

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:) In Proceedings
) Under Chapter 13
EDWARD ELMO KING and)
JANE ANN KING,)
) No. BK 87-40501
) Debtors.)

MEMORANDUM AND ORDER

This matter is before the Court on John Hancock Mutual Life Insurance Company's ("John Hancock") Motion to Dismiss and Objections to Chapter Thirteen Plan. A description of the procedural history in this case is necessary before addressing the merits of the motion and objections.

Debtors, Edward Elmo King and Jane Ann King, own 160 acres of real estate that is subject to a certain mortgage in favor of John Hancock. On March 25, 1986 John Hancock filed, in state court, its complaint to foreclose on that mortgage. John Hancock was named as mortgagee in possession on April 4, 1986, and the debtors subsequently operated the subject real estate as tenants for John Hancock. On June 23, 1986 debtors filed their Chapter 11 bankruptcy petition, as well as a motion to incur secured debt. John Hancock objected to the motion. On August 8, 1986 the parties entered into an Agreed Order, pursuant to which John Hancock was to receive one-third share from the crops grown on the property in 1986. Debtors apparently failed to abide by this agreement. On January 22, 1987 John Hancock filed a motion for relief from stay. A hearing on this motion was set for March 3, 1987, but debtors failed to contest the motion, and on March 4, 1987 the Court

ordered that the stay be lifted. Debtors then requested that their case be converted to a Chapter 7, and on March 22, 1987 the Court granted debtors' request. The Chapter 7 petition was subsequently filed on March 17, 1987. On April 29, 1987 debtors filed their Motion to Dismiss Chapter 7 and Request for Leave to File Under Chapter 13. John Hancock, assuming that the Court's previous order lifting the stay would remain in effect, did not object to this motion. The Court granted debtors' motion, and on August 11, 1987 debtors filed their Chapter 13 petition.

In their plan, debtors propose to repay the \$54,000.00 loan from John Hancock by making annual payments of \$6,172.00 for thirty years at an interest rate of 10.92%. John Hancock moves to dismiss debtors' Chapter 13 case pursuant to section 109(g)(2) of the Bankruptcy Code, which provides:

[N]o individual...may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if -

(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

11 U.S.C. §109(g)(2). John Hancock contends that the filing of the Chapter 13 petition within 180 days of the dismissal of the Chapter 7 case, and subsequent to the motion for relief from stay, violates section 109(g)(2). Additionally, John Hancock objects to debtors' proposed plan on the basis that 1) the stay was previously lifted and therefore the real estate in question is no longer subject to the

jurisdiction of this Court in a Chapter 13 proceeding; 2) the plan fails to comply with section 1325(a)(5) in that the value of property to be distributed under the plan is less than the value of the secured claim of John Hancock; and 3) the plan fails to meet the good faith requirement of section 1325(a)(3).

In the present case, debtors specifically requested leave to file a Chapter 13 case, and that request was granted by this Court. Since debtors obtained authority from the Court before filing a Chapter 13, debtors' case should not now be dismissed under section 109(g)(2). Furthermore, although the Court has the power to continue the lifting of the stay that was previously granted, Norton v. Hoxie State Bank, 61 B.R. 258 (D. Kan. 1986), the Court finds that it is neither necessary nor equitable to do so in the present case. In Norton, the bank had taken possession of and sold its collateral. The court, after balancing the hardships of the parties, concluded that the lifting of the stay, granted in debtors' previous Chapter 11, should be extended to the pending Chapter 13 proceeding. In the instant case, while John Hancock has been named mortgagee in possession, a judgment of foreclosure has not been obtained and the property has not been sold. Thus, the circumstances justifying an extension of the lifting of the stay in Norton are not present in this case.

Additionally, debtors' plan contains a fair and equitable proposal for repaying the debt owed to John Hancock. While John Hancock appears to argue that the proposed interest rate is too low, the Court finds that 10.92% is a fair rate.

In support of its contention that debtors' plan fails to meet the

good faith requirement of section 1325(a)(3), John Hancock contends that 1) debtors have repeatedly sought relief under the Bankruptcy Code, 2) debtors failed to make timely payments of crop rentals in accordance with this Court's prior order, and 3) debtors' plan fails to treat the secured creditors equally in terms of time period for repayment. The Court does not believe that the successive filings in this case demonstrate bad faith, nor does the evidence suggest that debtors filed their bankruptcy petitions solely to avoid foreclosure proceedings. With regard to John Hancock's second argument, debtors' counsel admitted at the hearing on these matters that debtors had failed to abide by the Agreed Order previously approved by this Court. However, debtors' attorney also indicated that debtors were now ready and willing to tender one-third share of the crops as previously agreed. While it is not exactly clear why debtors initially failed to make the required payments, the evidence simply does not support John Hancock's contention that debtors acted in bad faith.

Finally, the Court does not agree that debtors' plan unfairly discriminates against John Hancock, under section 1322(a)(3), by proposing that its loan be repaid over thirty years, while also proposing that Fairfield National Bank's loan be repaid over fifteen years. The loan from Fairfield National Bank was for \$25,585.00, while John Hancock's loan was for \$54,000.00, over twice the amount. Furthermore, debtors propose to repay each loan at the same interest rate. In light of these factors, the Court finds that the plan is fair and that it meets the requirements of section 1322(a)(3).

Accordingly, for the reasons stated above, John Hancock's Motion

to Dismiss is DENIED. The Objections to Chapter 13 Plan filed by John Hancock are DENIED.

_/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: November 12, 1987