

In the United States Bankruptcy Court

for the Northern District of Iowa

DOUGLAS A. NEUHAUS

Debtor(s).

Bankruptcy No.

Chapter 12

MEMORANDUM OF DECISION AND ORDER RE: DEBTOR'S PLAN OF REORGANIZATION

The matter before the Court is the confirmation of the Second Amended Plan of Reorganization filed by Douglas A. Neuhaus, Debtor. A hearing was held on November 17, 1987 in Waterloo, Iowa. The matter was submitted to the undersigned for consideration. The Court now issues this ruling which shall constitute Findings and Conclusions as required by Bankr. R. 7052. This is a core proceeding pursuant to 28 U.S.C. section 157(b)(2)(L).

I.

On May 18, 1987, Debtor filed a Chapter 12 petition in bankruptcy. He listed three secured creditors: the State of Iowa (State) for \$3,850.00 for a loan to terrace his farm property; Henry J. Neuhaus (Debtor's father) for \$64,862.00 which Debtor borrowed as a down payment for the purchase of his farm real estate; and Charles Williams, Jr. and Marie Williams (the Williams) as vendors for \$369,720.00 due in principal and interest on a farm real estate contract. Butler County was listed as a priority creditor for property taxes of \$4,200.00. The only unsecured creditors listed were Henry J. Neuhaus and Wilma J. Neuhaus (Debtor's parents) for \$12,600.00 for room and board since Debtor's majority. Assets listed included his interest of \$160,000.00 (original purchase price of \$440,000) in the executory contract for the farm real estate and a 7/8th interest in a grain bin located on the farm valued at \$32,375.00.

On June 3, 1987, the Williams applied to the court to compel assumption or rejection of the executory contract between the Williams, vendors, and Debtor, purchaser, of the farm real estate. The application noted Debtor's failure to pay property taxes and to make a required contract payment due March 1, 1987. The Williams further complained of their loss of use or rental of the land for the 1987 crop year as well as the opportunity for resale.

A hearing on this matter was held July 24, 1987, and that day the Court ordered Debtor to "accept" or reject the real estate contract by August 17, 1987. Findings and Conclusions on the matter were entered by the Court on August 3, 1987. Therein, the Court ordered:

. . . Debtor shall on or before 4:30 p.m. on August 17, '87, file herein their statement which may be made as a part of their plan indicating assumption or rejection of the Williams/Neuhaus contract.

Should the statement or plan indicate assumption the current default shall be cured or adequate assurance of prompt cure and adequate assurance of future performance shall be provided.

In the event the statement or plan provides for rejection of the contract, or in the event no such statement or plan is filed by the date set, the contract shall be deemed rejected by the Debtor in which case the automatic stay shall be deemed lifted such that applicants herein may take steps to obtain Title to the real estate as well as possession of same.

Debtor filed his initial Chapter 12 plan on August 17, 1987. The plan proposed assumption of the farm real estate contract but seemingly conditioned assumption upon the Williams' agreement to defer two installments of principal and interest by adding these amounts to the balance payment due March 1, 1999. Debtor's initial plan also contemplated a

sale of the grain bin to accommodate his brother's claim for a partition of his interest in the bin.

By documents filed with the Court, Debtor's father agreed to forebear collection of the secured indebtedness owed him and Debtor's parents forgave the unsecured debt--both conditioned upon a continuance of Debtor's reorganization under Chapter 12.

On August 28, 1987, the Williams objected to the plan and moved for an order modifying the stay and preventing harvest of the 1987 crop. The Williams specifically noted Debtor's failure to cure the current default or give adequate assurance of a prompt cure of the current default or of future performance. The Williams further stated that the plan rejects the executors contract on its face by showing Debtor's inability to comply with its terms.

Debtor resisted the Williams' application and claimed, *inter alia*, that the plan gave the Williams a choice of security and adequate assurance. Debtor further argued the Williams had no interest in the unharvested crops since they were only contract vendors. Finally, Debtor stated:

As Applicants, as contract-vendors, elected forfeiture as their remedy, the contract debt is thereby satisfied by reason thereof and they have no legal basis for asserting any rights to anything other than the real estate itself.

Carol Dunbar, Trustee, also objected to the initial plan and stated that it should: provide for payment of impaired claims through the Trustee's office, specify when payments to creditors are due, and provide for payment of trustee fees as required by 11 U.S.C. section 1226(b). Janet Long, U. S. Trustee, objected to the absence of a liquidation analysis. She further argued that the plan failed to provide a sum certain to be paid to State and that it was not feasible.

A telephonic preliminary hearing on the Williams' motion to modify the stay was held September 18, 1987. Debtor was ordered to cure the default on the executory contract by September 25, 1987 by making the March 1, 1987 and the September 1, 1987 contract payments plus accrued interest. The stay would terminate as to the Williams without further order of the Court upon affidavit of the Williams' counsel that default was not timely cured. On September 28, 1987, the Williams' counsel filed an affidavit that Debtor had not cured and the requested relief from stay became effective.

The hearing on the objections to Debtor's initial plan was held October 1, 1987. Debtor was ordered to make any amendments by November 1, 1987. The remaining issues to be litigated were identified.

Williams objected to the initial confirmation order and notified the Court that they had elected forfeiture (fn.1) of the executory contract so that there would be no deficiency judgment entered against Debtor and no right of redemption vested in Debtor. Consequently, the Williams requested that the real estate valuation issue at the final confirmation hearing be replaced with a determination of the amount of reasonable rent due for use of the farmland for the 1987 crop year.

¹ There was no evidence presented on whether either a forfeiture or foreclosure has actually commenced. An earlier foreclosure action by the Williams has apparently been dismissed.

Debtor resisted this objection and stated that the Williams' intent to forfeit the executory contract was not relevant to the initial confirmation order. He maintained there was no basis for payment of rent under 11 U.S.C. section 1205(b)(3) and that valuation of the real property was still an issue since he had not yet been divested of his interest in it. Debtor further stated that the Williams' rejection of offers of adequate protection under the initial plan precluded disposition of that issue as part of the confirmation process.

Debtor filed an amended and substituted plan (second plan) on October 22, 1987. This plan claimed it complied with the Order Re: Initial Confirmation Hearing filed October 7, 1987 and satisfied the objections of the Trustee and U. S. Trustee.

The second plan describes the priority claims as follows:

Full payment shall be made, in deferred cash payments, of all claims entitled to priority under Section 507

of Title II, U.S.C. including the following and in the order listed;

(a) Administrative expenses allowed, including fees and charges assessed against the estate. This contemplates payment in full of all fees allocable to the Chapter 12 Trustee and prior to payment of any other claims or creditors.

This Plan does not provide for payment of property tax on the farm real estate purchased by Debtor from Charles Williams, Jr. and Marie Williams for the reason that the amount thereof is included in the prayer of the foreclosure petition filed in the State Court.

(b) Any expenses and claims in the order of priority as specified by the terms of Section 507.

Treatment of secured claims included the following provisions:

(a) The Henry J. Neuhaus claim for \$67,987.70 is secured by Debtor's DSL Farms, Inc. 2610 shares common stock transferred January 15th, 1986 and also a security agreement on all of his personal property given on January 1st, 1987. The value of said security exceeds the indebtedness. In the event Henry J. Neuhaus is awarded Debtor's interest in the drying bin in the amount of the appraised valuation thereof, the cash flow chart projections of payments shall abate inversely to the extent of the amount thereof.

(b) As the indebtedness evidenced by the farmland sale contract is not qualified as an allowable claim, no provision for any payments thereon is included in the cash flow chart.

Under this plan, Debtor's brother was to receive his interest in the grain bin and Debtor's father, as noted above, was to receive Debtor's interest in the bin. This, of course, was contingent on the Court finding that Debtor retained his ownership in the bin and that it did not go to the Williams upon default of the executory contract as a fixture upon the farm realty.

Debtor's father and brother entered "Acceptances" of the second plan with the Court. Debtor's parents withdrew their conditional forgiveness of their unsecured claim for room and 6 board. The second plan proposed payment of this debt.

Trustee, the State and the Williams objected to the second plan. In their objection, the Williams argued the second plan effectively puts them into a landlord-tenant relationship with Debtor for the 1987 crop year but failed to fairly compensate them for it. They requested that a reasonable amount of rent be determined and paid pursuant to their need for adequate

2 Objector and State of Iowa reached an apparent agreement at the confirmation hearing on the second plan which should be reflected in any subsequent plan by Debtor.

protection. The Williams further objected to Debtor's reliance on his title to the bin in the plan since its status upon default as realty belonging to the Williams or as personalty belonging to Debtor was not yet determined.

Trustee stated the second plan resolved her differences with the first plan but she objected to its lack of specificity in the amount to be paid to State and to Debtor's brother. She further noted that the plan does not provide for full payment of unsecured claims and so she requested that the second plan be amended to provide for payment to the Trustee of Debtor's disposable income pursuant to 11 U.S.C. section 1225(b)(1)(B). Ultimately, she recommended the plan not be confirmed until several problems were resolved.

