UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
RODNEY MACHOLAN and	)	
ANGELA MACHOLAN,	)	CASE NO. BK85-921
	)	
DEBTORS	)	Chapter 11

MEMORANDUM OPINION AND ORDER
RE MOTION FOR RELIEF FILED
BY FIRST NATIONAL BANK, SCHUYLER, NEBRASKA

Memorandum Opinion

Preliminary hearing on affidavit evidence only was held on February 6, 1986. Daniel Evans of Dixon, Dixon & Minahan, P.C., of Omaha, Nebraska, appeared on behalf of the Bank and Michael Heavey of Dwyer, Pohren, Wood & Heavey, Omaha, Nebraska, appeared on behalf of the debtors.

Findings of Fact

The Bank, on the date of the filing of the bankruptcy petition, April 25, 1985, was owed, on one series of notes, $431,681 principal and accrued interest and on another series of notes was owed $502 principal and accrued interest for a total of $432,183. The Bank claims a security interest in a 1976 Chevrolet truck, all of the debtor's equipment, and by virtue of real estate mortgages, a security interest in two parcels of real estate.

From the evidence, it appears that all of the equipment, except the truck, is worth $69,360 and the truck is worth $1,900, for a total of $71,260. These values were presented by the Bank and are accepted by the Court. Some of the equipment is encumbered by purchase money security interests on notes owed to Deutz-Allis and Sperry New Holland. The purchase money security interests amount to a total of $54,028. Therefore, equity in the equipment and the truck available to the Bank's security interest is $17,232.

The real estate owned by the debtors is divided into two tracts, with Tract No. 1 worth $16,000 and Tract No. 2 worth $59,500. Tract No. 1 is encumbered only by real estate taxes and the mortgage of the Bank. The real estate taxes for 1983 and 1984 which are a lien and which are delinquent and accruing interest and penalties amount to $3,727, leaving the Bank with equity of

$12,273 subject to its secured claim. This figure does not include the 1985 taxes which, although a lien, are not delinquent at this time.

The Bank also claims a mortgage interest in Tract 2 owned by the debtors. Tract 2 is a 12 acre parcel which includes the house and other improvements. According to the evidence of the Bank, the value of Tract 2 is $59,500. The Federal Land Bank and the FmHA have first and second mortgages prior to the Bank's mortgage in an amount far in excess of the value of Tract 2. Therefore, the Bank has no equity in Tract 2 which is available to satisfy its secured claim.

The Bank was undersecured on the date of the filing of the petition in bankruptcy and is undersecured on the date of the hearing on its motion for relief.

The collateral available to the Bank, after deducting all other prior liens except the 1985 taxes, equals $29,505.

The evidence is that the land is depreciating at 15% per year.

The equipment is depreciating at 10% per year.

The 1985 taxes on Tract 1 are $1,867.82. These taxes are a lien against the property and are ahead of the lien of the Bank.

The debtors have offered to the Bank as adequate protection of the Bank's interest, a payment of $1,000 immediately and a monthly payment thereafter of $100 per month.

Conclusions of Law

The debtors have no equity in the property but the property is necessary for the effective reorganization. Without the truck, equipment and improved land, there is no possible means for an effective reorganization. However, with the encumbrances so great in contrast to the value of the property, this Court questions whether there is any reasonable basis for believing that these debtors can reorganize.

This case was started on or about April 25, 1985. No disclosure statement or plan has been proposed. While this is not an unusual length of time for a Chapter 11 farm bankruptcy to be pending in this district, this Court at some point in time must look at the reality of the operation and the likelihood that a plan can be confirmed when a major creditor is undersecured and, therefore, holds a large allowed unsecured claim.

The debtors have offered a payment of $1,000 immediately and a monthly payment thereafter of $100 per month as adequate protection for the interest of the creditor in what remains of the

value of its collateral. The practice in this district has been to tell the creditor that if the creditor was undersecured at the time the petition was filed, the creditor has no right to any type of "adequate protection" payments because the purpose of such payments is to protect the fully secured position of the creditor.

In this case the creditor's interest in the truck was fully secured on the date the petition was filed. The debtor continues to use the truck and the equipment in which the creditor has a security interest and this use, while benefiting the debtor, causes actual, as well as economic, depreciation to the collateral. Further, it does not appear to this Court that there is much likelihood of success in reorganizing these debtors. To permit the use of the truck and equipment for another farming season without requiring any type of payment to the creditor would simply ensure further harm to the creditor with no hope of protecting the creditor's interest in the collateral.

The creditor's interest in the land, Tract 1, was undersecured on the date the petition was filed. Post-petition accruing taxes further reduce creditor's interest. Because of the concern expressed above that reorganization probabilities are remote, creditor deserves some protection of its interest in the land, Tract 1.

The adequate protection proposal of the debtors is adequate temporarily, with some modification. The debtors are to make immediate payment of $1,000 to the creditor and to make a payment of $100 per month thereafter beginning on March 6, 1986. In addition, the debtors are to make full payment of the real estate taxes on Tract 1 prior to the date they become delinquent. This means that one-half of the taxes can be paid on each due date.

Failure to make any of the payments required by this order may result in relief being granted. However, no such relief shall be automatic and, therefore, the creditor will be responsible for bringing the matter to the attention of the Court on a timely basis.

Because of the Court's concern that the likelihood of an effective reorganization is limited, this matter shall be set for a status hearing during the first week of September, 1986. Debtors shall be prepared to present to the Court their position with regard to the filing of a disclosure statement and plan at that time.

In conclusion, relief shall not be granted at this time.

One other matter needs to be addressed. The creditor feels that it should be paid some type of "opportunity cost" pursuant to the authority of In Re Briggs Transportation Company, Case

No. 84-5196, 5197, (8th Cir., December 26, 1985). This Court acknowledges the authority of the Briggs case and has considered the request of the creditor. However, there is insufficient evidence before this Court as to the "opportunity cost" to the creditor if it is not permitted to obtain relief at this time. For example, there is no evidence before this Court as to the length of time it would take to repossess the equipment and the truck or foreclose upon the real estate. Further, there is no evidence concerning the net proceeds that the creditor would obtain from such replevin or foreclosure and no evidence of the rate of interest the creditor could earn by reinvesting the proceeds of the sale of the equipment, truck and real estate. Without these basic facts, this Court cannot and will not entertain a creditor's claim for lost opportunity costs.

Relief denied.

DATED: February 20, 1986.

BY THE COURT:

U.S. Bankruptcy Judge

Copies to:

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