

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

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Re: Roger Storm
Chapter 12 87-30022

Dear Counsel:

Roger Storm filed his Chapter 12 Petition February 9, 1987. This has been a difficult case, and the Plan is only now being considered for confirmation. This opinion discusses Federal Land Bank's objection to discharge and motion for relief from stay, and confirmation of the Debtor's Plan and approval of applications for payment of administrative expenses. Counsel for Federal Land Bank and the Debtor have submitted briefs. I have thoroughly considered the record, including proceedings held before Judge Ecker, and render the following decision.

Objection to Discharge

Federal Land Bank's brief relies upon a complaint objecting to discharge filed May 6, 1987 as a cause of action. The objection relies solely on Code Section 727. This provision, found in subchapter II of Chapter 7, applies "only in a case under such Chapter." Section 103(b). The objection is overruled as based on an inapplicable code section. But see 1141(d)(3); Bankr. R.P. 4004(a) and 4007(c).

Confirmation of Amended Plan

Federal Land Bank submitted lengthy objections to Mr. Storms amended plan. The objections rely largely on Mr. Storm's well documented history of misconduct in connection with this case. Federal Land Bank also claims improper treatment of its claims and unfeasibility. The chapter 12 Trustee also objected on the grounds of Debtor misconduct. The objections of the FmHA and ASCS were settled.

Mr. Storm's attempts to defraud his creditors creates a serious obstacle to confirmation of his amended plan. The record is replete with instances of Debtor misconduct and detailing specific events in this opinion is unnecessary-The transcript of the October 2, 1987 hearing resulting in relief from stay in favor of the PCA contains Judge Ecker's findings in this regard. Also, the comments of John Lovald, chapter 12 Trustee, at the confirmation hearing are indicative of Mr. Storm's abuses of the bankruptcy system. Mr. Lovald recommended that the Plan not be confirmed because of Mr. Storms perjury in regard to the ownership of cattle representing PCA collateral. Mr. Lovald recommended that in the event the Court was inclined to confirm the Plan, that private investigators be hired to attempt to determine the extent of the Debtor's assets- This recommendation is a telling example of the course of this case.

Under Section 1225(a) (3) the Court may not confirm a plan unless it has been proposed in good faith. The Code does not define good faith and resort to case authority is required. In *In re Estus*, 695 F.2d 311 (1982), the Eighth Circuit Court of Appeals held a chapter 13 Plan unconfirmable for a lack of good faith. Although not factually on point, the Court's comments on the meaning of good faith as a legal principle are presently relevant. The court suggests a case-by-case analysis in which "[i]f, after weighing all the facts and circumstances, the plan is determined to constitute an abuse of the provisions, purpose or spirit of chapter 13, confirmation must be denied." 695 F.2d at 316. *Estus* has been cited often in subsequent cases, and was recently reaffirmed by the Eighth Circuit in *In re Education Assist. Corp.*, 827 F.2d 1222 (1987). This latter case specifically names "fraudulent misrepresentation to mislead the bankruptcy court," and unfair manipulation of the code as factors bearing on good faith. *Id.* at 1227. See also, *Matter of Davis*, 68 BR. 205 (Bkrcty. S.O Ohio, 1986) (good faith requirement provides court with means to preserve integrity of bankruptcy process which requires basic honesty of debtor, misstating assets bears on good faith).

The above cited cases all discuss the good faith requirement in the context of confirmation of a Chapter 13 Plan. However, Chapter 12 is based upon Chapter 13 and Section 1225(a) (3) tracks the language of Section 1325(a) (3) verbatim. These Chapter 13 cases are therefore applicable to the good faith requirement of Chapter 12. In *re Weldin-Lynn*, 79 B.R. 409 (Bkrcty. E.D. Ark. 1987). See also, Collier on Bankruptcy para. 1225.02 (15th Ed. 1982) ; In *re Foster*, 84 B.R. 707 (Bkrcty. D. Mon. 1988)

It is the Debtor's burden to prove confirmation standards are met. 3 Norton on Bankruptcy, Section 92.03 (1981) . Mr. Storm has not proven his plan is submitted in good faith.

Relief from Stay

"Numerous cases have found a lack of good faith to constitute cause for lifting the stay to permit foreclosure" In re Little Creek Development Co., 779 F.2d 1068, 1072 (5th Cir. 1986). Little Creek is a leading case for this proposition. In partial explanation of this principle, the Court elaborated

a good faith standard protects the jurisdictional integrity of the bankruptcy courts by rendering their powerful equitable weapons . . . available only to those debtors and creditors with 'clean hands.'

At least two cases from this district are in agreement. In In re Farmers and Merchants Bank and Trust, 28 8.11. 389 (D.S.D. 1983), Chief District Judge Donald J. Porter held "[d]ebtor misconduct can constitute cause under section Judge Porter upheld the Bankruptcy court's ruling that failure to abide by restrictions required by the Code warranted relief from stay. Farmers and Merchants has been cited elsewhere with approval. In re Dabney, 45 B.R. 312 (Bkrcty. E.D. Penn. 1985); In re Fazio, 41 B.R. 865 (Bkrcty. E.D. Penn. 1984). Judge Ecker has also published an opinion on point. In In re Krisle, 54 B.R. 330 (Bkrcty. 1985) Judge Ecker held the debtors wrongful withdrawal of funds from a DIP account was cause for relief from stay.

Again, while none of the above cited cases are from Chapter 12, I note that Section 362 applies to all reorganization chapters. section 103(a). I hold that the Debtor's conduct in this case constitutes "cause" for lifting the automatic stay regarding Federal Land Bank.

I also hold that Federal Land Bank is entitled to relief from stay under Section 362(d)(2). Under this subpart relief from stay is appropriate where the debtor does not have equity in the property with respect to which relief is granted, and the property is not necessary to an effective reorganization. In this case, the Debtor's amended plan treats FLB as an undersecured creditor. By the Debtor's own admission, it therefore has no equity in the property. FLB has thus sustained its burden of proof on this point. See Section 362(g). I have already held that confirmation of the amended plan is denied. Absent a most convincing showing that the Debtor has "come clean," at this point it appears that no reorganization plan is confirmable. Therefore, the property is not necessary to an effective reorganization because there are no reasonable prospects of reorganization. In re S Farms One, Inc., 73 B.R. 103 (Bkrcty. El. Col. 1987) (Chapter 12) . See also, In re Ahlers, 794 F.2d 388 at 397- 398 (8th Cir. 1986), rev'd on other grounds - 108 S.Ct. 963 (1988).

The pleas of Debtor's counsel to allow this reorganization to proceed under the present proposed plan have not been ignored.

However, to confirm the present plan over objections of creditors and the Chapter 12 Trustee would stretch the integrity of the bankruptcy process to the breaking point. This opinion in no way reflects Attorney Pfeiffer's integrity or competence in handling this case.

The fee applications of Debtor's counsel and M-C Associates are approved. This matter constitutes a core proceeding under 28 U.S.C. 157. Counsel for Federal Land Bank is instructed to prepare appropriate findings of fact, conclusions of law and orders.

Very truly yours,

Irvin N. Hoyt
Bankruptcy Judge

INH/sh

CC: Bankruptcy Clerk