UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
HARRISON & SHARON HALLIGAN,	)	CASE NO. BK96-81034
	)	
DEBTOR	)	CH. 12

MEMORANDUM

Hearing was held on September 6, 1996, on Motion for Relief filed by Farm Credit Services of the Midlands. Appearances: Eric Wood for the debtor and David Pederson for Farm Credit Services of the Midlands. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(G).

Background

Farm Credit Services (FCS) is a secured creditor of the debtor and has a claim in the approximate amount of $700,000. The debt is secured by real estate, livestock, crops, equipment, and stock, and the collateral securing the debt is now worth approximately $1.6 million. FCS has a first lien on all of the real estate except for 431.83 acres of land where Hershey State Bank holds a first lien in an amount of approximately $38,000. The land securing the Hershey State Bank debt has a fair market value of approximately $354,000, according to the debtors.

The debtors made a payment to FCS on December 6, 1993 in the amount of $54,153.02. Harrison Halligan indicates in his affidavit that it became apparent to him in the summer of 1994 that he would not be able to make the payment due FCS later that year. He claims that subsequently he had discussions with Joe Law, an employee of FCS, and was given permission to sell calves and cows which secured the FCS debt in order to pay operating expenses, real estate taxes, and a smaller debt owed to PCA. Livestock was sold in June, July, August, September, and October of 1995, but no proceeds were used to pay down the FCS debt.

FCS maintains that it did not give permission to Harrison Halligan to sell any of the collateral which secured its debt. Law states in his affidavit that he did discuss conditions for the use of proceeds from the sale of livestock which secured the debt, but that no agreement was ever reached. In addition, letters were sent from FCS to the debtors on June 27, 1995, November 20, 1995, and January 9, 1996, wherein the debtors were

instructed that the proceeds of any sales of livestock needed to be made payable jointly to Halligans and FCS. It is apparent that the debtors did not have permission from FCS to sell any of the collateral securing the debt, and that the debtors, in fact, converted the collateral in question.

The debtors failed to make any payments on the debt in either 1994 or 1995. They filed their petition on May 14, 1996.

The FCS has filed this motion for relief from the automatic stay for cause.

Decision

Although the debtors converted collateral of FCS and have failed to make a payment on the debt since December 1993, those facts alone do not amount to "cause" as that term is used in 11 U.S. C. § 362(d)(1). FCS also has a substantial equity cushion in the property so that it is adequately protected, and cause does not exist under 11 U.S.C. § 362(d)(1) for relief from the stay.

In addition, FCS has not shown that the debtors lack equity in the property, and in fact the evidence shows that the debtors have substantial equity in the property. Therefore relief from the stay cannot be given under 11 U.S.C. § 362(d)(2).

Discussion

FCS seeks relief from the automatic stay pursuant to 11 U.S.C. § 362(d) because it claims it is not adequately protected, the collateral is diminishing in value, the debtors converted proceeds from the sale of collateral for their own use, and that the property is not necessary for an effective reorganization. The pertinent portions of § 362(d) provide as follows:

> 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;
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, 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. Adequate Protection

FCS seeks relief from the stay because it believes its interest in the debtors' collateral is not adequately protected. Although the term "adequate protection" is not defined in the code, where the value of the collateral is substantially greater than the lien held by the moving secured creditor and all liens with priority over that held by the movant, then this substantial "equity cushion" can provide adequate protection to the secured interest of a mortgagee. In re Colonial Center, Inc., 156 B.R. 452, 460 (Bankr. E.D. Pa. 1993). See, Pistole v. Mellor (In re Mellor), 734 F.2d 1396 (9th Cir. 1984);In re Chauncy Street Assoc. Ltd. Partnership, 107 B.R. 7 (Bankr. D. Mass. 1989); Bargas v. Rice (In re Rice), 82 B.R. 623 (Bankr. S.D. Ga. 1987); Bankers Life Ins. Co. v. Alycan Interstate Corp., 12 B.R. 803 (Bankr. D. Utah 1981). "If the movant lienholder bears little risk of nonpayment if the stay were to continue because the value of the collateral is significantly in excess of its lien, and this cushion is not eroding too rapidly, the secured interest of this creditor is adequately protected within the meaning of section[] . . . 362." Colonial Center, 156 B.R. at 460.

In this case, FCS maintains an equity cushion of almost 100%. FCS claims that the collateral value to debt has declined from nearly four to one down to nearly two to one, and the decline seems attributable to the sale of the livestock by the debtors and the mounting interest on the debt. However, there is no allegation or evidence that the debtors have converted collateral postpetition, nor any evidence that the real estate, equipment, crops, and stock is losing value at a rapid pace. Because FCS enjoys a nearly 100% equity cushion and this cushion is not declining rapidly, its interest is adequately protected and relief cannot be granted on that basis.

