In the United States Bankruptcy Court

for the Northern District of Iowa

DENMEN KENT HENNINGS and GWENDOLYN PEARL HENNINGS
Debtor(s).

Bankruptcy No. 92-11755LC

Chapter 11

ORDER RE: PLAN CONFIRMATION

This matter came before the Court on August 20, 1993 for hearing on confirmation of Debtors' Plan and objections thereto. Debtors Denman and Gwendolyn Hennings were present with their attorney Dan Childers. Creditor Tama-Benton Cooperative Co. (the "Coop") was represented by attorney Morris Eckhart. Attorney Linda Kirsch appeared for Norwest Bank. The Court took the matter under advisement after the presentation of evidence.

STATEMENT OF THE CASE

Debtors filed their petition for Chapter 11 relief on September 24, 1992. They had operated a grain and storage farm and custom feedlot until mid-1992 when the business failed. The Plan now being considered for confirmation was filed by Debtors on August 16, 1993 entitled Debtors' Second Amended and Substituted Plan of Reorganization. Debtors filed a further amendment to this Plan on the date of the hearing. The plan is a liquidating plan which calls for the sale of all Debtors' non-exempt property and payment of the proceeds to the creditors. Earlier versions of the Plan filed by Debtors on January 22, 1993 and May 3, 1993 were also liquidating plans. No creditor has filed a competing plan of reorganization. Debtors filed a Chapter 12 petition in 1987 which resulted in a confirmed plan. In the 1987 Plan, Norwest was a Creditor though it does not appear that the Coop was a Creditor under that Plan.

The Coop objects to specific provisions of the plan. Its objection to 4.06(d) is now moot because Debtors' August 20 amendment deleted that paragraph. Its other objections are:

1) The Coop's interest in machinery, crops and accounts receivable is senior to Norwest's but the Plan treats Norwest's interest as having a higher priority.

2) Debtors should have attempted to reorganize rather than liquidate.

3) The Plan is not confirmable under 1129(a)(3), requiring that it be proposed in good faith, 1129(b)(1), requiring that it be fair and equitable and not unfairly discriminate, and 1129(b)(2)(B), requiring that no junior claims be paid if unsecured claims are not paid in full.

James Hagge, General Manager of the Coop, testified that the Plan does not provide significant payment to the Coop. He testified that Debtors' Coop stock is valued at approximately $25,468 and is nontransferable. Paragraph 4.06(b) of the Plan provides for surrender of the stock and values it at $35,000. Mr. Hagge also stated that the $17,000 Evergreen Elevator check, to be tendered under 4.06(c), has already been turned over to the Coop. He testified that a debt of over $730,000 still remains. As to treatment of the Coop's claim, to the extent it is undersecured, Mr. Hagge testified that stock in Farm Service, Inc. which Debtors value at $16,750 in 4.10(a) is essentially valueless because it is restricted from transfer until Debtor Denman Hennings reaches age 65. Mr. Hagge testified that he considers it unreasonable for Debtors to expect that the Coop would accept a plan which pays only a few hundred dollars on a debt of almost $1 million.

Debtors respond that they are liquidating all assets and there is nothing else they can provide to the Coop. They argue

that the Coop's only objection is that it is dissatisfied with the amount it will receive under the Plan but that it has no valid legal objections to confirmation. Debtors assert that no junior interests are receiving distribution under the plan. They also argue that the Coop is getting more than it would under a Chapter 7 liquidation.

CONCLUSION

This is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(L).

Chapter 11 plans providing for liquidation of a debtor's estate are clearly contemplated by the Bankruptcy Code. In re Jartran, Inc., 886 F.2d 859, 868 (7th Cir. 1989). Liquidating plans are generally appropriate in the event that a Chapter 11 reorganization fails, as an alternative to converting to Chapter 7. Id. at 866. As the Court in Jartran held: "bringing in new parties and attorneys in the middle or at the end of the reorganization process to begin a liquidation in a chapter 7 proceeding is generally not the most practical, efficient, expeditious, or most effective manner of liquidating estates." Id. at 868, citing Anderson and Wright, Liquidating Plans of Reorganization, 56 Am. Bankr. L.J. 29, 47 (1982).

One court has noted that "liquidating plans are normally appropriate only if an initial true reorganization plan fails and it is desirable for some reason to sell in chapter 11 rather than by a liquidating chapter 7 trustee." In re Marsh Fairway Corp., 148 B.R. 721, 723 n.2 (Bankr. D.N.H. 1992) (citing Jartran). Debtors previously filed a Chapter 12 plan of reorganization. Thus, this Chapter 11 case does follow an apparently failed plan for reorganization and is consistent with the philosophy previously stated.

