

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

PAUL VAN DE WALLE and
CAROL JEAN VAN DE WALLE,

DEBTORS

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CASE NO. BK85-115

MEMORANDUM OPINION

This matter came before the Court on a Motion for Relief from the Automatic Stay filed by Albion National Bank. It was heard before Timothy J. Mahoney on September 9 and continued to September 12, 1985. Alan Kirshen of Omaha, Nebraska, appeared on behalf of the debtors-in-possession and Harry Dixon and Judith Spindler of Omaha appeared on behalf of the Albion National Bank.

The debtors-in-possession filed a voluntary petition under Chapter 11 of the Bankruptcy Code on February 6, 1985. On the date of filing the debtors farmed 1,760 acres of land owned by the debtors and 1,500 acres of rented ground. They operated a cattle and hog operation. Their cattle operation, in addition to raising a cow-calf herd for commercial marketing purposes, also included purebred livestock, specifically a herd of registered polled Hereford.

Upon the date of filing, the assets of the debtors which are relevant for this particular motion were as follows:

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| livestock | \$380,000 |
| equipment | \$195,300 |
| grain | \$136,000 |
| Total | \$711,300 |

On the date of filing, the Albion National Bank had a claim against the debtors, based upon notes and properly perfected security interests in excess of the value of the collateral.

The evidence presented at the hearing is that almost immediately upon the filing of the petition, the Bank and the debtors were in dispute over the debtor's equity in the assets, the possibility of an effective reorganization and the question of adequate protection. On two previous occasions the Bank has filed a motion for relief from the automatic stay of §362 of the Bankruptcy Code. On both occasions some type of an oral or written settlement was agreed upon by the parties. However, there was continuing controversy concerning the interpretation of the two previous settlement agreements, which led to this last motion being filed.

On May 28, 1985, a hearing was to be held before Judge David Crawford of this Court on the second motion for relief filed by the Bank. At the time set for the hearing counsel for the Bank indicated that a settlement had been reached and that the automatic stay should be lifted subject to a stipulation which would be filed within seven days. The Journal Entry indicates that the stay was lifted subject to a stipulation being filed.

A written stipulation was filed and it was signed by counsel for the Bank and counsel for the debtors. The stipulation was offered into evidence and it appears to provide for a basic liquidation of the assets of the debtors over time, with final liquidation taking place in October of 1985.

A dispute soon arose between the parties concerning the interpretation of the stipulation. During the dispute the debtors-in-possession terminated the services of the attorney who had negotiated the stipulation on their behalf. The debtors-in-possession then filed a "repudiation" of the stipulation. The Bank filed a motion requesting the Court to interpret the stipulation and a motion for relief from the automatic stay which included as grounds therefor the alleged repudiation by the debtors of the stipulation.

At the final evidentiary hearing on the third motion for relief filed by the Bank, debtors appeared with new counsel, Mr. Kirshen. He informed the Court that the debtors really did not intend to repudiate the stipulation, but desire to stand by it. However, he wanted the Court to interpret the meaning of the stipulation. Counsel for the Bank informed the Court that it believed the repudiation to be valid and did not want to be forced to live with the terms of a document which had been executed in early June of 1985, repudiated in July and would now be interpreted by the Judge in September. Since the document included a number of matters that needed to be taken care of during the summer of 1985, the Bank requested that the Court simply have an evidentiary hearing on the matter of the motion for relief from the automatic stay.

Over strenuous objection by counsel for the debtors, the Court ruled that the stipulation entered into following the hearing on May 28, 1985, had been repudiated by the debtors and was of no further force or effect. The Court further ordered that since the Journal Entry of May 28, 1985, stated that the automatic stay was lifted subject to a stipulation, but the terms of the stipulation were not read into the record and since the written "stipulation" eventually filed was subject to various interpretations, the Court would not consider that the automatic stay had been lifted on May 28, 1985.

The debt owed by the debtors to the Bank on the date of the hearing was approximately \$695,000.

Evidence was presented by both parties concerning the present value of the equipment. Although the equipment was scheduled on the original schedules at \$195,000, the evidence suggested present fair market value of either \$224,000 if sold from a dealer's lot, \$163,000 if sold at auction and \$140,000 if sold at auction. Evidence was presented by the debtor that some of the equipment which was owned on the date of filing has been improved by maintenance and repair since the date of filing and, therefore, is possibly worth more than it was on the date of filing.

The Bank had two appraisers, one of the appraisers was a new and used equipment dealer and the other appraiser was an independent appraiser and well qualified, but had significant ties to the Bank. For example, he was a director of the Bank. The dealer testified that the highest possible market value was a sale of all of the equipment from his lot. Such a sale would bring approximately \$224,000. An auction sale, in the opinion of this appraiser, would bring approximately \$140,000.

