

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of :
EUGENE A. SORENSEN, : Case No. 89-387-W H
Debtor. : Chapter 12

ORDER--MOTION TO DISMISS

On April 21, 1989, a hearing was held on the motion to dismiss. The following attorneys appeared on behalf of their respective clients: Ron Adams for Farm Credit Bank of Omaha; John W. Kocourek for Farmers Savings Bank; Kevin R. Query, Assistant United States Attorney, for Farmers Home Administration and Internal Revenue Service; Anita L. Shodeen, Chapter 12 trustee; and Eugene A. Sorensen, pro se debtor (hereinafter "Debtor"). At the conclusion of said hearing, the Court took the matter under advisement upon a briefing deadline of April 28, 1989. Briefs were timely filed and the Court considers the matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2). The Court, upon review of the pleadings, arguments of counsel, evidence admitted, and briefs submitted, now enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. On February 24, 1989, Debtor filed a pro se Chapter 12 petition.

2. On March 10, 1989, Debtor filed a Chapter 12 Supplement to Statement of Financial Affairs for Debtor Engaged in Business. In

response to Question No. 2 "State the amount of gross income realized from farming the last taxable year preceding the taxable year in which the accompanying Petition is filed", Debtor answered "None (Receiver received this income)".

3. Prior to 1982, most of Debtor's farm equipment was repossessed by a bank. Debtor does not own a tractor, planter or a combine. Debtor's remaining farm equipment includes a plow, till cultivator, harrow, feed wagon, hayrack, elevator and mower, and Debtor admits this equipment is not sufficient to plant, raise and harvest a crop.

4. In 1982 a mortgage foreclosure action was commenced in the United States District Court for the Southern District of Iowa, Western Division, captioned "United States of America, Plaintiff v. Eugene A. Sorensen and Kate M. Sorensen, et al., Defendants, Civil No. 82-109-W." Said action was commenced to foreclose mortgages on real estate described in Debtor's schedule B-1--Real Property (hereinafter "Real Estate"). On January 29, 1986, a judgment and decree of foreclosure was entered by the United States District Court for the Southern District of Iowa, Western Division, foreclosing the mortgages on the Real Estate held by Farm Credit Bank of Omaha and Farmers Home Administration. The foreclosure action is still pending.

5. For each year beginning in 1983 and continuing through 1987, Debtor leased the real estate to third parties who farmed it as tenants. The lease arrangements generally required the payment of

\$28,000.00 to \$32,000.00 cash rent with one-half of such cash rent payment being made in the spring of each year and the other half being made in the fall of each year.

6. During January of 1987, Debtor leased the Real Estate to Tom Hoffman for \$20,000.00 cash rent. Debtor received \$14,000.00 of the cash rent from Hoffman during January or February of 1987. The \$6,000.00 balance was received by Debtor in the fall of 1987. On January 23, 1987, Farmers Savings Bank was appointed Receiver to take charge of the Real Estate and collect the rents and profits from it during the mortgage foreclosure action. Debtor failed to pay over to the Receiver any of the cash rent received by him from Hoffman.

7. On October 24, 1987, Debtor and his wife conveyed by deed all of the Real Estate to the E&K Living Trust. The Deed was filed of record with the Recorder of Shelby County, Iowa. A "Trust Registration" with respect to the E&K Living Trust, dated October 24, 1987, was filed of record with the Shelby County, Iowa Recorder on October 29, 1987. The Deed under which the Real Estate was conveyed to the E&K Living Trust was an absolute conveyance of the Real Estate. The E&K Living Trust continues to own the Real Estate today.

8. The Receiver leased the Real Estate to Debtor for the 1988 crop year, and said lease provided for payment of cash rent of \$25,000.00. Debtor paid one-half of the cash rent in the spring. The second half of the cash rent which was to have been paid in the fall of 1988 has never been paid by Debtor. The crop grown on the

real estate

in 1988 was harvested, but Debtor never received any of the crops. The Receiver holds the 1988 crop.

9. The Honorable Donald E. O'Brien, United States District Judge for the Southern and Northern District of Iowa, entered an Order in the mortgage foreclosure action on April 10, 1989, declaring that neither the Real Estate nor the 1988 crop are part of Debtor's bankruptcy estate. In addition, said Order granted the Receiver permission to lease the Real Estate to the highest bidder and required that Debtor would receive a preference for leasing the Real Estate for 1989 if he was able to match the highest bid for the lease of the farm property. The Receiver leased the property to Dale Conrad for a cash rent of \$33,699.10, due and payable one-half on commencement of the farm lease and one-half on October 1, 1989. The Receiver advised Debtor of the terms of the lease with Conrad and Debtor was offered the lease upon the same terms provided 1) an acceptable form of financial commitment for payment of the balance of the cash rent due on October 1, 1989, was provided to the Receiver, 2) a lease be executed by Debtor, and 3) the initial payment be made on or before April 21, 1989. Debtor failed to meet the Receiver's requirements for obtaining the lease of the real estate for the 1989 crop season.

