

# **In the United States Bankruptcy Court**

## **for the Northern District of Iowa**

---

LEONARD W. DOSTAL, MARYAN DOSTAL  
Debtors.

Bankruptcy No. 94-10108KC  
Chapter 11  
Contested Nos. 4013 & 4016

---

### **RULING ON MOTION TO LIFT STAY**

---

On March 10, 1994, the above-captioned matter came on for hearing on Motions for Relief from Stay filed by Creditors Tama State Bank and Farm Credit Bank of Omaha. Both Motions have been resisted by the Debtors. Appearing on behalf of Tama State Bank was Attorney H. Raymond Terpstra, II. Representing Farm Credit Bank of Omaha was Attorney Eric Lam. Debtors Leonard W. and Maryan Dostal appeared pro se. Evidence was presented after which the Court took the matter under advisement.

### **STATEMENT OF THE CASE**

Debtors filed a Chapter 11 Bankruptcy petition in 1988. A Plan of Reorganization was filed September 12, 1989 and was confirmed as amended on January 10, 1990. Creditors Tama State Bank and Farm Credit Bank of Omaha (the "Banks") were included in the Plan as secured creditors. This Chapter 11 case was closed by Final Decree entered July 23, 1990. The confirmed Plan specifically provided for no discharge.

Debtors commenced paying under the Plan. However, they defaulted on their 1992 payments. Mediation was requested by the Banks and a Mediation Release was obtained June 24, 1993. Debtors entered into a Mediation Agreement. However, they subsequently defaulted on the Mediation Agreement by not applying rents obtained from their real estate to past real estate taxes and mortgage indebtedness.

As a result, Farm Credit Bank filed a foreclosure petition in Tama County, Iowa District Court on August 13, 1993. Tama State Bank joined in this foreclosure action. The pleadings allege and the evidence confirms that the Farm Credit Bank of Omaha holds a mortgage lien on Debtors' real estate which is first in priority. Tama State Bank also holds a mortgage lien on the real estate which is second in priority. The real estate securing the mortgages is an 80 acre parcel of farm ground.

The foreclosure litigation proceeded toward resolution. The Farm Credit Bank of Omaha and Tama State Bank eventually asked for the appointment of a receiver. This was set for hearing on three separate occasions. Two continuances were sought by Debtors and another continuance was caused by inclement weather. A hearing was ultimately scheduled for January 25, 1994 at 9:00 a.m. Debtors

filed the present Chapter 11 petition in Cedar Rapids, Iowa on January 25, 1994 at 8:55 a.m. As a result of the filing of the Chapter 11 petition, the receivership hearing set in Tama County did not occur. The automatic stay under 11 U.S.C. 362(a) has since prevented completion of the proceedings in Tama County.

Both Tama State Bank and Farm Credit Bank of Omaha asked the Court to lift the stay. It is their position that no equity exists in the real estate for the benefit of Debtors and the property is not necessary for an effective reorganization. Also, the Banks assert that the present Chapter 11 Plan was filed in bad faith to frustrate their legitimate attempts to appoint a receiver for this property and collect the obligations due. This is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(G).

### **STATEMENT OF FACTS**

The operative facts are not in significant dispute. Debtors Leonard and Maryan Dostal are husband and wife. Mr. Dostal is 64 years of age and lives in Traer, Iowa. The primary asset of Debtors is the 80 acre parcel of real estate located in Tama County, Iowa, to wit: SE 1/4 of Section 33, Township 85 North, Range 14, West of the 5th P.M., Tama County, Iowa which secures the Banks' mortgages. This property is farm ground with a set of buildings on it.

Mr. Dostal is employed at Iowa Valley Mutual Insurance Company as a claims adjuster. He has not recently personally farmed the ground in question. His brother and nephew have farmed the ground in recent years. They did pay rent although until recently there was no written lease agreement. A lease agreement was drafted prior to January of 1994 extending the term of the lease through 1998.

Under the original Plan of Reorganization and the Mediation Agreement, Debtors were required to apply the lease payments toward their obligations to the Banks. However, the evidence reflects and Debtors concede that these lease payments were not applied as promised. The Agreement stated that Debtors would turn the lease payments over to the Banks or, alternatively, use them to pay real estate taxes. Neither of these things have occurred. While Debtors are somewhat vague as to the disposition of the lease payments, Debtor Leonard Dostal testified that the funds were used to pay attorney's fees and for copying costs associated with this litigation.

The record reflects that Debtors made no payments on their obligations to the Banks between the date of the Mediation Agreement and the Acceleration Notice. Neither did Debtors make any payment of taxes to the Tama County Treasurer for property taxes on this ground. It appears that the last taxes were paid in 1992. There is a delinquency on these taxes for tax years 1992 and 1993, as well as on back taxes due for previous years.

