



SO ORDERED.

SIGNED this 14 day of January, 2005.


JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:)
)
BOB J. ANDERSON and)
MARGARITA ANDERSON,) **Case No. 04-40685-13**
)
Debtors.)
_____)

**MEMORANDUM AND ORDER DENYING WESTERN KANSAS
BANCSHARES' MOTION FOR SUMMARY JUDGMENT
AND DENYING DEBTORS' MOTION FOR SUMMARY JUDGMENT**

This matter is before the Court on Western Kansas Bancshares' Motion for Summary Judgment¹ and Debtors' Bob and Margarita Anderson's (Debtors) Cross-Motion for Summary Judgment.² Western Kansas Bankshares (the "Bank") contends that because it is now the owner of certain real and personal property formerly owned by Debtors, which property any Chapter 13 filed by these Debtors is dependent

¹Doc. 75.

²Doc. 91.

upon for generating the necessary farm income to sustain a plan, the Court should grant it relief from stay to exercise its ownership interest in the properties, and should dismiss the entire Chapter 13 case. Debtors contend that the Bank is not the owner of the property because there was never effective delivery of the conveyance instruments, and that it should be allowed to use Chapter 13 to restructure the payments codified in a prior confirmed Chapter 12 proceeding because of an unforeseen change in circumstances.

Both parties have submitted briefs on this matter, and the Court is prepared to rule. The Court has jurisdiction to decide this matter,³ and it is a core proceeding.⁴

I. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate if the moving party demonstrates that there is “no genuine issue as to any material fact” and that the moving party is “entitled to a judgment as a matter of law.”⁵ The rule provides that “the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.”⁶ The substantive law identifies which facts are material.⁷ A dispute over a material fact is genuine when the evidence is such that a reasonable jury could find for the nonmovant.⁸ “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude

³28 U.S.C. § 1334.

⁴28 U.S.C. § 157(b)(2).

⁵Fed. R. Civ. P. 56(c).

⁶*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original).

⁷*Id.* at 248.

⁸*Id.*

the entry of summary judgment.”⁹

The movant has the initial burden of showing the absence of a genuine issue of material fact.¹⁰ The movant may discharge its burden “by ‘showing’ – that is, pointing out to the . . . court – that there is an absence of evidence to support the nonmoving party’s case.”¹¹ The movant need not negate the nonmovant's claim.¹² Once the movant makes a properly supported motion, the nonmovant must do more than merely show there is some metaphysical doubt as to the material facts.¹³ The nonmovant must go beyond the pleadings and, by affidavits or depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is a genuine issue for trial.¹⁴ Rule 7056(e) requires the Court to enter summary judgment against a nonmovant who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party bears the burden of proof.¹⁵

II. FINDINGS OF FACT

In light of the above discussion, the Court makes the following findings of fact, and construes the facts in the light most favorable to the Andersons on the Bank’s Motion for Summary Judgment, and in the light most favorable to the Bank on the Andersons’ Motion for Summary Judgment. On February 10,

⁹ *Id.*

¹⁰ *Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1036 (10th Cir. 1993).

¹¹ *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

¹² *Id.* at 323.

¹³ *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

¹⁴ *Celotex*, 477 U.S. at 324.

¹⁵ *Id.* at 322.

1998, Bob J. Anderson and Margarita Anderson (the “Andersons”) filed their Chapter 12 bankruptcy petition.¹⁶ On February 25, 1998, Anderson Farms, a rather loose partnership,¹⁷ as described by Debtors when they later filed a Motion to Consolidate, filed its voluntary Chapter 12 bankruptcy petition.¹⁸ The two cases were consolidated in May, 1998 under the Andersons’ filing. On June 15, 1999, the Court orally confirmed Debtors’ Third Amended Plan, but for a variety of reasons noted in the record, the order of confirmation was not entered until May 24, 2000. That order incorporated the terms of a January 4, 1999 Stipulation as to Plan Treatment of Southwest Bank, N.A.¹⁹ It is the terms and effect of this Stipulation that give rise to the issue currently before the Court.

The Stipulation provides that certain real and personal property owned by the Andersons, in which Southwest Bank, N.A., now known as Western Kansas Bancshares, held a lien, would cross-collateralize the Bank’s secured claim, and essentially separates the real and personal property into two separate amortization schedules, with different interest rates. Payments on each schedule were first due beginning September 1, 1999, with annual payments thereafter. The Stipulation further acknowledges that

The Plan will provide that a deed on the real estate and a bill of sale on the personal property mortgaged to the bank will be placed in escrow. In the event a payment is not made by December 1, of any year beginning December 1, 1999, then the bank is entitled to the deed and bill of sale. No notice of default need be given.

¹⁶Case No. 98-40304.

¹⁷Order Granting Substantive Consolidation, Doc. 10 in Case No. 98-40445 (indicating the partnership was originally formed with Debtors’ parents, one of whom died, and the other of whom “withdrew from the partnership” several years before this filing).

¹⁸Case No. 98-40445.

¹⁹Doc. 336 (Case No. 98-40445), Order of Confirmation with attached Stipulation as Exhibit C.

For a variety of reasons, Debtors were late making the payments due September 1, 1999, September 1, 2000, September 1, 2001, September 1, 2002, and ultimately September 1, 2003. In other words, for four straight years, the Bank did not receive payment by the “drop dead” date of December 1, and for four straight years, the Bank did not “enforce” the drop dead provision.

The Bank did not request nor record the deed or bill of sale for the delinquencies in 1999, 2000, 2001 and 2002, nor did they ever suggest they had deemed the documents delivered from escrow, thus resulting in the Bank becoming the new owner of the property.²⁰ Instead, the Bank either negotiated some alternative arrangements with Debtors, or otherwise decided not to enforce the drop dead provision contained in the Stipulation. For the 2002 payments, Debtors even filed a motion to modify their Chapter 12 plan, to extend the payment dates, citing a drought as the basis for the delinquent payments, to which the Bank ultimately agreed, and the Motion was granted.

As a result of the late payment due September 1, 2003, however, which Debtors claim was not made, at least in part, due to an unprecedented drought, the Bank filed a Motion to Dismiss or Enforce Payments and/or Drop Dead on October 16, 2003.²¹ That Motion was later withdrawn, and Debtors received their discharge on February 2, 2004. The December 1, 2003 drop dead date passed without the

²⁰There is some debate whether Debtors executed the instruments soon after confirmation, and the Bank or its counsel lost them, or whether Debtors never executed the instruments until December 3, 2003. As the Court need not decide this issue to enter this order, the Court does not decide the issue, other than to note that on December 3, 2003, Debtors did execute and deliver the instruments to the Bank’s lawyer.

²¹Doc. 482 (Case No. 98-40445). The basis for this motion was that Debtors had failed to execute certain documents required by the Plan, which this Court assumes was the deed and bill of sale. Those instruments were received December 3, 2003, which could well explain why the Bank withdrew this motion December 30, 2003.

Andersons making the payments required by the terms of the Stipulation. At or before that date (possibly as early as May 2003), however, the Bank and Debtors were having conversations about the 2002 delinquency and expected 2003 delinquency, and how to resolve it.

The Andersons contend that the Bank represented that it would modify the payment schedule, as it had tacitly done or otherwise agreed to do for 1999-2002 payments, if they placed the deed and bill of sale in escrow for any future delinquencies (as required by the Plan/Stipulation), paid the 2002 delinquent payments, and provided cash flow information to show how they were going to be able to make the 2003 and subsequent payments. Conversely, the Bank's President's affidavit suggests that in December 2003, he merely promised to discuss the possibility of modification with the Bank's board of directors, conditioned on Debtors signing the instruments and providing cash flow and income tax information.

