IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN RE:	)	CV 86-0-1049
	)	BK 86-2407
ANN FOOS,	)	
	)	MEMORANDUM
Debtor.	)	AND ORDER

Scottsbluff National Bank and Trust (the "bank") appeals from a Bankruptcy Court order denying the bank relief from the automatic stay. The order was entered on December 18, 1986 and prevents the bank from foreclosing on real estate of the debtor, Ann Foos. This appeal followed.

The bank argues on appeal that the Bankruptcy Court erred in finding that debtor's real estate was necessary to an effective reorganization; that a reorganization was feasible; and that the debtor satisfied her burden of proof as to both matters.

BACKGROUND

The debtor filed a Chapter 11 bankruptcy petition in the Bankruptcy Court on August 20, 1986. Initially appearing without counsel, the debtor obtained counsel in early November.

At the date of filing, debtor owed the bank over $140,000. The Bankruptcy Court found that $97,000 of that debt was secured by the debtor's agricultural real estate. Based on a hearing held December 9, 1986, the Bankruptcy Court overruled the bank's motion to lift the automatic stay, which since the date of bankruptcy, has prevented the bank from foreclosing on the debtor's real estate. No schedules of creditors or plan of reorganization had been filed as of the date of the hearing.

DISCUSSION

This appeal presents mixed issues of fact and law. The Bankruptcy Court found that debtor's real estate was necessary to an effective plan of reorganization. The debtor's showing was found sufficient to deny relief from the automatic stay. When considering mixed questions of law and fact, the clearly erroneous rule is not applicable. In re American Beef Packers, Inc., 457 F.Supp. 313, 314 (D. Neb. 1978). The bankruptcy judge's decision cannot be approved without this Court's independent determination of the law. In re Werth, 443 F.Supp. 738, 739 (D. Kan. 1977) (citing Stafos v. Jarvis, 477 F.2d 369, 372 (10th Cir.), cert. denied, 414 U.S. 944 (1973)).

The outcome of this appeal is controlled by 11 U.S.C. § 362(d) and (g). Section 362(d)(2) provides that a court shall grant relief from the automatic stay where two conditions are met: "(A) the debtor does not have an equity in such property; and (B) such property is not necessary to an effective reorganization." 11 U.S.C. § 362(d)(2)(A)-(B). Section 362(g) places the burden of proof as to the absence of debtor's equity on the party seeking relief from the stay, see id. at § 362(g)(1), and places the burden of showing the necessity of the property for an effective reorganization on the debtor, see id. at § 362(g)(2).

The bank proved, and the Bankruptcy Court held, that the debtor had no equity in the real estate. As such, the bank's burden under § 362(d)(2)(A) and § 362(g)(1) was satisfied.

However, the court found that the land was necessary to an effective reorganization. It is this latter ruling that the bank challenges.

Necessity

Testimony in the record supports the finding that the land was necessary to a reorganized farming operation. In In re Besler, 19 B.R. 879 (Bankr. D.S.D. 1982), it was held that a farming operation "irrefutably requires . . . cropland." Id. at 884. From the record, it appears that the real estate is already part of an ongoing farming operation. It has been farmed for over 30 years; in 1986 the land produced in excess of $50,000 in gross revenue with about $20,000 thereof going to the debtor; and a 1987 crop was in the planning stage. The record indicates that the land is well suited for growing various commodities such as corn, alfalfa and potatoes. In order to grow such crops, land is a necessity.

Feasibility

The Bankruptcy Court did not make an explicit finding that an effective plan for reorganization is feasible. The absence of an explicit finding is best explained by the absence of schedules and a plan for reorganization. The Court could at most conclude that an effective plan was merely possible. The record supports that conclusion.

There was the possibility that the debtor would be able to service the debt given the $20,000 income to the debtor from the farming operation. However, it was unclear whether or not the

income was already encumbered. By the same token, the debtor had her son available to work the farm. Thus, it appeared that the farm might continue to be kept productive. All of these factors indicate that the land would be necessary to an effective plan, but that as of the time of the hearing, there was insufficient evidence as to whether a plan would be effective and feasible. The outcome of this appeal thus depends on whether a showing of possible feasibility satisfies the debtor's burden of proof.

Burden of Proof

In In re Clemmons, 37 B.R. 712, (Bankr. W.D. Mo. 1984), the court granted relief from an automatic stay where the debtor failed to show that there was any hope of servicing the debt. Id. at 719-20. Moreover, the debtor had a long history of not generating sufficient funds to pay the debt. Id. The record is not complete enough to see whether a plan for Ann Foos would have been hopeless. Given the potential revenue to the debtor of $20,000 and the absence of a plan, or a schedule of creditors, it would be difficult to characterize the debtor's prospects as hopeless.

In In re Besler, 19 B.R. 879, 884 (Bankr. D.S.D. 1982), the court found that the debtors did prove that a reorganization would be effective. In Besler, the debtors had not yet filed a reorganization plan. Rather, they had submitted only income and operating expenses. Id. at 882-84. Since the creditor in Besler initiated its action for relief one month after debtors' petition,

the court found that granting relief at that early stage would be "grossly inequitable and contrary to the remedial aspects of Chapter 11." Id. at 884.

These cases suggest that when relief from the stay is sought early in the proceeding and before the debtor has filed a plan, a court should not grant relief from the stay if the debtor offers some evidence that an effective reorganization is "in fact, a realistic possibility." Matter of Discount Wallpaper Center, Inc., 19 B.R. 221, 222 (Bankr. M.D. Fla. 1982).

The Bankruptcy Court properly denied relief from the automatic stay. The net income figures of the debtor suggested the possibility that a reorganization would possibly be effective. The debtor's affidavit stated that they intended to file a plan. Moreover, the debtor's attorney stated to the court that the required schedules and plan would be forthcoming.

Having demonstrated the necessity of the real estate to an effective reorganization and a realistic possibility of success, the debtor met her burden of proof as of the date of the Bankruptcy Court hearing. However, this opinion does not address whether denying relief from the automatic stay would be appropriate were relief sought today.

In this regard, the Court notes that the debtor has not filed a brief responding to the bank's appeal. Should the debtor have similarly not submitted a schedule of creditors and a reorganization plan, as it told the Bankruptcy Court it would,

then the circumstances that justity the December 18, 1986 order of the Bankruptcy Court would be far less favorable to the debtor were the bank to seek relief from the stay at this time.

Nothing in this order should be construed to prejudice the bank from reapplying for relief if it appears to be warranted due to changed circumstances.

Accordingly,

IT IS ORDERED that the order of the Bankruptcy Court denying the Scottsbluff National Bank and Trust Co. relief from the automatic stay respecting Ann Foos' real estate should be and hereby is affirmed.

BY THE COURT:

Dated August 21, 1987

C. ARLEN BEAM, CHIEF JUDGE
UNITED STATES DISTRICT COURT