(Cite as: 1998 WL 634210 (Bankr.D.Vt.))

In re Marcel FOURNIER, Debtor.

No. 96-10107FGC.

United States Bankruptcy Court. D. Vermont.

Aug. 17, 1998.

M. Palmer, of Palmer Legal Services, Middlebury, VT, for Marcel Fournier (Debtor).

M.P. Kehoe, of Saxer, Anderson, Wolinsky & Sunshine PC, Burlington, VT, for Franklin Lamoille Bank (FLB).

Amended Memorandum of Decision Denying Debtor's Request to Modify Chapter 12

Plan Post-Confirmation

CONRAD, Bankruptcy J.

***1** Debtor seeks [FN1] to modify his Chapter 12 Plan to eliminate his obligation to "drop dead" upon default. FLB objects, arguing, inter alia, that Debtor does not meet the statutory criteria for post-confirmation modification, § 1229, and that even if he did, Debtor contracted away his right to modify.

> FN1. Our subject matter jurisdiction over this controversy arises under 28 U.S.C. § 1334 (b) and the General Reference to this Court under Part V of the Local District Court Rules for the District of Vermont. This is a core matter under 28 U.S.C. § 157(b)(2)(A), (G) and (L). This Memorandum of Decision constitutes findings of fact and conclusions of law under Fed.R.Civ.P. 52, as made applicable by Fed.R.Bankr.P. 7052.

FACTUAL BACKGROUND

Debtor filed his Chapter 12 petition on February 1, 1996 (Doc. # 1-1, 2/1/96). FLB objected to the Plan, inter alia, on grounds that Debtor would be unable to make his Plan payments, Doc. # 42-1, p. 4-5, 6/25/96; that the amortization period exceeded the depreciable life of the collateral, id., at 3-4; and that the risk to FLB of a default by Debtor warranted imposition of a higher interest rate on FLB's secured claim. The parties negotiated a resolution of FLB's

objection, sparing themselves and this court the expense in time and money of resolving close questions of law and fact. Each gave up the right to litigate the issues raised by FLB's objection. FLB consented to the Plan's terms in consideration of Debtor's agreement that FLB would have the right to move quickly against its collateral if Debtor defaulted. The parties' handwritten stipulation, dated, filed, and read into the record on Sept. 4, 1996, provided, in pertinent part: [FN2]

> FN2. As Debtor notes, the provisions of the stipulation were inadvertently omitted from the Order Confirming Chapter 12 Plan. Debtor concedes, however, and we hold that those provisions are a part of the confirmed Plan. "Debtor's Memorandum in Support of Post-Confirmation Modification of Chapter 12 Plan of Reorganization," 1 n.1 (Doc. # 136-1, 6/30/98).

Classes IV and V[, representing FLB's two secured claims] are hereby amended to provide that, if the debtor is more than 30 days late on a payment to the Chapter 12 Trustee, the Franklin Lamoille Bank ("the Bank") may file an affidavit of nonpayment with the Court stating that the payment is more than 30 days late and requesting immediate relief from the automatic stay. The affidavit and request for relief from the automatic stay shall be served on all parties on the mailing matrix. Debtor shall have three business days from receipt of the affidavit within which to file a response or to request a hearing to present an explanation of the missed payment. In the event the debtor does not file a response or, at hearing, does not present an explanation that satisfies the Court that the missed payment was caused by circumstances outside the ordinary course of business, the Court shall grant the Bank relief from the automatic stay to pursue its state-court remedies.

Doc. # 65-1, 9/4/96. After hearing the stipulation, we approved its contents, and confirmed Debtor's Plan subject to its provisions. Doc. # 64-1, 9/4/96. The written "Order Confirming Chapter 12 Plan" was entered on 10/28/96. Doc. # 74- 1, 10/28/96.

FLB moved for relief from stay on June 5, 1997, alleging that Debtor had failed to make the payments due April 25 and May 25, 1997 on FLB's Class V claim, and those due May 1 and June 1, 1997 on FLB's Class IV claim. Doc. # 78- 1. Attached as Exhibit B to FLB's motion was a notice of cancellation from Debtor's insurer. Debtor's "Response to Motion for Relief from Stay" was filed on June 10, 1997, at a time when Debtor was more than 30 days late with his payments. Doc. # 84-1, 6/10/97. The Response alleged that: (1) he would be unable to make the May and June payments because a "series of unforeseen problems" had "seriously affected his cash flow," id.; (2) "he will be able to make at least a partial plan payment in July and expects to have sufficiently recovered to be making the balance of his payments on schedule from August forward," id.; and that the insurance premium had been paid with no lapse in coverage. Id. Debtor proposed to modify the Plan by extending it from 36 to 39 months to make up the monthly payments due in May, June, and July 1997.

***2** Filed simultaneously with Debtor's Response was a "Motion to Modify Plan of Reorganization," Doc. # 85-1, 6/10/97, and supporting "Memorandum." Doc. # 86-1, 6/10/97. The Memorandum explained that Debtor's "cash flow shortage ha [d] been the result, not of a systemic problem likely to recur, but of a series of unforeseen problems that overwhelmed his financial resources in the winter and early spring." Id. The four unforseen problems were that (1) "February is a short month to begin with;" (2) an additional eight days' milk were lost in February because antibiotics were detected in Debtor's milk; (3) Debtor's tenant didn't pay rent for several months then moved out with the furnace, which Debtor had to replace; and (4) Debtor had "been impeded by a severe stomach ailment, the exact nature of which ha[d] not yet been diagnosed." Id.

Neither Debtor's Response nor his Motion to Modify and supporting Memorandum alleged that the "unforeseen problems" were "circumstances outside the ordinary course of business." Nor did Debtor's pleadings explain why no motion to modify was made prior to Debtor's default.

FLB's "Objection to Debtor's Motion to Modify," 2 (Doc. # 92-1, 7/3/97) responded to the list of "unforseen problems" recited by Debtor, noting: (1) "February has always been a short month;" (2) Debtor had in the past had problems with antibiotics in his milk and that the problem is sufficiently usual in farming that insurance is available to cover it; (3) income from a tenant was not part of Debtor's income projections; and (4) Debtor had not shown that his illness affected milk production.

FLB's relief from stay motion and Debtor's motion to modify were both heard on Sept. 23, 1997. At the hearing, Debtor did not oppose FLB's motion, and withdrew his own. Accordingly, we granted FLB's motion for relief from stay. Doc. # 98-1, 9/23/97; Doc. # 101-1, 10/7/97.

After the grant of relief from the stay, FLB obtained a Judgment and Decree of Foreclosure and an Order of Replevin from the Franklin County Superior Court on December 4, 1997. FLB exercised its right to replevy the secured chattels, and auctioned them off on Jan. 23, 1998, raising $150,835.56 after costs [FN3] that was applied to Debtor's accounts.

> FN3. The total sale at the auction was $170,212.50, which after deducting the auctioneer's commission of 10% or $17,021.25, auctioneer's expenses of $2,225.69, and beef promotion charge of $130 resulted in a net payment to FLB of $150,835.56.

Debtor filed its "Motion to Reinstate Automatic Stay and to Modify First Amended Plan of Reorganization" and supporting Memorandum on March 31, 1998. The redemption period on Debtor's real property was set to expire on June 4, 1998. We stayed the running of the redemption period to consider whether Debtor is entitled to modify its Plan on these facts, and, if so, whether to approve the modifications proposed.

Debtor's June 30, 1998 Memorandum in support of the pending motion to modify, Doc. # 136-1, 2 (6/30/98), recites a somewhat different list of unforeseen reasons for his default than he gave in support of his first motion: "expenses that were not foreseen at the time of confirmation (replacement of a heating system and other extraordinary costs required by the insurance company) coupled with exceptionally low milk prices and high grain expenses." Once again, however, he does not argue that these matters constitute "circumstances outside the ordinary course of business" within the meaning of the Stipulation and Confirmation Order.

DISCUSSION

***3** Section 1229 of the Bankruptcy Code controls post-confirmation modifications to Chapter 12 plans of reorganization. [FN4] A plan may be modified on the request of the debtor, the trustee, or the holder of an allowed unsecured claim. 11 U.S.C. § 1229(a). Post-confirmation modifications may increase or reduce the amount of payments to a particular class, extend or reduce the time for making of such payments, or alter amount of distributions under the Plan to account for payments on the claim made outside the Plan. 11 U.S.C. § 1229(a).

> FN4. 11 U.S.C. § 1229: Modification of plan after confirmation.
>
> (a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, on request of the debtor, the trustee, or the holder of an allowed unsecured claim, to-- (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
>
> (2) extend or reduce the time for such payments; or
>
> (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.
>
> (b)(1) Sections 1222(a), 1222(b), and 1223(c) of this title and the requirements of section 1225(a) of this title apply to any modification under subsection (a) of this section.
>
> (2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.
>
> (c) A plan modified under this section may not provide for payments over a period that expires after three years after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the

court may not approve a period that expires after five years after such time.

The parties have devoted considerable attention to the question of whether an authorized party must make a threshold showing of a change in circumstances. Debtor argues that the plain language of Section 1229 suggests that the right to modify is absolute so long as the payments of the plan have not been completed.

[A] creditor, debtor or trustee has the absolute right to seek modification of a bankruptcy plan after its confirmation but before completion of the plan payments. Whether the modification will be granted is within the bankruptcy court's discretion.

In the Matter of Witkowski, 16 F.3d 739, 742 (7th Cir.1994) (construing the parallel provisions in Chapter 13, 11 U.S.C. § 1329).

Creditor argues that Debtor must show a change in circumstances, because a number of other courts have come out that way, and also because Debtor stipulated that relief from the stay would be granted unless his default was "caused by circumstances outside the ordinary course of business." Doc. # 65- 1, supra, 1. "A plan modification is only warranted where there is an unanticipated change in circumstances affecting implementation of the confirmed plan." In re Wickersheim, 107 B.R. 177, 181 (Bankr.E.D.Wis.1989). Another Bankruptcy Court wrote, "The right or the opportunity to modify ... exists only in order to address unforeseen circumstances whose consequences are not provided for by the plan as originally written and confirmed." In the Matter of Grogg Farms, Inc., 91 B.R. 482, 485 (Bankr.N.D.Ind.1988). Yet another Bankruptcy Court held:

"Modification should not be granted merely because the new plan complies with Chapter 12 standards. This would allow serial filings for modifications which could utterly frustrate reorganization. Confirmation is a significant event and parties need to be bound by the plan achieving court approval. The Code specifically mandates this. Unless something new happens, the debtor, the trustee and the unsecured creditors should remain governed by the terms of the confirmed plan. And, unless the new event is unforeseen, parties should not be able to change a plan when the circumstances were known to them at confirmation." In re Cook, 148 B.R. 273, 280 (Bankr.W.D.Mich.1992).

We need not decide whether a change in circumstances is required, either as a matter of law or contract, because the modifications proposed by Debtor are not authorized by § 1229(a). The confirmed Plan incorporates the parties' Stipulation that, in the event of a default "caused by circumstances outside the ordinary course of business, the Court shall grant [FLB] relief from the automatic stay to pursue its remedies." Doc. # 65-1, supra, 1. Debtor's proposed modifications eliminate this provision from the modified Plan, and prevent FLB from pursuing its remedies under the confirmed Plan. Moreover, as FLB points out, the existing Plan contemplates that payments to FLB will cease upon default and granting of relief from

the automatic stay. Thus, Debtor's proposed modification calls not for the adjustment of existing payments, but for the commencement of payments not due under the confirmed Plan. In Witkowski, supra, 16 F.3d at 742, the Seventh Circuit, construing identical language in § 1329, held:

***4** [B]y the express terms of the statute, modifications are only allowed in three limited circumstances to: "(1) increase or reduce the amount of the payments on claims for a particular class provided for by the plan; (2) extend or reduce the time for such payments; (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan."

Debtor's proposed modifications exceed the statutory limits. Accordingly, Debtor's motion to modify must be denied.

As an additional and alternative basis for our ruling, we reiterate that "[w]hether the modification will be granted is within the bankruptcy court's discretion." Id. at 739. We would not approve Debtor's proposed modifications even if we had the statutory authority to do so.

Debtor's request violates the foundation of the original confirmation of his Chapter 12 plan. FLB expressed concerns of Debtor's ability to maintain the original plan. However, Debtor agreed to include the drop dead order as consideration for FLB to withdraw its objection. It has been held elsewhere that a debtor is not, as a matterof law, automatically precluded from post- confirmation modification of a Chapter 12 plan by the mere inclusion of a drop dead order. In re Mader, 108 B.R. 643 (Bankr.N.D .Ill.1989). We do not disagree. However, we are not considering strictly the inclusion of the order. Rather, we wish to give effect to its basis and purpose.

The obvious purpose of the drop dead order was to permit FLB an unobstructed avenue to foreclosure proceedings should Debtor default for reasons outside the ordinary course of business. Debtor, in return for the inclusion of the order, got his chance for a fresh start. While the demonstration of circumstances outside the ordinary course of business may or may not be necessary for a Section 1229 modification absent the drop dead order, we hold, in the exercise of our discretion, that such a showing was required here. The drop dead order is a clear and unambiguous clause of the contract that was bargained for and accepted by both parties. Debtor had the opportunity to show that his default was caused by circumstances outside the ordinary course of business at the time of the heairng on FLB's motion for relief from stay. He chose not to make the attempt. The reasons now asserted are untimely and do not appear to us be outside the ordinary course. Debtor has not argued to the contrary. Thus, by the parties' contract and the confirmed Plan, FLB is entitled to the agreed- upon consequence of Debtor's default. To hold otherwise would violate the terms of the plan and undermine the concept of finality embodied in § 1227(a). Additionally, ignoring

the drop dead would discourage settlements in future reorganizations. This Debtor probably got a chance to succeed that he would not have received except for the drop dead agreement. We do not want to foreclose other debtors from receiving the same chance.

CONCLUSION

***5** We deny Debtor's motion to modify his Chapter 12 Plan post-confirmation Chapter 12 plan of reorganization for two reasons. First, the proposed modifications are more extensive than those permitted by § 1229(a), and thus we are without authority to approve them. Second, to the extent we have the discretion to do so, we deny Debtor's motion because it would deprive FLB of the benefit of its bargain, discourage settlements generally, and impair the ability of other debtors to reorganize.

The stay shall continue in effect for ten days from entry of the Order implementing this Memorandum of Decision to afford Debtor an opportunity to decide how he wishes to proceed. Debtor shall submit an order consistent with the provisions of this Decision within 10 days of the date of its entry.

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