

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re: EDWARD G. KOWALZYK,

BKY 06-60010

Debtor.

Chapter 12

ORDER DENYING CONFIRMATION AND DISMISSING CASE

This matter came before the Court for hearing on confirmation of the debtor's third modified proposed Chapter 12 plan with an objection and motion to dismiss by creditor Cenbank.¹ David G. Velde appeared on behalf of the debtor, Edward G. Kowalzyk; and David C. McLaughlin appeared on behalf of Cenbank Ortonville.

The Court took testimony at the hearing and allowed time for the parties to file post-trial briefs, and thereafter took the matter under advisement. Based upon all of the files, records and proceedings herein, the Court being now fully advised in the premises, makes this Order pursuant to the Federal and Local Rules of Bankruptcy Procedure.

FINDINGS OF FACT

One of the central problems in this case is the lack of a definitive factual record. At best, the evidence supplied by Kowalzyk in support of his proposed Chapter 12 plan is overly broad, too generalized. The facts claimed also suffer inconsistency and inadequate support. These findings therefore represent the most complete illustration of Kowalzyk's situation as is readily ascertainable from the record. In this instance, the shortfall of details is ultimately determinative of the question of whether the plan may be confirmed.

Edward Kowalzyk has raised hogs since farming with his father, and he has been in the feed and seed business for twenty five years. Approximately five years ago, he purchased his own hog facility. Sometime prior to filing a petition for relief under Chapter 12 on January 14, 2006, Kowalzyk lost many hogs due to disease and theft. At the time of filing, Kowalzyk was subject to foreclosure actions by two major creditors, Option One Bank (against his homestead) and Cenbank (against all of his real estate and personal property). The hog facility was cleared, and it is now permissible to put hogs in again. However, it took a long time for Kowalzyk to find a hog contract due to low hog prices.

¹ Objections by the Trustee and by Option One have been withdrawn.

Kowalzyk continues to work off-farm as well, as a farm equipment salesman for Green Implement. From this work, he receives an annual income of \$35,400, plus unidentified bonuses the certainty of which is unknown. Whether that amount is gross or net is not certain. In support of the plan, Kowalzyk stated that his Green Implement income was \$1,200 every two weeks, and that his “gross monthly income [therefrom] is approximately \$2,600 ... after tax withholding by the employer.” The \$1,200 and \$2,600 figures both constitute an annual amount of \$31,200, so the Court therefore supposes it to be a net amount, and the \$35,400 to be gross annual income. The \$2,600 may be a small exaggeration, however, because Kowalzyk’s Schedule I indicates fixed, non-commission, net monthly income from Green Implement in the amount of \$2,532.

Schedule I also lists income from a business as just \$1787.50 each month, gross receipts, with \$933.33 in ordinary and necessary business expenses, for a net monthly business income of \$854.17. There is little in the record to explain these numbers, and they do not appear to relate to Kowalzyk’s new agreement with B&W to raise hogs.

Kowalzyk’s current on-farm business is a custom feeding contract providing placement of hogs in Kowalzyk’s facility at \$33 per annual hog space and 1200 total spaces. Under this arrangement, an entity known as B&W supplies the hogs and covers all expenses within the hogs, and Kowalzyk raises the hogs in his facility. B&W puts the hogs in per batch. The agreement is per hog space, and therefore a batch payment is based on placing 1200 hogs even if actual placement is less than 1200. However, B&W has made no guarantee to Kowalzyk of any additional batches beyond the one currently placed. In other words, if Kowalzyk does get consistently renewed batches of hogs into his facility from B&W over the course of a 12 month period, then his hog income will be \$39,600,² or \$3,300 each month, for those 12 months. But, there is no guarantee whatsoever of any future hog batches, not to mention sure batches throughout the three-year life of Kowalzyk’s proposed Chapter 12 plan. The likelihood of ongoing hogs put in by B&W went essentially unexplored and undefined at trial and in Kowalzyk’s briefing.³

Kowalzyk’s expenses are by no means apparent to any degree of certainty. His monthly personal expenses appear to be \$2,156 based on Schedule J figures, but family living expenses are listed in the proposed plan at \$27,500, which is \$2,291.66 monthly, not including any debt servicing. At trial, however, Kowalzyk testified that monthly living expenses amounted to just \$1,730 each month. In supplemental briefing, the parties appear to agree that Kowalzyk’s monthly personal living expenses, not including hog farm expenses or debt service, amount to \$1,470, which is consistent with Schedule J less the mortgage payment included there (but inconsistent with the calculation represented in the

² The plan slightly exaggerates annual hog income by using the rounded up figure of \$40,000.