After a change of counsel, the Williams filed a Motion for Adequate Protection. Therein the Williams claimed an entitlement to (1) administrative expenses under 11 U.S.C. section 503(b)(1)(A) for the fair rental value of the farm property and (2) adequate protection under 11 U.S.C. sections 362 and 363 for the Williams' losses occasioned by the automatic stay.

A continued confirmation hearing was held November 17, 1987. The State and Debtor stipulated to the treatment of State's claim. Post-trial briefs were filed by Debtor and the Williams. The Williams filed a Request for Payment of Administrative Expense on December 30, 1987.

Confirmation of a Chapter 12 plan of reorganization is governed by 11 U.S.C. section 1225. One of the conditions of confirmation is that the debtor will be able to comply with the plan. 11 U.S.C. section 1225(b)(6). Since the feasibility of Debtor's second plan hinges on the status of the Williams' claims regarding use of the farm property during the 1987 crop year as well as Debtor's claim that the grain bin is personalty, it is on the Williams' objections that the Court will focus its attention.

For the several reasons discussed below, the Court concludes that Debtor's second plan is not confirmable. First, the plan erroneously assumes that the grain bin is personalty (fn.3) which Debtor may remove upon default. The executory contract (fn.4) between the Williams, vendors, and

3 Debtor described the bin as a "trade" fixture of his Schedule B-3. Since Debtor is not a tenant of the property on which the bin was placed, the description is inaccurate. See In re Van Hove, No. 87-01308-F, slip op. at 7 (Bankr. N.D. Iowa January 25, 1988)(see cases cited therein).

4 A threshold question, though perhaps no longer relevant if the contract has been forfeited, is whether the executory contract between the Williams and Debtor has been assumed or rejected. As noted in the facts above, Debtor was ordered on August 3, 1987 to assume or reject the contract by August 17, 1987, and if assumption was indicated, the current default was to be cured or adequate assurance of prompt cure and adequate assurance of future performance was to be provided. The Order further provided that the contract would be deemed rejected if no statement or plan was filed by the date set.

Debtor timely submitted a plan which indicated assumption. However, the default was not cured and the plan--including any assurances of prompt cure or of future performance--was not confirmed. 11 U.S.C. section 365(b)(1). Hence, it appears that the contract was neither assumed nor rejected under the terms of, the Order of August 3, 1987.

The contract was apparently not assumed or rejected by operation of law. While 11 U.S.C. section 365(d) establishes several situations where by elapse of time or by court order an executory contract or unexpired lease of residential real property is deemed rejected, the Court finds no provision which deems this executory contract for the purchase of nonresidential real property in a Chapter 12 case to be rejected by Debtor's action or inaction.

Debtor, vendee, included a specific forfeiture clause. This contract clause addressed treatment of improvements to the realty upon default of the contract (emphasis added):

If Buyers (a) fail to make the payments aforesaid, or any part thereof, as same become due; or (b) fail to pay the taxes or special assessments or charges, or any part thereof, levied upon said property, or assessed against it, by any taxing body before any of such items become delinquent; or (c) fail to keep the property insured; or (d) fail to keep it in reasonable repair as herein required; or (e) fail to perform any of the agreements as herein made or required; then sellers, in addition to any and all other legal and equitable remedies which they may have, at their option, may proceed to forfeit and cancel this contract as provided by law [Chapter 656 Code of Iowa]. Upon completion of such forfeiture, Buyers shall have no right of reclamation or compensation for money paid, or improvements made; but such payments and/or improvements if any shall be retained and kept by Sellers as compensation for the use of said property, and/or as liquidated damages for breach of this contract; and upon completion of such forfeiture, if the Buyers, or any other person or persons shall be in possession of said real estate or any part thereof, such party or parties in possession shall at once peacefully remove therefrom, or failing to do so may be treated as tenants holding over, unlawfully after the expiration of a lease, and may accordingly be ousted and removed as such as provided by law.

The rights of the parties under this executory contract are governed by the same rules of law as between a mortgagee and mortgagor. Junkin v. McLain, 221 Iowa 1084, ___, 265 N.W. 362, 365 (1936); First State Bank of Manchester v. Heims (In re Heims), 65 B.R. 112, 115 (Bankr. N.D. Iowa 1986); see also O'Bryon v. Weatherly, 201 Iowa, 190, ___, 206 N.W. 828, 830-831 (1926). Accordingly, the Court is guided by the several cases in Iowa which consider whether an improvement to mortgaged property is considered a fixture to the realty for security purposes.

The Iowa Supreme Court has established a three-part test for identifying a fixture. A court must consider: (1) whether there has been an actual annexation of the improvement to the realty or something appurtenant to the realty; (2) whether the improvement is applied to the use or purpose for which the related realty is also appropriated; and (3) whether the intention of the party making annexation was to make a permanent accession to the realty. Cornell College v. Crain, 211 Iowa 1343, 1345, 235 N.W. 731, 732 (1931); The Ottumwa Woolen Co. v. Hawley, 44 Iowa 57, 63 (1876). The key part of the test is a determination of the annexor's intent; the first and second elements alone are unsatisfactory and essentially aid in determining the annexor's intent. Cornell College, 211 Iowa at 1345, 235 N.W. at 732; The Ottumwa Woolen Mill Co., 44 Iowa at 63.

Where an item is attached to the real estate only by its weight, it is prima facie personalty and the party asserting that it is a fixture has the burden of proof. However, if the improvement is attached to the land other than by its own weight, even though slightly, the improvement is prima facie realty and the burden is on the one contending that it is personalty. Rahm v. Domayer, 137 Iowa 18, 21, 114 N.W. 546, 547 (1908). Since this bin is affixed to a cement slab which is imbedded, however slightly, into the realty, the Court places the burden of proof that the bin is personalty on the Debtor.

Debtor argues his intent to place the bin on the property as personalty is shown by several factors. These factors include that the bin was used not only for Debtor's storage purposes but also for that of his family's corporate hog operation and that placement on the Williams' property was for everyone's convenience; that one brother helped Debtor purchase the grain bin; and that Debtor's family helped him erect the bin.

The Court finds that these factors do not indicate any intention that the bin was merely personalty placed on the farm. Rather, these factors indicate that the bin was placed on the property for a specific purpose--that of providing drying and a storage facility for Debtor and his family's farming operations. This evidence shows neither an intent that the bin be permanent nor temporary. It at most indicates that Debtor had a present intent to place and use the bin on the farm property. Since Debtor had the burden to prove it was personalty, the Court finds that he has failed to meet that burden of proof and concludes that the grain bin located on the property subject to the executory contract is a fixture not subject to removal by Debtor⁶ upon default. See Des Moines Improvement Co. v. Holland Furnace Co., 204 Iowa 274, 212 N.W. 551 (1927). Accordingly, the feasibility of this plan, which depended in large part on treatment of the bin as personalty, is not shown. ⁵ Even though one of Debtor's brothers claims an interest in the bin, the annexor was Debtor. The treatment of the brother's claim in the bin under the plan does not appear to depend on whether the brother had a secured, unsecured or ownership interest in the bin. Therefore, the Court does not decide herein the exact nature of the brother's interest. See infra p. 13, note 5. The brother's proof of claim labels his interest as ownership and he states therein that his "claim is to establish the right to recovery of property not part of the bankruptcy estate." However, Debtor has not challenged this claim and Debtor's brother has filed an acceptance of his treatment under the second plan.

The Court notes that if it determined the bin was not personalty, Debtor proposed to treat his brother's claim as unsecured and to make annual payments in satisfaction thereof. Employment of this alternative, however, does not render the plan feasible because the amount of the claim is not estimated nor is provision for its payment made in Debtor's cash flow statement. Moreover, the alternative essentially converts the brother's claim from that of joint owner of property seeking partition to that of an unsecured creditor. That issue--the nature of Debtor's brother's interest in the bin--has not been litigated.⁷ If it were determined that Debtor's brother has an ownership interest in the bin, any loss of that interest to the Williams⁸ would not necessarily give rise to a claim by Debtor's brother against Debtor.

⁶ The question of Debtor's brother's interest, if any, in the bin which is contrary to the Williams' interest is not before the Court.

⁷ See p. 11, n. 5.

⁸ See p. 12, n. 6.

Trustee's contention that this plan fails under 11 U.S.C. section 1225(b)(1)(B) also appears to be correct. Trustee has objected to the plan and, accordingly, the Court may not approve it since the plan does not clearly provide that all of Debtor's disposable income received in the next three years (beginning on the date the first payment is due under the plan) will be applied to make payments under the plan.

Finally, Debtor's plan acknowledges that expenses and claims of priority under section 507 are to be paid, but the nature or amount of these are not identified. Accordingly, the Court is unable to determine whether a claim, if any, inuring to

the Williams for use of the farm real estate during the 1987 crop year is recognized. This omission further renders determination of the feasibility, and hence confirmation, of the plan impossible.

ORDER

IT IS HEREBY ORDERED that the Second Amended Plan of Reorganization filed by Douglas A. Neuhaus, Debtor, is hereby denied.

Judgment shall enter accordingly.

SO ORDERED ON THIS 19th DAY OF FEBRUARY, 1988.

William L. Edmonds
Chief Bankruptcy Judge