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

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May 15, 1989

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Re: Cal and Jean Nowell
Chapter 12 185-00075

Dear Counsel:

The Court has considered the oral argument presented at the February 27, 1989 hearing, the briefs of the parties, and the record in this matter and renders the following decision.

The following facts appear of record. In September, 1977 the debtors and representatives of Lindsay Credit Corporation executed a document purporting to be a lease of irrigation equipment (hereafter "lease") Concurrently, with signing the lease, Nowells forwarded Lindsay a $3,300.00 "security deposit."

The debtors filed for relief under Chapter 11 on April 18, 1985. Shortly thereafter Lindsay moved to compel the debtors' acceptance or rejection of the lease. In a stipulation dated July 18, 1985 debtors agreed to assume the lease, and that in the event of a post—assumption default Lindsay would be entitled to file an administrative expense claim for unpaid post-petition rentals, and to seek relief from the automatic stay to repossess the equipment. Judge Ecker subsequently entered an order approving the stipulation.

After the debtors failed to make the $4,279.10 annual lease payment due September 1, 1986 an order granting relief from stay was entered April 27, 1987 and Lindsay repossessed the equipment. An order approving a $4,805.10 administrative expense claim was entered March 9, 1988. According to the order, the claim consisted of $4,279.10 representing the unpaid 1986 lease payment, plus

$526.00 in "late rental charges to date."

After the case was converted, the Court entered an order November 25, 1988 confirming the debtors' amended Chapter 12 plan.

The amended plan provided that all administrative expenses would be paid on or prior to the date of confirmation. See §1222(a) (2). Earlier in November the debtors' credited the $3,300.00 security deposit against the administrative claim and paid the remaining $1,505.10 to Lindsay by check, which debtors intended as payment in full of the claim.

Subsequently Lindsay filed a motion to dismiss claiming the "$4,279.10" (sic) claim had not been fully paid, and requesting sanctions. It is the creditor's position that the debtors cannot apply the security deposit against the administrative claim because Lindsay previously setoff the deposit against repossession costs and other damages caused by the debtors' post-petition breach.

Analysis

At the February hearing I expressed my concern that Lindsay's setoff likely violated the automatic stay. After reviewing the matter I have confirmed this earlier inclination.

The automatic stay generally prohibits collection efforts against a debtor or property of the estate, and specifically applies to "the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor." Section 362(a) (7) See also U.S. Through Small Business Administration v. Rinehart, 88 B.R. 1014 (D.S.D. 1988).[1] Lindsay argues the September 1, 1986 order granting relief from stay also vacated the automatic stay as it applied to the security deposit. However, Lindsay's motion for relief requested the automatic stay be modified only to the extent allowing the creditor to "recover possession of its equipment." More importantly, the creditor's proposed order signed by Judge Ecker merely granted Lindsay "relief from the automatic stay to take any and all steps necessary to repossess" the irrigation system. The order did not allow Lindsay to pursue all remedies under the lease as was orally argued before this Judge. The leased equipment and the deposit fund are quite distinct assets. Relief from stay was granted as to the former but not the latter.

The Bank's offset of the pre-petition deposit against the damages allegedly caused by the post-petition contract breach

violated the automatic stay.[2] See Rinehart, 88 B.R. at 1018. The

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[1] For cases specifically dealing with modification of the stay to allow post—petition offsets of security deposits, see In re Inslaw, Inc., 81 B.R. 169 (Bkrtcy. D. Cob. 1988) (pre-petition rental arrearages); In re Coleman, 52 B.R. 1 (Bkrtcy S.D. Ohio 1989) (prepetition utility bill).

[2] Although the argument has not been raised, the debtors' credit of the security deposit against the administrative expense claim

general rule is that acts violating the stay are "void and without effect." 2 Collier on Bankruptcy para. 362.11 (15th Ed. 1989). Therefore Lindsay's offset of the security deposit against the alleged damages was ineffective to extinguish the debtors' rights in the security deposit. Despite the attempted offset, the fund retained its character of a debt Lindsay owed the debtors.

It follows from the above that the debtors are allowed to credit the deposit against Lindsay's administrative claim. The debtors have a duty to pay administrative expense claims in full. Section 1222(a)(2). Therefore allowing the deposit to be credited against the administrative claim does not prefer Lindsay as would an offset allowed against a general unsecured claim. See Rinehart, supra, at 1018.

Because the administrative expense claim has been paid in full, the motion to dismiss for failure to pay the claim is obviously untenable. Lindsay's request for a sanction including attorney's fees is on the same grounds denied. The debtors have not requested a sanction against Lindsay for violating the automatic stay, nor have they alleged the violation of the stay was willful. See Section 362(h). The Court therefore will not consider imposing any damage award or sanctions against the creditor.

This matter constitutes a core proceeding under 28 U.S.C. Section 157(b)(2). This opinion shall constitute the Court's findings of fact and conclusions of law. The Court shall enter an appropriate order.

Very truly yours,

Irvin N. Hoyt
Chief Bankruptcy Judge

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might more accurately be termed a recoupment. See In re NWFX, Inc., 864 F.2d 593, 596-97 (8th Cir. 1989). Characterizing the transaction as a recoupment as opposed to a setoff would not alter the result of this opinion, however. Post—petition recoupment is also subject to the automatic stay. In re Reafitz, 85 B.R. at 280; In re Klingberg, 68 B.R. at 178; In re Ohning, 57 B.R. 714, 716717 (Bankr. N.D. Ind. 1986); In re Newport Offshore Ltd., 88 B.R. 566, 569 (Bkrtcy. D.R.I. 1988).

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

IN RE:	)	CASE NO. 185—00075
	)	
CAL EUGENE NOWELL and	)	CHAPTER 12
JEAN OLIVE NOWELL,	)	ORDER
	)	
Debtors.	)	

Pursuant to the letter opinion filed in this matter and executed this same date

IT IS HEREBY ORDERED that the administrative expense claim in the amount of $4,805.10 awarded to the Lindsay Credit Corporation by an Order of this Court entered September 1, 1986 has been satisfied in full by the debtors' payment to Lindsay Credit Corporation of $1,505.10 and by crediting a $3,300.00 security deposit debtors had earlier provided to Lindsay Credit Corporation.

Dated this 15th day of April, 1989.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By: _____
Deputy Clerk

(SEAL)

_____
Deputy
Clerk

(SEAL)