

entered on March 20, 1991.

2. Debtors are engaged in farming near Charter Oak, Crawford County, Iowa.

3. Debtors scheduled Farmers Home Administration (FmHA) as a secured creditor holding a first real estate mortgage on real estate legally described as:

The North Half (N 1/2) of Section Thirteen (13), Township Eighty-Four (84) North, Range Forty-Three (43) West of the 5th P.M., Monona County, Iowa.

4. This real estate is a 320-acre farm and is encumbered by the first mortgage securing the FmHA loan. Debtors are not in default on this loan and FmHA has never commenced foreclosure proceedings against the farm.

5. Debtors scheduled this real estate as having a market value of \$115,000 and scheduled FmHA's claim as \$118,400.

6. At the time of the filing of the voluntary petition, Mr. Buschmann was employed as a farm hand.

7. Prior to the filing of the petition, Debtors leased the 320-acre farm to Henry Buschmann, Jr., Allen's father, and Mike Hageman. This lease was for the 1991 crop year and rent in the amount of \$14,000 was to be paid on October 1, 1991.

8. Debtors did not schedule this lease as an asset.

9. Trustee filed his report of abandonment of the 320-acre farm, but upon objection of the Creditor, the report was

not approved by the Court. The Creditor objected on the basis that said farm had more value than that scheduled by Debtors.

10. Debtors received their discharge on June 26, 1991.

11. By order of September 12, 1991, Trustee was granted until December 20, 1991, within which to assume or reject executory contracts on leases.

12. The Court has approved Trustee's employment of an auctioneer sell the 320-acre farm by public auction on November 16, 1991 at 11 a.m. The auctioneer will waive his auction fee of 4% if the farm does not yield sufficient monies to cover sales expenses, the FmHA payoff, the tax lien, plus the sum of \$10,000.

13. The farm is subject to the lien of FmHA in the amount of \$118,699.75 as of October 1, 1991, with a per diem of \$15.6720.

14. The farm is also subject to a lien of the Monona County Treasurer for real estate taxes in the amount of \$2,035.00.

15. Trustee proposes to sell the farm for a total sales price which exceeds the undisputed claim of FmHA and the Monona County Treasurer plus \$10,000. If the farm cannot be sold for such an amount, Trustee intends on terminating the sale and abandoning said property.

ISSUES

Debtors object to Trustee's motion on three bases:

(1) Debtors have not been afforded their rights under

the Agricultural Credit Act and therefore the sale should not be authorized;

- (2) The Trustee's minimum bid does not result in a benefit to unsecured creditors; and
- (3) Debtors should be allowed a first right of refusal by paying to the Trustee the amount of net recovery to the unsecured creditors.

DISCUSSION

Sale of Property Free and Clear of Liens:

The sale of property free and clear of all interest is governed by 11 U.S.C. § 363(f). That section permits such a sale if one of the following five conditions is met:

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

The sale can be justified under § 363(f)(3) in that the proposed sale price exceeds "the aggregate value of all liens on such property."

Debtors cite Matter of Stroud Wholesale, Inc., 47 B.R. 999 (DC EDNC 1985) to the Court for the proposition that the Court should not allow the sale of property free and clear of liens unless it is satisfied that the sale will produce proceeds to fully compensate secured lienholders and produce some equity for the estate. Id. 47 B.R. at 1002.

Debtors argue that the taxes and expenses of the sale will consume the cushion and result in no benefit to unsecured creditors.

11 U.S.C. § 506(c) permits the Trustee to recover costs from the collateral and expense of the preservation or disposition to the extent of any benefit to the holder of the allowed secured claim. Further, other collateral may be considered. The Court may consider the payment of \$14,000 under the lease. Upon considering this collateral, the requirements of § 363(f)(3) have been met.

Agricultural Credit Act:

Debtors also urge that they have not been afforded rights under the Agricultural Credit Act. Debtors contend that since FmHA alleges that the filing of the bankruptcy constitutes a default by debtors, they, the debtors, are entitled to preservation program options pursuant to the Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568-1718 (amending the Farm Credit Act of 1971, codified at 12 U.S.C. § 2001, et seq.). Debtors state that they have not been

afforded these options and are entitled to the protection of this act. Therefore, the trustee should not be allowed to sell this property free and clear of all liens and interest. The case of In re Nelson, 123 B.R. 993 (Bankr. D.S.D. 1991), was reversed by the United States District Court, District of South Dakota, Southern Division, on July 29, 1991. United States of America Through the Farmers Home Administration v. David E. and Marsha R. Nelson (In Re Nelson), No. CIV91-4039, slip op. (D.S.D. July 29, 1991).

The rationale of the district court decision is persuasive in that the debtors have chosen to deal with FmHA in bankruptcy court and the Bankruptcy Code establishes rights and responsibilities of the parties. The debt has not been reaffirmed and FmHA has the same rights as any other creditor.

However, if FmHA acquires title to the real estate, and the property comes into FmHA's inventory, debtors would then be entitled to preservation loan servicing. 7 C.F.R. § 1951.911(a)(1)(ii) and (v) (1990).

Accordingly, the protection of the Agriculture Credit Act is not available to the debtors at this time.

First Right of Refusal:

Debtors contend that they should be given a first right of refusal to purchase the estate's interest in the farm by paying the net amount of the recovery to the unsecured creditors.

Debtors cite no authority for this proposition except to state that this would permit them to retain the farm and obtain their fresh start.

A very likely effect of granting such a right to the debtors would be to depress the amount of the bids which would be detrimental because the fair market value of the farm would not be ascertained and obtained. Debtors are given an opportunity to bid at the auction, thereby giving them the opportunity to obtain the farm. Balanced against this is the possible prejudice to the estate by depressing the bidding at the auction. Accordingly, debtors prayer for a first right of refusal must be denied.

IT IS ACCORDINGLY ORDERED that the minute order of November 15, 1991, is affirmed in that Trustee's Motion to Sell Property Free and Clear of Lien is sustained and Debtors' Objection is overruled. Trustee may proceed to sell by public auction subject real estate for a minimum bid of \$130,734.75 with terms of sale to be 10% in cash on the date of sale, and the balance to be paid within 30 days of the date of sale.

Dated this 29th day of November, 1991.

RUSSELL J. HILL
U.S. Bankruptcy Judge

