In the United States Bankruptcy Court

for the Northern District of Iowa

CHURDAN-HARCOURT SWINE	Bankruptcy No. X91-01767M
Debtor(s).	Chapter 11
	Contested No. 1305 and 1331

ORDER RE: MOTION TO USE CASH COLLATERAL and MOTION FOR RELIEF FROM STAY

Two matters are before the court--a motion of the debtor-in-possession seeking to use cash collateral and a motion by Home State Bank for relief from the automatic stay. These matters are

core proceedings under 28 U.S.C. § 157(b) (2) (M) and (G). Trial was held on November 19, 1991 in Mason City, Iowa.

FINDINGS OF FACT

In December, 1989, a representative of NIP, Ltd. (NIP) contacted Patrick Griffin, an officer of Home State Bank, Jefferson, Iowa (BANK), about the prospect for obtaining financing for a commercial swine operation. NIP, an Iowa corporation owned by Sam Kennedy III and Ernest Miller, was already involved in swine production at several locations in Iowa. Its main office was in Clear Lake. In evaluating the request, Griffin examined Kennedy's and Miller's individual financial statements and tax returns; NIP's financial statements; and financial projections for the proposed operations. Bank agreed to finance Kennedy, Miller and NIP in a "joint venture." Bank would supply 100 per cent of the money necessary for the purchase of swine and for the operation of two production units--one located at Churdan in Greene County and one located at Harcourt in Webster County. In agreeing to loan money, Bank relied on the income projections for the two units and on the individual net worth of each borrower. Financial statements showed that NIP had a net worth of $420,000.00; Kennedy, $600,000.00 to $700,000.00; and Miller, $19,000,000.00.

The loan closing took place at the bank in Jefferson on February 22, 1990. Both Kennedy and Miller attended, Miller coming from his home in North Carolina. The loan documents included a "Loan Agreement", four promissory notes, security agreements and financing statements. Under the loan agreement, Kennedy, Miller and NIP would jointly purchase breeding stock from the loan funds which the three were jointly borrowing from the bank. The agreement contemplated four notes--one for the purchase of breeding stock for the Churdan unit, one for the purchase of breeding stock for the Harcourt unit, and an operating note for each unit. The notes were signed by the three borrowers. Each note provided for joint and several liability.

The operating notes would mature in one year. There was no bank commitment to make further advances. Kennedy contemplated that if the units performed as expected, the operating notes would be extended.

Each of the three signed separate security agreements granting the bank security interests in each individual's interests in livestock, inventory, supplies, general intangibles and accounts. Each of the three signed financing statements describing the collateral, and these were filed with the Iowa Secretary of State on March 7, 1990.

There was no mention of a partnership in the Loan Agreement or in any of the other documents. At the time of the closing, it was the intent of the borrowers that the livestock facilities would be owned by Miller and Kennedy, that the livestock would be owned "individually" and that the facility would be operated by NIP. Banker Griffin understood that the livestock were to be owned individually by Kennedy, Miller and NIP. He also understood that these individuals were to be a "joint venture."

Although the loan agreement provided that the required "security agreements and financing statements shall refer to Borrowers individually and collectively and by each trade name or 'd/b/a' by which the sow-pig units are operated at the Churdan unit and at the Harcourt unit," no collective reference is found in either. In Article 6, section 6.1, the Loan Agreement states that "[b]orrowers either have or will have good and marketable title to all its properties and assets given as security for the loans provided for in this Agreement." Exhibit 7, p. 6. The security agreements contain the following provision: "[s]o long as any indebtedness secured hereby remains unpaid, Debtor shall continuously represent and warrant that: (a) Debtor is the owner of the Collateral free of all security interests or other encumbrances, except the security interest created by this Agreement ...." Exhibit B.

Under the loan agreement, the three borrowers were required to open and maintain two checking accounts at Bank, one for each unit. All receipts for each of the operations were to be deposited into its account; each unit's disbursements were to be made from its account.

