UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

ORVILLE W. MEEKER, HILDEGARDE MEEKER,

Case No. 87-978-D

Debtors.

ORDER ON MOTION FOR MODIFICATION OF THE AUTOMATIC STAY AND MOTION FOR DETERMINATION OF SECURED STATUS

On October 7, 1987 a motion for modification of the automatic stay filed on behalf of the Federal Land Bank of Omaha (FLB) and a resistance thereto filed on behalf of the debtors came on for hearing before this court in Davenport, Iowa. John M. Titler appeared on behalf of the FLB and Ronald Schnack appeared on behalf of the debtors. At the time of the hearing the parties informed the court that they had come to a preliminary agreement with regard to the FLB's entitlement to adequate protection in the form of a cash rent payment of $50,699.00 for the FLB's interest during the 1987 crop year. The question posed to the court for determination is whether a "receivership fee", past due and current real estate taxes and expenses for compliance with the Conservation Reserve Program (CRP) should be deducted from the agreed upon rental figure. At the close of the hearing the parties were given until November 20, 1987-to submit briefs on this issue.

Also at the October 7, 1987 hearing the FLB indicated its intent to assert a security interest in payments received by the debtors in exchange for the enrollment of property in the CRP. The parties were directed to brief that issue also. On November 23, 1987 the FLB filed a motion for determination of secured status asserting that the CRP payments constitute rents, profits and issues subject to the FLB's mortgage. At this juncture there is no resistance to the FLB's motion in the file nor have any supporting briefs been filed. Accordingly, the court will not dispose of the motion to determine secured status in this decision.

DISCUSSION

In arriving at the figure of $50,699.00 as a starting point in providing adequate protection, the parties have agreed that the FLB would have been entitled to have a receiver appointed to collect rents from the property in question based upon underlying state law and but for the bankruptcy filing. The agreed upon figure represents the fair market cash rent for the farmland during the 1987 crop year. Both parties ask the court to determine whether certain deductions should be made from this figure and refer the court to Iowa Code section 654.14 which states as follows:

> In an action to foreclose a real estate mortgage, if a receiver is appointed to take charge of the real estate, preference shall be given to the owner or person in actual possession, subject to approval of the court, in leasing the mortgaged premises. If the real estate

> is agricultural land used for farming, as defined in section 172C.1, the owner or person in actual possession shall be appointed as receiver without bond, provided that all parties agree to the appointment. The rents, profits, avails, and income derived from the real estate shall be applied as follows:
>
> 1. To the cost of receivership.
>
> 2. To the payment of taxes due or becoming due during said receivership.
>
> 3. To pay the insurance on buildings on the premises and/or such other benefits to the real estate as may be ordered by the court.
>
> 4. The balance shall be paid and distributed as determined by the court.

The deductions at issue include the cost of receivership or "receivership fee", the payment of taxes due or becoming due, the payment of insurance costs and the cost of maintaining the seeding for the CRP acreage. The court will separately address each area of concern.

A. Cost of Receivership

The cost of receivership is the first priority expense to be paid from the income derived from real estate subject to a receivership. Iowa Code § 654.14(l)(1987). The costs typically include those incurred by a receiver in taking charge of and managing the property and in making periodic reports to the court. The debtors assert that they are entitled to a deduction from the rental figure for the amount which would otherwise be paid to a receiver. The debtors have not, however, presented any evidence as to the

proper amount of that "receivership fee". The FLB, on the other hand, asserts that section 654.14 does not provide for the deduction of a "receivership fee" when as in this case, the debtor/owner remains in possession as the receiver.

The court finds the arguments of the debtors more persuasive than those of the FLB. The statutory provision in question does not distinguish between a third party receiver and the owner or person in actual possession acting as a receiver. Each is directed to apply the rents and profits generated to the costs of the receivership. Where .the owner is appointed as receiver the owner typically rents the property to himself. While the duties imposed upon the receiver are very similar to those imposed upon a debtor in possession, a receiver is considered an officer of the court and performs various administrative functions which are compensable by virtue of the statute. The FLB's argument that the deduction for "receivership fees" would be artificial as there is no receiver actually appointed in this case is not well taken. The FLB will not be allowed to benefit from the presumption that a receiver would be appointed for purposes of determining its entitlement to adequate protection without incurring the burdens imposed by the statute underlying the hypothetical receivership.

With regard to the dollar figure to be applied as costs of the receivership, neither party has presented evidence sufficient to.allow the court to make a determination.

Accordingly, unless the parties can stipulate to an appropriate amount within 15 days of this opinion, the court shall conduct a further hearing to determine the amount to be deducted from the cash rental figure for costs of the receivership.

B. Taxes.

The second priority expense to be paid from the income derived from real estate subject to a receivership consists of taxes due or becoming due. Iowa Code 654.14(2)(1987). The FLB has conceded that past due and current taxes may be .deducted from the agreed upon rental figure. The FLB asserts, however, that it should be reimbursed for that payment by means of subrogation to the priority tax claim.

The FLB has submitted no authority for the argument that it is entitled to priority status by virtue of subrogation for payment of real estate taxes. Indeed, 11 U.S.C. section 507(d) specifically bars priority status with respect to subrogated claims which would otherwise receive priority. See 3 Collier on Bankruptcy, % 507.07 at 507-49 (15th ed. 1986); Matter of Barefoot Sports, 61 B.R. 546, 548 (Bankr. W.D. Wis. 1986); In re Bates, 30 B.R. 273, 275 (Bankr. D. Md. 1983); In re Walsey, 29 B.R. 328, 331 (Bankr. N.D. Ga. 1983). Payment of real estate taxes from the adequate protection rental figure serves to enhance the FLB's secured interest in the real estate in question. Under 11 U.S.C. section 506(a) the allowed secured claim of

a lienholder is secured to the extent of the value of the lienholder's interest in the property in question. Determining the extent of a secured creditor's lien involves deducting the amount of debt secured by senior liens. 3 Collier on Bankruptcy, § 506.04 at 506-19 (15th ed. 1986). Under Iowa law, real estate taxes constitute a first lien upon real property, superior to all other encumbrances. Iowa Code § 445.28 (1987); Merv. E. Hilpipre Auction Co. v. Solon St. Bank, 343 N.W.2d 452, 455 (Iowa 1984). Thus, unless these taxes are paid they would reduce the FLB's secured claim. Accordingly, the FLB shall deduct the amount of taxes due and becoming due from the agreed upon 1987 rental figure. No priority status shall be granted for such payment but rather the amount paid will not serve to reduce the FLB's secured claim.

C. Insurance.

The cost of insurance on buildings is the third priority expense to be paid from the income derived from real estate subject to a receivership. Iowa Code § 654.14(3). The FLB has not addressed the necessity of this deduction from the agreed upon cash rent payment. The debtors assert that the FLB's appraiser estimated insurance costs to be $448.00 annually and that figure should be deducted from the fair market rent.

The amount of insurance expenses, like the costs of receivership, has not been sufficiently established by the

parties. Thus, unless the parties can stipulate to an appropriate amount within 15 days of this opinion, the court will conduct a further hearing to determine the amount to be deducted from the cash rental figure for the payment of insurance.

D. Costs of Maintaining Seeding for CRP Acreage.

Finally, the debtors assert that the rental figure must be reduced by the cost of seeding the CRP acres of farmland. The debtors have stipulated that the federal government has paid approximately one-half of the seeding cost but assert that a receiver must expend the money for seeding or the fair market rent will not be paid. The FLB disputes the deduction of this element of maintenance for the reason that in a cash rent situation, such as the one forming the basis for the adequate protection payment here, a receiver/ landlord would not incur the expense.

In this regard the court must accept the FLB's arguments for the same reason the FLB's arguments were rejected in the area of receivership fees. It must be remembered that the underlying premise to the determination of adequate protection is the FLB's entitlement to have a receiver appointed to collect rents and profits from the real estate. The parties have agreed to a cash rent arrangement and rely upon the provisions of Iowa Code 654.14 to support or to dispute various deductions. Under section 654.14 the cost of seeding particular acreage would not be a cost of receiver-

ship in a cash rent arrangement. Rather the tenant would incur the expenses for farming the rented premises. The fact that the tenant and the receiver may be the same person does not alter the conclusion under these circumstances, albiet hypothetical, that the receiver would not be responsible for the seeding expenses. Accordingly, the cost of maintaining seeding for the CRP acreage shall not be deducted from the cash rent figure.

At the time of the October 7, 1987 hearing, the debtors asserted that the act of putting acreage into the CRP and maintaining compliance with the program served to enhance the collateral and benefit the FLB. This argument would be relevant to whether the debtor could recover such costs and expenses from the property securing the FLB's allowed secured claim pursuant to 11 U.S.C. section 506(c). Again, however, evidence sufficient to allow the court to make that determination was not presented by the debtors who bear the burden of proof under 506(c). See In re Lindsey, 59 B.R. 168, 171 (Bankr. C.D. Ill 1986).

CONCLUSION

Based on the foregoing discussion, the court hereby finds that the adequate protection payment to the FLB in the form of fair market cash rent must be reduced by the costs of receivership, taxes due and becoming due and insurance costs. If the parties cannot stipulate to an appropriate dollar amount representing a receivership fee and insurance

costs within 15 days, they are ORDERED to contact the undersigned's courtroom clerk for a further hearing assignment.

IT IS FURTHER ORDERED that the parties shall submit briefs with respect to the FLB's motion for determination of secured status within 30 days or contact the courtroom clerk for the purpose of scheduling another hearing.

Signed and filed this 22nd day of February, 1988.

LEE M. JACKWIG

CHIEF U.S. BANKRUPTCY JUDGE