

# In the United States Bankruptcy Court

## for the Northern District of Iowa

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KENNETH AND WARREN CONTRACTING  
COMPANY, INC.

Bankruptcy No. 96-61400KW

Debtors.

Chapter 11  
Contested No. 1115

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### ORDER RE MOTION TO MODIFY STAY

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This matter came on for hearing before the undersigned on July 11, 1996 on Motion to Modify Stay. Creditor Spreitzer, Inc. was represented by Attorney Wesley Huisinga. Debtor Kenneth and Warren Contracting Co., Inc. was represented by Attorney John Titler. After presentation of evidence and argument, the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(G).

#### STATEMENT OF THE CASE

Spreitzer, Inc. asserts a purchase-money security interest in a Hitachi Hydraulic Excavator owned by Debtor and used in Debtor's business to break up concrete. Debtor has not made payments to Spreitzer on the debt since December. Spreitzer is concerned about rapid depreciation in the value of the collateral. It requests relief from the automatic stay under 362(d)(1) and (2).

Debtor asserts Spreitzer is adequately protected by the value of the collateral. Furthermore, it has filed an Offer of Adequate Protection agreeing to make payments of \$1,500 per month on August 1, September 1, October 1 and November 1, 1996. Debtor also asserts that the excavator is necessary for its reorganization efforts and that it has equity in the machine.

#### FINDINGS OF FACT

Debtor is a paving contractor operating primarily as a subcontractor. It uses the Hitachi Excavator to break up concrete in road construction. Debtor's vice president Terry Phillips values the machine at \$85,000. Debtor has used the machine for approximately 1400 hours breaking up concrete. It asserts that it has provided reasonable maintenance for the machine.

Originally, Debtor rented the machine for six months. It then entered into a purchase agreement with monthly payments of \$3,209.00. The remaining balance owed to Spreitzer for the purchase of the excavator is \$68,967.68. Debtor has made no payments on the debt since December 1995. It filed for Chapter 11 protection on June 4, 1996.

Spreitzer values the machine at \$60,000 to \$65,000. It asserts that the excavator has excessive wear for only 1400 hours of use. Spreitzer's witness, Brian Tancos, testified that removing concrete is the hardest application for the machine and limits the life of the machine. Spreitzer's president, Joseph

Spreitzer, testified that the machine currently needs \$11,000 in repairs. He stated that using parts other than Hitachi parts would have an adverse effect on the machine. Mr. Spreitzer also testified that further use of the machine will cause a decline in value. Spreitzer did not offer evidence of the specific amount of depreciation the excavator is experiencing from Debtor's continued use. Exhibit 10 is a guide for values of used construction equipment. It lists two similar excavators as selling for \$65,000 and \$71,000 respectively in December.

Spreitzer states that Debtor has no equity in the excavator based on its value of between \$60,000 and \$65,000 and the amount of the debt, \$68,967.68. The IRS has filed claims for tax liens in the amounts of \$89,794 and \$92,074. Spreitzer asserts that these tax liens further erode any equity Debtor has in the machine and undermine any possibility Debtor has for reorganization.

Mr. Phillips testified on behalf of Debtor that the wear on the machine was not excessive. He stated that the repairs Spreitzer encourages are either already taken care of or unnecessary. Mr. Phillips testified that the most expensive repair, replacing the bucket for more than \$6,000, is not done on this type of machine as a matter of course. Instead, he stated that the wear on the bucket would be fixed by welding and building it up with sheet steel. Mr. Phillips stated that the excavator is necessary for Debtor's reorganization as it must be used in jobs for which Debtor has already bid or entered contracts.

### CONCLUSIONS OF LAW

Under 362(d), Spreitzer may have relief from the automatic stay to enforce its remedies regarding the excavator (1) for cause, including the lack of adequate protection of an interest in property or (2) if the debtor does not have equity in the excavator and it is not necessary to an effective reorganization. The creditor seeking relief from the stay has the burden of proof on the issue of the debtor's equity in the property, and the opposing party has the burden of proof on all other issues. 11 U.S.C. 362(g).

### LACK OF ADEQUATE PROTECTION

As to 362(d)(1), the most basic component of adequate protection is reimbursement of the creditor for a decrease in the value of the security, and thus of its lien, caused by the imposition of the automatic stay or use of the collateral by the debtor. United States Savs. Assoc. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 370 (1988); In re Offerman Farms, Inc., 67 B.R. 279, 281 (Bankr. N.D. Iowa 1986). The interest protected "includes the right of a secured creditor to have the security applied in payment of the debt upon completion of the reorganization; . . . that interest is not adequately protected if the security is depreciating during the term of the stay." Timbers of Inwood Forest, 484 U.S. at 370.

Debtor does not dispute that Spreitzer has a security interest in the excavator and that the remaining debt is over \$68,000. In order to determine whether Spreitzer's interest is adequately protected, the Court should value the collateral at the time Spreitzer requested relief from the stay and determine the amount the collateral has or will depreciate thereafter. In re Deico Elecs., Inc., 139 B.R. 945, 947 (9th BAP 1992). An equity cushion may support adequate protection, but is not necessarily an element of proof. In re Elmira Litho, Inc., 174 B.R. 892, 904 (Bankr. S.D.N.Y. 1994).

Under 361, the court has the discretion to order lump sum or periodic payments as adequate protection in such amounts and in such frequency as dictated by the circumstances of the case. Deico Elecs., 139 B.R. at 947. Periodic payments, which are meant to compensate for depreciation, might,

but need not necessarily be, in the same amount as the payments due on the secured obligation. In re South Village, Inc., 25 B.R. 987, 994 (Bankr. D. Utah 1982) (quoting Senate Reports regarding 362(d)(1) adequate protection).

The Court concludes that the excavator is depreciating in value to some extent through the imposition of the automatic stay and Debtor's continued use of the machine. Adequate protection must be provided to ameliorate this diminution in value of Spreitzer's collateral. The Court finds that the excavator's value is between \$65,000 and \$71,000, which are the selling prices for the two similar machines in Exhibit 10. With the debt being more than \$68,000, Debtor has very little, if any, equity in the property. Without an equity cushion, Debtor must provide adequate protection by some other method.

Debtor has offered monthly payments of \$1,500, or approximately one-half of the payment required by the parties' security agreement, as adequate protection of the value of the excavator. Spreitzer has not pinpointed the percentage of expected decline in the value of the machine. See In re Greiman, 45 B.R. 574, 582 (Bankr. N.D. Iowa 1984). Debtor asserts that the \$1,500 monthly payments will adequately protect Spreitzer during the remainder of the automatic stay. As the record does not contradict this assertion, the Court concludes that Debtor's Offer of Adequate Protection should be approved as sufficiently protecting Spreitzer's security interest in the Hitachi Excavator. Spreitzer is not entitled to relief from the automatic stay under 362(d)(1).

#### **LACK OF EQUITY; NECESSARY FOR REORGANIZATION**

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 Spreitzer to prove that Debtor lacks equity in the property. 11 U.S.C. 362(g). If that is proven, the burden shifts to Debtor 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 Timbers of Inwood Forest, 484 U.S. at 375). To meet its burden regarding the prospect of reorganization, Debtor must show that there is a reasonable possibility of a successful reorganization within a reasonable time. Anderson, 913 F.2d at 532.

The Court's determination of value is central to the issue of whether Debtor has 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 encumbrances to determine if Debtor has 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 second prong of the analysis requires Debtor 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.

Debtor filed its Chapter 11 petition on June 4, 1996. Spreitzer filed its motion for relief from stay on June 11, 1996. Debtor's exclusive period for filing and gaining acceptances of a Plan of Reorganization will not expire until 120 days after the petition date, approximately early October. See 11 U.S.C. 1121.

As indicated above, the Court finds Debtor has little, if any, equity in the Hitachi Excavator. The property is, however, essential to Debtor's operations. Debtor has already committed to contracts which require use of the excavator. It constitutes Debtor's major money-maker, being its only piece of heavy equipment. Without the excavator, Debtor would not be able to make successful bids because of the high cost of renting a similar machine.

This Chapter 11 case is in its infancy. This early on, Debtor is entitled to the breathing room Congress intended to grant with the automatic stay. The large amount of tax liens asserted by the IRS appears problematic to a successful reorganization. At this time, however, the Court cannot conclude that there is not a reasonable possibility of a successful reorganization within a reasonable time. Based on all of the foregoing, the Court concludes that Spreitzer is not entitled to relief from the automatic stay under 362(d)(2).

**WHEREFORE**, Spreitzer, Inc.'s Motion to Modify Stay is DENIED.

**FURTHER**, Spreitzer, Inc. is not entitled to relief from the automatic stay for cause, including lack of adequate protection, under 362(d)(1), or for lack of equity and inability to reorganize under 362(d)(2).

**FURTHER**, Debtor's Offer of Adequate Protection is hereby approved.

**SO ORDERED** this 19th day of July, 1996.

Paul J. Kilburg  
U.S. Bankruptcy Judge