

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

BYRON D. SMEBY and
LINDA J. SMEBY

Debtor(s).

Bankruptcy No. X88-00159M

Chapter 11
Contested No. 8559

ORDER RE: MOTION FOR MODIFICATION OF AUTOMATIC STAY OR MOTION FOR ADEQUATE PROTECTION and ORDER RE MOTION TO DISMISS

Before the court is a motion for modification of the automatic stay filed by Farm Credit Bank of Omaha (FCBO) (formerly Federal Land Bank of Omaha) (Contested matter 8559). Also before the court is FCBO's motion to dismiss this chapter 11 case which is joined in by the U. S. Trustee. Both motions are resisted by the debtors. Trial of these contested matter proceedings was scheduled for June 12, 1990. The parties elected instead to submit the matter by stipulated facts and written argument.

STIPULATED FACTS

Based upon the stipulation of the parties filed July 3, 1990, the court finds the following facts:

1. On January 5, 1982, Linda J. Smeby and Byron D. Smeby executed a promissory note and mortgage as part of a loan transaction with The Federal Land Bank of Omaha.¹ * * *

1 FCBO and Smebys stipulated that copies of the note and mortgage were attached to the stipulation as exhibits A and B. It was the intent of the parties to have the documents incorporated into the findings of fact. It was also noted in the stipulation that copies of the documents were attached to the proof of claim of FCBO. The parties omitted attaching the note and mortgage to the stipulation but submitted these documents separately at the request of the court. These documents will be considered as evidence in these contested matter proceedings.

2. On December 30, 1986, The Federal Land Bank of Omaha filed a petition in equity for foreclosure of the above-described mortgage and collection of the amounts due on the promissory note. That petition was filed in the Iowa District Court for Hancock County and was designated Equity No. 15,773. A decree in foreclosure was entered pursuant to that petition on November 10, 1987.² * * *

2 The parties stipulated that a copy of the decree was attached to the motion for modification of the stay as exhibit A. The court will consider it as evidence in these contested matter proceedings.

3. The sheriff's sale for enforcement of the special execution issued pursuant to the decree was scheduled for February 3, 1988. This bankruptcy proceeding was filed on February 1, 1988 and therefore the sale and other proceedings in the foreclosure action have been stayed.

4. As stated in the statement of affairs and schedules filed in this proceeding, a receiver was appointed in the foreclosure proceeding prior to the entry of the final decree and that receiver collected rent for the 1987 crop year from the debtors.

5. FCBO filed a prior motion for modification of the automatic stay seeking adequate protection and that matter was

resolved by a stipulation for adequate protection.-which was filed with the Court on April 28, 1988 and approved by order entered June 2, 1988. Pursuant to that stipulation, the debtors paid \$16,940 in two installments.

6. The debtors do not have any equity in the real estate which is the subject of this proceeding. FCBO has filed a claim in the amount of \$511,089.22 consisting of \$364,650 principal and \$146,439.22 interest. No objection to that claim has been filed. Pursuant to the above-described stipulation, the debtors have paid as adequate protection to FCBO \$16,940 as required by the stipulation. No further payments of adequate protection have been made or offered.

7. The debtors purchased life insurance policies prior to institution of this proceeding and have claimed the cash value of those policies as exempt. The FCBO interposed a number of objections to debtors' claim of exemptions and substantial litigation regarding this exemption took place in this Court. The various docket entries and the order of the Court with regard to the objection to exemptions may be noticed by the Court to the extent necessary for determination of the motions which are the subject of this stipulation.

8. The debtors have filed a plan of reorganization in this proceeding which plan was amended and subsequently objected to FCBO. Confirmation was denied by order dated April 25, 1990. The Court is asked to take notice of the various filing dates for plans, disclosure statements and amendments to the extent necessary to decide the motions which are the subject of this stipulation. The Court is also asked to take notice of the substantial amount of time which expired between the filing of FCBO's objection to exemptions and a ruling on that objection.

9. This Court has previously determined that the real estate which is the subject of the FCBO mortgage had a value of \$250,400. The parties agree that the real estate has increased in value since that finding, but the exact amount of that increase is undetermined. Parties agree that the property has increased in value, since the filing date, by more than \$20,000.

10. To the extent necessary for determination of these motions, the parties agree that the fair rental value of the subject real estate for the 1989 crop year and the 1990 crop year would be \$110 per acre or \$17,600 per year. The parties stipulate that all the post petition real estate taxes have been paid by the debtors. If the Court rules that the debtors must pay adequate protection to FCBO, then the debtors tender as adequate protection the rent specified above less the real estate taxes. FCBO would not accept this tender as being sufficient adequate protection.

11. The parties stipulate that the period of redemption from sheriff's sale which would apply to the subject real estate is one year. That period of redemption has not been affected by any of the changes in Iowa law relating to those matters.

12. The interest rate which would be applicable to compensate FCBO for "lost opportunity cost" in the event such an award is found to be appropriate is agreed to be 10 percent.

13. The debtors are purchasers of 160 acres of farmland on contract from Ellen and Dean Dungan. That contract was the subject of a compromise pursuant to which the claim of sellers was reduced to a principal amount of \$230,000 and debtors made a principal payment of \$18,000 on March 1, 1988 which reduced the amount due to \$212,000. The debtors have made payments of \$10,000 principal and accrued interest at the rate of 9 percent on March 1, 1989 and March 1, 1990.

DISCUSSION

Motion for Termination of Stay

FCBO seeks either modification of the stay to permit sheriff's sale on the property of the debtors upon which FCBO has foreclosed, or alternatively, the order of this court providing it adequate protection of its interests in debtors' property. Debtors resist the motion for modification of the stay but, in the event the court would find adequate protection of FCBO's property rights as necessary, debtors tender as adequate protection the payment to FCBO of the rental value of the land for 1989 and 1990 less real estate taxes paid by debtors during the course of the bankruptcy case. Debtors allege that they have paid real estate taxes on the property mortgaged to FCBO at the rate of approximately \$3,200.00 per year, but there has been no stipulation of that fact.

FCBO is entitled to adequate protection of its perfected security interest in "rents, issues and profits" arising from the mortgaged premises. Under its mortgage on debtors' land, FCBO has a perfected primary security interest in rents, issues and profits arising from the mortgaged property. It was effective from the date of the execution of the mortgage and was perfected by its filing. Federal Land Bank of Omaha v. Lower, 421 N.W.2d 126, 129 (Iowa 1988); Federal Land Bank v. Terpstra (In re Porter), 90 B.R. 399, 404 (N.D. Iowa 1988).

The phrase 'rents, issues and profits' as distinguished from the land itself refers to the products of the land, the annual rentals, the income derived therefrom, whether in money or in products. (Citation omitted). It has been said that 'to cultivate and have the use of the land is to receive the rents and profits.' * * * The word profits' as used in the phrase 'rents, issues and profits' is synonymous with 'rents.' (Citation omitted.)

Equitable Life Ins. Co. of Iowa v. Brown, 220 Iowa 585, 262 N.W. 124, 127 (1935).

FCBO's interest in the rents and profits is a separate interest from the creditors' interest in debtors' real estate. Ball v. Williams, 250 Iowa 216, 93 N.W.2d 723, 728 (Iowa 1958). This interest is entitled to adequate protection. Furthermore, FCBO's interest in these rents, issues and profits continues after bankruptcy is filed. 11 U.S.C. § 552(b). Were it not for the bankruptcy case, the receiver appointed by the state court would have had the authority to lease the property, to collect annual rentals, and to apply the income in accordance with state law. Debtors have not given the court a sufficient reason to terminate the creditor's rights under 11 U.S.C. § 552(b).

As to the real estate itself, since it is increasing in value, FCBO is not entitled to adequate protection of its value.

United Sav. Ass'n. of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 370 (1988).

The court disagrees with FCBO that the appropriate measure of adequate protection with regard to the rents and profits should be interest on the value of the land. Payment by debtors to FCBO of the fair rental value of the property for the 1989 and 1990 crop years is adequate protection of FCBO's interest in the rents, issues and profits of the mortgaged premises.

The court, therefore, finds the debtors' adequate protection offer as adequate and requires debtors to pay to FCBO the sum of \$35,200.00 less any amounts paid to the county treasurer for real estate taxes on the mortgaged premises. The real estate tax payments which may be offset against the adequate protection payment are those paid by debtors since March 2, 1989. Debtors shall provide receipts to FCBO to show such payments. The adequate protection payment shall be made to FCBO by debtors by no later than 20 days after the entry of this order. Such payment shall constitute adequate protection with regard to the rents, issues and profits on the mortgaged premises up to and including February 28, 1991.

MOTION TO DISMISS

FCBO has moved to dismiss this case on several grounds >pursuant to 11 U.S.C. § 1112(b). These include allegations that the debtors have been unable to effectuate a plan, that there has been unreasonable delay in the proceedings which is prejudicial to creditors, and because debtors have had a reasonable time in which to reorganize and have failed to obtain confirmation of a proposed plan. The case trustee joins in the motion. Both parties-in-interest point to this court's denial of the confirmation of the debtors' proposed plan and argue that this denial coupled with the length of time this case has been pending warrants dismissal. This court is well aware of the litigation which has taken place in this case. Many of the events in this case have been set out by debtors in their brief. The court declines to blame either the debtors or FCBO for the length of time in which this case has been pending. The Smebys and FCBO are the primary combatants. They have litigated the valuation of the debtors' real estate mortgaged to FCBO, the propriety of the debtors' life insurance exemption and several issues with regard to the confirmation of the debtors' proposed plan. Debtors have also litigated with another creditor the necessity to assume or reject an executory contract on the sale of land. There has previously been agreement in this case, as the court recalls, that litigating the exemption issue in advance of confirmation would be logical and appropriate. Based on this court's understanding of the issues in this case and from first-hand observation with regard to the activities of the attorneys, and based upon the court's own need for time in determining issues placed before it, the court finds that no party has been laggardly in the prosecution of this

case.

The debtors have exempt assets which they might determine to contribute to a plan of reorganization. The court, therefore, cannot say that debtors do not have the ability to effectuate a plan. In light of the court's order requiring adequate protection, and in light of the evidence with regard to the increasing value of the real estate mortgaged to FCBO, the court cannot find that there is delay prejudicial to creditors.

The court finds the debtors should have an additional opportunity to propose a plan or reorganization. Debtors will be provided with an additional 45 days to file a plan and disclosure statement. If a plan and disclosure statement are not filed within 45 days from the date of this order, the case will be dismissed. Debtors, if additional time is necessary, may of course seek it by motion, which the U. S. Trustee and FCBO can contest.

CONCLUSIONS OF LAW

1. This chapter 11 case should not be dismissed under 11 U.S.C. § 1112(b)
2. FCBO is entitled to adequate protection of its interest in the rents, issues and profits arising from the debtors' real estate which is mortgaged to FCBO. Debtors' offer of adequate protection is adequate under 11 U.S.C. § 362(d)(1) and 11 U.S.C. § 361(1).

ORDER

IT IS ORDERED that the motion to dismiss of FCBO and the U.S. Trustee is denied.

IT IS FURTHER ORDERED that debtors' offer of adequate protection is approved. Debtors shall pay to FCBO the sum of \$35,200.00 less the amount of any real estate taxes paid on the mortgaged premises by the debtors since March 1, 1989. In deducting such tax payments from the adequate protection payment of \$35,200.00, debtors shall provide to FCBO receipts for real estate taxes so paid. Payment shall be made by debtors within 20 days from the date of the entry of this order. This adequate protection of the rents, issues and profits on the mortgaged premises shall be for a period to and including February 28, 1991.

IT IS FURTHER ORDERED that the motion for relief from stay of FCBO is denied.

SO ORDERED ON THIS 13th DAY OF JULY, 1990.

William L. Edmonds
Chief Bankruptcy Judge