

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

Case No. 87-2924-C

BRUCE ANTHONY DeSILVA
DEBORAH DIANE DeSILVA
Engaged in Farming,

Chapter 7

Debtors.

**ORDER ON MOTION FOR RELIEF FROM STAY
AND OBJECTION TO DEBTORS' CLAIM OF EXEMPT PROPERTY**

On February 10, 1988, a telephonic hearing was held on the Motion for Relief from Automatic Stay filed by Windmills West, Inc. (hereinafter "Creditor"), and the objection to Debtors' claim of exempt property filed by Lester Mennen, Jeanette Mennen, and Ackley Sales Pavillion, Inc. William J. Lorenz appeared for the movant-creditor Windmills West, Inc., and Ronald J. Pepples appeared for the movantcreditors Lester Mennen, Jeanette Mennen, and Ackley Sales Pavillion, Inc. Pat W. Brooks, counsel for Debtors, was not present in his office to participate in the hearing.

This is a core proceeding pursuant to 28 U.S.C. section 157(b)(2)(B) and (G). The Court having heard the arguments of counsel and having reviewed the file now enters its findings and conclusions.

FINDINGS OF FACT

1. Debtors filed their petition for relief under Chapter 7 on November 25, 1987.
2. Creditor is an Arizona corporation qualified to do business in the State of Iowa.

3. Creditor is the owner of the following described real estate located in Marshall County, Iowa, to-wit:

Building site located in the Northeast Quarter of Section Ten, Township Eighty-five North, Range Twenty West of the 5th P.M., Marshall County, Iowa.

4. The Debtors, Bruce Anthony DeSilva and Deborah Diane DeSilva, entered into an oral lease with Creditor to lease the above premises. This lease commenced October 1, 1986, and continued on a month-to-month basis.

5. No rent has been paid on the oral lease since December, 1986.

6. On September 9, 1987, Creditor recovered judgment in the Iowa District Court for Marshall County on a forcible entry and detainer action holding that said landlord was entitled to possession of the premises. On November 18, 1987, this judgment was affirmed upon appeal and the sheriff was directed to proceed with execution pursuant to the order from the trial court.

7. Debtors' schedule A-3 includes a claim by Creditor. The consideration for this claim is shown as "rent and money due under lease."

8. Debtors' schedule B-1, Real Property in which debtors have an interest, shows the response "none."

9. Debtors, in their petition, state under oath that they are engaged in farming and have farmed for two years. Debtors also reveal the amounts of corn and hay production

for the year 1987, and that they have sold the prior year's harvest..

10. In schedule B-4, Debtors claim as exempt the following property:

- (a) One 1979 Buick belonging to Deborah DeSilva with an exempt value of \$1,000.00 pursuant to Iowa Code section 627.6(10)(b);
- (b) One 1979 Dodge Pickup as farm tools and implements with an exempt value of \$2,000.00 pursuant to Iowa Code section 627.10(d); and
- (c) One IH Model 560 tractor as farm tools and implements with an exempt value of \$1,000.00 pursuant to Iowa Code section 627.10(d).

11. It is contended that Debtors are not "farmers" in that Mr. DeSilva makes his living as a trucker and Mrs. DeSilva has an income from a non-farm source. A few years ago, Debtors raised some sheep on an acreage which was pasture but Debtors do not meet the definition of "farmer."

12. The trustee filed his consent to lifting of automatic stay on January 12, 1988, so that Creditor could proceed to execute on its judgment for forcible entry and detainer to obtain possession of the described real estate.

ISSUES

1. Whether the stay pursuant to 11 U.S.C. §362(a) should be lifted to permit Creditor to execute on its judgment for possession of owned real estate.

2. Whether Debtors' claimed exemptions are properly claimed and the amount thereof.

DISCUSSION

The first issue presented is whether the automatic stay under section 362(a) should be lifted to permit Creditor to execute on its forcible entry and detainer judgment for possession of owned real estate. For the following reasons, Creditor will be allowed to execute on its judgment against Debtors.

First, the property in question is not part of the bankruptcy estate under section 541 and therefore is not subject of the automatic stay under section 362. The filing of a bankruptcy petition operates as a stay of "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. §362(a)(3). Section 541(a) (1) provides that the property of the bankruptcy estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." State law, not federal law, determines the nature and extent of debtors' interest in property under section 541 as of the date of commencement of the bankruptcy case. In re Bundy, 53 B.R. 582, 584 (Bankr. W.D. Pa. 1985).

In the case at bar, Debtors had no interest in the property under state law at the commencement of the case. On September 9, 1987, Creditor recovered judgment in the Iowa District Court for Marshall County on a forcible entry and detainer action holding that Creditor, as landlord, was

entitled to possession. On November 18, 1987, this judgment was affirmed upon appeal and the sheriff was directed to proceed with execution. Thus, Debtors had no interest in the property when they commenced their case one week later on November 25, 1987.

Further, evidence showing this property is not property of the estate is found in Debtors' bankruptcy schedules. Debtors' schedule B-1, real property in which Debtor have an interest, shows the response "none." Under Schedule B-4, exemptions, Debtors did not attempt to exempt the property as a "homestead" pursuant to Iowa Code section 561.1(1987).

Later, in their resistance to Creditor's motion for relief from stay, Debtors for the first time argued the property in question was their exempt homestead. However, for exemption purposes, "homestead" is defined as follows:

The homestead must embrace the house used as a home by the owner, and if the owner has two or more houses thus used, the owner may select which the owner will retain....

Iowa Code §561.1 (emphasis added). Debtors clearly do not own the property and thus cannot claim it as an exempt homestead. Creditor owns the property. Therefore, since Debtors have no interest in the property as evidenced by the judgment against them and their lack of ownership, the property is not "property of the estate" under section 541(a) and thus not subject to the section 362(a) automatic stay.

Assuming arguendo the property somehow does qualify as "property of the estate," Debtors will still lose possession because Creditor is entitled to have the stay lifted, pursuant to section 362(d), in order to execute on its judgment.

The requirements for obtaining relief from the automatic stay are contained in 11 U.S.C. section 362(d), which in part provides:

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- -

... or

(2) with respect to a stay of any act against property under subsection (a) of this section, if-

(A) the debtor does not have any equity in such property; and

(B) such property is not necessary to an effective reorganization.

In the case at bar, Debtors clearly do not have any equity in the property as evidenced by the January 12, 1988, Trustee's consent to lifting of automatic stay. In addition, Debtors currently do not and never have owned the property. They previously leased from the owner-creditor. Thus, Creditor meets section 362(d) (2) (A).

In addition, Creditor also meets (d) (2) (B) because this case is a Chapter 7 liquidation proceeding so no reorganization is possible. Therefore, since Creditor

meets both requirements under section 362(d)(2), it is entitled to have the stay lifted.

The second issue presented is whether Debtors' claimed exemptions are properly claimed and the amounts thereof. The court finds that an evidentiary hearing is necessary on this issue. Thus, an evidentiary hearing will be set upon further order of the court.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the court concludes the property in question is not property of Debtors' estate pursuant to section 541(a) or, in the alternative, that the automatic stay should be lifted pursuant to section 362(d). The result of either will allow Creditor Windmills West, Inc. to execute on its forcible entry and detainer judgment against Debtors for possession of the property.

THEREFORE, IT IS ORDERED, that the automatic stay is lifted against the property owned by Windmills West, Inc.

IT IS FURTHER ORDERED, that an evidentiary hearing concerning Debtors' claim of exemptions and amounts thereof will be set upon further order of the court.

Signed this 10th day of March, 1988.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE