UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

IN RE:	)	Case No. A-B-87-0439
	)	Chapter 12
A.J. NIELSON and wife, DORIS NIELSON,	)	
	)	
Debtors.	)	
	)	JUDGMENT ENTERED ON 05-04-89

ORDER DENYING DISMISSAL OF CHAPTER 12 CASE

This matter is before the court on the debtors' "Dismissal" and the Chapter 12 Trustee's Motion to deny dismissal, delay dismissal or for conversion to Chapter 7. The Trustee's motion has been endorsed by Farmers Home Administration ("FmHA"), a secured creditor of the debtor. The court has concluded that dismissal of this Chapter 12 case should be denied.

BACKGROUND

This Chapter 12 case was filed September 9, 1987. It has followed a lengthy and rather tortuous course to reach this point. Consequently, a chronology of the proceeding is necessary for a proper background. The events relevant to this proceeding include the following:

Pre-Bankruptcy Activity

Prior to bankruptcy the debtors had raised apples in Henderson County, North Carolina. The male debtor, A.J. Nielson (hereinafter "Nielson"), also owned a fifty percent interest in a family corporation, Nielson Development Corporation ("NDC"). (Nielson's son owned the other fifty percent interest, but the court has found that Nielson operated the corporation as his own

alter ego). On the day prior to filing his Chapter 12 petition, Nielson transferred $23,000 to NDC as a "loan."

The Plans of Reorganization/Liquidation

The debtors filed their first (of five) proposed Plan of Reorganization in December 1987. It proposed a partial liquidation of land, but reserved at least one tract for the debtors. The Trustee objected to the proposed plan and FmHA also objected to the plan and sought dismissal of the case. After a hearing in January 1988, the court entered an Order Allowing Extension of Time to File Modified Plan dated February 1, 1988. (An Amended Order was filed February 8, 1988, which modified the original Order in a manner not significant here). That Order was the product of negotiations and consent of the parties. In it the debtors acknowledged that their proposed plan was not feasible because of the insufficiency of future income to fund plan payments. The Order allowed the debtors an additional ninety days to file a modified plan upon certain conditions -- two of which were: (a) that the debtors would pay to the Trustee amounts sufficient to cure the post-petition arrearage to a first mortgage holder plus a ten percent commission to the Trustee; and (b) that the debtors represented that they had a $12,000 inventory of apples and that they would pay the gross sales proceeds of those apples to the Trustee when they were sold. The debtors did not pay the Trustee to bring the first mortgage holder current as required, but dealt with the first mortgage holder directly; the debtors did not pay the Trustee the ten percent commission as required; and the purported $12,000 inventory of

apples was later sold for only $5,700, which the debtor did not pay to the Trustee.

The debtors filed their First Amended Chapter 12 Plan in April 1988. FmHA objected to the plan and recommended dismissal of the case. Upon FmHA's consent, the court continued the hearing on that plan in order to give the debtors another opportunity to modify their plan.

In May 1988, FmHA moved the court for relief from the automatic stay in order to permit it to offset against a disaster relief payment that was due the debtors from the U.S. Department of Agriculture. The court denied that offset on equitable grounds by Order dated July 15, 1988. In re Nielson, 90 B.R. 172 (Bankr. W.D.N.C. 1988).

The debtors filed their Second Amended Chapter 12 Plan in June 1988. This was a reorganization plan which was prompted by receipt of the disaster relief funds. The plan proposed to sell two tracts of unneeded land; transfer NDC's ownership and operations to the debtors; apply for disaster relief funds to satisfy certain debts; and pay creditors secured by the orchard land and equipment from orchard and juice production operations. After a full evidentiary hearing, by Order filed July 27, 1988, the court denied confirmation of the plan -- primarily because the plan was not feasible, because the total projected income from all sources was not sufficient to fund the required payments to creditors.

On August 1, 1988, FmHA filed a proposed plan of liquidation.

On August 5, 1988, the debtors filed a Third Amended Chapter 12 Plan that was a plan of liquidation rather than of reorganization. After negotiations with FmHA, the debtors agreed to make some modifications to their liquidation plan and FmHA agreed not to press for confirmation of its proposed plan.

