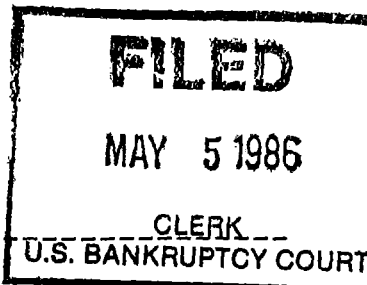


UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WISCONSIN



In re:

Case Number:

JAMES H. SUTTON  
SHARON C. SUTTON

EF11-84-02357

Debtors.

OPINION AND ORDER

The United Bank of Osseo (UBO), by Peter Herrell, and Security State Bank of Shell Rock (SSB), by Jeffrey Guettinger, have moved the court to dismiss this bankruptcy proceeding. The debtors appear by Bruce Zito and Mart Swenson and contest the motion. A hearing on this matter was held on February 24, 1986, and the motion has been submitted for determination by briefs.

The debtors are engaged in the business of hog farming. Their business has suffered from financial difficulties and they filed for relief pursuant to 11 U.S.C. Chapter 11 on December 14, 1984. The debtors have attempted to obtain alternate sources of financing for their farm operation but have been unable to receive such a commitment. The debtors still have not filed a disclosure statement or a plan of reorganization.

On September 5, 1985, UBO moved the court for relief from the 11 U.S.C. § 362 automatic stay. A hearing was scheduled on this motion for November 19, 1985. Prior to the hearing the debtors and UBO entered into a stipulation. The terms of the

stipulation were entered into the record of the hearing. Under the terms of the stipulation, UBO agreed to accept 25% of the gross sales from hogs as adequate protection and withdrew its motion for relief from stay. The stipulation was subsequently reduced to written form, and the debtors refused to sign same and attempted to repudiate the stipulation.

The debtors argue that the stipulation placed on the record was only a tentative agreement. Apparently during the negotiations, counsel for SSB had represented that SSB might be satisfied with monthly payments of \$500. This was, however, contingent on the approval of his client. SSB subsequently determined that monthly payments of \$500 would be inadequate, and insisted on monthly payments of \$1,500. The debtors argue that they were simply financially unable to both make such payments to SSB and still give UBO 25% of the gross sales of hogs. They argue that the stipulation with UBO was entered into with the understanding that the payments to SSB would only amount to \$500 per month. UBO argues that its agreement with the debtors was not tentative, contingent, or otherwise conditioned. UBO submits a copy of the November 19, 1985, hearing in which there is no such conditional language.

The debtors presently owe UBO approximately \$169,000. They owe SSB approximately \$62,000. These two debts total \$231,000. The debtors' average of gross sales for the last 12 months was \$10,008. The debtors' average of gross sales for the last 6 months was \$14,264.

On February 6, 1986, UBO filed a motion to dismiss the bankruptcy case for "cause" pursuant to 11 U.S.C. § 1112(b). UBO effectively argues three reasons why "cause" exists for dismissal: 1) failure to prosecute bankruptcy proceedings, 2) no ability to effectively reorganize, 3) lack of good faith.

This court has previously held that lack of prosecution can constitute "cause" to dismiss a Chapter 11 proceeding. In re Van Brunt, 46 B.R. 29 (Bankr. W.D. Wis. 1984). In the instant case the debtors have not filed a disclosure statement or a proposed plan of reorganization in the 16 months since their petition was filed. "The Chapter 11 debtor is a fiduciary of his creditors, and is obligated to prosecute his bankruptcy proceeding in an expeditious manner." (citations omitted) Id. at 30. Prejudice may be presumed from the unreasonable delay of the debtor. The Bankruptcy Code does not specify an exact time limit by which the debtor must submit a proposed plan of reorganization. Instead, the debtor must comply with a standard of reasonableness. When a debtor uses an unreasonable period of time to prosecute a bankruptcy proceeding the court can dismiss the proceeding. A very significant period of time has elapsed since the debtors filed their bankruptcy petition. There is still no indication that the debtors will be proposing a confirmable plan in the near future. It is the conclusion of the court that the delay of the debtors has been unreasonable and such delay constitutes "cause" for dismissal of the bankruptcy proceeding.

UBO next argues that the debtors are not capable of effectuating a plan of reorganization. 11 U.S.C. § 1112(b)(2). The debtors have offered to make a payment of 25% of their gross hog sales to the two banks and ask the court to determine the division of payment between the two. The debtors estimate that these payments would amount to about \$4,000 per month. UBO argues that the debtors' estimate is unrealistic. There have only been 3 months out of the last 16 months that the debtors have had gross sales in excess of \$16,000. UBO argues that even if the debtors could make such payments to its secured creditors there would be nothing left to make payments to the unsecured creditors. It is a long standing principle that a Chapter 11 plan cannot be confirmed unless it provides for payments to the unsecured creditors. The debt owed to UBO and SSB amounts to \$231,000. It does not appear that the debtors will have sufficient revenue to pay these claims off in a reasonable time. A court can only confirm a plan of reorganization if "[c]onfirmation of a plan is not likely to be followed by the liquidation, or the need for reorganization of the debtor or any successor to the debtor under the plan, unless liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11). "The failure of a debtor to meet the confirmational prerequisite of 11 U.S.C. § 1129(a)(11) is cause for dismissal under section 1112(b) of the Bankruptcy Code." In re Anderson, 52 B.R. 159, 162 (Bankr. D. N.D. 1985).

It does not appear likely that the debtors could ever effectuate a plan of reorganization. Their revenue is inadequate to

pay off their secured debt in a reasonable time. The most that the debtors can realistically expect to receive in gross from the sale of their hogs would be an average of \$13,000 per month. Their expenses in raising the hogs will consume over 70% of this amount. The 25% payments to the secured creditors is inadequate to service the \$231,000 debt and leaves nothing for the unsecured creditors. It is the conclusion of the court that the debtors are not able to effectuate a plan of reorganization, and their bankruptcy petition should be dismissed.

Finally, UBO argues that this proceeding should be dismissed because of the debtors' lack of good faith. Lack of good faith constitutes "cause" for the dismissal of a bankruptcy proceeding under § 1112(b) of the Bankruptcy Code. Matter of Madison Hotel Associates, 749 F.2d 410 (7th Cir. 1984). A failure to prosecute a bankruptcy proceeding may be evidence of a debtor's lack of good faith. In re McFarlane, EF11-85-01331 (Bankr. W.D. Wis. Feb. 13, 1986). A factor relevant to the examination of whether a debtor is exercising good faith is if there is a "reasonable probability of a plan being proposed and confirmed." Matter of Winshall Settlers Trust, 758 F.2d 1136, 1137 (6th Cir. 1985).

The debtors entered into a stipulation with UBO and submitted that stipulation before this court on the record of the November 19, 1985, hearing. The debtors subsequently repudiated the stipulation. The debtors have not prosecuted their bankruptcy petition in a reasonable manner. There is no indication that an effective reorganization is on the horizon. There is no

purpose being served by this bankruptcy proceeding except to frustrate the legitimate collection efforts of the debtors' creditors. It is the conclusion of the court that these factors indicate a lack of good faith and constitute "cause" for the dismissal of this bankruptcy proceeding.

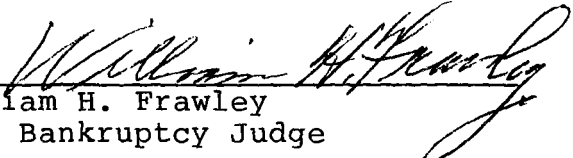
This opinion shall constitute findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052.

ORDER

NOW, THEREFORE, IT IS ORDERED THAT, this bankruptcy proceeding is now hereby dismissed.

Dated: May 5, 1986.

BY THE COURT:

  
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William H. Frawley  
U.S. Bankruptcy Judge

cc: Attorney Mart W. Swenson  
Attorney Bruce Evan Zito  
Attorney Peter F. Herrell  
Attorney Jeffrey W. Guettinger

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