

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)

VANCE K. WILLARD and)
HANNELORE W. WILLARD,)
d/b/a Fremont Cattle Company,)

CASE NO. BK80-644

DEBTORS)

A85-164

MERLE NICOLA, Trustee, and)
JAMES J. STUMPF, Trustee,)

Plaintiff)

vs.)

FREMONT NATIONAL BANK AND TRUST)
COMPANY, et al.,)

Defendant)

MEMORANDUM OPINION

This matter was submitted to the Court on briefs and written argument. Donald Swanson of Omaha, Nebraska, appeared on behalf of Merle Nicola, Trustee. James J. Stumpf, Trustee, of Omaha, Nebraska, appeared pro se. John Vodra of Omaha, Nebraska, appeared on behalf of Norton Livestock. Robert Hillis of Fremont, Nebraska, appeared on behalf of Fremont National Bank.

In April of 1980 the Bankruptcy Court permitted the Chapter 11 debtor to use cash collateral of \$75,000 and required debtor to grant creditors second mortgages on real property with a value of \$105,000. Later, the case became two Chapter 7 cases and the trustees liquidated the real estate. When the real estate sales finally close, the creditors will be paid the balance of the \$75,000 which has not previously been distributed.

The issue is whether or not the creditors should receive interest on the \$75,000, and, if so, at what rate and from what date?

The issue of interest on the mortgages granted to the creditors was not raised before Judge Crawford. The issue of "lost opportunity costs" was not raised before Judge Crawford.

The creditors are undersecured creditors and, therefore, not entitled to interest on their claims pursuant to Bankruptcy Code Section 506(b).

The creditors are not entitled to a super priority administrative claim under Code Section 507(b) because such priority is awarded only a claimant whose adequate protection payment failed to protect the value of the claimant's interest. Here, the claimants' interest was in \$75,000 cash collateral. From the liquidation of the real estate, claimants shall receive the full \$75,000.

This Court believes payment to the creditors of an amount representing creditors' "lost opportunity cost" is appropriate and authorized in this Circuit by In re Briggs Transportation Company, 780 F.2d 1339 (8th Cir. 1985).

The inability of the creditors to obtain the \$75,000 was not caused simply by the debtor's bankruptcy filing. In the Chapter 11 case, the debtor was granted the right to use the \$75,000 in its operation. That case was filed April 4, 1980, and the order authorizing the use of cash collateral was entered April 17, 1980. The case eventually became two individual Chapter 7 cases within approximately one year thereafter.

From the conversion date, the reason the creditors could not receive the \$75,000 was that the \$75,000 was represented by mortgages on real estate which had to be sold and turned once again into cash. Had the \$75,000 existed in the form of cash on the conversion date, it would have been delivered to creditors by the trustee in short order.

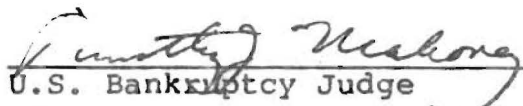
Therefore, this Court concludes the creditors were prohibited from realizing upon their collateral and investing it for their benefit by the transformation of the collateral from cash to real estate and the inability to liquidate such real estate in a timely manner. Therefore, a lost opportunity cost does exist. Had the debtor-in-possession simply invested the cash, upon conversion, the creditors would have received \$75,000 plus interest. Had the question of lost opportunity cost been specifically raised, the Bankruptcy Court may or may not have authorized interest in the debtor's new obligation (the mortgage).

This Court believes it is fair to provide these creditors compensation for lost opportunity cost and finds that it is not bound or limited by the April 29, 1980, order granting the use of cash collateral and requiring the debtor to grant mortgages as adequate protection. Neither the debtor, creditors or judge could have anticipated a six-year delay before the creditors would receive the "principal" amount of the cash collateral. Refusing to compensate the creditors benefits the unsecured creditors in the Chapter 7 cases, who would have received nothing had the Court initially denied the debtor the right to use the creditors' collateral.

Creditors shall be compensated for lost opportunity costs in the form of interest on \$75,000 (or the unpaid balance thereof) at the rate of 12% per annum from December 22, 1981, until paid. The creditors have previously stipulated the proration of such interest payments.

DATED: October 14, 1986.

BY THE COURT:


U.S. Bankruptcy Judge

Copies to:

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