United States Bankruptcy Court
District of New Mexico

Document Verification

Case Title: **Wesley Allen Myers and Sonja Diane Myers**
Case Number: **00-11511**
Chapter : **12**
Judge Code: **SA**
First Meeting Location: **Albuquerque**
Reference Number: **12 - 00-11511 - SA**

Document Information

Number: 50
Description: Minutes of Hearing Held On 2/2/01 Re: [21-1] Chapter 12 Plan -- PLAN CONFIRMED.
Size: 13 pages (25k)

Date Received: 02/01/2001 03:04:34 PM	**Date Filed:** 02/01/2001	**Date Entered On Docket:** 02/05/2001

Court Digital Signature View History

71 91 4e 65 a1 da 1b 44 0d 2d 6f 4a 43 86 45 8a e6 bb 74 8a 9e 69 37 78 c2 83 d7 04 48 06 ee 05 c5 33 7f ba 00 aa 82 bd aa 69 7e 21 d6 20 cf 5e 5f 52 d7 ba f4 1e 05 6e 0b 57 8f 73 e8 a4 08 0a 32 6e 28 2a 9f 07 3b 11 57 99 a3 0c 75 6c 89 b9 2e d9 85 0f 7d bc b3 96 6e 7b a6 de 76 7f 72 c5 57 43 b5 49 91 47 a4 96 da 86 c3 33 33 b1 17 59 2f 82 fc a6 9d 20 d5 f3 7c d6 e3 e9 f8 50 72 c5

Filer Information

Submitted By: Mary B. Anderson
Comments: Minutes of Hearing Held on February 2, 2001 on Oral Ruling on Confirmation of Plan. Plan Confirmed. George Moore to do order.

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

Clerk's Minutes

Before the Honorable James Starzynski

James Burke, Law Clerk
Jill Peterson, Courtroom Deputy

Joe Jameson Court Reporters
(505) 242-2809

JOE JAMESON XXX

Date:
THURSDAY, FEBRUARY 1, 2001

In Re:
WESLEY ALLEN MYERS
SONJA DIANE MYERS
No. 12-00-11511 SR

Oral Ruling on Confirmation of Chapter 12 Plan

Attorney for Debtor: George Moore
Attorney for Farm: Manny Lucero
Trustee: Ron Holmes
Debtor: Wesley Myers

Summary of Proceedings:

Exhibits _____

Testimony _____

Plan confirmed. George Moore to do order.

MYERS 12-00-11511 February 1, 2001
RULING ON CONFIRMATION OF CHAPTER 12 PLAN (DOC 21) AND FARM SERVICES ADMINISTRATION OBJECTIONS ("FSA" or "USDA") THERETO (DOC 24).

FINDINGS OF FACT AND CONCLUSIONS OF LAW ORALLY AS PERMITTED BY FED BANKRUPTCY RULE 7052. JURISDICTION 28 USC 1334 AND 157. CORE PROCEEDING 28 USC 157(b)(2)(L).

This is second Chapter 12 case. First was 12-98-11177 RR, converted to chapter 7 and discharged. Parties asked the Court to take judicial notice of the earlier case, which the Court has done.

The Plan proposes:
1. Pays all disposable income into the plan for its life (defined in para 1.2 as three years after the date that the confirmation order becomes final or the date on which all the claims other than the FSA claim are paid, whichever comes first).
2. FSA Class 3 claim is paid in equal installments over 25 years at a 7% interest rate.
3. FSA retains its liens.
4. The Court determines the value of the farm.

Hardzog v. Farm Credit Bank (In re Hardzog), 901 F.2d 858 (10th Cir. 1990) requires the Court to determine what would be a market interest rate for a loan of this sort. Debtor's expert John Duff (TUA FSA objections on hearsay and best evidence – overrule those objections) testified 30 year fixed loans of $400-600m were at 9.95%, on loans made to well qualified customers; borrowers with bankruptcy history would have to pay a higher rate. He also testified that if less than 30 years, could expect rate to be slightly lower. FSA's expert Chris Amend testified that the going rate for farm loans in the southeast, FSA guaranteed 90% in amounts up to $700,000, were at prime, which was 9% or prime plus 1%. Court finds that the proper interest rate should be 10%, based on comparable loans. So the Court will use that 10% interest rate with a pay off period of 25 years.

Comparing the 1998 plan projections with 2000 plan projections shows major shift in the nature of the farming operation. E.G.

INCOME	1998	1999	2000	2001	2002
Milo forage	81,900	81,900			
Milo	6075	6075			
Wheat	53,200	53,200	45820		
Cattle Grazing	39,361	41,242	23826	88275	88275
hay	780				
Sale of cattle	4000		11050	20000	20000
ascs	11000	21000	19334[1]	19354	???
Salaries	20596	20596	10998	14664	14664

The Debtors are getting out of milo, and transferring the use of the farm to cattle grazing and sale of cattle.

The cash flow projections were:

Year 2000 – income $111,048
expenses 70,579
Excess 40,469

Year 2001 - income $142,293
Expenses 99,312
Excess 42,981

Year 2002 - income $122,939 plus unknown ASCS payments
Expenses 97,212
Excess 25,717 plus ASCS payments.

Court finds that it is more probable than not that Congress will pass some legislation to continue the ASCS programs after 2001.

Debtors' efficiency rating, as shown on their tax return, was

[1] FSA has filed a motion for stay relief, seeking to withhold payment of this sum on the basis of setoff. No hearing has yet been conducted on the motion.

high (as strange as it sounds, the lower the efficiency rating, at least in this context, the better the farming operation); however, FSA's witness Chris Amend testified that a 95% operating ratio is not unusual for farmers participating in the direct loan program, that he has seen ratios that exceed 100%, and that a 63% ratio is very good for agriculture. (Indeed, if 63% were the norm, there would not be a family farm problem, it seems to the Court.) The fact that the Debtors would not qualify for or need the FSA program if they were at 63% or 64% is irrelevant. Further, the Debtors' income did not reflect approximately $40,000 of government payments to which they may have been entitled. (Whether the Debtors can attempt to collect this sum, or litigate it, in this bankruptcy court is a question pending now before this Court in an adversary proceeding.) If this additional figure of $40m were factored in, the Debtors' efficiency rating would be quite favorable. (Debtors have sought recovery of those missed government payments, but they are not factored into the plan – that is, the Debtors' plan does not require recovery of those funds in order to succeed.)

There were two appraisals entered into evidence. One, Exhibit 1 prepared by Bedinger and Nations for the debtors on April 11, 2000, valued the farm at $380,000. The appraisal contains a comparative market analysis of three comparable properties, that sold in July, 1996 (a 160 acre tract), September 1999 (a 320 acre tract), and January, 1999 (a 400 acre tract). Based on these comparables, the subject farm was valued at approximately $380,000, $392,000, or $367,000 respectively. A cost approach to valuation indicated the farm had a value of $382,000. Overall, the appraisal fixed the value at $380,000.

The second appraisal, Exhibit 2, was prepared by Lavon Williams for the USDA Farm Service Agency on February 11, 2000 and valued the farm at $438,000. This appraisal also used a comparative market analysis, for sales of land that took place in March, 1998 (a 160 acre tract), May, 1996 (a 200 acre tract), July, 1998 (a 200 acre tract with a lake) and June, 1999 (a 10 acre tract). The comparables were broken out based on whether the land was irrigated or dry, and the appraisal fixed the value of the land based on the market approach as $85,800 for dry land and $352,000 for irrigated. A cost approach to valuation indicated the farm had a value of $438,360. Overall, the appraisal fixed the value at $438,000.

