

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA  
NORTHERN DIVISION

IN RE:	)	CASE NO. 90-10107-INH
	)	ADVERSARY NO. 91-1002-INH
	)	
MINN-KOTA FARM AGENCY, INC.	)	
	)	
Debtor.	)	
	)	
	)	
MINN-KOTA FARM AGENCY, INC.	)	CHAPTER 11
	)	
Plaintiff,	)	MEMORANDUM OF DECISION RE:
	)	COMPLAINT FOR TURNOVER
vs.	)	
	)	
HOME FEDERAL SAVINGS & LOAN	)	
ASSOCIATION,	)	
	)	
Defendant.	)	

The matter before the Court is the complaint for turnover filed by Debtor Minn-Kota Farm Agency, Inc., against creditor Home Federal Savings & Loan Association. This is a core proceeding under 28 U.S.C. § 157(b)(2). This ruling shall constitute Findings and Conclusions as required by F.R.Bankr.P. 7052.

I.

Debtor seeks the turnover of approximately \$76,000.00 in rents that Home Federal collected between June 14, 1989 and August 31, 1990 pursuant to an assignment of rents executed by the parties. Debtor claims these rents are property of the estate because they were not validly collected by Home Federal. It argues that under South Dakota law, Home Federal had to obtain possession of the property or have a receiver appointed before it could collect the rents. Home Federal raises several defenses, including res judicata, collateral estoppel, and waiver, as well as reliance on

the validity of the assignment of rents.

The parties filed stipulated facts on October 11, 1991, which are incorporated herein by reference. The parties also filed memorandums of law and the matter was taken under advisement on November 9, 1991.

In addition to the facts stipulated by the parties, the Court finds that the Assignment of Rents executed by the parties on April 20, 1983 states:

FOR VALUE RECEIVED, The undersigned mortgagor hereby assigns, sets over, attorns, and delivers to [Home Federal]...all right, title, interest and demands in and to the rents, issues, and profits of the [subject property].

...The term of this attornment or assignment shall be until certain notes and mortgage of even date herewith, executed by undersigned to [Home Federal] ... shall have been fully paid and satisfied, at which time this Assignment of Rents is fully satisfied, cancelled and released, and the releasing of the mortgage shall constitute a release thereof....

It is understood and agreed that this assignment of rents shall not become operative or effective unless default shall be made in the covenants, terms and conditions of the note and mortgage herein before described.

## II.

A mortgagor's interest in rent collected by the mortgagee is generally governed by state law although the mortgagor is in bankruptcy. Butner v. United States, 440 U.S. 48, 55 (1979).<sup>1</sup> Under South Dakota law a mortgagor may contract away its right to rents and profits. First Federal Savings & Loan Association v.

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<sup>1</sup> Federal law may govern an assignment of rents perfection question involving a federal agency. See United States v. Landmark Park & Assocs., 795 F.2d 683, 684-86 (8th Cir. 1986), and United States v. Buckley (In re Buckley), 73 B.R. 746, 748 (D.S.D. 1987).

Clark Investment Co., 322 N.W.2d 258, 261 (S.D. 1982). Although S.D.C.L. § 21-47-13 insures that a mortgagor retains possession of the property during the redemption period upon foreclosure, the mortgagor and mortgagee may agree to a separate assignment of rents. Id. Moreover, possession is not a condition precedent for an assignment of rents unless the assignment so provides. Id.

Subsequent to Clark Investment Co., the following sentence was added to S.D.C.L. § 21-47-17:

[A] foreclosure may not be considered to be satisfaction of an assignment of rents agreement under the mortgage.

In interpreting this section, the South Dakota Supreme Court stated, "[A]n assignment of rents and profits on non-homestead property is now valid and enforceable from the time of default until the end of the period of statutory redemption." Aetna Life Ins. Co. v. McElvain, 363 N.W.2d 186, 191 (S.D. 1985); see also Wisconsin Investment Board v. Hurst, 410 N.W.2d 560, 564 (S.D. 1987).

### III.

Home Federal validly exercised its assignment of rents agreement with Debtor and took lawful title to and possession of the rents subsequent to Debtor's default. Consequently, Debtor is not entitled to a turnover of those funds because they are not property of the estate.

