

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: ) CASE NO. BK96-82856  
) CASE NO. BK96-82857  
WARREN & BRENDA BIERMAN, )  
OCONTO CATTLE LIMITED ) CH. 11  
PARTNERSHIP )  
) Nos. 15, 31, 34, 36(Bierman)  
DEBTORS. ) Nos. 3, 15, 16, 19 (Oconto)

MEMORANDUM

Hearing was held on February 3, 1997, on a Motion for Relief filed by Ned Maryott. Appearances: Howard Duncan and David Copple for Ned Maryott; Terrence Michael and Tim Haight for Farm Credit Services of the Midlands; W. Eric Wood for the debtors; and Michael Whaley for Franz Foods, Inc., et al. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(G).

**Background**

The debtors, Oconto Cattle Company (Oconto), a Nebraska limited partnership, and Warren Bierman, an individual, Oconto's general partner, registered agent, and principal manager, filed petitions for bankruptcy relief under Chapter 11 on December 16, 1996.

On January 7, 1997, Ned Maryott, an individual who had been doing business with both Bierman and Oconto for numerous years, filed a motion for relief from the automatic stay to continue a replevin action he had commenced in the District Court of Custer County, Nebraska. In that action, Maryott alleges that between July 16, 1996 and August 29, 1996, he delivered 640 head of cattle to Oconto, that he was not paid for the cattle, and that pursuant to an agreement between the parties, title to the cattle did not pass to Bierman or Oconto until he was paid.

Farm Credit Services of the Midlands, PCA (PCA) filed a petition in intervention in the replevin action on November 8, 1996. The PCA claimed that it was a secured creditor of Bierman and Oconto, that the delivery of the cattle from Maryott was absolute, that its security interest attached to

the cattle upon delivery, and that Maryott was not entitled to immediate possession.

On November 13, 1996, Franz Foods, Inc., Clay Gruben, Phyllis Hayley Gruben, Bryan Gruben, Helen Sams, Fred Bloom, Ted Bloom, Fred D. Bloom, Paul Clark, Doris Clark, and Nancy Franz (the intervenors) also filed a petition in intervention in the replevin action. They alleged that they each claimed an ownership interest in cattle that were located on the Oconto feed lot, and sought to intervene as they were uncertain if Maryott wanted to obtain possession of cattle which they claimed to own.

Upon the filing of the two bankruptcies, the replevin action was stayed. The PCA filed an adversary proceeding on January 8, 1997, naming Maryott, Oconto, and the Biermans as defendants. The complaint was substantially similar to the petition in intervention it filed in the adversary proceeding, and prayed that the bankruptcy court determine that the transfer of cattle was an absolute sale and that its interest is superior to that of Maryott.

The debtors have waived or disclaimed any interest in the subject cattle and have declined to participate in the adversary proceeding. The debtors are merely stakeholders, and the real dispute involves the competing interests of Maryott, the PCA, and the intervenors in the cattle and/or the proceeds of the cattle delivered by Maryott to Oconto.

### **Decision**

Cause exists under 11 U.S.C. § 362(d)(1) for limited relief from the automatic stay to be granted in order to continue the replevin action in the District Court of Custer County, Nebraska, that was stayed upon the debtors filing of bankruptcy.

### **Discussion**

It is first necessary to delineate what issues are, and what issues are not, presently before this court. At the hearing, all parties involved attempted to discuss and argue the merits of their respective cases. Whether Maryott's delivery of the cattle to Oconto was an absolute sale, whether the parties had a separate agreement which provided that title to the cattle would not pass until payment, and other related

issues are not presently before the court. The sole issue that is before the court is whether Maryott should be granted relief from the stay to continue the replevin action in state court, or whether the stay should remain in place and the issues involving the competing interests of the parties should be determined in the pending adversary proceeding.

Maryott seeks relief from the automatic stay pursuant to § 362(d) of the Bankruptcy Code to continue its litigation against the debtor. At the hearing, the PCA asserted that Maryott was first required to assert an interest in the subject property of the replevin action as a threshold issue. Such a showing is logical for an analysis under § 362(d)(2). However, it is neither necessary, nor logical, for an analysis under § 362(d)(1). Were such a requirement necessary, Maryott would find himself in a "catch-22." He would need to proceed with the replevin action in state court to prove his interest in the subject property, but would first need to prove his interest in that property to obtain relief from the stay to proceed with the replevin action.

