

# In the United States Bankruptcy Court

## for the Northern District of Iowa

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EARL L. ROBERTSON  
dba R. Net Business Services  
FAY F. ROBERTSON  
Debtors.

Bankruptcy No. 94-11876KC

Chapter 11

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### ORDER

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Hearing was held in the above-captioned matter on January 31, 1995 in Cedar Rapids. Attorney John Titler appeared for Debtors. Also present was Debtor Earl Robertson. Collins Credit Union appeared by Attorney Joseph Schmall and Mr. Deke Morrow. The matter before the Court is the Motion for Relief from Stay filed by Collins Credit Union. This is a core proceeding pursuant to 28 U.S.C. § 157 (b)(2)(G).

#### STATEMENT OF THE CASE

Collins Credit Union is the mortgagor of Debtors' homestead. It received a judgment against Debtors in 1994 for foreclosure and requested a sheriff's sale. Debtors' bankruptcy case interrupted the sheriff's sale at that point and the sheriff's sale has been stayed. The Credit Union now requests relief from the automatic stay in order to complete the sale.

As of the time of hearing, Collins Credit Union had a payoff of approximately \$163,000. Mr. Clarence (Bud) Hunter is a realtor who provided expert opinion testimony on the value of Debtors' house. He utilized a comparables approach and testified that the fair market value was \$200,000, with a variation of plus or minus 5%. The hypothetical sale on the Credit Union's "E" uses a gross sale price of \$210,000 which is within the 5% variation. The obligations in Exhibit "E" are correct and Debtors do not contest those amounts. The primary obligation on the house is to Collins Credit Union in the approximate amount of \$163,000. ITT holds a second mortgage in the amount of \$27,442.88.

Debtor Earl Robertson testified that he has been in aerospace industries since 1978. He recently experienced financial problems and now cannot afford to keep his residence. He testified that it was his intention to sell this property and liquidate as much debt as he could out of the proceeds. He valued the property at \$235,000. Debtors listed the property for sale at the end of November. Mr. Robertson testified that he did receive an offer several weeks ago in the amount of \$220,000. However, he was out of town and the offer expired before he was able to get back. He has had no other offers. The property was appraised in 1991 at \$211,000.

The property is Debtors' homestead. Debtors wish to keep the stay in effect so they can sell the property and pay off the security interests. Debtors feel that the house can generate a higher price than Collins Credit Union would get at a sheriff's sale.

Debtors argue that, under a sheriff's sale, it is possible that Collins Credit Union will bid in at their outstanding payoff of approximately \$163,000. There may not be any other party with a sufficient interest, which would force a sale at a higher price. Debtors assert that on the open market with an arm's length transaction they can exceed \$210,000. This would generate sufficient money to at least pay off the costs of sale and the second mortgage to ITT in the amount of \$27,500.

Debtors take the position that even if they cannot get a full \$210,000 or \$220,000, the fact that a sheriff's sale might only bring \$163,000 would turn the ITT pay off into additional unsecured debt. As unsecured debt, Debtors would have to address this in their Chapter 11 Plan of Reorganization. This would be a substantial additional obligation which Debtors feel they can remedy by keeping the stay in effect to allow for a private sale of the residence.

### 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 moving party 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.

### EQUITY IN THE PROPERTY

The Court's determination of value is central to the issue of whether Debtors have equity in the property. Valuation is determined on a case-by-case basis, taking into account market conditions and the type of collateral, among other factors. In re Sutton, 904 F.2d 327, 330 (5th Cir. 1990). Under § 362(d)(2), it is appropriate to consider the amount due on all mortgages and other encumbrances to determine if Debtors have equity in the property. In re W.S. Sheppley & Co., 45 B.R. 473, 479 (Bankr. N.D. Iowa 1984); In re Royal Palm Square Assoc., 124 B.R. 129, 132 (Bankr. M.D. Fla. 1991). The Court may also take into account sales commissions and other costs of sale as well as real estate taxes, escrow and title costs. In re Stratford Hotel Co., 119 B.R. 695, 696 (Bankr. E.D. Mo. 1990); In re Kaufman, 24 B.R. 498, 499 (Bankr. E.D. Pa. 1982). Essentially, a debtor's equity consists of the surplus value remaining after the property has been disposed of for satisfaction of liens. In re Garsal Realty, Inc., 98 B.R. 140, 154 (Bankr. N.D.N.Y. 1989), citing Black's Law Dictionary 484 (5th ed. 1979).

The Court finds that the appraisal of Mr. Hunter provides credible evidence of the value of Debtors' residence. Giving Debtors the benefit of the 5% variation, the Court concludes that a fair value of the house is \$210,000. As set out in the Credit Union's Exhibit "E", Debtors would have a shortfall of approximately \$2,000 if the property is sold for that amount. Deductions on Exhibit "E" include the liens of the Credit Union and ITT, delinquent real estate taxes, realtor commission and other costs of sale. When these amounts are deducted from the value of the house, Debtors have no equity in the property.

However, in reality, Debtors are very close to the break even point. Debtors lack equity by an amount which is only approximately 1% of the value of the property. If a foreclosure sale is held, the realtor commission might not be in the payout analysis. If that were the case, Debtors would have a small amount of equity. But, it appears that the Credit Union may well be the only bidder at the sale and would bid in only the amount of its claim which would eliminate all of Debtors' equity, including that which would satisfy ITT's lien. Considering the entire record presented here, the Court must conclude that Debtors have no equity in this property.

### **NECESSARY FOR AN EFFECTIVE REORGANIZATION**

The second prong of the analysis requires Debtors to show that there is a reasonable possibility of a successful reorganization within a reasonable time. Anderson, 913 F.2d at 532. Bankruptcy courts demand less detailed showings during the four months in which the debtor is given the exclusive right to put together a plan to ensure the debtor is given the breathing room Congress intended the stay to provide. Id. at 533. In certain circumstances, a liquidating plan can be considered an effective reorganization for purposes of this analysis. W.S. Sheppley & Co., 45 B.R. at 479. The Court must ask whether it is likely a liquidating plan could pay the secured creditor's claim within a reasonable time. Stratford Hotel, 119 B.R. at 697.

One court has noted that protecting the interests of junior lienors may be necessary for an effective reorganization. In re Mellor, 734 F.2d 1396, 1401 (9th Cir. 1984). The court was considering whether to lift the stay to allow foreclosure on a Chapter 11 debtor's residence. Id. It stated that the remainder of the sale proceeds after payment to senior secured creditors could be a necessary part of the debtor's estate to provide some compensation to the remaining creditors. Id. at 1402.

Debtors filed this Chapter 11 petition on November 18, 1994. At about the same time, they listed their house for sale. Collins Credit Union filed their motion for relief from stay on December 12, 1994. Debtors' exclusive period for filing and gaining acceptances of a Plan of Reorganization has not yet expired. See 11 U.S.C. § 1121.

The house has been on the market for less than three months. Debtors wish to liquidate the property in order to pay off secured creditors and avoid an increase in their unsecured debt. They should be given a fair opportunity to propose a confirmable plan. See Royal Palm Square, 124 B.R. at 132 (granting debtors one last chance at confirmation, one more month to attempt to sell single asset). In these circumstances and at this time, the property is necessary to Debtors' ability to propose a plan of reorganization which would liquidate the property and pay off both the first and second mortgages. The Court concludes that Debtors should be provided a reasonable amount of time to obtain a purchaser through the normal market process. Debtors shall, therefore, be given until March 31, 1995 in which to continue their attempts to market the property.

**WHEREFORE**, Collins Credit Union's Motion for Relief from Stay is DENIED.

**FURTHER**, Debtors shall have until March 31, 1995 in which to sell their residence to satisfy Collins Credit Union's claim.

**FURTHER**, the automatic stay will remain in effect against Collins Credit Union's foreclosure sale of Debtors' residence until March 31, 1995.

**FURTHER**, if Debtors have not sold their residence on or before March 31, 1995, Collins Credit Union may renew its Motion for Relief from Stay.

**SO ORDERED** this 10th day of February, 1995.

Paul J. Kilburg  
U.S. Bankruptcy Judge