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
FAX (605) 224-9020

May 16, 1988

Thomas Tobin, Esq.
Post Office Box 1456
Aberdeen, South Dakota 57401

Thomas Maher, Esq.
201 North Euclid
Pierre, South Dakota 57501

Re: Dale Arthur Resel
Chapter 11 386-00077

Gentlemen:

This matter was heard January 7, 1988 in Pierre, South Dakota. Tom Maher represents John Deere. Tom Tobin represents the Debtor. The hearing concerned John Deere's motion to enforce a stipulation, or in the alternative, for the award of administrative expense status.

In June of 1981 Beadle County Equipment sold the Debtor a John Deere Model 5720 Forage Harvestor, and a Model 484 Stalker Head. The debtor used the equipment to custom farm. Mr. Resel defaulted under the terms of the installment contract- In 1984 Mr. Resel filed a chapter 11 bankruptcy which was dismissed June 16, 1986. After the dismissal Beadle county Equipment repossessed the machinery. No evidence was presented demonstrating whether John Deere or its distributor regained title to the equipment by foreclosing. Mr. Resel negotiated the return of the equipment under the terms of a September 5, 1986 contract (Exhibit 1) entitled "Use Agreement." The agreement leases the property to the Debtor and also states a debt of $43,274.01 under the 1981 contract was still due. The debtor paid approximately $2500 under the "Use Agreement" prior to requiring the equipment. Shortly after regaining possession of the equipment, the Debtor spoke with Mr. Mies, the owner of Beadle County Equipment, on the telephone saying he was "getting even," would not make future payments required under the "Use Agreement," and would keep the equipment. True to his word, the Debtor filed bankruptcy three days after signing the contract. He continued to use the equipment after tiling.

On September 28, 1986 John Deere moved for relief from stay through Attorney Roger Damgaard, who represented the company at that time. An order entered pursuant to stipulation required the Debtor to make a $4,000 adequate protection payment by the last day *of* July 1987 to prevent John Deere from obtaining an "automatic" relief from stay. An order signed September 2, 1987 allowed the relief and the creditor repossessed the equipment. An order entered September 8, 1987 vacated the order granting relief.

Judge Ecker's order vacating granted the Debtors possession of the equipment, conditioned upon an immediate $4,000 adequate protection payment. The parties subsequently agreed to the terms of exhibit 3. The October payment required by the exhibit was not made. In settlement of this dispute Mr. Tobin offered that John Deere could repossess the equipment, conditioned on their forfeiting any remaining adequate protection payments or deficiency claim.

John Deere countered with the present motion. Attached to the motion is a copy of a four page contract with a payment schedule identical to exhibit 3, but containing additional terms. It is this document, signed only by Attorney Maher, which the Court is asked to enforce. Attorney Tobin admits he concurred in the terms of the September 14 letter, (Exhibit 3) but alleged that the Debtor did not sign the original off the four page stipulation because it contained ten~s extraneous to the September 14 agreement. Finally, he argues that when the October adequate protection payment was not made John Deere could have resorted to the remedy provided in the September 14th agreement – relief from the automatic stay.

Attorney Maher understandably made much of the tact that Mr. Resel assaulted Mr. Mies the day of the January 7, 1988 hearing. Prior to the heating the Debtor agreed to allow Mr. Plies to inspect the equipment for its condition and hours of use. When Mr. Mies arrived at the Debtor's place of business the Debtor would not allow him access to the machine, and ordered him off the property. In leaving Mr. Mies removed a "no trespass" sign the Debtor had posted for his visitor's benefit. In retrieving the sign the Debtor without justification assaulted Mr. Mies.

Attorney Maher has not provided this Court with any authority in support of his motions. He premises his request on the Court's "equitable powers." A more detailed analysis supported with authority would have been helpful. The Court on its own initiative has considered various theories under which John Deere's notions might be granted. On the present record each analysis proved deficient in some regard. The Court therefore denies both motions for the following reasons.