Although Maryott is ultimately seeking to take back property in the possession of the debtor which he claims is his, and an analysis under § 362(d)(2) is appropriate for actions against property, the motion for relief is initially for permission to continue a lawsuit against the debtor to determine Maryott's interest in cattle located on the debtor's real estate. When determining whether relief should be granted for the continuation of a lawsuit, the proper analysis is under § 362(d)(1). See, In re United Imports, Inc., 203 B.R. 162 (Bankr. D. Neb. 1996); In re Annie's, Inc., 201 B.R. 29 (Bankr. D.R.I. 1996); In re Marvin Johnson's Auto Service, Inc., 192 B.R. 1008 (Bankr. N.D. Ala. 1996); Prindle v. Countryside Manor, Inc. (In re Countryside Manor, Inc.), 188 B.R. 489 (Bankr. D. Conn. 1995); Mother African Union Methodist Church v. Conference of AUFCMP Church (In re Conference of African Union First Colored Methodist Protestant Church), 184 B.R. 207 (Bankr. D. Del. 1995); In re Neal, 176 B.R. 30 (Bankr. D. Idaho 1994); Smith v. Tricare Rehabilitation Sys., Inc. (In re Tricare Rehabilitation Sys., Inc.), 181 B.R. 569 (Bankr. N.D. Ala. 1994); In re Lamberjack, 149 B.R. 467 (Bankr. N.D. Ohio 1992); In re Claughton, 140 B.R. 861 (Bankr. W.D.N.C. 1992), aff'd 172 B.R. 12 (W.D.N.C. 1993); In re Johnson, 115 B.R. 634 (Bankr. D. Minn. 1989); In re Parkinson, 102 B.R. 141 (Bankr. C.D. Ill. 1988); In re

Curtis, 40 B.R. 795 (Bankr. D. Utah 1984). Section 362(d)(1) provides as follows:

(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, modifying, or conditioning such stay --

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

11 U.S.C. § 362(d)(1).

Although cause is not defined in the Code, Congress did intend that the automatic stay be lifted to allow litigation involving the debtor to continue in a nonbankruptcy forum under certain circumstances. See, H.R. Rep. No. 595, 95th Cong., 1st Sess. 341 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 50 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5836, 6297 ("[I]t will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from any duties that may be handled elsewhere.") "'Cause' for granting relief from the stay may exist if the equities in a particular case dictate that a lawsuit . . . should proceed in a forum other than the bankruptcy court for the purpose of liquidating the claim on which the lawsuit is premised." Marvin Johnson's Auto Service, 192 B.R. at 1013. In determining whether cause exists, the bankruptcy court must balance the potential hardship that will be incurred by the party seeking relief if the stay is not lifted against the potential prejudice to the debtor and the bankruptcy estate. Internal Revenue Service v. Robinson (In re Robinson), 169 B.R. 356 (E.D. Va. 1994).

There are two cases that are primarily relied upon by other courts which provide a number of factors that should be considered in balancing the equities of the case to determine whether cause exists. The first is Curtis, 40 B.R. at 799-800. The court in Curtis stated that the factors to be considered in making a determination of whether or not to grant relief from the stay for cause are as follows:

(1) Whether the relief will result in a partial or complete resolution of the issues.

(2) The lack of any connection with or interference with the bankruptcy case.

(3) Whether the foreign proceeding involves the debtor as a fiduciary.

(4) Whether a specialized tribunal has been established to hear the particular cause of action and that tribunal has the expertise to hear such cases.

(5) Whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation.

(6) Whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question.

(7) Whether litigation in another forum would prejudice the interests of other creditors, the creditors' committee and other interested parties.

(8) Whether the judgment claim arising from the foreign action is subject to equitable subordination under Section 510(c).

(9) Whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f).

(10) The interest of judicial economy and the expeditious and economical determination of litigation for the parties.

(11) Whether the foreign proceedings have progressed to the point where the parties are prepared for trial.

