UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
L. ROGER WENDELL and	)	
MAXINE WENDELL,	)	CASE NO. BK87-1405
	)	
DEBTORS	)	CH. 12

MEMORANDUM OPINION

Confirmation hearing was held in North Platte, Nebraska. Michael Washburn of Erickson & Sederstrom, P.C., Omaha, Nebraska, appeared on behalf of the debtors. Nancy Svoboda of Kelley, Scritsmier, Moore & Byrne, P.C., North Platte, Nebraska, appeared on behalf of the Federal Land Bank.

On January 16, 1981, L. Roger Wendell and Maxine D. Wendell, debtors, executed a $448,000 note to the Federal Land Bank of Omaha (FLB). The note was secured by a real estate mortgage, executed on the same date, in which debtors mortgaged to the FLB 800 acres of real estate located in Lincoln County, Nebraska, "including all buildings, improvements, fixtures, or appurtenances thereon or hereafter placed thereon."

Debtors filed their Chapter 12 petition on April 28, 1987. Their plan proposes to pay the FLB the value of the land, absent certain irrigation equipment including electric motors, pumps, and panels, plus interest, over a period of twenty years. The FLB argues that the electric panels, pumps, and motors are fixtures or improvements covered under the mortgage agreement, and, therefore, should be included in the value of the land. Debtors contend that the irrigation systems are readily removable from the real estate and should not be classified as fixtures; further, the irrigation systems are not owned by debtors personally, but are the property of Wendell's, Inc., a corporation primarily owned by Roger Wendell.

The evidence introduced at the September 9, 1987, confirmation hearing revealed that four irrigation systems were present on the land at the time the mortgage was executed in 1981 and that a fifth system was in the process of being installed. Each irrigation system included a center pivot, sprinkler, electric panel, pump, and motor. The FLB concedes that the center pivots and sprinklers are personal property which should not be included in the land value.

At the confirmation hearing, the Court requested both parties to brief the issue of whether the electric panels, pumps, and motors are fixtures subject to the mortgage which covers real estate and fixtures. The briefs submitted to the Court, along with further evidence presented, have been received and considered.

Issues

I. Whether certain electric motors, pumps, and panels are so affixed to the land such that they are the subject of the mortgage which covers real estate and fixtures?

II. If the equipment is considered a fixture, what is the value of the land with the fixture included?

Discussion

I. Fixtures.

In dispute are five Sargent-9 pumps, five U.S. Electric Motors, and five Allen Bradley 100 H.P. Electric Controls. The base of each pump is bolted to a cement pad with the motor bolted to the top of the pump. The Nebraska Supreme Court, in Cook v. Beerman, 201 Neb. 675, 271 N.W.2d 459 (1978), held that a pump and motor, fueled by natural gas, were fixtures. Although this decision is instructive, whether the equipment is a fixture depends on three factors:

> (1) [W]hether the article or articles are actually annexed to the realty, or something appurtenant thereto; (2) whether the article or articles have been appropriated to the use or purpose of that part of the realty with which it is or they are connected; and (3) whether the party making the annexation intended to make the article or articles a permanent accession to the freehold.

Metropolitan Life Ins. Co. v. Reeves, 223 Neb 299, 301, 389 N.W.2d 295, 296-97 (1986).

To apply the Metropolitan test, the Court must determine whether the equipment is annexed to the realty.

> The rule is that ordinarily the owner of the fee, by his annexation of personal property, renders it an accession to the land. ... [W]here the owner puts in improvements, the law at once raises a presumption of intention to make them a part of the land.

Joiner v. Pound, 149 Neb. 321, 323, 31 N.W.2d 100, 102 (1948) (citations omitted). Therefore, because the irrigation systems were installed prior to the entry of the FLB mortgage, the Court finds that the pumps and motors were annexed to the realty.

The next factor in the Metropolitan test, whether the articles have been appropriated to the use or purpose of the realty, is uncontested. Agriculture is the predominate industry in the area where the land is located. Although the area has virtually an unlimited supply of water due to the presence of the Ogallala aquifer, precipitation is limited to approximately twenty inches per year. The principal crop grown on irrigated land in this area is corn. The function of an irrigation system is to pump water located below the land to crops growing on the surface.

The appraisal, prepared by the FLB, FLB exhibit No. 9, stated that corn grew on land reached by the irrigation system but land not reached by the system was either growing grass or set aside in the farm program. In debtors' exhibit No. 1, an appraisal prepared by T. A. Klug, Mr. Klug stated that "the best use of the property is to have the irrigation equipment as part of the real estate. The land is too sandy to dryland farm."

The final factor is determining whether the annexing party intended to make the article a permanent accession to the realty. Although under Nebraska law the determination of whether an article is a fixture depends upon three factors, it is this last inquiry that is controlling. "[T]he third factor, the intention of the annexing party to make the article or articles a permanent accession to the realty, is the factor which is typically given the most weight." Metropolitan Life Ins. Co. v. Reeves, 223 Neb. 299, 301, 389 N.W.2d 295, 297 (1986).

> The intention of the party making the annexation is to be inferred from the nature of the articles affixed, the relationship between the parties, the situation of the party making the annexation,the nature of the structure, the mode of annexation,and the purpose or use for which the annexation has been made.

Fuel Exploration, Inc. v. Novotny, 221 Neb. 17, 23, 374 N.W.2d 838, 842 (1985). (Citation omitted).

Thus, the intent of the parties is a question of fact which must be determined from the circumstances surrounding the annexation. In the present case, five irrigation systems were installed on debtors' land of which, at the time debtors executed the note and mortgage and conveyed the land to creditor, four were operational and the fifth was being installed. Debtors contend

that these irrigation systems were the property of Wendell's, Inc., at the time the land was mortgaged and as such could not be looked to by creditor when extending credit to debtors personally.

If this contention is correct, the balance sheet of Wendell's, Inc., dated November 11, 1980, should have listed the irrigation systems as assets; however, no such journal entry is shown. Upon examining debtors' personal balance sheet, dated November 7, 1980, entries for the center pivot and several parcels of land are listed. No journal entries for the electric motors, pumps, or panels can be found. Since the equipment in question must be listed somewhere, it can be inferred from the facts that the electric motors, pumps, and panels were included in the value of the land as found on debtors' personal balance sheet.

The affidavit of Joseph D. Law, Assistant Vice President with FLB, FLB exhibit No. 14, further strengthens this conclusion. Mr. Law, after becoming familiar with the Wendells' file, states: "I am familiar with what real estate values were in that area in 1980, and this valuation indicates that the value of the wells, pumps, power units, and pivots was included in the valuation of the real estate." The land was mortgaged by the debtors to secure a note. The mortgage agreement covered "all buildings, improvements, fixtures, or appurtenance thereon or hereafter placed thereon. Therefore, the Court finds that it was the intent of the parties that the electric motors, pumps, and panels become a part of the real estate.

The three-part test of Metropolitan Life Ins. Co., supra, has been met. The electronic motors, pumps and panels were purchased by debtors and installed on the farm in order to make better use of the land. At the time the land was mortgaged, it was the intent of the parties that the equipment be permanently affixed to the land; therefore, the electronic motors, pumps, and panels are fixtures subject to the mortgage agreement.

II. Value.

The parties have submitted several appraisals valuing the land with and without the equipment. The valuations are consistent when considering the land values as including the equipment. Total value = land plus equipment = $268,000.

Separate Journal Entry will be filed.

DATED: April 12, 1988.

BY THE COURT:

Timothy J. Mahoney

Chief Judge