

REC

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

OCT 30 1987
UNITED STATES BANKRUPTCY CLERK
FOR THE DISTRICT OF NEBRASKA
OMAHA

IN RE:)
)
ROLLAND LEE VICTOR and)
MARJORIE MARIE VICTOR,)
)
Debtors.)

CV. 86-0-608

BK. 86-1351

IN RE:)
)
ROLLAND LEE VICTOR and)
MARJORIE MARIE VICTOR,)
)
Debtors/appellants,)

CV. 86-0-711

BK. 86-1351

v.)
)
FEDERAL LAND BANK OF OMAHA,)
NEBRASKA,)
)
Appellee.)

MEMORANDUM OPINION
FILED
DISTRICT OF NEBRASKA
AT _____ M
OCT 26 1987
8
William L. Olson, Clerk
By _____ Deputy

This matter is before the Court on the Victors' (hereinafter debtors) appeal of the Bankruptcy Court's order of July 3, 1986, sustaining the motion of the Federal Land Bank (FLB) to lift the automatic stay pursuant to 11 U.S.C. § 362 (Filing No. 1 in each case). The appeals are virtually identical and the actions have been consolidated (Filing No. 3 in CV. 86-0-608 and Filing No. 7 in CV. 86-0-711).

Title 11, U.S.C. § 362(d) provides for relief from the automatic stay "for cause" including lack of adequate protection of an interest in property of such party in interest." 11 U.S.C. § 362(d). In the present case, the Bankruptcy Court made a factual finding that "[t]he value of the land is declining at approximately 1.67 per cent per month or approximately \$1,600 per

month" and accordingly held that the interest of the creditor was not adequately protected. The Court lifted the automatic stay with reference to foreclosure proceedings in the District Court of Wayne County, Nebraska.

This Court may review the Bankruptcy Court's legal conclusions *de novo*, but the Bankruptcy Court's findings of fact may not to be set aside unless clearly erroneous. Bankr.R. 8013; *Wegner v. Grunewaldt*, 821 F.2d 1317, 1320 (8th Cir. 1987); *In re Martin*, 761 F.2d 472, 474 (8th Cir. 1985). In the Eighth Circuit, the question of adequate protection is a question of fact and is to be reviewed under the "clearly erroneous" standard. *In re Martin*, 761 F.2d at 474. Further, a decision of lift the automatic stay under 11 U.S.C. § 362 rests within the sound discretion of the Bankruptcy Judge and will not be disturbed absent and abuse of discretion. *In re MacDonald*, 755 F.2d 715, 716-17 (9th Cir. 1985), *Matter of Holtkamp*, 669 F.2d 505, 507 (7th Cir. 1982). This Court has reviewed the record on appeal, including the transcript of proceedings, and finds no abuse of discretion by the Bankruptcy Court; The Bankruptcy Court's finding that the FLB lacked adequate protection is not clearly erroneous.

The FLB presented competent evidence of the property's decline in value. Debtors offered only their own affidavits to show the value of the property. The Bankruptcy Court correctly found that debtors possessed no equity in the property. Debtors presented no evidence that an effective reorganization as feasible or possible.

Debtors argue, *inter alia*, that the decision by the Eighth Circuit Court of Appeals in *In re Ahlers*, 794 F.2d 388 (8th Cir. 1986), cert. granted in part sub nom. *Norwest Bank Worthington v. Ahlers*, 107 S.Ct. 3227 (1987), mandates reversal. To that effect, debtors argue that their technical knowledge and expertise provide FLB adequate protection. The *Ahlers* case involves confirmation of a Chapter 11 plan under 11 U.S.C. § 1129(b)(1) over objection by a class of creditors. The holding in *Ahlers* is not relevant to issues involving § 362. *Ahlers* stands only for the proposition that, in certain circumstances in a Chapter 11 reorganization, the Court may consider a debtor's contribution of technical expertise to the plan if that contribution is reasonably compensatory and measurable. *Id.* at 403.

Debtors also contend that the promissory note at issue is not a negotiable instrument. They also allege fraud, unconscionability and denial of remedies under the Farm Credit Act as defenses to the note, and argue that adequate protection payments to the bank are not required until such time as the foreclosure process would be complete. The Court has considered these arguments and finds them without merit. Accordingly,

IT IS ORDERED that the Bankruptcy Court's decision of
July 3, 1986, is affirmed.

DATED this 23rd day of October, 1987.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Lyle E. Strom", written over a horizontal line.

LYLE E. STROM
UNITED STATES DISTRICT JUDGE