In the United States Bankruptcy Court

for the Northern District of Iowa

FORT DODGE CREAMERY COMPANY	Bankruptcy No. X88-01550F
Debtor(s).	Chapter 7

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER RE: TRUSTEE'S MOTION TO ABANDON REAL PROPERTY

The City of Fort Dodge, Iowa objects to the trustee's abandonment of certain real property of the estate. Hearing was held on the report of abandonment and objection thereto in Fort Dodge, Iowa on May 11, 1989.

The court now issues the following findings of fact and conclusions of law pursuant to Bankr. R. 7052. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

FINDINGS OF FACT

On February 8, 1989, an order for relief under chapter 7 entered against Fort Dodge Creamery Company (CREAMERY) as the result of an involuntary petition filed October 11, 1988.

The debtor filed schedules of property and listed:

> Lots Two (2), Three (3), Four (4) and Five (5) all in Block Eight (8), in the original town of Fort Dodge, Iowa.

James H. Cossitt was appointed case trustee. On March 29, 1989, the trustee filed a report abandoning the previously described property. The trustee stated in his report that:

> The Trustee is satisfied that the above-described property is burdensome or of inconsequential value to the estate because:
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> Property was appraised at $218,000.00 on November 7, 1988 and at $119,000.00 on November 12, 1987. The property is encumbered by valid mortgages securing the debt of about $700,000.00 in mortgages on schedule A-2 and evidence of the perfection of those liens has been provided to and reviewed by the Trustee.

The U. S. Trustee certified that he has reviewed the abandonment and agrees with the trustee's proposed action.

Having heard of the proposed abandonment, the City of Fort Dodge (CITY) on March 28, 1989 filed an objection on the basis that the building's condition was in violation of Fort Dodge Municipal Code § § 302.5, .7 and .8 (1985 Uniform Code for the Abatement of Dangerous Buildings). The city argues

that the building should not be abandoned until the dangerous condition has been abated by the trustee. The trustee resists this objection and is supported by the U.S. Trustee.

The real estate includes a three-story brick building which was used by debtor in its creamery operation. In the early spring of 1988, the city inspection department became aware through public complaints of bricks falling from the building's second story, north side face.

The city inspection department barricaded the sidewalk adjacent to the side of the building where the problem existed, and also closed the sidewalk for the entire block on that side of the street. Dennis Jordison, the city building inspector, visited with Robert Loomis, the Creamery's general manager, with regard to correcting the problem, and then in November, 1988, issued to debtor a municipal infraction citation for unlawfully maintaining a dangerous building within the meaning of §§ 302.5, .7 and .8 of the Fort Dodge Municipal Code.

Loomis says he first noticed the problem of flakes of brick falling onto the sidewalk about eight or nine months prior to the hearing. A month later, upon closer examination, Loomis could see a bulge in the brick. It was his opinion this was caused because of moisture created on the inside of the building due to the creamery operation.

Creamery employees used sledge hammers to remove the loose brick. Loomis testified that by striking the building face with sledge hammers, all the bricks that were loose came down. These bricks were removed by the company in the late fall of 1988. It was Loomis' lay opinion that the remaining bricks were stable. It was further Loomis' opinion that the problem of loose brick occurred only on the second floor. The company had intended to replace the removed brick but its plans were interrupted by the filing of the involuntary petition.

It is Jordison's opinion that the problem of loose brick on the building's north face is caused by moisture and age. He says that two types of brick make up the construction of the building, the interior structural brick and the face brick. The face brick is connected to the interior brick by metal "ties." Normally, the face brick is separated from the interior brick, although connected by the ties, by approximately one inch of space. When he inspected the building from the roof, after the removal of some of the bricks by the corporation, Jordison was able to see brick ties that were totally rusted and five-inch gaps between the interior brick and face brick.

The city believes that bricks will continue to loosen and this poses a continuing danger to the public safety. A continued cause of falling brick in Jordison's opinion is the buildup of moisture behind the face brick, the transmission of that moisture through the face brick and the evaporation of the moisture, causing the bricks to deteriorate.

On September 7, 1988, Jordison sent Creamery a "notice of unsafe building." The problem identified by the city in this notice and the problem required to be corrected was as follows: "Face brick in the 2nd floor area of the north wall is loose and must be removed and repaired or replaced."

There is no danger to the public from the lack of replacement of the brick. However, the city indicates that in order for the building to be safe to the public, the remaining brick on the second and third floors must be removed.

Fort Dodge real estate broker, appraiser and property manager Cyril Vojak was retained by the trustee to take actions to protect the property during the course of the bankruptcy case. He testified at the abandonment hearing. It was Vojak's opinion that the building could be sold for a price between

$50,000 and $100,000. He said two appraisals showing the property's value at $119,000 or $218,000 are too high.

Vojak obtained repair estimates for the trustee. One quote was in the amount of $4,600 for a partial removal of the brick, not including the first floor. The area of removal is on the second floor where the problem is pinpointed. The second quote in the amount of $6,300.was for the removal of an area of brick measuring 12' x 35'. The higher estimate includes brick removal from the third floor which the contractor believes is necessary to insure safety of his workers.

Vojak and Loomis each testified that they saw no imminent danger from the present condition. The court, however, questions the qualifications of either Vojak or Loomis to come to such a conclusion. Vojak testified that the repair of the brick face would increase the value to any potential purchaser of the building because any such purchaser would have to do the repairs and thus repairs by the trustee would save the purchaser that expense. Vojak concluded that it was debatable as to whether the repair of the brick face would improve prospects for sale.

No witness called in the proceeding had knowledge of any persons being injured by falling brick or of any property being damaged by it. Jordison testified that in his view more bricks could fall at any time.

On February 27, 1989, Jordison received a report of Ray Schlotfeldt, a city engineer, with regard to the condition of the north wall. The letter to Jordison stated:

> After viewing the north wall of the Fort Dodge Creamery Building, located at the corner of 3rd Street N. and lst Ave. N., it is my professional opinion that the face brick on said wall are in an unstable condition and that they should be removed.
>
> The limits of removal can not be determined exactly until removal has been completed, approximately to the top of the first floor windows. At this point, another inspection could be made to determine the stability of the remainder of the face brick.
>
> The present condition of the face brick on the north wall does create a hazard to pedestrian traffic. Therefore, for the safety of the pedestrians, the sidewalk should remain barricaded.

This report was issued by the engineer after the removal of bricks by Fort Dodge Creamery in the fall of 1988.

The trustee has approximately $22,000 in estate funds, but he represents to the court that there may be claims against all or part of these funds by secured creditors. The Central States Southeast and Southwest Area Pension Fund and Health & Welfare Fund have a mortgage against the real property. These creditors also apparently have security interests in personal property, but there is no evidence that the total value of the collateral exceeds the debt.

The real estate which is the subject of this report is of inconsequential value and is burdensome to the estate.

DISCUSSION

City seeks to prevent the abandonment of this property until the dangerous condition which it perceives to exist there is abated. The city argues that based upon the Supreme Court decision Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494, 106 S.Ct. 755, 88 L.Ed.2d 859 (1986) a trustee may not abandon property "in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identifiable hazards." Id. at 762.

The statutes or ordinances relied upon by the city are Municipal Code § § 302.52 .7 and .8 (1985 Uniform Code for the Abatement of Dangerous Buildings). These sections of the Municipal Code are adopted from the "Uniform Code for the Abatement of Dangerous Buildings", 1985 edition.

Section 302 and the pertinent subsections state as follows:

> For purpose of this code, any building or structure which has any or all of the conditions or defects hereinafter described shall be deemed to be a dangerous building, provided that such conditions or defects exist to the extent that the life, health, property or safety of the public or its occupants are endangered:
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> * * *
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> 5. Whenever any portion or member or appurtenance thereof is likely to fail, or to become detached or dislodged, or to collapse and thereby injure a person or damage property.
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> * * *
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> 7. Whenever any portion thereof has wracked, warped, buckled or settled to such an extent that walls or other structural portions have materially less resistance to winds or earthquakes than is required in a case of similar new construction.
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> 8. Whenever the building or structure, or any portion thereof, because of (i) dilapidation, deterioration or decay; (ii) faulty construction; (iii) the removal, movement or instability of any portion of the ground necessary for the purpose of supporting such building; (iv) the deterioration, decay or inadequacy of its foundation; or (v) any other cause, is likely to partially or completely collapse.

Section 401(b)(4) of the Municipal Code permits the city to notify owners of dangerous buildings that "if any required repair or demolition work (without vacation also being required) is not commenced within the time specified, the building official (i) will order the building vacated and posted to prevent further occupancy until the work is completed, and (ii) may proceed to cause the work to be done and charge the costs thereof against the property or its owner." No such notice was given to Fort Dodge Creamery.

However, in the notice of September 7, 1988, the debtor was notified that it could "request that the structure be condemned, demolished by the city and the cost assessed against the property by filing with the city a financial affidavit demonstrating financial inability to comply within thirty (30) days hereof." No such request was filed by Creamery.

According to the evidence, it is within the city's authority to correct the dangerous condition and assess the costs of repair against the property.

The case before the court does not present a catastrophic dilemma.

The court finds that the condition of the north face brick presents imminent harm to the public. The court further finds that the Fort Dodge Municipal Code is a local law, reasonably designed to protect the public health or safety from an identifiable hazard which includes the crumbling brick face of Creamery's building. The court believes that the condition should be repaired as soon as possible.

Fortunately, this is not a situation where the cost to repair the dangerous condition far exceeds the value of the real property where the hazard exists. The problem presented to this court is to determine who will be inconvenienced by arranging and initially paying for the repairs which would ultimately be assessed against the property.

The trustee has some funds but at this time, he cannot determine whether they are necessary to pay secured creditors making claims against them. If the trustee had unencumbered funds and if abandonment were denied, the trustee would repair the building, and as he has, he would request this court to assess the repair costs against the property by surcharging the property in favor of the trustee. See 11 U.S.C. § 506(c).

Such a sequence of events, however, would require the trustee to expend funds and await the sale of the property by the secured creditor or else to repair and to recoup his expenses by selling the property, collecting upon his lien and transmit the balance of the sales price to the secured creditor. This would result not only in delay in closing this case and in additional administrative expense, but also could result in creation of a tax liability to the trustee, depending upon the tax basis in the building and the sale price.

On the other hand, if the court denied abandonment and the trustee did nothing due to lack of funds, the city could do the repairs, and request that its repair cost be assessed against the building as a prior lien. The city could pursue such a remedy under Iowa Code Chapter 657A or § 401(b)(4) of the Uniform Code for the Abatement of Dangerous Buildings. If abandonment is allowed, the city could take the same action.

Regardless of whether the trustee repairs or the city repairs, there will be attendant administrative inconvenience in recouping the expense. In either event, however, the cost of repairs even at their highest estimate are well below the estimated value of the property even at the lowest appraised value.

The question before the court is not whether the building should be repaired, but who should bear the administrative inconvenience of repair and recoupment. The court is mindful of Midlantic National Bank v. New Jersey Department of Environmental Protection decided by the Supreme Court. However, based on the foregoing facts and the alternatives, the court believes that the city is better situated to bear the initial cost and the administrative inconvenience and delay.

In the present case, it is questionable whether the trustee has sufficient funds to correct the problem.

Although the court has agreed with City that there is an imminent danger of further bricks falling, the City, which has harbored this belief for some time, has taken no action to correct the problem. This is so despite the fact that this case has been pending before this court since February 8, 1989 and this condition has existed in some form throughout the subsequent period.

Abandonment will not aggravate the dangerous condition. This is not a situation where the removal of the property from the custody and control of the trustee would give the public better access to the

dangerous condition or allow unauthorized persons to exacerbate the condition. Further, some prevention of the danger is already in the purview of the City--that is the barricading and closing of the adjacent sidewalk. This case does not involve the imminent release into the environment of a toxic chemical.

The City would have the court condition the abandonment on the prior complete repair of the property by the trustee. Midlantic requires that before permitting the abandonment, the bankruptcy court must formulate the conditions which will adequately protect the public safety. It seems that this does not necessarily require complete repair of the condition. It may be that such measures must only prevent imminent danger. Such measures have already been taken by the debtor in removing the loosest brick prior to bankruptcy, and by the City in closing off the street and sidewalk adjacent to the site.

The court believes that the abandonment should be permitted in this case. The stay in bankruptcy does not prevent City from taking what it views to be the most appropriate steps under either local ordinance or under Iowa Code Chapter 657A to do the final repairs. 11 U.S.C. 362(b)(4).

The court concludes that sufficient precautionary measures have already been taken to protect the public safety in order that the real estate might be abandoned by the trustee under 11 U.S.C. § 554.

ORDER

IT IS ORDERED that the trustee may abandon the real estate hereinafter described:

> Lots Two (2), Three (3), Four (4) and Five (5) all in Block Eight (8), in the original town of Fort Dodge, Iowa.

Judgment shall enter accordingly.

SO ORDERED ON THIS 2nd DAY OF JUNE, 1989.

William L. Edmonds
Chief Bankruptcy Judge