UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
PEPPER CREEK RANCH, INC.,	)	CASE NO. BK96-81141
	)	
DEBTOR	)	CH. 12

MEMORANDUM

Hearing was held on Motion for Relief filed by Farm Credit Bank of Omaha on August 26, 1996. Appearances: George Vinton for the debtor, Steven Olsen for Farm Credit Bank of Omaha, and Patricia Napier for the Trustee. 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

The principals of Pepper Creek Ranch, Inc. (the debtor), John and Margaret Colwell, formed a separate corporation, Hay Springs Land and Cattle Company (Hay Springs), in 1980. Hay Springs acquired the real estate from the debtor at approximately the same time it was formed and, in 1983, mortgaged the property to the Production Credit Association of the Midlands, now known as the Farm Credit Bank of Omaha (FCBO). On November 17, 1986, a renewal note was executed. The indebtedness was to be paid annually in installments with a balloon payment due November 15, 1993. All of the payments on the note have been paid with the exception of the balloon payment.

The debtor filed a Chapter 12 petition on April 27, 1987, and obtained an order confirming its plan on October 13, 1987 and an Order of Discharge on August 11, 1993. At the time of the filing, the debtor was leasing the Hay Springs real estate. On March 31, 1988, Hays Springs and the debtor entered into a purchase agreement whereby Pepper Creek was to acquire the real estate by paying the fair market value of the land to Hay Springs and assuming the debt to FCBO. John Colwell sent FCBO a letter dated November 14, 1988, informing it that the debtor had purchased the Hay Springs property and that the debtor had assumed the existing loan. The debtor made all subsequent payments on the loan to FCBO. Hay Springs was subsequently dissolved on April 16, 1990.

After the balloon payment was not paid, notices of default were given, and a FCBO obtained a decree of foreclosure. The debtor filed its voluntary petition in Chapter 12 on May 29,

1996. FCBO file its motion from relief from stay on July 18, 1996, a resistance was filed by the debtor on August 1, 1996, and hearing was held August 8, 1996.

Decision

A debtor-creditor relationship does exist between FCBO and the debtor pursuant to the Bankruptcy Code; the debtor has equity in the subject real estate; and it is necessary for debtor's reorganization. Cause does not otherwise exist, under 11 U.S.C. § 362(d)(1) or § 362(d)(2), for relief from the automatic stay to be granted. Accordingly, the motion for relief from the automatic stay is overruled.

Findings of Fact, Conclusions of Law and Discussion

FCBO asserts four grounds on why relief should be given. First, FCBO contends that it did not have a debtor-creditor relationship with the debtor. Second, it claims that the debtor does not have any equity in the property. Third, it maintains that the property is not necessary for an effective reorganization. Finally, it states that the debtor did not file the present bankruptcy in good faith. (FCBO's brief at 3-4).

1. Debtor-Creditor Relationship

FCBO contends that it did not have a debtor-creditor relationship with the debtor because there is no privity between the parties. Shortly stated, its argument is that because the debtor is not personally liable on the note, did not come to an agreement with FCBO regarding the loan, and assumed the obligation without notice to or consent from FCBO, the debt is not one that can be reorganized.

Section 101(10) of the Bankruptcy Code provides that the definition of creditor includes an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor . . ." 11 U.S.C. § 101(10)(A). Claim is defined in § 101(5) as including a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . ." 11 U.S.C. § 101(5)(A). The term "claim against the debtor" is further defined in § 102(2) as including a claim against property of the debtor. 11 U.S.C. § 102(2).

FCBO relies principally on the case of In re Wright, 183 B.R. 541 (Bankr. C.D. Ill. 1995). In that case, a bank took a security interest in real estate owned by the debtor's parents in 1986. After the 1992 harvest, the bank became aware that the parents had ceased farming and that the debtor had assumed

responsibility for the farming operation. The debtor made payments with respect to the real estate loan in 1993.

At some point, all of the subject real estate was sold except for three acres on which the debtor resided. Thereafter, the bank filed an action to foreclose the mortgage as to the remaining three acres. On May 5, 1994, a judgment of foreclosure was entered. However, the parents deeded the remaining three acres to the debtor on July 11, 1994, and the debtor filed a Chapter 12 case in bankruptcy on August 19, 1994.

The bank filed a motion for relief from the automatic stay, contending that a debtor-creditor relationship did not exist between it and the debtor. The bankruptcy court granted the motion, holding that a no debtor-creditor relationship existed. In discussing the meaning of § 102(2), the court stated:

> In § 102(2) it states the term "claim against the debtor" includes "claim against property of the debtor." 11 U.S.C. § 102(2). The legislative history to § 102(2) states:
>
> > This paragraph is intended to cover nonrecourse loan agreements where the creditor's only rights are against property of the debtor, and not against the debtor personally. Thus, such an agreement would give rise to a claim that would be treated as a claim against the debtor personally, for the purposes of the bankruptcy code. However, it would not entitle the holders of the claim to distribution other than from the property in which the holder has an interest . . .
>
> It is undisputed that there is no agreement between the Debtor and [the bank] concerning these loans. There is no written agreement between the Debtor and [the bank] whereby the Debtor has obligated himself to pay the debt to [the bank] incurred by the [debtor's parents]. Nor is there a nonrecourse loan agreement between the Debtor and [the bank] which permits [the bank] to proceed against the debtor's property, but not against the Debtor personally. It therefore follows that [the bank] is not a creditor under §§ 101(10) and 101(5) because it has neither a right to payment from the Debtor nor a "claim against property of the debtor" as that term was intended to be applied. When the Debtor obtained title to and possession of the real estate and personal property he did so subject to the mortgage and security agreement, but without any obligation to

> repay the loans they secured. Nothing in the Bankruptcy Code empowers this Court to impose an agreement on the Debtor and [the bank], or to permit the Debtor to reorganize a debt that is not his. As there is no agreement between the Debtor and [the bank], the Debtor cannot be in default, so there is no default to cure under § 1225, nor are there terms of an obligation which the Debtor can modify under that section. Stated another way, as there is no agreement, the Debtor can't cure a default which is not his, on loans which are not his, nor can he modify the terms of the loans to which he is not bound.

Id. at 543.

The Wright court's holding that § 102(2) applies only to nonrecourse loan agreements is, however, contrary to the United States Supreme Court's decision in Johnson v. Home State Bank, 501 U.S. 78, 111 S.Ct. 2150, 115 L. Ed. 2d 66 (1991). In that case, Justice Marshall, writing for a unanimous Court, construed § 101(2) as follows:

> Although the pre-1978 Bankruptcy Act contained no single definition of "claim," the Act did define "claim" as "includ[ing] all claims of whatever character against a debtor or its property" for purposes of Chapter X corporate reorganizations. It is clear that Congress so defined "claim" in order to confirm that creditors with interests enforceable only against the property of the debtor had "claims" for purposes of Chapter X, and such was the established understanding of the lower courts. In fashioning a single definition of "claim" for the 1978 Bankruptcy Code, Congress intended to "adop[t] an even broader definition of claim than [was] found in the [pre-1978 Act's] debtor rehabilitation chapters." Presuming, as we must, that Congress was familiar with the prevailing understanding of "claim" under Chapter X of the Act, we must infer that Congress fully expected that an obligation enforceable only against a debtor's property would be a "claim" under § 101(5) of the Code.
>
> The legislative history surrounding § 102(2) directly corroborates this inference. The Committee Reports accompanying § 102(2) explain that this rule of construction contemplates, inter alia, "nonrecourse loan agreements where the creditor's only rights are against property of the debtor, and not against the debtor personally." Insofar as the mortgage interest that passes

> through a Chapter 7 liquidation is enforceable only against the debtor's property, this interest has the same properties as a nonrecourse loan. It is true, as the Court of Appeals noted, that the debtor and creditor in such a case did not conceive of their credit agreement as a nonrecourse loan when they entered it. However, insofar as Congress did not expressly limit § 102(2) to nonrecourse loans but rather chose general language broad enough to encompass such obligations, we understand Congress's intent to be that *§ 102(2) extends to all interests having the relevant attributes of nonrecourse obligations regardless of how these interests come into existence.*

Id. at 86-87, 111 S. Ct. at 2155 (citations omitted) (emphasis supplied). The Supreme Court therefore did not construe § 102(2) to be limited to nonrecourse loans, as did the court in Wright, but rather held that it covered all interests having the relevant attributes of nonrecourse loans, i.e. that the creditor must look to the property rather than to the debtor for satisfaction of their claim. Other cases which have been decided after Johnson and have had similar holdings to Wright are distinguishable. In Ulster Savings Bank v. Kizelnik (In re Kizelnik), 190 B.R. 171 (Bankr. S.D.N.Y. 1995), the debtor did not have an ownership interest in the property securing the movants mortgage and In re Mitchell, 184 B.R. 757 (Bankr. C.D. Ill. 1994) was decided by the same court, although not the same judge, which decided Wright and it, too, did not cite Johnson.

In the case of (1) a nonrecourse loan, (2) a mortgage interest that passes through a Chapter 7 liquidation, or (3) a transfer of real property subject to a secured claim without a corresponding binding assumption of the debt by the transferee, the creditor/mortgagee is limited to an action against the property in the event of a default. It is true that in the third case, the mortgagee is not in contractual "privity" with the transferee. However, that fact does not affect the analysis. First, any agreement pertaining to personal liability entered into between the mortgagee and the mortgagor in the second example above cannot be enforced against the mortgagee after discharge. Second, in the instant case, FCBO cannot claim that it is now dealing with a stranger: the transfer from Hay Springs to the debtor occurred a number of years before the debtor filed its petition, FCBO was notified of the transfer of the real estate and the assumption of the mortgage, and FCBO accepted payments on the loan from the debtor after the transfer took place. FCBO's interest in the subject real estate has the relevant attributes of a nonrecourse loan agreement, and thus is a claim. Therefore, FCBO is a creditor pursuant to § 101(10), and a debtor-creditor relationship does in fact exist between FCBO and the debtor.

2. Debtor's Equity in the Property

FCBO asserts that because the debtor holds bare legal title to the property, it holds no equity in the property. It does not cite to any case where a court has made such a curious holding, nor offered any evidence to show that no equity does in fact exist. It appears that FCBO is insinuating that Hay Springs holds the equity, but Hay Springs no longer exists as an entity and transferred its interest in the property (which would include any equity) to the debtor a number of years before this petition was filed. The subject real estate is valued at $213,800.00. FCBO's claim as of August 21, 1995 was $56,236.38, and is second only to the real estate taxes in the total amount of $3,640.16. The remaining equity belongs to the debtor.

3. Effective Reorganization

FCBO maintains that the subject property is not necessary for an effective reorganization because the Order confirming its First Amended Plan of Reorganization in the earlier Chapter 12 case was entered before the transfer of property from Hay Springs to the debtor took place. However, the debtor was leasing the property from Hay Springs at that time.

John Colwell, one of the principals of the debtor, testified by affidavit that without the land, the debtor would be hampered by not having adequate pasture or adequate winter feed and that the land is adjacent to other land owned by the debtor and all of the land is operated together. (Affidavit of Colwell ¶ 12). This evidence, coupled with the fact that the debtor felt it necessary to lease the land during its initial reorganization, is sufficient to show that the subject real estate is necessary for an effective reorganization. Additionally, the debtor has filed a plan that includes the use of the property in question.

4. Lack of Good Faith

FCBO's last argument is that cause exists under § 362(d)(1) for relief from the automatic stay to be granted. The factors generally looked to in determining whether to grant relief from the automatic stay for cause include good or bad faith of debtor, injury to debtor and other creditors if stay is modified, injury to movant if stay is not modified, and proportionality of harm from modifying of continuing stay. In re Milne, 185 B.R. 280, 283 (N.D. Ill. 1995). FCBO contends that the debtor filed its petition in bad faith. However, Collier describes the cases that have used bad faith as a basis for vacating or annulling the automatic stay pursuant to § 362(d)(1) as "extreme." 2 LAWRENCE P. KING, ET AL., COLLIER ON BANKRUPTCY ¶ 362.07, at 362-76 (15th ed. 1996).

As evidence of bad faith, FCBO first claims that the only purpose of the filing was to delay the payment to it and to prevent the Sheriff's's sale of the subject real estate. Second, FCBO asserts that all of the other creditors and debts listed in the bankruptcy were in existence in the 1987 bankruptcy and that those obligations continue to be satisfied through the performing of the First Amended Plan of Reorganization which was confirmed in the first case. Third, FCBO maintains that the transfer of property from Hay Springs to the debtor was made without notice to it, and therefore constitutes bad faith. Finally, FCBO contends that it was prejudiced by the filing, and such prejudice constitutes bad faith.

The FCBO debt is not the only new debt that is scheduled in the second bankruptcy. The debtor has also scheduled real estate taxes that are due and owing on the property. As for filing bankruptcy to prevent a Sheriff's's sale, that fact, in and of itself, is not sufficient cause for relief from the stay pursuant to § 362(d)(1). In re North Indianapolis Venture, 113 B.R. 386 (Bankr. S.D. Ohio 1990); In re Kanawha Trace Development Partners, 87 B.R. 892 (Bankr. E.D. Va. 1988). The debtor did provide notice to FCBO of the transfer of real estate from Hay Springs, so FCBO cannot claim that a lack of notice of such transfer constitutes bad faith. As for prejudice, FCBO states that it was not its expectation when the note was signed that the balloon payment would be reorganized and paid over the course of a bankruptcy plan. This, however, is the potential plight of every secured creditor whose secured claim is modified in a bankruptcy reorganization. Something more must be shown for prejudice to be found in this context.

Accordingly, FCBO has failed to demonstrate that cause exists under § 362(d)(1) for relief to be granted from the automatic stay.

5. Conclusion

Because a debtor-creditor relationship does exist between the debtor and FCBO, and because there is insufficient evidence of bad faith or cause for relief, FCBO's motion for relief from the automatic stay is overruled.

6. Confirmation Hearing

Arguments in support of and against confirmation of the plan in this case were deferred pending a ruling on this motion. Since this ruling favors the debtor, the clerk shall reschedule the confirmation hearing to be held in the next ten days. See Filing No. 29.

Separate journal entry to be filed.

DATED: September 4, 1996

BY THE COURT:

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

Copies faxed by the Court to:

OLSEN, STEVEN	308-635-0907
LYDICK, RICHARD	333-9256
VINTON, GEORGE	308-532-8627

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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
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
PEPPER CREEK RANCH, INC.,	)	CASE NO. BK96-81141
DEBTOR(S)	)	
	)	CH. 12
	)	Filing No. 8, 16
Plaintiff(s)	)	
vs.	)	JOURNAL ENTRY
	)	
	)	DATE: September 4, 1996
Defendant(s)	)	HEARING DATE: August 26, 1996

Before a United States Bankruptcy Judge for the District of Nebraska regarding Plan and Objection by Farm Credit Bank of Omaha.

APPEARANCES

George Vinton, Attorney for debtor
Seven Olsen, Attorney for FCB

IT IS ORDERED:

Motion for relief is denied. Confirmation hearing will be rescheduled within ten days. See memorandum entered this date.

BY THE COURT:

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

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