In the United States Bankruptcy Court

for the Northern District of Iowa

KEARNEY PARTNERSHIP	Bankruptcy No. 99-03131-D
Debtor(s).	Chapter 12

ORDER RE MOTION TO TERMINATE AUTOMATIC STAY

On December 13, 1999, the above-captioned matter came on for hearing on a Motion to Terminate Automatic Stay filed by secured creditor Mercantile Bank of Midwest. Debtor Kearney Partnership appeared by Attorney Joseph Peiffer. Mercantile Bank appeared by Attorney Eric Lam. Evidence was presented after which 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

Debtor is a partnership in the business of breeding, raising and selling purebred Angus cattle. Debtor presently owns 52 cows and bred heifers. Prior to the filing of the bankruptcy petition, the Bank sued Debtor in Iowa District Court and a judgment was entered in favor of the Bank and against Debtor on September 3, 1999. A writ of execution was issued and on October 18, 1999, the Dubuque County Sheriff levied upon and took possession of the cattle herd as well as some items of machinery. A sheriff's sale was scheduled for November 30, 1999. Debtor filed its Chapter 12 petition on the previous afternoon, November 29, 1999, and stayed the sale. An emergency hearing was held on December 3, 1999 to determine whether the cattle should remain at the sale barn or be returned to Debtor for care until other issues were resolved. At the conclusion of the hearing, the Court determined that the value of the collateral could best be protected by returning the cattle to Debtor's care pending hearings on other matters. Since that time, the cow herd has been returned to Debtor. One cow died in transit and one cow was sold at the sale barn because its condition had deteriorated.

The Bank has an acknowledged security interest in all livestock, machinery, and crops owned by Debtor. On December 3, 1999, the Bank filed a Motion to Terminate Automatic Stay and/or to Condition Use on Tender of Adequate Protection. The Bank asks the Court to terminate the automatic stay so it may pursue its State law remedies including, but not limited to, completion of the Sheriff's sale. Alternatively, the Bank seeks adequate protection if the automatic stay is to remain in place. The Bank argues, however, that Debtor is financially incapable of providing legally adequate protection under 11 U.S.C. §1205 or 11 U.S.C. §363.

FINDINGS OF FACT

Debtor Kearney Partnership consists of three general partners: Don Kearney, David Kearney and Catherine Kearney. As indicated, the Partnership operates a purebred Angus breeding operation. The Partnership does not own any real estate but rents land upon which its business is based. The assets of

the Partnership consist of an agreed upon value of $82,000 in cattle, $5,500 in crops, and $36,000 in equipment. Thus, the total value of Partnership collateral is $123,500. The three partners are general partners and are, therefore, personally liable for Partnership deficiencies pursuant to 11 U.S.C. §723 (a).

The evidence establishes that there is little independently owned property held by any of the individual general partners. Catherine Kearney is 81 years of age and her only source of income is Social Security. There is no indication that she has substantial independent assets. Don Kearney and David Kearney each own an automobile and several horses. They have historically earned some income independently of the Partnership. However, the evidence does not establish that they have substantial assets other than the property just noted.

The evidence establishes that the Partnership has a checking account in East Dubuque, Illinois. This appears to be run as a Partnership account as well as an individual banking account for both Don and David Kearney. Catherine Kearney has a separate banking account used primarily to process Social Security income.

As stipulated, the total Partnership collateral has a value of $123,500. For the purpose of this hearing, the parties stipulate that, as of the date of the filing of the petition, the Bank's judicially determined claim is $193,719.01.

The Bank asks the Court to modify the automatic stay pursuant to 11 U.S.C. §362(d)(2). This section provides in applicable part that:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -
> . . .
> (2) with respect to a stay against property under subsection (a) of this section, 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. §523(d)(2).

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

The evidence establishes that, as of the filing date of the Chapter 12 petition, the Bank had a judicially determined claim of $193,719. It is also stipulated that, as of the petition date, the value of the collateral for the purposes of this hearing was $124,325. It is uncontested that there is a lack of equity in the collateral and the Bank has satisfied its initial burden.

Having satisfied this burden, the burden then shifts to Debtor to satisfy §362(d)(2)(B). The first prong of §362(d)(2)(B) requires a showing by Debtor that the collateral is necessary to effectuate a reorganization. In re Drahos, 93-60924KW, slip op. at 2 (Bankr. N.D. Iowa, Oct. 5, 1993). For the purpose of this hearing, the Bank concedes that all of the secured collateral including cattle,

equipment and any feed would be necessary for a reorganization. However, the Bank does not concede that there is a reasonable possibility of a successful reorganization within a reasonable time. "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 Assoc. 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. Generally, bankruptcy courts demand less detailed showings of feasibility during the first months following the filing of the petition. During this time, a debtor is given latitude in attempting to put together a plan to ensure that the debtor is given the breathing room which Congress intended the automatic stay to provide. Id. at 533.

The Bank argues that there is no possibility of a successful reorganization based upon the debt load, cash flow projections, lack of feasibility of future loans, and the inability of the general partners to infuse additional capital. The Bank argues that since 1994, the Partnership has suffered a net loss. This appears to be verified by the Partnership tax returns over that period of time. Debtor, nevertheless, argues that the income tax returns in and by themselves do not fully show the cash flow of the Partnership. The cash flow projections submitted to the Court by the Partnership anticipate a positive cash flow. However, the credibility of Debtor's assertion of a past and future positive cash flow is brought into question by the fact that in the fall of 1998, the Partnership sold approximately 60 cattle which were secured to the Bank. This was done without the knowledge or consent of the Bank and the proceeds were used to pay Partnership expenses. In fact, a portion of those proceeds were used to pay the retainer for Debtor's attorney. This sale of the Bank's collateral in excess of $30,000 undermines Debtor's assertion that the Partnership has been and can be in the future an entity with a positive cash flow.

Secondly, Debtor has apparently attempted to procure loans from other banks. However, the loan through Mercantile Bank is guaranteed by FSA. The record establishes that a bank from which Debtor has attempted to secure an outside loan would also require an FSA guarantee. Since it appears that Mercantile Bank will be making a claim on the FSA guarantee, it is unlikely and probably impossible that FSA would guarantee any outside loan. There appears no reasonable chance at this time that a loan in the amount necessary to underwrite this operation is available, or even plausible.

Finally, as indicated in the findings of fact, the general partners do not have sufficient assets to inject capital into this operation in the amount necessary to propose or fund a reasonable plan. The general partner, Catherine Kearney, has only Social Security payments as a source of income. General partners, Don and David Kearney, do have jobs outside the partnership, but they generally generate only sufficient income to meet their personal needs. There is no showing that their income is of a sufficient amount to support a capital injection. Additionally, neither Don or David Kearney has sufficient independent assets to support the operation.

It is the conclusion of this Court that Debtor has not satisfied the burden to show the possibility of a reorganization under §362(d)(2)(B). In In re Anchorage Boat Sales, Inc., 4 B.R. 635, 641 (Bankr. E.D.N.Y. 1980), the court lifted the automatic stay under §362(d)(2) after noting that when there is no source of funds to enable the debtor to finance a plan and lenders and manufacturers have stopped dealing with the debtor, cause has been shown to modify the automatic stay. In In re Syed, 238 B.R. 126, 133 (Bankr. N.D. Ill. 1999), the court considered the availability of financing to the debtor in determining whether to lift the automatic stay for cause. The court concluded that:

> The Debtor's evidence only indicates the possible availability of $292,000.00 in loans for the rehabilitation . . . which is quite insufficient to pay the necessary costs of rehabilitation [of $2 million]. Debtor did not establish other sources of funding to pay for the rehabilitation. Therefore, there is no reasonable possibility of a successful reorganization within a reasonable amount of time under the Debtor's Chapter 13 reorganization plan filed in this case, and cause has been established by the [Creditor] for modification or annulment of the automatic stay.

Id.

It is the conclusion of this Court that while Debtor should be given a reasonable opportunity to present a plan, the overwhelming facts in this case establish that Debtor has no funds in its checking account, it has no reasonable prospects of a capital infusion from outside sources, and the general partners do not have the resources with which to provide loans or other capital investment in this partnership. In fact, Debtor sold secured collateral in order to pay necessary business expenses. Under these circumstances, Debtor has failed to show that there is a reasonable possibility of a successful reorganization within a reasonable time and the stay should be modified accordingly.

RELIEF FROM AUTOMATIC STAY FOR CAUSE

The Court must grant relief from the automatic stay if it determines that "cause" exists. In In re Ouverson, 79 B.R. 830, (Bankr. N.D. Iowa 1987), Judge Melloy stated:

> "Cause" as a basis for granting relief from the automatic stay is not defined in the Bankruptcy Code. "Numerous cases have found a lack of good faith to constitute "cause" for lifting the stay to permit foreclosure or for dismissing the case." Bankruptcy petitions filed under Chapter 12 are also subject to dismissal or lifting of the automatic stay for lack of good faith. Relief from the automatic stay for cause based on lack of good faith in filing the petition is subject to judicial discretion under the facts and circumstances of each case. In finding a lack of good faith courts have emphasized: "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. But if it is apparent that the purpose is not to delay or defeat creditors but rather to put an end to long delays, administration expenses ... to mortgage foreclosures, and to invoke the operation of the (bankruptcy law) in the spirit indicated by Congress in the legislation, namely to effect a speedy, efficient reorganization upon a feasible basis ... good faith cannot be denied."

(Citations omitted). Filing a bankruptcy petition on the eve of a scheduled foreclosure sale is generally not, by itself, sufficient to constitute bad faith. Id. "Cause" under §362(d)(1) has been interpreted to include "any reason whereby a creditor is receiving less than his bargain from a debtor and is without remedy because of the bankruptcy proceeding." In re Bunke, 172 B.R. 63, 66 (Bankr. D.S.D. 1994). The burden of proof is on the movant. Id.

Whether the debtor filed for relief in good faith is a discretionary determination that turns on the bankruptcy court's evaluation of a multitude of factors.

> While no single fact is dispositive, courts have found the following factors meaningful in evaluating an organizational debtor's good faith:

(1) the debtor has one asset;
(2) the pre-petition conduct of the debtor has been improper;
(3) there are only a few unsecured creditors;
(4) the debtor's property has been posted for foreclosure, and the debtor has been unsuccessful in defending against the foreclosure in state court;
(5) the debtor and one creditor have proceeded to a standstill in state court litigation, and the debtor has lost or has been required to post a bond which it cannot afford;
(6) the filing of the petition effectively allows the debtor to evade court orders;
(7) the debtor has no ongoing business or employees; and
(8) the lack of possibility of reorganization.

In re Laguna Assoc. Ltd. Partnership, 30 F.3d 734, 738 (6th Cir. 1994). "In detailing these indicia of bad faith, we are mindful that 'no list is exhaustive of all the conceivable factors which could be relevant when analyzing a particular debtor's good faith.'" Id.; see also In re Sparklet Devices, Inc., 154 B.R. 544, 547 (Bankr. E.D. Mo. 1993) (listing factors).

In In re Reinbold, 110 B.R. 442, 446 (Bankr. D.S.D. 1990), aff'd, Reinbold v. Dewey County Bank, 942 F.2d 1304 (1991), cert. denied, 503 U.S. 946 (1992), the court granted relief from the stay to expedite a creditor's recovery of its collateral. The debtor had committed fraud by transferring collateral prepetition without the creditor's knowledge or consent and by turning over less valuable, substituted equipment to the creditor as collateral in violation of the Chapter 12 plan. Id.at 445. The Eighth Circuit affirmed in Reinbold v. Dewey County Bank, 942 F.2d 1304, 1306-07 (8th Cir. 1991). It stated that the debtor's failure to comply with the chapter 12 plan supports the bankruptcy court's decision to grant DCB relief from the automatic stay for cause under §362(d)(1). Id.

In this case, the factors listed in Laguna Assoc. Ltd. Partnership are largely satisfied. Debtor transferred secured collateral prepetition without the Bank's knowledge or consent. Debtor's property had been seized through foreclosure and the Chapter 12 petition was filed one day prior to the Sheriff's sale. During the period of time that the cattle were at the sale barn, the Debtor effectively had no ongoing business. Debtor lacks the ability to perform a successful reorganization for the reasons previously set out herein. The law provides that relief from the automatic stay may be ordered when cause is shown. It is the ultimate conclusion of this Court that the Bank has established sufficient factors to show cause to modify the stay and allow the Bank to proceed with State law remedies.

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.

In order to determine whether a creditor's interest is adequately protected, the Court should value the collateral at the time the creditor 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). Without an equity cushion, a debtor must provide adequate protection by some other method.

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).

In this case, the only offer of adequate protection made by Debtor is that it would provide good care for the cattle pending sales in the year 2000. While such an offer may arguably be adequate if there is a sufficient equity cushion, this argument fails when a substantial negative equity exists, as in this case. Adequate protection must be based on property which is free of the Bank's security interest. The Partnership has no property free of the security interest of the Bank and no reasonable likelihood of being able to supply the same from any outside source. The promise of good care without other protection is really nothing more than an obligation which Debtor is required to perform under any circumstances. Thus, such a commitment is not adequate protection. As Debtor has no capacity to provide appropriate adequate protection in this case, the stay must be modified on the basis of lack of adequate protection as well as those grounds previously stated.

WHEREFORE, the automatic stay imposed at the time of the filing of the petition is hereby modified so as to permit Mercantile Bank of Midwest to pursue any and all in rem remedies against its secured collateral granted to it by applicable non-bankruptcy law, including, but not limited to, completion of the Sheriff's sale as a result of the foreclosure decree entered in Jones County District Court.

SO ORDERED this 16th day of December, 1999.

Paul J. Kilburg
Chief Bankruptcy Judge