The evidence establishes that Farm Credit Bank of Omaha has a first mortgage on this property. A claim in the amount of \$161,475.55 has been filed in this case as the outstanding indebtedness owed to Farm Credit Bank of Omaha. Debtors do not significantly dispute that this amount is owed to this Creditor.

Tama State Bank asserts that it is the holder of a second mortgage on this property. Tama State Bank asserts that as of the date of hearing, Debtors owed Tama State Bank the sum of \$100,021.31. Debtors agree that Tama State Bank was the holder of a second mortgage. However, they take the position that this is paid in full.

Some explanation is necessary in order to state the parties' positions. Mr. William Beohm, President of the Tama State Bank, states that his Bank has provided funds to Debtors on occasion and acknowledges that they are in a second mortgage position. When loaning money to Debtors, Farmers Home Administration guaranteed 90% of the loan. Eventually, the guaranteed portion of the loan was sold to Auburn Savings Bank in 1987. Thereafter, Tama State Bank retained 10% of the loan which was its property and continued to administer and service the whole loan pursuant to their previous agreements with FmHA. The confusion arises out of the bookkeeping methods used by Tama State Bank. The Bank computer, for bookkeeping purposes, kept only the 10% portion or the Bank's portion of the loan in its obligation file.

Mr. Dostal was in the Bank on one occasion and made inquiry as to how much he owed the Bank. At that time, the computer was used to determine this figure. Mr. Dostal was then provided a figure which reflected only the Bank's portion of the loan or 10% of the total outstanding obligation. At that point, Mr. Dostal made arrangements and paid that amount. He was provided with a statement to the effect that the obligation was paid in full. In fact, the payment of this amount reflected only 10% of the initial loan and is not payment in full on the total outstanding obligation. While the Tama State Bank's initial handling of this obligation could create confusion, the fact remains that Mr. Dostal has made payments far short of his outstanding obligation. The confusion created by the Bank's computer does not in any manner exonerate the remaining obligation which mathematically, without any doubt, totals \$100,021.31 as of the date of hearing.

In summary, the foregoing evidence establishes that Debtors owe to Farm Credit Bank of Omaha the sum of \$161,475.55. Additionally, Debtors owe to Tama State Bank the sum of \$100,021.31. Total outstanding obligations as of the date of hearing are therefore \$261,496.86. In addition, there are associated liquidation costs as well as attorney's fees approximating \$28,000.

The Creditors presented expert testimony as to the value of this 80 acre parcel. An appraisal conducted June 4, 1993 reflected a value of approximately \$225,000. Mr. Alan Stockdale is a real estate broker and appraiser. He estimated that as of the time of hearing, the land values may have increased as much as 10%. The present value would, therefore, be a maximum of \$247,500. Mr. Dostal also testified as to valuation. The admissible evidence establishes that Mr. Dostal is of the opinion that the land value is closer to \$280,000.

### CONCLUSIONS OF LAW

Under 362(d)(2), the Court shall grant relief from the automatic stay to allow a creditor to pursue an action against property if the debtor lacks equity in the property and the property is not necessary for an effective reorganization. The burden is on the Banks to prove that Debtors lack equity in the property. 11 U.S.C. 362(g). If that is proven, the burden shifts to Debtors to show that the property is necessary for an effective reorganization. In re Anderson, 913 F.2d 530, 532 (8th Cir. 1990). "This

requires a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; and that the reorganization is in prospect." In re Holiday Assocs. Ltd. Partnership, 139 B.R. 711, 717 (Bankr. S.D. Iowa 1992) (citing United Sav. Ass'n v. Timbers of Inwood Forest, 484 U.S. 365, 375, 108 S. Ct. 626, 632, 98 L. Ed. 2d 740 (1988)). To meet their burden regarding the prospect of reorganization, Debtors must show that there is a reasonable possibility of a successful reorganization within a reasonable time. Anderson, 913 F.2d at 532.

The Court has reviewed the evidence and finds that the credible evidence establishes a value for this property of between \$247,000 and \$250,000 at this time. The outstanding obligations to Tama State Bank and Farm Credit Bank of Omaha, even excluding delinquent property taxes, liquidation costs, attorney's fees and other associated costs, is in excess of \$260,000. Clearly, Debtors have no present equity in this property.

Ordinarily, farm ground could be considered necessary for reorganization. However, in this case, such property is certainly not Debtors' only source of income. Mr. Dostal is employed outside the farm as an insurance claims manager. From the schedules it appears that Mrs. Dostal also earns non-farming income. Their total annual non-farming income is \$64,000. Debtors did not present any evidence or even attempt to indicate in what way this farm ground would be necessary for their reorganization under a Chapter 11. Thus, they have failed to meet their burden of proof on this issue.

