

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
JAMES PAUL KENNEDY,)	CASE NO. BK92-81355
)	A
<u>DEBTOR(S)</u>)	
)	CH. 12
)	Filing No. 33, 44
Plaintiff(s))	
vs.)	
)	
)	
<u>Defendant(s)</u>)	

MEMORANDUM

Hearing was held on October 5, 1992, on the Motion for Relief filed by First Nebraska Bank of Stanton. Appearing on behalf of the debtor was Mark Johnson of Norfolk, Nebraska. Appearing on behalf of the Bank was James Cavanagh of Lieben, Dahlk, Whitted, Houghton, Slowiaczek & Jahn, P.C., Omaha, Nebraska.

First Nebraska Bank of Stanton has filed a motion for relief from the automatic stay or for adequate protection. The undisputed evidence is that the Bank has a security interest in livestock and that the debtor, both pre- and post-petition, sold livestock, received payment for the livestock and did not turn all of the proceeds over to the Bank. The debtor is holding approximately \$20,000.00 which, pursuant to the Code, is cash collateral. The debtor proposes to keep the cash collateral in an interest-bearing account and not use it without permission of the Bank or the Court. It is the position of the debtor that the funds may be necessary to be used pursuant to a confirmed plan, if confirmation ever occurs.

The Bank takes the position that it has not granted the use of this cash collateral, that interest is running on the debt, that the debtor promised to turn over all of the proceeds of the sale of collateral, and the debtor should not be permitted to withhold the funds pending confirmation.

The Bank also asserts that the proceeds that were paid by the debtor have been applied to principal of the debt and not to interest. This application to principal is apparently a policy decision of the Bank in conjunction with FmHA guaranteed loans. The Bank proposes that if these funds are turned over to it, they will be applied to principal also.

The debtor believes that this is a significant issue with regard to the debtor's rights. He paid proceeds of the sale of collateral to the Bank, believing that such payment would be applied first to interest and then, only if accrued interest was covered, to principal. If the earlier proceeds and these proceeds are not applied to interest, he will have received income for tax purposes, but have no deduction and will probably incur a significant tax.

Although the fight between the parties concerning the application of proceeds is not directly before the Court, both parties have raised the issue in their affidavit evidence. The Court has reviewed the notes in question and finds that by the plain language of the notes, even including the FmHA guaranteed notes, payments are to be applied first for charges which are neither interest nor principal and then to unpaid earned interest and finally to principal. Such a payment procedure and an application procedure is not to be changed unless in writing agreed to by both parties.

Therefore, the Bank has a contractual duty to apply the payments to interest, after paying applicable charges and, although that procedure may be inconvenient or perhaps even not good policy, it is a contractual obligation.

The motion for relief from the automatic stay or for adequate protection is denied. Under the Bankruptcy Code, the debtor has the right to sell collateral, the proceeds of which become "cash collateral." The debtor cannot use that cash collateral without permission of creditor or the Court. The debtor does not propose to use the collateral in this case, but proposes to hold it, at interest, pending a determination of its use pursuant to the confirmation process. That is an appropriate procedure, particularly if the funds are deposited in an interest-bearing account with the Bank and not spendable without further order of the Court or approval of the Bank.

The parties are directed to endorse and negotiate the proceeds checks and deposit them in an interest-bearing account. The debtor is ordered to leave the funds in the account pending further order of the Court or agreement with the creditor.

Separate journal entry to be entered.

DATED: October 27, 1992.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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<u>DEBTOR(S)</u>)	
)	CH. 12
)	Filing No. 33, 44
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	
)	DATE: October 27, 1992
<u>Defendant(s)</u>)	HEARING DATE: October 5, 1992

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Relief filed by First Nebraska Bank of Stanton; Resistance by the Debtor.

APPEARANCES

Mark Johnson, Attorney for debtor
James Cavanagh, Attorney for Bank

IT IS ORDERED:

The motion for relief from the automatic stay, or for adequate protection, is denied. See memorandum this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge