IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN RE:	)	BK 84-1024
	)	CV 85-0-338
RICHARD HORST,	)	
	)	
Debtor.	)	ORDER

This matter is before the Court on appeal from a judgment of the United States Bankruptcy Court for the District of Nebraska entered on March 18, 1985, sustaining the request of Spalding City Bank (the Bank) for relief from the automatic stay pursuant to 11 U.S.C. §§ 362(1) and (2).

The issue presented for appeal is whether the Bankruptcy Court erred in sustaining the motion for relief of the automatic stay under 11 U.S.C. §§ 362(1) and (2). After a review of the briefs and the record submitted on appeal, the Court finds the decision of the Bankruptcy Court should be affirmed. The undisputed facts of this bankruptcy case are as follows:

On January 11, 1982, Dale Horst (the debtor) and his former wife borrowed $50,000.00 from the Bank and executed a note for $50,000.00 in favor of the Bank (the note) which came due on January 11, 1983, one year from its date of execution. As security for the note, the debtor executed and delivered to the Bank a deed of trust covering the Bel-Horst Inn Hotel located in Belgrade, Nebraska (the hotel), a deed of trust covering a residence owned by the debtor and his wife located in Sarpy County, Nebraska (the Sarpy County house); and a security agreement covering all fixtures, furniture and equipment (personal property) in the hotel and the hotel restaurant.

The Sarpy County house was sold by the senior lienholder in September of 1983 and as a result the Bank realized its first and only payment on the note. On May 29, 1984, the debtor filed a voluntary petition for relief under the provisions of Chapter 11 of the Bankruptcy Code. At the time of the Chapter 11 filing, the Bank was owed approximately $30,845.79 on the note.

The debtor has continued to operate the hotel at a loss since the petition was filed over fifteen months ago. The debtor has not paid real estate taxes since the first half of 1981 and the Bank has been required to forward money to cover the cost of the insurance premiums covering the hotel.

On March 18, 1985, the Bankruptcy Court granted the Bank relief from the automatic stay. At that time the Court held, "I am simply not convinced that to let this property sit there and lose money and to accrue taxes is somehow adequately protecting the Bank." The Bankruptcy Court further stated with regard to the debtor's claim that the property was necessary for a reorganization that "the proposed plan has no vitality [for me] because it is no more than a proposal. It is not a fact."

The debtor argues that relief from the automatic stay is not warranted because: (1) the Bank does have adequate protection; (2) the debtor does have equity in the property; and (3) the property is necessary for the debtor's plan of reorganization. The District Court is bound by the Bankruptcy Court's findings of fact unless they are clearly erroneous, however, the District Court is not so restricted in reviewing the Bankruptcy Court's

interpretation of the law. Bankr. Rule 8013; In re Cricker, 46 B.R. 229 (Bankr. N.D. Ind. 1985) (review of Bankruptcy Court's decision to dismiss, sua sponte, a proceeding).

At issue is 11 U.S.C. §§ 362(d)(1) and (2) which provide that a creditor may obtain relief from an automatic stay by either showing that he is not adequately protected, or that the debtor has no equity in the property and that the collateral was not required for an effective reorganization. 11 U.S.C. §§ 362(d)(1) and (2).[1]

"Adequate protection" is a concept that contemplates the need to avoid impairment of a creditor's interest. Where the Bankruptcy Court believes that the debtor is unable to protect the creditor's interest, the Bankruptcy Court may balance the harm likely to be caused to the creditor by continuation of the stay against the harm likely to accrue to the debtor if the stay is

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1 On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section such as by terminating, annulling, modifying, or conditioning such stay--

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
(2) with respect to a stay of an act against property under subsection (a) of this section, if--

(A) the debtor does not have an equity in such property; and
(B) such property is not necessary to an effective reorganization.

11 U.S.C. § 362(d).

lifted. The Bankruptcy Court may then grant relief from the automatic stay where the balance weighs in favor of the creditor. In re Southerton Corp., 46 B.R. 391 (M.D. Pa. 1982) (stay lifted for bank to pursue foreclosure); In re Rhoades, 38 B.R. 63 (Bankr. Vt. 1984) (payment of $700.00 per year towards a mortgage debt when interest was $1,862.00 per year is not adequate protection).

For purposes of determining what is adequate protection a court may look at a variety of factors, none of which standing alone might necessarily be dispositive on the issue of adequate protection, but which together, might swing the balance in favor of the creditor's interest. In re Southerton Corp., 46 B.R. at 399. The Court in In re Southerton Corp. set forth several criteria of which the following are relevant: (1) erosion of the equity cushion; (2) the increase in property's value; (3) offer by the debtor of protection that would supply the "indubitable equivalent" of the creditor's interest; (4) economic conditions that do not suggest a realistic prospect for rehabilitation or reorganization under Chapter 11. Id. at 399-400.

First, in order to determine whether the equity cushion is being dissipated it is necessary to determine the amount of equity the debtor has in the property. In order to determine this, the total amount of liens must be subtracted from the property's value. Stewart v. Gurley, 745 F.2d 1194 (9th Cir. 1984) (all liens both secured and unsecured must be subtracted from the property's value). The evidence in this case indicates that the appraiser stated if the hotel were to be sold today the building's

value would be approximately $5,000.00. He also appraised the personal property subject to the bank's lien at approximately $28,500.00. However, the appraiser did indicate that if the hotel were to be left and sold as a going concern its value would be approximately $20,000.00. The Bankruptcy Judge indicated that he was confused as to whether this appraisal of $20,000.00 included some or all of the personal property. In any event, looking at the property values in a light most favorable to the debtor, the maximum value of the real and personal property is approximately $48,500.00. The debtor's half interest in that property is approximately $24,250.00. There are liens on record against the debtor for approximately $82,000.00 (including bank's lien on hotel), an amount far in excess of debtor's half interest. This Court does not find the debtor's argument that he and his wife have between forty and sixty percent equity in the hotel to be persuasive. Therefore, as interest on the note and taxes continue to accumulate, the bank's interest in the property is being continuously eroded.

Second, the record does not support a finding that the property is increasing in value and can therefore provide adequate protection now or in the future.

Third, the debtor has not offered to provide the creditor with substitute equivalent protection.

Fourth, the debtor indicated by affidavit and again at the Bankruptcy hearing that he intended to file a plan under which he would begin paying the Bank $591.00 a month. The debtor also

indicated that he would begin making payments to retire the tax debt. However, as the Bankruptcy Court noted the plan is no more than a proposal. The economic conditions do not suggest that there is a realistic prospect for a successful reorganization under Chapter 11. The debtor does not dispute the fact that the hotel business has lost approximately $11,800.00 during the first eight months of 1984 and while the debtor indicates that he would be able to make the planned payments to the Bank from another business which he owns, the debtor has not in any way indicated any prospect of a successful future for the hotel.

The Bankruptcy Judge properly concluded that the Bank is not adequately protected and the appeal will be denied.

Accordingly,

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

DATED this 10th day of September, 1985.

BY THE COURT:

C. ARLEN BEAM
UNITED STATES DISTRICT JUDGE