On August 21, 1988, the debtors' modified Final Chapter 12 Plan was filed. After a hearing at which the parties (the debtors, FmHA and the Trustee) consented to confirmation, the court confirmed the Final Chapter 12 Plan by Order filed September 29, 1988. The confirmed plan provided for the sale by the Trustee of all of the debtors' non-exempt personal property and for distribution of the disaster relief funds. The plan also provided for the sale of all of the debtors' real property: Within sixty days of confirmation, the Trustee was to sell all land except an 18 acre tract -- identified as Lot 2-A -- on which is located NDC's juice plant and a "rock" house which could be used as a residence. The plan provided for the sale of Lot 2-A sixty days after the sale of the rest of the real estate -- but, it stated that the debtors intended to file a motion to modify the plan to allow them to retain Lot 2-A. Thus, the confirmed plan contains the following language that was agreed to by the parties:

> The Debtors propose that the Trustee <u>shall</u> sell all of the Debtors' real estate....
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> * * * *
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> The Debtors propose that the Trustee <u>shall</u> sell the 18-acre parcel known as Lot 2-A by public auction....
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> * * * *

> The Debtors propose that the Trustee shall sell all non-exempt personal property owned by the Debtors....

(Emphasis added).

Post-Confirmation Discoveries and Activities

In his preparation for the sales called for by the confirmed plan, the Trustee discovered several irregularities in the debtors' transfers of equipment. The debtors had made at least one proposed transfer to Ward Bros. Tractor and Equipment Co. upon a representation that FmHA approved of it (which FmHA denied) which the Trustee rejected -- although the debtor had already transferred the equipment to Ward Bros.' premises. That transfer and at least two others were negotiated by Nielson without consulting the Trustee. In addition, the Trustee discovered equipment of the debtor located as far away as Sanford, North Carolina, which had not previously been identified by Nielson. During this time allegations were brought to the court's attention that the female debtor, Mrs. Nielson, had threatened employees of FmHA and that the debtors were attempting to tamper with the auction by soliciting friendly "low-ball" bids at the auction in consideration of the debtors' agreement to repurchase the property from the friendly low-ball bidder within a year. The court made no findings on any of these formal and informal allegations, but did admonish the debtors to conduct themselves appropriately. (In addition to these semi-clandestine dealings by Nielson, there was an open dispute about the extent of FmHA's security interest in certain equipment Nielson claimed to be not his, but property of NDC -- which was the subject of an

adversary proceeding discussed immediately below). All of this resulted, after a hearing, in an Order filed November 29, 1988, which required return to the Trustee of all of the equipment subject to FmHA's security interest that had been located in other hands; that the debtors make no further sales of property; that the debtors cooperate with the Trustee and his agents "under penalty of contempt;" and that the U.S. Marshal provide appropriate protection in preparation for and execution of the auction of the debtors' property (as a result of the alleged threats by Mrs. Nielson).

The Trustee conducted an auction sale of the debtors' available personal property and some of their real estate in December 1988. The Trustee sold all of the debtors' real estate except: Lot 2-A, which had been exempted from the initial sale in the confirmed plan; and Lot 2-B which is roughly a thirty acre tract which adjoins Lot 2-A and is landlocked from road access by the exempted Lot 2-A. The Trustee's reason for not selling Lot 2-B was that it would not bring as good a price for the estate as a landlocked tract as it could if it were sold together with Lot 2-A at a later date. An Order confirming the public sales by the Trustee was filed December 27, 1988.

