY ANN BECKLER,	)	CHAPTER 12
	)	
	)	MEMORANDUM OF DECISION
	)	RE: MOTION TO DISMISS
Debtors.	)	

The matter before the Court is the Motion to Dismiss filed by First Bank of South Dakota, N.A., and the objection thereto filed by Debtors Marvin C. and Sally A. Beckler. It is a core proceeding under 28 U.S.C. § 157(b)(2). This ruling shall constitute Findings and Conclusions as required by Bankr. R. 7052.

I.

Marvin C. Beckler (Debtor) filed a Chapter 11 petition for reorganization on May 28, 1985 (Bankr. No. 185-00102). Scheduled assets totaled \$424,141.74 while scheduled liabilities totaled \$323,220.00. His plan of reorganization was confirmed April 9, 1986. The confirmed plan provided treatment for the following claims: Farmers Home Administration (FmHA), secured claim of \$120,709.88; First Bank of South Dakota, N.A., (First Bank), secured claim of \$174,745.81; J.I. Case Credit Corporation (Case Credit), secured claim of \$2,160.00; and Commodity Credit Corporation, secured claim of \$3,454.23. The plan incorporated an agreement between Debtor and First Bank filed on March 18, 1986 and an Addendum to that agreement filed April 22, 1986. These agreements provided that Debtor would liquidate all cattle and pay the proceeds to First Bank. The remainder of First Bank's claim was to be reamortized over ten years (from March 13, 1986) at a variable interest rate. Spink County had a priority claim of \$6,000 for real estate taxes that was to be paid in full on the effective date of the plan. Sixteen unsecured claims totaled \$12,998.88. Under the plan, they were to get a 37% dividend over ten years at 8% interest. A final decree was entered August 9, 1988.

On October 1, 1990, Marvin C. and Sally A. Beckler (Debtors) filed a Chapter 12 petition for debt adjustment. Scheduled non-exempt assets total \$302,480.00. Scheduled debts are: Spink County, priority claim for \$13,065.00

(years for which taxes due not given); FmHA, partially secured claim of \$148,000.00; First Bank, fully secured claim of \$122,000.00; and Home Federal Savings and Loan Association, fully secured claim of \$2,400.00. There are twenty-one unsecured claims that total \$39,520.37. Eight of these unsecured claims, totaling \$10,790.16, are identical to unsecured claims in the prior Chapter 11 case. One unsecured claim increased from \$114.76 in the Chapter 11 to \$2,464.64 in the present case.

On October 29, 1990, First Bank filed a Motion to Dismiss on the grounds that this Chapter 12 case constitutes an impermissible de facto conversion of the Chapter 11, the Chapter 12 was not filed in good faith as required by 11 U.S.C. § 1208, and Debtors were attempting an impermissible modification of a substantially consummated Chapter 11 plan that violates 11 U.S.C. § 1127(b). First Bank also requested sanctions under Bankr. R. 9011.

Debtors objected to the Motion. They agreed with First Bank that the Chapter 12 filing was precipitated by financial problems with First Bank, FmHA, and real estate taxes but denied that First Bank's 1990 foreclosure was caused by Debtors' failure to make their Chapter 11 plan payments to First Bank. To the contrary, Debtors argued that First Bank and Debtor-husband had modified the Chapter 11 plan repayment provisions in May of 1989 with a new agreement that provided Debtors would use 20% of their hog and crop checks to cure a default on his 1989 plan payment to First Bank and to apply against future payments to First Bank. Further, Debtors argued that they had made substantial payments on First Bank's claim and could continue to do so under the new agreement due to improved pig production, higher land values, and more feed on hand.

A hearing was held November 20, 1990. Debtor-husband acknowledged that he had not made his 1990 Chapter 11 plan payments to First Bank. It was his belief that the May 1989 agreement with First Bank extended beyond 1989, the year the new agreement was made. He said they filed the Chapter 12 to avoid loss of the property due to a tax deed and because they had received some bad legal advice. He stated that FmHA had paid some of their real estate taxes that they were unable to pay because of drought conditions. He also testified that he had

restructured his debt with FmHA after the account was accelerated but that after May 1, 1990 his checks to FmHA were returned. He spoke extensively about how his farm had "turned around" financially since his marriage in 1987. He said he had now "settled down" and that his wife promoted better business practices and hog care.

Debtor-wife testified about her involvement in the hog operation, their present hog production levels, and production projections. She stated that her role in the hog operation has vastly expanded and that she has improved pig production by increasing sow numbers and providing the animals with better care.

Craig Johnson, a vice president at First Bank and an experienced agriculture lender, testified that on his visit to Debtors' farm in mid September 1990, he found the hog operation workable but labor intensive and he noted that maintenance had been deferred. While he deemed Debtors' average litter size of eight to be good, he stated that the breakdown in the operation occurred in finishing where there was evidence of pneumonia. He recommended that Debtors become strictly a feeder pig operation but he recognized that option was precluded due to a pseudo rabies problem. He acknowledged Debtors were hard working people. When questioned about the 1989 agreement with Debtors, he testified that First Bank agreed to take 20% of Debtors' hog checks to cure a default on only the 1989 Chapter 11 plan payments and that post-1989 payments were to be paid pursuant to the plan.

The new agreement between Debtor-husband and First Bank, dated May 15, 1989, modified a March 13, 1986 agreement between the parties. It recognized that Debtor-husband had been unable to make his April 1, 1989 payment and it adjusted the repayment terms.<sup>1</sup>

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<sup>1</sup> The key portion of the agreement provides:

Marvin Beckler shall pay to First Bank on April 1, 1989, the total amount of interest due, which is in the amount of Twelve Thousand Nine Hundred Seventy-four Dollars and Twenty-six Cents (\$12,974.26). That in addition, First Bank, shall be entitled to 20% of all proceeds from the sale of hogs or crops regarding all sales occurring after April 30th, 1989. Marvin Beckler shall have the sale barn or purchaser of hogs or the purchaser of crops

II.

Section 109(g) sets forth two express limitations on successive filings of bankruptcy petitions.<sup>2</sup> Neither is applicable here. While there is also no

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write a check out in the name of First Bank for 20% of the sale proceeds and a check out to Marvin Beckler for 80% of the sale proceeds and Marvin Beckler shall forward immediately the check made out to First Bank to First Bank in Aberdeen, South Dakota. All money so received shall be applied to the indebtedness of Marvin Beckler. Marvin Beckler shall notify and First Bank shall be authorized to notify all potential purchasers in Marvin Beckler's products so that First Bank's name may be included and a check drawn separately for the 20% allowed to be paid to First Bank directly.

That it is recognized that Marvin Beckler is late in payment of Nine Thousand Two Hundred Sixty-three Dollars and Twenty-seven Cents (\$9,263.27) principal. The twenty percent (20%), as received from each check, shall be immediately applied by First Bank to cure the back payment. Once the back payment is cured, the twenty percent (20%) shall be applied to the future yearly payment. On April 1st, 1990 and each April 1, thereafter, until final payment is due on April 1, 1996. Marvin Beckler shall be responsible for paying the difference between the amount applied from the twenty percent (20%) payments and th [sic] amount actually due and owing and shall at that time make payment of the difference thereon.

.....  
That Marvin Beckler shall execute any financing statemetns [sic] or any other documentation necessary to carry out this Agreement.

That all requirements under the previous Agreement remain in full force and effect except as modified herein.

Addendum to Agreement, In re Marvin C. Beckler, Bankr. No. 185-00102-INH (Bankr. D.S.D. June 6, 1989) (No. 90) [also First Bank's Exhibit No. 7].

<sup>2</sup> Section 109(g) of Title 11 provides:

Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under [Title 11] who has been a debtor in a case pending under this title at any time in the preceding 180 days if--  
(1) the case was dismissed by the court for willful failure of the debtor to abide by the orders of the court, or to appear before the court in proper prosecution of the case; or  
(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of [Title 11].

express statutory requirement that a Chapter 12 petition be filed in good faith, the District Court for South Dakota recently recognized lack of good faith in filing a petition as cause for dismissal under § 1208(c). Schuldies v. United States (In re Schuldies), \_\_\_ B.R. \_\_\_, 1990 WL 209365, slip op. at 4 (D.S.D. December 14, 1990).<sup>3</sup> Accordingly, this Court must determine whether Debtors' Chapter 12 petition, on the heels of a confirmed Chapter 11 plan, was filed in "good faith." The Court must insure that the subsequent filing is not designed to "frustrate statutory requirements and abuse the bankruptcy process." Id.

A good faith filing is a question of fact. Id., slip op. at 5. Facts to consider include, but are not limited to: whether the earlier case has been closed (i.e., whether a final decree was entered in the prior Chapter 11); the length of time between the closing of the earlier case and the present petition; whether the second case was filed in order to invoke the automatic stay provisions under the Bankruptcy Code; the debtor's efforts to comply with the substantially consummated Chapter 11 plan; and whether the goals of bankruptcy law (e.g., a "fresh start") were fostered in the initial case. Id., slip op. at 6-8. The "totality of the circumstances" surrounding the second petition must be examined. Id., slip op. at 8 (citing In re Metz, 820 F.2d 1495 (9th Cir. 1987)).

### III.

When the totality of the circumstances surrounding Debtors' Chapter 12 petition is examined, this Court concludes that the Chapter 12 petition was filed in good faith.<sup>4</sup>

First, the Court finds that the Addendum to Agreement dated May 15, 1989

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<sup>3</sup> In light of In re Baker, 736 F.2d 481 (8th Cir. 1984), the District Court in Schuldies opined that the Court of Appeals for the Eighth Circuit would also apply a good faith standard to successive filings of bankruptcy petitions. Schuldies, slip op. at 5.

