

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
Waycross Division

In the matter of:)
J. LAVERNE CARTER)
Debtor)
SOUTHEASTERN BANK)
Movant)
v.)
J. LAVERNE CARTER)
Respondent)

Chapter 12 Case
Number 87-50111

FILED

at 10 O'clock & 20 min. AM
Date 4-13-90 CC

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia

MEMORANDUM AND ORDER
ON MOTION FOR RELIEF FROM STAY
OR IN THE ALTERNATIVE TO DISMISS CHAPTER 12 PETITION

On February 13, 1990, a hearing was held upon a Motion to Modify Stay or to Dismiss by Southeastern Bank. After consideration of the evidence adduced at trial and the documentation submitted by the parties, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor filed a petition under Chapter 12 of the Bankruptcy Code with this Court on June 23, 1987. On September 15, 1988, this Court approved the Debtor's Sixth Amended Chapter 12 Plan. Said plan provided for payments to the Movant Southeastern Bank's predecessor, Nicholls State Bank, as follows:

PAYMENT TERMS -- SECURED CLAIM: This secured claim shall be reduced within six (6) months from the effective date of the Plan by a reduction in the herd size of the Debtor until this secured indebtedness is reduced by one-half (to \$53,000.00).

Within twelve (12) months from the effective date of the Plan, this Debtor will further liquidate his herd of cattle until either the last cow is sold or the secured indebtedness is retired, whichever occurs first.

If funds from the sales of this collateral are insufficient to retire the indebtedness, this Creditor will be unsecured to that extent and treated as specified on Page 13 after the surrender of his one-half (1/2) interest in a CD securing this Debtor in part.

The Nicholls State Bank shall release any liens on real estate since there is no equity in any real estate to secure their loans.

The parties have stipulated that since the date of confirmation of the plan, the Debtor has realized profits from the sale of cattle in the amount of \$41,735.32. However, Debtor has remitted only \$26,758.69 to the Bank in payment of its secured indebtedness, leaving a deficiency in the amount of \$14,976.73. The Debtor states that the \$14,976.73 was not remitted because the Debtor estimated the expenses of raising the cattle and calculated these as a deduction from the proceeds. The Debtor also admitted that he used some of the proceeds from the sale of the cows to pay indebtedness on other obligations. In fact, Debtor admitted that he commingled the proceeds of the sales of assets with other funds from his farming operation and as such it would be impossible to determine the exact amount of the funds which were earmarked for the continuing cattle operation. With the exception of the present dispute with Southeastern Bank, Debtor is current in the plan payments. Debtor further stated that he is fully prepared to remit another \$5,000.00 towards payment of the cattle note, said funds to come from his wife's portion of the certificate of deposit on deposit with Southeastern Bank. Southeastern Bank has accrued interest against the Debtor on the notes in question and the amount of that interest is presently disputed.

CONCLUSIONS OF LAW

Southeastern Bank moves for dismissal of the Debtor's petition and plan for Chapter 12 relief, asserting that the Debtor's misappropriation of the proceeds of the cattle sales in a manner inconsistent with the plan constitutes gross mismanagement of the estate warranting such action. Alternatively, Southeastern Bank moves for relief from the automatic stay provisions of Section 362.

The Court is being called upon to interpret an ambiguity in the Debtor's plan as to whether the Debtor had to account to Southeastern for all proceeds of the cattle operation dollar for dollar or whether Debtor was entitled to setoff expenses of the ongoing farm operation prior to turnover of the proceeds. I hold that in the absence of express language giving Debtor the right to use the cattle proceeds for other purposes, including herd replenishment, Southeastern was entitled to all proceeds from the liquidation of the herd.

The Debtor's sixth amended plan, approved by this Court, clearly states that the Debtor's cattle herd would be liquidated "until either the last cow is sold or the secured indebtedness is

retired, whichever occurs first." Debtor's Sixth Amended Plan, Exhibit A, Page 9. The plan provision further states that "[t]he Nicholls State Bank shall release any liens on real estate since there is no equity in any real estate to secure their loans." Id. The plan, however, does not specifically state that all of the proceeds will be turned over, dollar for dollar, as they are realized from the sale of the cattle. To the extent of any ambiguity in the written plan terms, this Court will apply the doctrine of strict construction, contra proferentum,¹ and construe the plan terms against the Debtor, the party which prepared the document.

Although the Debtor's plan does not explicitly provide for the immediate turnover of proceeds of the cattle sales, the plan does provide for liquidation of the Debtor's herd and retirement of the secured debt owed Southeastern's predecessor. The plan did not expressly contemplate any deduction for the expenses of maintaining the herd, the costs of the ongoing farm operation or the

¹ Black's Law Dictionary, 5th Edition, defines "contra proferentum" as follows:

Used in connection with the construction of written documents to the effect that an ambiguous provision is construed most strongly against the person who selected the language. U.S. v. Seckinger, 397 U.S. 203, 216, 90 S.Ct. 880, 25 L.Ed. 2d 224.

replenishment of the herd from the sale proceeds. The Debtor asserts that Southeastern's predecessor acquiesced to the use of the proceeds in a manner inconsistent with the plan terms through a prior course of dealing but in the absence of further proof, I cannot find that any such acquiescence occurred.

The parties stipulated that \$41,731.00 was received by the Debtor from the cattle sales and that \$26,758.00 was paid over to the bank. There was some dispute as to the amount that Southeastern asserted to be due as of the date of the hearing, February 13, 1990. At that time I left the record open and gave the parties ten (10) days to perfect the record after recalculating appropriate interest. I also requested that the parties submit their closing arguments in written form after those calculations were made. To date the COURT has received nothing in response to those requests.

I find the Debtor in default under the provisions of his Chapter 12 plan. In light of Southeastern's failure to provide proof of any further amount owed, I find that the Debtor is in default in the amount of \$14,976.73, the stipulated arrearage. The Debtor must cure this arrearage within thirty (30) days from the date of this Order or this case will be dismissed. In light of this

decision, it is unnecessary to address Southeastern's Motion for Relief from Stay.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Debtor pay Southeastern Bank \$14,976.76 within thirty (30) days of the date of this Order or this case will be dismissed.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 17th day of April, 1990.