The Bank admits accepting \$60,000 in payments (apparently for the payments originally due September 1, 2002) made after the May 2003 conversation.²² There is no claim that after the meeting in December 2003, the Bank ever notified the Debtors they had not received the promised cash flow (and tax return) information (the former of which Debtor and his son both swear, under oath, was mailed in January 2004), or ever set a deadline for receiving it, or ever sent a letter to Debtor memorializing what agreements had been made at the December 2003 meeting. The Bank's President admits he never took the restructuring issue to the Board, because he claims Debtors never provided the requested information to permit a review. The Bank never sent a letter to Debtors notifying them that the Bank was the new owner of the real and personal property. It never recorded the instruments, or notified the county taxing

²²Debtors made the following payments from May 2003 through November 14, 2003: \$20,000, \$8,848.18, \$25,814.52 and \$6,131.68, totaling \$60,794.38.

authorities of the change of ownership, and thus for tax purposes, Debtors remain the title owners on county real estate records. Furthermore, although Debtors had previously conveyed real estate back to the Bank, which conveyance was noted as a “credit” on the Bank’s accounting documents, at no time has the Bank treated, on its own books, the escrowed deed and bill of sale as a credit against the amount owed by Debtors.

In December 3, 2003, at the request of the Bank and as an apparent precondition to the Bank agreeing to see if something could be worked out, the Andersons executed a deed to the real estate and a bill of sale for the farm machinery and equipment to the Bank, as required by the terms of the original Stipulation and Confirmed Plan. Debtors signed the instruments at the office of the Bank’s lawyer on December 3, 2003, at which time the parties all engaged in discussions about how the delinquency could be resolved.

The Andersons claim that they intended the deed and bill of sale to be held in escrow, believing that the Bank was going to restructure the September 2003 payment that had become delinquent, and only if the Bank declined to restructure, after submitting the matter to the Board of Directors in good faith, would the instruments be taken out of escrow and delivered to the Bank. The first that Debtors heard that the Bank claimed to be the owner of the property retroactive to December 2003, was when the Bank filed its Motion for Summary Judgment papers herein. It is unknown where the deed and bill of sale presently are held.

On March 29, 2004, the Andersons filed the instant Chapter 13 bankruptcy case. In their April 20, 2004 bankruptcy schedules, they scheduled as their assets both the real estate and personal property that were contained in the deed and bill of sale handed to the Bank’s lawyer on December 3, 2003.

Finally, Debtors contend they should be permitted to modify the terms of their confirmed Chapter 12 with a new Chapter 13 because there was an unprecedented drought between the spring of 2001 and the spring 2003, causing them to lose government pasture land and causing a significant crop production. The Bank does not controvert that the drought was unprecedented.²³ Second, Debtors contend Bob Anderson suffered from depression at least in part precipitated by the poor farming conditions, causing him to be medicated and hospitalized, which in turn caused him to be unable to plant the crops or do whatever else was necessary to fund the plan. The Bank does not specifically controvert this fact with contrary evidence—that he had had prior depression episodes, had previously been hospitalized, or that he wasn't hospitalized or medicated this time, instead it merely notes that because this basis has never before been asserted by Debtors, that it is not believable.

Additional facts will be described below, when necessary.

III. CONCLUSIONS OF LAW

A. Material issue of fact exists on whether Debtors or Bank owned real and personal property on date of filing Chapter 13.

In the Andersons' Chapter 12 case, the confirmed plan, which incorporated the Stipulation entered into between the Andersons and the Bank, clearly required the Andersons to tender a deed to the real estate and a bill of sale to the personal property to be held in escrow for the benefit of the Bank in the event the Andersons failed to make the required annual payment within the three month's grace period, which ended December 1 of each year. The Bank's right to receive the deed and the bill of sale was absolute

²³See Andersons' Fact Numbered 13 (Doc. 90), and response thereto (Doc. 107), which is "uncontroverted."

upon default by the Andersons.²⁴ It did not even require the Bank to serve a notice of default upon the Andersons, or seek relief from the Court. Accordingly, unless something occurred that changed this clear provision of the Plan, the Bank could take delivery of the deed out of escrow on December 2 of any repayment year, if Debtors failed to make the payment. That is because upon confirmation by the Court, the terms of the plan were binding upon both the Andersons and the Bank.²⁵

The parties do not dispute that the Andersons failed to make their 2003 payment by December 1, 2003, as required by the terms of the Stipulation. The Bank even notified the Debtors of its apparent future intent to enforce the Plan provisions (although notice was not required) when it filed a Motion to Dismiss or Enforce Payments and/or Drop Dead in October 2003. Similarly, the parties do not dispute that prior to the Andersons filing the instant bankruptcy petition on March 29, 2004, the Bank requested the deed and bill of sale be tendered to the Bank's counsel to hold, under the terms of the Stipulation for the missed 2003 payment, and it was in fact so tendered on December 3, 2003. Therefore, unless the terms of the Stipulation were modified by the parties, title to the land and the personal property passed to the Bank

²⁴Such a plan provision is obviously potentially draconian, if a debtor were to pay, for example, 19 of 20 required annual payments, and for non-receipt of the 20th, after substantial equity was built up over 20 years, the creditor could deem itself the owner, with no right of redemption available to the debtor. This is especially true in states such as Kansas, where such debtor would be entitled to a one-year period of redemption pursuant to K.S.A. 60-2414(a), to attempt to obtain refinancing or otherwise buy back the property. Conversely, it is certainly possible that by providing a three month grace period, the parties negotiated for a *de facto* three month redemption period.

²⁵*See* 11 U.S.C. § 1227(a) (stating, *inter alia*, that the provisions of a confirmed plan bind the debtor and each creditor). *See also In re Adams*, 218 B.R. 597, 600 (Bankr. D. Kan. 1998) (holding that “[t]he terms of a confirmed plan are binding on the parties and should be given res judicata effect. The terms of a confirmed plan usually represent the results of negotiations between the debtor and its creditors, and the parties should be able to rely on the finality of those terms.”)

when it received delivery²⁶ of the deed and the bill of sale after the drop dead date, the only condition precedent to receiving those instruments contained in the Plan. Thus one major issue before the Court is whether the terms of the Plan and Stipulation had been modified by the parties.

The Court finds that there are material issues of disputed fact that make granting summary judgment improper on the issue of whether the Plan and Stipulation had been modified by an agreement of the parties. The affidavit by Bob Anderson reflects that the Andersons did not believe or understand that the Bank was obtaining ownership of the property at the time the Andersons signed the deed and the bill of sale on December 3, 2003, as a direct result of their conversations with the Bank's President that very day. Although the relevant Kansas statute is clear that the deed did not have to be recorded in order to be valid between the parties thereto,²⁷ Kansas law is likewise clear that if the grantor does not intend to unconditionally deliver a deed—i.e. to have conveyance become effective upon the date of transfer—then the deed is not effective.²⁸ No one has testified that the Bank ever exercised control over the subject property, by paying taxes, or taking steps to evict the debtors, or seeking rent from the debtors, or recording their interest so third parties might know of their ownership, or crediting Debtors with the value

²⁶*Cain v. Robinson*, 20 Kan. 456, 460 (1878) (holding delivery is essential to make a deed effective, and “[a] deed not delivered is the same as no deed.”). *Agrelius v. Mohesky*, 208 Kan. 790, 795 (1972) (holding delivery of a deed is largely a matter of the grantor's intention, as evidenced by all the facts and circumstances surrounding the entire transaction, and where grantor by words or acts manifests a present intent to divest himself of title and to vest it in another, it is sufficient to constitute a delivery. The date on the deed is less important than the date when the grantor had the intent to effectuate delivery, and vest all right, title and interest in the property to the grantee).

²⁷K.S.A. 58-2223.

²⁸*Matter of Marriage of Wade*, 20 Kan. App.2d 159, 164 (Kan. App. 1994) (holding that cardinal rule in interpreting the effect of a deed is to ascertain the intent of the grantor).

of the property on their ledger sheet.

In fact, the Bank, according to Debtors, did the exact opposite and let Debtors believe they still owned the property, and the Bank was continuing to work with them. The most obvious example of this is the Bank's commitment, post-Chapter 13 filing, and months after it now contends it became the owner of the property, that if Debtors could obtain crop financing, the Bank would subordinate its lien on any crops to the crop input creditor.²⁹ Why would the Bank even allow Debtor to plant crops on the Bank's own land? Furthermore, the Debtors, after filing their Chapter 13 petition, did in fact obtain crop financing from the Elkhart Coop, and did move this Court for permission to obtain that credit. Interestingly enough, the Bank did not object to the Motion, and it was granted.

The Bank's silence, even after proper notification of the Motion, is not the action of an entity that is the true owner of the property on which the crops to be financed were to be input. Instead, the Bank's silence supports Debtors' position that not only the Debtors themselves treated the deed and bill of sale as security, but so did the Bank.³⁰ Since official "delivery" of a deed, for the purpose of immediately

²⁹In its response to Debtors' Brief in Opposition to Western Bancshares' Motion for Summary Judgment, specifically Debtors' Fact Numbered 22 (last sentence of which states "Debtor was told that if they obtained crop financing, the Bank would subordinate any lien it had on crops to the input creditor"), Western Bancshares disputes a portion of the matters within that paragraph, but wholly ignores this sentence. The Court, therefore, construes this failure to deny the truth of this fact as an admission. *See* D. Kan. Rule 56.1(a) ("All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party.") and D. Kan. LBR 7056.1(b). The Bank's failure to object to the Motion for Court approval of this input financing further corroborates Debtors' version of the facts, creating a genuine issue of material fact.

³⁰*Fuqua v. Hanson*, 222 Kan. 653, 655 (1977) (holding that a deed given therein to secure repayment of a debt was in actuality an equitable mortgage, and that the property should be foreclosed and the person owing the debt be given a right of redemption, stating that "[i]f the purpose and intention

transferring title, is largely a matter of the grantor's intention, as evidenced by all the facts and circumstances surrounding the entire transaction, Debtors' subjective belief is, in fact, relevant to this Court's inquiry.³¹

Next, the Andersons argue that they changed their position dramatically as a result of the Bank's commitment to at least consider, in good faith, Debtors' proposal. The Debtors indicate that based on the Bank's general willingness to work with Debtors, which willingness the Bank does not deny, Debtors allowed their Chapter 12 case to proceed to a discharge, rather than to dismiss it with a later refiling. Debtors also testify, by affidavit, that the Bank required them to cure the 2002 arrearages before the Bank would consider any workout for the 2003 payment—and option clearly within their rights. Thus, rather than demanding immediate delivery of the deed/bill of sale, or simply notifying Debtors that it now deemed itself the owner (in the event the Bank did in fact already have those instruments, as Debtor Bob Anderson swears), the Bank accepted over \$60,000 in payments, which Debtors testified they paid in order to get the Bank's agreement to modify the 2003 payments.

Even the Bank President admits that on December 3, 2003, the date the Bank requested Debtors execute the instruments, purportedly so they could be kept in escrow while the Bank reviewed their

behind a transaction is to secure a debt, equity will consider the substance of the transaction and give effect to that purpose and intention.”).

³¹*Agrelius v. Mohesky*, 208 Kan. at 795-96; *Berger v. Bierschbach*, 201 Kan. 740, 743 (1968) (holding that where circumstances disclose that a deed was intended merely to serve as security for a debt, principles of equity come into play and must be applied, and debtor who executed conveyance is entitled to reconveyance upon payment of debt, noting parol evidence is admissible on that issue, and holding that debtor entitled to redemption right); *Stambaugh v. Silverheels*, 188 Kan. 124, 127 (1961) (holding that although written instruments are generally construed according to terms, since consideration for a deed may always be shown, if evidence develops that there was a debt and the deed was given to secure it, the deed will be construed as a mortgage).

proposal for repaying the loan, he agreed to “take their proposal to the Board of Directors.” It is thus difficult to understand how the Bank can now argue that on that same date, it became the title owner to the property, since it appears no one thought that, at least on that date, Debtors intended to deliver title, or the Bank intended to accept it.

Accordingly, the Andersons’ version of the facts is corroborated by the following evidence. First, at no time between May 2003, when the 2002 payment was six months past due, and when the 2002 payments were ultimately made in the spring, summer and fall of 2003, did the Bank deem itself insecure as to the delinquent 2002 payments and inform Debtors that the Bank deemed itself the owner of the property. Instead, it received and kept almost \$60,000 in payments.

Second, at no time did the Bank commence payment of real estate taxes on the subject real property, which would have shown that it was treating itself as the owner of the property, or even apparently notify the taxing authorities of the title change.³² Third, at no time did the Bank exercise control over the real or personal property, including evicting Debtors from the premises or taking possession of or trying to sell the personal property. Fourth, although Debtors had previously conveyed real estate back to the Bank, which conveyance was noted as a “credit” on the Bank’s accounting documents, at no time has the Bank treated, on its own books, the escrowed deed and bill of sale as a credit against the amount due by Debtors. Fifth, on October 16, 2003, before the December 3, 2003 meeting with the Bank, the Bank filed a Motion to Enforce the payments that had become due September 1, 2003. After the meeting with the Bank, the Bank withdrew that Motion to Enforce, leaving the Andersons with the apparent

³²This is corroborated by Exhibit E, Morton County Treasurer Tax statement, attached to Debtors’ response (Doc. 111), showing that the 2004 Tax Statement is still in the Andersons’ name.

impression that the Bank was in fact working on some deal with Debtors.³³

Sixth, although the Bank now argues in its pleadings that it became the title owner of the property in December 2003, even the Bank's President has testified, by affidavit, that on December 3, 2003, he agreed to take the Debtors' proposal, with their cash flow information, to his Board, for review as to "how they could finance their crops and make restructuring work." The Bank President now also alleges that he requested Debtors' 2002 and 2003 tax returns at that meeting. Although the Debtors deny this, even if it is true, the 2003 tax returns could not have even been filed until January 2003, at the earliest.³⁴ This issue of fact goes to the question of whether the Bank agreed to modify the Stipulation and if so, whether the Bank failed to act in good faith when it did not complete the review process with its Board.

Seventh, as noted above, the Bank indicated after the Chapter 13 had been filed—and many months after it now claims it became the owner of the property—that if Debtors obtained crop financing, the Bank would subordinate any lien it had on the crops to the crop input creditor. This is an odd position for the owner of the property on which the crops are to be planted to take, as it would appear that its liens on the property would have merged into its receipt of the conveyance instruments. Debtor in fact procured crop financing from Elkhart Coop, and the Bank never filed an objection, which is additional evidence that even the Bank did not consider itself the owner of the property, despite its protestations to the contrary in

³³The Notice to Enforce was withdrawn December 30, 2003 (Doc. 494).

³⁴Most individuals must await receipt of year end information, such as dividend and interest statements, canceled checks, W-2 and other income statements, expense and withholding information, in order to prepare final tax returns. Assuming for a moment that the Bank did require 2003 tax return information in order to "work with the Debtors," it is difficult for this Court to understand how the Bank could have expected to receive Debtors' 2003 return by the date in December, 2003 when it now declares it became the owner of the subject real property.

its papers, months after the Chapter 13 was filed.³⁵

All these issues need to be resolved after a trial.

B. Can Debtors modify a confirmed Chapter 12 plan in a new Chapter 13 plan?

If this Court finds, after presentation of evidence, that the confirmed Plan/Stipulation was in fact modified by the parties such that the Bank is not the owner of the property—because the deed and bill of sale were not “delivered” to the Bank prior to the filing of this Chapter 13 proceeding, the next issue is whether Debtors can now restructure the Bank’s debt in this new Chapter 13 proceeding. Debtors argue that they can if they show an extraordinary and unforeseeable change in circumstances occurred between the time the Chapter 12 was negotiated and confirmed and the time the Chapter 13 petition was filed, and it impaired the Debtors’ ability to perform under the confirmed plan. Since the Bank has not controverted the drought was “unprecedented,” which is defined as “having no precedent or example,” and “unusual and extraordinary; affording no reasonable warning or expectation of recurrence,”³⁶ Debtor have already shown that the failure to perform was as a result of at least one unforeseen change in circumstance.³⁷

C. Issues of material fact for trial

The Court believes there is a genuine issue of material fact on at least the following factual issues:

1. Whether the original confirmed Chapter 12 plan, and Stipulation incorporated therein, have been effectively modified by subsequent promises or actions of the Bank;

³⁵Doc. 72 is the order allowing that financing.

³⁶Black’s Law Dictionary (5th ed. 1979).

³⁷A short-term drought by a dry land farmer would likely not be sufficient, as it is likely such drought could be anticipated, and planned for, in any debt repayment plan.

2. Whether the deed and bill of sale were effectively “delivered” prior to Debtors filing this Chapter 13, as that term is defined under Kansas property law.³⁸ In other words, did the Debtors, on December 3, 2003, intend to unconditionally divest themselves of all right, title and interest in the subject property on that date, and transfer such interest to the Bank;
3. Whether the Bank acted in good faith in deeming itself, apparently in March 2004, the “owner” of the subject property retroactive to December 2003;
4. Whether the Bank promised to restructure the debt, and whether Debtors changed their position (either by making payments or not dismissing, before discharge, their Chapter 12) as a result of that promise;
5. Whether the Bank acted in good faith when it accepted \$60,000 in payments if it never intended to work with Debtors to restructure the 2003 payment, and whether, even if the Court deems the Bank the title owner of the property, equity would require the Bank to repay the \$60,000 in payments accepted;
6. Whether Debtors in fact timely provided cash flow information to the Bank;
7. Whether the Bank made an effort after the December 3, 2003 meeting to inquire about the purportedly missing documents—cash flow information and tax return information;

³⁸Debtors contend the Bank’s lawyer held the deed and bill of sale, not yet delivering them to the Bank prior to the filing this Chapter 13. The Bank disputed this, not by providing any evidence to controvert it, but by stating that Debtors’ evidence was insufficient, as hearsay. The Court recognizes that the Bank’s prior lawyer may be a witness to the events of the December 3, 2003 meeting, but notes that the Bank has now retained different counsel to prosecute this Motion for Summary Judgment. The Court will hopefully receive evidence at trial so it can make a finding on this factual issue, to the extent it is relevant in light of all other evidence.

8. Whether the Bank is estopped from enforcing the original Stipulation, encompassed within the Plan; and
9. If Debtors remain the owners of the subject real and personal property, whether all the circumstances surrounding the Debtors' failure to make the payments required by the confirmed Chapter 12 plan were sufficiently unforeseeable to allow Debtors to now modify the terms of that Chapter 12 in a new Chapter 13 filing.

IV. CONCLUSION

The Court finds that because there are numerous genuine issues of material fact that preclude entry of summary judgment on behalf of either the Debtors or the Bank, their respective summary judgment motions must be, and are, denied. The Court wishes to stress that the findings of fact and conclusions of law contained here are made only for summary judgment purposes, and should not be construed by either party as the court's final findings and conclusions. Those will await presentation of evidence by the parties.

In addition, the Court will defer ruling on the Bank's Motion to Dismiss until after the trial on the disputed issues outlined above. That trial remains scheduled for **February 3, 2005 at 9:00 a.m.**, pursuant to prior notice to the parties.

IT IS SO ORDERED.

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