

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

BURDETTE WEAVER and
MAVIS WEAVER

Bankruptcy No. Y87-00327S

Debtor(s).

Chapter 12

MEMORANDUM OF DECISION AND ORDER RE: MOTION FOR HARDSHIP DISCHARGE

Debtors Burdette and Mavis Weaver seek a hardship discharge pursuant to the terms of 11 U.S.C. § 1228(b). FmHA objects. A hearing was held in Sioux City on November 20, 1990. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(j).

I.

FINDINGS OF FACT

On February 12, 1987, Burdette and Mavis Weaver (WEAVERS) filed for relief under chapter 12 of the Bankruptcy Code. They filed a proposed plan of reorganization on May 26, 1987. The plan provided that unsecured creditors would ratably share in annual distributions of the following amounts: \$11,862.00 on January 31, 1988 and \$12,786.00 on January 31, 1989 and January 31, 1990. The Weavers' plan was confirmed June 26, 1987. The Weavers are current on their payments of secured claims, however they have defaulted on the payments to unsecured creditors. The plan payments for January 31, 1989 and 1990 have not been made.

The Weavers' farming operation consists of swine and crop production. They own 21 sows and 84 hogs. The Weavers produce soybeans and corn. Their most recent planting included 100 acres of soybeans and 125 acres of corn. Burdette Weaver estimates the 1990 soybean yield at 28 bushels per acre and the corn yield at 115-120 bushels per acre.

Both Burdette and Mavis Weaver have off-the-farm employment. Burdette Weaver has been employed as a full time mail carrier in Paullina since September, 1990. His gross annual salary as a mail carrier is \$19,861.92. Prior to obtaining this job, he was employed full time at Wilson Foods in Cherokee, Iowa. Since May, 1990, Mavis Weaver has been employed as a full-time nurse with NMC Home Care in Sioux City. She resides in Sioux City during the work week and returns to Paullina on weekends. Her gross annual salary at NMC Home Care is \$27,040.00.

Burdette Weaver's position as a mail carrier limits the amount of time he can devote to farming. A substantial percentage of the farming operation is conducted by the Weavers' eldest son, Rick. A younger son, Ryan, is a full-time college student; he works weekends on the farm.

The Weavers' plan projected total income of \$158,878.00 in 1988 and 1989. Actual income in 1988 was \$122,410.00; in 1989, it was \$101,909.00. Projected expenses for 1988 totaled \$125,411.00. Actual expenses for 1988 were \$114,957.00. Weavers projected expenses of \$148,790.00 for 1989; actual expenses were \$109,242.00.

Thus in 1988, instead of income exceeding expenses by \$30,467.00, the excess was only \$7,543.00. In 1989, instead of income exceeding expenses by \$7,088.00 as projected, there was a deficit of \$7,333.00.

The shortfalls are largely attributable to problems experienced in the hog producing operation. Weavers projected \$74,727.00 in income from the sale of hogs in 1988 and 1989. Weavers realized actual income from the sale of hogs and feeder pigs of \$35,683.00 in 1988 and \$27,104.00 in 1989. The Weavers blame the diminution of hog production income on weather-related circumstances in 1988 and 1989 and on a pseudo-rabies outbreak in 1990.

The summer of 1988 was unusually hot in Iowa. In June, sows that had farrowed became uncomfortable from the heat. As a result of their discomfort, they rolled from side to side, crushing their own young. Weavers lost half of the newly born animals. A heat spell in September caused the same reaction in the sows; again approximately half of each new litter was lost.

Lack of moisture during the summers of 1988 and 1989 led to increased feed prices. Consequently, Weavers made a business decision to sell much of their existing stock as "feeder pigs." This resulted in a savings in feed costs which would have been incurred had debtors sold them later as "fat hogs." Even considering the savings in feed costs, the anticipated hog production income was substantially reduced. Weavers' loss of livestock affected farm income in another way. They had projected \$7,570.00 in income from cull cows in 1989. Herd losses reduced this figure to zero.

During the spring of 1990, there was an outbreak of pseudorabies in debtors' swine. According to Burdette Weaver, the disease killed about half of the herd. The Weavers unsuccessfully attempted to treat the outbreak by vaccinating their stock. Weavers have decided to liquidate their remaining hogs and sows by the end of 1990. They estimate that it will take approximately one year following liquidation to sufficiently sanitize their hog production facilities to prevent recurrences of the disease.

The 1989 drought severely reduced Weavers' corn yields. Although \$18,419.00 in corn income was expected, only \$8,917.00 was received. This was compensated for, however, by increased income from soybeans. Weavers had projected \$17,521.00 in soybean income for 1989; instead, they earned \$24,939.00. Therefore, despite reduced corn yields, total crop income for 1989 was down only \$2,084.00.

Weavers have been unable to obtain post-petition financing of their farm operation. Weavers' attempts at procuring credit from three separate banks proved unsuccessful. According to Burdette Weaver, the banks' refusals to extend credit were based solely on the Weavers' status as debtors in bankruptcy.

Weavers expect \$56,000.00 in farm income for November/December, 1990. Past due bills and farm and living expenses for the same two-month period are estimated at \$100,359.48. This figure includes the annual plan payment to secured creditor Equitable Life Assurance society in the amount of \$32,899.00. It also includes unpaid attorneys' fees for the bankruptcy in the amount of \$13,000.00 and machine hire expenses for 1988-1990 in the amount of \$23,400.00. There is an unpaid fertilizer bill in the amount of \$9,224.00 for 1989 and 1990.

Weavers project total annual income for 1991 of approximately \$91,000.00. The source of more than half of this income will be derived from the non-farming related salaries of Burdette and Mavis Weaver. The remaining income will come from crop production. Weavers project annual expenses for 1991 in excess Of \$100,000.00. The 1991 plan payment to Equitable is set at about \$33,000.00. Weavers expect to carryover approximately \$45,000.00 in bills to 1991.

II.

Weavers seek a hardship discharge of secured debts pursuant to 11 U.S.C. § 1228(b). Weavers claim they are entitled to such a discharge in light of their decreased hog production and increasing personal and professional expenses. Specifically, Weavers assert that a hardship discharge is warranted since:

1. their failure to complete the payments to unsecured creditors originally required in their confirmed plan is due to circumstances beyond their control;
2. the value of the funds distributed to unsecured creditors under their confirmed chapter 12 plan exceeds the amount the same unsecured creditors would have received in a chapter 7; and
3. modification of their chapter 12 plan is not a practical alternative.

FmHA, which holds a second lien on the Weavers' farm property, objects to the hardship discharge. The existence of Equitable's first lien on the farm property combined with the Weavers' apparent lack of equity in the same property effectively places FmHA in the position of an unsecured creditor. FmHA argues that Weavers' failure to complete their plan payments was due to circumstances within their control and that plan modification is a feasible alternative.

III.

Section 1228(a) of the Bankruptcy Code provides that a debtor who has completed making all payments under a plan of reorganization, other than long-term payments on secured claims, is entitled to receive a discharge. However, a debtor that has not completed making all payments under the plan may nonetheless obtain a "hardship discharge" of unsecured debts under the provisions of § 1228(b). The section provides that:

- b. At any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if--
 1. the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
 2. the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and
 3. modification of the plan under § 1229 of this title is not practicable.

The statutory language of § 1228(b) is identical to the language found in the hardship discharge provision of chapter 13.**(fn.1)** The court has been unable to find any published or unpublished case authority interpreting § 1228(b). There is also a paucity of published case law interpreting § 1328(b). The existing cases interpreting the latter are helpful in the application of § 1228(b).

(Fn.1) Section 1328(b) provides:

- a. Any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if--
 1. the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
 2. the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and
 3. modification of the plan under 1329 of this title is not practicable.

The three subsections of § 1328(b) are to be read in the conjunctive. See In re Dark, 87 B.R. 497, 499 (Bankr. N.D. Ohio 1988); In re Marrero, 7 B.R. 589, 590 (Bankr. D. P.R. 1980); 5 Collier on Bankruptcy, ¶ 1228.01(3) (15th Ed. 1989). Further, the debtor seeking a hardship discharge bears the burden of persuasion regarding compliance with each subsection. See In re Schleppi, 103 B.R. 901, 903 (Bankr. S.D. Ohio 1989) (emphasis supplied). The granting of a hardship discharge is discretionary with the court. See Dark, 87 B.R. at 498. Thus, in order to qualify for a hardship discharge under chapter 12, Weavers must persuade the court that they satisfy each subsection of 1228(b).

