

# In the United States Bankruptcy Court

## for the Northern District of Iowa

### Western Division

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RICHARD W. HEYER and NANCY J. HEYER  
Debtors.

Bankruptcy No. 93-51907XS  
Chapter 11  
Contested No. 4041

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### ORDER RE: MOTION FOR RELIEF FROM STAY

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The matter before the court is the final hearing on the motion for relief from the automatic stay filed March 7, 1994, by G. E. Capital Asset Management Corporation, servicing agent for Fairfield Affiliates (G. E. Capital). A preliminary hearing was held March 30, 1994. Final hearing was held April 20, 1994. The court allowed briefs to be filed by April 26, 1994. This is a core proceeding under 28 U.S.C. § 157(b)(2)(G).

#### Findings of Fact

Richard W. Heyer and Nancy J. Heyer filed a chapter 11 petition on November 22, 1993. The Heyers have operated a real estate rental business for more than 20 years in Estherville, Iowa. They own 17 rental properties. Richard Heyer does the bookkeeping and the maintenance work for the business. Nancy Heyer assists with the business. She also does part-time work at Kimberly Quality Care and at the Spirit Lake Community Schools as a teacher's aide.

In June, 1993, G. E. Capital purchased a loan that is secured by one of the Heyers' rental properties. Heyers purchased the property in 1982 and gave a mortgage to First Federal Savings & Loan Association of Estherville and Emmetsburg (First Federal). Exhibit 1. The mortgage secured a note dated April 6, 1982 for \$24,000.00. The note was to mature April 6, 1985. Payments were \$377.00 per month.

Heyers' community experienced an economic downturn approximately 10 years ago. John Morrell Company, a major employer in the area, closed its plant. Heyers had difficulty keeping their properties occupied and had to lower their rents.

By agreement dated January 17, 1986, Heyers and First Federal extended the maturity date of the loan to January 15, 1989. Exhibit 2. The parties agreed to add interest and late charges to the principal, so that the new principal balance was \$29,622.70. The interest rate for the new loan term was 11 per cent. Monthly installments were \$282.10.

On August 19, 1988, Heyers and First Federal agreed to reduce the interest rate on the loan to nine per cent, reduce the monthly payment to \$237.12, waive accrued but unpaid interest and late charges and extend the term of the loan to August 15, 2018. Exhibit 8.

In 1989, First Federal was taken over by the Resolution Trust Corporation (RTC). RTC would not accept payments on the note without full payment of arrearages. The Heyers' monthly payment included an amount for escrowed real estate taxes. Heyers could not cure the arrearages, so the monthly payments were not made and the real estate taxes were not paid. The RTC sold Heyers' note and mortgage. The loan was transferred several times before G. E. Capital purchased it. Since it took over the loan, G. E. Capital has paid the real estate taxes, which are approximately \$294.00 per year. G. E. Capital began foreclosure proceedings which were pending at the time of the Heyers' petition.

G. E. Capital filed a proof of claim for \$47,618.81, of which it claims \$15,664.17 is the delinquency. Exhibit 9. Heyers listed the value of the property in their schedules at \$24,000.00.

The property is approximately 100 years old, but Heyers have maintained the good condition of the property. They have replaced the furnace, the roof, the water heater, carpeting and windows. The building contains two rental units. Each tenant has a one-year lease.

On February 14, 1994, the Heyers filed a plan of reorganization and disclosure statement. Exhibits 5, 6. Attached to the disclosure statement are the Heyers' cash flow projections for 1994-1996. Heyers project they will receive \$787.00 monthly rent from the property mortgaged to G. E. Capital and will have the following average monthly expenses for 1994:

Utilities	\$143.77
Mortgage (\$237.12 per 8/19/88 agreement plus additional \$38.94)	276.06
Real estate taxes	24.50
Insurance	13.83
Miscellaneous expense	38.02
<b>TOTAL</b>	<b>\$496.18</b>

Exhibit 6. Heyers project their profit on the property will be approximately \$290.00 per month. They expect total net monthly rental income of \$1,501.94 on all properties they propose to retain. After subtracting living expenses from net rental income and Nancy Heyer's salary, they project a surplus of \$243.94 per month.

### Discussion

A creditor is entitled to relief from the automatic stay:

1. for cause, including the lack of adequate protection of an interest in property of [the creditor]; or
2. with respect to a stay of an act against property under [§ 362(a)], if--
  - A. the debtor does not have an equity in such property; and
  - B. such property is not necessary to an effective reorganization.

11 U.S.C. § 362(d). G. E. Capital has the burden of proof on the issue of the Heyers' equity in the property. 11 U.S.C. § 362(g)(1). The parties have stipulated that the Heyers have no equity. The Heyers must show the property is necessary for an effective reorganization. 11 U.S.C. § 362(g)(2). Although G. E. Capital must make a prima facie case of cause for relief from the stay under § 362(d) (1), the ultimate burden of proof is on the Heyers to show they are entitled to have the stay remain in

place. In re Kerns, 111 B.R. 777, 786 (S.D. Ind. 1990); In re Anton, 145 B.R. 767, 769 (Bankr. E.D. N.Y. 1992).

