UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

DEAN A. BEZEK
CANDACE R. BEZEK

Debtors

CASE NO. 86-00724

Chapter 11

APPEARANCES:

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

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

This matter comes before the Court on an Objection to Extend [sic] Plan of Reorganization and Motion to Dismiss filed by Marone Acee and Sons, Inc. ("Acee & Sons") on May l6, l988.

FACTS

On May 20, l986, Dean A. Bezek and Candace R. Bezek ("Debtors") filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code, 11 U.S.C.A. §§101-1330 (West 1979 & Supp. l988) ("Code").

A review of the case indicates that Debtor, Dean A. Bezek, had been engaged in the business of dairy farming in New York State for a period of six years prior to the filing of the Chapter 11 petition, that he had previously been engaged in the same business in the State of Pennsylvania for an undisclosed number of years, and that he has generally been involved in dairy farming all of his life.

In a Disclosure Statement filed with the Court on November 9, l987, the Debtors indicated that the Chapter 11 filing was precipitated by several factors: a general decline in the farm economy; overpaying for the farm premises on which they operate; and a decline in milk prices, milk being substantially the only product of their dairy farming business.

Debtors' petition indicates that at the time of filing, they owed $4,698.00 in priority real property tax claims; $3l8,98l.69 in secured debt and $53,320.06 in unsecured debt. The secured creditors were listed as Central National Bank, Barbara Quimet, Farmers Home Administration and the John Deere Company. Debtors' petition listed thirteen unsecured creditors, the only one of whom is relevant for purposes of this decision is Acee & Sons, itself a Chapter 11 Debtor before this Court.

Initially Acee & Sons maintained that its status was that of a secured creditor and, in fact, moved the Court in October l986 for an order modifying the automatic stay imposed pursuant to Code §362. After several mutually agreed to adjournments, Acee & Sons withdrew its motion in July l987 and has since conceded its status simply as an unsecured creditor. See Letter from Jeffrey P.

White, Esq. to the Hon. Stephen D. Gerling (June 23, l988).

The Debtors' Disclosure Statement in Exhibit A attached thereto projected a monthly gross income of $l0,645.00 in the form of a milk check plus off-farm income to be earned by Debtor, Candace Bezek. Projected expenditures also referred to in Exhibit A, which include payments to all of the priority claimants, secured creditors and $600.00 pro rata per month to unsecured creditors, total $l0,5l0.27. The Disclosure Statement was approved by Order of the Court dated February 22, l988.

On November 9, l987, Debtors also filed an Extended Plan of Reorganization ("Plan") which provided for the payment of their priority, secured and unsecured debt over various periods of time. The Plan proposed to pay unsecured and undersecured creditors, designated as Class 7, pro rata, $5,000.00 per year for six years, or approximately $30,000.00. While the Plan does not forecast a percentage of claim distribution, it is obvious that based upon the total unsecured debt, without even considering the undersecured debt of other classes which falls into Class 7, unsecured creditors will not be paid in full.

A hearing on confirmation of the Plan was scheduled for May 26, l988, and on May l6, l988 Acee & Sons filed an objection to the Plan combined with a motion to dismiss the Chapter 11 case.

As previously indicated Acee & Sons ultimately abandoned its claim to secured creditor status, but proceeded with its objection on the basis of lack of feasibility, lack of good faith and violation of the absolute priority rule. See id.

At the confirmation hearing held on May 26, l988, testimony was

received from Simon "Sam" Acee ("S.Acee") on behalf of the Creditor, Acee & Sons, in support of the objection based primarily upon feasibility of the Plan. The Debtor, Dean A. Bezek, testified in opposition to the objection.

The Court also notes that an objection to the Plan was filed by a Barbara (Quimet) Wagner, a secured creditor, on January 4, l988. However, there was no appearance by Mrs. Wagner at the hearing, and on May 24, l988, Mrs. Wagner filed a ballot accepting the Plan. Thus, the Court did not consider the Wagner objection at the hearing held on May 26, l988.

Neither party submitted any memoranda of law and the objection of Acee & Sons was submitted for decision on July 5, l988, the date on which the Court received the aforementioned correspondence from Jeffrey P. White, P.C.

JURISDICTIONAL STATEMENT

The Court has jurisdiction of this core proceeding arising in and under the Debtors' case under Title 11 pursuant to 28 U.S.C.A. §§1334(b) and 157(a),(b)(1) and (b)(2)(A), (L) and (0) (West Supp. l988). Rules 90l4 and 7052 of the Federal Rules of Bankruptcy Procedure provide the applicable procedures for the within findings of fact and conclusions of law.

DISCUSSION AND CONCLUSIONS OF LAW

In order to confirm a plan filed pursuant to Code §1121, a debtor must prove compliance with Code §1129. In the instant case, Acee & Sons has objected to confirmation of Debtors' Plan on three grounds: lack of good faith (Code §1129(a)(3)); feasibility (Code §1129(a)(11)), and the absolute priority rule (Code §1129(b)(2)(B)(ii)).

Actually, Acee & Sons' objection filed May l6, l988 also raised the issues of unfair discrimination, lack of fairness and equity, premature discharge and unreasonable delay which is prejudicial to creditors, the latter being the basis for a dismissal of the case pursuant to Code §1112(b)(2). However, following the hearing and based upon the correspondence from Acee & Sons' counsel, the Court will consider Code §§1129(a)(3) and (11) and 1129(b)(2)(B)(ii) as the only bases for objection to confirmation.

The Court is of the opinion that were Acee & Sons to sustain its objection based upon any one of the three grounds urged, Debtors' present Plan cannot be confirmed.

Dealing first with the issue of good faith, the Court notes that Acee & Sons' objection fails to particularize any actions of the Debtors from which one might conclude that their Plan was filed in bad faith.

Good faith, as used in Code §1129(a)(3), generally applies to a debtor's conduct both pre and post petition, and requires the Court to view the totality of circumstances. See Jorgensen v. Federal Land Bank of Spokane (In re Jorgensen), 66 B.R. 104 (Bankr. 9th Cir. l986) (good faith requires fundamental fairness

in dealing with one's creditors). See also In re Cheatham 78 B.R. 104 (Bankr. E.D.N.C. l987); In re Baugh, 73 B.R. 4l4 (Bankr. E.D.Ark. l987); .

The Court is not aware of nor has Acee & Sons called its attention to any conduct of Debtors that could be perceived as evidence of bad faith, and thus, the Court rejects Acee & Sons' objection based upon Debtors' failure to comply with Code §1129(a)(3).

Turning next to the issue of feasibility required by Code §1129(a)(11), the Court considers the testimony of both S. Acee and the Debtor, Dean A. Bezek.

S. Acee, as an officer of Acee & Sons, testified that he had been engaged in the business of buying and selling cattle for some forty-one years, and that in that time he had run dairy farms. However, the actual extent of his dairy farming experience is unclear. S. Acee challenged portions of Exhibit A attached to the Debtors' Disclosure Statement.

Specifically, S. Acee expressed doubt as to Debtors' projected monthly income from the sale of milk, noting that a monthly income of $l0,000.00 was based on a herd of 120 cows which would experience a "cull" rate of thirty percent annually. S. Acee questioned where the Debtors would secure the funds to replace the "culled" cows (cows no longer capable of giving significant quantities of milk).

S. Acee noted the absence from the Debtors' list of "Expenditures" on Exhibit A of veterinary and breeder fees, which he estimated would run $l00.00 per week, and $l5.00 per head,

respectively. While S. Acee conceded to the accuracy of a $2,400.00 per month grain expense, he questioned whether Debtors were feeding young stock or "milkers". Likewise Acee contended that Debtors had omitted or underestimated the cost of seed, twine, chemical spray, machinery repair or replacement, land taxes, vehicle insurance and power.

S. Acee also asserted that Debtors lacked sufficient tillable land to plant enough crop to feed 120 head and expressed doubt that one man could handle a herd that large without hired hands. He concluded that to produce a monthly milk check of $10,000.00 Debtors would have to maintain at least sixty high producing cows, which could each generate fifty pounds of milk per day.

Debtor, Dean A. Bezek, testified to his experience as a dairy farmer for eight years in New York State, similar experience in Pennsylvania and the fact that he had been around dairy farms all his life.

He testified that he was able to raise all of his own replacements for the cows he had to cull annually. He included no expense for breeding since he did his own breeding as a result of his having attended the American Breeders Service. The Debtor conceded that he erred in omitting veterinary fees, but asserted that that expense would be offset by income he receives from the sale of veal calves, which he omitted from the "Monthly Income" portion of Exhibit A. He also pointed out that his veterinary expenses were minimal because he was able to perform much of this work himself. With regard to the omission of fertilizer and chemical spray, the Debtor explained that they were included in

the cost of "seed" scheduled at $800.00 per month. However, he had omitted monthly equipment repairs, which he estimated at between $200.00 and $250.00 per month.

The Debtor also testified that as of the date of the May 26th hearing, he maintained 126 head, including seventy "milkers", of which twenty-six were Jerseys and the remaining were Holsteins. He also owned one Jersey bull, which he used to breed both Holsteins and Jerseys.

The Debtor introduced a series of exhibits identified as a Herd Summary and Management Report prepared by the New York State Dairy Herd Improvement (DHI) Cooperative, showing the quantity and quality of milk produced by the Jersey and Holstein cows respectively, monthly milk check stubs for the period 7/3l/87 through l/3l/87 issued by Dairylea Cooperative, Inc. and pick-up weights for four days in May l988. He indicated that he averages fifteen pick-ups per month, which, in turn, total about 90,000 pounds of milk at an average price, at least in May l988, of $11.67 per hundred weight. The Debtor conceded, however, that for the months of February, March and April of l988, his actual milk check stubs, which were still with his accountant, reflected 73,411 pounds, 77,054 pounds and 72,220 pounds, respectively. He also added that his Disclosure Statement contained an error with regard to tillable acres and that the correct total was 250, not 200 acres.

On cross-examination, the Debtor acknowledged that he had to sell all of the calves produced by the Jersey bull and Holstein cows and that he had to purchase Holstein and Jersey semen, which

he didn't include in his list of expenses. He also testified that he is able to sell thirty to thirty-five calves annually at average price of $l00.00 for a Holstein calf and $50.00 for a Jersey calf - with the ratio usually two to one, favoring Holsteins. He admitted that milk prices generally decline in the summer months, when his cows produce the greatest amount of milk and that he has to average about $10,500 per month to meet his expenses and Plan Payments, based upon his Exhibit A. He also stated that he plants at least 200 acres of corn and hay, and that his only help in running the farm is his seventy-one year old father.

The Debtor, still on cross-examination, was questioned with regard to a monthly amount shown on Exhibit A for "Back Taxes", conceding that he did not take into consideration any penalties and interest which might accrue over the life of the plan. He also claimed that his expense for power was taken from the average of his bills, that his insurance costs included fire and farm insurance and he had no separate crop or livestock insurance and that his father's life and health insurance is deducted from his milk check. He couldn't recall the seed cost per acre, but he believed that a suggested $l40.00 per acre was too high. He also conceded that he owned fifty non-tillable acres, of which thirty-three were used as pasture land and that he had failed to include any expense for fencing or baler twine. However, he disputed an annual cull rate of thirty percent, saying it was closer to ten percent in his herd. He claimed that the sales of seven to ten cull cows per year, the income from which is not shown in Exhibit

A of the Disclosure Statement, should offset the unlisted expenses. He revealed that his listed expenses actually include the support of his mother and father and that his wife, in order to pursue her employment, resides off the farm with her parents all week.

On re-direct examination, the Debtor testified that he usually sold a cull cow for approximately $500.00, that Holstein semen cost about $500.00 annually, that his insurance cost covered his cattle and equipment and that the $200.00 per month shown on Exhibit A for insurance also included various license fees.

Finally, on re-cross examination, the Debtor conceded that he had but one bulk tank in which all of his milk from both herds is mixed. He also stated that the $270.00 of health insurance expense shown on Exhibit A is his own coverage, including life insurance, and that his wife has her own health insurance through her employer, Agway.

"Feasibility" within the Chapter 11 context has been defined as being, "firmly rooted in predictions based on objective fact". Clarkson v. Cooke Sales & Service Co. (In re Clarkson), 767 F.2d 4l7, 420 (8th Cir. l985). The Eighth Circuit went on to observe that "sincerity, honesty and willingness are not sufficient to make the plan feasible, and neither are any visionary promises." Id. See also In re Cheatham, 78 B.R. l04, 109 (Bankr. E.D.N.C. l987). However, as the Eighth Circuit also noted in Prudential Insurance Co. of Am. v. Monnier (In re Monnier Brothers), 755 F.2d l336, l34l (8th Cir. l985), projecting future farm income is not an "exact science". Farming is an industry which is particularly

vulnerable to a fluctuating market, unpredictable weather and rapidly changing government control. Nevertheless, a farm Chapter 11 is capable of a finding of feasibility.

In the instant case, Debtors attempt to persuade the Court that their Plan is feasible insofar as it requires a monthly gross income of at least $l0,500.00 for at least the next six years.

Putting aside for the moment the reasonableness of the "Expenditures" reflected in Exhibit A attached to Debtors' Disclosure Statement, it would appear that a monthly milk check income of $l0,500.00, while not exactly "visionary" is perhaps optimistic on Debtors' part. Debtors' Exhibit A-1 through A-8, covering the period June 30, l987 through January 3l, l988, reflected an average gross monthly milk check of $l0,789.38 and an average net monthly milk check, after the deduction of hauling fees, co-operative dues, equity, health and life insurance etc., of $9,686.78, based upon an average Market Administrator price of $l2.278 per hundred weight. For a similar post-petition period in l986, Debtors' monthly operating reports reflected an average monthly income from "Dairy Products" of $5,677.00, although it does appear that the monthly income increased steadily during that period.

Considering the additional income earned by Debtor Candace Bezek from her employment with Agway, and a miscellaneous income of $6,000.00 to $7,000.00 annually from the sale of cull cows and calves, it appears to the Court that the Debtors could probably generate an average monthly income of $l0,500.00 in the future.

Turning to Debtors' "Expenditures" as reflected in their Exhibit

A attached to the Disclosure Statement, the Court believes that some significant expenses have been omitted. Veterinary expenses, estimated by S. Acee at $400.00 per month, but disputed by Debtors, equipment repair and replacement costs, estimated by Debtor at $200.00 per month, breeding fees estimated by S. Acee and Debtor at $40.00 to $60.00 per month, livestock replacement, again disputed by Debtors, and fencing costs are substantial expenses that have been overlooked or optimistically ignored. Real property taxes, both past and future, have been provided for in Exhibit A, and the Court rejects the contention of Acee & Sons, on cross-examination of the Debtor, that pre-petition real property taxes will continue to accrue penalties and interest post-petition. The Debtor explains that unrecorded income from the sale of veal calves and cull cows will offset the omission of some of these expenses and the Debtors will themselves provide services which will avoid others. However, the Court is without any documentary proof of these contentions by Debtors.

Nevertheless, having observed the sincere and credible demeanor of the Debtor and having questioned the "expert testimony" of S. Acee allegedly drawn from his experience as a dairyman, the Court believes that if milk prices hold fairly steady or, increase over the foreseeable future, the Debtors' Plan is feasible for purposes of Code §1129(a)(11).

Finally, as the Court observed at the May 26, 1988 hearing, Acee & Sons' objection to confirmation of the Plan based on its violation of the absolute priority rule, recently discussed by the United States Supreme Court in Northwest Bank Worthington v.

Ahlers, ___ U.S. ___, l08 S.Ct. 963 (Mar. 7, l988) is premature.

The absolute priority rule set forth in Code §1129(b)(2)(B)(ii) is only applicable if the Debtors must "cram down" their unsecured and undersecured creditors designated in the Plan as Class 7. Thus, the Court observes that if "cram down" of that class becomes necessary in order for the Debtors to obtain confirmation of their Plan, then the absolute priority rule, as interpreted in Northwest Bank Worthington v. Ahlers, supra, would appear to be an barrier to confirmation.

The Court further observes that the Plan may be deficient insofar as it provides for treatment of Class 1 and 2 creditors. Class 1 creditors, designated in the Plan as the holders of "administration priority claims", must be paid on the effective date of the Plan unless they agree to a different treatment. See Code §§1129(a)(9)(A), 507(a)(1), 503(b). Class 2 creditors, designated as tax claims, appear to be limited to municipalities holding delinquent real property tax claims. It is not clear from the Plan whether these tax claims arose pre or post-petition. However, a review of Debtors' petition would indicate that the total claims may comprise both.

Post-petition unsecured taxes constitute Code §507(a)(1) priority claims and, as such, must be treated like other administrative priority claims in accordance with Code §§1129(a)(9)(A) and 503(b). In contrast, pre-petition unsecured taxes are governed by Code §507(a)(7) and 1129(a)(9)(C) which requires, unless otherwise agreed, payment within six years of the

date of assessment at a rate of interest that will pay the tax claimant present value. See In re Trasks' Charolais, 84 B.R. 646, 652 (Bankr.D.S.D. 1988); In re Cheatham, supra, 78 B.R. at l07. See also 3 L. KING, COLLIER ON BANKRUPTCY, ¶¶503.04[1][b], 507.04[7] (15th ed. 1988).

In the absence of affirmative acceptance of the Plan by Class 1 and 2 creditors, the treatment provided for therein does not comply with Code ¶¶1129(a)(9)(A) and (a)(9)(C).

Thus, the Court denies the objection of Acee & Sons, based upon lack of good faith, Code ¶1129(a)(3), and feasibility, Code ¶1129(a)(11), and finds its objection based upon the absolute priority rule (Code ¶1129(b)(2)(B)(ii)) premature.

With regard to Acee & Sons' motion to dismiss, the Court notes that it apparently was grounded upon the contention that there has been unreasonable delay in this Chapter 11 case which has prejudiced creditors. Code ¶1112(b)(3). Although it does not appear that Acee & Sons offered any proof in support of its motion at the May 26th hearing, Debtors' counsel, John A. Nasto, Esq., alluded to the motion in his opening statement.

The delay presumably referred to by Acee & Sons resulted from the dispute as to its status as a secured or unsecured creditor. The dispute arose out of the termination, pre-petition, of an alleged security interest held by Acee & Sons in Debtors' dairy herd. An evidentiary hearing on Acee & Sons' motion to lift stay was adjourned numerous times on consent, and Acee & Sons ultimately abandoned its claim to secured status on the eve of the

hearing. See Letter from Jeffrey P. white, Esq. to the Hon. Stephen D. Gerling, supra.

The Court, therefore, denies Acee & Sons' motion based upon unreasonable delay which has been prejudicial to creditors in the absence of any competent proof.

The Court directs that an adjourned confirmation hearing be scheduled for November 23, l988 at 10:00 a.m. at the U.S. Courthouse, Utica, New York and that the Debtors and all interested parties be prepared to proceed with confirmation of Debtors' Plan at that time.

IT IS SO ORDERED.

Dated at Utica, New York
this day of October, l988

STEPHEN D. GERLING
U.S. Bankruptcy Judge