UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

DAVID DODDER, Case No. 87-692-D
BARBARA DODDER,
Engaged in Farming, Chapter 12

Debtors.

ORDER ON MOTION FOR RELIEF FROM STAY

On June 19, 1987 a motion for relief from stay filed by the Production Credit Association (PCA) on May 20, 1987 came on for telephonic hearing in Des Moines, Iowa. The debtors filed a resistance to this motion on June 1, 1987. Steven T. Hunter appeared on behalf of the PCA. Dennis D. Cohen appeared on behalf of the debtors. The parties have submitted the case on a stipulation of facts and briefs.

FACTUAL BACKGROUND

1. The debtors filed their Chapter 12 petition on March 17,,1987.

2. On May 16, 1985 the debtors executed a promissory note to the PCA in the principal amount of $275,000.00.

3. On that same date the debtors executed and delivered to the PCA a mortgage to the debtors' one acre homestead. The homestead presently is valued at $55,000.00. People's National Bank of Columbus Junction, Iowa holds a superior interest in the property in the amount of $15,473.00.

4. Also on May 16, 1985 Margery Dodder, mother of debtor David Dodder, executed and delivered a mortgage to the PCA. [1] The mortgage covered 160 acres of farmland owned by Margery Dodder and was given to further secure the debtors' obligation to the PCA. The 160 acres currently is valued at $181,200.00. The Federal Land Bank holds a superior interest in the 160 acres in the amount of nearly $9,000.00.

5. On May 16, 1985, the debtors and the PCA executed a security agreement whereby the PCA was granted a security interest in the debtors' machinery and equipment.

6. The Farmers Home Administration (FmHA) has guaranteed 90%, or $245,500.00 of the debtors' obligation to PCA. The FmHA executed the guarantee on May 16, 1985.

7. As of the filing date, the debtors' obligation to PCA, including interest, was $335,418.20.

S. The PCA does not seek to lift the automatic stay with respect to the debtors' machinery and equipment.

9. The parties agree that the value of the real estate in question is not declining in value at this time.

10. The debtors rent all of the land which they farm. For 17 years the debtors have rented the 160 acres from Margery Dodder.

11. The 160 acre parcel is located adjacent to the

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[1] There is nothing in the record to indicate that Margery Dodder is a co-obligor on the notes executed by the debtors and the PCA.

debtors' homestead and contains facilities for storing and drying grain and for storing farm machinery.

12. The debtors filed their Chapter 12 plan on July 24, 1987. The plan contemplates that the debtors continue leasing the 160 acres owned by Margery Dodder. The debtors propose to fix the PCA's allowed secured claim at $39,527.00, an amount that reflects the value of the homestead less the $15,473.00 interest of People's National Bank. The plan does not treat the value of the 160 acres.

DISCUSSION

I .

The PCA argues that the 160 acre parcel is not part of the bankruptcy estate under 11 U.S.C. sections 541 and 1207 and therefore is not subject to the automatic stay under section 362.

The filing of a bankruptcy petition operates as a stay of among other actions, "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. section 362(a)(3). In order to determine whether the stay operates to prohibit the PCA from foreclosing on Margery Dodder's land, it first must be determined whether her land is part of the estate. The debtors maintain that their rights as lessees of the land draws the property into the estate.

There can be no doubt that the debtors' leasehold

interest constitutes part of the bankruptcy estate given the broad and all-inclusive definition of "estate" found in 11 U.S.C. section 541(a)(1). [2] However, this does not mean the land itself is part of the estate. In Matter of Minton Group, Inc., 11 C.B.C. 1442 (S.D. N.Y. 1985), the issue before the court was whether the debtor's interest in real property, owned by a limited partnership of which the debtor was a general partner, qualified the property itself as property of the estate for purposes of operation of the automatic stay. The court held that the debtor's interest in the property did not bring the property into the estate. In so holding, the court commented:

> There is a distinction between owning an interest in land and owning the land itself, useful in this regard is the distinction drawn in the Restatement of Property between an "interest" and complete property." An "interest" is defined as a right, privilege, or power, or a group of such rights, privileges or powers, regarding land. Restatement of Property § 5(1936). Plainly there are a large number of interests which may simultaneously be possessed with regard to any piece of land. "Complete property" is the totality of interests which it is legally possible to have in a given piece of land. Restatement, § 5e. "Ownership" of a thing is possession of complete property in it. Restatement, S 10b.... In order to bring the land itself within the reach of... 362 ... the debtor must be able to exercise a greater degree of control over the land than is given by the limited power granted by a tenancy in partnership--

[2] 11 U.S.C. section 541(a)(1) provides that the bankruptcy estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case."

> sufficient control so that the land itself is 'of' the debtor or its estate.

Id. at 1445-1446.

Complete control of the property only can be exercised by Margery Dodder as she is owner of the property. A lessee's right to possession and use of real estate does not give the lessee sufficient control of the property to bring the property into the estate for purposes of section 362.

The debtors invoke the court's injunctive powers under 11 U.S.C. section 105 to enjoin the PCA from executing upon the 160 acres. Section 105 provides in part that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." One of the purposes of this provision is to endow the court with the power to issue stays or injunctions in situations not covered by the automatic stay. In re Monroe Well Service, Inc., 67 B.R. 746, 750 (Bankr. E.D. Pa. 1986). In surveying the contexts in which courts have exercised powers under section 105, the Monroe court observed that injunctions may be appropriate when the nondebtor owns assets that will be a source of funds for the debtor. Id. at 751 citing In re Otero Mills, Inc., 21 B.R. 777 (Bankr. D. N.M. 1982) aff'd, 25 B.R. 1018 (D. N.M. 1982); In re Lahman Manufacturing Co., 33 B.R. 681 (Bankr. D. S.D. 1983). In the Lahman case, guarantors of corporate debt owned substantial amounts of unencumbered farm real estate. The guarantors sought to enjoin creditors from enforcing the

guarantees on the basis that the land was to be offered as collateral in financing the corporation's reorganization. In determining whether to enjoin the creditors, the court applied the four-pronged test articulated by the Eighth Circuit in Dataphase Systems, Inc. v. C.L. Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981). The four factors that must be considered are:

(1) the threat of irreparable harm to the movant;

(2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant

(3 the probability that the movant will succeed on the merits; and

(4) the public interest.

Lahman, 33 B.R. 681 at 683.

With respect to the first prong of the test, the damage to the debtors would be irreparable if they were unable to farm the 160 acres. Since they are renting the land, this damage might be mitigated if substitute land were found. However, arrangements to rent land need to be made early. Finding 160 acres of replacement ground at this late date may be difficult.

The harm to the debtors must be balanced against the harm that would result to the PCA if the injunction were issued. The value of the PCA's interest in the 160 acres is $172,200.00. Assuming the stay was lifted and under the facts presented, the PCA would be able to execute upon the 160 acres and realize $172,200.00. The FmHA then would be

compelled to pay the PCA $73,300.00 ($172,200.00 value of PCA's interest in the 160 acres subtracted from the $245,500.00 guaranteed amount). In short, the PCA is protected in the amount $245,500.00 if the stay is lifted. If the stay is not lifted, the PCA will not be able to execute upon the land. However, the guarantee ensures that the PCA will be paid $245,500.00. In both instances, the PCA would receive $$245,500.00. Therefore, the PCA would suffer no harm if the stay were left intact.

The court must examine the probability that the debtors will be successful on the merits. “In a reorganization context the probability of success on the merits has been defined as the probability of a successful plan of reorganization." In re Lahman at 684-685. Under 11 U.S.C. section 1225(a)(5)(B)(ii), the court only can confirm a plan if:

> the value, as of the effective date of the plan, of property to be distributed by the trustee or the debtor under the plan on account of [the allowed secured] claim is not less than the allowed amount of such claim;

The debtors' plan reveals that the debtors propose to reduce the PCA's claim of $335,418.20 to the value of the PCA's secured interest in the homestead which has been stated as $39,526.00. The plan does not treat PCA's interest in the 160 acres. Since the PCA's allowed secured claim would include its interest in the 160 acres, the requirements of section 1225(a)(5)(B)(ii) remain unsatisfied. In essence, the plan calls for PCA to forego $172,200.00 in collateral.

Based on the public interest discussed below, the debtors will be given an opportunity to submit an amended plan that treats the 160 acres and addresses the objections to the plan discussed at the preliminary hearing. The ability of the debtors to accommodate treatment of the 160 acres in their plan is questionable but not so suspect that the court can conclude that formulation of a successful plan of reorganization is improbable.

Finally, the court must consider the public interest. The purpose underlying passage of Chapter 12 was to "give family farmers a fighting chance to reorganize their debts." 132 Cong. Rec. S 15076 (daily ed. Oct. 31, 1986) (statement of Sen. Grassley). To deny the debtors an opportunity to formulate an amended plan whereby the 160 acres is treated would be to deny the debtors that fighting chance.

Having found that the debtors have satisfied the Dataphase test, the court temporarily enjoins the PCA from executing upon the 160 acres. Whether a permanent injunction shall issue shall be addressed at the confirmation hearing.

The debtors' homestead consists of a residence located on one acre of property. The PCA contends that it should be granted relief from the stay with respect to this property for the reasons that the debtors have no equity in the property and that the property is not necessary for a

successful reorganization.

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--
>
> (2) with respect to a stay of any act against property under subsection (a) of this section, if--
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> (A) the debtor does not have any equity in such property; and
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> (B) such property is not necessary to an effective reorganization.

With respect to the burdens of proof, 11 U.S.C. section 362(g) states:

> In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section--
>
> (1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and
>
> (2) the party opposing such relief has the burden of proof on all other issues.

This court subscribes to the majority view which defines equity in debtor's property as the difference between the property value and all encumbrances against it. See, In re Jug End in the Berkshires, Inc., 46 B.R. 892, 900-01 (Bankr.

Mass. 1985) and cases cited therein; In re Irving A. Horns Farm, Inc., 42 B.R. 832, 836 (Bankr. N.D. Iowa 1984).

The Eighth Circuit recently adopted other court interpretations of the "necessary for an effective reorganization" standard as requiring a debtor not only to show that the property is essential to reorganization but to demonstrate that an effective reorganization is realistically possible. In re Ahlers, 794 F.2d 388, 398-99 (8th Cir. 1986).

There is no question that the debtors lack equity in the homestead. The value of the property is $55,000.00. The encumberances against the property exceed $350,000.00. However, the homestead is necessary for an effective reorganization. The debtors' residence is located on the property. It serves as the base of the debtors' operation. It is the only parcel of real property that the debtors own and it is located adjacent to the 160 acres where most of their storage facilities are situated.

In examining whether an effective reorganization is realistically possible, the court notes that "uncertainties should be resolved in the debtor's favor during the period in which the debtor is entitled to file a plan of reorganization." In re 6200 Ridge, Inc., 69 B.R. 837, 843 (Bankr. E.D. Pa. 1987). Although the debtors face difficult problems, there is a realistic possibility of a successful reorganization. The debtors have substantial nonfarm income that they propose to commit to the plan. Further, they are farming

and generating income. Granting the motion as to the homestead is premature at this juncture.

III.

Finally, the PCA argues that the debtors have failed to provide adequate protection. The debtors maintain that the FMHA guarantee provides the PCA with ample adequate protection.

The concept of adequate protection referred to in section 362(d)(1) is not specifically defined in the Code. Traditional notions of adequately protecting a creditor's interest under section 361 have been somewhat curtailed by section 1205. The new provision makes section 361 inapplicable to Chapter 12 cases and emphasises value of the property rather than the value of the creditor's interest in the property. What constitutes adequate protection is a factual question to be determined on a case by case basis. In re Briggs Transp. Co., 780 F.2d 1339, 1349 (8th Cir. 1985).

The concept of adequate protection has been characterized as being intended to protect a creditor's allowed secured claim. In re Keller, 45 B.R. 469, 472 (Bankr. N.D. Iowa 1984). The PCA's allowed secured claim is equal to the value of its interest in the collateral, or in other words $211,727.00. A federal mortgage guaranty may constitute adequate protection. Commonwealth of Pennsylvania State Employees Retirement Fund v. Roane, 14 B.R. 542 (E.D. Pa. 1981).

Application of these principles to the instant case leads to the conclusion that the PCA is adequately protected. The parties have stipulated that the property is not decreasing in value. Moreover, the FmHA guarantee of $245,500.00 protects the PCA's allowed secured claim of $211,727.00.

CONCLUSION AND ORDER

WHEREFORE, for the reasons expressed above, it is hereby found that the the PCA is temporarily enjoined from executing upon the 160 acres in question; the homestead is necessary for an effective reorganization; and the PCA's secured interest in the real property in question is adequately protected by the FmHA guarantee.

THEREFORE, the PCA's motion for relief from stay is denied upon the present record.

IT IS FURTHER ORDERED that the debtors amend their plan to comport with this decision by January 22, 1987 and that a confirmation hearing be scheduled for this court's next Davenport assignment. The merits of the PCA's motion for relief from stay may be reconsidered at that time.

Signed and filed this 31st day of December, 1987.

LEE M. JACKWIG

U.S. BANKRUPTCY JUDGE