

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

DAVID S. RUMMEL

CASE NO. 97-60553

Debtor

Chapter 12

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Presently before the Court is a motion filed on May 15, 1997, by Mark W. Swimelar, Esq., chapter 12 trustee ("Trustee"), seeking to dismiss the chapter 12 petition of David S. Rummel ("Debtor"), on the grounds that the Debtor does not qualify as a family farmer. The motion was

adjourned until the date of the confirmation hearing on the Debtor's chapter 12 plan.¹ On June 19, 1997, the Debtor filed a memorandum in opposition to the motion to dismiss. The United States of America, acting through USDA Farm Service Agency ("FSA"), filed an objection to the confirmation of the plan on June 30, 1997. The Trustee also filed an objection to the confirmation of the plan on July 2, 1997. The Debtor filed an additional memorandum on July 9, 1997.

A confirmation hearing was held in Utica, New York on July 9, 1997. At the conclusion of the hearing, the Court requested further briefing on two issues relating to the Debtor's eligibility for chapter 12 relief: (1) whether the Debtor was engaged in a farming operation when he filed for bankruptcy; (2) whether the Debtor derived more than 50% of his income in 1996 from a

¹ The Trustee also filed on May 15, 1997, a motion to dismiss on the grounds that the Debtor failed to file a plan within 90 days after the bankruptcy petition was filed. On June 9, 1997, that motion appeared on the Court's calendar in Binghamton, New York, at which time the Trustee noted that a plan had in fact been timely filed on May 5, 1997, thus making the motion moot. The Trustee did note that he had additional objections regarding the Debtor's eligibility for chapter 12 relief, apparently referring to his motion to dismiss on the grounds that the Debtor is not a family farmer. This latter motion did not appear on the Court's calendar because it contained default language pursuant to Rule 9014 of the Federal Rules of Bankruptcy Procedure and Local Rule 913.1(c) of the Local Bankruptcy Rules for the Northern District of New York and no opposition had been filed by the Debtor. The motion was therefore granted by default. Despite this fact, the Trustee agreed to adjourn his concerns regarding the Debtor's status as a family farmer until the date of the confirmation hearing.

At the confirmation hearing on July 9, 1997, the Court requested that the parties clarify their beliefs as to the status of the two motions. According to the parties, it was their understanding that the motion to dismiss for failure to file a plan was withdrawn and was moot, but that the Trustee's motion seeking to dismiss on the grounds that the Debtor does not qualify as a family farmer, and therefore is not eligible for chapter 12 relief, was to be addressed at the confirmation hearing.

Based on the foregoing, the Trustee's motion to dismiss for failure to file a plan is deemed withdrawn, and this Decision shall address the Trustee's motion to dismiss asserting that the Debtor is not eligible for chapter 12 relief, and the objection to confirmation submitted by the United States of America, acting through the USDA Farm Service Agency.

farming operation. The parties were given the opportunity to file memoranda of law on these issues, and the matter was thereafter submitted for decision on August 11, 1997.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and the subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1), and (b)(2)(L).

FACTS AND ARGUMENTS

On February 5, 1997, the Debtor filed a voluntary petition ("Petition") pursuant to chapter 12 of the United States Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code"). In Schedule D attached to the Petition, the Debtor listed three secured creditors: FSA (\$45,500 mortgage)², Guthrie Clinic (\$2000 judgment lien) and the Robert Packer Hospital (\$2000 judgment lien).

The Trustee contends that the Debtor does not qualify as a family farmer, and therefore is not eligible to be a chapter 12 debtor. The Trustee asserts that in the past the Debtor has performed only minimal farm related activities. For example, the Debtor sold some timber in 1996 and planted fifteen acres of corn and two acres of oats which were never used or sold. The Trustee also believes that the Debtor has abandoned his farming operation. Furthermore, the Trustee makes the argument that the Debtor's income generating activities are not sufficient to

² In response to opposition to the Debtor's plan by FSA, the Debtor agreed at the confirmation hearing to amend the plan by increasing the amount of FSA's secured lien to approximately \$49,200.

qualify him as a family farmer. The Trustee argues that less than 50% of the Debtor's current income is from a farming operation. Finally, the Trustee contends that the Debtor does not have a stable annual income which would enable him to make chapter 12 plan payments.