Because the Weavers have failed to persuade the court that their failure to make all plan payments was due to circumstances for which they should not justly be held accountable, issues concerning the "best interest of creditors" and plan modification need not be addressed.

It is said that when confronted with a request for a hardship discharge under chapter 13, bankruptcy courts have typically limited its application to catastrophic circumstances. Schleppi, 103 B.R. at 903. A catastrophe denotes a great and sudden disaster. It bears the sense of being outside the control of those whom it hurts. The formulation, however, is no more than another court's effort to come to grips with the language of the statute: the debtor's failure to complete plan payments must be "due to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1228(b)(1). The meaning of these words is that it is not fair that the failure be blamed on the debtor, or it may be stated that the debtor does not deserve the responsibility for failing to complete the plan. It would seem at first blush that the weather, not being within the control of the debtor, would be an obvious cause of failure for which a debtor should not be held accountable. A similar impression could be formed when one considers the effects of a contagious disease upon a herd of livestock.

However, the existence of these dire circumstances and their effects on the debtor cannot be the end of the inquiry. The need to examine the circumstances further is aptly pointed out in the explanation of § 1228 contained in Collier on Bankruptcy, ¶1228.01, p. 1228-7 (15th Ed. 1990):

The first requirement (of section 1228(b)) is that the debtor's failure to comply with the terms of the plan is due to circumstances for which the debtor should not justly be held accountable. This may include failure of the debtor's crop due to natural disaster or loss of livestock due to disease. The likely focus of the court's inquiry will be on whether the circumstances could have been foreseen by the debtor or could have been avoided by the debtor. For instance, if the loss of the crop could have been avoided by obtaining crop insurance or the loss of the livestock prevented by following proper veterinary practices, then the debtor probably should be held accountable for the debtor's failure to comply with the plan.

Much of Weavers' post-confirmation financial difficulty arises in the livestock operation. Large numbers of pigs were crushed to death by sows stressed by the heat. While the heat was not caused by Weavers, it does not relieve them from the responsibility of proving that the effects of the heat on the

animals could not have been foreseen or mitigated. Many questions arise. Could anything have been done by Weavers to reduce the stress of the heat on the sows? Could the pigs have been protected by removal from the sows during the extreme heat of the day? If the effects of the heat could not be foreseen in June, why were they not foreseen in September when the problem occurred the second time with equally devastating results?

Questions of foreseeability and mitigation are more bothersome with regard to the pseudo-rabies. How did the disease get started and how is it transmitted within the herd? Does it relate to cleanliness of the facility and Weavers' farming methods? Is there a preventative?

The court has no independent expertise in livestock husbandry. It is not required to be an expert. It was Weavers' responsibility or burden to educate the court as to the nature of the events which caused their inability to fulfill their payment obligations under the plan. It was their burden to prove that they had insufficient control to prevent or to mitigate the damage to the herd. Mere proof of heat and of disease and their effects on the livestock are, without more, insufficient.

Weavers also allege that the drought of 1989 reduced their corn crop and thus their income. However, in their own exhibit 5 they show as an expense premiums for crop insurance for 1989 and 1990. Did the insurance include coverage for drought or is that a separate policy which the debtors did not have? If it did cover drought was their compensation for the loss, and if not, why not? The court does not know the answers to any of these questions. The answers may be obvious to Weavers and their counsel, but they are not apparent to the court.

This court will not say that drought or extreme heat or disease are circumstances irrelevant to a debtor's inability to complete his plan. They most certainly are. The simple existence of such circumstances standing alone, however, is insufficient to show satisfaction of § 1228(b)(1). Consequently, Weavers bear some burden to show that they could neither prevent nor moderate the effects of events which in and of themselves may be uncontrollable.

IV.

CONCLUSIONS OF LAW

The court concludes that Burdette and Mavis Weaver have failed to prove pursuant to U.S.C. § 1228 (b)(1) that their failure to complete their plan was due to circumstances for which they should not justly be held accountable. As a result, the Weavers' Motion for Hardship Discharge should be denied.

ORDER

IT IS ORDERED that Weavers' Motion for a Hardship Discharge is denied.

SO ORDERED ON THIS 7th DAY OF DECEMBER, 1990.

William L. Edmonds
Chief Bankruptcy Judge