

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

JERRY DEAN ROTH and
BONNIE JEAN ROTH,

DEBTORS

CASE NO. BK85-535

MEMORANDUM

This matter came before the Court on Motion for Relief from Automatic Stay filed by Cattle National Bank, a secured creditor. Hearing was held on August 27, 1985, at Omaha. John M. Guthery appeared on behalf of Cattle National Bank and Robert R. Gibson appeared on behalf of debtors-in-possession.

At the close of the hearing the court placed on the record its findings of fact and conclusions of law. In summary, the Court found that there was no equity in the property, that the property was necessary for an effective reorganization, that the real and personal property was not declining in value, that the Cattle National Bank was undersecured at the time of the filing of the petition for relief and that it is undersecured at the time of the hearing. The Court further found that real estate taxes for at least two years are delinquent with interest accruing and that the first half of the real estate taxes due in September of 1985 will be delinquent in September and will accrue interest. Because the taxes are delinquent and are accruing interest, the debtors-in-possession were required to make full payment of all delinquent taxes within thirty days of the date of hearing as an adequate protection payment. If the debtors fail to do so, the automatic stay provided by 11 U.S.C. 362 would terminate. However, if the taxes plus accrued interest were paid in full within thirty days of the date of hearing, the automatic stay would not be lifted.

After the adjournment of the hearing, the Court further reflected upon the evidence and reviewed the trial notes. Based upon the further reflection and review, the Court believes that its decision is erroneous and should be withdrawn and a written opinion substituted in place thereof. This is the substituted written opinion.

Counsel for both parties were notified by telephone that the Court would be entering a different opinion and were notified that the automatic stay was to remain in effect until the written opinion was issued and became final.

FINDINGS OF FACT

Prior to the crop year 1985, the debtors were engaged in the farming business in the State of Nebraska. They borrowed money for the land purchase and for operating expenses from the Cattle National Bank, Farmers Home Administration and Metropolitan Life Insurance.

The debtors filed a petition for relief under Chapter 11 of the Bankruptcy Code on or about March 8, 1985. On the date of filing they owed Farmers Home Administration approximately \$120,000 plus accrued interest which was secured by a mortgage on their land. On the date of filing they owed Metropolitan approximately \$21,000 plus accrued interest which was also secured by a mortgage on their land. Finally, they owed Cattle National Bank approximately \$139,000 plus accrued interest which was secured by two real estate mortgages on the land plus perfected security interests in grain, livestock and equipment. Therefore, on the date of filing the total secured debt was approximately \$280,000. In addition to the secured debt, taxes were delinquent and accruing interest. The approximate amount of the taxes as of the date of filing was \$4,000.

On the date of filing the debtors had the following assets:

- a. cattle valued at \$20,000;
- b. equipment valued at \$19,000;
- c. grain valued at \$47,000;
- d. land valued at \$128,000.

Therefore, on the date of filing the total assets of the debtors amounted to \$214,000.

The evidence further shows that the value of the assets has not declined or increased since the date of filing.

During the 1985 crop year, neither Mr. or Mrs. Roth is engaged in farming operations for his/her own account. The evidence is that Mr. Roth is employed by his father and paid an hourly wage to perform farm duties for his father. Mr. Roth's father apparently provided the funds for putting in the 1985 crop and will receive the 1985 crop. There is no evidence concerning any written or oral lease or rental agreement for the land. The only evidence is that in consideration for paying the cost of the 1985 crop the senior Mr. Roth will receive the 1985 crop.

There was no evidence presented that the assets in question, both real and personal, are necessary for an effective reorganization. There was no evidence presented that the debtors intend to return to the farming operation as owners and operators or even as tenants. The sole evidence concerning the farm operation for 1985 and the future is that Mr. Roth is employed as an hourly worker for his father. He provides services both on land that he owns and on land owned by others and farmed by his father. There was additional testimony that he is using some of his equipment which is collateral for the Cattle National Bank loan, but no testimony concerning rental

agreements for the use of such equipment.

CONCLUSIONS OF LAW

On a motion for relief from the automatic stay the party requesting such relief has the burden of proof on the issue of debtor's equity in the property pursuant to 11 U.S.C. §362(g)(1). The Cattle National Bank has met its burden of proof. The security interest in the land and personal property on the date of filing of the petition and on the date of hearing was approximately \$280,000. The value of all of the assets of the debtors on the date of filing of the petition and on the date of hearing was approximately \$214,000. There was no equity on the date of filing of the petition and there is no equity on the date of hearing.

The debtors have the burden of proof on the issue of whether or not the property is necessary to an effective reorganization and on the issue of adequate protection. 11 U.S.C. 562(g)(2). Concerning the issue of whether or not the property is necessary to an effective reorganization, there is no evidence in the record. There is not even a statement by either of the debtors that the property is necessary to an effective reorganization. Assuming that such a statement would have been made, it still would not have been sufficient to meet the burden of proof. There needs to be some evidence in the record of how and why the livestock is necessary for an effective reorganization. There is absolutely no evidence. There needs to be some evidence in the record concerning the use of the equipment, grain and land in a reorganization plan. The evidence that is before the Court is simply that the equipment is being used to farm the land and other land not owned by the debtors and that the debtors are not at the present time receiving anything for the use of the equipment or for the use of the land. The debtors are being paid an hourly wage for providing labor to an employer. This lack of evidence concerning the need for the property to an effective reorganization is the reason the original opinion is withdrawn and this opinion is entered. At the time of the hearing, the Court assumed that the collateral of the Cattle National Bank was necessary for an effective reorganization. However, upon reflection and review of the trial notes, it became apparent to the Court that there was no evidence offered on that issue. Therefore, the Court believes it is erroneous to make an assumption of the need for the property, particularly when the actual evidence is that the debtor is not engaged in a farm operation but is an employee of another operator.

The conclusion is that the property is not necessary to an effective reorganization.

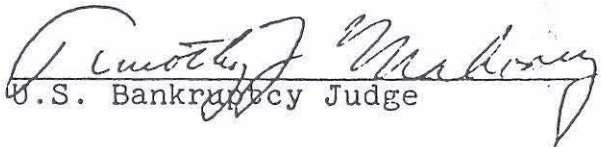
The issue of adequate protection was also tried at this hearing. The Court has previously found that the Cattle National Bank was undersecured at the time that the petition for relief was filed and was undersecured at the time of the hearing. In addition the Court has found that there has been no decline in value of the property since the date of filing of the petition. The evidence is that the value of the land at the time of filing of the petition and at the date of hearing is \$128,000. There are at least two mortgage liens ahead of the Cattle National Bank. These mortgages amount to \$141,000 plus accrued interest. Therefore, Cattle National Bank has no interest to be protected in the land. The fact that there are delinquent taxes and that interest is accruing on those taxes and that those taxes have a priority ahead of Cattle National Bank does not affect the Cattle National Bank. The Cattle National Bank has no interest in the land and, therefore, the taxes which are accruing on the land cannot harm the Cattle National Bank. Therefore, the Cattle National Bank has no need for adequate protection.

ORDER

The debtors-in-possession have no equity in the property and the property is not necessary for an effective reorganization. Therefore, the Cattle National Bank's Motion for Relief from Automatic Stay is granted. Separate order to follow.

DATED: September 4, 1985.

BY THE COURT:


U.S. Bankruptcy Judge

Copies mailed to each of the following:

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