

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:)
GERALD L. FITZGERALD) Bankr. Case No. 94-40472
Social Security No. [REDACTED]-1660) Chapter 12
and)
GERALDINE K. FITZGERALD) MEMORANDUM OF DECISION RE:
Social Security No. [REDACTED]-2352) RECD'S MOTION TO DISMISS
Debtors.)

The matter before the Court is the Motion to Dismiss Under 11 U.S.C. § 1208(c) filed by the Rural Economic and Community Development Agency and Debtors' response thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying Order shall constitute findings and conclusions under F.R.Bankr.P. 7052. As set forth below more fully, the Court concludes that this case should be dismissed.

I.

Debtors borrowed \$10,100.00 at 3% interest and \$75,600.00 at 8% interest from the Farmers Home Administration (now the Rural Economic and Community Development Agency [RECD]) on May 10, 1978. The notes were secured by a mortgage on Debtors' 160 acres of real property. The mortgaged property also is subject to a contract for deed held by Theodore Fitzgerald, Debtors' son¹.

Debtors made payments to RECD in 1979 and 1980. Each note was restructured on March 29, 1982; March 29, 1983; and March 1, 1985. Under the terms of the March 1, 1985 reconstructed notes, Debtors

¹ Theresa Fitzgerald, Debtor Gerald L. Fitzgerald's mother, transferred the real property to Theodore Fitzgerald by quit claim deed on February 15, 1985 while Theodore was still a minor.

were to repay the first note of \$9,971.99 at 3% over 14 years with annual payments on January 1. Debtors were to repay the second reconstructed note of \$112,263.28 at 8% interest over 34 years with annual payments each January 1.

The March 1, 1985 notes were secured by a mortgage on Debtors' real property. Between 1984 and 1990, RECD has advanced over \$20,000.00 for delinquent real estate taxes on the mortgaged property.

Debtors have not made any payments on the RECD notes or on the contract for deed since 1980.

Debtors filed a Chapter 11 bankruptcy petition on March 27, 1986. The case was converted to a Chapter 12 proceeding on September 21, 1987.² Debtors voluntarily converted to a Chapter 7 on November 23, 1987. They received a discharge on April 20, 1988. RECD offered Debtors primary loan servicing in November 1988. Debtors did not respond. The real property mortgaged to RECD was abandoned from the estate on February 16, 1989. The notes were accelerated in 1989 and thereafter a lump sum payment was required. The Chapter 7 case was closed on November 15, 1990 after a distribution of assets to creditors.³

The parties' continued efforts to settle the debts failed. Negotiations included participation in the state mediation program

² The Hon. Peder K. Ecker, presiding.

³ The file for Debtors' previous bankruptcy case has been archived. Consequently, the Court was unable to compare the debts scheduled in each case and determine which creditors received payment on their claims from the Chapter 7 trustee.

where Debtors reneged on two agreements to allow RECD to foreclose by advertisement. During these negotiations, RECD also offered Debtors lease back-buy back rights but Debtors did not accept them. RECD commenced a judicial foreclosure action on November 18, 1992. Again, RECD negotiated with Debtors without success. RECD ultimately filed a motion for partial summary judgment. On September 9, 1994, a few days before the hearing on RECD's motion, Debtors filed another bankruptcy petition seeking Chapter 12 relief. Debtors' schedules, filed September 27, 1994, were incomplete. The date and nature of each debt was not set forth. All assets were not disclosed.

Debtor filed a Chapter 12 plan on December 9, 1994.⁴ The confirmation hearing was set for February 7, 1995. Debtors' plan states that Debtors currently owe RECD \$236,336.21 on the two notes and \$21,033.30 for tax advances and other costs. Real estate taxes for 1991, 1992, and 1993 of \$9,688.09 remain unpaid. In their plan, Debtors project their income in 1995 will be \$124,600.00, excluding any income from a cattle-share agreement. Debtors' gross income, as reported in their plan, was \$50,780.00 in 1992 and \$74,473.00 in 1993. Debtors project their expenses in 1995 will be \$66,760.00. Their actual expenses, as reported in their plan, were \$56,305.00 in 1992 and \$59,579.00 in 1993.

RECD filed a Motion to Dismiss Under 11 U.S.C. § 1208(c) on January 18, 1995 on the grounds that Debtors' petition was filed in

⁴ The case was transferred to the undersigned on November 1, 1994.

bad faith based on their nominal effort to repay their debt over the last fourteen years. Debtors objected to the Motion on February 13, 1995. They argued that the Chapter 12 petition is a good faith effort to establish a repayment schedule with RECD and that previously RECD had not been willing to negotiate such a schedule.

A hearing on RECD's Motion to Dismiss was held March 28, 1995. Appearances included Assistant U.S. Attorney Craig P. Gaumer for RECD, Wesley D. Schmidt for Debtors, and Trustee A. Thomas Pokela.⁵ Testimony and documents received show that Debtors have not completed a farm plan with RECD since 1986 and that they did not respond to RECD's loan servicing letter in November 1988. Further, Debtors' notes were not modified during the previous bankruptcy case⁶ and RECD did not require a lump sum settlement until after the 1989 acceleration.

Debtor Gerald L. Fitzgerald said he and his co-debtor wife have not made any payments over the last fourteen years due to poor economic conditions. He stated any net income went toward living expenses. Neither Debtors' schedules nor Debtors' plan disclosed that Debtors had, at the time of their petition and when their plan was filed, twenty cows they are keeping on shares. Debtor Gerald L. Fitzgerald, however, testified that income generated from the

⁵ The current Chapter 12 Trustee for this case is John S. Lovald.

⁶ The Chapter 7 discharge released Debtors from any personal liability on the notes but did not modify the mortgage.

cattle would supplement the 1995 income projected in his plan. Otherwise, he did not testify how income from their farm would be substantially increased to meet their 1995 projection.

II.

A Chapter 12 case may be dismissed for cause, including

- (1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors; . . .
- (4) failure to commence making timely payments required by a confirmed plan; . . .
- (6) material default by the debtor with respect to a term of a confirmed plan; . . . or
- (9) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation.

11 U.S.C. § 1208(c) (in pertinent part). 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.

Further, a petition to reorganize and a debtor's proposed plan of reorganization each must be filed in good faith. *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). "The court should examine the 'totality' of the circumstances surrounding the filing." *Id.*

This Court, following *First National Bank v. Kerr (In re Kerr)*, 908 F.2d 400, 404 (8th Cir. 1990), has previously found that bad faith warranting dismissal of a reorganization case may include concealment, evasion, and direct violations of the Code or a court order that clearly establish an improper motive. *In re Coones Ranch, Inc.*, 138 B.R. 251, 258 (Bankr. D.S.D. 1991). Violations of the Code or an Order encompass self-dealing and asset manipulation without court approval. *Id.*

III.

There are no factors that weigh in Debtors' favor when considering whether Debtors should be allowed to continue this reorganization attempt. First, Debtors did not use their prior bankruptcy case that spanned four years to resolve their debt with RECD and other major creditors. Primary loan servicing offered by RECD at that time was ignored by Debtors.

Second and most important, Debtors misused the state mediation program by twice reneging on agreements with RECD. Consequently, resolution of the matter only was delayed longer.

Third, Debtors' schedules in this case are incomplete. All

assets, including the cattle share agreement and hogs, are not disclosed. Debts are not adequately described. Debtors' income and expense statement is woefully incomplete.

Finally, Debtors' plan shows virtually no prospect of success. See *In re Travis*, Bankr. No. 90-10094, slip op. at 4, 1991 WL 331675 (Bankr. D.S.D. April 5, 1991) (cited in *Coones Ranch*, 138 B.R. at 259). Debtors offered no substantive explanation of why they have not paid RECD and their real estate taxes or kept their contract for deed payments current over the past fifteen years. Moreover, they did not show how circumstances have changed to permit them to fund a plan now. Projected income and expenses are not rooted in historical figures. See *Clarkson v. Cooke Sales and Service Co. (In re Clarkson)*, 767 F.2d 417, 420 (8th Cir. 1985) (a showing of feasibility must be "rooted in predictions based on objective fact"). Income from hogs is projected but Debtors did not disclose any interest in hogs in their Schedules or in their plan's liquidation analysis. Neither Debtors' plan nor their testimony established how Debtors would produce almost twice as much income in 1995 while using only slightly higher expenses.

In sum, there is no evidence that Debtors' current bankruptcy petition will yield results any different from their previous bankruptcy case, mediation attempts, or negotiations with creditors. Instead, the evidence shows that this case is another futile attempt by Debtors to avoid paying RECD and other major creditors and to delay further a foreclosure by RECD.

An order will be entered dismissing the case and related

adversary proceeding number 94-4035. Since the adversary is a dischargeability complaint, there is no merit to this Court retaining jurisdiction. See *Porges v. Gruntal & Co., Inc. (In re Porges)*, 44 F.3d 159, 162-63 (2nd Cir. 1995) (cases cited therein).

Dated this _____ day of June, 1995.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA A. JOHNSON, ACTING CLERK

By _____
Deputy Clerk

(SEAL)

UNITED STATES BANKRUPTCY COURT
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In re:)
) Bankr. No. 94-40472
GERALD L. FITZGERALD)
Social Security No. [REDACTED]-1660) Chapter 12
)
and)
)
GERALDINE K. FITZGERALD)
Social Security No. [REDACTED]-2352)
)
Debtors.)
)
VALLEY EXCHANGE BANK,) Adversary No. 94-4035
)
Plaintiff,)
vs.)
) ORDER DISMISSING CASE AND
) RELATED ADVERSARY PROCEEDING
GERALD FITZGERALD,)
)
Defendant.)

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

IT IS HEREBY ORDERED that the above-captioned case and adversary proceeding are DISMISSED.

So ordered this ____ day of June, 1995.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA A. JOHNSON, ACTING CLERK

By _____
Deputy Clerk

(SEAL)