Liquidating plans allow the debtor to liquidate property in a reasonable manner. In re Hoosier Hi-Reach, Inc., 64 B.R. 34, 38 (Bankr. S.D. Ind. 1986). A liquidating plan can satisfy the 1129(a)(11) requirement that confirmation is not likely to be followed by liquidation. In re Coastal Equities, Inc., 33 B.R. 898, 907 n.10 (Bankr. S.D. Cal. 1983) (noting that 1129(a)(11) is meant to prevent confirmation of visionary schemes ultimately followed by forced liquidation). Distribution of property to creditors under a liquidating plan of reorganization is not per se improper under Chapter 11. In re Sandy Ridge Devel. Corp., 881 F.2d 1346, 1352 (5th Cir. 1989).

Because the Coop, an impaired creditor, has not accepted Debtors' liquidating plan as required by 1129(a)(8) for confirmation, Debtors are attempting a "cram down" under 1129(b). That section states, in pertinent part, as follows:

> (b)(1) . . . [I]f all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.
>
> (2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
>
> A. (A) With respect to a class of secured claims, the plan provides --
>
> . . .
>
> iii. (iii) for the realization by such holders of the indubitable equivalent of such claims.
>
> B. (B) With respect to a class of unsecured claims--
>
> i. (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
>
> ii. (ii) the holder of any claim or interest that is junior to the claims of such class will not receive

or retain under the plan on account of such junior claim or interest any property.

As to the Coop's secured claim, receipt of its collateral would constitute realization of the "indubitable equivalent of [its] claims" under 1129(b)(2)(A)(iii). This satisfies the "fair and equitable" requirement as to secured creditors. Sandy Ridge, 881 F.2d at 1350. As the plan provides that a secured creditor will receive the collateral itself, "and since common sense tells us that property is the indubitable equivalent of itself," the plan satisfies the "indubitable equivalent" requirement. Id. This is true even if the property cannot be readily converted into cash. Id.; see also In re Western Real Estate Fund, Inc., 109 B.R. 455, 464 (Bankr. W.D. Okla. 1990) (following Sandy Ridge).

Debtors' Plan provides for surrender of their Coop stock and accrued dividends in 4.06(b). Paragraph 4.06(c) provides for the surrender of a check representing 1991 crop proceeds. Debtors state in 4.06 that this constitutes the extent that the Coop's claim is secured. As such, the surrender of this collateral satisfies the indubitable equivalent requirement of 1129(b)(2)(A)(iii).

The Coop seems to claim that it was further secured by interests senior to Norwest's in machinery, crops and custom cattle feeding accounts receivable. It specifically urges that it has a first security interest in the first $50,000 of accounts receivable which was turned over to Norwest. Also, through its adversary proceeding, the Coop asserts that the missing 195 head of cattle also constitute collateral.

There is no evidence in the record regarding the seniority of the Coop's interest. Norwest has agreed to Debtors' Plan. Its claim was provided for in Debtors' Chapter 12 plan which was confirmed in 1987. The Coop's loans arose subsequent to that time. The Coop, however, is characterizing some of its interest as a purchase money security interest which would arguably give it priority. The Coop has not established that it is secured beyond the Coop stock and accrued dividends and the $17,000 crop proceeds check. As such, the Court must conclude that the Plan does not comply with 1129(b)(2)(A) by providing the Coop with the indubitable equivalent of its claim.

The requirements of 1129(b)(2)(B) must be met in order for a cram down plan to be confirmed as fair and equitable as to the unsecured portion of the Coop's claim. Technical compliance with all requirements of 1129(b)(2)(B) does not assure that the plan is "fair and equitable." In re Dawson, No. L-90-00454W, slip op. at 9 (Bankr. N.D. Iowa Aug. 12, 1991) (citing In re D & F Construction, 865 F.2d 673, 675 (5th Cir. 1989)). That section sets minimal standards plans must meet. Dawson, slip op. at 9. "A court must consider the entire plan in the context of the rights of the creditors under state law and the particular facts and circumstances when determining whether a plan is 'fair and equitable.'" Id. (quoting D & F Construction).

Sec. 1129(b)(2)(B) defines "fair and equitable" as a concept which applies to unsecured claims in the alternative. Either, under subsection (i), the unsecured creditor must receive the full amount of its allowed claim, or, under subsection (ii), the plan must make no provision for any interest junior to the unsecured creditor's. Subsection (ii) is referred to as the "absolute priority rule." In re Witt, 60 B.R. 556, 559 (Bankr. N.D. Iowa 1986); see also In re Pero Bros. Farms, Inc., 90 B.R. 562, 564 (Bankr. S.D. Fla. 1988) (finding that creditor's liquidating plan met requirements of absolute priority rule).

