

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of :
 :
 HAROLD S. UNTERNAHRER, : Case No. 94-38-D H
 : Chapter 11
 Debtor. :
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ORDER--MOTION TO DISMISS
AND MOTION FOR MODIFICATION OF AUTOMATIC STAY

The United States Trustee's Motion to Dismiss and Farm Credit Bank of Omaha's (FCBO), formerly known as the Federal Land Bank of Omaha (FLBO), Motion for Modification of Automatic Stay, and Debtor's resistance thereto came on for hearing on March 2, 1994, in the Courtroom, Davenport, Iowa. Harold S. Unternahrer appeared pro se for the Debtor-in-Possession; James L. Snyder, Assistant United States Trustee, appeared for the United States Trustee; and, John M. Titler appeared for FCBO.

The Court having heard the evidence and arguments now enters its findings and conclusions.

JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1334 and this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (G).

FINDINGS OF FACT

1. Debtor filed a Chapter 11 on January 7, 1994. He filed the petition pro se, although he stated that he had the advice of a "paralegal" in the preparation of the petition and the schedules.

2. Debtor scheduled 190 acres on Schedule A, Real Property, and \$5,000.00 as personal property which is in the nature of consumer goods.

3. Debtor scheduled Farm Credit Services, Chris Unternahrer, and Carl D. Unternahrer as the only secured creditors. He scheduled Farm Credit Services as having a contract claim in the amount of \$61,000.00 with the contract having a value of \$135,000.00. Chris and Carl Unternahrer, family members, were scheduled as having mechanic lien claims.

4. Debtor did not schedule any creditors holding unsecured priority claims.

5. There were no scheduled creditors holding unsecured non-priority claims on Schedule F.

6. Debtor did not schedule any executory contracts on Schedule G.

7. On or about July 22, 1987, FLBO, entered into a written contract whereby FLBO, as vendor, and Twin Oaks Trust, as vendee, contracted for the sale of the following described real estate:

8. S $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$; and the South 15 acres of the SE $\frac{1}{4}$ SW $\frac{1}{4}$;

and SW $\frac{1}{4}$ SE $\frac{1}{4}$ (except the North 3 acres of the NW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$),
of Section 28, Township 74 North, Range 7, West of the 5th P.M.; NW $\frac{1}{4}$ NW $\frac{1}{4}$; all that part of the E $\frac{1}{2}$ NW $\frac{1}{4}$ lying North of the Public Highway as same is presently located, Section 33, Township 74 North, Range 7 West of the 5th P.M.; NW $\frac{1}{4}$ NE $\frac{1}{4}$; the South 30 acres of the NE $\frac{1}{4}$ NE $\frac{1}{4}$; and all that part of the S $\frac{1}{2}$ NE $\frac{1}{4}$ lying North of the old railroad right of way, Section 33, Township 74 North, Range 7, West of the 5th P.M. (except all that part lying South of the Public Highway as same as presently located over and across said Section 33, and further excepting therefrom commencing at said Southeast corner of Section 33, thence North 3312.90 feet to the point of beginning, thence North 85.00 feet, thence North 67 degrees 05 minutes West 313.30 feet, thence South 85 feet, thence South 67 degrees 05 minutes East 313.30 feet to the point of beginning containing 0.61 acre, more or less, of Section 33, Township 74 North, Range 7, West of the 5th P.M.), Washington County, Iowa.

8. On May 7, 1993, a certificate was issued releasing FCBO from mandatory mediation pursuant to Iowa Code § 654A.11. Debtor acknowledges receipt of notice of said mediation session and said session was not held because the farm borrowers, Glen Oaks Trust, Harold S. Unternahrer, and Patricia A. Unternahrer, failed to appear and participate as prescribed by Iowa law.

9. On July 28, 1993, Notice of Forfeiture of Real Estate Contract was given forfeiting the above real estate contract for failure to pay principal and interest due March 31, 1993.

10. On August 14, 1993, Notice to Quit was served on Harold Unternahrer, individually and as trustee of Twin Oaks

Trust, Patricia Unternahrer, Chris Unternahrer, and Carl Unternahrer, for the reason that they had held over after forfeiture of real estate contract on July 28, 1993.

11. A forcible entry and detainer action was commenced in the Iowa District Court for Washington County, Small Claims Division, naming Harold Unternahrer, individually and as trustee of Twin Oaks Trust, Patricia Unternahrer, Chris Unternahrer, and Carl D. Unternahrer as defendants.

12. On October 8, 1993, judgment was entered in said forcible entry and detainer action. FCBO was awarded judgment against all defendants and it was ordered that a warrant of removal issue.

13. On October 22, 1993, a warrant of removal issued whereby the Sheriff of Washington County was ordered to remove said defendants from said real estate. FCBO delayed execution of the warrant of removal because of the upcoming Thanksgiving and Christmas holidays.

14. After the holiday season, FCBO sought enforcement of said warrant and Debtor filed his Chapter 11 petition on January 7, 1994.

15. The Internal Revenue Service (IRS) has filed a proof of claim in the amount of \$192,724.76.

16. As of the date of filing of the Chapter 11 petition, Debtor had not filed individual tax returns for the years 1990, 1992, and 1993.

17. Debtor has written the IRS that he had no federal tax liability and that he is not a "person" subject to tax liability. However, at the time of hearing, Debtor recanted these statements and acknowledges that he must file past due tax returns as he is a person subject to taxation under the Internal Revenue Code.

18. Harold S. and Patricia A. Unternahrer have filed "notices of common law liens," and "affidavits and land patents," on subject real estate in the recorder's office, Washington County, Iowa.

19. Mechanics liens and judgments have been filed impressing liens upon subject real estate. None of these debts have been scheduled by Debtors.

DISCUSSION

11 U.S.C. § 1112(b) provides as follows:

Except as provided in § (c) of this section, on request of a party in interest or the United States Trustee, and after notice and a hearing, the court may convert a case under this chapter to a case under Chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including--

- (1) continuing loss to or diminution of the estate and the absence of the reasonable likelihood of rehabilitation;
- (2) inability to effectuate a plan;
- (3) unreasonable delay by the debtor that is prejudicial to the creditors;

- (4) failure to propose a plan under § 1121 of this title within any time fixed by the court;
- (5) denial of confirmation of every proposed plan and denial of request made for additional time for filing another plan or a modification of a plan;
- (6) revocation of an order of confirmation under § 1144 of this title, and denial of confirmation of another plan or a modified plan under § 1129 of this title;
- (7) inability to effectuate substantial confirmation of a confirmed plan;
- (8) material default by the debtor with respect to a confirmed plan;
- (9) termination of a plan by reason of the occurrence of a condition specified in the plan; or
- (10) nonpayment of any fees or charges required under Chapter 123 of Title 28.

Clearly, bad faith is not included in this non-exhaustive list of grounds for dismissal. However, the Eighth Circuit has found that cause for dismissal of a petition includes bad faith. In re Kerr, 908 F.2d 400, 404 (8th Cir. 1990).

The Fourth Circuit requires a finding that the reorganization is both objectively futile and subjectively filed in bad faith before a dismissal of the petition is warranted. Carolin Corp. v. Miller, 886 F.2d 693, 968-700 (4th Cir. 1989). In contrast, the Eleventh Circuit permits dismissal upon a finding of bad faith alone. In re Phoenix Piccadilly, Ltd., 849 F.2d 1393, 1395 (11th Cir. 1988).

At present, the Eighth Circuit has not yet decided which

proof requirement is preferable and has declined to consider the issue. Kerr, 908 F.2d at 404 n.10. Assuming that the Eighth Circuit would follow the more difficult proof requirement as applied by the Fourth Circuit, this Court must 1) objectively assess whether there is a going concern to preserve and hope of rehabilitation; and 2) subjectively determine if the Debtor's actual motivation is to cause hardship or delay creditors by invoking the automatic stay without intent to reorganize financial activities. Carolin Corp., 886 F.2d at 701-02 (citations omitted). The following factors have been found to be indicative of such a bad faith filing:

1. whether the debtor owns but one primary asset, which asset is encumbered by a secured creditor's lien;
2. whether the debtor employs an insignificant number of non-insider employees;
3. whether the debtor generates insignificant cash flow;
4. whether the debtor lacks available source of income to sustain a reorganization plan and/or make adequate protection payments;
5. whether the debtor has few unsecured creditors, with relatively small claims;
6. whether the debtor's primary asset has been posted for foreclosure; and
7. whether bankruptcy offers the only possibility for forestalling loss of the asset.

In re Reiser Ford, Inc., 128 B.R. 234, 237 (Bankr. E.D. Mo. 1991).

In this case, the Debtor has scheduled no creditors holding unsecured non-priority claims. Although the Debtor stated that there were no creditors holding unsecured priority claims, the Debtor failed to schedule the Internal Revenue Service as a creditor and now concedes that he is subject to taxation under the Internal Revenue Code.

The 190-acre farm is the primary asset in this case. This asset is encumbered by a secured lien held by FCBO and mechanics liens held by two family members. However, the real estate contract executed by the Debtor and FCBO was forfeited under Iowa law prior to the filing of the bankruptcy petition. The Debtor was properly given Notice of Forfeiture and Notice to Quit after the FCBO was released from mandatory mediation due to the Debtor's failure to appear. Judgment was entered in favor of FCBO in a forcible entry and detainer action and a warrant of removal was issued against the Debtor. The Debtor did not schedule any executory contract and had no ownership interest in the property. At the time of the filing of the petition, the Debtor has only a bare possessory interest of the real estate. Bankruptcy is the only possibility for forestalling the loss of this asset.

Therefore, the Court finds that the sole purpose of this filing was to stop FCBO from gaining possession of property to which it is entitled under Iowa law. Furthermore, the Court finds that the Debtor has no hope of reorganization as the

Debtor has no viable farming business. Accordingly, the Court finds that under both objective and subjective inquiry, this petition was filed in bad faith and should be dismissed. The Motion for Modification of Automatic Stay is, therefore, denied as moot.

ORDER

IT IS THEREFORE ORDERED that the Motion to Dismiss brought by the U.S. Trustee is granted and this case is dismissed.

IT IS FURTHER ORDERED that the Motion for Modification of Automatic Stay is denied as moot.

Dated this _____ day of March, 1994.

RUSSELL J. HILL
U.S. Bankruptcy Judge