

In the United States Bankruptcy Court
for the Northern District of Iowa

BOCKES BROTHERS FARMS, INC.
MARY MATILDA BOCKES
Debtor(s).

Bankruptcy No. 93-60881KW
Bankruptcy No. 93-60889KW
Chapter 11

RULING

The above-captioned matter came on for hearing on February 15, 1994. The following attorneys appeared for parties of record:

- Dan Childers for Debtors, Bockes Brothers Farms, Inc.
- Thomas Hanson for Debtor, Mary Bockes
- Rodney Kubat and Irvin Ness for Farmland Financial Services
- Thomas McCuskey for Unsecured Creditors' Committee
- Eric Lam for Ag Services of America, Inc.
- Ana Maria Martel for the U.S. Attorney's Office
- H. Raymond Terpstra II for Conrad Cooperative
- Thomas Pepper for Vera Martin & Mutual Benefit Life
- Linda Merritt for First State Bank

The following parties have filed pleadings relating to the pending motions but did not appear personally at the time of hearing:

- Textron Financial Corporation
- Phelps Implement Company
- Eileen Hager
- Farm Credit Bank

Substantial evidence was presented after which the Court took the pending motions under advisement.

The following matters were considered: 1) Motion for Authority to Incur Debt on Secured Basis for 1994 Crop Year Expenses, 2) Motion for Extension of Exclusivity Period to File Plan and Obtain Acceptances an Additional 90 Days, and 3) Motion for Dismissal or, in the Alternative, for Concurrent Dissemination of, and Voting on, Plans of Reorganization.

The Court has considered each of the motions separately and collectively to the extent they are related, taking into consideration the effect the motions have on each other in light of the best interests of creditors. Having considered the record and arguments of counsel, the Court enters the following rulings.

Authority to Incur Debt

Debtors seek authority to incur debt on a secured basis for 1994 crop year expenses. They desire to obtain operating funds in an amount not to exceed \$2,000,000 under terms identical to those allowed by this Court for 1993 crop year expenses. Debtors are hopeful that Ag Services will provide financing if this motion is granted. Ag Services was the lender for the 1993 crop year.

Farmland has filed an objection. It argues that the motion should not be granted because it does not identify the lender, interest rate or terms for repayment with specificity. Farmland states that Debtors will have a shortfall in repaying their 1993 operating loan and will be unable to propose a feasible plan of reorganization. It argues that allowing Debtors to incur further debt will result in prejudice to and diminution of the estate. Conrad Coop has joined in Farmland's objections.

Farmland presented substantial evidence on the issue of cash flow generated by Debtors over the last years. The evidence establishes that Bockes Brothers Farms, Inc. produced a positive cash flow for 1988, 1989 and 1990. However, in subsequent years, there has been a negative cash flow. Debtors attribute this shortfall to weather conditions and other factors which Debtors assert can be remedied. Farmland takes the position that Debtors' basic business structure is such that positive cash flow cannot be generated in the immediate future. The record does establish that Debtors have an outstanding loan to Farmland Financial Services for calendar year 1991 in the approximately amount of \$1,000,000. In calendar year 1992, the Debtors received a loan from Ag Services of which there has been a shortfall after all payments were made in the approximate amount of \$300,000. It does appear that, for calendar year 1993, there will be an excess after payment of Ag Services 1993 loans in the approximate amount of \$39,000. This excess does not take into account other interest charges. The Debtors have filed a projected cash flow for calendar year 1994 in which they anticipate a positive cash flow and the ability to commence liquidation of their indebtedness. (Debtors' Exhibit 1)

Evidence was presented on the issue of diminution of the Debtors' estate. Debtors presented evidence that there has not been a substantial deterioration in value of the farm machinery since the last appraisal in the fall of 1993. Debtors' evidence supported Debtors' conclusion that if the farm machinery is properly maintained, it should hold its present value and should not suffer a substantial deterioration in value.

Additionally, Farmland has asserted that Debtors will be unable to propose a feasible Plan of Reorganization. Debtors have now filed a proposed Plan. While Farmland asserts that the Plan is unconfirmable, this Court cannot conclude, based on the record presented, that this Plan is so inherently defective that it does not stand a reasonable possibility of acceptance. While feasibility has relevance at this stage, the level of feasibility must be considered in light of the present stage of these proceedings. At this time, this Court concludes that feasibility is sufficiently possible that denial of additional financing is unwarranted.

The Court has considered the entire record presented on Debtors' Application for Authority to Incur Debt for calendar year 1994. The Court concludes that Debtors should be allowed to pursue secured financing for the 1994 crop year expenses. Debtors are hereby authorized to seek such financing under the same terms as the financing allowed by the Court for the 1993 crop year as set out in previous Orders filed May 26, 1993, June 30, 1993, November 18, 1993 and December 3, 1993.

Debtors are authorized to seek such financing from Ag Services of America. If Ag Services does not agree to provide financing or if the terms are not identical to those for the 1993 crop year, Debtors are required to seek further approval from the Court. Any such financing shall not jeopardize any interest of the United States in payments under Debtors' contracts with ASCS.

Extension of Exclusivity Period

The Debtors ask the Court for a second extension of the exclusivity period. The Court previously extended the period during which Debtors have the exclusive right to file a plan of reorganization under 1121(b). This extension expired January 14, 1994. The deadline for soliciting acceptances was set for March 15, 1994. Debtors request an additional extension of ninety days to April 14, 1994 and June 13, 1994, respectively. As cause for the extension, Debtors cite the following: 1) complexity of their operations, 2) pendency of extensive negotiations, 3) availability of certain accounting information, 4) uncertainty of amount of disaster payments, 5) time and effort spent responding to Farmland's motions and requests for information and discovery, and 6) the likelihood of acceptance of a plan during the extension by all creditors other than Farmland.

Farmland objects to the extension of time. It denies that cause exists to justify a further extension and asserts that creditors will be prejudiced if an extension is granted. Conrad Coop joins in Farmland's objection. Vera Martin and

Mutual Benefit Life Insurance Co. also filed objections.

Mary Bockes has also independently filed a Motion for Extension of the Exclusivity Period. The exclusivity period for Mary Bockes expired January 14, 1994. The Court file reflects that a Motion for Extension was not filed of record until January 18, 1994. In addition to all of the objections to an extension of time which Farmland noted as to Bockes Brothers Farms, Inc., Farmland also asserts that the Motion for Extension of the Exclusivity Period was not timely filed by Mary Bockes. Mary Bockes asserts that good cause has been shown for extension of the exclusivity period. This issue will be discussed subsequently in this opinion. Mary Bockes asks for an extension of the exclusivity period for the same reasons asserted by Bockes Brothers Farms, Inc.

The Court's authority to grant Debtors' request for an extension of the exclusivity period is found in 1121(d), which states:

On request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section.

A party seeking an extension has the burden to demonstrate good cause. In re Gibson & Cushman Dredging Corp., 101 B.R. 405, 406 (E.D.N.Y. 1989). Legislative history indicates that the granting of an extension must be based on a showing of some promise of probable success for reorganization. In re Newark Airport/Hotel Ltd. Partnership, 156 B.R. 444, 451 (Bankr. D.N.J. 1993) (citations omitted). Additionally, "an extension should not be employed as a tactical measure to put pressure on parties in interest to yield to a plan they consider unsatisfactory." Id.