The assignment of rents was conditioned only on Debtor's default under the mortgage and note. Debtor has conceded default

but relies on earlier decisions of this Court<sup>2</sup> that held actual possession of the property or an appointment of a receiver are necessary to perfect an assignment of rents. Ziegler v. First National Bank (In re Ziegler), 65 B.R. 285 (Bankr. D.S.D. 1986), and United States v. Buckley (In re Buckley), 65 B.R. 283 (Bankr. D.S.D. 1986).

To the extent that the Court in Ziegler and Buckley held that possession or an appointment of a receiver is necessary to perfect **all** assignment of rents, including those contained in an agreement separate from the mortgage, this Court respectfully disagrees. In Ziegler and Buckley, the Court relied upon Rudolph v. Herman, 56 N.W. 901 (1883). The Rudolph case, however, is not applicable here because the facts are not analogous. In Rudolph the issue was whether the purchaser at a mortgage foreclosure sale or the mortgagor was entitled to rents during the redemption period. Here, the question is whether upon Debtor's pre-petition default Home Federal was entitled to the rents pursuant to a written assignment of rents. Ziegler and Buckley may be similarly distinguished. Ziegler, 65 B.R. at 285 (assignment of rents clause was contained in mortgage); United States v. Buckley (In re Buckley), 73 B.R. 746, 748 (D.S.D. 1987) (debtor's mortgage did not contain an assignment of rents clause; rather, mortgage stated rents of the land are part of the mortgaged property).

The prerequisite of possession or appointment of a receiver

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<sup>2</sup> The Hon. Peder K. Ecker, presiding.

for perfection of any assignment of rents has not been continued in more recent decisions of the South Dakota Supreme Court. See Clark Investment Co., 322 N.W.2d at 261; McElvain, 363 N.W.2d at 191; Wisconsin Investment Board v. Hurst, 410 N.W.2d at 564. Instead, the express terms of the assignment control. Clark Investment Co., 322 N.W.2d at 260-61 (assignment of rents agreement separate from mortgage allowed possession and right to receive rents upon default until mortgage satisfied); McElvain, 363 N.W.2d at 191 (assignment of rents clause in mortgage conditioned on default only, not possession); Hurst, 410 N.W.2d at 564 (assignment of rents clause in mortgage allowed possession upon default; mortgage on rent "supplemented" by an assignment of rents); see also Aetna Life Ins. Co. v. Satterlee, 475 N.W.2d 569, 572 (S.D. 1991).

Home Federal's and Debtor's assignment of rents agreement was conditioned only upon Debtor's default. Thus, Home Federal was entitled to the rents upon Debtor's pre-petition default. Moreover, Home Federal took steps to enforce its rights thereunder upon Debtor's default by notifying Debtor, notifying tenants, collecting rents from tenants, paying expenses, and selecting management personnel for the building. Compare Buckley, 65 B.R. at 284.

Debtor has not identified any South Dakota statute or Bankruptcy Code provision that otherwise conditions Home Federal's right to the rents. Consequently, judgment must be entered for Defendant Home Federal.

Home Federal's remaining defenses are without merit. The

Court has not entered any prior ruling that addressed Home Federal's right to the rents from the property. Debtor's action for turnover was timely and not without merit based on the earlier Ziegler and Buckley decisions that have now been distinguished.

Dated this \_\_\_\_ day of March, 1992.

BY THE COURT:

\_\_\_\_\_  
Irvin N. Hoyt  
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By \_\_\_\_\_  
Deputy Clerk

(SEAL)

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Debtor.	)	
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MINN-KOTA FARM AGENCY, INC.	)	CHAPTER 11
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Plaintiff,	)	ORDER OF JUDGMENT
	)	FOR DEFENDANT
vs.	)	
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HOME FEDERAL SAVINGS & LOAN	)	
ASSOCIATION,	)	
	)	
Defendant.	)	

In recognition of and compliance with the Memorandum of Decision Re: Complaint for Turnover entered this day,

IT IS HEREBY ORDERED that judgment is entered for Defendant Home Federal Savings & Loan Association and that Plaintiff-Debtor Minn-Kota Farm Agency, Inc., is **not** entitled to a turnover of rents collected by Defendant pursuant to an assignment of rents.

So ordered this 27th day of March, 1992.

BY THE COURT:

\_\_\_\_\_  
Irvin N. Hoyt  
Chief Bankruptcy Judge

ATTEST:  
PATRICIA MERRITT, CLERK

By \_\_\_\_\_  
Deputy Clerk  
(SEAL)