

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

Case No. 3:09-bk-5691-PMG

WILBUR E. HAND, JR.,
and JERI-LYNN F. HAND,

Debtors.

Chapter 12

ORDER ON CONFIRMATION OF SIXTH AMENDED CHAPTER 12 PLAN

THIS CASE came before the Court for a final evidentiary hearing to consider confirmation of the Sixth Amended Chapter 12 Plan filed by the Debtors, Wilbur E. Hand, Jr. and Jeri-Lynn F. Hand. (Doc. 93).

First Federal Bank of Florida (First Federal) has filed a written Objection to the Debtors' Plan. (Doc. 21).

The Court has considered the Plan, the testimony and other evidence presented at the hearing, and the entire record in this case, and finds that the Sixth Amended Chapter 12 Plan satisfies the requirements of §1225 of the Bankruptcy Code and should be confirmed.

Background

The Debtors, Wilbur E. Hand, Jr. and Jeri-Lynn F. Hand, have operated a poultry farm in Suwannee County, Florida since 1995. (Transcript, p. 9). In connection with the poultry farm, the Debtors grow broilers pursuant to an arrangement with Pilgrim's Pride.

In addition to the farming operation, the Debtor, Wilbur E. Hand, Jr., works for the Suwannee County Fire and Rescue Department. (Doc. 1, Schedule I; Transcript, pp. 9-10).

On July 10, 2009, the Debtors filed a petition under Chapter 12 of the Bankruptcy Code.

On their Schedule of Assets filed with the Petition, the Debtors listed certain real property located in Suwannee County (the Property). The Property consists of approximately 40 acres of land, the Debtors' residence, and four poultry houses. (Doc. 1, Schedule A). The Property is encumbered by a first mortgage in favor of First Federal.

On July 10, 2009, the Debtors filed their initial Chapter 12 Plan. (Doc. 7).

On July 12, 2009, the Debtors filed a Motion for Valuation of the Secured Claim of First Federal. (Doc. 8). The Motion was filed pursuant to §506(a) of the Bankruptcy Code.

On August 4, 2009, First Federal Filed an Objection to the Debtors' Chapter 12 Plan. (Doc. 21). In the Objection, First Federal asserts that the Plan should not be confirmed because (1) it does not properly provide for First Federal's secured claim; (2) the repayment schedule provided by the Plan extends beyond the terms of the original mortgage; (3) the Plan is not feasible; and (4) the Plan was not proposed in good faith.

On August 18, 2009, First Federal filed a Proof of Claim in the Chapter 12 case (Claim Number 10). Claim Number 10 was filed as a secured claim in the amount of \$725,109.64. Copies of a Promissory Note, Mortgage, Modification of Mortgage, and Financing Statement are attached to the Claim. According to the Claim, the loan matured on July 15, 2009. (Transcript, pp. 16-17, 92-93, 105, 112).

On November 18, 2009, the Court entered an Order Granting Motion to Value Secured Claim Ten. (Doc. 73). The Order provides:

2. The value of that portion of Claim 10 secured by the SW ¼ of the NE ¼ of Section 23, Township 4 South, Range 14 East, Suwannee County, Florida, consisting of 40 acres, more or less, and all improvements situated thereon including poultry broiler houses, a residential dwelling and all related structures is \$380,000.00. The balance of this claim in the amount of \$345,109.64 is unsecured.

(Doc. 73). The Order is based on a Real Property Appraisal Report prepared by Lawrence H. Saucer, ARA, ASA, on September 25, 2009. (Doc. 66).

On November 30, 2009, the Debtors filed their Sixth Amended Chapter 12 Plan. (Doc. 93). The Plan provides that the Debtors will "pay to the Trustee the sum of \$15,870.00 per quarter over the life of the Plan for a total plan period of three (3) years." With respect to the Claim of First Federal, the Plan provides:

The amount of \$366,491.02 will be paid in quarterly installments amortized over a 20-year term at 6% per annum in quarterly installments of \$7,897.27 with the first quarterly installment payment to be due and payable on March 1, 2010, and on the first day of each quarter thereafter until paid in full. Beginning with the thirteenth quarterly payment, the Debtors shall make direct payments to the Bank of \$7,897.27 for quarters 13 through 80. [Total Plan Payments: \$7,897.27 x 12 = \$94,767.24 - - There will be a balance remaining after the 12th quarterly installment under the Plan.]

(Doc. 93, pp. 3-4).

First Federal objects to confirmation of the Debtors' Sixth Amended Chapter 12 Plan. First Federal primarily contends that the Plan is not proposed in good faith, does not properly provide for the payment of First Federal's Claim, and is not feasible.

Discussion

"Congress enacted chapter 12 to give small family farmers an opportunity to reorganize their secured debt, allowing them to keep their land and way of life." In re Carter, 165 B.R. 518, 521 (Bankr. M.D. Fla. 1994). The "legislative history is clear that Chapter 12 was intended to 'give family farmers facing bankruptcy a fighting chance to reorganize their debts and keep their land.'" Harmon v. United

States, 101 F.3d 574, 584 (8th Cir. 1996)(quoting H.R. Conf. Rep. No. 99-958, at 48 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5246, 5249).

Section 1221 of the Bankruptcy Code requires a Chapter 12 debtor to file a plan. 11 U.S.C. §1221. Section 1222(a) of the Bankruptcy Code sets forth the mandatory contents of the plan, and §1222(b) sets forth the permissive contents of the plan. 11 U.S.C. §1222. The requirements for confirmation of the plan are set forth in §1225 of the Bankruptcy Code. 11 U.S.C. §1225.

In this case, First Federal contends that the Debtors' Plan should not be confirmed because it does not satisfy the requirements of §1225(a)(3), §1225(a)(5), and §1225(a)(6) of the Bankruptcy Code.

I. Section 1225(a)(3)

Section 1225(a)(3) provides that the Court shall confirm a plan if "the plan has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. §1225(a)(3).

Good faith is not defined in the Bankruptcy Code. Instead, courts generally evaluate all of the factors present in a specific case to determine whether the good faith requirement is satisfied. In re Sorrell, 286 B.R. 798, 805 (Bankr. D. Utah 2002). A debtor's good faith is determined by examining "the totality of the circumstances" in the case. In re Carter, 165 B.R. at 523.

In essence, the good faith requirement is a catch-all provision that allows the court to take an overall look at the use which the debtor has made of the chapter 12 filing. If the court determines that the debtor filed the case or filed the plan for a purpose other than a good faith attempt to reorganize the debtor's farming business, the court is empowered by §1225(a)(3) to deny confirmation.

In re Lockard, 234 B.R. 484, 490 (Bankr. W.D. Mo. 1999)(quoting 8 Collier on Bankruptcy 1225.02[3], p. 1225-7 (15th ed. rev. 1999)). A debtor's use of the options available under the Bankruptcy Code, however, does not indicate a lack of good faith. In re Carter, 165 B.R. at 523.

In this case, First Federal asserts that the Debtors failed to disclose certain assets on the bankruptcy schedules initially filed with their petition, furnished an inaccurate financial statement to the Bank in February of 2009, and obtained postpetition loans from Mr. Hand's father without Court approval. For these reasons, First Federal asserts that the Debtors did not file the Sixth Amended Chapter 12 Plan in good faith within the meaning of §1225(a)(3) of the Bankruptcy Code.

The Court has considered the record and testimony of the Debtors, and finds that the Plan was filed in good faith.

The assets that were initially omitted from the Debtors' schedules include two motorcycles, two Yamaha Rinos, one of which is inoperable, and other miscellaneous property. The Debtors subsequently amended their Schedules to disclose the assets. The Debtors have also amended their Schedules to clarify their interest in a travel trailer, motorcycle, and boat that had been acquired with members of the Debtors' family. (Docs. 81, 82, 97, 98). The Debtors testified that the omissions were inadvertent, were caused by incomplete information or the pressure associated with their financial situation, and were corrected as soon as the oversight was discovered. (Transcript, pp. 22-26, 96).

Additionally, Mrs. Hand testified that she completed the Financial Statement for First Federal in February of 2009 based on the best information that she had at the time, and did not intend to misrepresent her financial condition in any way. (Transcript, pp. 103-04).

Finally, the Debtors testified that they obtained postpetition loans from Mr. Hand's father to pay immediate operating expenses that became due while awaiting receipt of the grow checks from Pilgrim's Pride. According to the Debtor, the loans were necessary to continue operating, and were obtained on an unsecured basis. (Transcript, pp. 32-34).

The Court observed the demeanor and candor of the Debtors, and is satisfied that they filed their Plan in good faith and without any improper intent. Further, it is clear that the Debtors possess a proper business purpose for filing the Chapter 12 plan. The income from their poultry operations declined in the years prior to the filing of the bankruptcy petition, which had impaired their ability to pay their operating expenses, living expenses, and mortgage payments. Additionally, First Federal's mortgage matured in July of 2009, and the full amount owed to First Federal was due at that time.

Under these circumstances, the Court finds that the Plan was filed as a good faith attempt to reorganize the Debtor's farming business.

II. Section 1225(a)(5)

Section 1225(a)(5)(B) provides that the Court shall confirm a Chapter 12 plan if (1) the plan provides that the holder of each secured claim retains the lien securing such claim, and (2) the value, as of the effective date of the plan, of property to be distributed by the trustee or the debtor under the plan on account of such claim is not less than the allowed amount of such claim. 11 U.S.C. §1225(a)(5)(B).

First Federal is the holder of a secured claim in this case. On November 18, 2009, the Court entered an Order establishing that the value of the secured portion of First Federal's claim is \$380,000.00.

The Debtors' Sixth Amended Chapter 12 Plan provides that the balance owed on the secured portion of the claim is \$366,491.02, after crediting certain adequate protection payments made during the course of the case. The Plan then provides that the sum of \$366,491.02 "will be paid in quarterly installments amortized over a 20-year term at 6% per annum in quarterly installments of \$7,897.27 with the first quarterly installment payment to be due and payable on March 1, 2010, and on the first day of each quarter thereafter until paid in full." (Doc. 93, p. 3).

The Court finds that the Debtors' proposed treatment of First Federal's claim is permissible in this Chapter 12 case.

"In order to facilitate restructuring of debts Congress gave the chapter 12 debtor broad powers to alter his obligations." In re Carter, 165 B.R. at 521(citing H.R.Rep. No. 958, 99th Cong., 2nd Sess. 48-51 (1986) *reprinted in* 1986 U.S.Code Cong. & Admin.News 5227, 5249-52.). Section 1222(b)(2) of the Bankruptcy Code expressly provides that a Chapter 12 plan may "modify the rights of holders of secured claims, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims." 11 U.S.C. §1222(b)(2)(Emphasis supplied).

Courts have generally recognized that §1222(b)(2), in combination with §506(a) of the Bankruptcy Code, allows Chapter 12 debtors to bifurcate the claim of an undersecured creditor, and to treat the claim as a secured claim only to the extent of the value of the creditor's collateral. Section 506(a)(1) provides in part:

11 USC § 506. Determination of secured status

(a)(1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.

11 U.S.C. §506(a)(1). "When an undersecured creditor files a proof of claim in a bankruptcy case, §506(a) divides the claim into a secured claim to the extent of the value of the collateral and an unsecured claim for the remainder." Harmon v. United States, 101 F.3d 574, 578 (8th Cir. 1996).

Based on the combined operation of §506(a) and §1222(b)(2), the Eighth Circuit Court of Appeals concluded that Chapter 12 of the Bankruptcy Code permits a debtor to "strip down" an undersecured creditor's lien to the value of the collateral. Harmon v. United States, 101 F.3d at 577. According to the

Eighth Circuit, the term "allowed secured claim," as it appears in §1225 of the Bankruptcy Code, "must be interpreted by reference to the bifurcation of claims into secured claims and unsecured claims by §506(a)." *Id.* at 583. Consequently, the Court concluded that §1225(a)(5)(B) "requires only that the creditor retain security for the repayment of its secured claim." *Id.* at 583-84.

Other cases that have recognized the availability of "lien stripping" in Chapter 12 cases include Travelers Insurance Company v. Bullington, 878 F.2d 354 (11th Cir. 1989), and In re Estrada, 387 B.R. 875, 880 (Bankr. M.D. Fla. 2008)(citing Harmon's holding that "section 506 operates with section 1225 in a chapter 12 case to allow 'strip down' of liens.").

Additionally, the provisions of Chapter 12 also permit debtors to provide for repayment of secured claims beyond the term of the plan. Generally, §1222(c) of the Bankruptcy Code provides that a chapter 12 plan may not provide for payments over a period that is longer than three years, or longer than five years if cause is shown. 11 U.S.C. §1222(c). An exception to the general rule is contained in §1222(b)(9), however, which provides that a Chapter 12 plan may "provide for payment of allowed secured claims consistent with section 1225(a)(5) of this title, over a period exceeding the period permitted under section 1222(c)." 11 U.S.C. §1222(b)(9).

Section 1222(b)(9) "clearly authorizes" chapter 12 debtors to provide for payments on secured claims that extend beyond the five-year term of the plan. In re Elk Creek Salers, Ltd., 286 B.R. 387, 390-91 (Bankr. W.D. Mo. 2002). A "Chapter 12 plan may restructure a loan obligation to provide for payment of a secured claim . . . beyond the length of the plan, provided the payment is consistent with section 1225(a)(5)." In re Torelli, 338 B.R. 390, 394 (Bankr. E.D. Ark. 2006). Further, "[m]ost courts that have addressed the permissibility of stretching out repayments to secured creditors have been lenient in allowing the debtors the maximum time for paying secured creditors." In re John Francks

Turkey Co., Inc., 1999 WL 565883, at 2 (10th Cir. BAP)(citing Travelers Insurance Co. v. Bullington, 878 F.2d at 356-58).

In conclusion, §506(a) and §1222(b)(2) of the Bankruptcy Code permit Chapter 12 debtors to "strip down" secured claims to the value of the underlying collateral, and §1222(b)(9) of the Bankruptcy Code authorizes Chapter 12 debtors to extend the payments on such claims beyond the term of the plan. Based on these specific provisions of Chapter 12, the Court finds that the Debtors' Chapter 12 Plan in this case complies with §1225(a)(5) of the Bankruptcy Code.

III. Section 1225(a)(6)

Section 1225(a)(6) of the Bankruptcy Code provides that the Court shall confirm a plan if "the debtor will be able to make all payments under the plan and to comply with the plan." 11 U.S.C. §1225(a)(6). "This requirement, dubbed the 'feasibility test,' focuses on the probability of the debtor's making all payments under the plan." In re Torelli, 338 B.R. at 397.

The feasibility test requires only that the debtor establish a "reasonable probability of success." In re Elk Creek Salers, Ltd., 286 B.R. at 396.

Feasibility is a question of fact that necessarily entails a determination of the comparative credibility of experts as well as of the debtor. (Citation omitted.) Many courts have held that a Chapter 12 debtor should be given the benefit of the doubt regarding the issue of feasibility when the debtor's plan projections – using reasonable inputs in light of the current economic climate – indicates that it is reasonably probable that the debtor can satisfy the plan payments. (Citations omitted.) Thus, it is not necessary that the debtor guarantee to the court that the plan will be successful, but only provide reasonable assurance that the plan can be achieved.

In re John Francks Turkey Co., Inc., 1999 WL 565883, at 4. In other words, "courts generally give debtors the benefit of the doubt on the issue of feasibility, provided a reasonable probability of success

is established." In re Lockard, 234 B.R. 484, 492 (Bankr. W.D. Mo. 1999)(citing In re Gough, 190 B.R. 455, 458 (Bankr. M.D. Fla. 1995)).

In this case, the Chapter 12 Plan provides for quarterly payments to the Trustee. The scheduling of the payments on a quarterly basis is intended to correspond to the Debtors' receipt of income from their poultry operations. Specifically, the payments to the Trustee will be funded primarily from the grow checks received from Pilgrim's Pride. (Transcript, p. 52). The Debtors' financial projection of income and expenses for 2010, 2011, and 2012 is based on the production and delivery to Pilgrim's Pride of five and one-half flocks per year, in accordance with USDA forecasts. (Transcript, p. 69). The amount of each grow payment is projected to approximate \$25,000.00 to \$30,000.00. (Transcript, p. 86). Additionally, Mr. Hand receives income from the Suwannee County Fire and Rescue Department in the approximate amount of \$61,414.00 per year.

The Debtors' Sixth Amended Chapter 12 Plan provides for payments to the Chapter 12 Trustee in the amount of \$15,870.00 per quarter.

James Walter Prevatt, an agricultural economist who was retained to assess the Debtors' net disposable income, testified that the Plan is feasible. (Transcript, pp. 68, 75). The Chapter 12 Trustee does not specifically object to confirmation on the grounds that it lacks feasibility. (Transcript, p. 144).

Under these circumstances, the Court finds that the Debtors have shown a reasonable probability that they will be able to make the payments proposed under their Plan. The Plan complies with §1225(a)(6) of the Bankruptcy Code.

Conclusion

The Court concludes that the Debtors' Chapter 12 Plan satisfies the requirements of §1225 of the Bankruptcy Code and should be confirmed. The Plan has been proposed in good faith, as required by §1225(a)(3), and is feasible, as required by §1225(a)(6). Additionally, the value distributed to First Federal under the Plan is not less than the allowed amount of First Federal's secured claim, as required by §1225(a)(5)(B) of the Bankruptcy Code.

Accordingly:

IT IS ORDERED that:

1. The Sixth Amended Chapter 12 Plan filed by the Debtors, Wilbur E. Hand, Jr. and Jeri-Lynn Hand, is confirmed.
2. First Federal Bank of Florida's Objection to Debtors' Chapter 12 Plan is overruled.

DATED this 4 day of February, 2010.

BY THE COURT

/s/ Paul M. Glenn

PAUL M. GLENN
Chief Bankruptcy Judge