IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

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| IN RE: | ) | BK 84-01618 |
| RAYMOND SIEKMAN and FERN SIEKMAN, | ) | |
| Debtors. | ) | |
| FARMERS & MERCHANTS BANK OF MILFORD, NEBRASKA, | ) | CV 84-0-768 |
| Plaintiff, | ) | |
| vs. | ) | MEMORANDUM AND ORDER |
| RAYMOND SIEKMAN and FERN SIEKMAN, | ) | |
| Defendants. | ) | |



This case is on appeal from the order entered by the Bankruptcy Court for the District of Nebraska on November 17, 1984, denying the request of appellant Farmers and Merchants Bank of Milford (the Bank) for relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1) and (2).

The issue presented for appeal is whether the Bankruptcy Court erred in holding that a junior lienholder is precluded from obtaining relief from the automatic stay under 11 U.S.C. § 362(d)(1) and (2) when the value of the senior liens far exceeded the appraised value of the property. After a review of the briefs and the record submitted on appeal, the Court finds the decision of the Bankruptcy Court should be affirmed.

The standard of review is as follows:

> On an appeal the district court . . . may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact shall not be set aside unless

> clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

Bankr. Rule 8013. This Court is not so restricted in its review of conclusions of law. With this scope of review in mind, the Court now turns to the merits of the appeal.

Briefly, the undisputed facts of this bankruptcy case are these. The appellees own two parcels of real property. At the time of the hearing the total value of the property was $305,750.00. Lienholders senior to the appellant have claims totaling $387,167.56 against the property. All of the senior lienholders' claims are at least partially secured by the value of the land. However, though the Bank claims a lien of $47,181.92 on the parcel of land, the value of the land is insufficient to secure any portion of the Bank's lien. The land would have to sell for $81,417.56 more than its fair market value in order for the Bank to receive any payment on its indebtedness. Therefore, the Bank stands, essentially, in the position of an unsecured creditor.

The Bank argues that relief from the automatic stay is warranted for a creditor in its posture because (1) it is entitled to adequate protection, and (2) there is no equity in the property and the appellees failed to prove the property was necessary to the reorganization. With regard to whether stay should have been lifted for the Bank, the Bankruptcy Court held, "It seems to me that Farmers and Merchants Bank is an unsecured creditor and

cannot complain of the erosion of the collateral since it cannot look to it anyway." (Filing 47 at 27). This Court finds no error of fact or law in this holding.

At issue is 11 U.S.C. § 362(d)(1) and (2) which provides:

> 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, annulling, modifying, or conditioning such stay --
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
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> (2) with respect to a stay of an act against property, if --
>
> (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)(1) and (2).

Under section 362(d)(1) the concept of adequate protection requires at least "some value" to be protected. The Bank has been in the position of an unsecured creditor since the time of the filing of the bankruptcy petition. If the collateral were sold, the Bank would receive nothing. The claim of the Bank as regards the property has a value of zero. The value of the collateral is insufficient to yield the Bank any return. "Valueless junior secured positions or unsecured deficiency claims [are] not entitled to adequate protection." 2 Collier on Bankruptcy § 362.07, p. 362-49 (15th ed. 1984); See also In re 620 Church St. Bldg. Corp., 299 U.S. 24, 27 (1936). In that case, as well as the

case at bar, the appellant has failed to show any injury. There is no value to be protected. The appellant failed to prove any cause for relief from the automatic stay under section 362(d)(1).

The appellant has cited no cases where a creditor with a valueless claim was granted relief from the automatic stay. See, e.g., In re Hart Ski Mfg. Co., 5 B.R. 734 (Bankr. D. Minn. 1980) (junior lien creditor at least partially secured); In re Del Gizzo, 5 B.R. 446 (Bankr. D. R.I. 1980) (second mortgage partially secured); In re Thayer, 38 B.R. 412, 419 (Bankr. D. Vermont 1984) (a subrogated party, while not a secured party, with a claim of value may be a real party in interest).

The appellant, further, argues it was improperly denied relief from the automatic stay under 11 U.S.C. § 362(d)(2), since the appellees have no equity in the property. The appellant argues further that though the appellees submitted affidavits that such property was necessary to an effective reorganization, the Bankruptcy Court failed to make findings that a reorganization was reasonably possible. See In re Shriver, 33 B.R. 176 (Bankr. D. Ohio 1983).

This Court does not find the appellant's argument persuasive. In the first place, since the appellant has no claim to the property, it has no standing to move for relief from a stay against the property under section 362(d)(2). Granted, 11 U.S.C. § 1109(b) states

> A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

This Court does not agree with the appellant that section 1109(b) means a party in interest to a Chapter 11 case has automatic standing as a party in interest to move for relief from a stay under section 362(d). Reason requires that even under section 362(d)(2) the party in interest must have a valid claim against the property. It may not have to be a secured claim, but the claim must have at least some positive value. The whole idea of a stay is a balancing of potential injury. The appellant can suffer no injury from a stay against the property if the appellant has a claim of zero against it.

It is noted, that none of the creditors with secured claims appealed the decision of the Bankruptcy Court to deny their motions for relief from the automatic stay. Therefore, this Court is somewhat puzzled why the appellant so magnanimously argued on behalf of their claims. (Brief of Appellant at 4). In any event, the appeal will be denied. Accordingly,

IT IS ORDERED that the judgment of the Bankruptcy Court should be and hereby is affirmed.

DATED this 13th day of March, 1985.

BY THE COURT:

C. ARLEN BEAM
UNITED STATES DISTRICT JUDGE