The Court cannot specifically enforce the terms of the memorandum appended to the motion for various reasons. First, Attorney Maher did not persuade the Court that the Debtor or his attorney agreed to all terms therein. It is true Attorney Tobin admitted reaching an agreement on September 14, 1937, as confirmed by exhibit 3. However, the Court is also unable to enforce the terms of exhibit 3. The agreement reached between the parties was at no time noticed f or approval as required by Rule 9019. "Absent

compliance with (the Rule's) requirements of notice, hearing, and court approval, a purported settlement or compromise 15 unenforceable." In Re Bramham, 38 B.R. 459, 465 (Bkrtcy. U. Hey. 1984) (citing In Re Lloyd, Carr and Co., 617 F.2d 882 (1st Cir. 1980)); Tn Re Bell and Beckwith, 50 BAR. 422 (Bkrtcy. 14.0. Ohio 1985) (citing In Re Flight Transp. Corp. Securities Litigation, 730 F.2d 1128 (8th Cir. 1984)). Even if the present motion were construed as one for Court approval in addition to enforcement, the motion would be inadequately noticed. Attorney Maher's certificate of mailing of notice of the present motion reveals that only the United States Trustee, the Assistant United States Attorney, and the Debtor's attorney were served. Rule 9019 requires notice to all creditors.

The motion for an administrative expense claim. is similarly plagued. There is no specific rule on noticing motions for administrative expense claim status. See In Re Dakota Industries, Inc. 31 B.R. 23 .(Bkrtcy. D.S.D. 1983); 1 Horton, Bankruptcy Law and Practice Section 12.04 (1981). Instead, "notice as is appropriate in the particular circumstances" is required. Section 102(1) (A) ; In re Dakota Industries. See also Rule 9014. Because "every priority claim diminishes the payments to unsecured creditors," Dakota Industries at 26, all creditors holding an unsecured claim are entitled to notice. In fact, granting administrative expense status potentially affects all creditors. See Norton, supra. Accordingly, the Court holds that -all parties in interest should be given notice of an administrative expense request in this case. See Dakota Industries.

The Court strongly stresses that nothing in this opinion is intended to condone Mr. Resel's assault of Mr. Mies, or the Debtor's business practices. This opinion does not foreclose John Deere from seeking any available relief by future motion. However, such a motion must be more intelligibly framed, as opposed to the present motions which simply dump John Deere's predicament in the Court's lap with the vague request that the Court grant the requested relief as equitable. Legal analysis of the availability of the relief under the code, local law or equity is required. As the United States Supreme Court recently stated "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." In re Ahlers 1988 WL 17016, at 12 (1988).

If John Deere wishes to have it's September 14 agreement approved and specifically enforced, the Court will need to know more precisely what it is asked to approve and enforce. The Court should be informed what payments are intended as adequate protection and which payments satisfy John Deere's secured claim. John Deere should explain whether specific performance is available under state law. The Creditor should also explain whether it has a right to specific performance of the payment terms in light of the agreement that John Deere was entitled to relief from stay in the event the Debtor defaulted.

Similarly, it an administrative expense is requested in the future, a legal analysis would be prudent. At least one Court has held "administrative expense claims are created by statute and not

by the Courts or on the basis of equitable grounds arising out of the conduct of the parties.' In Re Lockwood Enterprises, Inc. 54 B.R. 829 (Bkrtcy. S.D.N.Y. 1985). But see Dakota Industries Sections 503(b) (1) (A) and 102(3); 3 Collier on Bankruptcy Para. 503.04 (1987)(list of expense claims provided for by Section 503 are not exhaustive). Also, any future motion for relief should explain the effect of the following transactions on the parties rights: the repossession of the collateral after the first bankruptcy, the "Use Agreement," and the post petition stipulation, if it is to be approved and enforced.

This matter constitutes a core proceeding under 28 USC 157. Exhibit 1 received on the condition of relevancy is admitted as relevant. Counsel for the Debtor shall prepare an appropriate Order, and Findings of Fact and Conclusions of Law incorporating this opinion.

Very truly yours,

Irvin N. Hoyt
Bankruptcy Judge

INH/sh

CC: Bankruptcy Clerk