

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FILED
DISTRICT OF NEBRASKA
AT _____

IN THE MATTER OF)

BK 83-2087

CARL R. NELSON and)
ANN A. NELSON,)

CV 84-0-140 APR 10 1985

Debtors.)

ORDER
William L. Olson, Clerk
By _____ Deputy

This matter is before the Court on appeal from a judgment entered by the United States Bankruptcy Court for the District of Nebraska granting appellee relief from the automatic stay in effect due to appellants' Chapter 11 petition.

Appellants, Carl R. and Ann A. Nelson, are debtors-in-possession in a Chapter 11 proceeding filed on December 5, 1983. Appellee, the Arcadia State Bank, holds a claim owed by appellants in the approximate amount of \$103,174.81, as of December 5, 1983, with interest accruing from that date. Appellee's claim is secured by a security interest in all equipment, livestock, products of livestock, proceeds and other personal property owned by appellants.

On January 11, 1984, appellee filed a motion for relief from the automatic stay. The United States Bankruptcy Court held a hearing on the matter on January 30, 1984. Appellee submitted evidence that the amount it was owed by appellants as of the date of the hearing was \$105,501.62 and that the value of appellants' livestock, machinery, equipment and feed for livestock was \$103,190.00. Appellee also argued that appellants had no source of income to care for the livestock and maintain the equipment. Appellants offered the affidavit of Carl Nelson stating that

appellants needed to retain most of their machinery, equipment and livestock for an effective reorganization. Carl Nelson also indicated that he planned to use his monthly Social Security and Veterans Disability benefits to maintain the collateral and offered a post-petition lien on newborn livestock. At the close of evidence, the Bankruptcy Court sustained appellee's motion for relief from the automatic stay, ruling that appellee's claim was not adequately protected.

Under 11 U.S.C. § 362(d), a creditor is entitled to relief from the automatic stay if either (1) there exists a lack of adequate protection of the creditors interest; or (2) the debtor has no equity in the property and such property is not necessary to an effective reorganization. The party requesting relief has the burden of proof on the issue of the debtor's equity, and the party opposing relief has the burden of proof on all other issues. 11 U.S.C. § 362(g).

The Bankruptcy Court based its ruling on a determination that there was not adequate protection of appellee's interest. In reviewing that finding the Court observes that the question of what protection is adequate is a question of fact. Brookfield Production Credit Ass'n v. Borron, 36 B.R. 445 (D. Mo. 1983), aff'd, 738 F.2d 951 (8th Cir. 1984). As such, the Bankruptcy Court's decision is subject to review under the clearly erroneous standard.

The Bankruptcy Court based its ruling on the increase in the amount of appellants' debt from the filing of the Chapter 11 petition to the date of the hearing. At the time of filing the debt and the value of the collateral were almost identical. Appellee was fully secured. By the time of the hearing, the debt had increased by approximately \$2,300.00, due to interest, and appellee's interest was undersecured by that amount. The Bankruptcy Court ruled that because the fully secured debt had become partially unsecured, appellee was not adequately protected. Apparently, the Bankruptcy Court did not consider appellants' arguments as to why they were able to provide adequate protection.

The Bankruptcy Court erred in refusing to consider the appellants' evidence. The growth of the debt in excess of the collateral is not conclusive proof of the absence of adequate protection. See, e.g., In re Ausherman, 34 B.R. 393 (Bankr. D. Ill. 1983). It is strong evidence that appellee's interest is not adequately protected, but appellants were still entitled to have their arguments considered. Appellants presented evidence and arguments that:

1. Carl Nelson's disability benefits would be used to maintain the collateral;
2. The collateral was not declining in value;
3. Appellants would give appellee a post-petition lien on newborn livestock; and

4. The anticipated birth of calves and sale of some of the livestock and equipment would reduce the debt.

These arguments were relevant and; if accepted, would have justified a conclusion that appellee's interest was adequately protected.

Over one year has passed since the hearing. Given the length of time and the likelihood that circumstances have changed, the proper course is to remand this case to the Bankruptcy Court for a new hearing on the issue of adequate protection.

The court notes parenthetically that, although this decision is reached solely on the basis of the evidence before the Bankruptcy Court at the January 30 hearing, the events since that date support appellants' arguments. At the hearing, appellants argued that within a short time the debt would be reduced to slightly more than \$80,000.00. Subsequently, appellants sold certain livestock and equipment and turned proceeds over to appellee. According to a letter from appellee's attorney to appellants' attorney, as of July 26, 1984, appellants owed appellee \$84,285.51.

Accordingly,

IT IS ORDERED that the judgment of the Bankruptcy Court granting appellee relief from the automatic stay is reversed and remanded to the Bankruptcy Court for a new hearing on the issue of adequate protection.

DATED this 10th day of April, 1985.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "C. Arlen Beam", written over a horizontal line.

C. ARLEN BEAM
UNITED STATES DISTRICT JUDGE