(12) The impact of the stay on the parties and the "balance of hurt."

Id. at 799-800 (citations omitted).

The second case is Johnson, 115 B.R. at 636. In that case the court held that the relevant factors to consider in determining whether relief from the stay should be granted so that a creditor could continue pending litigation against the debtor include the following:

1. Whether insurance coverage with a duty of defense is available to the debtor or the estate, or, conversely, whether the conduct of the defense will impose a financial burden on the debtor or the estate;

2. Whether judicial economy favors the continuation of the action in the tribunal in which it was commenced, to fix and liquidate the claim which then may be made against the debtor's estate;

3. Whether the . . . litigation has progressed to trial readiness, with the likelihood that investment of resources in trial preparation would be wasted if trial were deferred;

4. Whether the issues presented are governed solely by state law, or should be adjudicated by a specialized tribunal with expertise in their subject matter;

5. Whether the litigation involves other parties over whom the Bankruptcy Court lacks jurisdiction, and whether full relief may be accorded to all such nondebtor parties without the debtor's presence in the lawsuit;

6. Whether the creditor has a probability of success on the merits;

7. [W]hether the interests of the debtor and the estate would be better served by the resolution of threshold bankruptcy-law issues in the Bankruptcy Court before the court and the parties address the issue of the forum where the claim against the debtor is to be fixed and liquidated.

Id. at 636 (citations omitted). See, Tricare Rehabilitation Sys., 181 B.R. at 572-74 (Comparing the factors listed in the two cases).

Reconsidering the factors listed in the two cases, the relevant factors to consider are: (1) judicial economy; (2) trial readiness; (3) partial or complete resolution of the issues in the nonbankruptcy forum; (4) the interests of the bankruptcy estate in the proceeding; (5) the involvement of third parties in the proceeding; (6) the cost of defense or other potential burden to the bankruptcy estate and the impact of the litigation on other creditors; (7) the law governing the issues.

1. Judicial Economy

"Principals of judicial economy require that, without good reason, judicial resources should not be spent by duplicitous litigation, and that a lawsuit should only be tried once, that is if one forum with jurisdiction over all parties is available to dispose of all issues relating to the lawsuit." Marvin Johnson's Auto Service, 192 B.R. at 1015. Both this court and the District Court of Custer County, Nebraska, have jurisdiction over all of the parties (though the intervenors are not named in the adversary proceeding) and are able to dispose of all of the issues relating to the lawsuit. However, considerable effort has already been expended in the State District Court. The District Court judge has already held a temporary hearing in replevin, the parties have already submitted briefs, and the judge has made proposed findings of fact and law with regard to the temporary hearing.<sup>1</sup> It is more economical to have the parties continue the ongoing suit there than it would be to start from the beginning in this court.

In addition, a determination of these issues is a non-core proceeding. A core proceeding under 28 U.S.C. § 157 is

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<sup>1</sup>At the hearing on the motion for relief, counsel for Maryott attempted to introduce the proposed findings as evidence. Counsel for the PCA objected to its admission on hearsay grounds, and the evidence was not admitted. However, the fact that proposed findings were made is not hearsay, and is noted merely to demonstrate how far the litigation had progressed.

one which arises only in bankruptcy or involves a right created by federal bankruptcy law, while a non-core proceeding is one which does not invoke a substantive right created by federal bankruptcy law and could exist outside of a bankruptcy, although it might be related to a bankruptcy. Specialty Mills, Inc. v. Citizens State Bank, 51 F.3d 770 (8th Cir. 1995). The rights asserted by Maryott are not created by federal bankruptcy law and exist outside of a bankruptcy. Therefore, the replevin action, as well as the adversary proceeding concerning the same factual and legal issues, are non-core proceedings.

This does not mean that the bankruptcy court could not hear this particular proceeding, as specific authority to do so is provided in 28 U.S.C. § 157(c)(1). However, in such a case the court would have to submit proposed findings of fact and conclusions of law to the district court for a final order after de novo review, unless all of the parties consented to the bankruptcy court entering final orders. Id. This would be a waste of effort, given that the state court judge could issue a final order on all of the issues.

## 2. Trial Readiness

On December 4, 1996, the State District Court held a hearing on Maryott's right to possession of the cattle or proceeds thereof pending final determination of the merits pursuant to Neb. Rev. Stat. § 25-1093.02. All that remains is for the court to hold a final hearing and make a final determination on the merits. Although there is no evidence as to when a final hearing and determination would be made, it is apparent that the State Court case is closer to such an occasion than the pending adversary proceeding.

## 3. Partial or complete resolution of issues

The PCA and the intervenors have argued that a replevin action is not the proper method by which to resolve all of the issues between the respective parties. However, cases discussing replevin law do not support such an assertion.

It is true that "[r]eplevin is an action for possession only and does not properly lie against one who is not, at the time of the commencement of the action, in possession of any of the property sought to be recovered." Arcadia State Bank v. Nelson, 222 Neb. 704, 386 N.W.2d 451 (1986). The PCA

contends that a replevin action is limited in scope, and, because only 40 of the 640 cattle remained at the Oconto feedlots when the replevin action was commenced, only those 40 cattle are the proper subject of the action.

However, Maryott seeks to replevy not only the cattle remaining, but proceeds from the sale of any cattle that are allegedly his. While money may not generally be replevied, a replevin will lie for money that is capable of specific identification. 1967 Senior Class v. Tharp, 154 N.W.2d 874 (Iowa 1967); Equitable Life Assurance Society v. Branch, 302 N.Y.S.2d 958 (N.Y. App. Div. 1969); Portland v. Berry, 739 P.2d 1041 (Or. Ct. App. 1987).

Furthermore, although replevin determines the right to possession only, and not ownership, Barelmann v. Fox, 239 Neb. 771, 478 N.W.2d 548 (1992), in this case a finding by the court that Maryott was entitled to immediate possession is tantamount to a finding of ownership. If the state court determines that Maryott was entitled to immediate possession, presumably it would first find that title or ownership had not passed from Maryott to either of the debtors and that the remaining intervenors did not have any superior ownership interests in the property being replevied.

The State Court has proper jurisdiction and authority to provide the parties one of many possible remedies after a thorough consideration of the facts and the Nebraska version of the Uniform Commercial Code. First, the court could determine that the delivery of the cattle was an absolute sale and that Maryott is not entitled to immediate possession of any property. Maryott might then have an unliquidated unsecured claim against the estate for the failure of Oconto or Bierman to pay for the cattle delivered.

Second, the court could award Maryott possession of the cattle remaining alleged to be his, find that the proceeds from the cattle since disposed of are not specifically identifiable, and award him the value of the non-returned property as damages. See, Pick v. Fordyce Co-op Credit Ass'n, 225 Neb. 714, 725, 408 N.W.2d 248, 256 (1987) ("The measure of damages in a replevin action where the property is not returned is the value of the property, together with interest, from the date of the unlawful taking."). Those damages would be an unsecured claim against the estate.

Third, it could award Maryott possession of the cattle remaining alleged to be his and the proceeds of the cattle since disposed of, assuming that the court finds that the proceeds are capable of specific identification.

In any of the possible events described, all of the issues between the respective parties will be determined, either specifically or by implication.<sup>2</sup> While the PCA and the intervenors may be unhappy with the December, 1996, proposed findings of the State Court, and while such findings may even be contrary to the evidence and to law, in the opinion of the PCA officials and counsel, the parties are not without remedy should the court eventually rule in Maryott's favor on the merits. They may appeal the case to the Nebraska Court of Appeals or the Nebraska Supreme Court (provided, of course, relief from the automatic stay is sought and granted).

4. The interests of the bankruptcy estate in the proceeding

The debtor has specifically waived or disclaimed any interest in the pending adversary proceeding, which action is substantially similar to the stayed replevin action. The replevin action will only determine the interest of Maryott vis-a-vis the PCA and the intervenors, and will not affect the bankruptcy estate. At the hearing, counsel for the debtors stated that the debtors did not want to litigate the replevin action, because the debtors had no real interest in the outcome.

5. The involvement of third parties in the proceeding

Although the debtors are the named defendants in the replevin action, the action is essentially between third parties as to their interests in property.

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<sup>2</sup>For example, if the court determines that Maryott is entitled to the remaining cattle and the proceeds from previous sales of his cattle, it necessarily follows that the court also determine that PCA does not have a security interest in the cattle or proceeds and that the remaining intervenors do not have a superior ownership interest in the property, though the court may not specifically address those issues.

6. The cost of defense or other potential burden to the bankruptcy estate and the impact of the litigation on other creditors

The cost to the estate will be minimal, given that the estate has no financial interest in the outcome, and counsel for the debtors indicated at the hearing that the debtors do not wish to litigate the merits of the replevin action because of their lack of interest in the outcome.

7. The law governing the issues

The outcome of this case is essentially governed by the Nebraska Uniform Commercial Code and the Nebraska statutes regarding replevin. Neither Title 11, nor any other federal law is implicated in the proceeding.

**Conclusion**

Cause exists to grant Maryott relief from the stay to continue the replevin action, though such relief is to be of a limited nature. Maryott is granted relief to prosecute the replevin action and to seek a final judgment from the District Court of Custer County, Nebraska. However, relief is not granted to execute on a judgment in his favor or to take immediate possession of any property that the state court may determine he is entitled to possess, and additional relief from this court must be sought to further proceed. No party is granted relief from the automatic stay to appeal the State Court decision without first bringing the matter back to this court for further review.

Finally, the court is aware of a recent Nebraska Supreme Court decision entitled Sawyer v. State Surety Co., 251 Neb. 440, \_\_\_ N.W.2d \_\_\_ (1997), wherein that court held that a party which was granted limited relief from the automatic stay to pursue an action against a third party guarantor of the debtor was prohibited from maintaining the action pursuant to Neb. Rev. Stat. § 30-2641(b). Although the replevin action in this case does not involve a surety, nor does it necessarily involve a debt between Maryott and the debtors, the Nebraska Supreme Court in Sawyer apparently equated a grant of limited relief from the automatic stay as a discharge of the debtor from the underlying obligation. It is merely as a precaution that this court states that the grant of limited relief from the automatic stay in order to prosecute the replevin action

is not a resolution of any disputes between any of the parties and does not in any way affect the possible liabilities of the debtors to Maryott, the PCA, the intervenors, or any other creditors of the debtors involved in these Chapter 11 proceedings. The grant of limited relief from the automatic stay to prosecute the replevin action is **NOT** a discharge of any debt of the debtors, or of ANY claim against the debtors or their bankruptcy estates.

Separate journal entry to be filed.

DATED: February 27, 1997

BY THE COURT:

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

Copies faxed by the Court to:

DUNCAN, HOWARD T.	342-8134
COPPLE, DAVID	402-371-0790
MICHAEL, TERRENCE	344-0588
WOOD, W. ERIC	292-0347
WHALEY, MICHAEL	392-1538

Copies mailed by the Court to:

United States Trustee

Movant (\*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
WARREN & BRENDA BIERMAN, ) CASE NO. BK96-82856  
OCONTO CATTLE LIMITED )  
PARTNERSHIP, ) CASE NO. BK96-82857  
) CH. 11  
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DEBTOR ) Nos. 15, 31, 34, 36 (Bierman)  
) Nos. 3, 15, 16, 19 (Oconto)  
) CH. 11  
Plaintiff(s) )  
vs. )  
) JOURNAL ENTRY  
) DATE: February 27, 1997  
\_\_\_\_\_  
Defendant(s) ) HEARING DATE: February  
10, 1997

Before a United States Bankruptcy Judge for the District of  
Nebraska regarding Motion for Relief filed by Ned Maryott.

APPEARANCES

Howard Duncan and David Copple for Ned Maryott  
Terrence Michael and Tim Haight for Farm Credit Services of  
the Midlands  
W. Eric Wood for the debtor  
Michael Whaley for Franz Foods, Inc.

IT IS ORDERED:

Limited relief from the automatic stay is granted. See  
memorandum this date.

BY THE COURT:

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

Copies faxed by the Court to:

DUNCAN, HOWARD T. 342-8134  
COPPLE, DAVID 402-371-0790  
MICHAEL, TERRENCE 344-0588  
WOOD, W. ERIC 292-0347  
WHALEY, MICHAEL 392-1538

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