

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

ERWIN HOLTZ,
DARLENE HOLTZ,

DEBTORS

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) CASE NO. BK84-2434
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A final hearing on a motion for relief from the automatic stay filed by the Prudential Insurance Company of America was heard on October 29, 1985. Patrick Nelson of Jacobsen, Orr & Nelson, P.C., of Kearney, Nebraska, appeared on behalf of the moving party. Charles Meyer of Omaha, Nebraska, appeared on behalf of debtors.

Memorandum Opinion

Prudential holds a real estate mortgage on 720 acres of land owned by the debtors located in Buffalo County, Nebraska. The debtors filed a joint petition under Chapter 11 of Title 11 United States Code on December 11, 1984.

On September 13, 1985, Prudential filed a motion for relief from the automatic stay alleging that the interest of Prudential in the collateral was not adequately protected; that the collateral has been and continues to diminish in value; that the debtors have no equity in the property which constitutes the collateral of Prudential and that the property constituting the collateral of Prudential is not necessary for an effective reorganization.

On the date of the filing of the bankruptcy petition, the amount owed to Prudential was \$796,583. The evidence presented by both parties is that on the date of filing the value of Prudential's collateral was in excess of the amount owed to Prudential. Therefore, pursuant to §506(b) Prudential has the right to be awarded interest on its claim post petition.

The evidence of Prudential on the issue of equity in the property was presented through an appraisal by Stephen England. Mr. England testified and his appraisal was admitted into evidence. His evidence was that he was requested to appraise the land and other land for the Overland National Bank of Grand Island, Nebraska, in May of 1985. He did such an appraisal using three recognized appraisal techniques, the market approach, the cost approach and the income approach. Although he used all three appraisal techniques, he felt that the income approach was the most likely procedure to provide a guide to fair market value. The reason for that was that there were not

a significant number of comparable sales in the area during the time prior to the date of the appraisal.

Based upon his investigation of the market, it was his opinion that the value of the land as of May of 1985 was \$746,000. Then, using the University of Nebraska at Lincoln Farmland Survey, the Federal Land Bank Benchmark System and his research concerning the market values of land in the general area, he determined that there had been a decline in value from December 11, 1984, to May 2, 1985, the date of the appraisal, of approximately 11%. Using the May value and adding 11% to it he determined that the value on December 11, 1984, was \$820,000.

He used the same procedure to determine the value on October 9, 1985, the most recent valuation date that he expressed an opinion about. He determined that land values in the general area and the land value of this property in particular had declined 5% from May 2, 1985, through October 9, 1985. Deducting the 5% from \$746,000, it was his opinion that on October 9, 1985, the value of the land was \$708,000.

The evidence of the debtors concerning the land value included direct testimony of Erwin Holtz concerning a description of his land and the improvements on the land as well as testimony by William Fischer, an appraiser from Grand Island, Nebraska. Mr. Fischer had originally appraised the Holtz land which is subject to the Prudential mortgage plus approximately 1,100 additional acres in 1983. His appraisal included 1,885 acres, much of which was not covered by the Prudential mortgage.

He did not use the market approach because he could not find comparables for tracts of land of approximately the same size. He, therefore, used the cost and income approach, compared the strong and weak points of each and determined his opinion of value.

His 1983 appraisal was then updated by him in April of 1984 and finally, he revisited the property on the morning of the evidentiary hearing to make certain that no significant changes had occurred.

He testified that since the 1983 appraisal was completed he had reviewed a number of comparable sales and it was his opinion on the date of the hearing that the value of the 720 acres which were subject to the mortgage of Prudential was \$957,000.

Both appraisers agreed that land prices have declined since December 11, 1984, and will continue to decline. Both agreed that the land values would decline at least 5% between the date of the hearing, October 29, 1985, and March 1 of 1986.

Mr. Fischer believed that the value of the 720 acres subject to the Prudential mortgage on December 11, 1984, was \$1,200,000.

Both appraisers appear from their credentials and their personal appearances to be credible. This Court, however, accepts the appraisal of Mr. England as being more likely to be an expression of fair market value of the 720 acres as of the time of the filing of the petition in bankruptcy and as of the time of trial, than the opinion of Mr. Fischer. The reason is that the appraisal of Mr. England is more current. It was originally performed for a non-party creditor in May of 1985. Calculations concerning costs, income and some comparable sales were provided as of May of 1985. Mr. England then used recognized indications of farm land declining values to determine the value as of December, 1984, and the current value.

On the other hand, Mr. Fischer's appraisal was originally performed in June of 1983. It was performed for the debtors and included a total of 1,885 acres. It was prepared in anticipation of a re-financing of part or all of the going operation owned by the debtors. Although this Court accepts the testimony of Mr. Fischer that he did everything necessary to properly update his 1983 appraisal in order to give an opinion as to fair market value in October of 1985, this Court simply accepts the opinion of Mr. England as being more credible.

Based upon the above finding, the land value in December of 1984 was \$820,000 and in October of 1985 \$708,000 or a decline of \$112,000. The debt on the date of filing was \$796,583 and the debt, including post-petition interest at the contract rate as of October 29, 1985, is \$860,967. In addition the evidence shows that real estate taxes for 1984 in the amount of \$14,228 were unpaid as of the date of hearing and are a lien or at least an encumbrance prior to the claim of Prudential. Therefore, there has been a total decline in the value of the collateral supporting the claim of Prudential of \$126,000, which includes the decline in value of the land and the unpaid real estate taxes.

The debt is over \$860,000. The land value is \$708,000. The debtors have no equity in the collateral.

Mr. Holtz testified that he has farmed since 1933. During the 1985 crop year he leased all of the land to his son because he was unable to obtain financing for the 1985 crop. However, he has worked the land during the 1985 crop year and testified that he is and has been a grain farmer. The land is, in his opinion, necessary to an effective reorganization. This Court finds that there is no dispute that the property which is the collateral of the Prudential mortgage is necessary to an effective reorganization of these debtors.

The debtors in possession claim that Prudential is adequately protected because the land is worth more than the amount of the debt and because Prudential will eventually receive \$75,000 as the proceeds of the sale of other land upon which Prudential also had a mortgage. With regard to the first contention, this Court has determined in this opinion that the land is worth less than the claim of Prudential. With regard to the second contention, there is no evidence that Prudential

is going to or has received \$75,000 from the sale of other land or from a settlement with Overland National Bank. Even if there were such evidence, this Court would not accept that as adequate protection of the claim of Prudential with regard to the 720 acres which is in question here. A payment of the fair market value of land upon which a creditor has a mortgage is not, for the purposes of this hearing, at least, adequate protection for the interest of the creditor in another parcel of land.

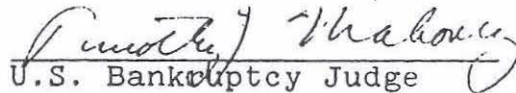
The debtors-in-possession offered no other form of adequate protection.

It is the conclusion of this Court that the debtors have no equity in the collateral. The collateral is necessary for an effective reorganization. The interest of the creditor in the collateral is not adequately protected. Therefore, the relief requested by the creditor pursuant to §362(d)(1) is granted.

Separate journal entry to follow.

DATED: November 18, 1985.

BY THE COURT:


U.S. Bankruptcy Judge

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