The Adversary Proceeding re Dischargeability and Discharge

Backing up a bit in time, in May 1988 FmHA had filed an adversary proceeding for determination of dischargeability and objection to discharge as to certain debts. The crux of the Complaint (later the Amended Complaint) was that (1) the debtors had transferred equipment in which FmHA owned a security interest

without the knowledge or consent of FmHA, the Trustee or the court -- and had unlawfully converted that property; and (2) that the debtors had converted the supposed $12,000 apple inventory. Back to the chronology, that case was tried to the court and a Memorandum Opinion and Order was filed March 2, 1989. The court made several determinations there that may be relevant here: First, the supposed $12,000 apple inventory had eventually grossed only $5,700. The court accepted the debtors' explanation for that, but found that amount of debt non-dischargeable because the debtors had violated the February 1, 1988, Order by using that money themselves (to pay creditors of their choice) instead of paying it to their Trustee as required. Second, the debtors had sold some hay equipment to their sons for $500 which the sons traded in on new equipment titled in their names. FmHA had a security interest in that equipment and had valued it at $2,400. Neither FmHA, the Trustee nor the court was advised of or approved this transaction in advance, and it amounted to a conversion by the debtors. Third, the debtors transferred two tractors to a son who traded them in on a new tractor titled in his name. FmHA had a security interest in these tractors valued at $2,000. Neither FmHA, the Trustee or the court were advised of or approved that transaction in advance, and it amounted to a conversion by the debtors. Fourth, the court found that Nielson had operated NDC with such dominion, control and indifference to its corporate identity that it was in fact his alter ego and its property thus subject to FmHA's lien -- at least as to the specific items of equipment that had been described on FmHA

security documents. (The extent of FmHA's or the Trustee's interest in all of NDC's property has not been resolved at this point).

On March 29, 1989, the debtors filed a proposed Amended Plan of Reorganization which was their expected effort to retain Lot 2-A and Lot 2-B. The Trustee, FmHA and another secured creditor, First Union National Bank, objected to the Amended Plan. A hearing on confirmation of the Amended Plan was held on April 18, 1989. After hearing all of the debtors' evidence the court orally denied confirmation of the proposed Amended Plan because it was, again, not feasible -- in this latest instance because it was based almost entirely on hope alone and not on anything in prospect. At that time the court also orally ruled on motions of the Trustee, including reaffirmance of the Trustee's right to sell Lots 2-A and 2-B and the Trustee's right to sell certain equipment of Nielson Development Corporation (which the debtors were ordered to identify).

Prior to entry of any written Order following the April 18 hearing, on April 25, 1989, the debtors filed a "Dismissal" purporting to dismiss their Chapter 12 case.

On April 26, 1989 -- after telephonic communications with the interested parties -- the court entered an Order which deemed the debtors' "Dismissal" as a motion* to dismiss the Chapter 12

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* There is no provision of the Bankruptcy Code or Rules which permits dismissal by mere notice. In fact, at present in this District there are no rules whatsoever with respect to the procedure for dismissal pursuant to § 1208(b). Bankruptcy Rule 1017(d) governs procedure for dismissal pursuant to § 1307(b),

case and which set that motion and the Trustee's anticipated opposition for hearing on shortened notice for May 1, 1989. That Order also prohibited the debtors from transferring or affecting their property and that of Nielson Development Corporation prior to determination of the hearing set for May 1, and ordered the debtors to identify to the Trustee any such actions respecting that property that had occurred since immediately before the April 18 confirmation hearing.

On April 26, 1989, FmHA filed in the District Court a proceeding to obtain a temporary restraining order and injunction against the debtors' transfer of property; and filed a Notice of that proceeding in this court. Given this court's Order of April 26, FmHA has not pursued its motion in the District Court and it sits in limbo pending this Order.

On April 27, 1989, the Trustee filed a "Motion By Trustee To Deny Debtors' Dismissal Motion; Or To Delay The Entry Of The Dismissal Order; Or To Convert" to a Chapter 7 case.

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and it requires a motion. Interim rules have been drafted to incorporate Chapter 12. Interim Rule 12-2(6) provides that "The reference in Rule 1017(a) to § 1307(b) of the code shall be read also as a reference to § 1208(b) of the code." (Emphasis added). (the omission of the reference in Rule 1017(d), which is the applicable provision here, must be an oversight). But, the Interim Rules are made applicable only by Local Rule in each District, and this District has not yet adopted such a Local Rule. In any event, treatment of the debtors' "Dismissal" as a motion and not an accomplished act appears appropriate because; (1) there is no rule which permits dismissal by notice; and (2) dismissal pursuant to the analogous provision of Chapter 13 -- § 1307(b) -- requires a motion.

On May 1, 1989, the court heard all matters relating to the purported dismissal of this case by the debtors, the Trustee's and secured creditors' opposition thereto and related motions.

DISCUSSION AND CONCLUSIONS

The crucial legal issue here is whether the debtors have an unfettered right to dismiss their Chapter 12 case pursuant to 11 U.S.C. § 1208(b). Having travelled the tortuous path outlined above, the parties -- and the court -- are confronted with a split of reported cases on the determinative legal issue. But, FmHA and the Trustee have the weight of an unreported Fourth Circuit Court of Appeals decision and a decision on point (as yet unreported) by this court's sister bankruptcy court in the Eastern District of North Carolina. The court finds the reasoning of those cases persuasive and has concluded that dismissal should be denied.

Section 1208(b) governs dismissal of Chapter 12 cases. It provides that:

> On request of the debtor at any time, if the case has not been converted under section 706 or 1112 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

11 U.S.C. § 1208(b). The court has found no reported cases dealing with § 1208(b). However, the operative language of § 1208(b) is identical to § 1307(b). The legislative history of both sections provides little guidance here because it essentially simply repeats the language of the sections. See, S. Rept. No. 95-989, 95th Cong., 2d Sess.

141 (1978); H. Rept. No. 95-575, 95th Cong., 1st Sess. 428 (1977).

The reported cases dealing with dismissal of Chapter 13 cases are split into two schools of thought. One line of cases holds that the plain language of § 1307(b) gives the debtor the absolute and unfettered right to dismiss his case. See, e.g., In re Kelsey, 6 B.R. 114 (Bankr. S.D. Tex. 1980); In re Hearn, 18 B.R. 605 (Bankr. D. Neb. 1982); In re Benediktsson, 34 B.R. 349 (Bankr. W.D. Wash. 1983); In re Gillion, 36 B.R. 901 (E.D. Ark. 1983); In re Eddis, 37 B.R. 217 (E.D. Pa. 1984); In re Turiace, 41 B.R. 466 (Bankr. D. Or. 1984); In re Nash, 765 F.2d 1410 (9th Cir. 1985) (dicta); In re McConnell, 60 B.R. 310 (Bankr. W.D. Va. 1986); In re Rebcor, 89 B.R. 314 (Bankr. N.D.N.Y. 1988); and In re Looney, 90 B.R. 217 (Bankr. W.D. Va. 1988). The other line of cases holds that a debtor's right to dismiss his case is not absolute, but may be restricted in situations where dismissal would result in some abuse or misuse of the bankruptcy process. See, e.g., In re Whitten, 11 B.R. 333 (Bankr. D.D.C. 1981); In re Zarowitz, 36 B.R. 906 (Bankr. S.D.N.Y. 1984); In re Merritt, 39 B.R. 462 (Bankr. E.D. Pa. 1984); In re Jacobs, 43 B.R. 971 (Bankr. E.D.N.Y. 1984); In re Powers, 48 B.R. 120 (Bankr. M.D. La. 1985); In re Gaudet, 61 B.R. 349 (Bankr. D.R.I. 1986) and In re Vieweg, 80 B.R. 838 (Bankr. E.D. Mich. 1987). Neither line of cases appears to command a majority position either in terms of numbers or of wisdom.

There is no reported opinion by the Fourth Circuit Court of Appeals dealing with the present issue, but that Court has spoken on the subject in an unreported opinion. In Couch v. Center Bros., Inc. (In re Couch), No. 82-1485 (4th Cir. 1983) (available on WESTLAW), the Fourth Circuit affirmed the Bankruptcy Court's conversion of a debtor's Chapter 13 case on motion of a creditor notwithstanding the debtor's attempt to dismiss the case prior to conversion. The Court adopted the reasoning of the district court which had stated that:

> While the right of the debtors to dismiss their case 'at any time' no doubt exists within the parameters of Chapter 13, it should not be construed in derogation of the court's inherent power to prevent the abuse and misuse of the judicial process.
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> A debtor should not be allowed to file a Chapter 13 petition and receive the benefits of the automatic stay...for an eight month period when he has no intention to effectuate a Chapter 13 plan.

Slip Op. at p. 3. That reasoning was also applied in a recent Chapter 12 case decided by the Bankruptcy Court for the Eastern District of North Carolina. In In re Tyndall, ___ B.R. ___, No. 87-00027-S03 (Bankr. E.D.N.C. March 21, 1989). There, the confirmed plan had been modified by consent of the debtor and FmHA, a secured creditor, to provide for an extension of payment of FmHA's claim and to provide for liquidation of property by the Trustee in the event of a default in the debtor's payment. After a default by the debtor, the bankruptcy court delayed the debtor's attempted dismissal of the case until the debtor cured the

default or the Trustee liquidated the collateral. The bankruptcy court reasoned that:

> FmHA's right to have a trustee's sale of its collateral in the event of a default was obtained as part of a consent order in which the debtors were given an extension of time in which to make payments due to FmHA. Having had the benefit of that extension and the protection of the Bankruptcy Code since their petition was filed in January of 1987, the debtors should not be permitted to rely on § 1208(b) to deny FmHA rights granted it under the confirmed plan.

Memorandum Opinion and Order at pp. 5-6. (Footnote omitted).

The reasoning of Couch and Tyndall have persuaded the court that these debtors' "Dismissal" should be denied in order to avoid a misuse or abuse of the bankruptcy process. The debtors have had the benefit of the protection of the Bankruptcy Code for over a year-and-a-half. The Trustee and FmHA (and other secured creditors) were active and aggressive in pursuing their interests during that time, but also negotiated with the debtors in good faith toward producing the "Final Chapter 12 Plan" which was confirmed by consent of the parties. Although FmHA may have been entitled to relief from the automatic stay at any time during that period, it forewent that route and negotiated with the debtors for the liquidation provisions of the confirmed plan. It would be an abuse of the bankruptcy process now to permit dismissal of the Chapter 12 case when the immediate effect of dismissal would be to deny FmHA the benefits of the confirmed plan for which it negotiated and to which the

debtors consented. The confirmed plan is tantamount to a contract, and permitting the debtors' dismissal would be tantamount to a court approved breach of that contract. Further, the confirmed plan is a judgment of this court which is binding on the debtors. See 11 U.S.C. § 1227(a). To allow the debtors the absolute right to dismiss the case would permit them to avoid a final judgment at their own whim and caprice.

To permit dismissal here would harm FmHA -- at least -- by delay. Pursuant to the confirmed plan FmHA is entitled to immediate sale of the property by the Trustee. If the case were dismissed it would take at least ninety days for FmHA to return to the point where it now stands with respect to liquidation of its collateral. That delay is sufficient harm in itself. But, with Nielson's history of violation of court orders, questionable transfers and outright conversions of property -- even with the Trustee's and the court's supervision -- there is a real possibility of improper transfers to the detriment of creditors if the case is dismissed the control of the Trustee and the court are lost. Dismissal of the case at this point would certainly delay liquidation of FmHA's collateral and could possibly frustrate it altogether.

Additionally, this case had included a running dispute about the location and ownership of the equipment on which FmHA claimed a security interest. Although the court has not found the debtors to have hidden property deliberately,

the debtors have certainly not been fully cooperative with FmHA or the Trustee. Part of the court's oral ruling at the April 18 hearing was to require disclosure of the location and asserted ownership of all of the debtors' and NDC's property. Dismissal of the case would avoid that disclosure which, given these debtors' actions, would deny the creditors that to which they are entitled.*

Bankruptcy cases are collective proceedings for the common benefit of creditors. But here, Nielson has committed a number of violations of court orders and security documents in making direct payments to certain creditors, using estate funds for his own purposes and converting FmHA's collateral -- all of which are contrary to the collective nature of the bankruptcy process. It is possible that continuing the collective bankruptcy proceeding will produce some dividend to unsecured creditors, but it appears certain that dismissal of the proceeding will result in unsecured creditors receiving nothing. The court cannot further frustrate FmHA and other creditors by sanctioning dismissal of the collective proceeding.