<sup>4</sup> Debtors must still meet the challenge of showing that their plan of reorganization is proposed in good faith. 11 U.S.C. § 1225(a)(3).

between First Bank and Debtor-husband altered the Chapter 11 plan payment provisions. Contrary to First Bank's argument, the Agreement clearly states that it applies to future yearly payments. This new Agreement, First Bank's refusal to accept payments under that Agreement, and the resulting foreclosure action in the fall of 1990 by First Bank constitute sufficient changes in Debtors' financial circumstances from those addressed in Debtor-husband's Chapter 11 plan to preclude a finding that the Chapter 12 petition was filed in bad faith.

Second, Debtors' farming operation has changed since the Chapter 11 plan was confirmed. From the testimony presented, the Court would be amiss not to recognize that Debtor-wife has effected a positive change in the business and in her husband. While the Court recognizes that Debtors' hog operation is not without problems, testimony by Debtors and Mr. Johnson indicates that Debtors' efforts to comply with the Chapter 11 plan were sincere.

Third, the Court notes that a final decree was entered in the prior Chapter 11 and over four years have passed since Debtor-husband's Chapter 11 plan was confirmed.

The circumstances here differ markedly from those presented in this Court's earlier decisions on successive filings. In In re Moeller, Bankr. No. 89-30022, slip op. (Bankr. D.S.D. October 13, 1989), the debtors exhibited bad faith by dismissing their Chapter 11 case and immediately filing a Chapter 12. In both Moeller and In re Gerth, Bankr. No. 89-10062, slip op. (Bankr. D.S.D. August 2, 1989), a final decree in the earlier Chapter 11 had not been entered. In In re Weiszhaar Farms, Inc., Bankr. No. 88-10194-INH (Bankr. D.S.D. November 8, 1988), the debtors exhibited a lack of good faith when their Chapter 12 petition was filed to invoke the automatic stay provisions of the Code only after the Court refused to allow the debtors to modify their substantially consummated Chapter 11 plan. Finally, the facts presented here are different from those presented in In re Schuldies, Bankr. No. 90-5001-INH, slip op. (Bankr. D.S.D. June 27, 1990), rev'd, Schuldies v. United States (In re Schuldies), \_\_\_ B.R. \_\_\_, 1990 WL 209365, slip op. at 4 (D.S.D. December 14, 1990). In Schuldies, the debtors admitted that the second petition was filed because they were unable to make

payments under their prior confirmed Chapter 11 plan and the same debts were to be reorganized. No evidence was presented of a change in the debtors' financial relationships or business circumstances since the earlier Chapter 11 case that would warrant another reorganization.

Not all facts weigh in Debtors' favor. Most of their debts continued from the Chapter 11. The Court notes that many unsecured claim holders received no payments under the Chapter 11 plan. However, since unsecured debts would be dischargeable in a Chapter 7, it is difficult to find prejudice to the unsecured creditors if Debtors are given another chance to reorganize. It is especially troublesome that Debtors have not kept current on their real estate taxes. While drought may account for some delinquent payments, Debtors' should have maximized their efforts to repay this priority claim. However, when these facts are weighed against those that indicate unanticipated changes occurred in Debtors' financial relationship with First Bank<sup>5</sup> and in their farming operation, the Court concludes that this Chapter 12 petition was filed in good faith.

An order denying First Bank's Motion to Dismiss will be entered.

Dated this 29th day of January, 1991.

ATTEST:

BY THE COURT:

PATRICIA MERRITT, CLERK

By \_\_\_\_\_  
Deputy Clerk  
(SEAL)

\_\_\_\_\_  
Irvin N. Hoyt  
Chief Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA  
NORTHERN DIVISION

IN RE:	)	CASE NO. 90-10168
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MARVIN CHARLES BECKLER and	)	
SALLY ANN BECKLER,	)	CHAPTER 12
	)	
	)	ORDER DENYING
Debtors.	)	MOTION TO DISMISS

In recognition of and compliance with the Memorandum of Decision Re: First

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<sup>5</sup> Neither party presented sufficient evidence for the Court to determine whether FmHA and Debtors have altered the repayment provisions of the debt to FmHA as established by the Chapter 11 plan.

Bank's Motion to Dismiss entered this day,

IT IS HEREBY ORDERED that the Motion to Dismiss filed by First Bank of South Dakota, N.A., is DENIED.

So ordered this 29th day of January, 1991.

BY THE COURT:

\_\_\_\_\_  
Irvin N. Hoyt  
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By \_\_\_\_\_  
Deputy Clerk

(SEAL)