FSA also contends that the Debtor has failed to prove that he is eligible for relief under chapter 12. FSA argues that the Debtor was not engaged in farming at the time of the plan nor has the Debtor been actively engaged in any farming operation for a number of years. FSA notes that the Debtor is currently working in a full-time position that does not involve farming, and that he intends on relying solely upon income from his outside employment to complete the plan. Furthermore, FSA argues that the one time sale of timber from the Debtor's land does not constitute a farming operation, since it does not expose the Debtor to the inherent risks of farming, and that the sale of timber should be analogized to the renting of land to tenant farmers which, according to some courts, is not a farming operation. It is the FSA's position that the Debtor's continued economic well-being does not depend on any farming activity, and that his income in the year prior to filing was not the result of any farming operation, but rather was a one-time logging operation which does not qualify him as a family farmer. In the alternative, if the Court finds that the Debtor qualifies as a family farmer, FSA requests an order requiring the Debtor's plan to conform to the requirements of Code § 1225(a)(5).

The Debtor contends that he is eligible for relief under chapter 12. He asserts that he is a family farmer because he plants crops, harvests timber, and raises livestock, and in addition lives on his farm and owns his own farm equipment. Furthermore, the Debtor testified that he earned more than 50% of his income from a farming activity, in this case the sale of timber, in the tax year preceding the year he filed bankruptcy, thus meeting one of the statutory requisites for

chapter 12 eligibility. The Debtor argues that courts have determined that the sale of timber constitutes a farming operation, and therefore the income he received from the sale of his timber is farm income. In addition, he asserts that greater than eighty percent of his debts arise out of his farming operation. Furthermore, the Debtor testified that he will have a regular annual income throughout the course of his plan. The Debtor has listed income from farming as part of his income.

As to the issue of confirmation, the Debtor argues that his plan should be confirmed because it was proposed in good faith. He claims that all of his disposable income will be paid into the plan, and that all creditors will be paid 100% of their claims. As to his ability to make the plan payments, the Debtor contends that he receives a steady income through full time employment at a non-farm related job where he works at night. During the day, the Debtor conducts his farming operations, which he testified will earn him the amount necessary to pay his real property taxes.

DISCUSSION

The Debtor has the burden to prove he is eligible for relief under chapter 12. *See Cottonport Bank v. Diciara*, 193 B.R. 798, 801 (W.D. La. 1996). According to Code § 109(f), a "family farmer with regular annual income may be a debtor under chapter 12." 11 U.S.C. §109(f). A family farmer is defined as an:

individual or individual and spouse engaged in a farming operation whose aggregate debts do not exceed \$1,500,000 and not less than 80 percent of those aggregate noncontingent, liquidated debts (excluding

a debt for the principal residence of such individual and spouse unless such debt arises out of a farming operation), on the date the case is filed, arise out of a farming operation owned or operated by such individual or such individual and spouse, and such individual or such individual and spouse receive from such farming operation more than 50 percent of such individual's or such individual's and spouse's gross income for the taxable year preceding the taxable year in which the case concerning such individual or such individual and spouse was filed;

Id. at §101(18).

A family farmer must be engaged in a farming operation when the case is filed. *See Watford v. Federal Land Bank (In re Watford)*, 898 F.2d 1525, 1527 (11th Cir. 1990); *In re Haschke*, 77 B.R. 223, 225 (Bankr. D. Neb. 1987); *In re Mikkelson Farms*; 74 B.R. 280, 284 (Bankr. D. Or. 1987); 2 COLLIER ON BANKRUPTCY ¶ 101.18[4], at 101-72 to 101-73 (Lawrence P. King ed., 15th ed. rev. 1997). The question of whether a debtor is engaged in a farming operation when the debtor filed for bankruptcy is fact specific, *see Watford*, 898 F.2d at 1527, and “must include a review of all the facts and circumstances about the entity and its operation at the time of the filing.” *Mikkelson*, 74 B.R. at 285. Some of the factors to be considered include whether the family members are physically present on the farm, whether the debtor owns traditional farm assets, whether the debtor has permanently ceased its own investment of assets and labor to produce the crops or livestock, and whether the debtor is exposed to the naturally occurring risks and cyclical uncertainties that are traditionally associated with farming. *See Cottonport Bank*, 193 B.R. at 801; *Mikkelson*, 74 B.R. at 285.

In *Mikkelson*, at the time of filing the debtor was not tilling the soil because it was wintertime. In addition, the debtor had leased out its property for the following crop year. *Id.* at 284. However, the debtor owned its own machinery and farm products on the date of filing,

and had planted and harvested a crop in the tax year in which it filed. *See id.* at 285. The court determined that the debtor was engaged in a farming operation. *See id.* In *Watford*, the Eleventh Circuit adopted a totality of the circumstances test to determine whether the debtors had abandoned all farming operations at the time of filing. 898 F.2d at 1528. Even though the debtors' land had lay fallow for some time prior to filing, the court found that their storage of soybeans and their plans to farm in the near future were relevant to a determination of whether there was an on-going farming operation. *Id.* at 1527-28. Many other courts use a totality of the circumstances test to determine whether the debtor was engaged in a farming operation. *See, e.g., Cottonport*, 193 B.R. at 802; *In re French*, 139 B.R. 476, 480 (Bankr. D.S.D. 1992) (examining the totality of the circumstances surrounding the nature and practice of the debtor relative to farming in South Dakota); *In re Fogle*, 87 B.R. 493, 494-95 (Bankr. N.D. Ohio 1988); *In re Paul*, 83 B.R. 709, 713 (Bankr. D.N.D. 1988). If the debtor has ceased farming and has no intention of resuming farming in the future, then the debtor is not eligible for relief under chapter 12. *See In re Tart*, 73 B.R. 78, 82 (Bankr. E.D.N.C. 1987); COLLIER, *supra*, ¶ 101.18[4], at 101-72.

The initial issue for determination is whether the Debtor was engaged in a farming operation at the time he filed his petition. The Debtor lives with his immediate family members on sixty-seven acres of farm land, approximately one-sixth of which is forest area which he considers part of the farm. At the time of filing the Debtor owned two tractors, chain saws and other farm equipment for planting and harvesting. According to testimony presented at the hearing, the Debtor does his own harvesting and hay baling. The Debtor also testified that he planted a crop every year, although at the time of filing it was too early in the season to plant. In the year prior to filing, the Debtor had planted corn but was unable to harvest the crop because it dried up and

became unuseable. It is clear that the Debtor's land had not been lying fallow prior to bankruptcy. The Court will infer that at the time of filing, the Debtor had intentions of planting a crop when the weather permitted.³ Based on the evidence presented, the Court finds that at the time the Debtor filed his petition, he was engaged in a farming operation.

Additional elements of the test to determine if a debtor qualifies as a family farmer are whether his aggregate debts do not exceed \$1,500,000, and “not less than 80 percent of the aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse unless such debt arises out of a farming operation), on the date the case is filed, arise out of a farming operation” 11 U.S.C. § 101(18). The Debtor in this case falls within these requirements since, according to the evidence presented, there are total debts of \$53,500, and approximately \$49,200 of this amount relates to the lien held by FSA on the Debtor’s farm, and presumably the residence located thereon.⁴

Finally, to qualify as a family farmer an individual also must meet the “farm income” test. *See* COLLIER, *supra*, ¶ 101.18[6], at 101-74. At least 50% of the individual's gross income in the taxable year preceding the year in which the petition was filed must have been from the individual’s farming operation.⁵ 11 U.S.C. §101(18). According to the evidence presented, in

³ Actions taken after the petition date generally are not considered in determining whether the Debtor was engaged in a farming operation at the time the petition was filed. *But see Watford*, 898 F.2d at 1527-28 (indicating that debtors’ plans to farm in the future may be relevant). The Court notes, however, that the Debtor currently has alfalfa and oat crops on his farm, and in addition is raising two steers which were purchased three weeks after the petition was filed. It is clear that the Debtor’s farming operations have not ceased postpetition.

⁴ The Court notes that none of the parties questioned the Debtor’s eligibility under these requirements.

⁵ Many courts borrow the Internal Revenue's definition of gross income to calculate the amount of the debtor's gross income. *See, e.g., In re Vernon*, 101 B.R. 87, 91 (Bankr. E.D. Mo. 1989).

the taxable year prior to the petition date the debtor received \$6,000 of income from the sale of timber and \$4,519 in wage income unrelated to his farm.⁶ Whether the Debtor's sale of timber is income from his farm operation will thus determine his eligibility for chapter 12 relief.

Whether an act constitutes a farming operation is a question of law. *See In re Watford*, 898 F.2d at 1527. According to the Code, the term "'farming operation' includes farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state." 11 U.S.C. § 101(21). Congress used the word "includes" rather than "means" in that section, and courts have indicated that the specific activities listed are merely illustrative, not exhaustive. *See, e.g., Cottonport Bank*, 193 B.R. at 801; *In re Paul*, 83 B.R. 709, 712 (Bankr. D.N.D. 1988). There are a variety of factors that courts examine to determine whether under the totality of the circumstances a particular activity is a farming operation. These factors include a rural location, the nature of the enterprise at the location, the type of product and its eventual market, and the debtor's role in the farming process. *See In re Maike*, 77 B.R. 832, 839 (Bankr. D. Kan. 1987). As noted earlier, another important factor is whether or not the farming operation is exposed to the inherent risks and cyclical uncertainties traditionally associated with farming. *See also Federal Land Bank v. McNeal (In re McNeal)*, 848 F.2d 170 (11th Cir. 1988).

Two courts addressing the issue of whether the harvesting of merchantable timber is a

⁶ The Debtor filed a Memorandum in Opposition to a Motion to Dismiss on June 19, 1997, attached to which is an affidavit wherein he states that his 1996 income consisted of \$6,000 from the sale of timber and \$5,000 from unemployment insurance. During the confirmation hearing, the Debtor changed his testimony, stating that to his knowledge he did not receive unemployment insurance income in 1996, but did receive \$4,519 in wages from the Town of Owego. The parties did not object to the Debtor's changed testimony.

farming operation have determined that it qualifies as such an activity. *See In re Glenn*, 181 B.R. 105 (Bankr. E.D. Okla. 1995); *In re Sugar Pine Ranch*, 100 B.R. 28, 34 (Bankr. D. Or. 1989). *But cf. In re Miller*, 122 B.R. 360 (Bankr. N.D. Iowa 1990) (finding that operation of a sawmill is not a farming operation). In *Sugar Pine Ranch* the debtor, a partnership, harvested a portion of its trees every year with a chain saw and tractor, and the tree stand was regularly attended to by the debtor. 100 B.R. at 30, 32. The court found that the debtor was dependent upon the harvest to pay debts, and that the timber crop was exposed to the inherent risks of farming, including a fire which could destroy the current year's crop as well as future crops. *See id.* at 32. After consideration of the facts and circumstances of the case, the court found that the harvesting of merchantable timber along with the debtor's other operations constituted an integrated farming operation. *See id.* In the case of *In re Glenn*, the debtor sold timber from his own property and also sold the timber of other people, but he did not actually cut the timber himself or fertilize or cultivate the trees. 181 B.R. at 106. The court looked at a variety of factors to determine whether the debtor's sale of timber was a farming operation. *See id.* at 107-08. The debtors lived on a traditional farm and had typical farm equipment, they had a cow and calf operation, and their farming operation, including the timber crop, was subject to the inherent risks of farming. *See id.* Despite the fact that one of the debtors had employment outside of the farm, the court determined that the debtor's timber operation was a farming operation and the income derived from it was farm income. *See id.* at 108.

FSA argues that the one time harvesting of timber is not exposed to the inherent risks of farming. Some courts believe that traditional farming risks, such as the weather and the farm economy, are determinative of farming status. *See, e.g., McNeal*, 848 F.2d at 171 (holding that

the income derived from cleaning other farmer's chicken coops is not farm income); *In re Hampton*, 100 B.R. 535, 536-37 (Bankr. D. Or. 1987) (holding that income received from a custom farming agreement is not farm income since the debtors were not themselves subject to the inherent risks of farming); *In re Maschhoff*, 89 B.R. 768 (Bankr. S.D. Ill. 1988) (holding that rental income is not farm income). The cases that have determined that a particular activity is not a farming operation because it is not subject to inherent risks are those dealing with custom farming, services, or rental income. In this case, the Debtor's harvesting of his own timber was not a service, nor was it custom farming. Furthermore, the Debtor's forest area could be destroyed by fire, an inherent risk, which would directly affect the Debtor's income.

FSA also argues that the Debtor's sale of timber is analogous to the passive renting of one's land. The Court does not feel that this argument is sound based on the facts of this case. The Eighth Circuit determined that rental income is farm income if the debtor is "involved in the farming operation taking place on the rented land." *In re Easton*, 883 F.2d 630, 635 (8th Cir. 1989). In order to characterize the income received by the debtor, it is necessary to focus on the "relationship between the income and a farming operation of the debtor." *Id.* at 633. In order for money received to be considered farm income, the debtor must be involved to some degree in the farming operation that gave rise to the income. *See COLLIER, supra*, ¶ 101.18[6], at 101-76. In this case, the Debtor was actively involved in harvesting the timber located on his land. Although this was the first time the Debtor sold timber from his property⁷, he removed only 50% of the mature trees, and therefore there is an additional 50% of mature trees to be harvested in

⁷ The Debtor testified that he has previously sold firewood from his land, and that he also uses this firewood to heat his own home. These uses appear to be on a significantly smaller scale than the sale of the timber discussed above.

the future, in addition to future crops which can be sold by the Debtor upon maturity.

Examining the Debtor's operations as a whole, the Court finds that the Debtor's harvesting of timber was a farming operation. The Debtor resides on a farm in a rural location with his family. The product the Debtor sold was trees, which are "agricultural in nature." *See In re Maiké*, 77 B.R. at 839. The trees were located on the Debtor's land and were harvested by him with his own farm implements. The Debtor planted crops every year, and was engaged in traditional farming in the tax year prior to the year he filed bankruptcy. He was also personally responsible for planting, cultivating and harvesting his crops, and he utilized traditional farming equipment in his operations. Furthermore, his crop production was subject to the traditional risks and uncertainties associated with farming, which is acutely evidenced by the loss of his corn crop in 1996. The sale of timber by the Debtor accounted for nearly 60% of his income in 1996, and this income was used to pay real property taxes on the Debtor's farm land. Patrick McGlew, an expert in tree farming called by the Debtor, testified at the confirmation hearing that it is common practice for farmers in central New York to sell timber from their land to pay a debt. In this case, the Debtor was unable to derive any income from the corn he planted. Instead, he sold timber from his land to pay property taxes so that he could continue farming on his land. The fact that the Debtor also had outside employment does not mean that he could not conduct a farming operation in the previous tax year. *See Cottonport*, 193 B.R. at 802 n.3 ("The present Code, however, does not require that a debtor be *primarily* engaged in farming operations, only that he be 'engaged' in them."). In terms of risk, the *Cottonport* court indicated that the fact that debtors have outside employment does not protect them from the risk of losing their investment in crops in the ground, but it may insulate them from the risk of complete destitution. *See id.* at 802. In

the future, the Debtor can depend upon harvesting his timber to pay his debts because a significant percentage of mature trees remain on his farm land. In light of the relevant circumstances, the court determines that the Debtor's harvest and sale of his mature trees was a farming operation, and that the income derived therefrom is farm income.

