

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

IN RE:) CASE NO. 90-10107-INH
)
MINN-KOTA FARM AGENCY, INC.) CHAPTER 11
)
) MEMORANDUM OF DECISION
) RE: MOTION TO DISMISS
Debtor.) OR CONVERT

The matter before the Court is the Motion to Dismiss Chapter 11 Case or In the Alternative to Convert to Chapter 7 filed by creditor Home Federal Savings and Loan Association of Sioux Falls and the objection thereto filed by Debtor Minn-Kota Farm Agency, Inc. 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.

Debtor Minn-Kota Farm Agency, Inc., (Debtor) filed a Chapter 11 petition for reorganization on June 7, 1990. According to Debtor's amended schedules, it has two secured or partially secured debts totaling \$570,000.00 and one unsecured debt of \$12,000.00. The only scheduled assets are a 46 unit apartment building in Aberdeen, South Dakota, and \$134,264.00 in cash.

Creditor Home Federal Savings and Loan Association of Sioux Falls (Home Federal), the first mortgage holder on the building, obtained relief from the automatic stay on October 25, 1990 because Debtor was unable to offer adequate protection of Home Federal's interest in the property. Debtor appealed that decision on November 20, 1990. Briefs have been submitted and the matter is

now pending before the Honorable Donald J. Porter, Judge, United States District Court, District of South Dakota. This Court denied a stay of the Order Granting Motion for Relief From Stay. Debtor's motion for a stay of the Order before the District Court was mooted by Home Federal's agreement not to proceed with a state court foreclosure action until the District Court renders its appellate decision.

On January 2, 1991, Debtor commenced an adversary proceeding against Home Federal seeking recovery of rents paid pre-petition to Home Federal by the building tenants under an assignment. That matter is scheduled to be submitted to this Court on stipulated facts and briefs before the end of May, 1991.

On January 14, 1991, Home Federal filed a Creditor's Motion to Dismiss Chapter 11 Case or In the Alternative to Convert to Chapter 7 in which it argued there has been continuing loss to and diminution of the estate and Debtor does not have a reasonable likelihood to reorganize and there has been unreasonable delay in the case that is prejudicial to creditors. Debtors filed a reply on January 31, 1991 and argued that the Motion to Dismiss or Convert should not be entertained until the relief from stay appeal and adversary proceeding have been resolved.

A hearing on the Motion to Dismiss or Convert was held March 19, 1991 and the matter was taken under advisement.

II.

A Chapter 11 case may be dismissed or converted to a Chapter 7 proceeding for cause, including "diminution of the estate and

absence of a reasonable likelihood of rehabilitation," "inability to effectuate a plan." and "unreasonable delay by the debtor that is prejudicial to creditors." 11 U.S.C. §§ 1112(b) (1), 1112(b) (2), and 1112(b) (3). The moving party has the burden of establishing cause. *In re Sheehan*, 58 BR. 296, 299 (Bankr. D.S.D. 1986). A determination of cause is within the discretion of the Court upon a consideration of all circumstances of the case. *Id.* The movant may meet his burden by showing the debtor cannot generate sufficient income to fund a plan or that reorganization will not improve the debtor's generation of income. *In re Kerr*, 980 F.2d 400, 403 (8th Cir. 1990); see also *Sheehan*, 58 B.R. at 299. Once the movant has met his initial burden, the burden may shift to the debtor to demonstrate "that [it has] at least some chance of achieving every stage of [its reorganization] proposal." *In re Minnesota Alpha Foundation*, 122 B.R. 89, 94 (Bankr. D. Minn. 1990).

Absent a showing of bad faith in filing, *Kerr*, 980 F.2d at 404, a case in its early stages should be dismissed or converted only upon a showing 'lthat there is no more than a 'hopeless and unrealistic prospect' of rehabilitation." *Minnesota Alpha Foundation*, 122 B.R. at 91 (*quoting In re Economy Cab & Tool Co., Inc.*, 44 B.R. 721, 724 (Bankr. D. Minn. 1984), and cite therein); see also *Sheehan*, 58 B.R. at 299. The feasibility test is "firmly rooted in predictions based on objective fact." *Clarkson v. Cooke Sales and Service Co. (In re Clarkson)*, 767 F.2d 417, 420 (8th Cir. 1985). "The test is whether the things which are to be done

after confirmation can be done as a practical matter under the facts." *Id.* Once a debtor is given a reasonable amount of time to reorganize, however, its Chapter 11 case may be dismissed or converted if a plausible plan has not been proposed. *Kerr*, 908 F.2d at 404; *In re Ashton*, 107 BR. 670, 675 (Bankr. D.N.D. 1989); *Sheehan*, 58 B.R. at 300.

III.

Upon consideration of all circumstances of this case, the Court concludes that the Motion to Dismiss or Convert should be denied. While the case has been pending for almost a year, in many regards it is still in its early stages and should not be dismissed since Home Federal has failed to show that there is no more than a "hopeless and unrealistic prospect" of rehabilitation. Changes in Debtor's counsel and the appeal of the relief from stay order have delayed progress. Further, favorable resolution of the adversary proceeding is crucial to Debtor's reorganization.

If circumstances warrant, Home Federal may again seek dismissal or conversion if the relief from stay order is affirmed or if it prevails in Debtor's adversary proceeding.

An order denying Home Federal's Motion to Dismiss Chapter 11 Case or In the Alternative to Convert to Chapter 7 will be entered.

Dated this 23rd day of April, 1991.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

IN RE:) CASE NO. 90-10107-INH
)
MINN-KOTA FARM AGENCY, INC.) CHAPTER 11
)
) ORDER DENYING
) MOTION TO DISMISS
Debtor.) OR CONVERT

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

IT IS HEREBY ORDERED that the Motion to Dismiss Chapter 11Case
or In the Alternative to Convert to Chapter 7 filed by creditor
Home Federal Savings and Loan Association of Sioux Falls
is DENIED.

So ordered this 3rd day of April, 1991.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)