The second appraiser for the Bank testified that the equipment on auction would bring \$163,000.

The debtor testified that even if the equipment didn't increase in value from the time of the filing, it did not decrease in value because it was used equipment, none of which was newer than five or six years old and was in average condition on the date of filing and is in average condition now.

Based upon the evidence presented, it is more persuasive that the value has not changed since February of 1985. From the testimony from the three witnesses, the two appraisers and the debtor, it seems likely that the equipment is worth somewhere close to the scheduled value of \$195,000. In addition, the dealer testified that there has been no decline in value since May when he did his original inspection and appraisal. He indicated there would be no decline in value for the next couple of months because this was now the sale season for most of the equipment.

Therefore, the Court finds that the value of the equipment on the date of hearing is \$195,000 and is not likely to decline in the near future.

As with the equipment, there were significant differences in the evidence concerning the value of the livestock as of approximately the date of hearing. The Bank's witness testified that the cattle would bring approximately \$161,000 and the hogs would bring approximately \$12,000. Therefore, his opinion was that the total value of the livestock on the date of hearing was \$173,000. On the other hand, the debtor's witness valued the cattle in May at approximately \$228,000 and testified that there had been some change in the market value since May but that the change was not significant. Although he was not certain of the number of cattle he

observed in September, he did know the type and number of cattle in May. The debtor then supplemented his testimony with current numbers. The value estimated by the witness for the debtor is more persuasive than that of the Bank.' The witness for the debtor took into consideration the quality of the herd and not simply its "hamburger" value as several witnesses discussed and used the term during the hearing. Based upon the evidence, the value of the cattle on the date of the hearing is \$217,000 and the value of the hogs is \$3,625.

The total value of the livestock on hand on the date of hearing is \$220,625 and the total value of the equipment on hand is \$195,000. Therefore, the total value of the assets upon which the Bank claims a lien is \$415,625. No evidence was presented concerning the value of grain on hand at the time of the hearing.

In addition to the above-listed values, the debtors indicate that there is a check in the amount of approximately \$118,000 which is the subject matter of litigation between various creditors, including the Bank. The debtors claim no interest in the check and ask the Court to give the full amount of the check, for the purposes of this hearing, to the Bank, or in other words, to treat \$118,000 as additional cash in the hands of the debtor upon which the Bank has a lien. Adding the previously-determined value of \$415,625 to the proposed check of \$118,000 gives a total value of the assets of \$533,625.

The value of the property is less than the claim of the Bank. Therefore, the debtors have no equity in the property.

Under §362d(2), once the creditor proves that the debtor has no equity in the property, the debtor has the burden of showing that the property is necessary for an effective reorganization.

The debtors outlined a proposal for using 80 purebred cows in an embryo transplant program. The debtors state that their reorganization plan will include a proposal whereby they lease their purebred cows to an organization which will pay the debtors a monthly lease payment and a daily care and feeding payment. In return, the company will receive the right to use the cows in an embryo transplant program. To care and feed the cows in the program, the debtors will need the use of the equipment.

The Bank presented evidence that the embryo transplant program is risky and that the debtors probably have not determined their actual costs accurately. However, the debtors have a thought-out plan and, although the expenses may not be calculated to the penny, they have at least presented evidence that such a program is possible and might enable a payment to the Bank on a regular basis. The evidence presented by the Bank that such a program is not feasible is better presented at a hearing on confirmation of a

plan rather than at a hearing on a motion for relief from the automatic stay.

The 80 purebred cows which the debtors intend to use in the transplant program are necessary for an effective reorganization and the equipment is necessary for an effective reorganization. The additional cattle and hogs are not necessary for an effective reorganization.

The Bank has a right to have the value of the collateral on the date of the filing of the petition for relief adequately protected from depreciation or dissipation. This value is \$711,000 from the debtor's schedules. From the earlier finding of value of the equipment, it is clear that there has been no depreciation in the value of the equipment and, therefore, the Bank has no right to any payment for adequate protection on the equipment.

However, the livestock has declined in value from \$380,000 to approximately \$221,000 and all of the grain is gone. It was valued on the schedules at \$136,000. The debtors claim that such decline should be offset by the amount of money they have paid to the Bank since the date of filing. That money is the proceeds of the sale of cattle and hogs and grain during the pendency of this case. The proceeds from the sale of cattle and hogs and grain since the date of filing is approximately \$150,000. That amount has been paid to the Bank. However, the debt decreased only \$114,000 after application of the proceeds. Therefore, debtors will be given credit for \$114,000 in adequate protection payments. Apparently, from the receipt of the proceeds, the Bank made payments to the debtors for living expenses and maintenance of the herd.

The reduction in the value of the livestock and grain from \$516,000 on the date of filing to \$221,000 on the date of hearing is \$295,000. The Bank has received \$114,000 net amount from the sale of the collateral and the debtors will be given credit for that payment as an adequate protection payment.

Deducting the value of the equipment, livestock and proceeds from the value of the assets on the date of filing leaves \$181,000 to be protected. This is determined by adding \$195,000 (equipment) plus \$221,000 (livestock) plus \$114,000 (proceeds) and subtracting that sum, \$530,000 from \$711,000, the value of the collateral on the date of the filing.

The debtors ask the Court to consider the disputed check for \$118,000 as further adequately protecting the interests of the creditor. The schedules list an undisputed secured debt of ADM in the amount of \$70,000. This claim and its effect on the ownership of the funds represented by the \$118,000 check are the subject of an adversary proceeding in this Court. The debtors will be given credit only for \$48,000, the difference between the amount of the check and the claim of ADM.

After adding \$48,000 to the value of the equipment, livestock and proceeds, the total protected collateral is \$578,000. Therefore, the debtors must still provide adequate protection for the Bank's interest in the difference between \$711,000, the value on the petition date, and \$578,000, the value now. The value that must be protected is \$133,000.

The debtors presented evidence that if they had been permitted to enter into the embryo transplant operation five months before the date of hearing, they would have been able to gross approximately \$10,000 from the lease of the 80 head of cattle plus they would have received daily feed and maintenance revenue of \$1.50 per head or approximately \$18,000. Therefore, they would have grossed \$28,000 and incurred maintenance and feed expenses of approximately \$175 per head per year or \$8,260 for five months. They, therefore, would have netted approximately \$19,000 less some living expenses which the Bank would have had available for adequate protection of its interests.

The debtor presented no solid evidence of a specific contract with specific figures. Evidence was presented that the debtor has the possibility of such an embryo transplant program. Without further evidence that such program is more than a possibility, this Court is not inclined to give the debtor credit for "what might have been".

The question then is: what must the debtor give to the Bank to adequately protect the Bank's interest in the \$133,000 reduction in value of its collateral since the date of filing? Under 11 U.S.C. §361 the debtor can give a lien on other property, can make periodic payments or, in some fashion, give the creditor its indubitable equivalent in its interest in the collateral. No evidence has been presented that the debtor is capable of giving a lien on previously unsecured property.

Evidence has been submitted that the debtor, if permitted to use the 80 head of purebred open cows will be able to generate a cash flow which can protect the creditor's interests. The evidence is that if the debtor is able to use the cows in the embryo transplant program it will receive \$2,000 per month in lease payments, assuming 80 head times \$25 per month lease payment. In addition, the debtor will receive \$1.50 per day for feed and maintenance of the 80 head. Using a 30-day month, the gross receipts from feed and maintenance payments should be \$3,600. Therefore, the debtor should have a gross income of \$5,600 per month for the 80 head. Using the debtor's projection of \$175 per head per year for feed and maintenance, the debtor will have \$1,200 per month expenses for 80 head. The debtor should then net \$4,400 per month.

The debtor further presented evidence that the herd would number 300 in six months and cash flow would service all of the debt. The vague method by which this increase in cattle and

increase in revenue would occur is not convincing. The debtors have no ability to make a lump sum payment of \$133,000 and insufficient revenue to make such a payment in installments over a short period such as one or two years. Therefore, the conclusion is that the Bank is not and cannot be adequately protected.

CONCLUSIONS OF LAW

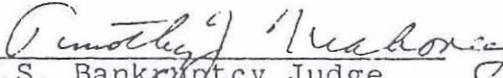
The Bank has proven under §362d(2) that the debtor has no equity in the property. The debtor has proven that most of the property is necessary for an effective reorganization. The property that is necessary for an effective reorganization is the equipment and the 80 head of purebred cows.

The Bank is entitled to adequate protection of its interests in the collateral to the extent of \$133,000. The debtor has presented no evidence which convinces the Court that it can make either a lump sum payment of \$133,000 or make installment payments plus interest over a short time period such as two years. Therefore, the Court concludes that the debtor has failed in its burden to prove that the Bank's interest in the collateral is adequately protected.

The motion for relief from the automatic stay of §362 is granted. A separate order to follow.

DATED: September 18, 1985.

BY THE COURT:


U.S. Bankruptcy Judge

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