The Coop's unsecured claim is a Class 10 claim provided for in 4.10 of Debtors' Plan. The only junior interests are Debtors' equity interests which, under 4.11, are extinguished and receive no distribution under the Plan. Thus, the Plan meets the requirement of 1129(b)(2)(B) that interests junior to the Coop's unsecured claim receive nothing from the Plan.

For a cram down plan to be confirmed, it must also meet the requirements of 1129(a). Sandy Ridge, 881 F.2d at 1352. Sec. 1129(a)(3) states the requirement that "[t]he plan has been proposed in good faith and not by any means forbidden

by law." A plan is considered proposed in good faith if there is a reasonable likelihood that the plan will achieve results consistent with the standards prescribed under the Code. Hanson v. First Bank, 828 F.2d 1310, 1315 (8th Cir. 1987) (holding bankruptcy court's finding of good faith in proposing Chapter 11 liquidating plan not clearly erroneous). The fact that a party proposes a liquidating plan is not evidence of bad faith under 1129(a)(3). In re Yagow, 60 B.R. 543, 547 (Bankr. D.N.D. 1986). Nevertheless, a liquidating plan must aim toward a result consistent with the purposes and objectives of Chapter 11. Hoosier Hi-Reach, 64 B.R. at 38. Two of the objectives of Chapter 11 to be considered in this respect are a) expeditious resolution of disputes and b) speedy payment to creditors. Id. In Hoosier Hi-Reach, the court found that the fact that the plan was misleading suggested a lack of good faith. Id.

An evaluation of good faith should not be based on the plan proponent's behavior prior to filing the bankruptcy petition. In re General Homes Corp., 134 B.R. 853, 862 (Bankr. S.D. Tex. 1991). Thus, the status of the unresolved adversary does not compel a finding of bad faith.

Dawson addressed the burden of proof for confirmation of Chapter 11 plans. It stated:

> While it is well-settled that a plan proponent bears the burden of proving that all of the requirements for confirmation enumerated under 1129 are satisfied, many courts have found that a party objecting to confirmation "initially bears the burden of proving the validity of the objections and must set forth adequate reasons." Hence, the [objecting party] must demonstrate adequate reasons that support the validity of its objection. This is only an initial burden, however, and once it has been met the plan proponent bears the ultimate burden of proving that the plan meets all 1129 requirements, including the requirement that the plan is "fair and equitable" under 1129(b). Some courts have even required the plan proponent to satisfy that burden with "clear and convincing evidence" that the plan is fair and equitable.

Dawson, slip op. at 9-10 (citations omitted). The court ultimately held that the objecting party had failed its initial burden of providing adequate reasons to support the validity of its objection and confirmed the creditor's liquidating plan. Dawson, slip op. at 13.

SUMMARY

The evidentiary record does not support the conclusion that the Coop's claim is entitled to priority. As such, the Plan does not improperly treat the Coop's claim as junior to that of Norwest.

Liquidating plans are permissible in Chapter 11 cases. The Coop is secured to the extent of the collateral which it will receive under 4.06. As such, the Plan is fair and equitable as to its secured claim under 1129(b)(2)(A)(iii). As Debtors are not retaining any property of the estate under the Plan, the Plan is fair and equitable as to the Coop's unsecured claim under 1129(b)(2)(B)(ii).

The plan must be proposed in good faith. The record establishes that the Plan complies with Chapter 11 objectives of expeditious resolution of disputes and payment of Creditors. Confirmation does not depend merely on a technical application of 1129(b). All the facts and circumstacnes of a case must be considered. Dawson, slip op. at 9. In making a determination of good faith, the Court must take into consideration the totality of the circumstances. Witt, 60 B.R. at 560. For the reasons set forth herein, it is the conclusion of this Court that the Plan is proposed in good faith as defined herein.

Further, Plan confirmation does not affect the adversary proceeding which is presently under advisement.

ORDER

IT IS THEREFORE ORDERED that the Objections of Creditor Tama-Benton Cooperative Company are DENIED.

IT IS FURTHER ORDERED that the Plan, as proposed, will be confirmed. Counsel for Debtors is directed to prepare an Order confirming Debtor's Chapter 11 Liquidation Plan.

SO ORDERED this 15th day of November, 1993.

Paul J. Kilburg, Judge
U.S. Bankruptcy Court