Of course Chapter 12, like Chapter 13, is a voluntary proceeding. Section 1208(b) is consistent with that voluntary nature. Whereas, for example, where a farmer's plan is to reorganize by continuing to farm and to pay his

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* Although the debtors were ordered to submit monthly reports of operations, accounts and transactions, they have not filed such a report since August, 1988.

creditors monthly from his farming income, there would be an element of "involuntary servitude" in forcing the debtor to continue to farm. But, because the confirmed plan in this case is a plan of liquidation, denial of dismissal does not produce the oppression that might be involved in refusing to dismiss a plan of reorganization. Here, denial of dismissal simply causes the liquidation of the collateral to which the debtor had agreed -- and for which there is a final judgment, the confirmed plan. Absent fraud or a miracle, that liquidation would be inevitable -- although delayed -- even if the case were dismissed. So, in the circumstances of this cases, the debtors are not harmed by denial of their purported dismissal.

Finally, it appears that the sole purpose of the debtors' "Dismissal" was to frustrate creditors by delay and nondisclosure. The debtors have suggested no legitimate purpose other than to assert that dismissal is their "right." But, the history of this case and the timing of the "Dismissal" indicate that it is motivated by a last ditch effort to delay sale of their property. That motivation is understandable, but improper in this case. The history of this case is one of the debtors' efforts to save a parcel of their land. Their first proposed plan provided for liquidation of most of their land, but saving out one tract. When the disaster relief funds became available the debtors made several attempts at a reorganization plan, but their projected income from all sources was never sufficient

to fund the payments that would be required, so reorganization was not feasible. So, the debtors ultimately proposed a "Final Chapter 12 Plan" that was a plan of complete liquidation, but reserved the possibility of later obtaining a modification of the plan that would allow them to retain Lot 2-A. Throughout all of this, the Trustee, FmHA and other creditors worked with the debtors to that end. But, the debtors' proposed modification -- like their previous reorganization plans -- did not hold the prospect of producing sufficient income to fund required payments to creditors. Consequently, the court denied confirmation for lack of feasibility. The court also ordered disclosure about NDC property. Within seven days of those rulings -- and before formal Orders were entered -- the debtors filed their "Dismissal," obviously for the purpose of avoiding those rulings. Thus, it appears that the debtors' motivation for the "Dismissal" was to hold on to their land by delay and frustrate the Trustee and creditors by nondisclosure of NDC assets, and to avoid the order of this court requiring that disclosure. Even if that was not the debtors' subjective motivation, it certainly would be the immediate effect of their attempted dismissal. So viewed, the "Dismissal" is improper and would be an abuse and misuse of the bankruptcy process.

For all of the above reasons, the court has concluded that the debtors' "Dismissal" should be denied at this time. This denial is without prejudice to refiling at such time as the confirmed plan has been consummated and Orders of the court fully complied with by the debtors. Because of the history of questionable transfers by the debtors, the court's Order of April 26, 1989, prohibiting transfers of and acts affecting property of the debtors and of NDC shall remain in effect. Finally, in light of this ruling, the alternative relief of delay of the dismissal or conversion requested by the Trustee should be denied. (Although, the court is aware that its denial of the "Dismissal" without prejudice to refiling has the same effect as delaying entry of the dismissal).

The court ruled on several matters from the bench after the April 18, 1989 hearing, but has refrained from entering Orders on those matters pending resolution of the dismissal issue. Those Orders will be entered forthwith.

It is therefore **ORDERED** that:

1. The debtors' "Dismissal" is denied;

2. The Trustee's motion for delay of dismissal or for conversion to a Chapter 7 case is denied;

3. The Trustee, the debtors and the creditors shall proceed to consummate the confirmed plan; and

4. The terms of the court's Order of April 26, 1989, shall remain in force and effect until suspended by further Order of this court.

This the 4th day of May, 1989.

George R Hodges

George R. Hodges
United States Bankruptcy Judge