

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

IRVIN N HOYT
CHIEF BANKRUPTCY JUDGE

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September 17, 1997

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Subject: *In re David J. and Tammy L. Thyen,*
Chapter 12; Bankr. No. 97-10030

Dear Counsel and Trustee:

The matter before the Court is the good faith objection to Debtor's plan filed by the Farm Service Agency, Agriculture Credit Division. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the objection will be sustained in part and overruled in part.

SUMMARY OF FACTS. Debtors filed a proposed plan June 17, 1997. The Farm Service Agency, Agriculture Credit Division (FSA) filed objections on July 3, 1997. Objection number 5 provided:

The Debtors' plan violates 11 U.S.C. § 1225(a)(3) and is not proposed in good faith because the Debtors have converted FSA's security and made false statements in their original loan applications and the plan is an attempt, in part, to evade the effects of such conversion and false statements and, while the plan proposed to treat FSA as fully secured, the plan does not propose to provide FSA with adequate protection by actually maintaining sufficient security to fully secure such obligation.

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FSA and other creditors filed additional objections as did other creditors. Debtors filed a modified plan on July 30, 1997 that addressed most objections. At the confirmation hearing on July 15, 1997, Debtors indicated they had settled plan treatment with all creditors and would file a second modified plan to reflect that treatment. Counsel for Debtors and FSA, however, acknowledged that FSA's "good faith" objection to the original plan still had not been resolved.

Counsel for FSA stated, and Debtors' counsel agreed, that Debtors were unable to account for cattle that previously secured FSA's claim. Counsel for FSA acknowledged that FSA was fully secured when both real property and the cattle were totaled as collateral. However, FSA was still concerned that Debtors had not explained to date what happened to FSA's secured cattle and that Debtors yet today could not differentiate between cattle they leased and cattle they owned. FSA also was concerned that Debtors' proposed rejection of one cattle lease and assumption of another cattle lease would leave FSA without any cattle as collateral. As a form of adequate protection, FSA wanted some explanation. Counsel for Debtors did not dispute the statements of FSA's counsel but emphasized that FSA is fully secured and has a nondischargeable claim, pursuant to an agreement between the parties.

DISCUSSION. A plan is filed in good faith if the debtor has stated his debts and expenses accurately, has not made any fraudulent misrepresentation to the Court, and has not unfairly tried to manipulate the Bankruptcy Code. *Nielsen v. DLC Investment, Inc. (In re Nielsen)*, No. 97-6019, slip op. at 5 (8th Cir. BAP Aug. 7, 1997) (citing *Education Assistance Corp. v. Zellner*, 827 F.2d 1222, 1227 (8th Cir. 1997) (discussing 11 U.S.C. § 1325(a)(3), which is identical to 11 U.S.C. § 1225(a)(3)). A totality of the circumstances must be considered. *Nielsen*, slip op. at 5 (citing *Handeen v. LeMaire (In re LeMaire)*, 898 F.2d 1346, 1348 (8th Cir. 1990). The type of debt to be discharged, whether that debt is dischargeable in a Chapter 7, and the debtor's motivation and sincerity in seeking relief are pertinent. *Nielsen*, slip op. at 5-6 (citing *LaMaire*, 898 F.2d at 1349 (citing *In re Estus*, 695 F.2d 311, 317 (8th Cir. 1982))).

The record before the court indicates Debtors have stated their expenses accurately, they have not tried to fraudulently mislead the Court, they have not unfairly manipulated the Code, and that their motivation to reorganize is sincere. While pre-petition conversions of collateral have been alleged, no misdeeds have been alleged post-petition. Further, Debtors have agreed that FSA's claim will be nondischargeable. The only problem that remains is

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whether Debtors have accurately stated their assets.

As FSA has asked, which cows are leased from whom and which are owned? Although FSA is fully secured by the real property, the Court agrees that these questions should be resolved before confirmation. Such unanswered questions could come back to haunt us if the plan needs to be modified, a plan default occurs, or disposable income becomes an issue.

Accordingly, FSA's objection will be sustained to the extent that Debtors need to identify clearly the ownership or lease status of each animal in their herd to the satisfaction of Trustee Lovald, the lessors, FSA, and any other creditor with an interest in the cattle. FSA's objection will be overruled to the extent that FSA wants an explanation of what happened to the secured cattle pre-petition. That issue is better addressed in a criminal action, if warranted, or in a motion to dismiss. At this point, however, it appears Debtors are cooperating and have conceded that FSA's claim is fully secured and nondischargeable.

An appropriate order will be entered. Debtors shall file a third modified plan as soon as they resolve the ownership and lease status of their cattle.

Sincerely,



Irvin N. Hoyt
Chief Bankruptcy Judge

INH:sh

CC: case file (docket original; copies to parties in interest)

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

SEP 17 1997

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota