

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF :
THEODORE V. OLSON, : Case No. BK82-379
SANDRA ANN OLSON, :
 : Adversary Pro.No. 82-0244
Debtors, :
O'NEILL PRODUCTION CREDIT :
ASSOCIATION, :
Plaintiff, :
v. :
THEODORE V. OLSON, :
SANDRA ANN OLSON, :
OFFICIAL CREDITORS COMMITTEE, :
Defendants. :
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MEMORANDUM OF DECISION

This matter is before the court on a complaint to modify the automatic stay of 11 U.S.C. § 362(a). The complaint was brought by the O'Neill Production Credit Association ("Association") against Theodore V. Olson and Sandra Ann Olson ("Debtors"), debtors-in-possession in proceedings for reorganization under Chapter 11 of the Bankruptcy Code.

An order was entered in this adversary proceeding on May 4, 1982, modifying the automatic stay so as to permit the Association to foreclose its security interest in the Debtors' stored 1981 corn crop.¹

On August 20, 1982, this court issued an order further modifying the stay of § 362(a) so as to permit the Association

¹ Now on appeal to the District Court of this District.

to continue a real estate mortgage foreclosure action against the Debtors.

Supplementing its Orders of May 4, and August 20, 1982, the court makes the following Findings of Fact and Conclusions of Law.

1. The Association holds three real estate mortgages on approximately 3,819 acres of the Debtors' land:²

- a. November 6, 1978, \$1,500,000 securing a note of \$2,550,100, 3,025.16 acres (by real estate descriptions 3,019.11).
- b. August 1, 1980, \$600,000 securing a note of \$600,000, 800 acres.
- c. April 29, 1981, \$800,000 securing a note of \$800,000.

2. The mortgages of November 6, 1978, and August 1, 1980, each contain this provision:

This mortgage to be void upon payment in full with interest of any obligations, present or future, secured or to be secured hereby.

3. In order to obtain the loans from the Association the Debtors signed an "Application For Loan" containing a "Loan Agreement" which recites in part:

That all loans, whether past, present or created in the future, or any renewals thereof owed by the undersigned to the Association, constitute one indebtedness of the undersigned, regardless of the number of promissory notes executed and delivered by the undersigned to the Association or the dates of making or the due dates thereof. All repayments on such indebtedness shall be applied to the indebtedness as a whole, and shall not be applied to any specific

² Some acres are covered by more than one mortgage.

note or notes. Also that all loans, whether past, present, or obtained in the future or any renewals thereof, owed by the undersigned to the Association, are secured by all pledged security whether past, present, or given in the future and whether in real or personal property, and shall stand as said security to the Association until all such indebtedness is paid in full.

4. The Association's claim against the Debtors is \$4,621,886. The net proceeds from the sale of the 1981 corn crop will be approximately \$1,000,000 reducing the claim to approximately \$3,621,886. All but one quarter section of the Debtors' real estate is collateral for this debt.

5. Various portions of the Debtors' property are subject to other mortgage liens and encumbrances that are prime to the Association.

a. John Hancock Ins. Co. (2 mortgage)	\$1,584,907
b. Prudential Ins. Co.	1,086,931
c. Bernard Engler, 1st real estate contract	32,808
2nd real estate contract	57,333
d. George and Margret Keidel, land contract	58,050
e. Ted Olson Enterprises, Inc., threshers lien	131,943
f. Ted Olson Enterprises, Inc., as assignee of a mortgage dated March 14, 1980, Republic National Bank of Dallas & First National Bank of Minneapolis	Approx. 450,000
g. First National Bank of O'Neill	150,825
h. Real estate taxes	23,077
i. Lien on grain bins	49,875
	<u>\$3,625,749</u>

6. Two real estate appraisers have testified as to the value of the Debtors' real estate. The Farmers National Company places a value on all the real estate, irrigation facilities and buildings as of March 1, 1982, at \$4,020,400. Shonka Real Estate, Inc. values the same property as of May 7, 1982, at \$4,392,472.

7. The value of the Debtors' property remaining after payment of all prime interest will range between \$500,000 (the Debtors' brief states \$542,113.00) and \$900,000 depending on which appraiser is correct. It suits the court for purposes of this decision to find the value of property available to satisfy the Association's lien is somewhere between the two outside figures.

The Association's claim is undersecured, which is to say, the Debtors lack equity in the farmland and other property they need to conduct their farming operation.

8. The value of the farmland is relatively stable. Like most it has steadily appreciated since the Debtors started farming. A recent slight depreciation in the past year reflects the unfavorable farm economy. If there is some diminution of value in the land in the near future it will be offset by the improvement in the Association's interest that will result from the application of the 1982 crop proceeds to senior liens. Such payments should offset any interest accumulating on the Association's secured debt, whatever that happens to be.

The Debtors are excellent farmers and have tended their land with care. The soil for the 1982 crop year has been treated

and seeded to yield 150 bushels of corn an acre. Barring an adverse act of nature it may produce 140 to 145 bushels this crop year. The existence of the crop improves and protects the land.

Because the Debtors' farm land is irrigated, and the center pivot irrigation system is functioning, it is reasonable to assume the irrigation system is being maintained and is not significantly depreciating.

An offer of a \$50,000 lien on a quarter section not now covered by the Association's lien gives the Association additional protection.

9. The Debtors' offer as other adequate protection against a diminution in value of the Association's collateral the following:

1. Profit from the sale of the 1981 corn crop.
2. Debtors' stock interest in the Association.
3. A check for \$49,000 representing proceeds from the sale of personal property in which the Association has a security interest.
4. Certain mortgages assigned to Ted Olson Enterprises, Inc., by the Republic National Bank of Dallas, Texas, and the First National Bank of Minneapolis, which the Debtors claim are prime to the Association's mortgage dated April 29, 1981.

10. The financial troubles of the Debtors are traceable to more than one source. The Debtors had substantial interests in Olson Brothers Manufacturing Company and Southwest Farms, Inc. Both of these businesses are now in straight bankruptcy. Olson Brothers Manufacturing Company, a manufacturer of agricultural irrigation equipment, drained significant sums of cash

from the farming operation at a time, when because of a depressed farm economy, the farming operation could least afford it. In terms of feed grains the depression is likely to continue. It is a real barrier for the Debtors.

11. The Debtors' most immediate need is cash to continue operations through a reasonably acceptable reorganization period. If it had not been for Ted Olson Enterprises, Inc., the corn crop for 1982 would not have been plated. That source of funds is now exhausted.

12. On May 14, 1982, the Debtors filed an application to borrow money and secure the lenders with the 1982 corn crop. The amount requested was \$779,440. On May 19, 1982, the court authorized an immediate borrowing of \$199,449. On June 10, 1982, the Debtors' application to borrow of May 14, 1982, was granted. The Debtors could not find a lender who would follow through with any cash.

The Debtors do project a favorable 1982 crop, but do not have enough cash to manage it and start again next year. They initially sought to use the proceeds from the 1981 crop as operating capital. This was denied to them by this court's order of May 4, 1982. In that order the court stated that, "[t]here has been enough evidence adduced to show that with a timely infusion of enough working capital it is reasonable to believe that there could be an effective reorganization." This was the reason for ordering a final hearing on the complaint to lift the stay filed by the Association. That final hearing was

held on June 10, 1982, and is the subject of this order. The court also observed in its order of May 4, 1982, "[t]hey [Debtors] have worked too long and invested too much not to give them a few more days."

13. On June 14, 1982, an "Emergency" application for leave to borrow was filed, and a make-shift arrangement was hurriedly ordered to assure a supply of fuel and electricity for the operation of the irrigation system.

It has been four months from the original order authorizing the borrowing of operating capital and the Debtors have still not found a lender. The lack of cash is the second, and for a farm operation of this size, an insurmountable barrier.

14. The philosophy of a reorganization under Chapter 11 is one of mutual consent; the joint efforts of the debtor and creditors to salvage a business. The stubborn resistance of the Debtors' largest creditor demonstrates that there will be no consensual reorganization in this case. This is another barrier that it is more than unlikely the Debtors can clear and expect to retain any interest whatsoever in their farm property.

15. In the order of May 4, 1982, the court stated:

The Debtors project a corn crop of 516,000 bushels which at the 1982 corn program fixed price and the government storage rate for on-site storage would bring about \$1,612,500, (Debtors' actual figure is at \$1,613,636). This figure with corn stalk rent fixed at \$30,000, is about \$1,642,500.

This is the most the Debtors could expect to make on their 1982 crop. It is too speculative.

True, the crop is maturing and the projected yield may be made. The Debtors' own assessment of cash requirements and net profit, however, has been changed three times since early 1982. Projected profit ranges from a low of 98,050 to the most recent projection (May 25, 1982) of a \$416,685 profit. Debtors attribute the increase to a ten bushel an acre improvement in expected yield; a heretofore unrealized right to a \$50,000 government grain program "deferred payment", payable in late October; a \$137,000 storage payment for storing the 1982 crop; and the additional income from one quarter section of sorghum that should provide an additional "gross" of \$40,000. Because of recent rains, the Debtors have also used less fuel for irrigation than expected. The court is of the opinion that there is serious reason to doubt that the storage payment of 26-1/2 cents a bushel will be available to the Debtors.

What the court deems reasonable adjustments to the costs of harvest, and the added expenses of marketing reduce the Debtors' expected net profit substantially. It is more reasonable to speculate there will not be enough cash after payment of all expenses of the operation to pay the accruing taxes, principle, and interest on the secured debt. There will be no cash and no credit to commence next year's operation.

16. The Debtors have filed a plan of arrangement. Prospectively, it provides for a continued operation of the Debtors' farms. There are no material changes in the manner that the farm business will be conducted. The Debtors believe that this ongoing farm

production will result in profits through 1985, and the land will appreciate in value. Debtors' estimates of profit through 1985 are:

1983	\$526,000
1984	\$578,000
1985	\$708,000

They predict the land will be worth \$5,500,000 in 1985. There is no evidence in the record to support these projections.

CONCLUSIONS OF LAW

1. The Association has a substantial interest by way of valid and subsisting real estate mortgages on the real estate of the Debtors described in the mortgages. This interest is entitled to "adequate protection" during the course of the Chapter 11 case. 11 U.S.C. § 362(d)(1).

2. The value of the Association's undersecured interest is the value of the real estate that remains after all prime mortgages, contract interests and encumbrances are satisfied.

3. The Association's interest in the Debtors' real estate is adequately protected at present.

4. The Debtors have no equity in the real estate on which the Association has mortgages.

5. The Debtors have failed to sustain their burden of proof that the real estate subject to the Debtors' mortgages is necessary for an effective reorganization of their farm business. 11 U.S.C. § 362(d)(2)(A).

6. The stay of 11 U.S.C. § 362 should be modified to permit the Association to prosecute the foreclosure of its mortgages.

MEMORANDUM OF LAW

The Bankruptcy Code at once provides Debtors with protection from their creditors in the rehabilitation process under Chapter 11 by means of the automatic stay of § 362(a), and provides a means to test the continued need for the stay in § 362(d). It is § 362(d) that is the focal point of this memorandum. It recites:

(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--

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property, if--

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

The responsibility for the burden of proof is set out in § 362(g) and falls as follows:

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section--

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

The Association urges there is cause to lift the automatic stay, including a lack of adequate protection, and in the

alternative that the Debtors do not have equity in the real estate, and that the real estate is not necessary to an effective reorganization.

The Debtors deny the fact of the existence of either ground.

Since the remedies are phrased disjunctively, the Association will prevail if it is entitled to relief under § 362(d) (1) or (2). In re La Jolla Mortg. Fund, 18 B.R. 283, 286 (Bankr. S.D.Cal. 1982); In re Family Investments, Inc., 8 B.R. 572, 575 (Bankr. W.D.Ky. 1981); In re High Sky, Inc., 15 B.R. 332, 335 (Bankr. M.D.Pa. 1981); Cf., In re Saint Peter's School, 16 B.R. 404, 408 (Bankr. S.D.N.Y. 1982).

The Association's proof and arguments under § 362(d) (1) center on adequate protection. It insists the real estate is depreciating, and that the money it has invested is eroding as time passes.

The cases decided under the Bankruptcy Code are holding, in the main, that adequate protection during the pendency of the stay requires preservation of the creditor's secured interest in the collateral at the time of filing the debtor's petition, that is the value of the collateral minus the amount of any primary liens. See In re Monroe Park, 17 B.R. 934, 939 (Bankr. D.Del. 1982); citing, In re BBT, 11 B.R. 224, 229 (Bankr. D.Nev. 1981); In re American Mariner Industries, Inc., 10 B.R. 711, 713 (Bankr. C.D.Cal. 1981); In re Nixon Machinery Co., 9 B.R. 316, 317 (Bankr. E.D.Tenn. 1981); In re Williams, 7 B.R.

234, 237 (Bankr. M.D.Ga. 1980); In re El Patio, Ltd., 6 B.R. 518, 522 (Bankr. C.D.Cal. 1980); In re Rogers Development Corp., 2 B.R. 679, 685 (Bankr. E.D.Va. 1980). See also, 2 Collier on Bankruptcy, ¶ 362.01[1] (15th ed.).

Whether this value fixed for the secured claim should contain an amount for the loss of the use of the value of the collateral while the stay is in effect, and that this additional value is to be adequately protected is subject to debate. See In re Monroe Park, supra at p. 940; In re Virginia Foundry Co., Inc., 9 B.R. 493, 498 (Bankr. W.D.Va. 1981); contra, In re American Industries, Inc., supra at p. 712. In any event, the secured value plus the value of its use in terms of interest is all the protection the Association has coming.

It is difficult to put a precise value on the secured claim of the Association as it is not definitely fixed by the evidence. The court believes that it will turn out to be closer to the higher figure of \$900,000 stated in the findings of fact.

The findings of fact explain to the court's satisfaction that the Association is adequately protected to the extent the law requires. It must be kept in mind that adequate protection is a flexible concept which requires a court to make decisions on a case by case basis, "after full consideration of the peculiar characteristics common to each proceeding." In re Monroe Park, Inc., supra at p. 940. See In re San Clemente Estates, 5 B.R. 605, 609 (Bankr. S.D.Cal. 1980).

The Debtors' argument that the mortgages of November 6,

1978, and August 1, 1980, are void and not subject to adequate protection is tortured and unconvincing.

The term "comfort" as used by Ted Olson to characterize these mortgages is foreign to the court. His opinion standing alone that this was a "comfort" mortgage adds little to the court's ignorance of such a form of legal encumbrance. The Association's witnesses, and counsel for the Association at least, find the concept foreign to the business practice of the Association. The idea that the phrase "void on any payment in full with interest of any obligation, present, or future, secured or to be secured hereby," means that "any" payment of "any" obligation secured by the mortgage releases all obligations secured, and voids the entire mortgage is untenable, particularly, when it contradicts all the other terms of the mortgage; for example, all the provisions of (4) relating to payment of taxes and rental charges, and leases assigned as security; and (5) default provisions in the event of failure to pay "said principal sum" or advances, or interest when due. The "principal sum" being in the sum "of Eight Hundred Thousand and no/100 -- Dollars."

These two mortgages are titled "Nebraska Real Estate Mortgages" and are obviously intended to be used under the common and statutory law of Nebraska relating to real estate as general real estate mortgages. A judicial construction based solely on the use of the term "any" instead of "all" used in the mortgage of April 29, 1981, containing in every other respect

the identical "boiler plate" of the first two mortgages, in an effort to produce some unfamiliar, illdefined, and contradictory "comfort" mortgage would be an absurd construction.

The court should, it is true, construe unclear terms of a written contract against the writer, but at the same time, it must guard against interpretations which lead to a document's total invalidation.

The court's findings are dispositive of the issue of adequate protection and obviate the need to assess the respectability of all the Debtors' offers of adequate protection, other than to say adequate protection must be compensatory in nature and result in an increase in value. In re Virginia Foundry, Inc., 9 B.R. 493, 497-98 (Bankr. W.D.Va. 1981). The offers of the P.C.A. stock, already collateral, and a check for proceeds from the sale of collateral are not compensatory.

Neither does the court have the slightest trouble with the issue of "equity," the only burden of proof on the Association. § 362(g)(1). "'Equity' is the value, above all secured claims against the property, that can be realized from the sale of the property for the benefit of the unsecured creditors." (citations omitted) In re La Jolla Mortgage Fund, supra at p. 283. The Debtors have no equity in the farm property, Ted Olson admits it.

This leaves the central issue of this proceeding; is the farm property necessary to an effective reorganization. This means more than a simple claim that the Debtors' business needs

the farm property to survive. The Debtors must establish to the court's satisfaction that a reorganization is, in fact, a realistic possibility. In re Dublin Properties, 12 B.R. 77 (Bankr. E.D.Pa. 1981); In re Discount Wallpaper Center, 19 B.R. 221, 222 (Bankr. M.D.Fla. 1982); This is just another way to say a reorganization is feasible. In re Martin, 19 B.R. 496 (Bankr. E.D.Pa. 1982); In re Aries Enterprises, Ltd., 3 B.R. 472 (Bankr. D.D.C. 1980); In re Castle Ranch of Ramona, Inc., 3 B.R. 45 (Bankr. S.D.Cal. 1980); In re Hanson Dredging, Inc., 6 B.R. 230 (Bankr. S.D.Fla. 1980); In re Gilece, 7 B.R. 469 (Bankr. E.D.Pa. 1980).

Collier's commentator, no doubt recalling problems of reorganization under the former Bankruptcy Act states, "The reference to an 'effective' reorganization should require relief from the stay if there is no reasonable likelihood of reorganization due to creditor dissent or feasibility considerations." 2 Collier on Bankruptcy, ¶ 362.07[2], p. 362-48 (footnotes deleted - emphasis in original).

In this proceeding the principal unsecured creditor, the Association, is an intractable and obdurate foe of any attempt to reorganize this business.

Other conditions are negative in the extreme, such as the absence of cash and no credit.

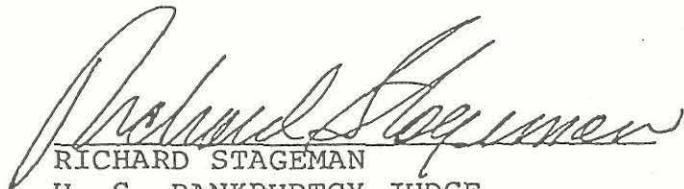
Two other conditions are beyond the control of the Debtors, weather and the economy. These make the Debtors' projections no more than a hopeful glimmer. All the Debtors can offer is that,

"indications are present that the farm will be able to operate at a profit in years to come." (Debtors' brief, August 3, 1982, p. 8). The secured debt burden is inescapable. It amounts to more than the farm property can support.

The Debtors have a farmer's seemingly ingrained disposition to hope. Next year is always the year. The fact is that the Debtors have been operating on the appreciation of the land and not on raw profit. It is asking too much to ask the creditors to bear all the risk, or force them to place faith in no more than the Debtors' optimistic expectations.

If the Debtors do not survive as farmers, it is not because of their creditors. It is because of their improvident use of credit, injudicious ambition, and an injurious farm economy.

Dated this 14th day of September 1982.



RICHARD STAGEMAN
U. S. BANKRUPTCY JUDGE
Sitting by Special Assignment
From the Southern District of Iowa