

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

TELEPHONE (605) 224-0560

FAX (605) 224-9020

July 5, 1989

Keith Tidball, Esq.
Post Office Box 877
Pierre, South Dakota 57501

Robert Ronayne, Esq.
222 Midwest Capitol Building
Pierre, South Dakota 57501

Re: Martin Frank, Jr. and Ernestine Frank
Chapter 7 89-10012

Dear Counsel:

Martin Frank and Ernestine Frank have asked the Court to dismiss the involuntary Chapter 7 petition filed against them by petitioner Farm Credit Bank of Omaha (FCBO). After considering the record and the evidence adduced at the hearing held February 27, 1989, the Court holds in favor of Franks and grants their motion to dismiss.

The facts are not seriously disputed. Martin Frank, Jr. has been engaged in farming and ranching in the Timber Lake, South Dakota area all of his life. He operated a cow-calf operation until his herd, save two cows and two calves, was liquidated by a creditor in 1987. Since that time Martin has pastured cattle owned by other people on land which he owns and/or leases. Martin has also taken employment at a Timber Lake cheese plant where he works nights part-time. His wife, Ernestine, is employed as a community health representative in Timber Lake. She has been so employed and has lived in town for the past sixteen years.

FCBO holds a first position real estate mortgage on 280 acres of land which secures a note in the principal sum of \$26,500.00. The balance due on the note, which is currently in default, now exceeds \$41,000.00. FCBO brought in involuntary Chapter 7 petition against Franks in January 1989. Franks have moved to dismiss the petition, claiming that an involuntary case cannot be commenced against them pursuant to 11 U.S.C. §303(a) due to Martin's status as a family farmer.

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In involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer or a corporation that is not moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

A family farmer is defined by 11 U.S.C. §101(17) (A) as an

individual or individual and spouse engaged in a farming operation whose aggregate debts do not exceed \$1,500,000 and not less than 80 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse unless such debt arising out of a farming operation), on the date the case is filed, arise out of a farming operation owned or operated by such individual or such individual and spouse, and such individual or such individual and spouse receive from such farming operation more than 50 percent of such individual's or such individual and spouse's gross income for the taxable year preceding the taxable year in which the case concerning such individual or such individual and spouse was filed[.]

The evidence and testimony indicate that Martin was raising cattle until such cattle were liquidated by a creditor. It further shows that Martin has attempted to grow some crops (later used for silage), with little success due to the drought, that he raised several pigs, and that he has pastured cattle owned by other people since being liquidated. The record further indicates that for 1988, the majority of Martin's liabilities are attributable to his farming operation, as is the majority of his income.¹

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Martin's liabilities include \$41,368.24 owed to FCBO which was used for the purchase of a mobile home located on the farm and secured by a mortgage on certain of his real estate and \$19,997.97 owed to American Indian Ag. Credit Corporation for the purchase of livestock. FCBO estimated Martin's 1988 gross farm income at approximately \$4,500.00. Martin indicated at the hearing that his income from his part-time job at the cheese plant was approximately \$4,000.00.

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FCBO claims that Martin does not qualify as a family farmer under 11 U.S.C. §101(17) because his non-farm gross income from the cheese plant, when combined with that of his wife, exceeds the 50 percent requirement imposed by the statute. However, the Court notes that the requirements for meeting the definition of a family farmer under the statute are written in the alternative, so that the Court may consider the gross income and liabilities of the "individual or such individual and spouse." The statute² does not give guidance as to those instances when the gross incomes of both parties should be considered. However, where, as here, only Martin is engaged in farming and Ernestine has been employed away from the farm for the past sixteen years, the Court concludes that only the income of Martin should be considered in determining whether the definition of family farmer has been met.³

A somewhat similar case was presented to the Eighth Circuit Court of Appeals in In re LaFond, 791 F.2d 623 (8th Cir. 1986). In LaFond, the debtor was employed as a police officer in addition to his being engaged in the trade of farming. The Bankruptcy and District Courts concluded that the LaFonds were farmers despite the fact that the debtor derived income from his outside employment. The Court further noted that the debtor's wife was engaged in the trade of farming because the evidence revealed that she had no significant source of income other than farming.

In the present case, as in LaFond, there is significant evidence to support the conclusion that Martin Frank is engaged in farming despite his outside employment at the cheese factory. Inclusion of both his farm and non-farm income is therefore appropriate in determining his status as a family farmer. Conversely to LaFond, there is little, if any, evidence that links Ernestine Frank with the farming operation because she has resided in Timber Lake and has been employed away from the farm for the past sixteen years. The inclusion of her income in determining

² The Court agrees with the statement in Matter of Reiners, 846 F.2d 1024, that 11 U.S.C. 101(19) is not "a model of clarity."

³ The Court notes that FCBO's petition names both Martin and Ernestine as debtors and that both their names appear on the note and mortgage in FCBO's favor. Testimony at the hearing revealed that Ernestine played no part in the farming operation and that the real estate may only be in Martin's name.

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Martin's status would therefore be inappropriate. Further support for this conclusion stems from the fact that Martin has manifested an objective intent to remain engaged in farming despite adversities he has encountered in the past. The code drafters made it clear that one "bad" year, which results in a farmer's temporary inability to pay his creditors should not subject him to involuntary bankruptcy. In re Armstrong, 812 F.2d 1024 (7th Cir. 1985) cert. denied ____ U.S. ____, 108 S.Ct. 287 (1987). See also Senate Report No. 989, 95th Congress 2nd Sess. 32, reprinted in 1978 U.S. Code Cong. Admin. News 5787.

FCBO, as petitioner, has the burden of proving that Franks are qualified debtors under the terms of the Code. In re Rott, 73 B. FL 366 (Bkrtcy. D.N.D. 1987); Jenkins v. Petitioning Creditor Ray E. Friedman, 664 F.2d 184 (8th Cir. 1981). FCBO has not met its burden here because it failed to overcome the requirements of 11 U.S.C. §303 and 11 U.S.C. §101(17). The Court therefore will order that the involuntary petition be dismissed.

This letter constitutes the Court's findings of fact and conclusions of law in this matter. This is a core proceeding under 28 U.S.C. §157(b). The Court will enter an order dismissing the petition.

Very truly yours,

Irvin N. Hoyt
Chief Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

IN RE:) CASE NO. 89-10012
)
MARTIN FRANK, JR., and) CHAPTER 7
ERNESTINE D. FRANK,)
)
) ORDER DISMISSING
Debtors.) INVOLUNTARY PETITION

The involuntary petition for relief under Chapter 7 of Title 11 of the United States Code filed by Farm Credit Bank of Omaha, and the issues raised by debtors, having been heard by the Court, and the Court having found that the material facts alleged in said petition were not proved,

IT IS HEREBY ORDERED that the involuntary petition for relief be, and the same hereby is dismissed.

Dated this 5th day of July, 1989.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By: _____
Deputy
(SEAL)

(SEAL)