

# In the United States Bankruptcy Court

## for the Northern District of Iowa

TASMAK FARM INC.

*Debtor(s).*

Bankruptcy No. 95-31722XF

Chapter 12

### ORDER RE: APPLICATION TO INCUR DEBT

Debtor Tasmak Farm, Inc. (Tasmak) requests permission to incur secured debt. Tasmak gave reduced notice of its motion with permission of the court. First Federal Savings Bank of the Midwest (First Federal) filed objection. Hearing was held March 22, 1996. The court heard additional argument by telephone on March 26. This is a core proceeding under 28 U.S.C. § 157(b)(2)(D).

Tasmak obtained confirmation of its Second Amended Plan on January 22, 1996 (Judgment, docket no. 52). The plan contemplated borrowing by the debtor to finance future crops (Plan, docket no. 44, ¶ 2(c)).

Tasmak filed an "application" to incur secured debt on December 20, 1995. It proposed to borrow \$45,000.00 from Ag Services of America, Inc. (Ag Services) as "an operating line of credit" secured by crops (Application, docket no. 42). Nothing in the application mentioned the priority of the security interest which would be granted to the lender. No one objected, and the application was approved (docket no. 48). Tasmak filed an Application for Nunc Pro Tunc Order in order to correct an error in the interest rate to be paid to Ag Services (docket no. 54). This too was approved (docket no. 57).

Tasmak's application to incur was quite brief. Tasmak learned that Ag Services was not willing to advance credit based upon it or the approving order. On March 11, 1996, Tasmak filed a new application, one drafted by the lender (docket no. 58, Application attached to Notice). It was more particular. In it, debtor sought "to borrow up to \$45,000.00 plus interest for crop inputs (including, but not limited to, seed, chemicals, fertilizer and cash needs) on any and all real estate being farmed by the Debtor." (*Id.*, ¶ 4). The introduction was more comprehensive. It stated that debtor was requesting a court order "authorizing the Debtor to incur secured indebtedness for the purpose of purchasing crop inputs, including, but not limited to, seed, fertilizer, chemicals, fuel, and for the purpose of obtaining certain cash advances for rents, other operating expenses and the like." (*Id.*, introductory paragraph) (emphasis added).

The application further provided that

[a]s security for such loan, Debtor proposes to grant a security interest post-petition to ASA in the 1996 crop, crop insurance and government payments of any nature (and proceeds of payments with respect to which such crop inputs relate) to the extent of such funds actually borrowed, plus interest and costs thereon.

(*Id.*, ¶ 6). Although the Application alleged a copy of the proposed security agreement was attached, it was not. The nature of Ag Services' proposed lien in the collateral was described in paragraph 11 of the Application. It stated:

ASA requires as part of its security for funds to be loaned as requested herein that it be given a lien on the 1996 crop in accordance with the priority afforded by Section 364(c) of the Bankruptcy Code, and further that to the extent the crop and proceeds security described above are not sufficient to repay principal and interest loaned, that this Court award administrative priority to it in accordance with Sections 364(c)(1) and 507(b) for any such collateral deficiency.

Section 364(c) of the Code merely provides that the court may authorize obtaining credit secured by a lien on

unencumbered property or by a junior lien on encumbered property. Tasmak's counsel concedes that the Application was filed with incorrect reference to that Code section and that Tasmak actually seeks to obtain financing under § 364(d)(1) by giving Ag Services a superior lien on property encumbered by First Federal. First Federal has understood this and has objected on that basis. The court will treat the application as one under 11 U.S.C.

§ 364(d)(1) which states that

[t]he court . . . may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if--

- A. the trustee is unable to obtain such credit otherwise; and
- B. there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

It appears to be undisputed that Tasmak cannot obtain credit without granting a lien on its property. Tasmak contends that the confirmed plan provides for the subordination of First Federal's lien in the collateral for the purposes of the application and that even if it did not, there is adequate protection of First Federal's lien so as to allow the motion. First Federal disagrees. It argues that Tasmak seeks to borrow money for purposes not contemplated by the plan and that it seeks to grant Ag Services a superior security interest in collateral as to which the plan does not require Ag Services to subordinate. First Federal says the application is an improper attempt to modify the confirmed plan.

The plan provides retention of First Federal's security interests in all of debtor's inventory, farm products, accounts, instruments, documents, chattel paper, other rights to payment, general intangibles, and government payments and programs (Plan, docket no. 44, ¶ 2). The plan also provides that First Federal would have a lien in after-acquired property of such description and the proceeds and product thereof.

The subordination provision in the plan's treatment of First Federal is as follows:

First Federal shall subordinate its lien in Debtor's crops and proceeds therefrom to the lien of any person providing Debtor financing for the planting thereof, but only to the extent of the amount advanced for that purpose.

(Second Amended Plan, docket no. 44, ¶ 2(c)). The plan requires Tasmak to prove to First Federal by February 1 of each plan year that Tasmak has a commitment for financing. Default in this or any other plan provision would permit First Federal to foreclose on its security.

Although he concedes that the plan appears literally to limit First Federal's subordination obligation to money lent for planting of a crop and to a crop financier's lien on crops and crop proceeds, Tasmak's counsel argues the plan must be read more broadly. He says that loans for planting a crop must be interpreted to include money lent for seed, fertilizer, chemicals, fuel, cash rent, and other expenses such as machinery repair. Also, he says that First Federal's subordination obligation applies to crop insurance and government payments as proceeds of crops. He does not say what types of government payments may be involved.

As to the types of collateral regarding which First Federal is bound under the plan to subordinate its interest, there is no dispute that debtor's crops are included (Plan, ¶ 2(c)). "Crop proceeds" are also described in the plan, and such proceeds include as a matter of law the "[i]nsurance payable by reason of loss or damage to the collateral. . . ." Iowa Code § 554.9306(1). Bank disputes whether government payments are included within the meaning of "crop proceeds" under the plan. The parties' failure to particularly describe the government program payments at issue makes resolution more difficult. Not all government program payments are crop proceeds. For example, deficiency payments under price support programs are not. See Kingsley v. First American Bank of Casselton (In re Kingsley), 865 F.2d 975, 981 (8th Cir. 1989) (applying North Dakota commercial law). The plan is ambiguous as to whether any government program payments are included in "crop proceeds." "[D]oubtful language in a written instrument is construed against the party which selected it." Fashion Fabrics of Iowa, Inc. v. Retail Investors Corp., 266 N.W.2d 22, 27 (Iowa 1978). Moreover, the debtor in proposing its plan described with particularity the retained security interests of First Federal to include "government payments and programs." (Plan, ¶ 2). It did not use the same terms when listing the collateral as to which

First Federal must subordinate. I conclude that First Federal agreed to subordinate only in the crop and proceeds thereof, including insurance payments. It did not agree to subordinate its interest in government programs. Because debtor has failed to describe what types of programs are at issue, I cannot determine that First Federal is adequately protected if its interest in such programs is subordinated. Therefore, although Tasmak may grant Ag Services a lien in government programs, it cannot grant Ag Services a lien in them that is superior to the lien of First Federal.

The parties dispute the purposes for the loan that may take priority over First Federal's lien. The plan says that First Federal shall subordinate its lien to the lien of any person providing financing for the planting of a crop. I agree with Tasmak's counsel that this should be read more broadly than to mean just the planting of seed. A reasonable interpretation is that financing for planting a crop includes financing for the purchase of seed, chemicals, including insecticides and herbicides, fertilizer, and fuel for the operation of farm machinery to accomplish the tilling of the ground, planting, cultivation, application of fertilizer and chemicals, the harvesting and delivery of the crop. First Federal does not appear to argue otherwise. It does, however, object to the subordination of its interest for loans to pay advance cash rent and to pay for machinery repair. It also objects to any requirement that it subordinate for loans "for the purpose of ... other operating expenses and the like." (Application, docket no. 58, introductory paragraph).

Tasmak contends that it must finance its cash rent in the amount of \$12,000.00 to have access to the ground to plant a crop. Even if borrowing to pay cash rent in advance is included only in a broad reading of "planting," it argues that First Federal is in no way harmed because under Iowa law, the landlord, in any event, would have a lien on the 1996 crop prior to the lien of First Federal. I agree. As to crops to be grown in the future, the landlord would have a statutory lien in the crop prior to the lien of First Federal. Perkins v. Farmers Trust and Savings Bank, 421 N.W.2d 533, 535 (Iowa 1988); see Iowa Code Chapter 570 (landlord's lien). Therefore, if Tasmak is permitted to borrow the money to pay the landlord in advance and to give a security interest in the crop to the lender, First Federal is not prejudiced because the landlord would have priority over First Federal's lien in the crops even if the loan were not made. I do not conclude that First Federal's interest in the crop is prejudiced by Tasmak's giving a priority interest in the crop to Ag Services so it can pay the landlord. First Federal argues that it is harmed because if the court does not permit the priority interest, Tasmak cannot obtain the lease and will be in default under the plan. First Federal, as a result, could foreclose. I do not believe this is the type of prejudice that is relevant in this dispute. I am concerned with the adequate protection of First Federal's interest in the future crop. If that interest is protected by Tasmak's proposal, I should not preclude the priority secured loan from Ag Services merely because permitting it will prevent default and foreclosure.

The parties also dispute whether Tasmak should be permitted to borrow for equipment repair and to grant a first security interest in crops to finance it. Tasmak wants to borrow up to \$5,000.00 for that purpose if it is necessary. First Federal says this purpose is outside the parameters of the plan's subordination requirement. It contends that equipment repairs are not part of planting a crop. Certainly, repairing equipment used for crop production may be, by degree, less an input expense than seed or fertilizer. But the distinction would not be meaningful to a farmer whose planter breaks down in the middle of the field. I will construe the planting of a crop broadly to include equipment repair because First Federal has a first security interest in Tasmak's line of machinery. There appears to be no dispute on this. Moreover, as debtor is a corporation, it has not and cannot claim the equipment exempt and avoid First Federal's lien. Repair of the machinery inures to the benefit of First Federal. It might even be required by First Federal's security agreement. Thus, the debtor's ability to borrow money for repairs serves two purposes which benefit First Federal. First, to the extent the equipment is necessary to put in the crop, the borrowing helps to create an asset against which First Federal's lien will attach. Second, it permits maintenance of the equipment in which First Federal already has a lien. These considerations lead me to construe the subordination requirement broadly in this regard.

I agree with First Federal that Tasmak's catch-all language in the application is too broad. Given the continual disputes in this case between these parties, that is imprudent. The court will not in this order approve the granting of a superior lien for Ag Services' advances to Tasmak for "other operating expenses and the like." There has been no showing of what these expenses are or might be and no indication that they would relate in some meaningful and causal way to the production of the crop. This determination will not preclude debtor from making further motion as to any other advances.

The only remaining issue is the court's jurisdiction. First Federal says the court has none over the property as it is not property of the estate and further that the court cannot grant an interest not provided for by the plan. This is not so.

Despite the vesting of the property of the estate on confirmation, an estate continues to exist. See Security Bank of Marshalltown, Iowa v. Neiman, 1 F.3d 687, 690 (8th Cir. 1993) (Chapter 13 estate). Moreover, I have jurisdiction to grant motions under 11 U.S.C. § 364 post-confirmation and to interpret a confirmed plan. First Federal has not cited authority otherwise.

IT IS ORDERED that the motion of Tasmak Farm, Inc. to incur secured debt is granted. Tasmak Farm, Inc. may borrow up to \$45,000.00 plus interest from Ag Services of America, Inc. for 1996 crop inputs, which inputs may include the purchase of seed, agricultural chemicals for crop production, fertilizer, fuel for the production of crops, including planting, tilling, cultivating, applying chemicals and fertilizers, harvesting and delivering, and for the repair of machinery and equipment necessary to the planting, tilling, cultivating and harvesting a crop. Tasmak Farm, Inc. is granted permission to grant a security interest in its 1996 crops and proceeds thereof, including insurance proceeds, to Ag Services of America, Inc., and such interest shall be prior and superior to the lien of First Federal Savings Bank of the Midwest in such crops and proceeds. Ag Services of America, Inc. may perfect its security interest as requested in the application of the debtor.

IT IS FURTHER ORDERED that Tasmak Farm, Inc. may grant a security interest to Ag Services of America, Inc. in government program payments, but that its interest shall not be prior to the interest in such programs of First Federal Savings Bank of the Midwest. The debtor may borrow within the dollar limitation prescribed herein for other operating expenses not delineated in this order, but the lien granted to secure such advances shall not have priority over the lien against crops held by First Federal Savings Bank of the Midwest.

IT IS FURTHER ORDERED that debt incurred shall have the priority provided in 11 U.S.C. § 364(c)(1).

IT IS FURTHER ORDERED that the debtor's application is otherwise granted. Judgment shall enter accordingly.

SO ORDERED THIS 28th DAY OF MARCH 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, Carol Dunbar and U.S.Trustee.