In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

MERLYN J. FELL and
BONNIE L. FELL
Debtor(s).

Bankruptcy No. X88-00772S

Chapter 12

ORDER RE: DEBTORS' FIFTH AMENDED PLAN and CREDITOR'S MOTION TO DISMISS

Debtors Merlyn and Bonnie Fell seek confirmation of their Fifth Amended Plan of Reorganization. The State Bank of Everly objects to confirmation and moves to dismiss. A hearing was held May 13, 1992 in Sioux City, Iowa. For the reasons stated hereafter, the court denies confirmation.

Merlyn and Bonnie Fell (DEBTORS or FELLS) filed their joint voluntary petition under chapter 12 in 1988. They proposed a plan in January, 1989, which was confirmed. A post- confirmation amendment was approved in June, 1990. Debtors defaulted in their plan payments to the State Bank of Everly (BANK), and Bank moved to dismiss. The court provisionally denied the motion and permitted debtors to seek modification of their plan. Debtors proposed an amended plan in January, 1992. On March 18, 1992, the court entered an order denying confirmation but permitting the debtors a further opportunity to amend. Debtors have filed a fifth amended plan to which the Bank has objected. Bank's primary objection is that Fells will not be able to make all payments under the plan, or in bankruptcy jargon, Bank contends that the plan is not "feasible." Plan feasibility is a confirmation requirement. 11 U.S.C. § 1225(a) (6). Bank also contends that the plan was not filed in good faith and that the plan does not provide for full payment of Bank's secured claim and does not adequately protect it during the course of the proposed 20-year payout. Because the court finds that the plan is not feasible, it does not reach the latter issues.

I.

On the day of the confirmation hearing, Fells were indebted to Bank in the amount of $290,012.30 including principal and accrued interest. Debtors concede that Bank, as the holder of a fully secured claim, is entitled to an allowance for legal fees and costs under 11 U.S.C. § 506(b). Fells estimate these costs at $3,500.00; Bank estimates them at $4,200.00. If the plan were to be confirmed, the determination of the allowance would be left to a separate proceeding. For purposes of a confirmation decision, the court estimates them at $4,200.00, finding Bank's estimate to be more reliable. Thus, Bank's total claim at the time of the hearing was $294,212.30.

In the amended plan, Fells propose to pay Bank $30,000.00 within 10 days of confirmation. The balance of the claim would be paid over 20 years at 11 per cent interest. Debtors would make annual payments on March 1st of each year, beginning in 1993. Fells estimate the amount of each annual payment at $32,887.60. However, that figure is based on Fells' estimate of Bank's claim which did not include interest to the date of the confirmation hearing and which included only $3,500.00 for legal costs. The court calculates the annual payments at $33,178.64.

Fells would obtain money for the immediate $30,000.00 payment by borrowing from Morris Fell, Merlyn Fell's uncle. Morris Fell is willing and able to make the loan. The loan would be repayable on Morris Fell's demand, anytime after March 2, 1995. Interest, at the rate of eight per cent per annum would be payable on or before March 2 of each year, after the payment to Bank. Interest due on March 2, 1993 would be approximately $1,800.00.

II.

To support their contention that they will be able to make plan payments, Fells have submitted a 15-month cash flow covering the period of January 1, 1992 through the end of March, 1993, the month of the first annual payment to Bank. In the cash flow, Fells project income of $177,746.00. The income comes from the following sources:

Hog sales	$ 26,695.00
Cattle sales	--0--
Corn sales	67,398.00
Bean sales	51,228.00
Government programs	18,825.00
Off-farm income	13,600.00
Miscellaneous	--0--
Total income	$177,746.00

Merlyn Fell's trial testimony indicates several necessary adjustments to these income figures. Thus far in 1992, Fells have received $19,680.00 in hog sales proceeds. One hundred swine remain on hand, and Merlyn Fell expects these will be sold by July at market weights of 240 pounds and a sales price of 45 cents per pound. The additional hog sales income is estimated at $10,800.00. There would be no further hog purchases or sales for the remainder of the 15-month period. Total hog sales income for the period would be $30,480.00.

In February, 1992, debtors received $8,900.00 from sales of 1991 corn. For 1992, they have planted 195 acres of corn. Merlyn Fell projects a yield of 125 bushels per acre, the average yield recorded for the farmland by the Agricultural Stabilization and Conservation Service (ASCS). Fell projects a sales price of $2.40 per bushel. Fell's estimated price per bushel is arrived at by the court by dividing dollar corn sales of 1992 crop by the projected total bushels. Sales of 1992 corn are shown on the cash flow in December, 1992 and February, 1993. These sales total $58,498.00. The price-per-bushel calculation is as follows: $58,498 divided by 24,375 bushels equals $2.40.

Based on Fell's testimony, the court cannot find that 125 bushels per acre is the likely yield for the 1992 corn crop. Fells have had four corn crops since filing bankruptcy. In 1991, Fells harvested only 73 bushels to the acre because of weather problems. Fell thought he was close to the ASCS average in 1990, but he was unable to give any firm and reliable information on yield. He also did not recall his 1989 yields. On cross examination by Bank's counsel, Fell testified that unless he might have fed some corn to his livestock, his 1988 corn yield was approximately the 100 bushels per acre shown on his Third Amended Plan. Although predictions of future crop yields do not have to be certain, a farmer's projections should at least be based on known history with due consideration for any changes in circumstances. Fell's testimony was inadequate to support a finding that a 125-bushel per acre yield is likely. The best evidence of the likely 1992 corn yield is debtors' experience with their 1988 crop, and even that evidence was somewhat uncertain. The court finds that a reasonable expected yield for debtors' 1992 corn crop is 100 bushels per acre. Debtors' projected price of $2.40 per bushel is reasonable and will be used to determine corn income. The yield for the 1992 corn crop will be estimated at 100 bushels per acre for 195 acres at a value of $2.40 per bushel. This equals $46,800.00. When added to sales of 1991 crop, the total corn income for the 15-month period is $55,700.00.

Debtors recently sold the last of their 1991 soybean inventory. They received $13,100.00 net of sales costs. Fells have planted 150 acres of beans in 1992 and expect a yield of 42 bushels to the acre. Of the total yield, 500 bushels have been sold in advance at a price of $5.92 per bushel. From the debtors' sales of 1992 beans as shown on the cash flow, the court estimates Fells' anticipated price of 1992 beans at $5.77 per bushel. This figure will be used by the court for calculating bean income. Again, however, the court cannot accept debtors' projections as to yields bccause of a lack of supporting evidence. The bean yield in 1991 was poor because of bad weather. Merlyn Fell gave no evidence on numerical yields for 1990 and 1989, other than to say he thought he was close to the county average in 1990. On cross examination, Merlyn Fell agreed that his 1988 yield was shown on his Third Amended Plan at 30 bushels per acre. That figure will be used by the court. At 30 bushels per acre for 150 acres, the 1992 bean crop is projected at 4,500 bushels.

Fells will receive $2,960.00 for the 500-bushel sale at $5.92 per bushel. The remaining 4,000 bushels will bring an estimated $23,080.00. Total 1992 beans sales will be an estimated $26,040.00. Including the May sale of beans for $13,100.00, total beans sales for the 15-month period is estimated at $39,140.00.

Because Fells' 1991 crop disaster payment from the government was $1,835.00 less than expected, government program payments for the period will be reduced by that amount. The total income from this source will be projected at $16,990.00.

Debtors will have off-farm income of $13,600.00 for the period. Fells will also earn $4,312.00 during the 15 months from hay sales.

Debtors have failed to show loans from the Farmers State Bank as income. They have shown the repayment of such loans in the expense and loan repayment portions of their cash flow. This method of treating the loans distorts the debtors' projections. Assuming the debtors are using the loan proceeds to pay expenses, debtors' projection has the effect of increasing the amount of xpenses by the amount of the loan repayments. To correct this, the court has added as an income item loan proceeds received and expected to be received by the debtors during the period. These proceeds are shown as advances on Exhibits F and G and through the testimony of Wayne Simington, President of Farmers Savings Bank. These advances total $5,950.00. In considering advances, the court does not include the proposed loan from Morris Fell.

The court's summary of findings for the debtors' projected income is shown as follows:

Hog sales	$ 30,480.00
Corn sales	55,700.00
Bean sales	39,140.00
Government programs	16,990.00
Off-farm income	13,600.00
Hay sales	4,312.00
Bank loans	5,950.00
Total income	$166,172.00

III.

Bank disputes the reasonableness of debtors' expense and loan payment projections. Debtors' projections for expenses and loan repayments total $141,960.00. Bank contends that crop-related expenses are underestimated. Challenged items include expenses for seed, fertilizer, herbicide, repairs, labor, fuel, machines and utilities. Bank's expert estimates these at a total of $36,815.00; debtors estimate them at $31,350.00, a difference of $5,465.00. Nearly 70 per cent of this difference relates to the estimates for fertilizer. Fell says he intends to use a manure inventory to help cut fertilizer costs. Bank's expert did not consider this. I find this a reasonable explanation for the $3,000.00 difference in fertilizer expense estimates. Despite the expert's testimony as to other differences, the court will rely on debtors' figures with one exception: $750.00 will be added to feed costs to account for protein supplement purchases in May and June.

A comment is necessary regarding loan repayments and interest payments. On their cash flow, debtors show these expenditures on the initial three lines of the expense portion of the cash flow; they are labeled "Loan", "Payment", and "Interest." The three categories total $30,510.00 for the period. Debtors' projections do not square with actual repayments made for January through May 13, and they do not fully account for operating loan repayments and hog loan repayments due prior to March, 1993. From the notes (Exhibits C, D, E, F and G) and the Simington testimony, the court finds that the following loan repayments took place during January through May 13, 1992:

March	Note # 4837	$3,000.00
March	Note # 4412	2,000.00
April	Note # 4837	1,000.00
April	Note # 4412	398.47
May	Note # 4837	600.00
Total repayments		$6,998.47

From the same exhibits and from the testimony of Simington and Merlyn Fell, the court finds that the following repayments will take place during the remainder of the 15-month period[(1)]:

May	Note # 4412	$14,525.55
June 30	Note # 5100	1,428.43
June 30	Note # 4837	271.21
June 30	Note # 5035	2,450.43
Dec. 15	Note # 5346	4,587.72
Total repayments		$23,263.34

Total repayments for the period are calculated to be $30,261.81. This figure is only $248.19 from debtors' estimates. Even this small difference may disappear depending on the date debtors pay off the hog loans. Therefore, the court will use debtors' total figure for loan repayment.

IV.

Debtors' expenses and loan repayments for the period total $142,710.00. Total income for the period is $166,172.00. The difference, $23,462.00, is available to make the March, 1993 payment to Bank. The shortage in funds necessary to make the payment is $9,716.64. This figure does not include debtors' obligation to make an interest payment to Morris Fell in March, 1993. If the uncle's loan to the debtors were made on June 1, 1992, and an interest payment were made March 2, 1993, the interest payment would be approximately $1,800.00. Debtors' shortage of funds is, therefore, more than $11,000.00. This figure does not take into account debtors' obligation to pay their lawyer any allowed fees. In their plan, debtors estimate their legal fees at $3,000.00 but agree to pay only as cash flow allows. Attorney Poulson has apparently agreed to such treatment. Therefore, the obligation to pay the fees will not be considered as a further detriment to the viability of the plan.

V.

It is the debtors' burden to show they will be able to make all payments under the plan. 11 U.S.C. § 1225(a) (6). In considering the feasibility of the proposed plan, the court must "determine whether it offers a reasonable prospect of success and is workable." Prudential Ins. Co. of America v. Monnier (In re Monnier Bros.), 755 F.2d 1336, 1341 (8th Cir. 1985) (citing United Properties, Inc. v. Emporium Department Stores, Inc., 379 F.2d 55, 64 (8th cir. 1967). The plan proponents are not required to show that the success of the plan is guaranteed. Monnier Bros., 755 F.2d at 1341. "The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts." Clarkson v. Cooke Sales and Service Co. (In re Clarkson), 767 F.2d 417, 420 (8th Cir. 1985) (quoting In re Bergman, 585 F.2d 1171, 1179 (2d Cir. 1978).

The Circuit Court has recognized that predicting farm income and expenses is not an exact science. Monnier Bros., 755 F.2d at 1341. But it also has stated that predictions made in support of feasibility must be based on objective facts. Clarkson, 767 F.2d at 420.

Debtors' proof of their ability to meet their crop income projections was inadequate. As a result, the court cannot find that the proposed plan is feasible. Merlyn Fell testified as to the ASCS average yields for corn and beans. He predicts he will achieve those averages. He also says that the projections are based on his experience in farming the ground, that the projections are realistic and that he can meet them. Yet there is no evidence that he met them in 1988, 1989 or 1991. For 1990, he imagines he was close to the county averages. Fell's inability to recall or to provide records as to his historical yields undermines his general testimony regarding his ability to achieve the projected yields.

The court has considered whether on the date of the confirmation hearing, the debtors had sufficient crop inventory to make up the difference between the debtors' 1992 crop projections and the court's findings. This consideration is addressed because on their exhibit 2, debtors show $30,400.00 in grain inventory as of April 21, 1992. Merlyn Fell testified that he had sold his 1991 beans on May 12. Gross proceeds of the sale were $13,529.00. Debtors' cash flow projects sales of crop in November and December, 1992 and in February, 1993. These sales, however, involve 1992 crops. If debtors had $30,400.00 in crops on hand in April and sold crops for $13,529.00 in May, do the debtors have remaining inventory worth $16,871.00? If so, the sales of such inventory would provide sufficient funds to make the debtors' proposal feasible. But the remaining inventory does not necessarily exist. Debtors may have overestimated the value shown on exhibit 2. The amount of crop may have been underestimated. Merlyn Fell's testimony provides the strongest indication of whether debtors still have crops on hand. Bank's counsel questioned Fell regarding the debtors' ability to make up the negative cash flow months shown on their cash flow for June through September. Fell testified that he did not have inventory of grain or livestock to make up the deficits for those months. Thus, despite the possible implications of debtors' exhibit 2, there is no firm evidence that the debtors hold crop inventory which would make their plan feasible.

Based on the evidence, the court is unable to find that Fells will achieve the projected crop income. Absent the achievement of the projected figures, the plan is not feasible. Accordingly, the plan does not satisfy the requirements of 11 U.S.C. § 1225(a)(6).

VI.

Bank has moved to dismiss the case on the ground that there has been a material default in the performance of the plan. 11 U.S.C. § 1208(c)(6). There has been such a default. Moreover, the court will not grant debtors a further opportunity to obtain confirmation of an amended plan. The court is concerned, however, that absent default in paying Bank, the debtors might have been entitled to a discharge in this case. This court does not know whether debtors made all payments to the trustee which were required under the confirmed plan. It may be that the only default was to the Bank and that all other payments have been made to the trustee as required. The clerk shall set an expedited hearing so the court may determine whether debtors might otherwise be entitled to a discharge. The hearing shall be held by telephone with notice to counsel for the debtors and the Bank and with notice to the U. S. Trustee and the case trustee. The court will determine at that hearing what further hearings or action, if any, may be necessary.

ORDER

IT IS ORDERED that confirmation of the debtors' Fifth Amended Plan of Reorganization is denied. The clerk shall set an expedited preliminary hearing by telephone so the court may further consider the motion to dismiss filed by the State Bank of Everly. Notice of the hearing shall be provided to counsel for the debtors, counsel for the Bank, the U. S. Trustee and the case trustee. The case trustee shall be present at the hearing.

SO ORDERED ON THIS 21st DAY OF MAY, 1992.

William L. Edmonds
Bankruptcy Judge

1. For payments on June 30 or later, the court has calculated interest on each note from the date of the advance of funds to repayment. The interest calculation is based on the interest rate shown on each note and a 365-day year. The total interest calculated by the court is $589.89. The calculations will not be shown.