United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

In re Klug Farm Partnership, Debtor
Bankruptcy Case No. 99-50046-12

United States Bankruptcy Court
W.D. Wisconsin, Eau Claire Division

May 27, 1999

George B. Goyke, Byrne, Goyke, Tillisch, & Higgins, S.C., Wausau, WI, for debtor.
Matthew P. Gerdisch, Kohner, Mann & Kailas, S.C., Milwaukee, WI, for Firstar Bank Wisconsin.

Thomas S. Utschig, United States Bankruptcy Judge.

MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Firstar Bank Wisconsin ("Firstar") has filed a motion to dismiss this chapter 12 farm reorganization case pursuant to 11 U.S.C. § 1208(c). Firstar contends that the case should be dismissed for two reasons. First, the partners executed a formal partnership dissolution agreement in June of 1998, and Firstar contends that the partnership therefore exists only to "wind up" its affairs, not reorganize. Second, Firstar believes that the individual bankruptcies of the two partners render them incapable of executing the documents necessary to file the partnership in bankruptcy.

The partnership in question is comprised of Bruce and Mary Klug, a married couple who have operated their dairy farm in partnership form for some period of time. They concede that they executed a written dissolution agreement on June 18, 1998. However, they argue that while they dissolved the formal partnership, they always intended to continue the farm operation. Firstar holds the mortgage on the farm assets, and the Klugs submit that the dissolution was really just another aspect of their efforts to rejuvenate their business. In this regard, they point to the fact that at the same time they executed the dissolution agreement, they had also entered into a series of forbearance agreements with Firstar and were trying to improve cash flow and reduce their debt load.

Firstar's primary contention is that a partnership which is already in dissolution cannot attempt to reorganize itself under the bankruptcy code. This argument is premised upon the Wisconsin Uniform Partnership Act. Under Wis. Stat. § 178.25(2), a partnership is not terminated upon dissolution, but "continues until the winding up of partnership affairs is completed." This "winding up" process involves the settling of partnership affairs and is often called liquidation. Essentially, the process contemplates the liquidation of assets into cash, the payment of all debts, and the division of any profits among the partners. Gull v. Van Epps, 185 Wis. 2d 609, 517 N.W. 2d 531 (Wis. App. 1994). Firstar argues that since the partnership was dissolved, the only thing it can do during the "wind up" phase is liquidate, not

reorganize.

In response, the debtor points to various sections of the Act, most specifically Wis. Stat. § 178.33 and § 178.36, as well as the case of Matter of Trust Estate of Schaefer, 91 Wis. 2d 360, 283 N.W. 2d 410 (Wis. App. 1979). The debtor argues that these provisions support the notion that the partnership can in fact continue to operate its business. The debtor's position is that for the most part, it is the agreement of the partners, rather than the language of the statute, which is critical. For example, in Lange v. Bartlett, 121 Wis. 2d 599, 601, 360 N.W. 2d. 702 (Wis. App. 1984), the court states that:

> It is at this juncture, the point of dissolution, that the retiring partner makes an election. He can either force the business to "wind-up" and take his part of the proceeds, sharing in profits and losses after dissolution, or he can permit the business to continue and claim as a creditor the value of his interest at dissolution.

Firstar's response to the debtor's argument is to contend that while the partnership act may recognize some ability to continue the business after the death or retirement of one partner, it makes no provision whatsoever for the continuation of the business when all the partners have agreed to dissolve the partnership. The Court, however, cannot agree with Firstar on this issue. The Wisconsin partnership act reflects the fact that a partnership rests upon the agreement of the various partners. As the court states in Gull, the affairs of a partnership will be wound up under the Uniform Partnership Act "in the absence of agreement otherwise." 185 Wis. 2d at 621.

The voluntary "dissolution" of this partnership was intended only to eliminate the official form, not terminate the business operations. In fact, had the Klugs never held themselves out as a partnership, one still might have existed. Under Wis. Stat. § 178.03, a partnership is "an association of 2 or more persons to carry on as co-owners a business for profit." There are legal tests to determine whether a partnership exists, but clearly the partners need not call themselves such. Bartelt v. Smith, 145 Wis. 31, 129 N.W. 782 (1911). One crucial element of the determination is the parties' intent. Stern v. Wisconsin Department of Revenue, 63 Wis. 2d 506, 217 N.W. 2d 326 (Wis. 1974). Since the intent of the parties is critical in determining the existence of a partnership, it seems appropriate that their intent upon dissolution also be of vital importance.

The partners in this case thought dissolution of the partnership would help in their reorganization efforts. That they have now changed their minds and wish to continue the partnership form is permissible because it is their intent which is the "ultimate and controlling test" as to the existence of a partnership. Heck & Paetow Claim Service, Inc. v. Heck, 93 Wis. 2d 349, 286 N.W. 2d 831 (Wis. 1980). Firstar's citation to In re C-TC 9th Avenue Partnership, 113 F.3d 1304 (2nd Cir. 1997) does not alter this conclusion. In that case, the court held that a partnership in dissolution was not eligible to be a debtor under the bankruptcy code, but there were several distinguishing factors. First, the partnership featured only one partner. The other had withdrawn from the partnership. This disqualified the entity immediately, as a partnership is comprised of "two or more" persons. Id. at 1307. Second, there was no allegation that the partners had agreed to continue the partnership notwithstanding the dissolution. It is possible for the partnership to be reconstituted by the subsequent actions of the partners. See In re Middletown Metro Associates, 225 B.R. 281 (Bankr. D. Conn. 1998).

Firstar is not prejudiced by the partners' decision to reinstate the partnership. The dissolution agreement was intended to more accurately reflect that the business operation was simply a family farm, operated by a husband and wife. There was no effort to gain any advantage over creditors. There is no allegation that Firstar's interest in its collateral was ever impacted or adversely affected by the dissolution. What is more, Firstar was certainly not entitled to have the partnership dissolved. The decision was solely between the partners, and Firstar cannot seek to gain an advantage when the partners have decided to change their minds.

As for the argument that the partnership cannot be bound by the actions of a partner who has filed bankruptcy, the Court concludes that this statutory provision can likewise be modified by the agreement of the partners. The language of Wis. Stat. § 178.30(3)(b) provides that the partnership is "in no case bound" by an act of a partner who becomes bankrupt. This protection seems to be afforded to the partnership and the other partners, not to creditors. The likely purpose is to preclude partners from adversely affecting the operation of the partnership or the other partners. Matter of Phillips, 966 F.2d 926, 929 (5th Cir. 1992). The Court questions whether creditors have the right to dispute the decision where both partners have agreed to continue the business notwithstanding the bankruptcy of the other. See Middletown Metro, 225 B.R. at 282-83 (bankrupt partners who continued their association created a new partnership).

This case is also problematic because it is essentially nothing more than a family farm. The technical arguments cloud the fact that the debtor in question is a business entity comprised solely of a husband and wife. Carried to its logical conclusion, Firstar's argument about Mr. Klug's lack of authority to bind the partnership means that the entity cannot operate in any capacity whatsoever. No other party can act on behalf of the partnership if the Klugs are denied the ability to do so. This is very intriguing given Firstar's other argument that the partnership can do nothing but liquidate its assets and distribute the proceeds to creditors. If, as Firstar suggests, this partnership is only able to "wind up" its business affairs, it is incapable of doing so because neither partner can act on its behalf. Under Wis. Stat. § 178.28, they would normally have some authority to act on behalf of the partnership during dissolution, but even that authority is denied them under Firstar's interpretation of § 178.30(3). This interpretation obscures the practical aspects of the case, and overlooks the unanimous agreement of the partners. The Court concludes that at least in a case like the present one, if all the partners agree, the partnership can be bound by the acts of a bankrupt partner. Further, those same partners can agree to reinstate a partnership that they once sought to dissolve.

Accordingly, the motion to dismiss is denied.

This decision shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Rule 52 of the Federal Rules of Civil Procedure.