The "cause" standard allows maximum flexibility to accommodate various types of reorganization proceedings. Gibson & Cushman, 101 B.R. at 409. Cause may be found if there is an unusually large or unusually small case, delay by the debtor or recalcitrance among creditors. Pendency of a dispute between parties might not alone warrant an extension of the exclusivity period. The court must consider the debtor's financial position and whether debtor's assets are likely to be depleted during the requested extension. Another factor is whether progress has been made regarding acceptance of a plan. In re Perkins, 71 B.R. 294, 299 (W.D. Tenn. 1987). If a debtor has filed a plan and seeks extension of time for gaining acceptances, the potential for detrimental impact on the creditors' bargaining position is lessened.

In Perkins, the court found that cause existed based, in part on the size and complexity of the case, the substantial support for debtor by the majority of its creditors, the time consuming character of underlying proceedings involving some of the creditors, a showing of probable success of the plan and the lack of debtor's apparent intent to use the extension as a tactical device. Id. at 299-300. Cause was established in Gibson & Cushman evidenced by debtor's proposed plan, continuing negotiations, creditors' recalcitrance and reluctance to negotiate, debtor's ability to carry on its business, and the lack of danger of dissipation of assets. 101 B.R. at 410. In Newark Airport, cause was found based on problems in obtaining an appraiser, pendency of accounts receivable claims against third parties, a pending appeal in state court, and delay in formation of a creditor's committee. 156 B.R. at 451. This constituted cause even though traditional grounds for granting an extension -- the large size of debtor and concomitant difficulty in formulating a plan -- were missing.

Debtors assert many of the foregoing grounds for extending the exclusivity period. They state that most of the creditors will agree to their proposed plan if negotiations can be extended; that Farmland is recalcitrant; that their operations are sufficiently complex making formulation of the plan difficult; and that pending proceedings are especially time-consuming.

The Court has considered the entire evidentiary record on this issue. As with all of the matters presently before the Court, it is almost impossible to consider an extension of the exclusivity period in isolation. An extension of the exclusivity period, by its nature, precludes the filing and circulation of a competing Plan by Farmland or other creditors. Nevertheless, the record does disclose that Debtors are making legitimate efforts to obtain a successful rehabilitation. Additionally, the Court has considered all of the other factors raised by the Debtors as well as the fact that the farming business is seasonal in nature requiring a substantial time commitment during peak crop seasons. The Court has also considered that the past crop year was poor in Iowa.

Ultimately, this Court must conclude that while this is the second request for an extension of the exclusivity period, the Debtors are making progress and now have a Plan on file. The Court concludes that the record sufficiently supports Debtors' assertions that good cause exists to extend the exclusivity period under 11 U.S.C. 1121(d). However, considering the amount of time which has transpired since the filing of the Petition and the fact that the Court has previously granted an extension, the Debtors extension of time will be granted with limitations. The exclusivity period shall be substantially less than the entire time requested by Debtors.

The Court considers Mary Bockes' Motion for Extension of Exclusivity Period also. The Court first addresses whether her motion is timely. The evidentiary record establishes that she signed the motion filed by Bockes Brothers Farms, Inc. but through apparent inadvertence or mistake failed to file the motion in her own case. Having considered the facts of this case and having considered the fact that her motion was filed only several days late, the Court considers the motion as being filed late through excusable neglect. See In re Crescent Mfg. Co., 122 B.R. 979, 982 (Bankr. N.D. Ohio 1990). It is the specific finding of this Court that excusable neglect under Rule 9006(b)(1) permits this Court to consider a late-filed motion to extend the exclusivity period. It is the ultimate conclusion of this Court that excusable neglect has been established and as such, the Motion for Extension of the Exclusivity Period is proper for consideration by this Court. The Court has considered the entire evidentiary record previously presented on the issue of exclusivity. Mary Bockes' ability to propose a Plan of Reorganization is sufficiently intertwined with that of Bockes Brothers Farms, Inc. to justify granting her an identical extension of the exclusivity period. As such, the exclusivity period, as to Mary Bockes, shall be allowed under the same terms as those allowed for Bockes Brothers Farms, Inc.

As such, the motions of Bockes Brothers Farms, Inc. and of Mary Bockes for extension of their exclusivity period are granted to the extent that the deadline for exclusivity in filing a plan of reorganization and disclosure statement is March 4, 1994. Thus, Debtors' plan filed on February 14, 1994 is deemed to have been timely filed within the Debtors' exclusivity period. Furthermore, the expiration of the exclusivity period during which Debtors may solicit acceptances is extended to April 15, 1994. No other party in interest may file a concurrent plan during this time. In granting this extension, the Court is certain that Debtors understand that further extensions will not be necessary.

Motion to Dismiss

Farmland moves for dismissal pursuant to 112(b)(1), based on allegations of continuing loss to the bankruptcy estate and absence of reasonable likelihood of rehabilitation, and 112(b)(2), based on allegations of inability to effectuate a Plan of Reorganization. Farmland claims there is a "clear lack of feasibility for any plan of reorganization." It asserts that cash shortfalls from the past six years indicate that Debtors will be unable to service their prepetition debt in a Chapter 11 Plan. Farmland also asserts that Debtors will be unable to repay postpetition financing, which constitutes a continuing loss and diminution to the bankruptcy estates. Conrad Coop has withdrawn its previous objection to the motion and now joins in Farmland's motion to dismiss. Also joining in the motion are Vera Martin and Mutual Benefit Insurance Co.

Debtors characterize Farmland's allegations as "flawed, incomplete and misleading." They assert that a draft of their plan filed the day before the hearing evidences a good likelihood of a successful reorganization. Debtors state that Farmland has been overly litigious and has harassed Debtors, attempting to apply a "stranglehold" during the "breathing spell" bankruptcy is meant to grant debtors. Debtors assert the existence of an avoidable preferential transfer claim against Farmland which would be lost if the case was dismissed.

Textron Financial objects to the motion to dismiss, asserting that it is in the best interests of creditors to allow Debtors to pursue their Plan rather than being forced to liquidate as Farmland's plan provides. Ag Services responds that it has no objection to Farmland's motion conditioned on protection of its liens on 1992 and 1993 crops, and conditioned on retention and continuation of pending adversary proceedings by this Court. The Unsecured Creditors Committee asserts that dismissal is not in the best interests of the creditors. It is premature to be determining feasibility. Concurrent dissemination should not be allowed in order that creditors can vote yes or no to a plan by Debtors which does not call for liquidation. First State Bank joins in this objection.

Statutory and case law provide this Court with broad discretion in deciding whether to dismiss or convert a Chapter 11 case under 112(b). In re Lumber Exch. Bldg. Ltd. Partnership, 968 F.2d 647, 648 (8th Cir. 1992). Section 112(b)

provides that a case may be dismissed for cause. Cause includes: (1) continuing loss to or diminution of the estate in the absence of a reasonable likelihood of rehabilitation and (2) inability to effectuate a plan. In re Witt, 60 B.R. 556, 561 (Bankr. N.D. Iowa 1986). The burden of proof in a motion for dismissal rests squarely on the moving party.

[T]he Court must begin by recognizing that the stated purpose of Chapter 11 is to further the rehabilitation of businesses in economic distress. "A Court should not precipitously sound the death knell for a debtor by prematurely determining that the debtor's prospects for economic revival are poor."

In re Economy Cab & Tool Co., 44 B.R. 721, 724 (Bankr. D. Minn. 1984) (citations omitted). At early stages in the proceedings, a moving party must show that there is no more than a "hopeless and unrealistic prospect" of rehabilitation in order to prove absence of a reasonable likelihood of rehabilitation under 1112(b)(1). Courts limit application of 1112(b)(2) to cases where a debtor is little more than a corporate shell lacking a place of business, employees, payroll or discernible economic activity. Id. at 725. "Where a debtor is carrying on some business activity, this ground is not properly argued or applied before a plan is filed, when the debtor's ability to accomplish the plan first can be gauged." Id.

In Economy Cab, debtor was continuing operations of metal fabrication and manufacture. Debtor's exclusivity period had only recently run out and debtor anticipated filing a plan within a short period of time. Id. at 726. The Court noted that a sufficient likelihood of rehabilitation can be found "even where apparent chances of survival are 'precarious', so long as the remaining corporate principals have 'business acumen and sufficient resilience' to build the business back up." Id. at 725.

In contrast, Lumber Exchange was a single asset case. 968 F.2d at 650. The court dismissed the case after the debtor had proposed a reorganization plan. It concluded that the debtor could not propose a confirmable plan without properly classifying creditors, reasoning that the secured creditor could block any plan that did not pay its claim in full. Id. The court in Witt dismissed the case where efforts to reorganize over 2 1/2 years had been unsuccessful. 60 B.R. at 561. This Court dismissed a case where more than four years had elapsed since the filing of the petition and the case was not particularly complex. In re Ver Dell Cox, No. A-86-01718S, slip op. at 10 (Bankr. N.D. Iowa Aug. 28, 1990).

It is the conclusion of this Court that dismissal is not in the best interests of creditors at this time. Farmland's motion to dismiss is premature. Insufficient cause is shown why Debtors should be precluded from utilizing Chapter 11 without at least one opportunity to present a Reorganization Plan to the creditors. This is not a single asset case. Debtors filed their petition approximately 9 months ago. Business activity is continuing and the corporate principals appear to have sufficient business acumen to attempt reorganization. While not a decisive issue, the Court has considered that Farmland could benefit from dismissal if Debtors have a potential avoidable preferential transfer claim. The Motion to Dismiss must be denied.

In the alternative, Farmland requests concurrent dissemination of and voting on Plans proposed by Debtors and by Farmland. The concurrent dissemination of competing Plans is effectively foreclosed at this time by the Court's ruling extending the Debtors' exclusivity period. However, as previously discussed, the various motions involved in this proceeding are interrelated and even absent an extension of the exclusivity period, it is the conclusion of this Court that competing Plans, at this juncture, are inappropriate. Farmland has cited authority for the proposition that competing Plans can serve a function in the reorganization process. In re EUA Power Corp., 130 B.R. 118 (Bankr. D.N.H. 1991). However, in the present case, the competing Plans would be a Plan of Reorganization propounded by Debtors and a Liquidation Plan propounded by Farmland Financial Services. It is the feeling of this Court that this situation is completely different than competing Plans, both of which envision reorganization and continued existence as a viable business entity. For this reason, even absent extension of the exclusivity period, the Court feels that the competing Plans as contemplated would be inappropriate and the Motion would, therefore, be denied.

WHEREFORE, Debtor's Motion for Authority to Incur Debt on Secured Basis for 1994 Crop Year Expenses is GRANTED.

FURTHER, Debtors are hereby authorized to seek such financing specifically from Ag Services of America under the same terms as the financing allowed by the Court for the 1993 crop year. If Ag Services does not agree to provide financing or if the terms of the financing change, Debtors are required to seek further approval from the Court. Any

such financing shall not jeopardize any interest of the United States in payments under Debtors' contracts with ASCS.

FURTHER, Debtors' Motion for Extension of Exclusivity Period to File Plan and Obtain Acceptances is GRANTED.

FURTHER, Debtors' deadline for exclusivity in filing a plan of reorganization and disclosure statement is extended to March 4, 1994. Debtors' plan filed on February 14, 1994 is deemed to have been timely filed within the Debtors' exclusivity period. The exclusivity period during which Debtors may solicit acceptances is extended to April 15, 1994. No other party in interest may file a concurrent plan during this time.

FURTHER, Farmland's Motion for Dismissal or, in the Alternative, for Concurrent Dissemination of, and Voting on, Plans of Reorganization is DENIED.

SO ORDERED this 24th day of February, 1994.

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