

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Central Division

In re:)
) Bankr. Case No. 94-30036
CLIFFORD BUXCEL)
dba Uptown Market)
Social Security No. 504-56-5178) Chapter 13
)
and)
) MEMORANDUM OF DECISION RE:
ELAINE BUXCEL) SBA'S MOTION TO
Social Security No. 504-56-3535) DETERMINE SECURED VALUE
)
Debtors.)

The matter before the Court is the Motion for Determination of Secured Status and Valuation filed by the Small Business Administration. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and subsequent order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052.

I.

Clifford and Elaine Buxcel (Debtors) filed a Chapter 13 petition and plan on August 3, 1994. Trustee Rick A. Yarnall and the Small Business Administration (SBA) filed objections to the plan. On September 16, 1994, SBA also filed a Motion for Determination of Secured Status and Valuation. The confirmation hearing has been held in abeyance pending resolution of the valuation motion.

The parties conducted substantial discovery. SBA filed a brief on March 15, 1995. On March 21, 1995, Debtors and SBA filed a summary of their calculation of SBA's secured status. A valuation hearing was held March 21, 1995. Appearances included

Jon Haverly for SBA and James E. Carlon for Debtors. Counsel reported that the parties had agreed that the value of Debtors' real property is \$269,000.00, the value of Debtors' grocery store and contents is \$49,582.00, the cash value of Debtors' life insurance is \$5,619.44, and the prior lien of Jones County on the real estate is \$11,542.28. Attorney Haverly also reported that SBA and First Fidelity Bank had agreed that the value of the Bank's mortgage, which is superior to SBA's claim, is \$13,778.96. The parties stipulated to the foundation of all offered exhibits (Debtors' Exhibit A and SBA's Exhibits 1-27). Each offered exhibit was received. The Court gave Debtors an opportunity to respond to SBA's brief and SBA was given an opportunity to respond to Debtors' response.

The four legal issues to be decided, as identified by counsel, are:

- (1) As of what date should the secured claim of South Dakota's Conservation Reserve Enhancement Program be valued and should that valuation include payments made post-petition?
- (2) What is the value of Frances Neidan's secured claim? Should Debtors be bound by the unpaid amount of the contract for deed with her that they reported to SBA when they applied for a loan?
- (3) Does SBA have a perfected, secured interest in Debtors' insurance policy with the Aid Association for Lutherans?
- (4) What is the effect on Debtors of the settlement between SBA and First Fidelity Bank?

Since material facts are not in dispute, none are stated herein except as needed to set forth the Court's conclusions.

II.

*Value of the Claim of the
South Dakota Conservation Reserve Enhancement Program*

The Court of Appeals for the Eighth Circuit provides clear guidance. "For purposes of the reorganization plan, the value of the collateral is to be determined at the time for confirmation of that plan." *Ahlers v. Norwest Bank Worthington (In re Ahlers)*, 794 F.2d 388, 398 (8th Cir. 1986), *rev'd on other grounds*, 485 U.S. 197 (1988); *see also Dewsnap v. Timm*, 112 S.Ct. 773, 778 (1992). Although *Ahlers* is a Chapter 11 case, the rationale is the same in a Chapter 12 case. A valuation is to be made in light of the purpose of the value and the proposed disposition. *Ahlers*, 794 F.2d at 398; *Metrobank v. Trimble (In re Trimble)*, 50 F.3d 530 (8th Cir. 1995); *In re Seip*, 116 B.R. 709 (Bankr. D. Neb. 1990). A valuation of the Reserve Enhancement Program's secured claim at or near the time of confirmation will insure that the secured claim's value as of the effective date of the plan is paid as required by 11 U.S.C. § 1225(a)(5)(B)(ii) and that the value used for plan treatment mirrors the value used for the best interest of creditors test under § 1225(a)(4). A valuation at confirmation also will insure that any post-petition, pre-confirmation changes in the values of secured property are recognized. Sometimes a valuation at confirmation will benefit the creditor; other times it will benefit the debtors. Therefore, any post-petition payments to the Reserve Enhancement Program should be recognized when the Reserve Enhancement Program's secured claim is valued for confirmation.

III.

Value of Frances Neidan's Secured Claim

Absent an objection prior to confirmation to Frances Neidan's claim, the claim constitutes *prima facie* evidence of her claim. 11 U.S.C. § 502(a) and F.R.Bankr.P. 3001(f). While SBA's motion put Frances Neidan on notice that the value of her secured claim may be decided in this action, a motion procedure may not substitute for an adversary proceeding when the validity, priority, or extent of her lien is contested. Since SBA's argument that Frances Neidan's claim should be limited because of alleged misrepresentations by Debtors or because the contract for deed limits Frances Neidan to zero interest, the Court will require that an adversary proceeding be filed to resolve those issues, if not resolved by stipulation. The adversary may include a determination of whether Frances Neidan's secured claim in excess of \$70,000.00 should be subordinated to SBA's secured claim.

IV.

*SBA's Secured Interest in Debtors' Policy
with Aid Association for Lutherans*

The extent of SBA's lien on an insurance policy also should have been determined by an adversary proceeding because it contests the extent of SBA's lien. However, the Court will rule on the matter with the caveat that such issues must be raised by complaint in future cases. Only the value of a secured claim, that is the value of the property securing the claim, should be resolved as a contested matter under 11 U.S.C. § 506.

The Security Agreement between SBA and Debtors dated May 26, 1992, includes a description of the General Intangibles in which Debtors gave SBA a secured interest. The Security Agreement's definition of General Intangibles includes unearned insurance premiums and premium refunds. The definition does not conflict with the definition of general intangibles set forth in S.D.C.L. § 57A-9-106. The Security Agreement also covers contract rights. Either provision adequately covers Debtor Elaine K. Buxcel's insurance policy with Aid Association for Lutherans. The September 23, 1993 Assignment of Life Insurance Policy as Collateral further clarifies SBA's secured interest. Finally, the description in the financing statements is sufficient because it reasonably identifies what is covered, including the insurance policy, as required by S.D.C.L. § 57A-9-110.

V.

*The Effect on Debtors of the Settlement
Between SBA and First Fidelity Bank*

The record does not contain sufficient information about the settlement between SBA and First Fidelity Bank for the Court to determine its effect on Debtors or to determine whether the Bank may still seek a deficiency claim against Debtors.

If the matter cannot be resolved among Debtors, SBA, and the Bank, SBA and the Bank should file a motion to approve their stipulation and notice it for objections. An evidentiary hearing on the matter can then be held.

This Chapter 13 case has been pending much too long while the

parties have tried to sort out these lien questions. No further delays will be tolerated. The parties should attempt a prompt settlement of remaining issues so that Debtors can get a confirmable plan filed or appropriate adversary proceedings and contested matters should be commenced.

Attorney Haverly shall prepare a proposed order that reflects the Court's conclusions in sections II and IV.

Dated this _____ day of June, 1995.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA A. JOHNSON, ACTING CLERK

By _____
Deputy Clerk

(SEAL)