

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

TELEPHONE (605) 224-0560
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November 12, 1999

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Subject: *In re Kenneth M. and Joan K. Gudahl,*
Chapter 13; Bankr. No. 99-40740

Dear Trustee and Counsel:

Two issues are before the Court arising from the SBA's Motion for Relief From the Automatic Stay and the confirmation of Debtors' proposed plan dated September 2, 1999: What date is used to determine a secured creditor's collateral for the purpose of applying 11 U.S.C. § 1322(b)(2), and whether Debtors' home is necessary for an effective reorganization as governed by 11 U.S.C. § 362(d)(2)(B). These are core proceedings under 28 U.S.C. § 157(b)(2). This letter decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P.7052. As set forth below, the Court concludes that SBA's collateral on the petition date is used in this case to apply § 1322(b)(2). The Court also concludes that Debtors' home is not necessary for them to reorganize.

SUMMARY OF MATERIAL FACTS. In 1994, Kenneth and Joan Gudahl obtained a business loan from a bank. The Small Business Administration ("SBA") guaranteed 87% of the loan. The loan was secured by the business assets and the Gudahls' home. Debtors' business ceased in early 1999. All the business assets securing the SBA-guaranteed loan were sold and the net proceeds were applied against the debt. SBA was still owed a deficiency. Only the

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Gudahls' home remained as security for the SBA's loan. The SBA was second in position on its home mortgage to First Federal Bank. The SBA commenced a foreclosure by advertisement proceeding. The Gudahls ("Debtors") filed a Chapter 13 petition on August 19, 1999.

On September 10, 1999, SBA sought relief from the automatic stay. In their response, Debtors conceded that they had no equity in the property on the petition date. A hearing was held October 26, 1999. The parties stipulated that Debtors' home is presently worth \$70,800. According to the proofs of claims that have been filed, on the petition date First Federal Bank's mortgage lien was for \$30,768.89 and the SBA's claim was for \$46,340.30. That left SBA unsecured by \$6,309.19 on the petition date.

Debtor Kenneth Gudahl testified that he and his wife have no dependents at home and that they do not use the property to produce income; both have away-from-home, salaried positions. He stated that it would be a personal hardship for them to move. He also opined that to rent a residence would likely cost them \$600 to \$800 per month. SBA Loan Specialist Neil McIntyre testified that their records indicate that the property has not been well maintained. Appraisals offered in evidence indicate the house has decreased in value by about \$9,000 in the past year.

Both parties filed briefs on whether Debtors had shown that their home is necessary for an effective reorganization. Debtors primarily argued that the Court must presume that a home is necessary for the success of a Chapter 13 plan, or alternatively, that § 362(d)(2)(B) does not apply in Chapter 13 cases because the term "reorganization" is used only in the Chapter 11 context.

DATE FOR DETERMINING CREDITOR'S COLLATERAL. Under § 1322(b)(2), a Chapter 13 debtor may not modify the rights of a secured creditor whose only collateral is the debtor's principal residence. The majority view appears to be that the date for determining what collateral secures a claim is the petition date. *In re Barrett*, 188 B.R. 285, 286 (Bankr. D. Or. 1995); *In re LeBrun*, 185 B.R. 665, 666 (Bankr. D. Mass. 1995); *In re Wetherbee*, 164 B.R. 212, 215-16 (Bankr. D.N.H. 1994); *In re Graham*, 144 B.R. 80, 84 (Bankr. N.D. Ind. 1992); *In re Amerson*, 143 B.R. 413, 416 (Bankr. D. Miss. 1992). *But see In re Smart*, 214 B.R. 63, 67-68 (Bankr. D. Conn. 1997) (date security interest was created was used where the question presented was not whether creditor's claim was secured by other collateral but whether the debtor was using the house as his residence when the security interest was created). The majority view is consistent with the Code and so is adopted here. Thus, under § 1322(b)(2), Debtors, through their plan, may not modify SBA's rights under the terms of the note and mortgage that existed on the petition date. *See generally Nobleman v. American Savings Bank*, 112 S.Ct. 2106 (1993).

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NECESSARY FOR AN EFFECTIVE REORGANIZATION. There is nothing in the Bankruptcy Code that indicates § 362(d)(2)(B) applies only in Chapter 11 cases, as Debtors argue. To the contrary, 11 U.S.C. § 103(a) expressly states that all of Chapter 3 applies in Chapter 13 cases. While the Court agrees with Debtors that many Chapter 13 cases are filed with the express purpose of helping a debtor retain his home, the Code does not except Chapter 13 debtors from the relief from stay provisions of § 362(d).

A debtor has the burden to show that property secured to a creditor in which the debtor has no equity is nonetheless necessary for an effective reorganization. 11 U.S.C. § 362(g)(2); *In re Holiday Associates Ltd. Partnership*, 139 B.R. 711, 717 (Bankr. S.D. Ia. 1992). "This requires a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; and that the reorganization is a prospect." *Id.* (citing *United Savings Assoc. v. Timbers of Inwood*, 484 U.S. 365, 375 (1988)); *Anderson v. Farm Credit Bank of St. Paul (In re Anderson)*, 913 F.2d 530, 532 (8th Cir. 1990).

Little evidence was presented on the prospect of Debtors' ability to get a plan confirmed and then make the payments. If anything, the record shows rental payments or mortgage payments on a different home for Debtors will be less than the combined monthly payments they will have to make to the Bank and SBA on their mortgages and for taxes. Further, Debtors did not show that suitable replacement housing at a reasonable cost is not available or that moving costs are prohibitive. Thus, it appears keeping the property may actually put the success of Debtors' plan in jeopardy.

There was no evidence that Debtors' ownership of their home affects their income producing ability. Both work outside the home. There are no dependents at home.

Finally, there is some evidence that the condition of the house has worsened in recent years. Necessary repair costs have not been quantified by Debtors and Debtors have not shown that they can afford the repairs and thus insure that the home will maintain its value. That fact may warrant relief under both § 362(d)(1) or (2) where there is no present equity in the property to protect SBA.

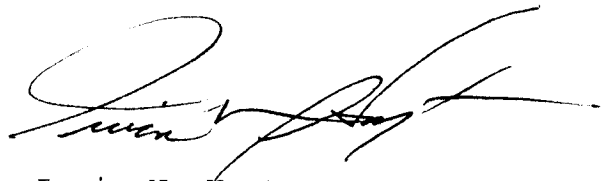
Based on these findings, the Court concludes that Debtors have not shown under § 362(d)(2)(B) that retention of their home is necessary for an effective reorganization. SBA will be granted

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relief from the automatic stay.¹ See *In re Eynetich*, 98 B.R. 966, 968 (Bankr. D. Ne. 1988).

An appropriate order will be entered on the SBA's motion. Confirmation of Debtors' plans dated September 2, 1999² and November 9, 1999 will be denied as well as Debtors' motion to shorten notice filed November 10, 1999 since Debtors' latest plan still bifurcates SBA's claim and modifies SBA's rights in contravention of § 1322(b)(2). Debtors will need to file and notice for hearing another modified plan that treats SBA in compliance with § 1322(b)(2).

Sincerely,



Irvin N. Hoyt
Bankruptcy Judge

INH:sh

CC: case file (docket original; serve copies on parties in interest)

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

NOV 12 1999

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

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

NOV 12 1999

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

¹ Granting SBA relief from the automatic stay does not mean that Debtors cannot still propose a plan that SBA may accept.

² Technically, Debtors' plan dated September 2, 1999 was supplanted by Debtors' plan dated November 9, 1999. See Local Bankr. R. 3071-1(c).

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Total notices mailed: 8

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