IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN RE:	BK 84-2434
ERWIN HOLTZ and DARLENE HOLTZ, Debtors.	
PRUDENTIAL INSURANCE COMPANY, Plaintiff,	CV 85-0-1016
vs.	ORDER
ERWIN HOLTZ and DARLENE HOLTZ, Defendants.	

This matter is on appeal from an order of the Bankruptcy Court for the District of Nebraska entered November 18, 1985. The Bankruptcy Court sustained the motion for relief filed by creditor, the Prudential Insurance Company of America. The Court, after a review of the issues presented, finds the decision of the Bankruptcy Court should be affirmed.

BACKGROUND

The Bankruptcy Court held a hearing on the motion for relief from the automatic stay. The Bankruptcy Court determined that the farm land in dispute was essential to an effective reorganization. However, the Bankruptcy Court also determined that the debtors failed to prove that the creditor was adequately protected as required under 11 U.S.C. § 362(d). As a result, the Bankruptcy Court granted the creditor relief from the stay.

At the hearing, the Bankruptcy Court allowed Mr. Stephen England, a licensed Nebraska real estate appraiser who was called by the creditor, to testify as to the value of the farm land. The

Bankruptcy Court also allowed Mr. William Fischer, a certified and licensed real estate appraiser called by the debtors, to testify as to the value of the land. The Bankruptcy Court refused to allow the debtor Erwin Holtz to testify as to his opinion about the value of the farm land subject to the creditor's lien.

ISSUES ON APPEAL

The debtors raise three issues on appeal: (1) Whether the Bankruptcy Court erred in refusing to allow the debtor to testify as to the value of his farm land?; (2) Whether the Bankruptcy Court's statement in paragraph one on page three of the memorandum opinion that greater credibility was assigned plaintiff's appraiser because of having been performed "for a non-party creditor" constituted plain error? (3) Whether the trial court erred in refusing to consider over objection an alleged separate settlement agreement between the debtors and a third-party creditor (not involved in the proceeding) out of which settlement Prudential was allegedly to receive certain property as a source of adequate protection to the plaintiff?

DISCUSSION

Under Bankruptcy Rule 8013, this Court is bound by the clearly erroneous standard in reviewing findings of fact by the Bankruptcy Court. In re Hunter, 771 F.2d 1126 (8th Cir. 1985). "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses." Bankr. Rule 8013. The Advisory Committee Note to Rule 8013 explains that the

"clearly erroneous" standard "accords to the findings of a bankruptcy judge the same weight given the findings of a district judge under Rule 52 F.R.C.P." The Supreme Court in Anderson v. City of Bessemer City, 105 S. Ct. 1504 (1985), stated:

> '[A] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. [Citations omitted.] This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court. 'In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.' [Citations omitted.] If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reversed it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. When there are two permissible view of the evidence, the fact-finder's choice between them cannot be clearly erroneous.

Id. at 1511-12.

With regard to the first issue, Bankruptcy Rule 9017 directs that the Federal Rules of Evidence apply in cases under the Bankruptcy Code. Fed. R. Evid. 103 provides in part:

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . .
>
> (2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was

made known to the court by offer or was apparent from the context within which questions were asked.

Id.

The debtors failed to make an offer of proof as to what value the debtor placed on the property. As a result, the debtors failed to preserve the matter for review. It is not apparent from the context within which the questions were asked the specific matters about which the debtor would have testified. In any event, the debtors' expert had testified at length concerning the value of the property. Not allowing the debtor to give his opinion on the same subject did not affect a substantial right of the debtor.

As to issue two, the statement by the Bankruptcy Court that the appraisal of Mr. Steven England that such appraisal "was originally performed for a non-party creditor in May of 1985" was not contrary to the evidence. The evidence presented at trial did in fact show that Mr. England performed the appraisal for a party not involved in the instant litigation, in which Prudential and the debtors are the only parties.

Finally, the Bankruptcy Court's finding that the alleged settlement and alleged proposed payment on a separate indebtedness of the debtors was irrelevant to the adequate protection issue in this case was not clearly erroneous. Furthermore, the debtors again failed to preserve the matter for review as required under Fed. R. Evid. 103. The debtors failed to make an offer of proof of the details of the settlement.

After a consideration of the record, the issues raised on appeal and the briefs, the Court finds that the decision of the Bankruptcy Court should be affirmed.

Accordingly,

IT IS ORDERED that the decision of the Bankruptcy Court should be and hereby is affirmed.

DATED this 14th day of August, 1986.

BY THE COURT:

C. ARLEN BEAM, CHIEF JUDGE
UNITED STATES DISTRICT COURT