

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

JUNIOR SEBASTION HAMMRICH and) CASE NO. 87-10032
JOYCE MARIE HAMMRICH,)
) CHAPTER 12
)
Debtors.) MEMORANDUM DECISION
)

Debtors Junior Sebastian Hammrich and Joyce Marie Hammrich, filed for relief under Chapter 12 of the Bankruptcy Code on January 26, 1987. Federal Land Bank filed four separate Proofs of Claim totalling \$277,517.10. According to both the Debtors' Schedule A-2 and Chapter 12 Plan, the value of the Debtors' land mortgaged to Federal Land Bank is less than its proof of claim.

On July 8, 1987, this Court, the Honorable Peder K. Ecker presiding, entered its order granting Federal Land Bank's motion for adequate protection, or in the alternative, relief from stay. The order required the Debtors to adequately protect Federal Land Bank by insuring all buildings located on the mortgaged real estate with a company and in an amount acceptable to the Bank.

On August 19, 1987, Judge Ecker entered his order suspending Chapter 12 proceedings pursuant to 11 U.S.C. Section 305 "pending the outcome of the state court action wherein Clarence Hammrich is plaintiff and Junior Hammrich is defendant, in Circuit Court [sic], 5th Judicial Circuit, Edmunds County, South Dakota." The Circuit Court proceedings are apparently still in progress as the bankruptcy case remains suspended.

On October 23, 1987, Federal Land Bank filed the motion for adequate protection, or in the alternative relief from stay, which is the subject of this opinion. The matter was heard in Aberdeen, South Dakota, December 9, 1987. Federal Land Bank appeared by its attorney Robert Ronayne and the Debtors by their attorney William J. Pfeiffer. Counsel for Federal Land Bank requested adequate protection payments in the form of periodic payments equal to the reasonable rental value of the mortgaged property. The matter was taken under advisement and counsel were allowed to submit briefs. Only Mr. Ronayne exercised this right.

The two issues raised by the arguments and evidence put forth at the December 9, 1987, hearing are treated below.

ISSUE I

WHETHER A CREDITOR REQUESTING ADEQUATE PROTECTION
PAYMENTS IN THE FORM OF RENTAL VALUE IN A CHAPTER
12 CASE MUST WAIT UNTIL THE AHLERS FORECLOSURE
DELAY PERIOD HAS EXPIRED BEFORE THE DEBTOR IS
REQUIRED TO MAKE SUCH PAYMENTS?

In In Re Ahlers, 794 Fed.2d 388, 395 (8th Cir. 1987, rev'd.
on other grounds, 1988 WL 17016 (U.S. S.Ct. March 7, 1988), the
Eighth Circuit Court of Appeals held "Payments to protect the
creditor's right to reinvestment return on foreclosure proceeds
should not begin until, under state law, the creditor could have
taken possession of the collateral, sold it to a third party, and
reinvested the proceeds." Ahlers was a chapter 11 case, while the

present one is in chapter 12. It has been opined by Judge Ecker that lost opportunity costs are not available in ~chapter 12 cases. In Re Rennich, 70 B.R. 69 (Bankr. D.S.D. 1987). Furthermore, Ahlers, insofar as it would allow lost opportunity cost adequate protection payments, was all but expressly overruled by the Supreme Court in United Savings Association of Texas vs. Timbers of Inwood Forest Associates, Ltd., Slip Op. No. 86-1602 (handed down Jan. 20, 1988). Nevertheless, Debtor's counsel argues that the waiting period the Ahlers Court required prior to receiving lost opportunity cost payments be applied to Federal Land Bank's request for rental payments under 11 U.S.C. 1205.

This Court's position is that the foreclosure waiting period discussed in Ahlers, is not a concept appropriate in the context of rental based adequate protection payments. When a creditor requested lost opportunity costs it was logical that it wait the appropriate Ahlers period before that type of adequate protection payments began. The creditor seeking lost opportunity cost was not deprived of the opportunity to reinvest the proceeds of its collateral until the expiration of this period. This rationale does not apply where a request for rental payments is made. In Chapter 12, adequate protection is designed to compensate the creditor for

a devaluation of his collateral during the period intervening the petition filing and plan confirmation. In Re Billy E. Turner, 1988 WL 6412 (Bankr. W.D.Tenn. Jan. 29, 1988). Thus, it is an immediate decline in the value of the security that justifies the rental payments. The foreclosure/redemption waiting period would not be appropriate in this context.

Furthermore, in reviewing the Chapter 12 cases which discuss adequate protection payments cases there is no reference to a waiting period. See, e.g., Turner Norton, Bankruptcy Law Practice, Section 87.04 (1981) ("When is the farm rent payable? Code Section 1205(b) (3) does not say when the rent must be paid. The time of payment will depend upon what is customary in the community. It is possible that rent is paid in advance, in installments, or at the end of the season when crops are sold.") It would also be illogical to apply a waiting period exceeding one year to a bankruptcy chapter in which the petition/confirmation interim period is ordinarily no longer than one hundred, thirty-five days.

ISSUE II

WHETHER FEDERAL LAND BANK IS ENTITLED TO PAYMENTS
OF RENT ON ITS REAL ESTATE COLLATERAL AS ADEQUATE
PROTECTION UNDER SECTION 1205?

11 U.S.C. Section 1205 governs awards of adequate protection in Chapter 12 cases. Subsection (a) of that statute expressly excludes the application of Section 361, the adequate protection statute of otherwise general applicability. The portion of the statute relevant in this case provides:

. . .

"(b) In a case under this chapter, when adequate protection is required under Sections 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by -

. . .

(3) paying to such entity for the use of farmland at the reasonable rent customary in the community where the property is located, based upon the rental value, net income, and earning capacity of the property...

In constructing the adequate protection scheme under chapter 12, Congress included a concept fundamental to an award under Section 1205 which is fatal to Federal Land Bank's motion. "Section 1205 eliminates the 'indubitable equivalent' language of 11 U.S.C. 361(3) and makes it clear that what needs to be protected is the value of property, not the value of the creditors 'interest' in property." H.R. Conf. Rep. No. 99-958 99th Cong., 2d Sess. 49-50 (1986). See also In Re Turner supra; 3 Norton, Bankruptcy Law and Practice Sections 87.03 and 87.05 ("What is different about adequate protection in Code Section 1205 is that all that needs

to be adequately protected is the value of the property. If the property's value is constant, no adequate protection payment will be required.")

It is the burden of the creditor who requests adequate protection to prove that the value of its collateral has, or is likely to, depreciate in the post-petition/preconfirmation period. In Re Turner. In Turner the creditor submitted evidence concerning the rental value of the collateral, but did not address the increase or decrease in the collateral's market value. The Court observed:

The provision in Section 1205(b) (3) of a unique method of adequate protection for Chapter 12 cases in the form of reasonable rents does not automatically mandate that all creditors ... are entitled to adequate protection payments in this fashion. Rather, the secured creditor is still required to show a necessity for adequate protection, which would include, in this case at least, a showing that farm property securing [the] debt was likely to decrease in value between the time of filing of the Debtor's petition and action by the Court on confirmation. Had that showing been made ... Section 1205(b) (3) appears to provide a per se form of adequate protection. That is, the fair rental value is adequate protection without the necessity of the rental fully compensating for a decline in land values. In Re Kochen, 16 B.C.D. 558, 562 (Bkrctcy. S.D. Ohio 1987).

1988 WL 6412 at p. 6. The evidence presented by the creditor in this case established the rental value of the property, not a

decline in its market value. In fact, testimony at the hearing established that the value of the property was increasing. Federal Land Bank simply has not proven that the value of its farmland is depreciating as required by Section 1205.

The Turner Court went on to remark that although the post-petition/preconfirmation period in Chapter 12 cases is normally short, it was still possible for a creditor to show diminution in collateral value during this time frame. Therefore it allowed the creditor to refile its motion and provide proof of such a devaluation.

Consequently, the Court finds that Federal Land Bank has not proven a diminution in the value of its collateral during the relevant time frame as required by Section 1205(b) and the Code sections cited therein. The Court also finds that Federal Land Bank has not shown cause for lifting the automatic stay as required by Section 362(d) (1), nor should the stay be lifted under 362(d) (2).

The Court considers this a core proceeding under 28 U.S.C. Section 157. This memorandum decision shall constitute the Court's findings of fact and conclusions of law pursuant to Bankr. R.P. 7052 and 9014 and F.R.Civ.P. 52. Counsel for the Debtor is requested to provide an appropriate order.

Dated this, 18th day of March, 1988.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By: _____
Deputy

(SEAL)