

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

IN RE:) CASE NO. 91-50242-INH
)
MITCHEL E. MORRIS, a/k/a) CHAPTER 11
MITCH MORRIS,)
) MEMORANDUM OF DECISION RE:
) MOTION FOR RELIEF FROM
Debtor.) AUTOMATIC STAY AND OBJECTION
) TO CLAIM OF HOMESTEAD EXEMPTION

The matters before the Court are the Motion for Relief From Automatic Stay and Objection to Claim of Homestead Exemption filed by creditor Western United Life Assurance Company and the responses thereto filed by Debtor. These are core proceedings pursuant to 28 U.S.C. § 157(b)(2). This ruling shall constitute Findings and Conclusions as required by F.R.Bankr.P. 7052.

I.

Mitchel E. Morris (Debtor) filed a Chapter 11 petition on July 22, 1991. On his Schedule B-4 filed August 22, 1992 he claimed as exempt, among other things, 279.3 acres of land in Pennington County, South Dakota, the property that is the subject of the pending motions. On Schedule A-2, he claimed no one had a secured interest in this real estate.

On August 30, 1991, Western United Life Assurance Company (Western) filed a Motion for Relief From Automatic Stay. Therein, Western argued that M & M Contracting, Inc., had assigned its vendor's interest in a real estate contract for deed with Debtor to Western, that Debtor had defaulted on the contract by not making payments and paying taxes, that Western had obtained a Judgment of Foreclosure and Sale for \$196,553.56 plus costs of \$4,802.52 on

March 26, 1991 in state circuit court on its complaint against Debtor seeking specific performance or strict foreclosure, and that the circuit court determined the value of the land was \$41,000.00. Western thus claimed it was entitled to relief from the automatic stay from this Court because Debtor had no equity in the property and Western's interest in the property was not adequately protected.

Debtor filed an objection to Western's motion for relief from the automatic stay on September 26, 1991. He argued that by obtaining a judgment for specific performance in state court, Western waived its vendor's lien rights in the real property so that whatever interest Western had in the property, it was adequately protected. Debtor also argued the property was necessary for an effective reorganization.

Neither party presented any testimony at the hearing held October 1, 1991. The only exhibits presented were the Summary Judgement entered March 4, 1991 in state circuit court against Debtor and the Judgment of Foreclosure and Sale against Debtor entered March 26, 1991 by the circuit court. Counsel agreed that the property has on it Debtor's trailer home and a shop used by Debtor's family's business on it and that the remainder is pasture. Western argued Debtor has no equity in the property and that its interest is not adequately protected because taxes of \$13,000.00 to \$14,000.00 have accrued. Western also argued its loss of use of the property should be compensated through adequate protection payments. Debtor agreed that he has no equity in the property and

he conceded the secured value of the land is \$41,000.00. However, he argued Western waived its lien on the property by seeking specific performance on the contract for deed in state court. Further, Debtor argued that even if Western has a valid lien, Western's interest is adequately protected because the property is not depreciating and he offered to pay accruing taxes. Finally, Debtor stated the property generates some pasture rental income that is necessary to fund Debtor's reorganization.

Debtor asked the Court to address the lien waiver issue first. The Court ordered simultaneous briefs on that issue to be filed within ten days and took the matter under advisement.

On October 8, 1991, Western filed an Objection to Claim of Homestead Exemption. It argued that under South Dakota law Debtor could not maintain a homestead exemption claim against Western as the vendor on the contract for deed for the property. Debtor did not file a formal response to that Objection.

Western submitted its authority on the waiver of lien issue on October 15, 1991. Debtor filed his brief on that issue on October 18, 1991 and stated therein: "The Debtor concedes that the procedure followed by Western in the state court action allowed it to retain its lien on the subject property." Debtor filed a memorandum of law on the homestead exemption question on November 6, 1991 and raised the lien waiver issue again. Western filed a reply memorandum to Debtor's memorandums on November 8, 1991.

A hearing on the objection to the homestead exemption claim

was held November 12, 1991. The parties conceded that the same issues were raised by the homestead objection as were raised under Western's motion for relief from stay. Again, neither party presented any testimony in support of their respective positions. Pictures of Debtor's trailer home located on the property were presented. The Court took the objection under advisement to be decided jointly with Western's motion for relief from stay.

The Court will hold Debtor to his concession of the lien waiver issue as stated in his October 18, 1991 brief. Accordingly, the remaining issues involve Western's motion for relief from stay: whether Western's interest is adequately protected or whether the property is necessary for an effective reorganization. As Debtor recognized in his November 6, 1991 brief, the homestead issue is subordinate.

II.

The Court may grant relief under 11 U.S.C. § 362(d)(1) for "cause," including lack of adequate protection, even if the property is found to be necessary for reorganization under 11 U.S.C. § 362(d)(2). Production Credit Association v. Wieseler (In re Wieseler), 934 F.2d 965, 968 (8th Cir. 1991). "Adequate protection," as defined by 11 U.S.C. § 361, may include cash payments to the movant to the extent that the property is decreasing in value. 11 U.S.C. § 361(1). An interest entitled to adequate protection under § 362(d) does not include a secured party's right to immediate use, possession, or foreclosure. United Savings Association v. Timbers of Inwood Forest Associates, 108

S.Ct. 626, 630-31 (1988).

The burden of proving whether a secured claim is adequately protected falls on the debtor once the movant has shown he is undersecured. 11 U.S.C. §§ 362(g)(1) and 362(g)(2); Timbers, 108 S.Ct. at 632; Anderson v. Farm Credit Bank (In re Anderson), 913 F.2d 530, 532 (8th Cir. 1990). The debtor also has the burden of proving the property is necessary for an effective reorganization. 11 U.S.C. § 362(g)(2).

What this requires is not merely a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization that is in prospect.

Timbers, 108 S.Ct. at 632 (emphasis in original). "[T]here must be `a reasonable possibility of a successful reorganization within a reasonable time.'" Id. (quoting the underlying circuit opinion at 808 F.2d at 370-71 and nn. 12-13 and cases cited therein); Anderson, 913 F.2d at 532. This burden of showing a "reasonable possibility of a successful reorganization within a reasonable time" demands less detail while the debtor's exclusivity period under 11 U.S.C. § 1121(b) and 1121(c)(2) is in effect. Anderson, 913 F.2d at 533. This is to insure that the breathing room Congress intended the automatic stay to provide is given to a reorganizing debtor. Id.

III.

Western is entitled to relief from the automatic stay because it has established cause under § 362(d)(1). Debtor has conceded that Western has a valid lien on property that is not adequately

protected because Debtor has not paid post-petition taxes on it.¹ Accordingly, Western is entitled to relief from the automatic stay unless Debtor can "cure" this decrease in the value of Western's secured interest by bringing post-petition taxes current. Debtor offered to do so at the hearings but he failed to present any evidence that he had the means to do so or show when he would pay them.² Accordingly, Debtor will be given ten days from the entry of the order accompanying this decision to pay all post-petition taxes. If the taxes are not paid timely, Western shall file an affidavit stating Debtor's non compliance and the Court will enter an order granting Western relief from the automatic stay.

Western is **not** entitled to relief from the stay under § 362(d)(2) because Debtor made a minimal showing that the property is necessary for an effective reorganization. Debtor conceded he has no equity in the property but his counsel did state the property generates some income. Consequently, the Court will conclude, at this stage of the case, that Debtor has shown the property is necessary for his reorganization. That conclusion was not reached without great difficulty, however, because Debtor

¹ Western failed to establish cause when it argued Debtor should protect it from "lost opportunity costs." The Supreme Court has left no doubt that such costs are not entitled to protection. United Savings Association v. Timbers of Inwood Forest Associates, 108 S.Ct. 626, 630-31 (1988).

² Both parties failed to present any evidence to the Court in support of their respective positions. But for Debtor's acquiescence to several of Western's counsel's statements that taxes were due, the Court would have had no evidence on which to render any decision.

offered only argument -- no evidence -- of the amount of income from the property and he did not show how this income was to be used in Debtor's reorganization. Nevertheless, Debtor's burden of showing he had a "reasonable possibility of a successful reorganization within a reasonable time" was not great because the case was then in its early stages. Accordingly, if the taxes are timely paid, Western's motion for adequate protection will be denied without prejudice. Western may again seek relief for cause or if Debtor's efforts to reorganize indicate the property is not necessary for Debtor's reorganization.

The Court declines to rule on Western's objection to Debtor's claimed homestead exemption. If the issue becomes relevant to Debtor's reorganization, the Court will issue a ruling. If relief from the automatic stay is granted, the parties can litigate the issue in state court when Western proceeds with a foreclosure sale of the real property.

Dated this ____ day of March, 1992.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk
(SEAL)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

IN RE:) CASE NO. 91-50242-INH
)
MITCHEL E. MORRIS, a/k/a) CHAPTER 11
MITCH MORRIS,)
) ORDER GRANTING CONDITIONAL
) RELIEF FROM THE AUTOMATIC
Debtor.) STAY AND HOLDING OBJECTION
) TO CLAIM OF HOMESTEAD
) EXEMPTION IN ABEYANCE

In recognition of and compliance with the Memorandum of Decision Re: Motion for Relief From Automatic Stay and Objection to Claim of Homestead Exemption entered this day,

IT IS HEREBY ORDERED that Debtor Mitchel E. Morris shall pay all post-petition real estate taxes on the subject property on or before ten days after the entry of this Order; and

IT IS FURTHER ORDERED that should Debtor fail to timely pay all post-petition real estate taxes on the subject property as required by this Order, movant Western United Life Assurance Company (Western) shall file an affidavit that sets forth Debtor's failure to comply with this Order, upon receipt of which the Court will enter an order granting Western relief from the automatic stay; and

IT IS FURTHER ORDERED that should Debtor timely pay all post-petition real estate taxes on the subject property as required by this Order, Debtor's counsel shall file an affidavit stating Debtor has complied with this Order, upon receipt of which the Court will enter an order denying without prejudice Western's motion for relief from the automatic stay; and

IT IS FURTHER ORDERED that Western's Objection to Claimed Homestead Exemption shall be held in abeyance to be reheard upon ten days notice by this Court sua sponte or upon a motion for hearing filed by any party in interest.

So ordered this 24th day of March, 1992.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)