³ Kowalzyk basically relied on his bare assertion that B&W is “big” in chicken and livestock all over the world.

plan). But, Cenbank argues that the calculation overlooks the \$500 *monthly* transportation expense related to Kowalzyk's off-farm employment, which is not listed in Schedule J but is listed as an *annual* expense in the proposed plan.

Schedule J lists business/farm expenses as \$2,798 monthly, but at the time of trial Kowalzyk claimed expenses would be actually much less.⁴ Hog expenses, he testified, would be essentially labor only, and just \$500 annually. The expense decrease from the past, he explained, was the result of maintenance and repair costs since resolved by improvements recently made to the facility.⁵ In contrast, he also testified that the business expense calculations in the plan are actually correct, and those are listed as \$13,400 annually, or just \$1,166.66 each month, segregated into categories as follows: \$1,000 taxes; \$4,000 insurance; \$2,500 utilities; \$4,000 repairs; \$900 veterinary; \$500 labor; and \$500 transportation.

The plan proposes annual debt and trustee payments of \$32,229.59, or \$2,685.80 each month. To date, no payments have been made according to the proposed plan, and the DIP account had a balance at the time of trial of less than \$300.

DISCUSSION

"The Chapter 12 debtor bears the burden of proving that his proposed plan satisfies all of the requirements for confirmation as set out under section 1225(a), including ... 1225(a)(6) (feasibility)." See In re Torelli, 338 B.R. 390, 395 (Bankr. E.D.Ark. 2006), citing In re Krause, 261 B.R. 218, 222 (8th Cir. BAP 2001) (citing In re Sauer, 223 B.R. 715, 726 (Bankr. D.N.D. 1998)); In re Alvstad, 223 B.R. 733, 737 n. 3 (Bankr. D.N.D. 1998)); In re Michels, 301 B.R. 9, 13 (Bankr. N.D.Iowa 2003) (citing In re Szudera, 269 B.R. 837, 842 (Bankr. D.N.D. 2001)), *aff'd*, 305 B.R. 868 (8th Cir. BAP 2004); In re Clark, 288 B.R. 237, 245 (Bankr. D.Kan. 2003) (citing In re Ames, 973 F.2d 849, 851 (10th Cir. 1992)); In re Harper, 157 B.R. 858, 865 (Bankr. E.D.Ark. 1993)(citing 5 Collier on Bankruptcy ¶¶ 1225.01, 1225.03[c] (15th ed.1991)).

Section 1225(a)(6) provides:

(a) Except as provided in subsection (b), the court shall confirm a plan if —

⁴ The \$2,798 business expense figure apparently included debt payments now included in proposed plan payments.

⁵ Kowalzyk offered the same scenario to explain why no funds had accumulated in the debtor-in-possession account during the many month pendency of the case during which time the current numbers reflect there would have been a sizeable surplus. The funds, he contends, were used to fund necessary facilities improvements, specifically "fixing up barns." No receipts or other evidence of such projects were offered into evidence or otherwise described in persuasive detail.

- (6) the debtor will be able to make all payments under the plan and to comply with the plan.

See 11 U.S.C. § 1225(a)(6).

“This requirement, dubbed the ‘feasibility test,’ focuses on the probability of the debtor’s making all payments under the plan.” Torelli, 338 B.R. at 397, citing In re Mosbrucker, 227 B.R. 434, 437 (8th Cir. BAP 1999) (citing First Nat’l Bank v. Hopwood, 124 B.R. 82, 86-87 (E.D.Mo. 1991) (quoting In re Clarkson, 767 F.2d 417, 420 (8th Cir. 1985)), *aff’d*, 198 F.3d 250 (8th Cir. 1999); In re Konzak, 78 B.R. 990 (Bankr. D.N.D. 1987) (quoting In re Ahlers, 794 F.2d 388, 392 (8th Cir. 1986)).

“To determine whether a plan is feasible, the court should analyze the debtor’s projected income and expenses in relation to actual past performance.” Torelli, 338 B.R. at 397, citing Euerle Farms, Inc. v. State Bank in Eden Valley (In re Euerle Farms, Inc.), 861 F.2d 1089, 1092 (8th Cir. 1988); 8 Collier on Bankruptcy ¶ 1225.02[5] (Alan N. Resnick & Henry J. Sommer et al. eds., 15th ed. rev.1993).

In this case, Kowalzyk has failed to prove feasibility. The record contains several claims of income and expenses, and there are projections, but the lack of specificity and support render them unhelpful. First, there is nothing in the record about actual past performance. No financial information regarding past operations of the hog facility (before the disruptive disease event) has been provided. The Court has nothing to compare or otherwise justify the current projections of income and expenses relating to the hog facility, and nothing against which to analyze the B&W hog raising arrangement, except the changing and contradictory assertions of Kowalzyk. It could just as easily be his first attempt at a hog facility this time around for the lack of a reliable historical record.

Similarly, while Kowalzyk purports to not rely on his Green Implement bonus or commission income, he has nevertheless invoked it repeatedly as a potential cushion or back up source of funding for the plan. Yet, there is no evidence in the record before the Court of the regularity or substance of such “extra” income.

Second, the projections of income and expenses going forward are annual sums without analysis or support. For example, Kowalzyk’s proposed plan provides a simple \$1,000 expense entry for taxes, but there is no formula included to demonstrate the manner by which that number was determined, and what sort of taxes are included in the expense remain unidentified. It is highly unlikely that the \$1,000 entry for taxes includes both Kowalzyk’s withholding from Green Implement and self-employment taxes related to his hog farm operations, yet the income entries included in the plan are gross, not net, figures.

The same problem is present with all of the other expenses listed in the plan as well.

Annual amounts are provided, but there is no monthly accounting, past or projected, to support any expense category. The plan merely lists annual expenses, not including family living, as \$13,400 total, divided into seven oversimplified and unelaborated areas (taxes, \$1,000; insurance, \$4,000; utilities, \$2,500; repairs, \$4,000; veterinary, \$900; labor, \$500; and transportation, \$500). Moreover, some of the expenses are questionable based on Kowalzyk's testimony, and illustrate the necessity of detailed projections to support a proposed plan. For example, Kowalzyk claimed to have made extensive facilities repairs over the past several months of the pendency of the case such that he does not anticipate significant repair costs going forward. Yet, the expense projection for repairs is \$4,000, sharing first place with insurance as the most costly annual expense. The Court has no way of assessing the accuracy of this expense, however, for no reliable evidence was offered to specify or support it.

The Court has no means to measure the necessity or accuracy of any particular expense, because a detailed monthly analysis is completely absent from the record with respect to all of the expense items. Cenbank contests the transportation expense, claiming Kowalzyk spends the \$500 listed amount each month, not annually. The Court has no evidence by which to settle that disputed fact. At trial, Kowalzyk briefly explained that under the agreement with B&W, he would not be responsible for care "within" the hogs, yet the plan provides for some veterinary costs. The Court does not have before it any information regarding what specific animal care costs would or might be Kowalzyk's liability under the agreement with B&W, nor any insight into hog health or industry circumstances that could have an impact upon his costs. The plan also provides for \$2,500 expended annually for utilities costs associated with the hog farm business, yet there is no distribution of this expense described in the projection by either month, season, or type of utility consumed. This same problem exists with respect to Kowalzyk's family living expense: it is not subcategorized nor divided month-to-month, and though it has not remained a constant calculation, no satisfactory explanation for changing numbers has been made.

The mere fact that the bare numbers in the income and expense projections provided in the plan demonstrate an apparent surplus to adequately fund the plan is not enough to meet the burden on feasibility. Even if the calculations were not close, and instead showed a generous surplus, it would not be sufficient. Feasibility must be compellingly demonstrated not by bald, broad speculations, but by reliable and fully reconcilable evidence, including historical and projected monthly cash flow analyses. In addition to that not being the case here, the Court also recognizes the inherent weakness of Kowalzyk's financial situation represented by a virtually empty DIP account even after so many months without servicing debt, bolstered by his nonspecific and unsupported explanation of those funds being applied to general barn facilities improvements. Finally, the uncertainty of B&W placing future hog batches with Kowalzyk throughout the life of the proposed plan is a meaningful feasibility consideration, and Kowalzyk's optimism on this point does not overcome the lack of guaranteed hogs.

This case has been pending many months, and a proposed plan has gone through multiple revisions (and repeated hearing continuances). Ample opportunity has been given the debtor to develop a confirmable plan, yet the burden to establish feasibility remains unfulfilled. Further delay would constitute prejudicial delay to Cenbank (and Option One). Therefore, both denial of confirmation and dismissal of the case are presently appropriate.

DISPOSITION

IT IS HEREBY ORDERED:

1. The amended Chapter 12 plan dated August 15, 2006, proposed by debtor Edward G. Kowalzyk, has not been demonstrated feasible;
2. Confirmation of the proposed Chapter 12 plan dated August 15, 2006 is DENIED;
2. Cenbank's pending motion to dismiss (docket 13) is GRANTED; and
3. This case is DISMISSED.

BY THE COURT:

DATED: October 24, 2006

/e/ Dennis D. O'Brien
United States Bankruptcy Judge