In the United States Bankruptcy Court

for the Northern District of Iowa

BERT A. JOHNSON
d/b/a River City Bowl
Debtor.

Bankruptcy No. 93-40123XM

Chapter 11

ORDER RE: DEBTOR'S MOTION TO DISMISS and CREDITORS' MOTIONS TO CONVERT

The Debtor, Bert A. Johnson, moves to dismiss his chapter 11 case. Sue Johnson, Willard Anderson, and the United States of America, on behalf of the Internal Revenue Service (IRS) resist. Sue Johnson, the Debtor's former spouse, moves to convert the case to chapter 7. She is joined in the conversion motion by the IRS and the United States Trustee.

Hearing on the motions was scheduled for November 22, 1993. Debtor moved for a continuance; the motion to continue was heard on November 22. Roger L. Sutton appeared for the Debtor; Ana Maria Martel appeared for the IRS; David M. Nelsen appeared for Willard Anderson; and James M. Stanton appeared for Sue Johnson. The motion to continue was granted; hearing was rescheduled for November 30. Prior to the hearing, the court received a telephone call from attorneys Sutton, Nelsen and Stanton at which time they said that the matters could be determined by the court without hearing upon consideration of the Debtor's 1992 state and federal tax returns, the transcript of the meeting of creditors, and legal briefs. Counsel represented to the court that attorney Martel had agreed to that manner of submission.

The IRS and the Debtor have filed briefs and attached the copies of the Debtor's 1992 federal and state tax returns. The returns were to have been submitted separately from the briefs as Exhibit No. 1. The court has removed the duplicate set of returns from its copy of the IRS brief and has labeled it "Debtor's Exhibit #1." The transcript of the section 343 examination has been submitted as "Exhibit A." Exhibits "1" and "A" are admitted.

In his motion to dismiss, Johnson states that there is good cause to dismiss his case--"an inability to effectuate a plan" and "unreasonable delays in the handling of indebtedness which will be prejudicial to creditors" (Debtor's motion, docket no. 90, paragraph 3). These grounds are sufficient causes to support either dismissal or conversion. 11 U.S.C. 1112(b)(2) and (3). When cause is shown, the court may dismiss or convert a chapter 11 case, whichever is in the best interest of creditors and the estate. 11 U.S.C. 1112(b). Creditors Sue Johnson, the IRS and Willard Anderson contend that it is in their best interests that the case be converted to chapter 7. The U. S. Trustee agrees. Where there are substantial assets subject to administration by a chapter 7 trustee, the court gives great deference to creditors' opinions as to which remedy is in their best interests.

Debtor resists conversion, contending that as a "family farmer" his reorganization proceeding may not be converted to a chapter 7 proceeding without his consent. He also contends that he is solvent and for this reason also his case may not be converted.

Debtor's defenses to the motion to convert are without merit. Section 1112(c) of the Bankruptcy Code provides that a chapter 11 case may not be converted to a chapter 7 case if the debtor is a farmer. To be a farmer, one must receive from a farming operation more than 80 per cent of his gross income for the taxable year immediately preceding the taxable year when the case was filed. 11 U.S.C. 101(20). Debtor filed in 1993. His tax return for the 1992 calendar year shows the following:

Gross income from farming	(Schedule F)	$110,871.62

Farm rental income	(Schedule E)	13,240.00
Farm rental income	(Schedule E)	22,691.00
Non-farm rental income	(Schedule E)	8,400.00
Gross income (bowling alley)	(Schedule C)	92,577.00
Interest income	(Schedules A & B)	406.97
Dividend income	(Schedules A & B)	6,933.43
Capital gains	(Schedule D)	2,566.17
TOTAL INCOME		**$257,686.19**

In determining how much of this total income, if any, arose from Debtor's farming operation, several issues would normally have to be addressed. Not the least of these would be whether Debtor was engaged in a farming operation at all during 1992. He testified at his 343 examination that he leased his farmground to his 18-year old son during 1992 and intended to lease the ground to him in 1993. Despite this arrangement, Debtor did farm 40 acres of wheat or oats in 1992 and he helped his son. He collected rent on farmground leased to his son. He also received a $10,000.00 payment from the City of Mason City for permitting it to dump sewage sludge on the farmground. Whether the farm rental income would be included in income from Debtor's farming operation, would, as in a chapter 12 case, depend on whether Johnson had some significant role in the production of income from the rented land. Otoe County National Bank v. Easton (In re Easton), 883 F.2d 630, 636 (8th Cir. 1989). The proportion of non-farm income would depend also on whether the court included in the gross income total Johnson's gross receipts from the bowling alley or instead the gross profit from that business. This would turn on whether the bowling alley was a merchandising or manufacturing business or a service business. If it is a service business, the court would include in the total income the $162,260.00 of the gross receipts received by Johnson from the bowling business, without deduction of the cost of goods sold. See Matter of Faber, 78 B.R. 934, 935-36 (Bankr. S.D. Iowa 1987). If the business is one of manufacturing or merchandising, cost of goods sold would be deducted from gross receipts and only $92,577.00 would be included as non-farm income from the bowling alley. Farm Credit Bank of St. Louis v. Cox (In re Cox), 93 B.R. 625, 626-27 (Bankr. S.D. Ill. 1988).

The court need not decide these issues. Even if each were resolved in favor of the Debtor, it is clear that farm income would not be more than 80 per cent of the Debtor's gross income for 1992. At best, including all farm rental income and farm operation income, the total gross income from farming would be $146,802.62, only 56 per cent of total income. Debtor is not a farmer within the meaning of 11 U.S.C. 101(20) for the purpose of determining whether his case may be involuntarily converted.

Debtor, however, urges the court to apply the income test for a "family farmer" under 11 U.S.C. 101(18). The definition of family farmer is used to determine who is eligible to file a chapter 12 case. To be a family farmer, one need receive only more than 50 per cent of one's income from the farming operation for the preceding tax year. Johnson would meet this income test if the farm rental income is income generated from the farming operation. There is little evidence as to the extent of the role Johnson played in the production from the land. For the sake of argument, the court will assume that Johnson played a significant role in the farming of the land. He had apparently operated the land previously. He rented the land to his 18-year old son, a young farmer who would no doubt seek the guidance and counsel of his father in farming the ground. Because the son could not finance the operation alone, Johnson purchased some seed necessary for the crop. Assuming a significant operational role by Johnson would put the farm rental income in the category of "farm income" for the purpose of chapter 12 eligibility.

But even assuming Johnson could meet the 50 per cent test, Johnson cannot qualify as a family farmer. In addition to the income test, to so qualify, not less than 80 per cent of one's debts must arise out of the farming operation. 11 U.S.C. 101(18)(A). In making his argument, Johnson has failed to address this issue. An examination of the Debtor's schedules shows he cannot meet this test. His Summary of Schedules shows total liabilities of $863,705.50 (docket no. 11). Eighty per cent of this amount, or $690,964.00, must have arisen from the farming operation. This leaves only $172,741.50 that may be non-farm debt. Even giving the Debtor the benefit of every doubt, his non-farm debt clearly exceeds this amount. On the date of filing, he listed among his debts the following non-contingent, liquidated, undisputed debts:

William D. Anderson	purchase of bowing alley	$ 76,393.15
Don Ayers	purchase of duplex	43,000.00
Susan M. Johnson	property settlement	$100,000.00.

Other debts are also obviously non-farming debts: radio station trade debt, Job Service debt, and sales taxes. They need not be discussed, as the debts to Anderson, Ayers and Johnson total $219,393.15. Johnson could not qualify as a family farmer because his non-farming debt exceeds 20 per cent of his total debt.

Johnson is not a farmer within the meaning of 11 U.S.C. 1112(c) and 101(20). His case may, therefore, be converted to chapter 7 under 1112. As Johnson is not a family farmer, so the court need not reach the issue of whether one's status as a family farmer may be used to prevent involuntary conversion of a case from chapter 11 to chapter 7.

Johnson's remaining argument is that he is solvent and, therefore, his case may not be or should not be converted to chapter 7. The Bankruptcy Code does not prohibit conversion of a solvent debtor's case from chapter 11 to chapter 7. The Code permits an involuntary chapter 7 case to be filed against a solvent debtor, as petitioning creditors must show only that "the debtor is generally not paying such debtor's debts as such debts become due. . . ." 11 U.S.C. 303(h)(1). Debtor has pointed to no authority for his argument.

ORDER

IT IS ORDERED that this case shall by separate order be converted to a case under chapter 7 of the Code.

SO ORDERED ON THIS 17th DAY OF DECEMBER, 1993.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order and judgment by U. S. mail to: Roger Sutton, U. S. Attorney, James Stanton, David Nelsen, Robert Swanson and U. S. Trustee.