In the United States Bankruptcy Court

for the Northern District of Iowa

CARL E. PRELIP — Bankruptcy No. X88-00918F
Debtor(s). — Chapter 12

ORDER RE: MOTIONS TO DISMISS CASE

Three creditors have moved to dismiss this chapter 12 case. They are First State Bank, Belmond (BANK), Federal Land Bank of Omaha (FLB), and United States of America on behalf of the Internal Revenue Service (IRS). The motions are resisted by Ronald Prelip, the executor of the estate of the late Carl E. Prelip. Hearing on the motions was held on May 15, 1991 in Fort Dodge, Iowa. The hearing was held simultaneously with a hearing on the executor's motion for hardship discharge. At the conclusion of the evidence, the court denied the motion for hardship discharge and took under submission the motions to dismiss. The court now issues its ruling regarding dismissal. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

FINDINGS OF FACT

Carl E. Prelip filed his chapter 12 case in 1988. He obtained confirmation of a plan of reorganization on January 25, 1989. Confirmation began the three-year plan period. The plan classified claims against the debtor into six classes. The claim of the class 5 creditor, Willow Tree Investments, Inc., has been satisfied. The remaining classes of creditors treated by the plan were: class 1, Wright County, Iowa; class 2, IRS; class 3, FLB; class 4, Bank; and class 6, unsecured claims. The class 6 claimants were to receive a pro rata share of $2,350.00 to be paid by debtor to the case trustee during the three-year life of the plan. This payment is as yet unmade; the deadline for payment is December 31, 1991.

The late debtor made 1989 plan payments to Wright County, FLB, and Bank. FLB has also received its 1990 payment. Certain other payments are delinquent. They include the 1990 payment to Wright County in the approximate amount of $6,500.00. A similar payment will also be due sometime during 1991, but it is difficult to tell from the plan language exactly when during the year the payment is to be made. The 1991 payment to FLB is delinquent; with interest and estimated attorneys' fees and costs, the amount claimed by FLB for the 1991 payment is approximately $35,000.00. Debtor failed to make the November, 1990 payment to Bank in the amount of $17,000.00. There would now be due on that payment, the approximate amount of $17,600.00 including interest. A $17,000.00 payment would be due to the Bank also in November, 1991. Last, the IRS has not yet been paid the $5,287.00 payment provided for by the plan.

Carl E. Prelip died on August 18, 1990. He was survived by two sons, Ronald and Richard, to whom he left his entire estate. Richard has disclaimed any interest in the estate, leaving Ronald as the sole beneficiary of Carl's will. Ronald is the executor of the probate estate. Ronald lived with his father for the last three years of Carl's life. He harvested the crop in the fall of 1990 and had helped his father on the farm since he was 15 years old. Ronald has a full-time job as a painter with Iowa Mold and Tooling in Garner. He has worked there 13 years. His annual net pay is $11,960.00. Ronald is divorced and has a child support obligation of $1,800.00 a year.

The chapter 12 estate presently includes 240 acres of land, a line of machinery and equipment, household goods, two motor vehicles, cash in the amount of $24,686.00, and grain inventory. The grain inventory is 13,000 to 14,000 bushels of corn having an estimated value of $2.25 to $2.30 per bushel. Giving the nonmovant the benefit of the higher price and inventory amount, the court finds that the inventory on hand has an approximate value of $32,200.00. These assets are available to cure the plan payment delinquencies, but payment has been delayed by Carl Prelip's death.

Ronald has prepared the farm ground for 1991 planting but has not planted a crop because of the present uncertainties of the bankruptcy estate and the probate proceeding. He does not know whether he, as executor, will be permitted to continue with the administration of the chapter 12 estate. He has already invested approximately $11,000.00 for 1991 crop costs. He intends to plant, if allowed, 119.5 acres of corn and 95 acres of beans. His estimated income from the corn would be 130 bushels to the acre at $2.30 per bushel. This would provide in round numbers approximately $36,000.00 in gross corn income. The estimated yield for the 95 bean acres would be 30 bushels per acre at an estimated sale price of $5.50 per bushel or approximately $6,000.00 in gross income from the bean crop. There will also be some undetermined amount of government program income for the crop year. In addition to the delinquent plan payments, there is delinquent the first half real estate taxes on the farm. These amount to approximately $3,250.00. Ronald has not only helped his father with the farming activities, but lent money to his father for the purposes of farming after confirmation. The loans amounted to slightly more than $12,000.00. Carl's payments under the plan have not come without difficulty. The evidence indicates that absent the borrowing from his son, Carl could not have made the payments as he did. It is questionable whether the income off of the farm ground would be sufficient each year to pay all creditors under the plan. However, Ronald has his own assets which he is willing to invest in support of the plan's consummation. These assets include $24,000.00 in cash, $35,000.00 in a 401-K plan with Ronald's employer, and a life insurance policy with a $5,000.00 loan value.

DISCUSSION

The moving creditors ask that the case be dismissed because of debtor's delinquent payments under the plan. Bank also argues that because of debtor's death there will be continuing loss to the estate rather than consummation of the plan.

In considering creditors' motions, the court must apply Fed.R.Bankr.P. 1016 which in relevant part states:

> Death . . . of the debtor shall not abate a liquidation case under chapter 7 of the Code. . . . If a reorganization or individual's debt adjustment case is pending under chapter 11 or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or insanity had not occurred.

This rule is applicable in chapter 12 cases. Section 305(b) of the Bankruptcy Judge's, United States Trustees, and Family Farmer Bankruptcy Act of 1986.

The 1983 advisory committee note to the rule makes comment that in chapter 11 or chapter 13 cases it is more likely that the case will be dismissed. This may well be so because of the dependence upon the debtor for the income necessary to propose, confirm or consummate a plan. This same likelihood would therefore exist under a chapter 12, especially in the case of a single debtor. However, dismissal upon the death of the debtor is not an absolute requirement. The court may permit further administration if such is possible and in the best interest of the parties.

The creditors, by their introduction of evidence and argument, contend that further administration is not possible because the estate cannot generate sufficient income to make all of the plan payments. It is true that performance of the confirmed plan in this case has been difficult. However, this court does not read Rule 1016 as requiring a co-debtor or executor of a deceased debtor to prove to an absolute certainty that a plan can be confirmed, or that a confirmed plan is still feasible. The proponent of further administration must show that further administration is possible and in the best interest of the parties. The court concludes that the proponent of further administration has met that burden.

There are delinquent payments under the plan. These include in approximate amounts the following:

Class	Creditor	Due Date	Amount
1	Wright County	1990	$ 6,512
2	IRS	1989	5,387
3	FLB	1-1-91	35,000
4	Bank, Belmond	11-90	17,595
		Total	$64,494

There is also delinquent $3,250.00 in current real estate taxes; a like amount will be due in the fall of 1991. Also, the plan requires 1991 payments to class 1 creditor Wright County in the amount of $6,512.00, a $17,000.00 payment to Bank and a payment to the trustee on behalf of unsecured creditors in the amount of $2,350.00. The estate will be required to pay the trustee's fee on these payments. The trustee's fee, at five or ten per cent, would be calculated on approximately $90,000.00 in payments to impaired creditors. It may well be difficult for the estate to satisfy all of these payments. However, the sole beneficiary of the probate estate, Ronald Prelip, wishes to make the attempt. This would benefit the estate in that if all payments are brought current by December 31, 1991, the estate would obtain a discharge of the balance of unsecured debt. Further, if all payments are brought current by the end of the year, the remaining creditors would include only FLB and Bank. There is evidence that the income from the farm ground could be sufficient each year to support the debt of those two creditors. If the estate is able to make all payments, the unsecured creditors would receive their pro rata distribution of $2,350.00. If the case is dismissed, it is unlikely that unsecured creditors would receive anything. If plan payments are made, several creditors would receive the benefits of their secured claims without the necessity of foreclosure. The court, therefore, concludes that continuation of the bankruptcy proceeding would be beneficial not only to the estate of Carl Prelip but also to creditors.

The court need not involve itself in an analysis of whether consummation of the plan is a certainty or whether the plan is still feasible. The court believes the Carl Prelip estate should have the opportunity to consummate the plan by curing defaults and making future payments. Monies on hand could be used to bring current the delinquent plan payments. Ronald Prelip is willing to invest his own money in the case. The line of farm equipment still exists, and the farm ground is available and ready for planting. Further administration is "possible." That is the test, not whether one can predict with any certainty future failure or success. Dismissal of the case at this juncture could more than likely doom any possibility of Ronald Prelip keeping anything as a beneficiary of the estate and would likely lead to no distribution to unsecured creditors.

If Ronald Prelip, as executor, is unable to make the plan payments, a motion to dismiss could still be granted. If payments are made, then the creditors have not been damaged.

Ronald Prelip, as executor of the estate of Carl Prelip, has asked to be appointed as trustee in this bankruptcy case. The court can find little case authority for the appropriate procedural action when a debtor dies during the

administration of a chapter 12 case, and the case continues under administration. Fed.R.Civ.P. 25 provides for substitution of the appropriate person upon death of a party in a civil action. This rule is made applicable to adversary proceedings pursuant to Fed.R.Bankr.P. 7025. In an adversary proceeding, this rule is subject to the limitations of Fed.R.Bankr.P. 2012. The latter permits substitution for a trustee dying during administration. However, Carl Prelip, at the time of his death, was not a trustee. The trustee in the case is Carol Dunbar. However, as normally is the case in chapter 12, the case trustee does not operate the business or possess the assets upon confirmation. These are powers of the debtor. In a chapter 12 case, the debtor remains in possession of property of the estate until the case is closed. 11 U.S.C. § 1207(a)(1).

Fed.R.Bankr.P. 9014 provides that Rule 7025 applies in contested matters. However, the case is neither a contested matter proceeding nor an adversary proceeding. There is little authority as to whether the appropriate action in this case is to substitute the probate estate as the debtor; to substitute executor Ronald Prelip, as debtor-in-possession; or to appoint Ronald Prelip, executor, as trustee. Ronald Prelip has asked to be appointed trustee. Because a case trustee already exists, the appointment of Ronald Prelip as trustee does not appear to be the appropriate response to Carl Prelip's death. Moreover, because the case is to continue as though no death occurred, it seems unnecessary to substitute the Carl Prelip estate as the named debtor. The most appropriate action, therefore, seems to be the appointment of executor Ronald Prelip to the position of debtor-in-possession. This will give him the powers of a normal debtorin-possession until the case is closed or dismissed.

The court has considered FLB's argument that permitting any kind of substitution would force upon the creditors a "debtor" for whom they did not bargain. The court considers this argument without merit; if it were to prevail, it would render Rule 1016 meaningless.

Having considered the evidence and the arguments of counsel, this court finds and concludes that further administration in this case is possible and in the best interest of the parties.

ORDER

IT IS ORDERED that the motions to dismiss this chapter 12 case are denied. The case may proceed and be concluded as though the death of Carl Prelip had not occurred. Ronald Prelip, as executor of the estate of Carl E. Prelip, is substituted as debtor-in-possession. Judgment shall enter accordingly.

SO ORDERED ON THIS 20th DAY OF MAY, 1991.

William L. Edmonds
Chief Bankruptcy Judge