

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

IN RE:)	CASE NO. 87-40067-INH
)	
EDWARD W. CARR and)	CHAPTER 11
WILMA CARR, d/b/a Farmers,)	
)	
Debtors.)	
IN RE:)	CASE NO. 87-40068-INH
)	
CARR FARMS, INC.,)	CHAPTER 11
)	(JOINTLY ADMINISTERED)
a South Dakota Corporation)	
)	MEMORANDUM OF DECISION RE:
Debtor.)	MOTION TO DISMISS

The matter before the Court is the Motion to Dismiss filed by Farm Credit Services of Omaha and the response thereto filed by Debtors. This 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.

Debtors Edward W. and Wilma Carr and Debtor Carr Farms, Inc., filed Chapter 11 petitions for reorganization on February 5, 1987. On April 30 1987, the cases were ordered to be jointly administered. By order entered July 11, 1989, Debtors' joint plan of reorganization was confirmed. The plan as confirmed incorporated a stipulation between Debtors and Farm Credit Bank of Omaha (FCBO) which was approved by Order on January 31, 1989. A final decree was entered January 8, 1990.

On April 8, 1991, Debtors Edward W. and Wilma Carr and Debtor Carr Farms, Inc., filed Chapter 7 petitions for liquidation. In response FCBO filed a Motion to Dismiss the earlier Chapter 11

cases on the grounds that Debtors have been unable to effectuate a substantial consummation of the plan, Debtors have materially defaulted on their plan, and, due to the new Chapter 7 cases, there was no need to preserve the Chapter 11 cases. FCBO also argued that Debtors had acted in bad faith by filing the Chapter 7 cases without seeking to dismiss or convert the Chapter 11 cases.

Debtors resisted and argued that FCBO was no longer an interested party in the Chapter 11 cases because it had obtained relief from the automatic stay. Debtors also argued that the Chapter 11 cases should remain in place because other secured claimants had materially altered their secured positions in satisfying mortgages. Debtors also stated they had acted in good faith.

A hearing was held May 29, 1991, in conjunction with the hearings on FCBO's motions for relief from the automatic stay in the Chapter 7 cases. Thomas E. Lee appeared for Cecelia A. Grunewaldt on Debtors' behalf. Brent A. Wilbur appeared for FCBO. Chapter 7 Trustee John S. Lovald appeared pro se.

II.

A Chapter 11 case may be dismissed if the debtor is unable to effectuate substantial consummation of a confirmed plan. 11 U.S.C. § 1112(b)(7). Substantial consummation has three elements: (1) transfer of all or substantially all the property proposed to be transferred under the plan; (2) assumption by the debtor of all or substantially all the business or property dealt with in the plan; and (3) commencement of distributions under the plan. 11

U.S.C. § 1101(2). All three elements must be present to warrant a finding of substantial consummation. *United States v. Novak*, 86 B.R. 625, 628 (D.S.D. 1988). There must be completion or near completion of the first two elements but only commencement of the latter. *Id.* at 631; see also *Metropolitan Life Insurance Co. v Olsen (In re Olsen)*, 861 F.2d 188, 190 (8th Cir. 1988).

No evidence was presented that indicated Debtors' plan was not substantially consummated. Accordingly, the Court concludes that the case shall not be dismissed for Debtors' failure to effectuate a confirmed plan.

In this Circuit, a Chapter 11 case may be dismissed for bad faith only if there is "a pattern of concealment, evasion, and direct violations of the Code or court order which clearly establishes an improper motive...." *First National Bank v Kerr (In re Kerr)*, 908 F.2d 400, 404 (8th Cir. 1990). The Court cannot conclude that Debtors' subsequent filing of Chapter 7 cases rendered Debtors' Chapter 11 cases as "bad faith" reorganization attempts. FCBO did not present any evidence of "a pattern of concealment, evasion, and direct violations of the Code or court order" nor was there any showing that Debtors exhibited an improper motive in filing the Chapter 11 cases. Consequently, the Court concludes that Debtors' Chapter 11 cases shall not be dismissed for bad faith.

A Chapter 11 case with a confirmed plan also may be dismissed if the debtor has materially defaulted on the plan. 11 U.S.C.

§ 1112(b)(8). Debtor-husband admitted material default on FCBO's claim and Debtors responded to their default by filing Chapter 7 cases. Cause for dismissal having been established, it is now within the discretion of this Court to decide whether dismissal¹ of these cases is in the best interest of creditors and the estates. See 11 U.S.C. § 1112(b).

III.

The Bankruptcy Code does not provide conclusive guidance to this Court on the circumstances, if any, when a substantially consummated Chapter 11 case should be dismissed, assuming cause has been established. In addition to the Chapter 11 dismissal statute, § 1112(b), three other Code provisions must be examined. 11 U.S.C. § 1141. Section 1141 sets forth the effects of confirmation. Confirmation binds the debtor and any creditor. 11 U.S.C. § 1141(a). It revests all the property of the estate in the debtor. 11 U.S.C. § 1141(b). Confirmation also triggers discharge except of those old debts restructured under the plan or those new debts created by the plan. 11 U.S.C. § 1141(d); *In re Page*, 118 BR. 456, 460 (Bankr. ND. Texas 1990).

Although not expressly stated in 1141, confirmation also terminates the automatic stay imposed by 11 U.S.C. § 362. Since there is no longer "property of the estate" for the stay to protect after confirmation is ordered. *In re T.S.P Industries. Inc.*, 117

¹ Since Debtors are farmers, these Chapter 11 cases may not be converted to Chapter 7 proceedings absent a request by the Debtors. 11 U.S.C. § 1112(c).

B.R. 375, 377, amendment denied, 120 B.R. 107 (Bankr. N.D. Ill. 1990). Further, discharge of the debtor upon confirmation nullifies the need for a stay to protect the debtor and debtor's property. *Id.*

Section 1141 has been consistently interpreted to provide that confirmation puts the debtor and creditors back into the "real world." The confirmed plan that established the new legal and financial relationship between the parties is binding on both. Creditors are free to collect lawfully obligations established by the plan. See ~, 118 B.R. at 460; *T.S.P. Industries*, 117 B.R. at 377.

11 U.S.C. § 1144. Section 1144 governs revocation of confirmation. It provides that confirmation may be revoked only if an action for fraud is brought within 180 days of confirmation. Although a court may dismiss a case with a confirmed plan, confirmation will stand absent a timely showing of fraud.

11 U.S.C. § 349. Section 349 sets forth the effects of dismissal. Subsection (a), which provides that dismissal does not bar a debtor from a discharge in a later case, was drafted with pre-discharge dismissals in mind and is not applicable here. *Page*, 118 B.R. at 459 (citing H.R.Rep. 595, 95th Cong., 1st Sess. 337-38 (1977) *reprinted in* 1978 U.S.Code Cong. & Admin. News 5963, 6294; S. Rep. No. 989, 95th Cong., 2d Sess. 48 (1978) *reprinted in* 1978 U.S.Code Cong & Admin.News 5787, 5834); *First State Bank & Trust Co. v. Bishop (In re Bishop)*, 74 B.R. 677, 681 (Bankr. M.D. Ga. 1987) (§ 349(a) does not effect the finality of a discharge granted

upon confirmation of a Chapter 11 plan).

Under subsections (b) (1) and (2), dismissal of a case restores all property to the position it occupied at the commencement of the case by reinstating custodianships, avoided transfers, and avoided liens, unless otherwise ordered by the Court. *Page*, 118 B.R. at 459. Subsection (b) (3) reverts the property of the estate in the entity that owned such property at the commencement of the case. *Id.* Since estate property reverts in the debtor at confirmation in a Chapter 11 case, subsection (c) has no effect here. *Id.* at 459-60.

Upon consideration of these several Code provisions, the Court can find no benefit to the estate or creditors if these Chapter 11 cases are dismissed. FCBO made no timely showing of fraud in this case so confirmation may not be revoked. If confirmation may not be revoked, Debtors' discharge stands and Debtors and their creditors remain bound by the confirmed Chapter 11 plan. Parties who acquired rights in good faith reliance on the confirmation order should not be jeopardized, especially when there has been no showing of how the Court could protect their interests by a conditional dismissal order under § 349(b). Accordingly, to the extent that confirmation of Debtors' Chapter 11 plan established the obligations between Debtors and their creditors and bound the parties to that agreement, §§ 1141 and 1144 dictate that in this case those obligations should not be disturbed or placed in incertitude by a dismissal.

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

Dated this 14th day of June, 1991.

BY THE COURT:

Chief Bankruptcy Judge

Irvin N. Hoyt

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)

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IN RE:) CASE NO. 87-40068-INH
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CARR FARMS, INC.,) CHAPTER 11
) (JOINTLY ADMINISTERED)
a South Dakota Corporation)
) ORDER DENYING
Debtor.) MOTION TO DISMISS

In recognition of and compliance with the Memorandum of
Decision Re: Motion to Dismiss entered this day,

IT IS HEREBY ORDERED that the Motion to Dismiss filed by Farm
Credit Services of Omaha is DENIED.

y of June, 1991.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)