Code § 109(f) states that “only a family farmer with regular annual income” is eligible for relief under chapter 12. *See* 11 U.S.C. § 109(f). “The definition does not specify the source of income and presumably does not require that the income be farm-related.” *COLLIER, supra*, ¶ 101.19, at 101-19. The debtor’s plan can be funded with non-farm income as long as the other eligibility requirements are met. *See In re Mikkelson*, 74 B.R. at 286 (stating that a family farmer may be a “family farmer with regular income” if he can show that he “will have regular annual income, from whatever source, that is sufficiently stable to fund the plan.”); *see also In re Turner*, 87 B.R. 514, 516 (Bankr. S.D. Ohio 1988). “An interpretation of [Code § 101(19)] to require annual income to be only from farm operations could, on occasion, deny a debtor the right, which it would otherwise have, to liquidate pursuant to 1222(b)(8).” *See Mikkelson*, 74 B.R. at 285. In *In re Indreland* the court approved a plan where a majority of the debtor's income would come from non-farm income sources. 77 B.R. 268, 271 (Bankr. D. Mont. 1987) (“The fact that outside earnings of the Debtor must now be used as the principal source of payment to creditors does not, in my opinion, destroy his eligibility as a family farmer engaged in a farming operation . . .”). The Debtor will receive a regular annual income from his current job, and in addition will receive income from his continued farming operations.⁸ Therefore, the Debtor satisfies the requirement

⁸ The Debtor has listed \$250 of farm income as part of his total monthly income. *See* Debtor’s Second Amended chapter 12 plan, filed August 15, 1997.

that he have regular annual income.

At this point, however, the Court will not confirm the Debtor's Second Amended chapter 12 plan, which was filed on August 15, 1997.⁹ The evidence and testimony at the confirmation hearing focused almost exclusively on whether the Debtor met the eligibility requirements of chapter 12, rather than whether the Debtor's plan satisfied the confirmation requirements of chapter 12. At this point, it is unclear to the Court whether the Debtor's plan satisfies these requirements. For example, FSA had objected to confirmation of the Debtor's initial plan in part on the grounds that it did not provide for payment of its claim at a market rate of interest. The Court notes that the Debtor's Second Amended chapter 12 plan has not changed the interest rate on FSA's claim from that proposed in the initial plan. In addition, FSA argued that its claim is fully secured by the Debtor's farm property and that its claim should be paid in full. In the most recent plan, the Debtor has increased the amount of FSA's secured claim to the amount due as of the date of filing. *See* Debtor's Second Amended chapter 12 plan, filed August 15, 1997. However, it appears that FSA's claim may be oversecured, thus raising the potential for additional claims pursuant to Code § 506(b). A further issue is the Trustee's objection to the length of the plan proposed by the Debtor.

A confirmation hearing on the Debtor's Second Amended chapter 12 plan shall be scheduled to allow the parties to address all necessary issues. *See Lenz v. Federal Land Bank (In re Lenz)*, 74 B.R. 413 (Bankr. C.D. Ill. 1987) (rescheduling confirmation hearing to allow for additional

⁹ The Debtor's Post-Confirmation Hearing Memorandum, filed August 11, 1997, contained an unsigned copy of the Debtor's Second Amended chapter 12 plan. The signed version of this plan, which is an exact duplicate of the unsigned version, was filed on August 15, 1997, four days after the matter was submitted for decision.

evidence regarding proper interest rate).

Based on the foregoing, it is hereby

ORDERED that the Trustee's motion to dismiss on the grounds that the Debtor does not qualify as a family farmer entitled to relief under chapter 12 is hereby DENIED; it is further

ORDERED that a confirmation hearing on the Debtor's Second Amended chapter 12 plan shall be scheduled for Monday, December 1, 1997, at 10:00 a.m.; and it is finally

ORDERED that the Debtor shall provide proper notice of the scheduled confirmation hearing to all appropriate parties.

Dated at Utica, New York

this 31st day of October 1997

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge