UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

GEORGE F. HOFFMAN, JR. .	CASE NO. 99-61365
Debtor	Chapter 12

APPEARANCES:

THOMAS, COLLISON & MEAGHER Attorneys for Debtor 1201 Monroe St., P.O. Box 329 Endicott, New York 13761-0329	ROBERT F. WHALEN, ESQ. Of Counsel
GETNICK, LIVINGSTON, ATKINSON, GIGLIOTTI & PRIORE, LLP Attorneys for First Pioneer 258 Genesee St. Utica, NY 13502	NICHOLAS PRIORE, ESQ. Of Counsel
LYNN HARPER WILSON, ESQ. Attorney for Chapter 112 Trustee 250 S. Clinton Street, 5th Floor Syracuse, NY 13202	

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

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

The Court has before it various contested matters arising out of the Chapter 12 bankruptcy of George F. Hoffman, Jr. ("Debtor"), among which are a motion by secured creditor First Pioneer Farm Credit, A.C.A. ("First Pioneer") seeking to dismiss Debtor's bankruptcy petition for cause pursuant to § 1208(c) of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"); a motion by First Pioneer to prohibit to use of certain cash collateral; a motion by First Pioneer for relief from the automatic stay of Code § 362; a motion by Debtor to avoid certain

liens asserted by First Pioneer; and a motion by Debtor for the turnover of property seized by First Pioneer prior to the petition date. The full procedural history of these matters is stated in the Court's previous memorandum-decision of May 11, 1999, familiarity with which is assumed for purposes of this discussion.

The Court conducted an evidentiary hearing on the above matters on May 12, 1999. In light of the evidence presented at that hearing, the Court invited each party to prepare additional memoranda on certain issues not addressed by their previous submissions. Pursuant to this request, First Pioneer submitted a Supplemental Memorandum of Law; however, no additional materials were submitted by Debtor. On June 16, 1999, all of the pending contested matters in this case were submitted for decision.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of these contested matters pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1), (2)(A), (B), (E), (G), and (K).

FINDINGS OF FACT

This Chapter 12 case marks the third occasion on which Debtor has filed a petition for relief in this Court within the past two years. Debtor's original petition was filed on September 15, 1997, and sought protection under Chapter 13 of the Code. This petition was subsequently dismissed for cause on account of Debtor's failure to make payments to the Chapter 13 Trustee.

On October 28, 1998, Debtor filed a second bankruptcy petition under Chapter 13; on the motion of First Pioneer, this petition was also dismissed pursuant to Code § 1307(c) on January 15, 1999. The present case was commenced on March 18, 1999, shortly after First Pioneer repossessed certain of Debtor's personal property pursuant to an Order of Seizure issued under § 7102 of the New York Civil Practice Law and Rules by the New York Supreme Court, County of Otsego.

Debtor is the owner of a dairy farm in the town of Pittsfield, New York. First Pioneer is Debtor's major secured creditor and holds a first mortgage on Debtor's real property as well as a perfected security interest in, among other personal property, all of Debtor's existing and after-acquired livestock. The security interest in livestock was granted to First Pioneer pursuant to a Security Agreement executed between the parties on March 13, 1996. Under the terms of that agreement, Debtor warranted that he owned free and clear of all liens a herd of 200 cattle, which at the time included 128 dairy cows, 39 dairy-bred heifers, 16 dairy yearlings, and 17 dairy calves. At the hearing, Debtor stated that these figures had been accurate as of the date of the Security Agreement. This security interest was expressly extended to the "proceeds" of the livestock, which was defined to include any natural increase, substitutions, and insurance proceeds. In addition, Debtor pledged not to "sell, lease, transfer, assign, or otherwise dispose of" any of his livestock without the prior written consent of First Pioneer.

The number of cows alleged to be owned by Debtor declined precipitously in 1997 and 1998. In a financial statement provided to First Pioneer on June 16, 1997, Debtor stated that he owned 141 cows. Less than five months later, a farm inspection by an employee of First Pioneer revealed just 90 cows, a figure substantially in accord with the data listed in Debtor's September

1997 bankruptcy schedules. However, in March, 1999, when First Pioneer attempted to repossess its collateral, Debtor stated that he owned only 16 cows, claiming that the approximately 65 other cows and calves then in his possession were actually the property of his grandfather, Joseph Laughlin ("Laughlin"). According to Debtor, approximately 30 of Laughlin's cows had been included in the herd counts of 1996 and 1997. It appears, however, that these cows were listed as if they were property of the Debtor on both his 1997 bankruptcy schedules and in all his disclosures to First Pioneer prior to March, 1999.

In his testimony at the evidentiary hearing, Debtor offered varying explanations for the reduction in the size of his herd between June, 1997, and March, 1999. According to Debtor's testimony, he had been forced to maintain his dairy cows on rented, off-site property as a result of a 1995 barn fire which destroyed his milking facilities. Debtor stated that he had moved these cows four times as a result of the fire, which resulted in a significant decline in the cows' productivity. Between June and September, 1997, Debtor culled approximately ten cows from his herd. Debtor did not notify First Pioneer of his decision to cull the herd, and did he not pay First Pioneer any of the proceeds from the culling. On Thanksgiving Day, 1997, five cows were killed and two injured in a barn accident. Although Debtor was required to maintain insurance on the cows as part of his Security Agreement with First Pioneer, Debtor never filed a claim as a result of these losses, nor did he notify First Pioneer of the accident. In February, 1998, another dairy cow was injured in an accident, as a result of which it was sold to a pet food company. Again, no notice was given to First Pioneer. In May and June of 1998, 11 of Debtors' cows wandered onto the property of a neighbor, who allegedly refused to give them back. Although Debtor claims to have notified the police on the first of these occasions, he ultimately took no

legal action to recover them and has not recovered them to this date. Finally, in the spring of 1998, Debtor sold twenty cows, including the two that had been injured in the Thanksgiving barn accident. Debtor claims to have obtained a total of $2,150 from this sale, all of which was turned over to First Pioneer. This sale price was considerably lower than the approximately $1,000 per head purchase price for dairy cows paid by Debtor in his other transactions.

In addition to his dairy operation, Debtor has maintained a gravel and sand mine on his property since approximately 1992. Pursuant to an oral contract, this mining work has been carried out since 1993 by David Beisler, a professional excavator who supplies materials for public construction projects. Under the terms of this agreement, the mined sand and gravel become the property of Beisler, who in turn pays Debtor a royalty, the exact amount of which is often not determined until the minerals are resold by Beisler. In his testimony, Beisler stated that he generally paid Debtor between thirty and forty thousand dollars a year for the minerals removed from his property. However, in 1997, Beisler was ordered by Debtor to redirect his payments to Laughlin. While Beisler complied with this new arrangement, he stated that it was his belief that the payments would eventually be turned back over to Debtor through Laughlin. While neither Debtor nor Laughlin gave a fully satisfactory explanation of this arrangement, one alleged reason for the change was that all mining permits since 1992 had been made out to Laughlin, not to Debtor, in spite of the fact that it was Debtor who owned the real property at all relevant times. In any event, Debtor's interest in the proceeds of these minerals was not listed as an asset in his Chapter 12 bankruptcy schedules as originally filed.

DISCUSSION

Code § 1208(d) provides that "[o]n request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter or convert a case under this chapter to a case under chapter 7 of this title upon a showing that the debtor has committed fraud in connection with the case." As the party moving for dismissal, First Pioneer bears the burden of proving Debtor's fraud by clear and convincing evidence. *See In re Caldwell*, 101 B.R. 728, 732 (Bankr. D. Utah 1989).

While the reported case law interpreting this section is sparse, it has been held that a Chapter 12 debtor commits fraud "in connection with" his case for purposes of Code § 1208(d) where he acts to conceal assets or convert a secured creditor's collateral. Thus, in *Reinbold v. Dewey County Bank*, 942 F.2d 1304 (8th Cir. 1991), the Court of Appeals affirmed the conversion of a debtor's Chapter 12 petition where it was proven that the debtor had knowingly sold two pieces of farm equipment that were subject to a creditor's security interest without that creditor's permission. Similarly, in *In re Graven*, 936 F.2d 378 (8th Cir. 1991), the debtors were found to have committed fraud in connection with their Chapter 12 case by engaging in a series of sham transactions designed to shelter their assets from creditors.

Of course, it is never enough to prove merely that a debtor took actions which happened to prejudice a creditor. In order to make out a case for fraud under Code § 1208(d), the objecting creditor must also prove that the debtor acted with fraudulent intent. *See Graven*, 936 F.2d at 378. Because direct proof of fraudulent intent is often difficult to obtain, however, a creditor may carry his burden by proving circumstantial "badges of fraud" which are indicative of a debtor's intent. *See In re Carletta*, 189 B.R.258, 262 (Bankr. N.D.N.Y. 1995).

Applying this standard, the Court finds that the evidence of intentional fraud in

connection with this case is overwhelming. By his own admission, Debtor has reduced the size of his herd from 200 to less than 20 cows in less than three years. In plain violation of the terms of the Security Agreement, this was done in almost all cases without giving the First Pioneer the notice or the sale proceeds to which it was entitled. While isolated omissions of this sort might sometimes be excusable as neglect, the degree to which the size of the herd was reduced, as well as the length of time over which it occurred, makes the inference of deliberate fraud in this case inescapable. Even if the Court were to believe Debtor's otherwise incredible explanations for the loss of these cattle, sizeable gaps would remain in his testimony. In particular, Debtor has not explained why he would have taken no action against a neighbor who allegedly converted a portion of his herd, nor has he explained his failure to maintain insurance on his herd (or, if the herd was insured, to make any sort of insurance claim following the accidental deaths of some of his cows). In addition, the Court finds it unusual, at the very least, that the misfortunes of the herd seem to have been borne entirely by those cows owned by Debtor: by contrast, Laughlin's cows (which were kept in the same herd and which presumably faced the same perils) not only survived these disasters, but even doubled in number as Debtor's share of the herd decreased to a fraction of its former size.

An additional badge of fraud is Debtor's conduct regarding the mining payments due from Beisler. By Debtor's own testimony, the redirection of payment to Laughlin was ordered in September of 1997, at approximately the same time as Debtor filed the first of his bankruptcy petitions. It is difficult to escape the conclusion that these two events are linked, particularly in light of Beisler's belief that the money paid to Laughlin would eventually be used for the benefit of Debtor. At best, Debtor deliberately permitted a third party to convert valuable property of

the estate on the eve of bankruptcy; at worst, Debtor engineered a fraudulent transaction designed to retain for his own benefit property that should have been available for distribution to his creditors. In either case, Debtor's conduct cannot be tolerated by this Court.

It appears that shortly prior to commencement of this bankruptcy case, First Pioneer had taken steps to enforce its rights against Debtor in state court, actions which are currently stayed by operation of Code § 362(a). Because First Pioneer appears to have an interest in substantially all of Debtor's real and personal property which is superior to that of any creditor, the Court believes that the interests of judicial economy will best be served if this case is dismissed rather than converted to Chapter 7.

As a final matter, the Court consider's First Pioneer's request for an order prohibiting Debtor from filing another bankruptcy petition within 180 days of this order. Although there is no per se rule against successive bankruptcy filings, *see In re Garsal Realty,* 98 B.R. 140, 150 (Bankr. N.D.N.Y. 1989), Code § 349(a) permits a bankruptcy court to dismiss a petition with prejudice if sufficient cause is present. *See In re Casse*, 219 B.R. 657, 662 (Bankr. E.D.N.Y. 1998) (citing cases). Such cause has been found in the cases of debtors who have "abuse[d] . . the bankruptcy process" in an attempt to deprive a creditor of its rights under state law, as well as where it appears that a creditor will be prejudiced if the debtor is allowed to file subsequent petitions. *In re Hall*, 216 B.R. 702, 711 (Bankr. E.D.N.Y. 1998); *Casse*, 219 B.R. at 663.

In the present case, the evidence reveals that for nearly two years, Debtor has carried out a deliberate, systematic conversion of First Pioneer's collateral. Even more troubling, it appears that the bulk of this conversion occurred while Debtor was under the protection of the automatic stay during his three bankruptcies. Based on this record of Debtor's past behavior, the Court

finds that there is a significant probability that he will abuse the bankruptcy process even further if he is allowed to file a new petition for reorganization before First Pioneer has had an opportunity to fully exercise its remedies under state law. Accordingly, the Court will enjoin Debtor from filing a petition under Chapters 11, 12, or 13 of the Code for 180 days following the entry of this Order.

In light of its ruling on First Pioneer's motion to dismiss this case, the Court finds it unnecessary to discuss the remainder of the parties' contentions.

Based on the foregoing, it is hereby

ORDERED that Debtor's Chapter 12 petition is dismissed pursuant to Code § 1208(d); and it is further

ORDERED that Debtor is enjoined from filing a bankruptcy petition under Chapters 11, 12, or 13 until one hundred and eighty (180) days shall have elapsed from the date of this Order.

Dated at Utica, New York

this 9th day of July 1999

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge