In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

CRAIG ROBERT HEMMINGSEN — Bankruptcy No. 97-01536S
Debtor(s). — Chapter 12

DECISION RE: CONFIRMATION

Debtor Craig R. Hemmingsen seeks confirmation of his proposed chapter 12 plan. Four parties object to confirmation: the United States of America on behalf of the Farm Service Agency (FSA) (docket no. 49), Jack Borchers (docket no. 48), the Plymouth County Treasurer (docket no. 47) and Carol F. Dunbar, the standing trustee (docket no. 50). Hearing was held July 1, 1998 in Sioux City. Hemmingsen was represented by Donald H. Molstad; Donna K. Webb appeared for FSA; John Harmelink appeared for Borchers. Trustee Carol Dunbar also appeared. This is a core proceeding under 28 U.S.C. § 157(b)(2)(L).

Hemmingsen filed his chapter 12 petition on May 20, 1997. He filed his *First Amended and Substituted Plan of Reorganization* on June 9, 1998 (docket no. 45). Creditors have raised several objections to the plan. Among them is the contention by FSA that the debtor will not be "able to make all payments under the plan and to comply with the plan." This so-called "feasibility" requirement must be satisfied if a plan is to be confirmed. 11 U.S.C. § 1225(a)(6). The burden is on the debtor to show feasibility by objective facts. In re Gough, 190 B.R. 455, 458 (Bankr. M.D. Fla. 1995).

Based on the evidence presented, I cannot find that the plan is feasible. The objection of FSA will be sustained, and confirmation of the plan will be denied. I do not reach other confirmation issues raised by the parties.

Inextricably bound up in the feasibility issue is the debtor's proposal to have the court reallocate a lien credit given the debtor by FSA prior to the bankruptcy filing. Hemmingsen, a farmer, has been indebted to FSA by three promissory notes. These are identified in the pending plan as notes "A," "B," and "C." Collateral was given to secure the notes. As part of an agreement in a prior chapter 12 bankruptcy, Hemmingsen gave an additional piece of collateral to secure each of the three notes. The additional collateral was a mortgage on a house in Akron, Iowa. Another creditor, First Federal Savings Bank, held a prior mortgage on the property.

Because of farming and personal problems, Hemmingsen fell behind in his payments to FSA. He defaulted on his annual payments on each note in 1995, 1996 and 1997. Hemmingsen also defaulted on his payments to First Federal, and it filed a petition to foreclose its mortgage. First Federal purchased the Akron property at a foreclosure sale in 1995. FSA redeemed. On October 21, 1996, FSA filed a notice of redemption in state court and deposited $21,000.00 with the Plymouth County Clerk of Court. FSA filed an affidavit with the redemption notice stating that Hemmingsen's debt as of June 14, 1995 was $186,260.56, and that FSA would credit Hemmingsen's note in the amount of $71,000.00. FSA received a sheriff's deed dated October 23, 1996. Hemmingsen subsequently attempted to redeem from FSA, but the state court ruled that his redemption was invalid.

When it redeemed the Akron property, FSA internally set up a new loan to cover the redemption amount and $69.61 of interest on it. It applied $21,069.91 to that loan to satisfy it, and it applied the balance of a $71,000.00 lien credit to interest and principal on Hemmingsen loan 44-08 (see Exhibit 1) or as it is identified in the plan, Note "A." Such an application left Hemmingsen in default on notes "B" and "C." He remained in default on these notes at the time he filed his chapter 12 petition on May 20, 1997. I cannot determine from the evidence whether he is in default on note "A."

Hemmingsen contends that FSA did not give him sufficient credit on his notes when it redeemed, and second, that the court has the equitable power to reallocate the lien credit so that he would be current on all three notes at the time of confirmation. His plan proposes this reallocation and then regular payments to FSA on the then-current notes. FSA contends that Hemmingsen received proper lien credit through its redemption and that the court does not have the jurisdiction or the authority to reallocate a pre-petition credit on the notes. The debtor concedes that unless the redemption lien credit is reallocated from note "A" alone to all three notes, his plan is not feasible.

I agree with debtor that he is entitled to $21,069.91 further credit on his loans. I recently dismissed Hemmingsen's adversary proceeding against FSA because I determined that FSA's redemption of the Akron property was not a fraudulent conveyance. Hemmingsen v. United States of America, Adv. No. 97-9117S (March 6, 1998). I concluded also that as a result of FSA's redemption, Hemmingsen was entitled to a lien credit of $71,000.00 not including the $21,000.00 paid by FSA for the sale certificate. Id., slip op. at 2. I believe this is a correct construction of Iowa law. Iowa Code §§ 628.11, 628.13, 628.17, 628.18 and 628.19. I conclude so again in this proceeding. As FSA credited Hemmingsen $71,000.00 including the price it paid for the sale certificate, I find that Hemmingsen remains entitled to additional lien credit of $21,069.91.

Hemmingsen also argues that the court may, through plan confirmation, direct reallocation of the $71,000.00 lien credit from note "A" to the delinquent interest and principal on notes "A," "B," and "C." Debtor says that FSA's application violated its own policies. The evidence of this was Hemmingsen's testimony that he had been told by FSA personnel that its policy was to apply debt payments first to interest and then to principal. Although this policy may exist in a single note transaction, the evidence is insufficient to permit a finding that it is the same policy or procedure in a multi-note transaction. I cannot find that FSA violated its policies or procedures by applying the loan credit to the interest and principal of one note rather than to interest on all notes, and then to principal on all notes.

Debtor concedes that he can point to no case or statute to show that FSA's application of the credit to a particular note was contrary to law. He has not shown that it was a breach of contract.

Debtor's remaining argument is that the court has the authority to direct any application it finds equitable. Debtor argues for an application he says enables him to confirm a plan but does not injure FSA. He says, under any application, FSA is fully secured, and will be paid in full.

Although the debtor presents a sympathetic argument, I do not believe it finds any basis in the law. If FSA's application choice were not contrary to law, then avoiding it must be found in an avoidance power provided by Congress. Debtor essentially asks the court to avoid a pre-petition transaction so that it may be redone under a plan. I have already denied debtor's claim that the redemption was a fraudulent conveyance. I find no power in the Code that permits me to avoid FSA's application of the lien credit to note "A." I disagree that the powers conferred under § 105 of the Bankruptcy Code permit me to avoid pre-petition transactions just because avoidance aids the debtor in reorganization. 11 U.S.C. § 105(a). Absent reliance on a specific avoidance or strong arm power, I view it as an inappropriate use of § 105(a) to reorder legitimate pre-petition transactions between debtor and creditor for the purpose of putting debtor in the best possible position on the date of bankruptcy.

Debtor concedes that absent a reallocation of the $71,000.00 lien credit, he cannot propose a feasible plan. I have concluded that the plan may not obtain reallocation of the $49,930.09 credit given by FSA prior to bankruptcy. Debtor remains entitled to a lien credit of $21,069.91. He may direct allocation of this amount under a chapter 12 plan. See United States v. Energy Resources Co., Inc., 110 S.Ct. 2139 (1990)(debtor may direct tax payments under Chapter 11 plan). However, there is no evidence that debtor's allocation of this smaller amount to notes "B" and "C" would cure delinquencies and make a plan feasible. Debtor has failed to prove that his proposed plan is feasible. The plan does not meet the requirement of 11 U.S.C. § 1225(a)(6), and it cannot be confirmed.

IT IS ORDERED that confirmation of debtor's *First Amended and Substituted Plan of Reorganization* is denied. Judgment shall enter accordingly.

SO ORDERED THIS 9th DAY OF JULY 1998.

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, U.S. Attorney, Jeffrey Poulson, and U.S. Trustee.