UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

FILED
February 14, 1990
William F. Clayton,
Clerk

kmh

DONALD J. PORTER
CHIEF JUDGE
413 U.S. COURTHOUSE
PIERRE, SOUTH DAKOTA 57501

February 12, 1990

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Dear Counsel:

RE: MARCUS RAY MOELLER and LANA MOELLER, Plaintiffs/Appellant
vs.
FARMERS HOME ADMINISTRATION, Defendant/Appellee

CIV. 89-3038

MEMORANDUM OPINION

This bankruptcy appeal follows the Bankruptcy Court's[1] dismissal of the appellants' Chapter 12 case pursuant to

[1]United States Bankruptcy Court for the Central Division of South Dakota, Chief Bankruptcy Judge Irvin N. Hoyt presiding.

§ 302(c)(1) of the Bankruptcy Judges, United States Trustees, and Family Farmers Bankruptcy Act of 1986, Pub. L. No. 99-554 (the Act) and In re Erickson Partnership, 856 F.2d 1068 (8th Cir. 1988). For the reasons discussed below, the decision of the Bankruptcy Court is Affirmed in all respects.

FACTS AND PROCEDURE

The factual and procedural histories of this case are set forth in the well-reasoned letter opinion of the Bankruptcy Court, filed October 13, 1989. Briefly, the appellant Moellers filed a Chapter 11 petition on February 19, 1985. Appellee Farmers Home Administration (FmHA) filed a § 1111(b) election to fully secure its total claim of $261,938.09. The 1111(b) election effectively made the Moellers proposed Chapter 11 reorganization plan incapable of being confirmed. The Moellers sought relief by converting their Chapter 11 case to a Chapter 12 bankruptcy reorganization. Originally, the Bankruptcy Court did allow the Moellers to convert their Chapter 11 case to one under Chapter 12, pursuant to 11 U.S.C. § 1112(d) (as amended by § 256 of the Act). However, this order was later vacated following the Eighth Circuit Court of Appeals' decision in Erickson, supra. The Moellers did not pursue confirmation of their Chapter 11 plan and moved to voluntarily dismiss their case. The motion hearing was held on February 27, 1989, and the order dismissing the Chapter 11 case was entered on April 4, 1989.

On March 9, 1989, after the hearing but before the entry of the order dismissing the Chapter 11 case, the Moellers refiled a

Chapter 12 reorganization petition. Relying on Erickson, supra, In re Sinclair, 870 F.2d 1340 (7th Cir. 1989), and In re Olson, 102 B.R. 147 (Bkrtcy. C. D. Ill. 1989), the Bankruptcy Court found that the refiling was an "attempted de facto conversion" and dismissed the Moellers' Chapter 12 case.

This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 158(a).

DISCUSSION

Although the amended § 1112(d) allows a Chapter 11 debtor to convert his case to one under Chapter 12 or 13 in certain circumstances,[2] § 302(c)(1) of the Act did not make the amendments retroactive to Chapter 11 cases filed before the effective date of the Act.[3] Section 302(c)(1), however, did not comport with the

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[2]11 U.S.C. § 1112(d) provides:

> (d) The court may convert a case under this chapter to a case under chapter 12 or 13 of this title only if-
>
> (1) the debtor requests such conversion;
>
> (2) the debtor has not been discharged under section 1141(d) of this title; and
>
> (3) if the debtor requests conversion to chapter 12 of this title, such conversion is equitable.

[3]Section 302(c)(1) of Pub. L. No. 99-554 states:

> (c) **Amendments Relating to Family Farmers.** -- (1) The amendments made by subtitle B of title II shall not apply with respect to cases commenced under title 11 of the United States Code before the effective date of this Act [November 27, 1986].

See also Sinclair, 856 F.2d at 1069 (the Act was enacted on October 27, 1986 and took effect thirty days after the date of enactment

Joint Explanatory Statement of the Committee of Conference dealing with the applicability of Chapter 12 to pending Chapter 11 and 13 cases.[4] Erickson settled the debate, at least in the Eighth Circuit, whether the plain language of § 302(c)(1) was to be "interpreted" by its expressly contradictory legislative history. Judge Gibson stated:

> Aside from the question raised by the legislative history, there is no ambiguity in the statute, no inconsistency between the language in question and any other language in the Act, and no irrational result created by the plain language of the statute.

Erickson, 856 F.2d at 1070. The Court went on to reverse the lower courts' decisions allowing conversion, observing that, "[i]n short, the courts below did not use the legislative history to interpret section 302, but to preempt it." Id. at 1069. Thus, the "plain language" of § 302 did not allow conversion of pending Chapter 11 or 13 cases to Chapter 12.

In light of this prohibition on converting pre-Act Chapter 11 or 13 cases to Chapter 12, this Court is faced with the effect on

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as required by section 302(a) of the Act).

[4]The Conference Committee's statement, entitled Applicability of Chapter 12 to Pending Chapter 11 and 13 Cases, clearly contemplates conversion of pending reorganization cases:

> It is not intended that there be routine conversion of Chapter 11 and 13 cases, pending at the time of enactment, to Chapter 12. Instead, it is expected that courts will exercise their sound discretion in each case, in allowing conversions only where it is equitable to do so.

H.R.Conf.Rep. 99-958, 99th Cong., 2d Sess. 48 (1986), U.S. Code Cong. & Admin. News 1986, pp. 5227, 5249. This, then, was the issue facing the Eighth Circuit in Erickson.

§ 302 of a Chapter 12 filing "on the heels" of a voluntarily dismissed Chapter 11 case. While the Eighth Circuit has not yet addressed this question, the Seventh Circuit Court of Appeals faced a similar issue in In re Sinclair, 870 F.2d 1340 (7th Cir. 1989). The Sinclair Court followed the Eighth Circuit in holding that § 302's plain language could not be ignored. In dictum, the Seventh Circuit considered the propriety of a voluntary dismissal by debtors and a subsequent Chapter 12 refiling:

> The debtors made an alternative request. They asked the bankruptcy judge to allow them to dismiss their Chapter 11 case and start a new one under Chapter 12. This would avoid the ban in § 302(c)(1). Ordinarily, however, a dismissal several years into a lawsuit is with prejudice to refiling. The Sinclairs do not want to dismiss the case with prejudice, pay all of their accrued debts, and then file a fresh bankruptcy action that could go forward from the date of refiling. They want, instead, to file a Chapter 12 case that would be administered as if it had been commenced in 1985. This is conversion by another name. Statutes control more than nomenclature; they are addressed to conduct. Proposals for conversion by another name are proposals for conversion. This one was properly rejected on the authority of § 302(c)(1).

Sinclair, 870 F.2d at 1345 (emphasis added).

The Moellers' voluntary dismissal is a conversion incognito. Whether the dismissal of the debtors' Chapter 11 case is voluntary, as is the case here, or involuntary, the subsequent Chapter 12 refiling flies in the face of § 302(c)(1). See In re Olson, 102 B.R. at 148-49 (bankruptcy court saw no difference between a voluntary dismissal and an involuntary dismissal). Accordingly, it is the opinion of this Court that the Order of the Bankruptcy

Court granting FmHA's motion to dismiss the Chapter 12 proceeding with prejudice should be, and is, Affirmed.

BY THE COURT:

Donald J. Bo...

CHIEF JUDGE