Overall, appraisals have only this $58m difference and suggest a considerable degree of agreement. Court finds the value of the farm for purposes of confirmation to be $390,000. (This is in accordance with Para. 5.3.7 of the Plan, which provides that the FSA/Lavon Williams appraisal value will be the value for purposes of the Plan until the Court determines a different value. The evidentiary hearing is ample evidence that the parties understood that the value of the property was open to contest.) The finding of $390m value is based on the Court's belief that the market approach to valuation is by and large the most useful, and on the Court's finding that the comparables used by Debtors' appraiser are more "comparable" (and there are more of them) and thus the overall market-approach number arrived at in the Debtors' appraisal is more accurate. However, I also adjusted that number upward by $10,000 to take into account what I think is too short a marketing time (3-6 months) provided for in the Debtors' appraisal. (Land Appraisal Report, both pages of the two-page document, immediately preceding the pages summarizing the comparables.)

The Court found the FSA appraisal difficult to read and use, but particularly the comparables were not as good, as illustrated by last three pages of Attachment A which discuss the comparables.

A valuation of $390,000 would require a yearly payment of $42,965.55 (25 years at 10%). Since the plan proposes to make these payments to FSA (para. 5.3.1, albeit at 7% but the Court is modifying that to 10%) and to allow FSA to retain its lien on the real property and any other property on which FSA has a lien (paras. 5.3.2 and 5.3.4), the plan, as effectively modified by this confirmation order, meets the requirements of §1125(a)(5)(B), in that it provides that FSA retains its lien securing its claim and the value, as of the effective date of the plan, of the stream of payments to be distributed to FSA on account of FSA's claim is not less than the allowed amount of the claim (i.e., $390m).

Payments to Class 3 are to start "beginning after the Effective Date," Para. 5.3.1, which is defined as the "first day of the first month following the Confirmation Date," Para. 1.6. Confirmation Date is defined as "The date upon which an order confirming the Plan becomes final." Para. 1.3. Paras 8.6 and 8.7 provide respectively that "Unless specifically provided in this Plan,...the date upon which an annual

installment payment shall be due shall July 1 of each year" [sic] and "Unless specifically provided in this Plan,...the first due date of any installment payment provided for under this Plan shall be the first due date following the Effective Date." The Court interprets these provisions of the plan to mean that the first installment payment due to FSA under this plan will be July 1, 2001, based on this confirmation order becoming final sometime within the next few months at the latest. The Court has some concerns about whether, given the Code's mandate that a secured claim be paid its full value, see §1125(a)(5)(B)(ii), any interpretation of the plan that significantly delays the start of payments to FSA might well put the plan out of compliance with the Code. However, FSA has not objected to that due date, and it is not so far out from the date of confirmation (given the length of time it has taken the Court to rule), that the Court should sua sponte deny confirmation on this ground. And in any event, the Debtors' cash flows are such that July 1 is the date that the financial planning has centered around. Presumably FSA was also aware of this.

Exhibit 3, pages 6 and 9 show that Debtors project cash on hand of $98,155 at the end of June, 2001. The Debtors' projected cash position for the end of June 2002 is $135,459, but without taking into account any ASCS payments for CY 2002, without taking into account the $42,965.55 which will have to have been paid on July 1, 2001, but assuming also that the Debtors receive the CY 2000 ASCS payments. Thus, without taking into account the possibility of collecting additional ASCS payments for CY 2000 (see footnote 1 above), as of the end of July, 2002, Debtors will have $5,333 on hand. That figure will drop by $14,700 by the end of October 2002, so that the Debtors would need about $9,300 to still be in the black at that time.

These numbers, and the optimism implicit therein, obviously leave some genuine questions about the feasibility of the plan. For example, if FSA is able to withhold or set off the $19,354 in ASCS payments for CY 2000, how will the Debtors have sufficient funds to make the FSA payments? And if the Debtors still have on hand funds sufficient to make the first FSA payment of almost $43m, and then make that payment, how will that affect the Debtors' ability to continue their operations for CY 2001 and 2002 (see preceding paragraph and Exhibit 3)? What about the conflict in testimony about whether the Debtors can in fact obtain contracts paying them

$.35 a pound weight gain for calves to be grazed on their triticale wheat, and are the calves likely to gain about 2 pounds a day? And what about administrative expenses, specifically Debtors' counsel fees?

To begin with, the Court has not ruled yet on the FSA motion for stay relief, doc. 44, and the Debtors' response thereto, doc. 46. (As of January 31, no hearing had been requested.) Were the Court to determine that the ASCS payments should go to the Debtors and not be withheld, on whatever grounds (and if the Debtors could provide adequate protection for the use of the funds if required), the Debtors' cash flow would presumably be sufficient to make the FSA payments.

And there is some room for the Debtors to maneuver, if the testimony of Mr. Myers is to be believed. For example, he stated that he could obtain additional income by part time employment, as he has done in the past: law enforcement, helping his neighbors, serving as a rodeo coach at ENMU for 10 weeks for $14m. That additional income would bridge potential income gaps. In addition, Mr. Myers testified that they still expected payment of insurance proceeds which were due originally in June 2000 but had not been paid (due to delays arising from a large number of claims from around the country that year) by the time of the evidentiary hearing on confirmation (August 1).

Concerning the proposed weight-gain contract, the Debtors did not produce one at the time of the evidentiary hearing (or later, for that matter, at the oral argument in October), and that gives the Court some pause about whether such a contract can be obtained. The Debtors' counsel explained, in the course of an objection, that the Debtors had not entered into any such contract because if the Court did not confirm the plan, the Debtors would quickly be in breach of such a contract. Given that presumably the Debtors could have entered into a contract subject to confirmation of their plan, the tendered explanation leads the Court to wonder whether the Debtors have disclosed or will disclose to the cattle owner their financial circumstances. However, the Court will not presume that the Debtors will fail to make whatever disclosures may be necessary. While the amount of income to be derived from the pasturage leases is critical to the success of the Debtors' new farming venture, the Court will not require that as a condition of confirmation that the Debtors obtain a written grazing contract (if they do not have

one already) for any given amount. The reason for this ruling is that the Debtors have enough incentive to obtain such a contract without the Court ordering it, and that in any event the important issue is not whether the Debtors obtain such a contract per se, but whether, with or without the contract, they can make the requisite payments.

As far as the Court is able to tell at this point, almost the only administrative expenses are those of counsel for the Debtors. 11 U.S.C. §1222(a)(2) requires that the plan "provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim;..." In this instance, nothing in Exhibit 3 shows payment of the Debtors' attorney fees in the years 2000-2002. Since Debtors' counsel has obviously been intimately involved in the financial planning of this case (made apparent by, among other things, counsel's vigorous advocacy of his clients' position during the trial and closing argument of the confirmation hearing), the lack of inclusion of a budget item for the fees constitutes the agreement by counsel not to assert such a claim for the period in question (2000-2002), at least while the case continues as a Chapter 12 case and while there are no funds for distribution other than to the secured claim. (Should there be disposable income, the plan provides for payment of that claim.) The Court will not rule further on this issue, leaving counsel essentially what may be a Hobson's choice about whether to forego payment for some period of time or to pursue payment, possibly at the risk of cratering the plan. The decision about whether and when to pursue fees should be left to counsel, and should not be one that the Court makes, at least in these circumstances.

So it appears the Debtors can make the payments called for by the plan, and will be able to make the installments due during the life of the plan (thereby meeting the requirements of 11 USC §1225(a)(6)), albeit the showing is somewhat tenuous. Eg, Debtors are switching to a farming operation that they have not ever performed before, and they intend to increase their income very substantially in the process. That is a very tall order, but under the best-case scenario they have sketched out, they can do it with a little bit to spare. In so ruling, the Court recognizes the very strong testimony presented by FSA through Chris Amend, who, the Court concedes, spoke authoritatively, candidly and from experience. Nevertheless,

the Court has determined that there has been a least the minimal showing needed of feasibility of the plan (as modified by the Court in this ruling).

The Court's decision needs some additional explication:

FSA has argued that these Debtors have already taken advantage of previous government programs that allowed them to write down their loan by over $500m. The fact that the Debtors availed themselves of the earlier write downs does not constitute a basis for depriving the Debtors of the benefits of the Bankruptcy Code, and FSA has cited no authority to that effect. FSA also cites Judge Rose's ruling in the previous case, to the effect that the feasibility of the Debtors' plan is only in their heads. While the Court has some doubts about feasibility and while the Court certainly respects Judge Rose, his previous ruling is simply irrelevant (different case, different facts), and in any event this Court has come up with a different conclusion. And candidly, this different decision probably represents the inevitable and perhaps regrettable fact of life that presented with the same facts, different judges will sometimes rule differently.

It is also apparent that the Court to some extent is taking the Debtors "at their word" (a colloquialism meant to include the plan and the testimony and exhibits) about their chances of success, and is willing to give the Debtors the benefit of the doubt about whether they can succeed. In this case, and at this stage of the proceedings, there is really little harm that can flow to the other parties involved by letting the Debtors make the attempt. The parties have now expended all the money and time and effort in litigating the issues, and the work left for the parties that they would not be doing anyway is quite minimal: all they need to do is monitor the payments and the Debtors' cash situation (and in the case trustee's situation, collect and disburse any disposable income and collect his fee out of that, a task which the Court assumes he would not strenuously object to). The Court is not saying that there is a "balance of harm" analysis that goes into the decision about whether the plan is feasible – see §1225(a)(6) – but merely that this is essentially a one-creditor simple plan with one of two fairly simple outcomes: either the Debtors are able to make the payments to FSA (in which case FSA, retaining its liens until it is paid in full, benefits from any partial or full payment), or the Debtors default, in which case FSA, having

retained its liens, can move forward with the foreclosure action it has already initiated and obtained judgment upon.

The Court also thinks that it is not inappropriate in a case such as this to allow the Debtors to try to make this work. Such an attempt will be difficult for the Debtors, requiring long hours of work, entailing a lot of anxiety, etc., but if they are willing to undertake all that, with the risk that they will not succeed and understanding that if they fail here, they will have to give up the farm, then why not let them take the shot? While the decision as to feasibility has been vested in this Court by Congress – see §1225(a)(6) – in a case where the Court can find feasibility, albeit "by a hair," the Court should not be so paternalistic as to take that decision away from the Debtors. Compare 11 U.S.C. §524(d)(2) (for self represented debtor, Court must make decision whether proposed reaffirmation agreement is in the best interests of the debtor and dependents).

Some additional issues raised by the parties remain to be decided:

Paras 5.3.6 and 5.3.9 provide that the adversary proceeding now pending (Myers v. USA USDA et al, Adv. No. 00-1118) to recover ASCS and LDP payments will be pursued and the proceeds, if not offset by USDA, will be applied to reduce the balance owed on the real estate. USDA objected to that in para 1 of its objection to the plan, asserting that the funds are subject to recapture. The language of the plan and the testimony of Mr. Myers make clear that the plan is intended to work even without any of the alleged past due ASCS and LDP payments. That being the case, and given further that the parties did not address the issue of offset or recapture in the evidentiary hearing or the closing argument, the Court does not see a need to address that issue in connection with confirming the plan. The issue will be addressed in the future, either in the context of the adversary proceeding or of an action by the Debtors to apply any proceeds to pay down the USDA debt, or some other context, if necessary.

Exhibit 4 is a letter arising out of a class action pending in the Southern District of Mississippi against USDA, which the Debtors argue constitutes an agreement which precludes USDA from foreclosing on their land and which USDA argues is not applicable to these Debtors. The Debtors argue that the letter provides a further basis for confirming the

plan and letting the Debtors have a go at making the plan work, since USDA will not be able to take the farm away from the Debtors anyway. Again, the plan provides a sufficient basis in itself for confirmation, so this Court does not need to reach the issue of what is the effect of the letter. The Court therefore does not decide this question either. Should the Debtors default on their plan by failing to make a payment or otherwise, the issue can be dealt with then, in the appropriate forum. (Court concedes that leaving a foreclosure action pending for up to 25 years may present some unique problems for the United States District Court, where the foreclosure action is pending, but that is a matter for that court to deal with, not this court.)

Additional matters:

At the conclusion of the Debtors' case in chief (focusing on the interest rate and feasibility), FSA moved for judgment under FRCP 50(b) – or 50(a)?, although neither is as such applicable. As is apparent, Court denies the motion for judgment at the close of Debtors' case in chief.

Additional findings/conclusions (concerning 11 USC §1225(a)(1)-(4)):

> The plan complies with the provisions of chapter 12 and other applicable provisions of Code;
> Any fee, charge or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;
> The plan has been proposed in good faith and not by any means forbidden by law; and
> Given that this case would otherwise clearly be a no-asset chapter 7 case, the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 on the effective date of the plan.

FSA has objected to the proposed treatment in the plan (paras 5.3.8, 5.3.8.1 and 5.3.8.2) of the FSA lien which attempts to effectively dismiss the foreclosure action now pending in the United States District Court (CIV 97-0086 MV/LFG) and in which

a foreclosure judgment has been entered, although no sale is currently pending. Objection to Debtor's [sic] Chapter 12 Plan, para 5, at 2. FSA has also objected to the plan's provision (para. 5.3.3) that would cause FSA to waive any of the Debtors' prepetition defaults. Objection to Debtor's [sic] Chapter 12 Plan, para 4, at 2. Ordinarily, in circumstances in which there is a pending foreclosure judgment, the foreclosure litigation is stayed pending the Debtors' successfully completing the plan, or at least those portions of the plan which deal with payment of the obligation sought to be collected in the foreclosure action. Debtors have provided no authority that would permit the Court to depart from this typical treatment of a pending foreclosure action. Indeed, causing the foreclosure action to be dismissed might be construed to be an impairment of the current value of the lien. In consequence, both of those FSA objections to the plan provisions are sustained.

All of the other objections of FSA, to the extent not already addressed, are denied, including para 13, at pages 4-5, to the effect that FSA cannot "rewrite" the obligation to extend it out 25 years. (Actually, it is the Court that is extending the due date on the payment of the written-down obligation, and doing it pursuant to the Code, not any FSA regulations, just as it is the Court changing the interest rate according to the Code, which Mr. Amend said that he could not do, for the most part, under the regulations.) The evidence presented by FSA on this issue (through Mr. Amend) was murky and no legal authority was presented to the Court to back up this argument.

If either the Debtors or FSA wish to contest the Court's rulings concerning paras 4, 5 and 13 of the FSA objections (or any other ruling contained herein), they may do so by filing a motion to alter or amend the judgment pursuant to FRBP 9023 (incorporating FRCP 59).

It does not appear necessary for the Court to find that the plan meets the requirements of §1225(b), the disposable income test, because neither the Trustee nor a creditor with an allowed unsecured claim has filed on objection to the plan. Although FSA may well have an unsecured claim, to date it has not been allowed, and in any event was not allowed as of the date of the confirmation hearing. Nevertheless, the Court will make such a finding, and construe paras 1.5 and Article 5.4 to require that the Debtors contribute all their

disposable income to payment of claims other than the FSA secured claim, through the Completion Date (para 1.2). The basis for the Court making this filing is In re Compton, 73 BR 800, 808 (Bankr. E.D. Pa. 1987) (partially secured creditor can raise objection); but see 2 Lundin, Chapter 13 Bankruptcy (3d Ed. 2000), §163.1, at page 163-2 (judges unable to resist ruling on the issue in absence of objection).

The Debtors' chapter 12 Plan, filed June 18, 2000, as amended by this ruling, is confirmed.

GMM to prepare order – cite 7052 – circulate to RH and ML.