UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:	)	Bankr. No. 96-40507
	)	Chapter 13
JOHN R. HARRIS	)	
Soc. Sec. No. 504-58-1985	)	MEMORANDUM OF DECISION RE:
	)	MOTION FOR RELIEF FROM STAY
Debtor.	)	

The matter before the Court is the Motion for Relief From Automatic Stay filed by Clem L. Egan, the joinder therein by Richard Halstead, and the response thereto filed by Debtor. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below more fully, the Court concludes that the stay should be modified to allow Clem L. Egan and Richard Halstead to pursue in state court their claims against the subject real property

I.

The subject property is real estate in a commercial area of Lincoln County, South Dakota. Debtor John R. Harris and his then wife[1] Audrey L. Harris purchased the property on June 29, 1990. The deed was recorded October 7, 1991. On November 27, 1992, Debtor and Audrey Harris quit claimed the property to Debtor's aunt, Emma Armstrong. This deed was recorded November 30, 1992. A civil action by Clem L. Egan against Debtor was then pending. Title remains in Emma Armstrong's name. Debtor and Audrey Harris

[1] The Court does not know whether Debtor is still married to Audrey L. Harris.

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later gave a mortgage on the same property to First National Bank of Brookings to secure a $20,000.00 note. This loan was guaranteed by a business associate of Debtor, Richard Halstead. The Bank's mortgage was dated December 29, 1992 and it was recorded January 6, 1993.

In the spring of 1993, Clem Egan filed a second suit against Debtor alleging he had fraudulently transferred the real property. A *lis pendens* was recorded April 29, 1993. On September 8, 1993, Debtor confessed judgment for $34,100.00 plus post judgment interest on the first civil action by Clem Egan.

The Bank became aware that title in the mortgaged property was not in Debtor's and Audrey Harris's names. In lieu of criminal action, the Bank accepted a new mortgage signed by Debtor, Audrey Harris, and Emma Armstrong. The new mortgage was dated August 3, 1993 and was recorded September 7, 1993. Sometime in the fall of 1995, a trailer home was purchased and placed on the land. Title to the trailer is held by Emma Armstrong.

The Bank brought a foreclosure action after the mortgage payments on the land went into default. Clem Egan filed a cross-claim alleging the property had been fraudulently transferred by Debtor to avoid the attachment of his judgment as a lien. Both the Bank and Clem Egan filed motions for summary judgment. Debtor John Harris then filed bankruptcy, which halted the state court proceedings.

In his Chapter 13 schedules, Debtor included the real property

on his schedules and claimed it as his homestead. His schedule of secured claims did not clearly identify the Bank or Richard Halstead, who satisfied the Bank's claim with his guarantee, as a mortgage holder on the real property. Debtor's schedules also did not acknowledge a judgment lien on the real property in favor of Clem Egan.

On August 6, 1996, Clem Egan sought relief from the automatic stay to continue his state court action. Clem Egan argues that cause for relief exists because the state court is addressing a fraud claim and, in the alternative, because Debtor has no equity in the property and the property is not necessary to Debtor's reorganization because he has no legal interest in it. Clem Egan also argued that if Debtor' s transfer of the property to his aunt is voided, Debtor would still not have equity in the property because the claims against it -- held by him for $34,000.00 and by Richard Halstead for about another $34,000.00 -- exceed the $20,000.00 value of the land. Finally, Clem Egan argued the property is not necessary for Debtor's reorganization because it is not income producing. Richard Halstead joined the motion for relief on August 12, 1996.

Debtor objected to the motion for relief on August 23, 1996. Debtor claimed there is equity in the property. He also argued that the property is necessary for his reorganization because he bases his trucking operation from there and parks trucks and other equipment there.

An evidentiary hearing was held September 4, 1996. Emma Armstrong testified how she came to hold title to the real property and trailer. She said Debtor makes the mortgage payments and is responsible for taxes in lieu of paying rent to her. She had no knowledge of any lawsuits against her nephew. There was no evidence presented on the current value of the property nor whether it is necessary for Debtor's reorganization.

II.

Relief for Cause under § 362(d)(1). Cause is not defined by the Code but must be determined on a case by case basis. *Universal Life Church, Inc., v. I.R.S. (In re Universal Life Church, Inc.)*, 127 B.R. 453, 455 (E.D. Cal. 1991), *aff'd*, 965 F.2d 777 (9th Cir. 1992). It has been interpreted to include "any reason whereby a creditor is receiving less than his bargain from a debtor and is without remedy because of the bankruptcy proceeding." *In re Food Barn Stores, Inc.*, 159 B.R. 264, 267 (Bankr. W.D. Mo. 1993). The burden of proof is on the movant. *Id.*

Relief to allow the movant to litigate in another court. Here, the Court must make two determinations: first, whether allowing the litigation to proceed will result in "no great prejudice" to the debtor and estate, and second, whether a balancing of the relative hardships that would result from the grant or denial of stay relief favors the debtor or creditor. *In re Johnson*, 115 B.R. 634,636 (Bankr. D. Minn. 1989)(cites therein). Factors to consider include:

> 1. Whether insurance coverage with a duty of defense is available to the debtor or estate or whether the litigation will financially burden the debtor or estate.
>
> 2. Whether judicial economy favors the continuation of the action in the court where it was commenced.
>
> 3. Whether the state-court litigation has progressed to trial-readiness, with the likelihood that investment of resources in trial preparation would be wasted if trial was deferred.
>
> 4. Whether the issues presented are governed solely by state law, or should be adjudicated by a specialized court with expertise in the subject matter.
>
> 5. Whether the litigation involves other parties over whom the Bankruptcy Court lacks jurisdiction and whether full relief may be accorded to all such nondebtor parties without the debtor's presence in the lawsuit.
>
> 6. Whether the creditor has a probability of success on the merits.
>
> 7. Whether the interests of the debtor and the estate would be better served by the resolution of threshold bankruptcy-law issues in the Bankruptcy Court before the other court and parties address the issue of the forum where the claim against the debtor is fixed and liquidated.

Id. *See also In re Parkinson*, 102 B.R. 141 (Bankr. C.D. Ill. 1988).

Relief when the debtor has no equity and the property is not necessary for reorganization under § 362(d)(2). The party seeking relief from the automatic stay is required to establish a *prima facie* case of cause for relief. *In re Planned Systems, Inc.*, 78 B.R. 852, 859-60 (Bankr. S.D. Ohio 1987); *see also First National Bank v. Turley*, 705 F.2d 1024, 1026 (8th Cir. 1983)(to obtain relief from stay, creditor must show its interest is sufficiently

clear and in need of protection). A *prima facie* case may be established by showing the debtor lacks equity in the property, the value is declining, the property is not adequately maintained, property taxes are not being paid, insurance coverage is not adequate, or other facts evidencing a lack of adequate protection. *In re Briggs Transportation Co.*, 780 F.2d 1339, 1349 (8th Cir. 1985); *In re Planned Systems, Inc.*, 78 B.R. at 860; *In re Brown*, 78 B.R. 499, 503 (Bankr. S.D. Ohio 1987). If the creditor establishes a *prima facie* case, the burden shifts to the debtor to prove adequate protection. 11 U.S.C. § 362(g); *In re Planned systems, Inc.*, 78 B.R. at 859-60.

III.

Under the facts presented, it is clear that Clem Egan and Richard Halstead should be granted relief from the automatic stay for cause under 11 U.S.C. § 362(d)(1). Title to the real property and trailer are not in Debtor's name. Thus, the land and trailer are not estate property protected by the stay. Debtor may not make it his property and deem the trailer his homestead merely by putting them on his bankruptcy schedules.

If Debtor's transfer of the land to his aunt in 1992 was fraudulent, the state court is the better place to address that matter: state law governs, an action has already been commenced and has progressed toward resolution; most of the parties are not within the Bankruptcy Court's core jurisdiction; and the bankruptcy estate and Debtor will be no better served if the litigation is

retained by this Court. The state court also can address whether any judgments attached to the property as a lien. Any homestead interest that Debtor may have can be protected by the state court. Finally, since this is a Chapter 13 case, the bankruptcy case will not be impeded by that litigation. Debtor can and should promptly proceed to the confirmation of a plan.

There was no evidence presented on whether equity exists in that property for the bankruptcy estate, assuming Debtor had an interest in it. There also was no evidence that the property is integral to Debtor's business. Therefore, the Court cannot rule on whether relief under § 362(d)(2) is also appropriate.

An order will be entered allowing Clem Egan and Richard Halstead relief from the automatic stay to pursue their state court actions against the subject real property.

Dated this 14 day of November, 1996.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: _____
Deputy Clerk
(SEAL)

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

NOV 14 1996

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

Case: 96-40507 Form id: 122 Ntc Date: 11/14/96 Off: 4 Page : 1
Total notices mailed: 8

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Trustee	Yarnall, Rick A. PO Box J, Sioux Falls, SD 57101
Aty	Gaumer, Craig Peyton PO Box 5073, Sioux Falls, SD 57117
Aty	Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321
Aty	Helsper, Richard J. PO Box 198, Brookings, SD 57006-0198
Aty	Langley, Timothy J. PO Box 966, Sioux Falls, SD 57101