UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN RE:	
MARLYN VERLE DAHLQUIST and MARY CHARLOTTE DAHLQUIST,	BK84-751
Debtors.	
FIRST NATIONAL BANK IN SIOUX CITY, IOWA,	CV 84-0-413
Appellant,	
v.	
MARLYN VERLE DAHLQUIST and MARY CHARLOTTE DAHLQUIST,	
Appellees.	
IN RE:	
ROBERT DEAN DAHLQUIST,	BK84-752
Debtor.	
FIRST NATIONAL BANK IN SIOUX CITY, IOWA,	CV 84-0-414
Appellant,	
v.	
ROBERT DEAN DAHLQUIST,	
Appellee.	
IN RE:	
JAMES MARLYN DAHLQUIST,	BK84-753
Debtor.	
FIRST NATIONAL BANK IN SIOUX CITY, IOWA,	CV 84-0-415
Appellant,	
v.	
JAMES MARLYN DAHLQUIST,	MEMORANDUM OPINION
Appellee.	

These matters are presently before the Court on appeal from findings and orders of the bankruptcy court entered on June 15, 1984. The appellant in all three appeals, First National Bank in Sioux City, Iowa (hereinafter Bank) appeals the bankruptcy court's order denying its motion for relief from the automatic stay to allow the receiver to proceed. This Court, after carefully reviewing the record on appeal and the briefs filed by the respective parties, is of the view that the January 15, 1984, orders of the bankruptcy court should be affirmed for the reasons hereinafter stated.

It is unnecessary herein to chronicle the entire tortuous history between these parties, which includes not only many appeals to this Court, but also several appeals to the Eighth Circuit Court of Appeals. As relevant herein, the facts are these. Prior to the filing of the instant petitions under Chapter XI of the Bankruptcy Code, the Bank had filed a suit against debtors in the United States District Court for the District of Nebraska. Such suit alleged that debtors defrauded the Bank in obtaining loans and sought to impress a constructive trust on all assets of the debtors. Subsequently, however, that action was automatically stayed when debtors filed their petitions in bankruptcy with the United States Bankruptcy Court for the Northern District of Iowa. On March 20, 1984, the Bank filed motions with the bankruptcy court seeking relief from such stay. At the conclusion of that hearing, Bankruptcy Judge William Thinnes vacated the stay to a limited extent that the Bank could seek appointment of a receiver in the pending civil suit.

On March 22, 1984, debtors and the Bank appeared before the Honorable Richard E. Robinson for a hearing on the Bank's motion for the appointment of a receiver. After the parties stipulated that Norwest Management and Trust Company be appointed standby receiver of debtors' assets, Judge Robinson ordered that such receiver would not be empowered to act until further order by the bankruptcy court appropriately modifying the automatic stay.

On April 10, 1984, venue for debtors' bankruptcy proceedings was transferred to the United States Bankruptcy Court for the District of Nebraska. Thereafter, the Bank filed its motions for relief from the automatic stay to allow receiver to proceed, which were denied on June 15, 1984. Thereafter, timely appeals were filed by the Bank and are now before this Court.

Before this Court addresses the merits of the appeal, it is prudent to state the general standard of review that guides the Court in matters such as this. Although on appeal, the bankruptcy judge's findings of fact are generally entitled to stand unless clearly erroneous, where there are presented 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), and 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.Kansas 1977), **citing Stafos v. Jarvis**, 477 F.2d 369, 372 (10th Cir.), cert. denied, 414 U.S. 944 (1973).

With this standard in mind, this Court must now determine whether the bankruptcy court erred in denying the Bank's motion for relief from the automatic stay to permit the receiver to proceed. In

this connection, at the conclusion of the June 15, 1984, hearing, the bankruptcy court, the Honorable David L. Crawford presiding, entered its decision on the record:

> Attempting to reconstruct what happened in the past in this case is not productive. The Bank wants relief from the stay so that a receiver in another forum can proceed to take possession of the assets of the debtors. I gather that the argument is that the Bank is not adequately protected because the Bankruptcy Code itself prohibits the appointment of a receiver. Therefore, the Bank says, 'we cannot get our hands on all of the assets for our own benefit in the bankruptcy court and, therefore, we are not adequately protected.' I don't agree. The Bank is adequately protected by the jurisdiction of this Court over the assets of the debtors, and that is the adequate protection that is present if they are also adequately protected by the possibility of appointment of a trustee in these Chapter proceedings. What has happened in the past is not of much help and it is no help at all to have two courts trying to exercise jurisdiction over the same assets. (Tr. at 22).

Pursuant to 11 U.S.C. § 362(c)(1), a party in interest may obtain relief from the automatic stay "for cause." Once a motion for relief is filed by a party in interest, the party opposing relief has the burden of proving the absence of cause for relief. 11 U.S.C. § 362(g)(2). In its brief in support of reversal of the June 15, 1984, orders of the bankruptcy court, the Bank appears to argue in the alternative. First, the Bank alleges that the bankruptcy court improperly placed the burden of proof upon the Bank. Review of the bankruptcy court's findings of fact and conclusions of law merely reflects a rejection of the Bank's arguments at the hearing and does not reflect an erroneous assignment of the burden of proof.

The Bank also argues that debtors presented insufficient evidence to sustain their burden of proving that a stay should not be granted to enable the receiver to exercise its duties. This argument must also fail. First, 11 U.S.C. § 105(b) prohibits the bankruptcy court from appointing a receiver in a bankruptcy proceeding. Had the bankruptcy court granted Bank's motion for relief from automatic stay to allow receiver to proceed, Bank would have accomplished in effect what 11 U.S.C. § 105(b) prohibits. Furthermore, the bankruptcy court correctly noted that, should the need arise, a trustee could be appointed to take control of the assets of the estates. This latter option would allow the bankruptcy court to maintain management of the assets of the estates and protect the interests of all creditors, not merely the Bank.

Based upon the foregoing discussion, the Court concludes that the bankruptcy court did not err in denying Bank's motions for relief from stay. Accordingly, a separate order affirming the June 15, 1984, orders of the bankruptcy court will be entered contemporaneously with this memorandum opinion.

DATED this 30th day of May, 1985.

BY THE COURT:

C. ARLEN BEAM
UNITED STATES DISTRICT JUDGE