2. Conversion of Collateral

FCS also maintains that the debtor's conversion of collateral provides a basis for relief from the stay. A debtor's prepetition conduct, including conversion of collateral and nonpayment of debt for a long period of time may be relevant in certain circumstances to determine whether a debtor's's petition was filed in bad faith and relief should be granted for cause. In re Grieshop, 63 B.R. 657 (N.D. Ind. 1986); Nationsbank, N.A. v. LDN Corp. (In re LDN Corp), 191 B.R. 320 (Bankr. E.D. Va. 1996); In re Lipply, 56 B.R. 524 (Bankr. N.D. Ind. 1986). However, the debtor's prepetition conduct in only one of a number of indicia of bad faith, see, e.g., Laguna Assoc. Ltd.

Partnership v. Aetna Cas. & Sur. Co. (In re Laguna Assoc. Ltd. Partnership), 30 F.3d 734 (6th Cir. 1994), and there is no other evidence in the record at this time to indicate that the debtors filed their petition in bad faith.

There is no allegation or evidence that the conversion of collateral is an ongoing, postpetition problem. Generally, for relief from the stay to be granted for cause, there must be a showing that continuation of the stay will cause some affirmative harm to the secured creditor. Capital Communications Fed. Credit Union v. Boodrow, 197 B.R. 409, 413 (N.D.N.Y. 1996). In addition, "a debtor's pre-petition payment behavior is relevant only insofar as it would suggest that equally unimpressive post-petition payment behavior will ensue. However, it must be recalled that poor pre-petition payment histories are systemic of most debtors and hence this factor is, in itself, of very limited relevance." In re Tashjian, 72 B.R. 968, 974 (Bankr. E.D. Pa. 1987).

Although the debtor did convert collateral prepetition and has not serviced the FCS debt since December 1993, those two factors, standing alone, do not amount to a bad faith filing or such other cause as to grant relief from the automatic stay pursuant to § 362(d)(1).

3. Necessity for Effective Reorganization

FCS's last argument is that the property is not necessary for an effective reorganization. Relief pursuant to § 362(d)(2) is a two part analysis: first, § 362(d)(2)(A) requires a showing that the debtor has no equity in the property and second, § 362(d)(2)(B) requires a showing that the property is not necessary for an effective reorganization. Colonial Center, 156 B.R. at 459. The secured creditor bears the burden of demonstrating lack of equity. Id. If there is no equity, then the debtor must demonstrate that the collateral is necessary for a plan of reorganization that is in prospect within a reasonable time. Id.

FCS has not alleged in its motion that there is a lack of equity in the property. In fact the evidence reveals that the debtors have substantial equity in the property.

> Unless the secured creditor demonstrates a lack of equity, a court does not reach the issue under section 362(d)(2)(B). Accord, e.g., In re Kaplan, 94 B.R. 620, 621 (Bankr. W.D. Mo. 1989); Matter of Cardell, 88 B.R. 627, 631-32 (Bankr. D.N.J. 1988); In re Skipworth, 69 B.R. 526, 527 (Bankr. E.D. Pa. 1987). This follows because, to a certain extent, Congress implicitly assumed in section 362(d)(2) that if the collateral has measurable value to the

> estate in excess of lien claims, it can be liquidated and its proceeds used as part of a liquidating plan of reorganization. Measurable equity therefore means that the secured property is likely to be needed in a plan of reorganization, and such reorganization is possible.

Id.

Because the debtors have substantial equity in the property that serves as collateral for the FCS debt, relief cannot be granted from the automatic stay pursuant to § 362 (d)(2).

Conclusion

The motion for relief from the automatic stay is denied.

Separate journal entry will be filed.

DATED: September 17, 1996

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

WOOD, W. ERIC	292-0347
LYDICK, RICHARD	333-9256
PEDERSON, DAVID	308-532-2741

Copies mailed by the Court to:
United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute

UNITED STATES BANKRUPTCY COURT
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IN THE MATTER OF	)	
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HARRISON & SHARON HALLIGAN,	)	CASE NO. BK96-81034
DEBTOR(S)	)	
	)	CH. 12
	)	Filing No. 20, 23
Plaintiff(s)	)	
vs.	)	JOURNAL ENTRY
	)	
	)	DATE: September 17, 1996
Defendant(s)	)	HEARING DATE: September 6, 1996

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Relief filed by Farm Credit Services of the Midlands.

APPEARANCES

Eric Wood, Attorney for debtors
David Pederson, Attorney for Farm Credit Services

IT IS ORDERED:

The motion for relief from the automatic stay is denied. See memorandum entered this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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