Further, Debtors have failed to show that there is a reasonable possibility of a successful reorganization. Debtors' first attempt to reorganize under Chapter 11 failed within a short time. The record shows no change in circumstances which would indicate that Debtors would be successful in a second attempt.

The second ground the Banks present to support relief from the automatic stay is Debtors' alleged bad faith in filing their petition. Lack of good faith constitutes "cause" under 362(d)(1) for lifting the stay to permit foreclosure or for dismissing the case. In re Ouverson, 79 B.R. 830, 832 (Bankr. N.D. Iowa 1987). "If it is obvious that a debtor is attempting unreasonably to deter and harass creditors in their bona fide efforts to realize upon their securities, good faith does not exist." Id. (citations omitted).

There is no particular test for determining whether a debtor has filed a petition in bad faith. Instead, the courts may consider any factors which evidence "an intent to abuse the judicial process and the purposes of the reorganization provisions" or, in particular, factors which evidence that the petition was filed "to delay or frustrate the legitimate efforts of secured creditors to enforce their rights."

In re Wild, No. L-92-00165C, slip op. at 6 (Bankr. N.D. Iowa Jan. 30, 1992) (quoting In re Phoenix Piccadilly Ltd., 849 F.2d 1393, 1394 (11th Cir. 1988)). Whether a bankruptcy filing is made in good faith depends on the debtor's financial condition, motives and local financial realities as a whole. Holiday Assocs., 139 B.R. at 717.

In support of their motion, the Banks cite Phoenix Piccadilly which lists six factors for determining bad faith. One critical factor found in all the tests used by bankruptcy courts on this issue is whether

the bankruptcy filing is simply an attempt to forestall or delay legitimate rights of creditors. Wild, slip op. at 7. Other relevant factors are that 1) the debtors have only one asset which is fully encumbered; 2) the debtors have few unsecured creditors whose claims are small compared to the claims of secured creditors; 3) the debtors have few employees; 4) the property is subject to a foreclosure action; 5) the debtors' financial problems essentially involve a dispute between the debtors and secured creditors which can be resolved in pending state court action; and 6) the timing of the debtors' filing evidences an intent to delay or frustrate legitimate efforts of secured creditors to enforce their rights. Phoenix Piccadilly, 849 F.2d at 1394-95; Wild, slip op. at 6-7; see also In re Cedar Falls Hotel Properties, No. 88-01146W, slip op. at 12-14 (Bankr. N.D. Iowa Nov. 23, 1988).

Debtors' schedules show that the farm property which secures the Banks' mortgages is essentially Debtors' only significant asset. As previously discussed, Debtors have no equity in the property. The unsecured debts scheduled are insignificant in comparison to the Banks' claims. Debtors do not farm the property nor do they employ others. The Banks' foreclosure action appears to be Debtors' only financial problem precipitating bankruptcy. Filing their petition five minutes prior to the state court receivership hearing evidences an intent to frustrate these secured creditors' legitimate efforts to enforce their rights.

Debtors earned, according to their schedules, \$64,000 as income for 1993. They were required to make payments in the calendar year 1991 and 1992 under their previous Chapter 11 Plan. Debtors did not make plan payments in 1991 or 1992 until they were delinquent. No plan payments were made in 1993.

Additionally, property taxes were to be paid. Debtors made their last property tax payment in 1992. The taxes are delinquent for the 1992 and 1993 tax years. Also, there are taxes owing for previous years which are still unpaid.

Mediation was held which resulted in a Mediation Agreement requiring a \$16,000 payment by Debtors. This payment was never made. Debtors earned a significant amount of income. They generated revenues from the lease payments, however, they have applied none of these revenues toward bringing the plan current or toward the obligations owed to the Banks.

The Court concludes, based on all of the foregoing, that Debtors' bankruptcy filing is a delay tactic. Debtors have no good faith intention to apply any of their income toward obligations owed to the Banks based on their past performance. The filing at this time is merely an attempt to stop the process and the appointment of a receiver in Tama County.

Debtors have no equity in the 80-acre parcel of farm property. There is nothing in the record to indicate that this property is necessary to an effective reorganization or that reorganization is likely to succeed. Grounds to lift the automatic stay exist under 362(d)(2). Debtors acted in bad faith in filing their petition. This constitutes grounds to lift the stay for cause under 362(d)(1). Therefore, the automatic stay should be lifted to allow the Banks to proceed against the property.

**WHEREFORE**, Tama State Bank's Motion to Lift Stay is GRANTED.

**FURTHER**, Farm Credit Bank of Omaha's Motion to Lift Stay is GRANTED.

**FURTHER**, the automatic stay is lifted pursuant to 362(d) to allow Tama State Bank and Farm Credit Bank of Omaha to proceed with foreclosure proceedings in Iowa District Court in Tama County.

**SO ORDERED** this 31st day of March, 1994.

Paul J. Kilburg, Judge  
U.S. Bankruptcy Court