G. E. Capital alleges grounds for relief from the stay exist under 11 U.S.C. § 362(d)(2) because the Heyers have no equity in the property and the property is not necessary for an effective reorganization. The property provides a substantial portion of the income the Heyers project is needed to fund their proposed plan. It is clearly a necessary component of the plan. The further issue is whether the property is necessary for an "effective reorganization that is in prospect," which means there must be a "reasonable possibility of a successful reorganization within a reasonable time." United Savings Ass'n. of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 108 S.Ct. 626, 632 (1988).

The weight of debtor's burden of proof to show that property is necessary for an effective reorganization depends upon the time when the issue arises. The debtor's burden is not as great in the early stages of the case as it would be later in the case. In re Building 62 Ltd. Partnership, 132 B.R. 219, 221 (Bankr. D. Mass. 1991), citing Timbers of Inwood, 108 S.Ct. at 632. G. E. Capital's motion for relief from stay was filed early in this case. The Heyers have had a plan on file since February 14, 1994. Although some of the plan and disclosure statement provisions are confusing, the documents on their face show Heyers' rental business will produce net income and service the debt on the properties. The court finds the Heyers have sufficiently shown a realistic prospect of an effective reorganization. They need not prove, on a stay motion, that the plan can be confirmed. The court concludes that G. E. Capital is not entitled to relief from the stay pursuant to § 362(d)(2).

G. E. Capital also alleges grounds for relief exist for cause under 11 U.S.C. § 362(d)(1) because it is not adequately protected. G. E. Capital's motion suggests that part of the reason for its lack of adequate protection is its inability to proceed with its foreclosure action. The Supreme Court has held that the right to immediate foreclosure is not an "interest in property" protected by § 362(d)(1). Timbers of Inwood, 108 S.Ct. at 630. G. E. Capital has not alleged that the property is depreciating, which would entitle it to cash payments or other adequate protection. Id. at 629.

G. E. Capital's primary argument is that the Heyers have not made payments on the note for over three years. The court finds that the age of the last mortgage payment is not grounds for relief. It is a fact that existed prior to the time G. E. Capital purchased the loan; it is not a harm caused by the automatic stay. Heyers have proposed a plan to pay G. E. Capital's claim. Whether the plan is adequate to pay the claim is an issue for confirmation.

At the final hearing on the motion, G. E. Capital raised a more serious issue. It alleges the rents from the property are its cash collateral. Heyers admit they are commingling the rents with rents from other properties and are using the rents for rental expenses and living expenses. They believed they were authorized to do so. Ordinarily, the court would consider use of cash collateral without the creditor's or the court's permission cause for relief from the stay. It appears from the mortgage, exhibit 1, which grants a security interest in rents, that the rents are G. E. Capital's cash collateral. See Federal Land Bank v. Terpstra (In re Porter), 90 B.R. 399, 401 (N.D. Iowa 1988). Heyers concede this point in their post-hearing brief. However, the issue was not raised either in the motion or at the preliminary hearing. The court will not consider this ground in ruling on G. E. Capital's motion.

Also raised for the first time at the final hearing was the issue of real estate taxes. Real estate taxes become a first lien on property at the time they are levied. Iowa Code § 445.28; Merv E. Hilpipre Auction Co. v. Solon State Bank, 343 N.W.2d 452, 454-55 (Iowa 1984). Taxes G. E. Capital has paid thus far were for tax years for which the lien would have attached pre-petition. See Iowa Code § §

(441.46 (assessment year); 444.22 (annual levy); 445.28 (taxes are a lien); 445.30 (as between vendor and purchaser, tax liens attach June 30 each year). Thus, the lien for the amount of the tax was not harm attributable to the stay. Failure to pay the tax post-petition would cause the tax installment to draw interest. Iowa Code § 445.39. G. E. Capital would be entitled to adequate protection payments in the amount of accruing interest on the tax to prevent erosion of its secured position. However, the court finds that this issue also was not properly raised prior to the final hearing. The court will not consider the issue on G. E. Capital's motion.

### **ORDER**

IT IS ORDERED that G. E. Capital Asset Management Corporation's motion for relief from stay is denied. Judgment shall enter accordingly.

SO ORDERED ON THIS 28th DAY OF APRIL, 1994.

William L. Edmonds  
Chief Bankruptcy Judge

I certify that on \_\_\_\_\_ I mailed a copy of this order and a judgment by U. S. mail to: Alvin J. Ford, Dean Prober, Karen McCarthy, and U. S. Trustee.