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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

In re	)	Bankruptcy Case No. 86C-05249
	)	
ORVILLE L. CREECH and	)	
RUBY CREECH,	)	
	)	
Debtors.	)	MEMORANDUM OPINION AND ORDER

The matters presently before the court are the motions filed by AgriStor Leasing Company and AgriStor Credit Corporation (hereinafter collectively referred to as "AgriStor") to dismiss the above-captioned case. A hearing was held on September 28, 1989. Steven W. Dougherty appeared on behalf of the debtors-in-possession, Orville and Ruby Creech. Roger F. Baron and J. Riley Burton appeared on behalf of AgriStor. Counsel presented argument after which the court took the matters under advisement. The court has carefully considered and reviewed the arguments of counsel and the pleadings on file and has made an independent review of the pertinent authorities. Now being fully advised, the court renders the following decision.

Several years prior to filing for bankruptcy, the debtors entered into an installment contract with AgriStor for the purchase of certain farm equipment. The

debtors also leased a Harvestore from AgriStor. On November 28, 1986, the debtors filed a voluntary petition for relief under Chapter 12 of the Bankruptcy Code. At that time, AgriStor had a oversecured claim of $8,250.00 based on the farm equipment contract ("farm equipment claim"), and a undersecured claim of $176,000.00 based on the Harvestore lease which had not yet expired ("Harvestore claim").

On February 26, 1987, the debtors filed a plan with the court that was modified by them on June 4, 1987. In a letter dated June 9, 1987, AgriStor stated that it would not object to confirmation of the debtors' plan because it was satisfied with the debtors' treatment of its claims in the plan. On June 11, 1987, the court approved the debtors' plan and an order confirming it was entered on July 8, 1987.[1]

According to the debtors' confirmed plan, AgriStor's claims are undisputed. The farm equipment claim is provided for in class "G" of the plan where the debtors have promised to pay AgriStor in full by making payments of $183.00 a month, with a 12% discount factor, for a period of sixty months. The debtors have assumed the Harvestore lease in class "F" of the plan; the debtors have promised to make payments to AgriStor of $1,000.00 a month for eighteen months, followed by payments of $1,831.60 a month for ninety-seven months. The plan does not contain a default clause.

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[1] The order confirming the debtors' plan contained a clerical error regarding the number of payments the debtors were required to make to AgriStor on the Harvestore claim. This error was corrected by an ex parte order entered on December 28, 1987.

Upon confirmation of the plan and for approximately one year thereafter, the debtors were diligent in making payments to AgriStor as required by the plan. At the end of 1988, however, the debtors had a change of heart; AgriStor has not received payment on the farm equipment claim since November, 1988, and it has not received payment on the Harvestore claim since September, 1988.

On September 1, 1989, AgriStor filed the present motions to dismiss the debtors' case pursuant to 11 U.S.C. § 1208(c)(6) and Bankruptcy Rules of Procedure 1017 claiming that there has been a "material default by the debtor[s] with respect to a term of [the] plan." In response, the debtors do not dispute that they are in arrears in their payments to AgriStor. Rather, the debtors maintain that their case should not be dismissed because they have offered to cure the default by surrendering to AgriStor the collateral that secures its claims. According to the debtors, they "have chosen not to retain and pay for the equipment" because in the "exercise of their best business judgment, they have determined that the equipment is not productive and cost-efficient." The debtors claim that the "[s]urrender of the equipment is in the best interest of the estate." In support of this argument, Orville Creech testified at the hearing regarding the present motions that he had included the AgriStor claims in his Chapter 12 plan because he thought that he was obliged to do so, but that prior to filing for bankruptcy he: (1) was not using the equipment in question; and (2) believed the equipment to be

worthless to his operations. Moreover, Mr. Creech alluded to a possible cause of action in contract against AgriStor for breach of warranty.

The cure proffered by the debtors is not acceptable to the court because it would require an amendment to the debtors' confirmed plan. Based on the facts in the present case, the court cannot countenance such an amendment to the plan for three reasons.

First, as a general principle, the integrity of confirmed plans of reorganization would be called into question if the court were to allow the debtors in the present case to amend their plan. The provisions of a confirmed Chapter 12 plan binds the debtor as well as all of the creditors. 11 U.S.C. § 1227(a).[2] Cf. 11 U.S.C. § 1141(a) (same language); In re Hoffman, 99 B.R. 929, 936 (N.D. Iowa 1989)(interpreting 11 U.S.C. § 1141(a)); In re Garsal Realty, Inc., 39 B.R. 991, 994 (N.D.N.Y. 1984) (interpreting 11 U.S.C. § 1141(a)); In re Auto Dealers Services, Inc., 89 B.R. 233, 235 (Bankr. M.D. Fla. 1988) (interpreting 11 U.S.C. § 1141(a)). Indeed, as the debtors recognize in their opposing memorandum, a confirmed plan creates a "contractual relationship between [the debtors and their] creditors which delineate[s] their respective rights and duties...." In re White Farm Equipment Co., 38 B.R. 718, 724 (N.D. Ohio 1984); Denver & R.G.W.R. Co. v. Goldman, Sachs & Co., 212 F.2d 627, 630 (10th Cir. 1954). Having

[2] 11 U.S.C. § 1227 (a) reads in relevant part that "the provisions of a confirmed plan bind the debtor, each creditor, each equity security holder, and each general partner in the debtor...."

entered into a contract, the debtors must comply with all of its terms. Absent such a requirement, confirmed plans under Chapter 12 would be rendered meaningless.

Second, the debtors' confirmed plan in the instant case is res judicata as to the issues raised by the debtors in support of the proposed amendment that refute the value of the farm equipment and the Harvestore to their farm operations and that call into question the validity of the AgriStor contracts.

As a general rule, a confirmed plan is "'res judicata as to all questions pertaining to [it] which were raised or could have been raised [prior to its confirmation].'" In re Hoffman, 99 B.R. at 937 (emphasis in the original) (quoting In re Sanders, 81 B.R. 496, 498 (Bankr. W.D. Ark. 1987)); Stoll v. Gottlieb, 305 U.S. 165, 171-72, reh'g denied, 305 U.S. 678 (1935); In re Air Center, Inc., 48 B.R. 693, 695 (Bankr. W.D. Okl. 1985). The reason for this rule is that the effectiveness of a confirmed plan demands that there be finality of orders of confirmation. In re Hoffman, 99 B.R. at 936; In re Earley, 74 B.R. 560, 563 (Bankr. C.D. Ill. 1987). Accordingly, in Chapter 12 cases it is imperative that the debtor-in-possession evaluate the obligations of the estate and raise all problems known to it regarding those obligations prior to confirmation of the plan. For example, the debtor-in-possession is obliged to review the validity of the contracts that it has entered into and dispute claims based on those contracts that it believes are invalid. A debtor-in-possession is also required to use the pre-confirmation period to assess the value of the property that is included in its estate and to abandon any property that

is burdensome to the estate or of inconsequential value and benefit to the estate. 11 U.S.C. § 554(a). Furthermore, a debtor-in-possession has a duty to seek approval by the court for rejecting burdensome executory contracts. In re Investors Dev. Co., 7 B.R. 772, 774 (Bankr. D.N.J. 1980); see 11 U.S.C. § 365. If the debtor-in-possession fails to dispute a claim, abandon property, or seek approval for the rejection of an executory contract prior to confirmation of the plan, a presumption is created that it deems the contract or property necessary for the entity's reorganization.

In the present case, Mr. Creech testified that prior to proposing a plan he was not using the equipment in question and considered it to be worthless to his operations. On the basis of this testimony it is clear that the debtors knew that the equipment in question was not beneficial to the estate long before their plan was confirmed. Furthermore, the possible breach of warranty claim alluded to by the debtors at the hearing would be based on facts that they were aware of before the plan was confirmed. Accordingly, prior to confirmation of the plan the debtors could have: (1) disputed AgriStor's claims by alleging a breach of warranty; (2) attempted to reject the Harvestore lease; or (3) simply abandoned the equipment in question. Having failed to raise these issues in a timely manner, res judicata bars the debtors from raising them at this time to support an amendment to the plan.

Finally, the debtors in the present case are equitably estopped from amending the plan. The debtors proposed the plan and were the major proponents of it. The

plan provides for the payment of AgriStor's claims. AgriStor did not object to confirmation of the debtors' plan because it was satisfied with the treatment of it's claims in it. The debtors had ample opportunity to challenge any portion of the plan prior to it's confirmation, yet they did not do so until over two years after the entry of the confirmation order. Given these facts, the debtors are equitably estopped from seeking an amendment to the plan that would alter the treatment of AgriStor's claims. See In re Garsal Realty, Inc., 39 B.R. at 991 (Debtor, the major proponent of Chapter 11 plan, was estopped from challenging a portion of it after confirmation.).

Concluding that the cure proposed by the debtors is not desirable, the court must determine whether dismissal under 11 U.S.C. § 1208(c) is proper in this case. The debtors argue that there has not been a "material default" under the plan because AgriStor holds only two of seven claims against them, and they are current on all of the other payments required by the plan. Furthermore, the debtors argue that "[d]ismissal of a bankruptcy case after a plan has been confirmed is an extreme measure that should be exercised only when such remedy is in the best interests of all of the creditors...."

This court agrees with the debtors that an order of dismissal should be not be entered into hastily. See, e.g., In re Copy Crafters Quickprint, Inc., 92 B.R. 973 (Bankr. N.D.N.Y. 1988). A determination of cause sufficient to dismiss a case pursuant to section 1208(c), however, is subject to broad judicial discretion and is governed by the

circumstances of each individual case. Cf. Hall v. Vance, No. 89-5079, slip op. at 6-7 (10th Cir. Oct. 16, 1989) (discussing standards of dismissal under 11 U.S.C. § 1112(b)). The facts in the present case warrant a dismissal under section 1206(c)(6). The debtors have not made ten consecutive payments to AgriStor on its farm equipment claim. Furthermore, the debtors have missed twelve consecutive payments to AgriStor on its Harvestore claim. Failure by debtors to make payments to AgriStor as required by the plan constitutes a "material default." Cf. In re Sensabaugh, 88 B.R. 95 (Bankr. E.D. Va. 1988) (Failure by the debtor to make seven post-confirmation payments to one claimant under it's Chapter 13 plan constituted grounds for dismissal as a "material default with respect to a term of the confirmed plan.").

In addressing the debtors' claim that dismissal may be had only when it is in the best interest of all of the creditors, it is noted that the creditors in the present case had ample notice of Agristor's motions to dismiss, yet not one creditor filed an objection to the motions. If dismissal of the debtors' case was not in the best interest of the creditors, they would have filed objections to AgriStor's motions. Cf. Hall v. Vance, slip op. at 8 (In considering whether conversion under 11 U.S.C. § 1112(b) was in the best interest of all of the creditors, the court cited the absence of objections by those creditors to the motion to dismiss.).

Accordingly, IT IS HEREBY ORDERED that AgriStor's motions to dismiss the debtors' case be GRANTED. The case is dismissed without prejudice.

DATED this 13 day of November, 1989.

BY THE COURT:

Glen E. Clark

GLEN E. CLARK, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT