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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October 19, 1989

Thomas M. Tobin, Esq.
Post Office Box 1456
Aberdeen, South Dakota 57402

Robert E. Hayes, Esq.
Post Office Box 1030
Sioux Falls, South Dakota 57101.

Re: Weiszhaar Farms, Inc.
Chapter 11 186-00226

L.J. Hog Co, Inc.
Chapter 11 186-00227

Dear Counsel:

This letter memorandum will address the motion for sanctions filed with this Court by Attorney Robert E. Hayes. Attorney Hayes; represents the Livestock State Bank of Leola, forrnerly the Leola State Bank. Attorney Thomas M. Tobin represents the debtor farm corporations.

FACTS

Debtor corporations filed for protection under Chapter 11 of the Bankruptcy Code on September 2, 1986. The cases were administratively consolidated on December 5, 1986 and a Chapter 11 plan and disclosure statement were tiled on January 20, 1987. The disclosure statement was thereafter approved, as was an amended Chapter 11 plan.

Under the plan the debtors were to pay the sum total of $185,000.00 to Livestock State Bank by June 10, 1988. Another payment to the bank in the sum of $500,000.00 was due by June 25, 1988. Payments totaling $185,000.00 were timely made through the liquidation of livestock. However, the $500,000.00 payment was not made as required. The parties entered into a stipulation which extended the time of payment to August 29, 1988. Debtors also tailed to meet this deadline.

The Court, on October 17, pursuant to the terms of the stipulation also known as the "drop dead" clause, entered an order directing debtors to surrender personal property securing the bank's debt to Livestock State Bank for liquidation. On October 21, the bank took possession of 650-685 head of debtors' livestock and took them to the sale barn in Bowdle. The livestock were to be sold the following week. On October 24 a request to stay the implementation of the October 17 order was denied by the Court. The debtors contacted the bank one day before the proposed sale and received a week's delay on the liquidation of livestock. Arrangements for payment of the bank's claim were not completed during that week. Some of those cattle were then sold.

On October 31, this Court denied debtors' ex parte motion to modify the Chapter 11 plan and stay the October 17 order directing the surrender of the remaining livestock. On that same date, debtors filed a petition under Chapter 12 of the Bankruptcy Code. The automatic stay triggered by the filing of the petition prevented the sale of the remainder of the livestock. Upon learning of the bankruptcy, the sale barn requested that the bank remove the livestock by midnight that night. The bank did not know of any feedlots in the area which could handle 600 head of livestock on such short notice. Accordingly, the remaining livestock were thereafter transported to a feed lot near Letcher, some 200 miles away.

On November 2, 1988, Livestock State Bank filed motions to dismiss the Chapter 12 petition or for modification ot the automatic stay. The Court dismissed the Chapter 12 petition on November 8 and entered findings of fact and conclusions of law that same date. Conclusion of Law VI(a) sets forth the Court's conclusion that the subsequent tiling of the Chapter 12 petition was done in bad faith and was an attempt to frustrate the Court's order for surrender of personal property and two subsequent denials of motions to stay the implementation of that order.

Attorney Hayes filed a motion tor sanctions on December 9, 1988. A hearing thereon was held March 20, 1989. At the hearing, the bank submitted several exhibits to show the costs incurred as a result of the Chapter 12 tiling. These included yardage at the Bowdle Sale Barn ($7,200), truck transportation from Bowdle to Letcher ($3,500), yardage at the Letcher feedlot ($37,477.59[1]) and legal tees directly related to the tiling of the Chapter 12 petition ($2,600), for a grand total of $50,777.59. Both parties, following the hearing, submitted briefs on this subject.

DECISION

Bankruptcy Rule 9011 provides, in salient part:

> Every petition, pleading, motion or other paper served or filed in a case under the Code on behalf of a party represented by an attorney . . . shall be signed by at least one attorney of record[.] ... The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact-and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed tor any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation. ... If a document is signed in violation

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[1] Letcher feedlot expenses may be broken down as follows:

249 cows tor 48 days	- $ 4,244.20
108 yearlings tor 81 days	- $ 13,439.07
242 calves tor 101 days	- $ 19,564.32
Vet supplies tor calves	- $ 230.00

The cattle were held various lengths of time pending this Court's entry of an order dismissing the Chapter 12 petition, due to market conditions, and in order to advertise the several sales that took place. The sales were all conducted at the Mitchell, SD, livestock auction.

> of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount ot the reasonable expenses incurred because of the tiling ot the document, including a reasonable attorney's fee.

Rule 11 is designed to discourage the filing of frivolous court papers or those that are legally unreasonable or without factual foundation. Hartman v. Hallmark Cards, 833 F.2d 117 (8th Cir. 1987) . See also IKurkowski v. Volcker, 819 F.2d 201 (8th Cli. 1987). In Lupo v. R. Rowland & Co., 857 F.2d 482 (8th Cir. 1988) the Eighth Circuit also stated that the purpose of Rule 11 is to compensate the offended party for the expenses caused by a violation as well as to penalize the oftender.

A violation of Rule 9011 occurs when a party or attorney tiles or serves a document (1) not well grounded in fact, warranted by existing law or containing a good faith argument for a change of the existing law or (2) for an improper purpose. See Byrne, Sanctions for wrongful Bankruptcy Litigation, 72 Am. Bankr. L.J. 109, 114 (1988). See also Robinson v. National Cash Register Co., 808 F.2d 1119 (5th Cir. 1987). The Rule is intended to be vigorously applied to curb frivolous pleadings and other papers. Adduono v. World Hockey Association, 824 F.2d 617 (8th cir. 1987). However it is not a panacea intended to remedy all matter of attorney misconduct. Id.

Under Rules 11 and 9011 the conduct ot the non-movant is to be judged under a standard of "objective reasonableness." E.E.O.C. v. Milavetz and Associates, P.A., 863 F.2d 613 (8th Cir. 1988). See also Hartman supra, Adduono supra, Kurkowski supra, and O'Connell v. Champion International Corp., 812 F.2d 393 (8th Cir. 1987). Good taith is not a detense under Rule 11. See Milavetz and Hartman supra. See also Robinson supra and Byrne at 114. In this case it is contended that the tiling ot the second petition was done in bad faith and for an improper purpose, namely delay.

This Court recently held that successive filings under two difterent chapters of the Bankruptcy Code are improper. In re

Gerth, No. 89-10062, Slip Op. (Bkrtcy. D.S.D. August 1, 1989). See also In re Smith, 85 B.R. 872 (Bkrtcy. W.D.Ok. 1988). In Gerth, this Court noted that allowing the debtor to proceed under two separate bankruptcy chapters circumvents the "well established notions of orderly administration of justice, the court's inherent right to protect its own jurisdiction, and the court's duty to preclude, where possible, an abuse of the bankruptcy laws." Slip Op. at 2 (quoting In re Belmore, 68 B.R. 889, 891 (Bkrtcy. N.D.Pa. 1987))

The filing of successive bankruptcy petitions for the same debtor poses a serious risk of the imposition of sanctions under Rule 9011. In fact, such filings are one of the most common abuses of the bankruptcy laws, especially where such petitions are filed for the sole purpose of interfering with the rights of secured creditors. Byrne at 116. -

Debtors contend that the subsequent filing was designed to advocate a new or novel theory, namely that 11 U.S.C. §1107 does not prevent a Chapter 11 debtor in possession from tiling under a different chapter of the Code after a Chapter 11 plan has been confirmed. "A legal position is unwarranted by law where any reasonably competent attorney would recognize that it is plainly clear that it has absolutely no chance of success." Byrne at 115 (citing Eastway Construction Corp. v. City of New York, 762 F.2d 243, 254 (2nd Cir. 1985)). While debtors may have indeed fell upon some novel legal theory (a contention upon which this Court makes no decision) , such does not preclude the imposition ot sanctions where the initial and paramount reason for the subsequent filing was to delay the surrender ot the livestock to the bank. A document may survive scrutiny under the first prong ot Rule 11 but nevertheless be judged to have been filed for an improper purpose. See Schwarzer, Sanctions Under the New Federal Rule 11 — A Closer Look 104 F.R.D. 181, 195 (1985). It is clearto the Court that debtors tiled the second bankruptcy petition to delay the sale of the livestock. The above stated authorities likewise make it clear that such action constitutes an improper, sanctionable purpose under Rule 9011.

The subsequent filing arguably was also initiated in order to evade the triggering of the "drop dead" clause tound in the stipulation previously entered into by Weiszhaars and the bank. This Court, like a host ot others throughout the country, recognizes the validity of these clauses in the bankruptcy setting.

See, e.g., In re Hood, 92 B.R. 645 (Bkrtcy. E.D.Va. 1988); In re Pearson, 90 B.R. 638 (Bkrtcy. D.N.J. 1988); In re McClure, 69 B.R. 282 (Bkrtcy. N.D.Ind. 1987); In re Mobile Air Drilling Co., Inc., 53 B.R. 605 (Bkrtcy. N.D.Ohio 1985) and In re Multech Corp., 47 B.R. 747 (Bkrtcy. N.D. Iowa 1985). It is axiomatic that it "drop dead" clauses are to serve any purpose, the courts must enforce them according to their terms. To tail to enforce them would make their creation an idle act. The Court believes that agreements with such clauses should not be effectuated it the parties thereto have no intention of honoring them. Moreover, where such an agreement is effectuated and one party thereto has no intention of honoring it, that party's initial entry into the agreement would appear to have been made in and may constitute evidence of, bad faith.

Livestock State Bank requests to be compensated for their actual, out of pocket expenses as a result of debtors' filings. As previously discussed, these would include the bank's costs and expenses for the maintenance and removal of the cattle and its costs and expenses, including attorney's tees, incurred in the prosecution of the bank's motions for dismissal and modification of the stay in the Chapter 12 proceedings. Debtors argue that the expenses relative to the livestock's maintenance and removal in essence ha~ already been charged back to them. Their contention is based upon the fact that the bank deducted such amounts from the proceeds of the sale of the cattle. While it is true that the bank did make such a deduction, it must be remembered that the bank therefore did not fully realize on the value of its collateral. If the Court would preclude the recovery of this deficiency, debtors, who have already received a discharge under Chapter 11, would incur no liability for this amount. It is clear from the record that such expenses were incurred as a result of the filing of the Chapter 12 petition. Rule 9011 contemplates that the responsibility for the payment of such expenses would tall on debtors and their attorney. The Court concludes that such expenses are chargeable to debtors and their attorney and that those parties should be held responsible for such payment.

Based on the foregoing, the motion of Livestock State Bank of Leola tor sanctions against Weiszhaar Farms, Inc., L. J. Hog co., Inc. and their attorney, Thomas M. Tobin, will be granted. This is a core proceeding under 28 U.S.C. §157. This letter constitutes

the Court's findings of fact and conclusions of law. The Court will enter an appropriate order.

Very truly yours,

Irvin N. Hoyt
Chief Bankruptcy Judge

INH/sh

CC: Bankruptcy Clerk

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

IN RE:		
WEISZHAAR FARMS, INC., Bankruptcy No. 186-00226,	)	CHAPTER 11 CASES
L.J. HOG CO., INC., Bankruptcy No. 186-00227,	)	ORDER GRANTING SANCTIONS UNDER BANKRUPTCY RULE 9011
Debtors.		

Pursuant to the letter opinion executed this same date,

IT IS HEREBY ORDERED that debtors Weiszhaar Farms, Inc. and L.J. Hog Co., Inc., and their Attorney, Thomas M. Tobin, jointly and severally, pay unto Livestock State Bank the sum of $50,777.59 as its costs and expenses for the removal and maintenance of cattle previously in possession of the bank and tor costs, expenses and attorney's fees incurred for prosecution of motions for dismissal and modification of stay in debtors' Chapter 12 proceedings..

Dated this 19th day of October, 1989.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By: _____
Deputy

(SEAL)