

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF )

MERRILL M. DOWNEY, )  
DEANNA K. DOWNEY, )

DEBTORS )

CASE NO. BK82-1776

MEMORANDUM

This matter is before me upon the debtor's application for the use of cash collateral. The hearing is made necessary by reason of a claimed security interest in that cash collateral by the First National Bank & Trust Company of Kearney.

The matter comes on for hearing based on a form order (Filing Number 20) which prescribes that this hearing is to be a preliminary hearing only, and that all evidence is to be offered by way of affidavit.

I take this opportunity to explain what this order, in my view, is intended to do.

Debtors under 11 U.S. Code, Section 363, cannot use cash collateral unless the secured creditor consents or the consent of this Court is obtained. The hearing on the use of cash collateral most often arises on an emergency basis if the secured creditor does not consent.

The order which is routinely entered as a form order for hearing directs that this hearing be a preliminary hearing only. I read 11 U.S. Code, Section 363(c)(3) to authorize such a preliminary hearing to determine whether cash collateral should be utilized by a debtor. That hearing is preliminary only in the sense that it does not preclude later examination of whether the secured creditor is adequately protected. In other words, the structure of 363(c)(3) allows authorization of the use of cash collateral if the Court can find that there is a reasonable likelihood that the debtor will prevail upon a request for adequate protection by the secured creditor.

In my view, it is necessary under 363(e) that the secured creditor actually ask for adequate protection. No final hearing will occur until the secured creditor so requests. Thus, it seems to me the structure of 363(c)(3) allows a preliminary hearing to determine whether at, a final hearing, if requested by the secured creditor, the debtor reasonably could be expected to prevail.

Here, the evidence before me discloses that replacement and other liens are offered. Based upon that, I can find that there is a reasonable likelihood that the debtor will prevail at a final hearing, if requested, on the issue of adequate protection.

Today the issues of adequate protection in ultimate form is not before me. The sole issue before me is the question of whether it can be expected that debtor will prevail. I leave it to the creditor to request the hearing on adequate protection which would be evidentiary in form.

I find, based on this evidence, that there is a reasonable likelihood that the debtor would prevail if the adequate protection offered is actually given and in place at that final hearing.

Application is granted and counsel are excused.

DATED: 6-28-83

BY THE COURT:

  
U.S. Bankruptcy Judge

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