UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

ONTARIO ORCHARDS, INC. Case No. 87-10255 K

Debtor

The Trustee's December 29, 1994 Motion to Dismiss this eight year old Chapter 12 case is granted unless the Debtor completes the current Plan in 30 days, and the Court will not reach the Debtor's responding Motion to Amend or to Discharge except in dictum as set forth hereinafter.

This Debtor offers no response to the Trustee's Motion under 11 U.S.C. § 1208(c). Although the Motion is structurally cryptic, it is legally well-framed, for it represents that he has received from the Debtor insufficient payments to execute the Plan; that the Debtor has refused and failed to pay the final sum to complete the plan; that the five year maximum length of a Plan under Chapter 12 has been grossly exceeded, 11 U.S.C. § 1222(c), and that the Trustee's demands for information have been ignored by the Debtor for many months.

These affirmations clearly set forth grounds for dismissal under 11 U.S.C. § 1208(c)(1) ("unreasonable delay ... by the debtor that is prejudicial to creditors") and § 1208(c)(6) ("material default by the debtor with respect to a term of a confirmed plan"). The failure to communicate with the Trustee also raises the specter of a possible "continuing loss to or diminution of the estate and absence of a reasonable likelihood

of rehabilitation." 11 U.S.C. § 1208(c)(9).

The Debtor does not explain or dispute any of the Trustee's affirmations, except to suggest that the Debtor should somehow be held harmless for not knowing that it owed a priority debt to the State Department of Labor.

The Debtor's only significant response to the Motion to Dismiss is to assert a right either to further modify its Plan and thereby deem it to be "completed," so that the Debtor may receive a "completion discharge" under 11 U.S.C. § 1228(a), or to leave the Plan as it is but to receive a "hardship discharge" under 11 U.S.C. § 1228(b).[1]

The Debtor seems to think that grounds for dismissal somehow evaporate if there are still some statutory provisions by which the Debtor may prevail upon the Court to grant the Debtor greater relief against its creditors. It is as if the Debtor believes that the possibility that the Court might approve a Plan modification or might grant a hardship discharge, requires that the Court place the Trustee's dismissal Motion on hold (obviating the need for the Debtor to respond to that Motion) and take the Debtor's Motions first.

In fact, the opposite is true. Because the Trustee's Motion is well-founded on its face and none of its essential

[1]Congress has seemingly not excluded a corporate debtor from eligibility for a hardship discharge in Chapter 12.

elements has been placed in dispute, it should be granted unless the Debtor completes the current Plan immediately. The Court will not reach the Debtor's Motion.

Having so held, the Court will note as dictum its concurrence in the Trustee's reasoning as to why the Debtor's Motion could not be granted even if the Court were to reach it. Further, the Court notes the following:

A. It is the Debtor, not the Trustee, that is expected to have known the extent of its debts. Had the Debtor been diligent enough to have discovered and disclosed the Department of Labor's claims, it is likely that other creditors would not have had to wait eight years to find out that there is nothing for them -- eight years during which the Debtor has enjoyed the protection of this Court.

B. During the eight years, the value of the Debtor's assets has apparently declined, without explanation. In the Court's view the Debtor's noncommunicativeness constitutes an absence of good faith, which defeats the requisites for confirmation of a further modification, 11 U.S.C. § 1229(b)(1) (incorporating § 1225(a)), and, as noted above, of itself constitutes prejudicial delay justifying dismissal.

C. The Trustee has politely understated the extent of the Debtor's failure to provide current facts justifying either of the Debtor's prayers for relief. For a Debtor to operate for eight years under the protection of this Court, make two meager

payments over the course of those years, and then seek a hardship or completion discharge without offering a complete accounting is troubling. The Court is persuaded by the case of *In re Bereolos*, 126 B.R. 313 (Bankr. N.D. Ind. 1990), that modification is only appropriate as to unanticipated and substantial post-confirmation changes in the Debtor's condition. (Although that case interpreted the Chapter 13 modification provision, the language of § 1323 is identical to § 1223 and the result should be the same.) Here, the Debtor complains of a "surprise" debt. That is not a post-confirmation change warranting modification.

D. The Debtor makes much (in conclusory fashion) of its current lack of equity in its property. As to hardship discharge (and perhaps as to modification and consequent completion discharge, where no further payments are contemplated) the issue is not what the current equity position of the Debtor is, but what it was on the effective date of the Plan currently in effect.

The case is dismissed unless the Plan is completed within 30 days.

SO ORDERED.

Dated: Buffalo, New York
January 27, 1995

/s/Michael J. Kaplan
U.S.B.J.