10. A government subsidy check for advance deficiency payment

or diversion payments with respect to the Real Estate in the approximate amount of \$10,000.00 was paid during the spring of 1988.

That money was deposited in the bank account of the E&K Living Trust at Packers National Bank in Omaha, Nebraska. The E&K Living Trust plans to file a tax return for 1988 with respect to the \$10,000.00 government subsidy payment. The E&K Living Trust has never previously filed income tax returns.

11. Debtor has not filed any income tax returns since 1983.

12. Debtor's petition was filed six days prior to a scheduled Marshal's sale of the real estate pursuant to the foreclosure decree in the mortgage foreclosure action.

13. Debtor failed to enter into evidence any commitments for financing his 1989 farming operation.

14. Debtor's aggregate debts total \$1,532,398.24.

DISCUSSION

Farm Credit Bank set out a number of grounds for dismissal including: 1) Debtor is not a "family farmer" under §101(17)(A) because he does not meet the \$1.5 million aggregate debt limit and did not receive more than 50% of his gross income in the preceding taxable year from a farming operation; 2) Debtor is not a "family farmer with regular annual income" under §101(18); and 3) Debtor's petition was not filed in good faith. The Court will separately address each of these issues.

A. Eligibility Requirements

To qualify for relief under Chapter 12, a debtor must be a

family farmer with regular annual income. 11 U.S.C. §109(f). A "family farmer" is defined, in relevant part, as an:

[I]ndividual . . . engaged in a farming operation whose aggregate debts do not exceed \$1,500,000 and . . . such individual receive[d] from such farming operation more than 50 percent of such

individual's . . . gross income for the taxable year preceding the taxable year in which the case concerning such individual . . . was filed[.]

11 U.S.C. §101(17)(A). A "family farmer with regular annual income" is defined as a:

Family farmer whose annual income is sufficiently stable and regular to . . . make payments under a plan under chapter 12

11 U.S.C. §101(18).

The Court must strictly enforce eligibility criteria for Chapter 12 relief. In re Stedman, 72 B.R. 49, 54 (Bankr. D.N.D. 1987); see Basin Electric Power Co-op. v. Midwest Processing Co., 769 F.2d 483, 485 (8th Cir. 1985) (strict letter of the law will be applied when considering eligibility for relief under the Bankruptcy Code). Failure to meet any of the specific Chapter 12 eligibility criteria will result in dismissal of the case. See In re Faber, 78 B.R. 934 (Bankr. S.D. Iowa 1987) (less than 50% of gross income from farming in a taxable year preceding taxable year case was filed); Stedman, supra (aggregate debts exceeded the \$1.5 million debt limit); In re Wilhelm, 6 B.R. 905, 908 (Bankr. E.D.N.Y. 1980) (debtor failed to

produce evidence of the existence of regular annual income).

1. \$1.5 Million Aggregate Debt Limit--§101(17)(A)

In determining whether the \$1.5 million aggregate debt limit eligibility requirement is met, the Court has taken judicial notice of Debtor's schedules and creditors' Proofs of Claims. A debtor's schedules create a rebuttable presumption regarding the amount of debt owed by the debtor. In re Labig, 74 B.R. 507, 509 (Bankr. S.D. Ohio 1987). A proof of claim executed and filed in accordance with the Rules of Bankruptcy Procedure shall constitute prima facie evidence of the validity and amount of the claim. Fed.R.Bankr.P. 3001(f).

In the case at bar, adding the amounts Debtor listed on his schedules to the Proofs which have been filed results in aggregate debts totaling \$1,532,398.24. Debtor offered no evidence to rebut the debt as presented by the Proofs or schedules. As a result, the Court concludes Debtor is in violation of the \$1.5 million aggregate debt limit under §101(17)(A).

2. 50% of Gross Income From Farming Operation--§101(17)(A)

"Gross income" for purposes of Chapter 12 eligibility has the same meaning as the term "gross income" under federal income tax law. Matter of Wagner, 808 F.2d 542, 547 (7th Cir. 1986); In re Van Fossan, 82 B.R. 77, 79 (Bankr. W.D. Ark. 1987); Faber, 78 B.R. at 935. Gross income is computed without regard to the allowable deductions used in determining taxable income. In re Fogle, 87 B.R.

493, 497 (Bankr. N.D. Ohio 1988). Because farming is treated as a business under the Tax Code, gross income under Chapter 12 is gross profit, or the difference between total receipts and the cost of goods sold. In re Pratt, 78 B.R. 277, 280 (Bankr. D. Mont. 1987). In determining whether a Chapter 12 debtor meets the 50% gross income requirement under §101(17)(A), the Court need not look beyond the face of the debtor's income tax return for the tax year preceding the year debtor's petition was filed. In re Nelson, 73 B.R. 363, 365 (Bankr. D. Kansas 1987); see Fogle, 87 B.R. at 497; In re Shepherd, 75 B.R. 501, 503 (Bankr. N.D. Ohio 1987).

In the case at bar, Debtor filed his Chapter 12 petition in the taxable year 1989 which means the relevant tax year for the income percent test is 1988. Debtor has not filed any income tax returns since 1983. Moreover, in answer to question No. 2 "State the amount of gross income realized from farming the last taxable year preceding the taxable year in which the accompanying Petition is filed" from his Supplement to Statement of Financial Affairs, Debtor answered "None (Receiver received this income)". Based on the lack of any 1988 tax return and Debtor's admission that he realized no gross income from farming in 1988, the Court concludes Debtor does not meet the 50% of gross income test under §101(17)(A).

3. Regular Annual Income Sufficient to Make Plan Payment--
§101(18)

Under §101(18), a family farmer with regular annual income must have annual income sufficiently stable and regular to enable such

family farmer to make payments under a Chapter 12 plan. To understand the concept of sufficiently stable and regular income under Chapter 12, the Court may refer to cases interpreting sufficiently stable and regular income under Chapter 13. In re Hoskins, 74 B.R. 51, 52-53 (Bankr. C.D. Ill. 1987). In order to demonstrate sufficiently stable and regular income under Chapter 13, a debtor must demonstrate that he will have income with which to make payments under the plan. In re Mozer, 1 B.R. 350, 352 (Bankr. D. Colo. 1979). The debtor has the burden of producing evidence of the existence of stable and regular income. In re Tucker, 34 B.R. 257, 262 (Bankr. W.D. Okla. 1983); Wilhelm, 6 B.R. at 908.

In the case at bar, Debtor produced no evidence in support of his ability to make payments under a Chapter 12 plan. The record indicates Debtor owns no real estate, and Judge O'Brien has already ruled the real estate transferred to the E&K Living Trust is not part of Debtor's bankruptcy estate. Moreover, Debtor has no farm leases for the 1989 crop year, and even if Debtor did have a lease, he failed to demonstrate any ability to acquire the machinery and equipment necessary to plant, raise and harvest a crop. As a result, the Court concludes Debtor has not demonstrated any ability to make plan payments under §101(18).

B. Lack of Good Faith

Chapter 12 bankruptcy petitions are subject to dismissal for a lack of good faith. In re Ouverson, 79 B.R. 830, 832 (Bankr. N.D. Ia. 1987) (citations omitted). A lack of good faith exists if a

debtor "is attempting unreasonably to deter and harass creditors in their bonafide efforts to realize upon their securities. . . ." Id.

The filing of a bankruptcy petition on the eve of foreclosure, by itself, does not indicate bad faith. In re Land, 82 B.R. 572, 576 (Bankr. D. Colo. 1988); In re Weldin-Lynn, Inc., 79 B.R. 409, 411 (Bankr. E.D. Ark. 1987). The burden of proof in a motion to dismiss a Chapter 12 case

rests with the moving party. Matter of Jessen, 82 B.R. 490, 495 (Bankr. S.D. Iowa 1988).

The applicable standards set forth in Chapter 11 case law concerning lack of good faith dismissal apply in a Chapter 12 context. In re Turner, 71 B.R. 120, 123 (Bankr. D. Mont. 1987). In determining whether a petition has been filed in bad faith, a court must consider all the facts and circumstances of a case, weigh each factor considered, and not allow any one factor to be controlling. In re Kasdorf, 64 B.R. 294, 295 (Bankr. D. Colo. 1986). Factors to be considered on the issue of good faith include the nature and extent of a debtor's assets and debts and whether there is a reasonable probability that a reorganization plan can be proposed and confirmed. In re HBA East, Inc., 87 B.R. 248, 259 (E.D.N.Y. 1988). A debtor files a petition for reorganization in good faith only if he

or she has a reasonable expectation of reorganizing. Matter of King, 83 B.R. 843, 847 (Bankr. M.D. Ga. 1988); see HBA East, 87 B.R. at 261.

In the case at bar, Debtor's Chapter 12 petition was filed six days prior to a Marshal's sale of real estate which has been in foreclosure for nearly 7 years. Debtor owns no real estate and has presented no evidence of a lease on any crop land for 1989. Debtor admits he does not own the machinery and equipment necessary to plant, raise and harvest a crop, and offered no evidence of his ability to acquire such machinery and equipment. Based on these facts, the Court believes Debtor does not have any reasonable probability of reorganizing

and, as a result, concludes Debtor's petition was not filed in good faith.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes Debtor is not eligible for Chapter 12 relief.

FURTHER, the Court concludes Debtor's petition was not filed in good faith.

IT IS ACCORDINGLY ORDERED that Farm Credit Bank's motion to dismiss Debtor's Chapter 12 petition is granted.

Dated this 3rd day of May, 1989.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE