

In the United States Bankruptcy Court

for the Northern District of Iowa

MARCUS JOY GUMZ
aka Marcus J. Gumz
dba Marcus Gumz Farms
Debtor.

Bankruptcy No. 95-61821KW

Chapter 12

RULING ON MOTION TO DISMISS

On November 29, 1995, the above-captioned matter came on for hearing pursuant to assignment. Debtor Marcus J. Gumz appeared individually, without an attorney. Carol Dunbar was present as the Chapter 12 Trustee. John Titler appeared on behalf of Griffin & Brand of McAllen, Inc. The matters set for hearing include Confirmation of Debtor's Chapter 12 Plan, Trustee's Motion to Dismiss, Griffin & Brand's Motion to Dismiss, Trustee's Objection to Property Claimed Exempt by Debtor and Debtor's Application re Stay Enforcement. This is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(A), (L).

Debtor filed a "Farming/Reorganization Plan for 1996" and an "Addendum" which together constitute his Chapter 12 plan. He filed an identical plan in a bankruptcy proceeding in the Western District of Wisconsin. That proceeding was dismissed in a hearing held November 7, 1995.

Trustee, Sauk County Farmers Union Coop, Sauk County, and Griffin & Brand each filed objections to Debtor's Chapter 12 plan. The objections include assertions that Debtor has failed to list and provide for all his creditors, the plan does not state its length, Debtor has failed to provide the Trustee with necessary information, and the plan fails to provide for a trustee fee. Essentially, Trustee and the creditors assert that the plan is not feasible or filed in good faith. Griffin & Brand also states that this Court should consider the Wisconsin Court's dismissal of Debtor's Chapter 12 case as res judicata on the issue of confirmation in this case.

Trustee also filed a Motion to Dismiss. Initially, Trustee points out that Debtor had two bankruptcy petitions pending at one time. Trustee also asserts that she has not received a copy of Debtor's 1994 tax returns or bank signature cards, Debtor may not qualify as a family farmer and his petition is incomplete as grounds for dismissal. Griffin & Brand also moves for dismissal and joins in Trustee's motion to dismiss. It states that the Wisconsin court rejected Debtor's identical Chapter 12 plan and also dismissed his Chapter 12 proceeding in its entirety. Griffin & Brand argues that Debtor is improperly using bankruptcy proceedings to avoid enforcement of a foreclosure judgment lawfully obtained in Wisconsin courts and that Debtor has failed to establish proper jurisdiction and venue.

The remaining matters set for hearing include Debtor's application for enforcement of the automatic stay against activities by Attorney Mercer on behalf of Griffin & Brand regarding its foreclosure judgment. Also, Trustee objects to exemption of farm headquarters and buildings in Sections 11, 16 and 17 in Sauk County, Wisconsin.

The Court has reviewed the record, including all of Debtors' copious filings. The Court has also reviewed a transcript of the Wisconsin bankruptcy court's November 7, 1995 hearing. That court's dismissal of Debtor's Chapter 12 case filed in Wisconsin was premised on that court's finding that the plan was not feasible and did not meet the standards of good

faith. The plan was not feasible, in part, because in order for it to succeed Debtor sought to overturn a Wisconsin State Court foreclosure judgment based on Iowa law. The Wisconsin Bankruptcy Court found this proposal incredible. It further found that there was no possibility of amending the plan to make it feasible.

In examining good faith, the Wisconsin Bankruptcy Court considered whether the plan represents an intention to pay debts as opposed to an intention to avoid paying, under In re Schaitz, 913 F.2d 452, 454 (7th Cir. 1990). That case requires that in making a finding of good faith, consideration must be given to "whether the plan could be said to be a sincere effort at repayment, or [is] instead an effort to thwart repayment." Id. (applying standard in Chapter 13 context); In re Fortney, 36 F.3d 701, 707 (7th Cir. 1994) (applying Schaitz good faith standard in Chapter 12 context).

The Eighth Circuit takes a "totality of the circumstances" approach in finding good faith. In re LeMaire, 898 F.2d 1346, 1349 (8th Cir. 1990) (considering good faith in Chapter 13 context). Factors such as "the debtor's motivation and sincerity in seeking [] relief are particularly relevant." Id. The filing of a bankruptcy petition without the ability to properly reorganize is an abuse of the Bankruptcy Code and renders the petition subject to dismissal. In re Euerle Farms, Inc., 861 F.2d 1089, 1092 (8th Cir. 1988). In Euerle Farms, the court affirmed dismissal of a Chapter 12 petition for cause where the debtor proposed only a problematic and unconfirmable plan from which payment of creditors was conjectural at best. Id.

The "feasibility" standard requires the court to determine whether the debtor is likely to be able to make the payments in accordance with the plan provisions. In re Monnier, 755 F.2d 1336, 1341 (8th Cir. 1985); In re Foertsch, 167 B.R. 555, 565 (Bankr. D.N.D. 1994). It "injects pragmatism into the confirmation process by prohibiting confirmation of overly optimistic reorganization plans clearly destined to fail and by not belaboring the inevitable demise of a hopelessly insolvent debtor." Foertsch, 127 B.R. at 565 (citation omitted). The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts. In re Clarkson, 767 F.2d 417, 420 (8th Cir. 1985).

This Court concludes that Debtor's Chapter 12 plan cannot be confirmed and the petition filed in this District should be dismissed for cause under 1208(c). Debtor's plan fails the feasibility and good faith requirements 1225(a)(3) and (6). As the Wisconsin bankruptcy court pointed out, there is virtually no likelihood that Debtor will be successful in overturning the Wisconsin foreclosure judgment using Iowa law in order to fund the plan as proposed. Debtor has not demonstrated an ability to modify the plan to make it feasible. The petition is rendered subject to dismissal by Debtor's inability to properly reorganize. Considering the totality of the circumstances and a multiplicity of factors, the Court concludes that this case should be dismissed for cause.

The Court also notes that the issue of venue is problematic. Although Debtor claims to have property, creditors and a residence in Iowa, the bulk of Debtor's assets and liabilities exist in Wisconsin. Debtor apparently also believed this case belonged in Wisconsin as evidenced by the filing of his initial bankruptcy petition there. As the Court has found that this case is subject to dismissal for cause, however, it is not necessary to also rule on the issue of venue.

WHEREFORE, confirmation of Debtor's Chapter 12 plan is DENIED.

FURTHER, the Motions to Dismiss filed by Trustee and Griffin & Brand of McAllen, Inc. are GRANTED.

FURTHER, Debtor's Chapter 12 petition is DISMISSED.

FURTHER, Trustee's Objection to Property Claimed Exempt by Debtor and Debtor's Application re Stay Enforcement are DENIED AS MOOT.

SO ORDERED this 7th day of December, 1995.

Paul J. Kilburg
U.S. Bankruptcy Judge