Within a week to ten days after the closing, Miller and Kennedy learned that First Interstate Bank of Des Moines, NIP's principal lender, did not want NIP to become involved in the new operations at Churdan and Harcourt. First Interstate was concerned about the mingling and confusion of collateral. Miller and Kennedy discussed this situation and also sought advice from their accountant as to the best form of doing business at the two locations. The CPA recommended that they do business as a partnership so they could take advantage of expected early losses in the operations.

Kennedy says that within the week to ten-day period after the closing, based on the First Interstate prohibition and on the accountant's advice, Miller and Kennedy decided to operate the two units as a partnership without the participation of NIP. Kennedy says they decided to use their normal written partnership agreement, modified as necessary for the new operations, and that they would sign it the next time Miller came to Iowa. Kennedy prepared the agreement, and the two executed it on August 30, 1990. The agreement provided March 1, 1990 as its effective date. Exhibit H. The agreement required the deposit and disbursement of partnership funds through a partnership account at Home State Bank.

According to Kennedy, the partnership purchased livestock in the partnership name. The swine were purchased from Williams Brothers of Big Sandy, Montana. It was Kennedy's testimony that no bill of sale or invoice was provided by Williams Brothers. He recollected, however, that he sent the vendor a letter requesting that six boars be invoiced to NIP and that the other stock be invoiced to him and Miller individually.

In September, 1990, Bank made additional operating loans--$15,000.00 for the Churdan unit and $15,000.00 for the Harcourt unit--with the three individual borrowers again signing the promissory notes. Exhibit A.

The new operations did not run smoothly. There was an outbreak of a swine disease known as "TGE" at the Churdan unit, resulting in the loss of about 500 pigs. At the Harcourt unit, there were problems with the manure disposal system and with the sufficiency of the existing water supply. These problems resulted in a loss of production at Churdan and a decision to cut back production at Harcourt.

The borrowers defaulted on the payments of the operating notes which became due in February, 1991. Because the maximum amounts had been borrowed on the operating loans, overdrafts had occurred in the checking accounts. The borrowers and Bank began discussing a workout agreement.

Banker Griffin testified that Kennedy first came into the bank on May 23, 1991. He says that at that meeting Kennedy told him that livestock was owned individually. In a follow-up letter dated May 24, 1991, Griffin wrote to Kennedy and Miller:

> "I asked Sam about the ownership of the two units. The original loan agreement had the individuals owning the facility. You in turn were to lease the facility to NIP, Ltd. and then operate as a joint venture. Sam has informed me that you as individuals own and operate the units and NIP, Ltd. is just a co-maker of the note. For our records we should have verification, such as tax records regarding this matter."

Exhibit 1.

On May 29, 1991, Kennedy responded to that and other points of Griffin's letter. He stated:

> 2. We are in the process of preparing the tax returns for the Churdan and Harcourt Units which will be filed as a partnership between Miller and myself. Upon completion we will furnish you a copy for your file.

(Exhibit 2.)

Griffin recalls no other time prior to bankruptcy when the issue of a partnership was discussed. Kennedy remembers differently. He testified that at a meeting at the bank on April 23, 1991, he told Griffin that NIP, Ltd. was not involved in the operations. Later at the May 23 meeting at the bank, he said that he explained that NIP was not part of the operation and that the units were being operated as a partnership. Kennedy's testimony was somewhat confused. He stated that as individuals he and Miller owned the livestock 50-50 and the partnership 50-50. He also testified that he and Miller owned the partnership 50-50 but that the partnership owned the livestock, and that he told Griffin that at the meeting.

At the May 23 meeting at the bank, Kennedy provided an updated financial statement. It was dated December 31, 1990 but was presented to the bank at the meeting. At presentation, Kennedy added to his listed assets the following reference: "Ch - H ?" According to Kennedy, this was a listing of his partnership interest at an unknown value. Griffin said he did not know what the reference meant, but that other references on the statement to partnership interests noted them as partnership interests.

Kennedy acknowledges that there can be a difference between owning livestock located at a facility and operating the facility, but that he thinks, in a hog operation, "ownership" and "operation" are

synonymous. He is unable to testify that prior to September, 1990 he told the bank that "the partnership owns the livestock." He said he did not believe ownership was an issue when he responded to Griffin's May 24 letter, and his response was intended to focus on resolving matters. Kennedy also testified that prior to the filing of bankruptcy, he had never mentioned the name "Churdan-Harcourt Swine" to Griffin. Griffin said the first time he learned of the name was with the bankruptcy filing.

Initially, the federal tax identification number for NIP was used for the Churdan and Harcourt operations. The office manager for the operations obtained two tax identification numbers in December, 1990, one for each unit. Later, during work on the business operation's tax return, the accountant recommended the use of just one. In November 1991, the partnership filed a federal tax return for the period March 1, 1990 to December 31, 1990. It listed as asset the livestock in question. (Exhibit 8.)

During the spring and early summer of 1991, Bank and Kennedy continued to negotiate a resolution of the delinquent credit. Bank wanted the borrowers to put $60,000.00 of their money into the operation. The borrowers would not or could not.

On July 8, 1991, Kennedy agreed to waive mediation rights under Iowa law. Exhibit D. On July 17, 1991, the negotiations between the parties not having borne fruit, Bank filed a Petition for Replevin against Kennedy, Miller and NIP in the Iowa District Court for Greene County. The petition alleged a security interest in livestock valued at $135,000.00 and asserted Bank's right to possession. Returns of service attached to Exhibit E show service on Miller in North Carolina on July 31, 1991 and service on Kennedy personally and as agent for NIP on July 19. Also served was a District Court Order for a preliminary hearing on the petition, scheduled for August 5, 1991. Final hearing was set for September 6.

On August 5, the Preliminary Hearing was held, but defendants did not appear. The district court entered an order determining that Bank was entitled to immediate possession of the livestock and that writs of replevin would issue upon Bank's filing of a bond with the clerk of court. In its Findings of Fact, the court found that each defendant was within the jurisdiction of the court; that in the security agreements, the defendants had granted Bank a security interest in the livestock; and that under the security agreements, Bank was entitled to possession of the property. Exhibit G. None of the defendants filed an answer or motion in response to the petition. Thus on August 28, 1991, the Iowa District Court entered Final Judgment on Bank's petition without the necessity of final hearing. Exhibit G. The court incorporated its previous findings into the final order and authorized the clerk of court to issue writs of replevin.

Prior to obtaining possession of the swine as a result of the writs, Bank and Miller entered into the "Harcourt Swine Agreement." (Exhibit I.) The agreement provided for the sale of most swine from the Harcourt facility and a transfer of some to Churdan. Some swine from Churdan would be sold, but the agreement acknowledged continuing discussions about the disposition of the bulls of the Churdan herd. The agreement recognized that the hogs at Churdan and Harcourt were security for debts owed to Bank by Kennedy, Miller and NIP. The proceeds from the sale would be applied to the personal judgments which had been taken by default against the individuals. Among the obligors, only Miller signed the agreement. Griffin testified, however, that personnel at the Clear Lake office had "documented" that they had been contacted by Kennedy and that he would not oppose the sale.

The swine at Harcourt were seized and sold, and the proceeds of sale were applied to Bank's judgment. Before the bank could obtain possession of the swine at Churdan, the partnership filed its chapter 11 petition, claiming ownership of the livestock.

As of the date of trial, the balance on Bank's judgment against Kennedy, Miller and NIP was $261,440.17; this included principal of $245,403.11 and interest of $17,037.06.

Since the bankruptcy filing, the number of swine has increased from approximately 1,400 to 2,282. Debtor places a value of $182,570.00 on the herd. Kennedy expects the numbers and value to increase over the next 12 months.

ISSUES

Debtor claims ownership of the livestock and seeks to use the proceeds of ordinary sales for the operation of the business. Bank objects, contending that under 11 U.S.C. § 363(b)(1) debtors may only use "property of the estate" and that the livestock do not belong to the debtor. Also, since the debtor has no property interest in the livestock, Bank contends that the court should grant it relief from the automatic stay so it can obtain possession of the livestock under its writ of replevin.

Debtor claims it owns the livestock and maintains that Bank has a perfected security interest in them. For use of proceeds from their sale, debtor offers the following as adequate protection of Bank's interest: replacement liens (on unspecified property), the maintenance of at-filing inventory levels, the provision of monthly inventory reports, and installment payments at the rate of $2,500.00 per month beginning on January 10, 1992 until dismissal, confirmation of a plan, or conversion. (Debtor's Answer and Resistance to Motion for Relief . . . Docket No. 28.)

The parties agree that ownership of the livestock is the "fighting issue" in this proceeding. In support of its position that the partnership is not the owner of the livestock, Bank maintains:

1. that the evidence does not support the claim of ownership;

2. that debtor is equitably estopped from claiming ownership because of the partners' representations and warranties of individual ownership in the loan documents;

3. that the partnership is estopped from claiming ownership in the livestock because it stood silently by during the replevin proceedings and the subsequent sale and did not raise the issue of ownership as a defense; and

4. that the partnership is precluded by the replevin judgment under the principals of res judicata from again litigating the issue of ownership.

DISCUSSION

I.

The evidence is sufficient to establish the existence of a partnership formed by Kennedy and Miller. They orally agreed to constitute the partnership within 10 days after the loan closing. They executed a written partnership agreement in August, 1990 and filed a partnership tax return in November, 1991. There is no indication from the evidence that the formation of the partnership is a sham dreamed up solely to avoid Bank's interest in the livestock. Indeed, the debtor has at all times taken the position

that Bank has a perfected security interest in the livestock. Kennedy, in his dealings with Bank after the closing, brought up the partnership on more than one occasion--certainly in his letter to Griffin dated May 24, 1990 and perhaps earlier in both April and May, 1990. Kennedy and Miller intended to form a partnership. Intent is "the crucial test" of a partnership's formation. Chariton Feed and Grain, Inc. v. Harder, 369 N.W.2d 777, 785 (Iowa 1985). I find, therefore, that Churdan-Harcourt Swine is an Iowa partnership formed by Kennedy and Miller on or about March 1, 1990.

II.

The swine at issue are the property of the partnership. The preponderance of evidence is that Kennedy and Miller intended that the partnership operate the Churdan and Harcourt units and that it own the livestock located at the units. Although Kennedy's testimony was confused at one point as to whether he and Miller owned the livestock and also the partnership, other of his testimony leads to a finding that Miller and Kennedy at some point intended the partnership to own the livestock. The partnership shows the livestock as a partnership asset on the tax return. The partners believed the swine were partnership assets at the time of the filing of the bankruptcy case and listed them as assets. I find that the livestock on hand at the Harcourt unit as of the date of filing (September 27, 1991) are the property of Churdan-Harcourt Swine, a partnership. The swine are thus property of the debtor's estate.

III.

Bank had a perfected security interest in the swine at filing and continues to have an interest in the swine and their proceeds. Determining that a partnership exists and that the partnership owns the livestock in question does not answer the question of whether Bank has an interest in the property. Bank contends that based on the evidence, if the court finds that the partnership owns the livestock, the only possible legal conclusion is that Bank has no security interest. It says this is so because Kennedy testified that the livestock was purchased in the name of the partnership and was never owned by him and Miller individually. As a result, Bank says its interest in the livestock never attached because its debtors--Kennedy and Miler--never had rights in the collateral. *See* Iowa Code § 554.9203(1) (c). However, I reach a different conclusion, finding that Miller and Kennedy initially had rights in the collateral prior to its transfer to the partnership.

The decision to form a partnership was made a week to 10 days after the closing. It is reasonable to infer, and there is no contrary evidence, that the loan proceeds were deposited in the required checking accounts on February 22, 1990. Regardless of the titles of these accounts, under the Loan Agreement, they would have been the joint property of Miller and Kennedy. According to the Loan Agreement, the two men were to use the funds to purchase the livestock as joint owners, with the Bank obtaining a security interest in each owner's interest. Kennedy testified that the money was used to purchase the livestock from Williams Brothers in the partnership name. However, he claims no invoice or statement was provided to the buyer or buyers because to provide such an invoice or statement was not Kennedy's normal way of doing business with the vendor. Upon cross examination by Bank's attorney, Kennedy admitted that at the time of the purchase, he requested that the seller invoice the livestock, with the exception of some boars, to Kennedy and Miller, individually. This clearly contradicts Kennedy's position that the purchase was made by the partnership. I find this latter testimony more credible. It is not inconsistent with the evidence that Miller and Kennedy, at the time of purchase, had already determined to form a partnership. During the trial, it was obvious that there was confusion by not only Kennedy, but also banker Griffin, as to the distinction between ownership of livestock and the operation of the units. There is evidence that even at the outset, Miller, Kennedy and NIP intended that the units be operated as a partnership or joint venture with Kennedy and Miller owning the real estate and Kennedy, Miller and NIP owning the swine. Even Griffin recognized this

as he testified at least twice that Bank had committed to lend money to the three as a "joint venture." A joint venture in Iowa is nothing more than a partnership for a specific purpose. Johanik v. Des Moines Drug Co., 235 Iowa 679, 17 N.W.2d 385, 389 (1945).

Kennedy's desire at the time of purchase that the livestock sale be invoiced to Kennedy and Miller individually supports an inference that although Kennedy and Miller had decided to operate the facilities as a partnership, they had not yet determined to own the livestock as a partnership. Although this decision was made later, initial ownership, contrary to Bank's argument, was in Kennedy and Miller individually. Inasmuch as the two had rights in the collateral, the security interests of Bank attached at purchase under Iowa Code § 554.9203(1). At a later time, when the pair transferred their interests to the partnership, the security interest continued in the livestock, notwithstanding disposition. Iowa Code § 554.9306(2). Moreover, the partnership was not a "buyer in the ordinary course of business" so as to permit it to take free of the interest of Bank. The partnership was not a buyer. Iowa Code § § 554.9307(1) and 554.1201(9). There is no evidence the partnership paid for the swine and clearly they should have known that the transfer violated the terms of the Loan Agreement and security agreements. I, therefore, find that at the filing of the bankruptcy, Bank held a perfected security interest in the livestock of the debtor.

IV.

Despite the evidentiary and legal basis which would permit the court to conclude that the partnership is the owner of the swine, Bank has asked the court, for several reasons, to rule that the partnership is either estopped or precluded from claiming ownership.

First, Bank contends that the partnership, as a party in privity with the individual partners, is precluded by the principle of res judicata, from disputing ownership. The state district court ruled that Bank had a perfected security interest in the swine. Bank argues that such a ruling precludes a decision that the partnership is the owner. This is based on Bank's argument that the state court could not have so held if the livestock had been purchased originally for or by the partnership without attachment of Bank's interest. Because I have determined that the security interested attached prior to the transfer of the livestock to the partnership, it would seem unnecessary to reach this argument. However, even had I not so ruled, I could not find in the Bank's favor on the issue of res judicata.

The claim of the bank in the state court proceeding was based on this state's replevin statute. Iowa Code Chapter 643, § 643.1, et seq. In such a proceeding, the court determines the right to possession. Iowa Code § 643.17. Such a proceeding does not necessarily determine ownership or title. The proceeding in Greene County was to determine possession rights between bank and the individuals; the individuals, Kennedy and Miller defaulted. The partnership, however, was not made a party to the proceeding. Iowa Rule of civil Procedure 4 provides that one may bring an action against a partnership or against any or all of the partners without joining the firm. To that extent, the separate entity theory has survived the adoption in Iowa of the Uniform Partnership Act. "The only remaining vestige of the 'entity' theory of partnership in the UPA is in regard to procedural . . .purposes." Carlson v. Carlson, 346 N.W.2d 525, 527 (Iowa 1984). "[A] judgment against the individuals that compose a partnership is not a judgment against the partnership." Bankers Trust Co. v. Knee, 222 Iowa 988, 270 N.W. 438, 441 (1930).

However, under res judicata (or claim preclusion), "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." Lane v. Peterson, 899 F.2d 737, 741 (8th Cir. 1990). Therefore, although Kennedy and Miller might be barred

from raising the partnership issue because of the default judgment, the partnership would only be barred if in privity with the individual partners.

"Privity is said to be a mutual or successive relationship to the same rights of property, and if it is sought to bind one as privy by an adjudication against another with whom he is in privity, it must appear that at the time he acquired the right or succeeded to the title, it was then affected by the adjudication, for, if the right was acquired by him before the adjudication, then the doctrine cannot apply." Leach v. First National Bank, 206 Iowa 265, 217 N.W. 865, 868 (1928); Hawkeye Life Ins. Co. v. Valley-Des Moines Co., 220 Iowa 556, 260 N.W. 669, 673 (1935). That individuals are interested in defeating separate action based on the same claim by a party, by proving the same facts, does not make the individual "privies." Betz. v. Moore-Shenkberq Grocery Co., 197 Iowa 1348, 199 N.W. 254, 256 (1924). Because by the time Bank had filed the replevin action, the partnership had acquired the livestock, the partnership was not a privy of the individual defendants, Kennedy and Miller. Thus the partnership is not bound, under the principle of claim preclusion, by the judgment against the individuals.

Nor does the doctrine of collateral estoppel, or issue preclusion, prevent the partnership from asserting ownership in the livestock. Federal courts generally give the same preclusive effect to a prior state court judgment as would the courts of the state where the judgment was entered. Yancy v. McDevitt, 802 F.2d 1025, 1027 (8th Cir. 1986). In Iowa, use of issue preclusion requires the establishment of four factors: (1) the issue precluded must be identical, (2) the issue must have been raised and litigated in the prior action, (3) the issue must have been material and relevant to the prior decision, and (4) the determination of the issue in the prior action must have been necessary and essential to the prior judgment. *Id*. at 1027. Even if the partnership was in privity with the individuals for purpose of the application of the doctrine, Bank cannot show actual litigation of the issue of ownership.

V.

Bank argues also that the partnership is estopped from claiming ownership of the livestock by virtue of the representations and warranties contained in the Loan Agreement and the security documents as to the individuals' maintaining continuous ownership of the livestock while debt was owed. For this position, Bank relies on the theory of equitable estoppel. I believe that it is more accurately promissory estoppel. In Iowa, reliance on promissory estoppel requires a showing of (1) a clear and definite oral agreement, (2) proof that the party urging the doctrine acted to his detriment in relying on the agreement, and (3) that the equities support enforcement of the agreement. Warder & Lee Elevator, Inc. v. Britten, 274 N.W.2d 339, 342 (Iowa 1979). "This concept binds the promissor to a gratuitous promise where, 'in reliance upon the promise, the promisee had suffered a substantial loss, expended money or incurred liability, that he would not have suffered, expended or incurred except for the promise.'" Matter of Estate of Graham, 295 N.W.2d 414, 419 (Iowa 1980) *citing* O. Patton, Iowa Annotation of the Restatement of Contracts § 90 at 179 (1934) (quoting 4 A.L.I. Proceedings 101 (1926)).

The concept is not applicable in this case. Here there was a written promise that is not denied. In the case under consideration, we deal with breach of a written promise, not the establishment of an oral one.

As to equitable estoppel, that doctrine is also not applicable. For its application, a false representation or concealment of a material fact is a necessary element. Merrifield v. Troutner, 269 N.W.2d 136, 137 (Iowa 1978). There is no evidence in this case that at the time Kennedy and Miller executed the documents indicating personal ownership of the livestock, they did not intend to acquire or to

maintain such ownership. The evidence is that a week to 10 days later the decision was made. The partnership should not be barred under the doctrine from asserting subsequently acquired ownership in the livestock.

Last, Bank argues that the partnership is estopped by its conduct in standing silently by while Bank brought its replevin action against the individuals. It supports its contention by citing § 62 of Restatement (Second) of Judgments (1982) and Howe Coal Co. v. Prairie Coal Co., 362 F.Supp. 1117 (W.D. Ark. 1973).

> Section 62 of the Restatement is as follows:
>
> A person not a party to an action who has a claim arising out of the transaction that was the subject of the action, and who knew about the action prior to the rendition of judgment therein, may not thereafter maintain an action on his claim against a party to the original action if:
>
> (1) The enforcement of the claim against that party would result in subjecting him to inconsistent obligations or in a determination of his rights and duties that is incompatible with the judgment in the original action; and
>
> (2) The claimant so conducted himself in relation to the original action that the party against whom the second action is brought:
>
> > (a) Was reasonably induced to believe that the claimant would make no claim concerning the transaction or that the claimant would govern his conduct by the judgment in the original action; and
> >
> > (b) Justifiably abstained from employing procedures, such as joinder of the claimant or commencement of another action in which the claimant was made a party, that could have determined the claimant's claim.

Bank says that the partnership, although not a party to the replevin action, was aware of the action (as the defendants and partners were identical persons) and failed to raise its claim of ownership. Under § 62, Bank argues that the partnership should not be permitted now to assert its interest because that would subject Bank to a determination of its rights which would be incompatible with the state court judgment. Bank argues that based on the partnership's inaction and on the partners' cooperation in liquidating the Harcourt unit, it was reasonable for Bank to believe that the partnership would not make a claim and that Bank was justified in not joining the partnership as a defendant in the replevin suit.

I can find no Iowa case which adopts § 62 of the Restatement. However, assuming that the principle espoused therein would be adopted by Iowa courts, I do not believe that the present case is one in which the section should be applied. When considering that the purpose of a replevin action is to determine right to possession, further litigation with the partnership would not subject Bank to a potentially inconsistent determination of its rights. The Iowa District Court rule that Bank had a right to possession superior to the individuals. It did not decide the right to possession vis-a-vis the partnership. Also, unlike the case of Howe Coal Co. v. Prairie Coal Co., cited by Bank, the replevin action was not full-blown litigation. Bank's action against the individuals involved a default. Kennedy and Miller failed to defend. Kennedy testified that he planned on attending the final hearing in the replevin suit but found out that default judgment had been taken against him. Thus, there was no

action by Kennedy or Miller at trial that would have led Bank to believe that Kennedy and Miller took a position different from that now taken by the partnership. Nothing leading up to the default judgment would have induced Bank to believe that another entity involving Miller and Kennedy would not claim ownership of the swine. The partnership merely remained silent, as did the individuals.

The comment to § 62 discusses such silence in the application of the section:

> Given the premise that a person is ordinarily free to assert his claim by separate action, and given the opportunities for joiner of third persons known to have claims arising out of the transaction through the necessary party and other joinder rules previously referred to, denying a claimant opportunity to maintain his action is warranted only in compelling circumstances.
>
> Thus, a person should not be denied that opportunity simply because the opposing party may have to relitigate a matter already adjudicated with another. Nor is it sufficient that the claimant may have silently stood by while the prior action was pending, aware that he would not be bound unless made a party and aware also that he might benefit if the judgment was favorable to his position in the controversy. See § 29. The rules of procedure generally put the burden of joinder on the person who wishes to obtain the benefits of the rules of preclusion, requiring him to bring in third parties involved in the transaction. Hence, as between a silent bystander and the party to the prior litigation, the latter properly bears the risk that the original litigation will not terminate the controversy.

The partnership was merely a silent bystander to an action to determine the rights of Bank versus the rights of the individuals. Although Bank argues that one can be estopped by silence, still there must be a duty to speak. Bank has not established such a duty. Hart v. Worthington, 238 Iowa 1205, 30 N.W.2d 306, 313 (1947).

Bank was or should have been aware that a partnership might claim the livestock as a result of Kennedy's letter to Griffin dated May 29. It made no follow-up investigation of Kennedy's indication of partnership so as to cause it to join a partnership in the replevin action. It cannot, therefore, be said that Bank justifiably abstained from joining the partnership as a defendant.

Following the entry of the default judgment, the individuals cooperated in the surrender of the swine at arcourt. Miller executed the Harcourt Swine Agreement (Exhibit 1). This, however, was post-judgment and was no inducement to Bank in the conduct of the litigation. It thus does not fall within the type of conduct covered by § 62 of the Restatement. It also did not injure or prejudice Bank, but instead aided it in the liquidation of the collateral. I do not believe such conduct should now prevent the partnership from claiming ownership of the swine and from attempting to restructure its business at the Churdan unit.

VI.

Having determined that the partnership owns the swine and that Bank has a security interest in the property, I must now rule on the adequacy of the debtor's offer of adequate protection. Counsel for Bank at the hearing indicated that if it were necessary for the court to rule on the adequacy of the offer, that the parties were not seriously far apart on that issue. Debtor offers a replacement lien on unspecified property, but the court construes the offer to mean property of the kind described in Bank's security agreements but acquired by the debtor after the filing. Debtor also offers to maintain

at-filing inventory levels. The offer is ambiguous as to whether this protection is of numbers of hogs or dollar value of the herd. The court construes it to be both. Finally, debtor offers monthly cash payments beginning on January 10, 1992 and on that date for each successive month in the amount of $2,500.00. Bank responds that it would rather the payments begin immediately.

Debtor's only income comes from the sale of livestock in the ordinary course of business. It must use proceeds of sale to operate the Churdan unit. To the extent proceeds of livestock sales are used to protect, care for, feed and market the swine, Bank is obtaining a benefit from the use as the swine increase in numbers and value. Debtor wishes to use up to $75,000.00 of sales proceeds for the operation of the unit.

Inasmuch as the court has construed the adequate protection order to require debtor to keep the numbers in and values of the herd at filing-date levels, the court finds that the debtor's offer is adequate.

VII.

Debtor's offer of adequate protection is in response also to the motion for relief filed by Bank. Having found the protection adequate, I conclude the motion for relief should be denied.

ORDER

IT IS ORDERED that the Motion to Use Cash Collateral filed by Churdan-Harcourt Swine is granted. Debtor-in-possession may, during the pendency of this chapter 11 proceeding, use up to $75,000.00 in the cash collateral of Home State Bank. The offer of adequate protection is approved. As adequate protection of Bank's security interest in the livestock which are property of the estate, debtor-in-possession shall maintain filing-date inventory levels both as to numbers in the herd and dollar value of the herd. Debtor-in-possession shall provide Bank with a replacement lien on post-petition acquired property of the estate. Partners Kennedy and Miller shall also provide such post-petition replacement liens. Debtor-in-possession shall provide Bank with monthly inventory reports. Debtor-in-possession shall, commencing January 10, 1992, pay Bank monthly payments of $2,500.00. Such payments shall be made on the 10th of every successive month until this case is dismissed or converted or until a plan of reorganization is confirmed.

IT IS FURTHER ORDERED that Bank's motion for relief from the automatic stay is denied.

SO ORDERED ON THIS 6th DAY OF DECEMBER, 1991.

William L. Edmonds
Bankruptcy Judge