

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

February 22, 1994

Patrick T. Dougherty, Esq.
Counsel for First National Funding
P.P. Box 1004
Sioux Falls, South Dakota 57101

Brian D. Hagg, Esq.
Counsel for First National Funding
P.O. Box 8008
Rapid City, South Dakota 57709

James P. Hurley, Esq.
Counsel for Debtor
P.O. Box 2670
Rapid City, South Dakota 57709

Thomas A. Lloyd,
Assistant U.S. Attorney
Counsel for the Small Business Administration
224 Federal Building
Pierre, South Dakota 57501

Dennis C. Whetzal, Esq.
Chapter 7 Trustee
P.O. Box 8285
Rapid City, South Dakota 57709

Subject: ***In re Steen's Feeds, Inc.,***
Chapter 11; Bankr. No. 91-50339

Dear Counsel and Trustee:

The matter before the Court is the Motion for Relief From Automatic Stay and Motion to Compel Debtor to Abandon Property filed by First National Funding (FNF) on November 1, 1993 and the responses thereto filed by the Small Business Administration (SBA), the Chapter 7 Trustee, and Debtor. A hearing was held December 7, 1993. Appearances included Patrick T. Dougherty and Brian D. Hagg for FNF, Chapter 7 Trustee Dennis C. Whetzal, Assistant U.S. Attorney Thomas A. Lloyd for the Small Business Administration, and James P. Hurley for Debtor. These are core proceedings under 28 U.S.C. § 157(b)(2). This letter memorandum of decision and accompanying Order shall constitute findings and conclusions under F.R.Bankr.P. 7052.

Re: Steen's Feeds, Inc.
February 22, 1994
Page 2

With the consent of interested parties, this Court entered orders on January 18, 1994 that compelled the Chapter 7 Trustee to abandon certain real property to FNF and that granted FNF relief from the automatic stay as to that real property. The remaining question is whether FNF is entitled to an order that compels the Trustee to abandon \$50,000.00 held in a trust account and an order that grants FNF relief from the automatic stay as to those funds. FNF relies on a Stipulation and Settlement agreement entered into between First Federal Savings Bank of South Dakota [FNF's assignor], Debtor, and Michael R. Steen in state court in August 1991. The objectors essentially argue that the money is property of the bankruptcy estate and they dispute the priority of FNF's interest in the money. Trustee Whetzel further argues that the August 1991 Stipulation may be a preferential transaction that the estate may avoid under 11 U.S.C. § 547. The SBA also contends that Debtor fraudulently obtained the \$50,000.00 through an SBA loan and that the Court should impose a constructive trust on the funds for SBA's benefit.

Upon consideration of the evidence and arguments received at the December 7, 1993 hearing, this Court concludes that FNF's interest and priority in the \$50,000.00 should be determined before the funds are abandoned or relief from the stay is granted as to the funds.

Abandonment. Abandonment under § 554(b) is within the discretion of the Court. The present record sufficiently raises questions about the priority and extent of FNF's interest in the money, especially where that interest may be subject to recovery as a preference. While Debtor and FNF may have considered the August 1991 Stipulation a completed transaction as stated in Debtor's last plan filed July 6, 1993, others dispute the finality of that agreement and FNF's rights to the \$50,000.00. There is even some evidence that Debtor's and FNF's counsel understood that the Stipulation would be subject to the state court's approval. See Exhibits 2, 3, and 4 and the objections to FNF's motions. Therefore, the prudent course is to first litigate whether the Stipulation constituted a preference and whether SBA is entitled to a constructive trust on the \$50,000.00.

FNF's argument that § 554(c) governs is inexact. Section 554(c) provides that scheduled property that is not administered during a case is deemed abandoned when the case is closed. We are far from closing this case and so § 554(c) does not cloud whatever interest FNF has in the money, whether the \$50,000.00 has not been scheduled or not.

Modification of the Automatic Stay. Relief from the automatic

Re: Steen's Feeds, Inc.
February 22, 1994
Page 3

stay under § 362(d) is appropriate where cause is shown or if the debtor does not have any equity. Relief may be granted if a party's interest in property is not protected; relief is not granted to prevent any delay in access to that interest. *In re Park at Dash Point L.P.*, 121 B.R. 850, 858 (Bankr. W.D. Wash. 1990); *In re Marion Street Partnership*, 108 B.R. 218, 224 (Bankr. D. Minn. 1989). Further,

[t]o obtain relief from an automatic stay under 11 U.S.C. § 362(d), a creditor must show the court that its interest in the debtor's property is *sufficiently clear and in need of protection* to justify exempting the property from the normal course of bankruptcy proceedings.

First National Bank of Denver v. Turley, 705 F.2d 1024, 1026 (8th Cir. 1983). While the extent of the estate's, SBA's, and FNF's interests in the money are sorted out, there is no evidence that the value of FNF's interest will not be protected adequately.

To date, Trustee Whetzal has not commenced a preference or turnover action and SBA has not sought a constructive trust. I urge these parties to file those actions immediately and I urge all other interested parties to respond promptly. My goal is to have these matters fully litigated within ninety days.

An order will be entered denying FNF's Motion for Relief From Automatic Stay and Motion to Compel Debtor to Abandon Property.

Sincerely,

Irvin N. Hoyt
Chief Bankruptcy Judge

INH:sh

CC: Bankruptcy Clerk
United States Trustee

Re: Steen's Feeds, Inc.
February 22, 1994
Page 4

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:)	
)	
)	Bankr. Case No. 91-50339
STEEN'S FEEDS, INC.,)	Chapter 7
d/b/a/ Steen's Trucking, Inc.,)	
)	
Employer Tax ID No. 46-0368213)	ORDER DENYING FIRST NATIONAL
)	FUNDING'S MOTION FOR RELIEF FROM
)	AUTOMATIC STAY AND MOTION TO
Debtor.)	COMPEL DEBTOR TO ABANDON PROPERTY
)	

In compliance with and recognition of the letter Memorandum of
Decision entered this day,

IT IS HEREBY ORDERED that First National Funding's Motion for
Relief From Automatic Stay and Motion to Compel Debtor to Abandon
Property are DENIED.

So ordered this ____ day of February, 1994.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

Re: Steen's Feeds, Inc.
February 22, 1994
Page 5

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk
(SEAL)