

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

CHEYENNE RIVER CORPORATION,

Case No. 89-1372-C
Chapter 12

Debtor.

ENROLLED ORDER--DISMISSAL AND SANCTION

On July 10, 1989, the United States Trustee's motion to dismiss, request for sanctions, and request for expedited hearing came on for hearing. The following appearances were entered:

Terry L. Gibson, Assistant U.S. Trustee for the U.S. Trustee; Anita L. Shodeen, Chapter 12 Standing Trustee; Kevin R. Query, Assistant U.S. Attorney, for the United States of America on behalf of the Agricultural Stabilization and Conservation Service; David A. Erickson, Chapter 7 Interim Trustee, in the Matter of John F. Foust, Debtor, personally, Case No. 88-1580-C; and Mark D. Walz for Deutz-Allis Credit Corporation. There was no appearance by counsel for Debtor corporation, John F. Foust, or any other corporate officer.

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

7052.

FINDINGS OF FACT

1. A Chapter 12 Voluntary Petition was filed herein on June 20, 1989. This case will be referred to as Cheyenne River No. 2.

This petition was signed by John F. Foust as president of Debtor corporation. Attached to the petition was a corporate resolution authorizing the filing of a petition under Chapter 12 of the bankruptcy law which was signed by John F. Foust as president and secretary of Debtor corporation. This resolution bore the date of June 20, 1989. This petition was filed without schedules or statements.

2. A Chapter 12 Voluntary Petition was previously filed by Cheyenne River on February 28, 1989. That case was docketed under the number of 89-421-C and will be referred to herein as Cheyenne River No. 1. That petition was signed by John F. Foust as president of Debtor corporation. Attached to that petition was a corporate resolution, over the signature of John F. Faust as president and secretary of Debtor corporation, authorizing the filing of the Chapter 12 petition. This resolution bore the date of February 27, 1989. This petition was filed without schedules or statements.

3. On July 22, 1988, John F. Foust filed his personal Chapter 12 Voluntary Petition. This case was docketed as No. 88-1580-C and was filed without schedules or statements. On December 29, 1988, this case was converted to a proceeding under Chapter 7 of the Bankruptcy Code, upon motion of John F. Foust.

4. On December 30, 1988, David A. Erickson was appointed as interim trustee of Mr. Foust's personal bankruptcy. On January 23, 1989, John F. Foust filed schedules and statements which included as an asset of that bankruptcy estate his stock in

Cheyenne River Corporation. John F. Faust owns all of the outstanding stock of Cheyenne River Corporation. John F. Faust's stock in Cheyenne River Corporation became property of the Chapter 7 estate and subject to the administration and control of said interim trustee. John F. Faust's stock in Cheyenne River Corporation has not been abandoned, sold or otherwise disposed of by said interim trustee and remains an asset of said estate to this date.

5. On May 15, 1989, the case of Cheyenne River Corporation No. 1 was dismissed upon order of the Court. The basis of said Order was as follows: 1) the commencement and filing of Debtor corporation's Chapter 12 petition by John F. Faust constituted the improper practice of law by Mr. Faust, and Debtor corporation was attempting to appear pro se without counsel which, under the circumstances, is not permitted in this Court; 2) the commencement of the proceeding by John F. Faust, as president of Debtor corporation, constituted an action with respect to the stock of Debtor corporation, which was property of the estate of John F. Faust and subject to the control of the Chapter 7 trustee; 3) Debtor corporation failed to file complete and adequate schedules as required by 11 U.S.C. §521; 4) Debtor corporation did not fulfill its duties as debtor-in-possession because it failed to insure the farm machinery and equipment included within the estate; and 5) Debtor corporation failed to cooperate and provide financial information as required by the U.S. Trustee and Chapter 12 trustee.

6. On June 15, 1989, the United States District Court, Southern District of Iowa, Central Division, entered an order in the case of United States of America, Plaintiff, v. Cheyenne River Corporation, Defendant, Civil No. 89-363-A. This order incorporated and adopted the findings and conclusions of the U.S. Magistrate, dated and filed June 5, 1989, all of which are incorporated by reference and made a part hereof, and ordered the Clerk of Court to issue a Writ of Replevin directing the U.S. Marshal to take immediate possession of stored 1985 and 1986 corn to prevent imminent spoilage of said grain. Said order further enjoined the defendant, its agents, officers and assigns, and all persons acting in concert with them, from actions that would prevent the plaintiff from acquiring possession of said grain and said persons were specifically directed to allow access to the storage bins that contained the corn to be delivered to the United States of America.

The Clerk of the U.S. District Court entered a Writ of Replevin on June 15, 1989, which was delivered to the United States Marshal for the execution. The United States Marshal made arrangements to remove the grain on June 22, 1989, at 8:00 a.m.

7. As previously stated, Cheyenne River Corporation filed the instant Chapter 12 petition, Cheyenne River No. 2, on June 20, 1989, as a pro se petition without counsel of record. This petition was filed without schedules and statements.

