In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

MICHAEL G. JELLINGS and MARGARET R. JELLINGS — Bankruptcy No. 94-51864XS

Debtors. — Chapter 12

DECISION RE: DEBTORS' MOTION TO MODIFY PLAN

Michael and Margaret Jellings move to modify their confirmed chapter 12 plan. Their motion was filed November 3, 1995 and amended January 12, 1996. The only objection was filed by Heritage Bank, N.A. (BANK). Trial was held January 16, 1996. Donald H. Molstad, Esq. appeared for Jellings; Anthony J. Stoik, Esq. appeared for Bank. This is a core proceeding under 28 U.S.C. 157(b)(2)(L).

Findings of Fact

Jellings filed their chapter 12 petition on November 16, 1994. They obtained confirmation of their Second Amended Plan (docket no. 29) as modified twice prior to confirmation (docket nos. 36 and 37). For the first 48 months of the plan, Jellings are required to pay $1,650.00 per month to the standing trustee. For the last 12 months of the five-year plan, Jellings must make monthly payments of $713.20. Among the trustee's required distributions is a monthly payment of $605.89 to Bank on its fully secured claim. Bank holds a first priority mortgage on debtors' homestead. Under the plan, Bank would be paid its claim in full by monthly payments for four years and a balloon payment at the end of the four years.

Jellings are custom farmers. They raise swine owned by David Friedrich of Alta, Iowa. It is a farrow-to-finish operation. Friedrich pays Jellings $15.00 for each newborn pig when it is moved out of the nursery and five cents per head per day for the care of each pig after it leaves the nursery and until it is marketed. Michael Jellings also earns $8.00 per hour helping Friedrich in other farm work. Friedrich paid the Jellings approximately $80,000 in 1995.

After confirmation, Jellings immediately fell behind on their plan payments to the trustee. As a result, the trustee was not able to make timely payments to the Bank. The following chart shows the due dates for plan payments, the dates and amounts of actual payments, and the payment dates and amounts of the trustee's payments to the Bank.

Due Date	Actual Date	Amount Paid to Trustee	Trustee's Payment to Bank	Amount to bank
April 15, 1995	May 3	$1,650	May 4	$605.89
May 15	July 12	605.89	July 14	1,650
June 15	August 7 September 27	825 825	August 9 October 9	302.95 302.94
July 15	September 27 October 6	375 1,275	October 9	605.89
August 15	October 6	1,650	October 9	605.89
September 15	October 18	1,650	October 26	605.89

October 15	November 11	1,650	November 9	605.89
November 15	December 4	1,650	December 16	605.89
December 15	January 4	1,650		

(Exhibit 1). The foregoing does not show the actual amount of each specific check paid by the debtor or trustee. I have broken down the actual amount of particular payments to show how payments of a particular date would be applied to required payments. The plan provided that Jellings were to make the payments to the trustee by the 15th of each month. It did not specify when payments were to be made to the Bank. Unless payments to the trustee were by cashier checks, it would not be unreasonable for the trustee to delay payments to creditors for a sufficient interval to permits Jellings' checks to her to clear.

Debtors' plan provided creditors with the right to accelerate payments under the plan if debtors defaulted (Modification, docket no. 36, Article 2b). It stated:

DECLARATION OF ACCELERATION. If an event of default shall have occurred and be continuing and such default is not cured within 30 days after written notice to the Debtor, then the holder of such Debt may declare the Plan Debt of such holder immediately due and payable. The Plan Debt shall be immediately due and payable without presentment, further notice or demand, all of which are hereby waived. The declaration of acceleration of the Plan Debt shall be made by written notice to the Debtor.

On July 7, 1995, the Bank filed and served notice to debtors of their failure to pay fully the payments required under the Plan and of Bank's intent to accelerate if the defaults were not cured within 30 days. As shown above, the defaults were not fully cured within 30 days from July 7. Bank accelerated Jellings' note. Beginning in October, Bank returned all payments received from the trustee. She retains these funds.

There are two reasons for Jellings' defaults under the plan. In March 1995, there was an outbreak in the herd of the disease transmissible gastroenteritis (TGE). Approximately 200 pigs died, and the loss detrimentally affected Jellings' cash flow in April and May. Debtors had a previous outbreak of TGE in January 1994. TGE is not uncommon, especially in winter.

The second reason for default involved Jellings' decisions on personal expenditures. Michael Jellings was previously married. He has four older children by his first marriage. The oldest child, David, married in August. Michael's older daughter, Melissa, graduated from high school in June. Michael Jellings' child support obligation for David and Melissa has ceased, but he still provides support for two other children. Since Melissa's graduation from high school, Jellings' support obligation has decreased from $450 to $225 per month.

Apparently as a result of his divorce, Jellings has been estranged from his children for the past six years. Sometime prior to Melissa's graduation from high school, his relationship with his children improved. His children began calling him, and he was invited to his daughter's graduation. As a result of his improved relations with his children and in an effort to improve these relationships further, Jellings agreed to contribute to his daughter's high school graduation festivities and to his son's August wedding. Margaret Jellings estimates that they contributed about $300 to Melissa's graduation and about $2,200 to David's wedding. Michael had not anticipated participating financially in these events at the time he proposed his plan. He knew that participating when he did would cause problems in fulfilling his obligations under the confirmed plan. His desire to retrieve the love of his children led to his decision to spend the money on their special events.

Jellings admit they are not good money managers. They have enlisted the voluntary aid of David Friedrich to help them control spending. He meets with them regularly and supervises their disbursements. His authority is non-binding, but debtors say they now follow his advice. Michael Jellings has worked for Friedrich since 1991. Friedrich considers both debtors to be good, productive workers, who are always willing to do whatever is needed.

Bank filed a foreclosure petition against Jellings in the Iowa District Court of Buena Vista County on October 10, 1995. Jellings answered and thereafter removed the action to this court (Notice of Removal, docket no. 1, Adversary No. 95-5178XS). Bank has filed a motion for remand or abstention which is under consideration.

Jellings responded to Bank's efforts by filing a Motion to Modify Plan (docket no. 73). They "supplemented" the motion on January 12, 1996 (docket no. 88). The latter is viewed by the court as the pending motion. Debtors propose that their plan be modified to permit them to decelerate the note, permit extensions of the time for making payments to the trustee and to Bank under the plan so that debtors are not delinquent, and to increase the amount of payments to trustee and Bank to compensate the Bank for default interest and reasonable attorney's fees. The written motion does not state when debtors would make the payments to the trustee to provide the Bank's additional compensation.

Discussion and Conclusions

Bank objects to the modification on two grounds. It argues first that post-confirmation modification may only be permitted if the debtors can show they have experienced materially changed circumstances which they could not have anticipated or foreseen at confirmation. Bank argues that debtors cannot show such circumstances in that the TGE outbreak was foreseeable and because the expenditure of money on family events was a choice, not a circumstance imposed upon debtors.

Bankruptcy Code 1229 governs modification of confirmed plans. Subsection (a) states in pertinent part:

At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, on request of the debtor, the trustee, or the holder of an allowed unsecured claim, to--

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time for such payments; or

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

11 U.S.C. 1229(a).

Subsection (b) states that 1222(a), 1222(b), and 1223(c) and the requirements of 1225(a) apply to modifications. The foregoing subsections of 1222 relate to mandatory and permissible contents of a plan. Section 1223(c) relates to acceptance by a secured claim holder. Section 1225(a) specifies confirmation requirements. 11 U.S.C. 1229(b).

Although there is no such express requirement in 1229, there is significant judicial support for requiring debtors to show material, unanticipated changes in circumstances before post-confirmation modification will be allowed. The following are only some of the decisions supporting such a requirement. Agribank, FCB v. Honey (Matter of Honey), 167 B.R. 540, 543 (W.D. Mo. 1994) (modification of chapter 12 plan appropriate when creditor can show substantial, unforeseen change in debtor's circumstances); In re Cook, 148 B.R. 273, 279-80 (Bankr. W.D. Mich. 1992) (debtor must show substantial and unanticipated change in circumstances before modification of chapter 12 plan will be granted); In re Wickersheim, 107 B.R. 177, 181 (Bankr. E.D. Wis. 1989) (because of need for finality in determining rights of parties, plan modifications warranted only if there has been unanticipated change in circumstances); Matter of Grogg Farms, Inc., 91 B.R. 482, 485 (Bankr. N.D. Ind. 1988) (modification of chapter 12 plan only warranted if there has been an unanticipated change in circumstances).

At least one court has declined to demand such a showing on the ground that the statute does not require it and because the statutory guidelines for evaluating modifications "are sufficiently flexible so as to allow the Court considerable discretion in passing on the propriety of proposed changes to a plan" and "to ferret out arbitrary or inappropriate modifications." In re Larson, 122 B.R. 417, 420 (Bankr. D. Idaho 1991). The court pointed out that if Congress had intended "that the Courts scrutinize the circumstances surrounding a case to decide if they 'warrant' the modification, it could have employed specific language incorporating such condition as they did in Section 1127(b)." Id.

The sections governing chapter 12 and 13 modifications are nearly identical. The Seventh Circuit Court of Appeals has decided that "the clear and unambiguous language of 1329 negates any threshold change in circumstances requirement. . . ." Matter of Witkowski, 16 F.3d 739, 746 (7th Cir. 1994). Some bankruptcy courts have come to the same conclusion

regarding chapter 13 plan modifications. In re Powers, 140 B.R. 476, 479 (Bankr. N.D. Ill. 1992); In re Perkins, 111 B.R. 671, 673 (Bankr. M.D. Tenn. 1990). This court has also so ruled. In re Jourdan, 108 B.R. 1020, 1022 (Bankr. N.D. Iowa 1989). A respected treatise on chapter 13 bankruptcy states: "'Changed circumstances' should not be a separate condition for modification of a confirmed plan but should be considered as evidence bearing on the good faith of the proponent of the modified plan under 1325(a)(3) and 1329(b)(1). The conditions for confirmation of a modified plan are fully set forth by Congress in 1329(b). The changed-circumstance test is an unwarranted judicial reaction to the fear that the existing statutory restrictions on confirmation of modified plans are insufficient to protect the finality of confirmation orders."

2 Lundin, Chapter 13 Bankruptcy 6.42 at 6-115-16 (1993).

Having considered the matter, I conclude that debtors need not show a material or substantial, unanticipated change in circumstances in order to obtain modification of a chapter 12 plan. I reach that conclusion because the requirement is not expressed in the statute and because I think the limitations on modification which are expressly stated permit the court sufficient discretion to prevent abuse. Section 1229(a) circumscribes the types of modifications that can be obtained. Modifications may not be obtained if the plan as modified would not comply with plan confirmation requirements, including the requirement that the plan be proposed in good faith (11 U.S.C. 1229(b)(1), incorporating 1225(a)).

Attention to the reason for a modification as part of the overall consideration of a modification proposal permits the court to retain an equitable measure of flexibility. There may be cases where there has been no substantial change in circumstances, or where the changes could have been foreseen, but where the modification is not prejudicial to creditors. Balancing the reason for the modification against its effect on creditors is a reasonable response to a modification dispute of this type--better, I think, than one which will not permit any kind of modification if the movant is unable to show at the outset a substantial, material change in circumstances. It offers no less protection to creditors from abuse.

The good faith requirement under 1225(a)(3) is an issue in this modification. Debtors chose to contribute financially to two family events, a high school graduation and a marriage. They contributed approximately $2,500. It is assumed by the parties that the diversion of money from the plan caused the debtors to default, and this may be so. Certainly the use of the funds in conformance with the plan would have lessened the prospects of default, but I cannot determine from the evidence whether use of the money under the plan would have certainly prevented default. The outbreak of TGE in the swine herd exacerbated the debtors' financial difficulty. It took 200 pigs out of the production line and lessened Jellings' income in April and May. As a result, there may have been default in any event. Although the debtors admit diverting $2,500 from plan payments, there is no evidence as to when or in what increments it was diverted. So it is difficult to tell whether use of the same funds under the plan could have at all points prevented default. Nonetheless, one can assume that use of the funds under the plan would have at least allowed the debtors to cure more quickly and perhaps to have avoided the pending problem.

I agree with Bank's counsel that debtors made a choice. It is not as though circumstances were thrust upon them such as by natural catastrophe or a personal crisis. The choice, to spend money on family celebrations, although they were not legally obligated to do so, no doubt contributed to their default or at least their continuing default. One can understand why the choice was made. The court must decide whether, having made the choice, Jellings' proposed modification is in bad faith. They say they have made sufficient payments to the trustee to bring current all payments under the plan, so that the trustee can make all required payments to the Bank. Moreover, they propose to increase the amount of their payments in order to make the Bank whole as to default interest and attorney's fees and costs. Although the plan is somewhat vague on the point, I understand from their counsel's argument, that debtors intend to pay the additional amounts to the trustee as soon as the interest and fees are allowed by the court. Had debtors proposed to pay such interest and costs over time or at the end of four years, I would not find their proposal to be in good faith as they would be asking the Bank to finance the wedding and graduation party. Debtors' proposal to make Bank whole almost immediately convinces the court that they propose the amendment in good faith.

Bank's second objection to the proposed modification is that chapter 12 plan modification cannot be used to cure plan defaults. I have already ruled on such an objection in the chapter 13 context permitting the debtors to modify their plan

to cure post-confirmation default. In re Thacker, No. X90-01494S, slip op. at 9-11 (Bankr. N.D. Iowa Aug. 24, 1992). See also Central Bank of the South v. Thomas (In re Thomas), 121 B.R. 94, 102-04 (Bankr. N.D. Ala. 1990) (Code does not prohibit modification to cure post-confirmation default). Given the similarity of the statutes, I see no reason for a different result in chapter 12.

Bank also may be making a third objection. It argues that as the note was accelerated, the entire debt is due, and therefore extension of payments alone is insufficient to cure the default. However, as a cure of the default may be provided by the modification through 1222(a)(3), deceleration of the note is a permissible part of the cure. Nor is deceleration an inappropriate modification of the Bank's rights under 1222(b)(2) inasmuch as Bank's costs of acceleration will be paid by debtors.

I conclude that debtors' proposed plan modification filed January 12, 1996 meets the requirements of 11 U.S.C. 1222(a) and 1225(a) and should be confirmed. I have noted, however, that the modification is vague as to the timing of the proposed cure. Rather than require further amendment, and because approval of the motion is based on my understanding that the debtors propose an immediate cure, I will set a timetable for consummation of the modified plan's provision on cure. First, the standing trustee shall make payments from funds in her possession and to come into her possession in accordance with the modified plan, including delinquent payments to Bank in the monthly amounts of $605.89. Second, Bank shall have to and including February 9, 1996 to file a claim for default interest and attorney's fees and costs. Any objection to the claim shall be filed by debtors by no later than February 16, 1996. Hearing on the claim and any filed objections will be held at 1:30 P.M. on February 20, 1996 in the bankruptcy courtroom in Sioux City. If there are no objections, the court will order debtors' immediate payment of the claim to trustee for payment to Bank.

IT IS ORDERED that the debtors' modification of their chapter 12 plan is approved. The plan confirmed March 24, 1995 and modified January 12, 1996 is the confirmed plan.

IT IS FURTHER ORDERED that Heritage Bank, N.A. shall have to and including February 9, 1996 to file a claim for default interest and attorney's fees and costs. Debtors shall have to and including February 16, 1996 to file objection to the claim. If no objection is filed, the claim shall be allowed by the court without further hearing and ordered paid.

IT IS FURTHER ORDERED that if debtors object to Bank's claim, the claim and the objection shall come before the court at 1:30 P.M. on February 20, 1996.

SO ORDERED THIS 5th DAY OF FEBRUARY 1996.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order and a judgment by U.S. mail to: Don Molstad, A. J. Stoik, 2002 List, Carol Dunbar and U.S. Trustee.