

THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:) In Proceedings
) Under Chapter 12
ELMER H. KLENKE,)
) No. BK 87-50656
Debtor(s).)

MEMORANDUM AND ORDER

This matter is before the Court on the Motion to Dismiss Chapter 12 Bankruptcy Petition of Federal Land Bank of St. Louis (hereinafter, Land Bank) and the objection thereto of Debtor, Elmer H. Klenke.

Debtor filed his voluntary Petition for Relief under Chapter 12 of the Bankruptcy Code on December 16, 1987. On December 18, 1987, Land Bank filed its Motion to Dismiss Debtor's Bankruptcy Petition on the basis that relief under Chapter 12 is limited to family farmers pursuant to 11 U.S.C. §109(f) and that Debtor, with aggregate debts in excess of \$1,500,000.00 on the date of filing, is not a family farmer within the meaning of 11 U.S.C. §101(17). Land Bank's Motion to Dismiss was accompanied by the affidavit of its officer attesting that Debtor owed Land Bank \$2,335,927.23 on the date of filing.

Also on December 18, 1987, the Court granted Land Bank's Emergency Motion for Relief from Automatic Stay to allow a hearing on Land Bank's Motion for Summary Judgment on its Amended Complaint to Foreclose Mortgage to proceed in cause #85-CH-165 in the Circuit Court, Third Judicial Circuit, Madison County, Illinois. The determination of the Motion for Summary Judgment would resolve the amount of debt owed to Land Bank by Debtor and, thus, decide Debtor's

right to proceed as a family farmer under title 11. The Court's order lifting the stay was limited so that Land Bank was precluded from enforcing its judgment during the pendency of the bankruptcy case.

At the hearing on the Motion for Summary Judgment, both parties appeared and were represented by counsel. On December 23, 1987, the state court entered summary judgment in favor of Land Bank and against Debtor in the amount of \$2,338,986.66 plus costs and attorney's fees, and ordered foreclosure and sale. On December 31, 1987, Land Bank filed its Notice of Entry of Judgment with this Court.

This Court heard Land Bank's Motion to Dismiss on January 4, 1988, at which time Land Bank appeared by counsel and Debtor appeared pro se. The Court took the matter under advisement and granted Debtor leave to January 8, 1988 to obtain counsel to submit a brief opposing the Motion to Dismiss. Debtor filed his brief pro se on January 7, 1988.

Chapter 12 of the Bankruptcy Code recognizes "the concept of the family farm as an economic unit worthy of special protection." In re Johnson, 73 B.R. 107, 108 (Bankr. S.D. Ohio 1987). However, relief under Chapter 12 is limited by 11 U.S.C. §109(f) to "family farmers." That term is further defined in Section 101(7) of the Bankruptcy Code which explains in considerable detail what is meant by "family farmer." For purposes of the instant case, 11 U.S.C. §101(17)(A) defines a "family farmer" as an individual engaged in a farming operation whose aggregate debts do not exceed \$1,500,000.00. The language of this section is clear and unambiguous as to the permissible aggregate debt ceiling to be eligible as a debtor under Chapter 12. In re Johnson, 73 B.R. at 108.

On its face, then, Debtor, with a judgment against him of \$2,338,986.66 plus costs and attorney's fees, is not a family farmer within the meaning of Chapter 12. If this judgment is res judicata with respect to Debtor's liability to Land Bank, then Debtor's case must be dismissed.

Black's Law Dictionary 1174 (5th ed. 1979)(citations omitted) defines res judicata as the "[r]ule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action." The principle "is founded upon the generally recognized public policy that there must be some end to litigation and that when one appears in court to present his case, is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court." Heiser v. Woodruff, 327 U.S. 726, 733 (1946)(citation omitted). Thus, because Debtor and Land Bank have already fully litigated the question of Debtor's liability to Land Bank in the state court, the state court's judgment is binding on this Court.

Debtor's arguments challenging the amount of the judgment,¹ the admissibility of Land Bank's computer evidence and the veracity of Land Bank's evidence do not change this outcome. If debtor, in fact, raised

¹Debtor argues that an offset against the debt to Land Bank of approximately \$350,000.00 was not taken into account in the state court judgment. However, even if this Court were to reduce the judgment by \$350,000.00, this would still fail to bring Debtor's debt load below the \$1,500,000.00 aggregate debt limit mandated by §101(17)(A).

these issues in the state court proceeding, his redress would have been through state court appeal. And, as to any issues which Debtor failed to raise, those issues are nonetheless precluded. It is well established that a judgment is res judicata as to "all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." Kapp v. Naturelle, Inc., 611 F.2d 703, 707 (8th Cir. 1979), quoting Brown v. Felsen, 442 U.S. 127, 131 (1979) (citation omitted). See also, Heiser v. Woodruff, 327 U.S. at 735.

Finally, Debtor argues that the granting ex parte of Land Bank's Emergency Motion for Relief from Automatic Stay was improper because the Motion was based on the false affidavit of the bank's officer. However, this argument is untimely. The Order granting Land Bank's Emergency Motion was a final order. E.g., Matter of Boomgarden, 780 F.2d 657, 659-660 (7th Cir. 1985); In re Kemble, 776 F.2d 802, 805 (9th Cir. 1985); In re American Mariner Industries, Inc., 734 F.2d 426, 429 (9th Cir. 1984); In re Regency Woods Apartments, Ltd., 686 F.2d 899, 901-902 (11th Cir. 1982). A party aggrieved by a final order is required to appeal the order to the district court, or otherwise move this Court to reconsider or vacate its order, within ten days of the date that the order is entered. 28 U.S.C. §158; Bankruptcy Rules 8001(a), 8002. The Order herein was entered on December 18, 1987. Debtor was duly served with a copy of the Order. Yet, debtor never attempted to appeal the decision. Nor did he move the Court to reconsider or vacate its Order. Thus, he cannot now, in opposing Land Bank's Motion to Dismiss, collaterally attack the granting of the

motion for relief from stay.

Accordingly, the Court finds that Debtor is not a family farmer eligible for relief under Chapter 12 of the Bankruptcy Code, and the Motion to Dismiss of Land Bank is GRANTED.²

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

ENTERED: February 23, 1988

²The Court takes no position on the question of whether the debtor would be entitled to relief under any other chapter of the Bankruptcy Code.