8. On June 21, 1989, the government filed its expedited Motion Relief From Stay. This motion incorporated the U.S.

District Court order, and findings that the grain was rapidly deteriorating with the onset of hot weather and immediate relief should be granted. Diligent efforts were made to locate John F. Foust, all without success. On June 21, 1989, the government was granted relief from the stay under 11 U.S.C. §362.

9. The Debtor corporation has never filed statements and schedules herein, notwithstanding the Order of June 21, 1989.

10. The U.S. Trustee's motion to dismiss, request for sanction, and request for expedited hearing was filed on June 22, 1989. By Order of June 26, 1989, hearing was noticed for July 10, 1989, at 2:15 p.m. Notice was given to Debtor corporation in care of John Foust as shown on the matrix.

11. On July 10, 1989, at approximately 11:40 a.m., the Court's secretary received a telephone call from John Faust stating, in part, that he would not be able to attend the hearing on said date as he had to go to Kansas to pick up a part for his combine in order to harvest his wheat crop. Neither John Faust nor any representative of Debtor corporation appeared for Debtor corporation at the hearing.

12. On December 31, 1987, a voluntary Chapter 12 bankruptcy petition was filed by John Faust as an officer of Faust Bros. Farms, Inc., which was docketed as Case No. 87-3139-C. This petition was filed without benefit of legal counsel.

13. On May 3, 1988, the Faust Bros. Farms, Inc. petition was dismissed upon motion of the Chapter 12 Standing Trustee. Said Trustee's motion asserted that Debtor corporation failed to

properly administer the proceeding and file a plan within the time period set forth in 11 U.S.C. §1221. Neither John Foust nor any representative for Debtor corporation appeared at the hearing on said motion to dismiss.

14. On January 6, 1988, a voluntary Chapter 12 bankruptcy petition was filed by John Foust as officer of Southern Cross, Inc., which was docketed as Case No. 88-23-C. This case was also filed on behalf of Debtor corporation by John Foust as an officer of said corporation and without benefit of legal counsel.

15. On May 3, 1988, the Chapter 12 Standing Trustee's motion to dismiss the Southern Cross, Inc. petition was granted and said case dismissed. This case was dismissed because of said debtor-in-possession's failure to properly administer the proceeding and file a plan within the time period set forth in the Bankruptcy Code. Neither John Foust nor any authorized representative for Debtor corporation appeared at the time of the hearing on said motion to dismiss.

CONCLUSIONS OF LAW

As stated in the Order of Dismissal in the case of Cheyenne River Corporation, Cheyenne River No. 1, Case No. 89-421-C, filed on May 15, 1989, the filing of Debtor corporation's voluntary Chapter 12 petition by Debtor's president, John F. Foust, without the benefit of legal counsel authorized to practice before this Court, constitutes a continued improper practice of law by John F. Foust.

Further, the commencement of this case by John F. Foust, as president of Debtor corporation, constitutes a continued action with respect to the stock of Debtor corporation previously held by John F. Foust, which stock is the property of the estate in the Chapter 7 proceeding, Case No. 88-1580-C, currently pending before this Court. The interest that John F. Foust had formerly held in Debtor corporation is now held by the duly appointed Chapter 7 trustee in said Chapter 7 case, subject to further administration of the same.

Debtor's continued failure to file complete and adequate schedules; failure to fulfill its duties as debtor-in-possession; failure to cooperate and provide financial information as required by the U.S. Trustee and Chapter 12 trustee; the circumstances concerning the prior Chapter 12 proceedings filed by John F. Foust on behalf of Foust Bros. Farm, Inc. and Southern Cross, Inc.; and the failure of the respective Debtor corporations, and their principal, John F. Foust, to appear as ordered to prosecute and administer the bankruptcy proceedings, constitute evidence of bad faith upon the part of Debtor corporation and its president and sole stockholder, John F. Foust. Further, it shows absence of any intent to seek reorganization through the bankruptcy process. Generally, John F. Foust's actions evidence an intent to frustrate the rights of the creditors involved, as well as the bankruptcy process itself.

Pursuant to 11 U.S.C. §109(g)(1), no individual or family farmer may be a debtor under Title 11 who has been a debtor in a

case pending under this title at any time in the proceeding 180 days if the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case.

The Debtor corporation, by and through the actions of John F. Foust, and John F. Foust have repeatedly failed to abide by orders of the Court and to appear before the Court in the proper prosecution of this and previous cases. Accordingly, sanctions should be imposed to prevent the further frustration of the bankruptcy process.

IT IS ACCORDINGLY ORDERED as follows:

- 1) The motion to dismiss by the United States Trustee is sustained.
- 2) This case docketed as Case No. 89-1372-C, is dismissed.
- 3) The Debtor, Cheyenne River Corporation, its officers, directors, and assigns, and John F. Foust, personally, are enjoined from filing a case under Title 11 for 180 days from the date of this Order without prior order of the Court.
- 4) This Order shall not be interpreted as controlling of those proceedings pending in the case of John F. Foust's Chapter 7 case, Case No. 88-1580-C.

Dated this 18th day of July, 1989.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE