

In the United States Bankruptcy Court

for the Northern District of Iowa

JON ROTHER and
CAROLINE ROTHER

Debtor(s).

Bankruptcy No. X91-01964M

Chapter 11

Contested No. 5176&2181

ORDER RE: REQUEST FOR HEARING 5176 and MOTION FOR RELIEF FROM STAY 2181

Norwest Bank moves for either of two forms of relief. In contested matter number 5176, it seeks a determination that debtors' violation of a cash collateral stipulation afforded Norwest spontaneous relief from the stay to pursue its collateral. In contested matter number 2181, Norwest seeks relief from the stay for cause, that cause being the debtors' violation of the same stipulation. Debtors resist each motion. Hearing was held on July 7, 1992, in Fort Dodge.

FINDINGS OF FACT

Jon and Caroline Rother raise pullets on a three-acre farm, hold off-farm jobs and rent out the balance of their farm ground. When, in 1991, Norwest Bank Iowa, National Association (NORWEST) refused to renew their financing, they filed chapter 11 bankruptcy. Norwest and Sheffield Savings Bank (SHEFFIELD), both secured creditors, objected to debtors' proposed use of the creditor's cash collateral (contested matter no. 5176). The debtors and the two secured creditors settled their dispute and on January 27, 1992, filed with the court a "Stipulation and Agreement for Adequate Protection Regarding the Use of Cash Collateral" (AGREEMENT). (Exhibit C). The debtors served notice of the agreement on all parties-in-interest. Parties were given an opportunity to object. None did. On March 4, 1992, the court approved the Stipulation and Agreement. (Docket no. 37)

The Agreement provided that, as adequate protection, debtors would make various payments to the two secured creditors. By the end of January, 1992, debtors were to pay Norwest \$10,000.00 and Sheffield \$22,736.10. Debtors were also to pay Norwest quarterly payments of \$8,625.00 beginning with the quarter ending April 30, 1992. Debtors were to pay Sheffield semi-annual payments of \$7,629.83 beginning July 31 and monthly payments of \$128.65. Debtors made the January and April payments as required.

The agreement contains a provision which requires additional payments to secured creditors from "excess funds":

Each month, to the extent there are excess funds available over and above what appears on Exhibit "O" "Cash POS Before Borrow", the excess funds shall be distributed monthly on a pro rata basis to Norwest, Sheffield and Farm Credit Bank based on their respective claims on the date of the filing of Debtors' bankruptcy.

Exhibit C, page 6, paragraph 5.

"Cash POS Before Borrow" was a monthly line item on an income/expense projection attached to the Agreement. In the Agreement, the parties stipulated that on the date of filing, Debtors owed Norwest \$171,209.09 (Exhibit C, p. 3) and Sheffield \$141,719.78 (Exhibit C, p. 3). The stipulation makes no mention of the amount owed to Farm Credit Bank.

The Agreement contains a default provision:

In the event the Debtors default under any provision of . . . this Agreement . . . and any such default remains uncured for a period of ten days after written notice of the default is given to the Debtors by either Norwest or Sheffield, then upon the filing of an Affidavit signed by an officer of either Norwest or Sheffield stating that there has been an occurrence of such default, Norwest or Sheffield shall be entitled to relief from the automatic stay under 11 U.S.C. § 362 with respect to all of the collateral without the necessity of Norwest or Sheffield filing a Motion for Relief From the Automatic Stay. The Debtors hereby consent to the entry of an Order lifting the automatic stay in any such event.

Exhibit C, page 8, paragraph 11. The parties agreed that "[t]ime is of the essence of each provision of [the] Agreement of which time is an element." (Exhibit C, page 11, paragraph 25).

Problems arose regarding the calculation of the excess funds distribution. No excess-funds payments were made in January, February or March. On April 8, 1992, Norwest's attorney advised Debtors' attorney that it was Norwest's position that as of the end of February, \$8,651.90 was to be distributed among the three secured creditors. After nearly a month, the "dispute" over the excess-funds calculation was resolved. At trial, Norwest and Debtors stipulated to the existence of the following facts:

On May 5, 1992, a representative of Norwest Bank and the Debtors' attorney, Angela Ostrander, Norwest Bank's Attorney, Mark Rice, and Elizabeth Goodman, attorney for Sheffield Savings Bank, met and reviewed figures provided by the Debtors re: the additional cash collateral payments pursuant to the cash collateral stipulation. Norwest Bank's representative requested additional time to review the proposed payments. On May 6, 1992, Doug Gibson and Mark Rice called Steven W. Hendricks and agreed to the following payments:

Norwest:	\$2,503.22
Sheffield:	2,020.28
FCS:	<u>1,986.50</u>
TOTAL:	\$6,510.00

On May 7, Norwest sent each debtor a certified letter demanding distribution of the \$6,510.00 among the three secured creditors pursuant to the Agreement. The letters (Exhibits 1 and 2) showed the monthly breakdown of the \$6,510.00 in excess funds: \$965.00 from January, \$4,725.00 from February, and \$820.00 from March. The letter stated that it was intended to serve as notice of default under the cash collateral agreement and that if the default were not cured within 10 days of the letter, an affidavit of default would be filed with the court, entitling Norwest to relief from the stay.

The Rotheres received their letters on Friday, May 8. Caroline Rother testified that although she knew the excess funds would have to be paid, she did not know the amount to pay to each of the three. She called attorney Angela Ostrander for help in determining the amount of each check. She does not remember when she made the call, but it was probably within the week. The court finds that to mean sometime between May 11 and 15. Ostrander said she would make the calculations and get back to Mrs. Rother. Ostrander called with the figures on either May 18 or 19. Based on the figures, Mrs. Rother wrote a check to each creditor on May 20 and mailed them to her attorneys that night or the next morning. The attorneys tendered them to the creditors on approximately May 23.

Meanwhile, on May 21, an officer of Norwest filed an Affidavit of Default under the prior cash collateral proceeding (#5176). When Norwest received its excess funds distribution, it returned it to debtors' counsel. Debtors responded to the Affidavit on May 28, contending that Norwest was not entitled to relief from the stay. Norwest requested a hearing. Alternatively, because it was threatened by debtors' counsel with a contempt proceeding, Norwest has filed a motion for relief from the stay.

As of July 7, 1992, debtors owed Norwest approximately \$161,000.00. The primary collateral securing the debt has an approximate value of \$305,000.00. The collateral includes the acreage where the debtors conduct their pullet growing operation.

DISCUSSION

Norwest contends that as a result of debtors' failure to make timely payment of the excess funds, it obtained relief from the stay upon filing its Affidavit of Default. Alternatively, it argues that debtors' default is cause for the court now granting relief. The alleged cause is straight-forward: upon agreement as to the amount of excess funds to be distributed, the money was owed, the debtors were in default and they failed to cure within 10 days of Norwest's written notice. Debtors argue that there was no default. They argue that the Agreement provides no due day for the payment of the excess funds beyond the provision that they be paid monthly. They argue also that under the circumstances, the debtors acted in timely fashion to make payment and that the notice of default was premature. Debtors contend also that Norwest has a substantial equity cushion in its collateral and that granting relief from the stay would harm the debtors out of proportion to any harm to Norwest which might have resulted from any delay in payment.

The first consideration is whether, at the time of Norwest's notice, debtors were in default on their agreement to pay excess funds. The calculation of excess funds was to be based upon the debtors' cash income and expenses for each month beginning in January, 1992. Although the Agreement requires the debtors to distribute the funds monthly, it does not provide a date certain for distribution. A reasonable interpretation of the Agreement would allow calculation and distribution during the month following the month in question. For example, January's excess funds would be calculated and distributed in February; February's funds would be calculated and distributed in March, and so on.

Because of a dispute over the amounts, debtors did not pay the excess funds for either January, February or March, 1992. For approximately one month, representatives of the debtors, and some or all of the secured creditors, tried to resolve the dispute. At a meeting on May 5, certain payments were proposed. On May 6, representatives of Norwest contacted debtors' counsel and agreed to a total figure for the three-month period and the breakdown among the three secured creditors. On May 7, Norwest sent letters demanding payment and indicated that it considered debtors in default. Debtors contend they were not in default on May 7, and the court agrees.

Norwest's theory is that once the dispute over the calculation of excess funds was resolved, debtors were already in default or were then instantly in default. Thus, Norwest could notify them of the default, and if the money were not paid within ten days of the notice, Norwest would have relief from the stay.

The Agreement, however, does not provide a methodology or procedure for resolving disputes over the excess funds calculation; nor does it describe the effect of a dispute and its resolution on the time limit for making payment. In this regard, the Agreement is ambiguous. In construing such a contract, the court should give the contract an interpretation "most equitable to the parties, one which will not give one of them an unfair or unreasonable advantage of the other." White v. Miller, 132 Iowa 144, 109 N.W. 465, 467 (1906). Because the court construes the Agreement to provide for payment to the secured creditors at any time during the month subsequent to the month in question, it also concludes that the most reasonable and fair construction of the Agreement would provide for payment of any disputed amount within the month that the dispute is resolved. If, of course, the dispute is not resolved, the parties can seek a judicial determination of the amount of excess funds. The foregoing construction of the Agreement should not be license to the debtors to forestall any payments by creating bogus disputes. However, there is no evidence indicating to the court that the dispute between debtors and the creditors was anything but bona fide. Under the present set of facts, the debtors should not be penalized by entering into good faith negotiations with Norwest and Sheffield over the appropriate amount of the payment.

The court, therefore, concludes that when, in May, the parties reached agreement on the amount of excess funds due for January, February and March, 1992, the debtors had until the end of May to make their distribution. Since they tendered to Norwest its share of excess funds prior to May 31, debtors were not in default and Norwest's notice of default was premature. Accordingly, Norwest has failed to show cause for obtaining relief from the automatic stay under 11 U.S.C. § 362(d) (1). Because there was not a default by debtors, Norwest is not entitled to an order concluding that the stay was automatically modified upon the filing of the Affidavit of Default.

Although the court has issued findings related to the amount of the alleged default and Norwest's equity cushion, these

factors played no part in the court's resolution of the issues. In reaching its result, the court has also disregarded Mrs. Rother's testimony as to Norwest's bad faith.

IT IS ORDERED that the motion for relief from stay is denied and that relief requested by Norwest in its "Request for Hearing" is denied.

IT IS FURTHER ORDERED that debtors shall have seven days from the date of this Order to again tender to Norwest its portion of the excess funds for January through March, 1992.

SO ORDERED ON THIS 17th DAY OF JULY, 1992.

William L. Edmonds
Chief Bankruptcy Judge