

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

CASE NO. 01-23919

RICHARD C. CURTISS,

Debtor.

DECISION & ORDER

BACKGROUND

On October 12, 2001, Richard C. Curtiss (the "Debtor") filed a petition initiating a Chapter 13 case. On the Schedules and Statements required to be filed by Section 521 and Rule 1007, the Debtor indicated that: (1) he was the owner of three parcels of real property, as follows: (a) 219.3 acres of land at 8397 Pardee Hollow Road (the "Main Farm"), improved by various structures, including a farm house on a one acre lot (the "Farmhouse") and a dairy barn; and (b) a 150 x 275 foot lot at 8393 Pardee Hollow Road improved by a 1957 manufactured home (the "Trailer Lot"); (2) the Main Farm had a current market value of \$134,000.00; (3) the Trailer Lot had a current market value of \$10,500.00; (4) John Schumacher ("Schumacher") leased 110 acres of the Main Farm on an oral year-to-year lease at an annual rental of \$4,500.00; (5) he was indebted to the U.S.D.A. Farm Service Agency (the "FSA") in the amount of \$239,395.00; (6) his indebtedness to the FSA was secured by a first mortgage on the Main Farm and a lien on various items of farm equipment

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(the "Farm Equipment"), which he alleged had a current fair market value of \$13,325.00; (7) there were various judgments and outstanding real estate taxes that were liens against the Main Farm and the Trailer Lot; (8) the United States of America on behalf of the FSA (the "Government") had commenced a mortgage foreclosure proceeding (the "Foreclosure Action") for the Main Farm in the United States District Court for the Western District of New York (the "District Court"), in which a judgment of foreclosure and sale (the "Foreclosure Judgment") had been entered and a sale scheduled for a date after the filing of the Debtor's petition; (9) the Debtor's net monthly income was \$2,639.00, consisting of net wages of \$1,531.00 and rental income of \$1,108.00, and his current monthly expenses were \$1,219.00, resulting in net monthly disposable income of \$1,420.00; and (10) he had a lawsuit pending against the Government for a drug overdose.

The Debtor's proposed Chapter 13 plan (the "Plan"), filed with his petition, provided in part that: (1) he would make two (2) monthly payments of \$750.00 to the Trustee, and then monthly payments of \$1,400.00 for fifty-eight (58) months; (2) from the monthly payments there would be paid: (a) Chapter 13 Trustee's fees; (b) an attorney's fee in the amount of \$2,000.00; (c)

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\$2,118.00 in outstanding real estate taxes; (d) \$66,020.00 to the FSA; (e) nominal amounts to judgment creditors on their liens; and (f) an estimated four percent (4%) pro rata distribution to unsecured creditors, including the deficiencies owed to the judgment creditors; and (3) by the end of the Plan, the Debtor would refinance the balance then due on the FSA allowed secured claim of \$147,325.00 (the combined alleged fair market values of the Main Farm and the Farm Equipment), which he estimated would be \$118,981.00.

On November 8, 2001, the Government filed a Motion for Relief from the Stay (the "Stay Motion") provided for by Section 362 (the "Stay"). The Stay Motion alleged that: (1) the Debtor had obtained thirteen (13) different loans from the FSA over the period from July 25, 1972 through February 23, 1990 (the "FSA Loans"), which were secured by the Main Farm and the Farm Equipment; (2) the FSA had not received any payments on the FSA Loans since 1990; (3) in July 2001, the Government paid real estate taxes of \$51,789.08 after the Debtor had failed to pay his real estate taxes on the Main Farm for seven years; (4) the \$1,108.00 monthly rental income scheduled by the Debtor was estimated, and, in part, speculative, because it projected a \$500.00 monthly rent for the Farmhouse that was not currently

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rented; (5) under the Foreclosure Judgment the Debtor's right of redemption expired on August 27, 2001; (6) criminal proceedings had been commenced against the Debtor in the District Court based upon threats he had made against the Secretary of Agriculture and others; (7) on July 26, 2001, the District Court issued an Order in the criminal proceeding limiting the Debtor's ability to reenter the Main Farm (the "District Court Order"); (8) the Stay should be terminated to allow the Government to enforce the Foreclosure Judgment, because: (a) the Debtor had no equity in the Main Farm; and (b) the Farm was not necessary to an effective reorganization, since there was no reasonable likelihood that the Debtor could successfully reorganize; and (9) any interest of the Debtor or the bankruptcy estate in the Main Farm should be abandoned.

In a Memorandum of Law submitted with the Stay Motion, the Government further asserted that: (1) upon information and belief, the Debtor's income was less than he had scheduled, particularly since a substantial component of the rental income was speculative; (2) the Debtor's expenses did not include any amounts for insurance and maintenance on the Main Farm; (3) because the Debtor's access to the Main Farm was limited by the District Court Order, the expense of maintenance would not be

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nominal; and (4) the prospects for the Debtor to be able to refinance his real property at or before the termination of his five-year Plan was extremely speculative, given that: (a) he had no equity in the property; (b) he had not made mortgage payments in over ten years; (c) he had not made real estate tax payments in over seven years; (d) his income was not regular; and (e) the District Court Order limited his access to the Main Farm.

On November 13, 2001, the Debtor filed an Affidavit (the "Opposition Affidavit") which alleged that: (1) he worked "approximately an average of sixty-five hours per week" from April through November as a farmhand, and received a net income of \$353.40 per week, or \$1,531.00 per month; (2) between December 1 and March 31, he sold firewood and did odd jobs that allowed him to maintain the same monthly earned net income; (3) he had filed Chapter 13 to stop the foreclosure sale on the Main Farm and save the Farm that had been in his family for over thirty years; (4) it was his understanding that when he filed his Chapter 13 petition that, notwithstanding the District Court Order, he would have unrestricted access to the Main Farm; (5) Schumacher had indicated to him that he wished to rent some of the barns on the Main Farm at an additional annual rent of \$1,000.00; (6) he believed that he could rent the Farmhouse for

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at least \$500.00 per month; (7) despite his protracted litigation and differences with the FSA, he had not previously filed Chapter 13 because no one had ever advised him of his rights and potential remedies under Chapter 13; (8) he believed that: (a) over the five-year term of the Plan the Main Farm would appreciate in value; and (b) he could refinance his real property for the approximately \$118,000.00 balance that would be due the FSA at the termination of the Plan; (9) the Main Farm was now insured; (10) he had received a verbal commitment from a bank to loan him \$110,000.00, to be secured by a first lien on his real property, which he could close on if the FSA would accept \$100,000.00 in full satisfaction of the FSA Loans; (11) he wished to begin farming again, so he wanted to retain the Farm Equipment and pay its value to the FSA through the Plan.

At a November 19, 2001 hearing on the Stay Motion, the Court scheduled the matters of the Confirmation of the Debtor's Plan and the Stay Motion for an Evidentiary Hearing on December 4, 2001 (the "Hearing"). At that time, the Court assumed that the Debtor would appear at his scheduled November 26, 2001 Section 341 Meeting, so that the Chapter 13 Trustee (the "Trustee") could: (1) examine the Debtor concerning his financial affairs and the feasibility and confirmability of the Plan; and (2) be

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prepared to make a recommendation to the Court regarding confirmation at the Hearing.¹

On December 3, 2001, the Court received a letter from the Debtor regarding the Hearing, which stated in part that: "I have for 6 months tried to get transcripts of hearings dated 3-15-00, 4-3-01 - 7-3-01 - 7-23-01 and 7-26-01 for this hearing on December 4, 2001. These hearings are needed because they show my drug[g]ing by U.S. Attorney Christopher Taffe at 1500% overdose to silence me on some murders he and others at the Federal Building are involved in."

On December 4, 2001, the Court conducted a hearing on the Confirmation of the Debtor's Plan and the Stay Motion, at which the Debtor testified. After the Court: (1) heard the testimony of the Debtor; (2) observed the Debtor's demeanor and assessed his credibility; (3) reviewed the Exhibits admitted into evidence; and (4) heard the recommendation of the Trustee that he did not believe that the Plan was feasible, as required by Section 1325(a)(6)², it made a preliminary ruling that: (a) the

¹ The Debtor failed to appear at his Section 341 Meeting on November 26, 2001.

² Section 1325(a) provides in part that:

(a) Except as provided in subsection (b), the court shall confirm a plan if -

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Plan was not confirmable; (b) the Stay should be terminated to allow the Government to proceed with its Foreclosure Action; and (c) the interests of the bankruptcy estate in the Main Farm and the Farm Equipment should be abandoned. The Court also advised the Debtor that it would file a Decision & Order so that he would have the Court's Decision in writing.

DISCUSSION

Section 1325(a) requires the Court to make a number of affirmative findings before it can confirm a debtor's Chapter 13 plan. One of the most important findings is the requirement

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(5) with respect to each allowed secured claim provided for by the plan -

(A) the holder of such claim has accepted the plan;

(B) (i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder; and

(6) the debtor will be able to make all payments under the plan and to comply with the plan.

11 U.S.C. § 1325 (2001).

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under Section 1325(a)(6), often referred to as a finding of feasibility. This Section requires that the Court find that the debtor will be able to make all of the payments required under the Plan.

Since the Government has not accepted the Debtor's Plan that proposes to retain the Main Farm and the Farm Equipment which are the Government's collateral, the Plan must also meet the requirements of Section 1325(a)(5)(B). In order to meet those requirements, the Government must receive its \$147,325.00 allowed secured claim plus an appropriate present value factor over the five-year term of the Plan. Accepting the Debtor's numbers in the Plan, he would be required to make each and every monthly payment proposed under the Plan, close on the proposed \$118,981.00 refinancing and pay the proceeds to the Government before the termination of the Plan.

At the conclusion of the Hearing, based upon the Debtor's testimony and the other evidence presented, the Trustee advised the Court that he could not recommend confirmation of the Plan because it was not feasible, in that: (1) the Debtor's income was in part speculative and otherwise not sufficiently certain to conclude that he could make the required monthly Plan payments; and (2) the Debtor's prospects for refinancing his

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real property before the termination of the Plan were speculative at best.

The Court agrees with the Trustee that the Debtor has not met his burden to show by definitive and credible evidence that he will be able to make all of the required monthly Plan payments and that the necessary refinancing proceeds will be available before the five-year term of the Plan expires.³

The Court finds that the Debtor has not met his burden to demonstrate that he can make the required monthly Plan payments for the following reasons: (1) the Debtor's 1999 and 2000 Federal Income Tax Returns produced at the Hearing do not demonstrate or confirm that the Debtor will earn the projected gross annual income of \$28,728.00 (\$2,394.00/month x 12 months = \$28,728.00), required to make the proposed monthly payments, in that the Debtor's 2000 Federal Income Tax Return showed total earned income and unemployment compensation of only \$13,920.00; (2) the Debtor did not produce anyone from his current employer, Rathbun Farms, Inc. to testify as to his projected wages over the five-year term of the Plan for the months of April through November, nor did he produce any other admissible evidence from

³ See *In re Fantasia*, 211 B.R. 420 (1st Cir. BAP 1997), and the cases cited therein, for its comprehensive discussion of feasibility and analysis of balloon payments dependent upon refinancing.

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that employer to confirm his current or projected income⁴; (3) the Debtor produced no credible evidence of his ability to earn the required gross income for the months of December through March; (4) the evidence presented by the Debtor at the Hearing did not support the Debtor's allegation that he would have regular monthly rental income of \$1,108.00, in that: (a) he did not have Schumacher available to testify or any admissible evidence from Schumacher to confirm the rent Schumacher was paying him or would pay him over the five-year term of the Plan, including any additional rent for the barns on the Main Farm; (b) although the Debtor testified that he is attempting to rent the Farmhouse for \$650.00 per month, it is currently not rented, and the \$1,108.00 required monthly rental amount is dependent upon at least a \$500.00 per month rental of the Farmhouse; and (5) the Debtor acknowledged at the Hearing that he had not included in his expenses an amount for insurance and maintenance of the Main Farm and that if he did not have full access to the Main Farm because of the District Court Order, maintenance costs might be more than nominal.⁵

⁴ The Debtor did produce two checks from Rathbun Farms, Inc. in the amount of \$353.40, but they are not sufficient to support a finding that his monthly gross wages are \$2,394.00 for the period of April through November.

⁵ This Court has no jurisdiction or authority to vacate, modify, clarify or otherwise affect the District Court Order, and the Debtor's bankruptcy

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The Court also finds that the Debtor has not met his burden to show that he can refinance his real property for an amount sufficient to pay the Government the amounts required under Section 1325(a)(5)(B) before the expiration of the five-year term of the Plan for the following reasons: (1) the Debtor has not made a payment on the FSA Loans since 1990⁶; (2) notwithstanding any disputes the Debtor may have had with the FSA regarding the FSA Loans, he did not pay the real estate taxes on his real property for over seven years; (3) the Debtor has a criminal record; (4) the Debtor has a history of disagreements with mortgage lenders; (5) the Debtor had a number of judgments entered against him in connection with his former farming operations; (6) unless he obtains relief from the District Court Order, he will continue to have limited access to the Main Farm and the Farmhouse; (7) the Debtor's mental state is somewhat uncertain; and (8) the Debtor produced no evidence whatsoever to confirm the alleged \$110,000.00 mortgage commitment for his real property. In the Court's experience,

filing has no affect on that Order.

⁶ At the Hearing the Debtor testified that he had not made a payment on the FSA Loans since 1990 because representatives of the FSA had told him not to make a payment since if he and all other farmers paid off their farm loans, the President of the United States would disband the FSA and everyone would lose their jobs.

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the combination of these facts and circumstances would make it extremely difficult, if not impossible, for the Debtor to refinance his real property, especially when he was also in a Chapter 13 proceeding.

In view of the Debtor's: (1) speculative and uncertain income where the evidence does not indicate that he can make the required monthly Plan payments; (2) expenses, which appear to be understated; and (3) speculative and uncertain prospects for refinancing his real property before the termination of the Plan, which is necessary so that the Plan can meet the requirements of Section 1325(a)(5)(B), the Court finds that the Plan does not meet the requirements of Section 1325(a)(6), and, therefore, is not confirmable.

Since the Debtor has no equity in the Main Farm and the Main Farm is not necessary to an effective reorganization, because the Debtor's Plan is not confirmable, the Government has met its burden under Section 362(d)(2)⁷ to obtain relief from the Stay.

⁷ Section 362(d)(2) provides that:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -

(2) with respect to a stay of an act against property under subsection (a) of this section if -

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In addition, since the Debtor and his bankruptcy estate have no equity in the Main Farm or the Farm Equipment, such property should be abandoned so that the Government can proceed with its Foreclosure Action on the Main Farm and can enforce its security interest in the Farm Equipment.

CONCLUSION

The Stay provided for by Section 362 is terminated so that the Government can proceed with its Foreclosure Action on the Main Farm and enforce its rights as a secured creditor of the Farm Equipment. The interests of the estate in the Main Farm and the Farm Equipment are hereby deemed abandoned pursuant to Section 554.

IT IS SO ORDERED.

HON. JOHN C. NINFO, II

(A) the debtor does not have an equity in such property;
and

(B) such property is not necessary to an effective
reorganization[.]

11 U.S.C. § 362(d) (2001).

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CHIEF U.S. BANKRUPTCY JUDGE

Dated: December 14, 2001