

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

IN RE:)	CASE NO. 486-00428-PKE
)	
GERALD JEROME VOELKER and)	CHAPTER 12
ANTOINETTE VOELKER,)	
)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW RE:
Debtors.)	MOTION FOR RELIEF FROM
)	THE AUTOMATIC STAY AND
)	MOTION TO PROHIBIT USE
)	OF CASH COLLATERAL
)	

The matters before the Court are Dakota State Bank of Coleman's Motion for Relief From the Automatic Stay filed April 30, 1991 and the Motion to Prohibit Use of Cash Collateral filed March 13, 1991 and Debtors Gerald J. and Antoinette Voelker's responses thereto. These are core proceedings pursuant to 28 U.S.C. § 157(b)(2). A hearing was held May 23, 1991. Appearances included Vance R. C. Goldammer and Terry N. Prendergast for Movant, Harry A. Engberg for Debtors, and Larry Nelson for Chapter 12 Standing Trustee Rick A. Yarnall. Both matters were taken under advisement on May 31, 1991 upon receipt of each party's proposed findings of fact and conclusions of law. The Court enters the following Findings of Fact and Conclusions of Law as required by Bankr. R. 7052.

FINDINGS OF FACT

1. Debtors Gerald J. and Antoinette Voelker (Debtors) filed a Chapter 11 petition for reorganization on July 11, 1986.
2. The case was converted to a Chapter 12 proceeding on August 3, 1988.

3. Debtors' plan of reorganization was confirmed by Order entered May 18, 1989.

4. Creditor Dakota State Bank of Coleman (Bank) filed a Motion for Relief from Automatic Stay on November 13, 1989. A hearing was held and an Order Relative to Dakota State Bank's Motion for Relief From the Automatic Stay was entered June 26, 1990.

5. The June 26, 1990 Order directed Debtors to, inter alia, deposit all income in their account at Bank, make all disbursements by check written on that account, and spend funds only as set forth in Debtors' budget attached to their Second Objection to Motion for Relief from the Automatic Stay.

6. The June 26, 1990 Order amended paragraph 14 of the parties' Stipulation for Use of Cash Collateral, for Adequate Protection, and for Repayment of Indebtedness approved by Order entered January 14, 1988. As amended, paragraph 14 provides:

At all times, including immediately upon the making of any payments required to the Dakota State Bank pursuant to the prior Stipulation of the parties, Debtors shall maintain on hand at least 120 head of cattle-breeding stock (defined as cows or heifers of at least one year of age).

7. On March 13, 1991, Bank filed a Motion to Prohibit Use of Cash Collateral. An expedited hearing was held March 19, 1991. On March 25, 1991, the Court¹ entered a Preliminary Order Relative to Dakota State Bank's Motion to Prohibit Use of Cash Collateral. Therein, the Court, in recognition of an agreement reached by the parties, directed Debtors to permit Bank to inventory and appraise

¹ The Hon. Peder K. Ecker presiding.

all of Debtors' livestock and to pregnancy check the breeding females. Further, upon completion of the above, Debtors' use of cash was restricted to \$750.00 for living expenses. Expenditures for livestock feed were to be agreed upon by the parties' counsel. A continued hearing could be scheduled on twenty-four hours notice.

8. On April 30, 1991 Bank filed another Motion for Relief From the Automatic Stay on the grounds that its secured interest was no longer adequately protected due to Debtors' failure to fully comply with the June 26, 1990 Order.

9. A hearing on Bank's Motion for Relief From the Automatic Stay and a continued hearing on Bank's Motion to Prohibit Use of Cash Collateral was held May 23, 1991.

10. Testimony and exhibits established the following:

a. Debtors currently have 4 bulls and 108 to 118 cows, including 6 cull cows, plus 32 yearlings and 10 replacement heifers.

b. At least 11 head of cattle, including some 1990 calves, died during 1990.

c. At least 42 head of cattle, including some 1991 calves, have died between January 1, 1991 and May 16, 1991.

d. Only 80 of Debtors' cows were pregnant for the 1991 calving season. As of the hearing date, one-half of the bred cows and heifers had calved but 5 to 12 1991 calves have died.

e. The condition of Debtors' cows varies. Twenty-five percent are in moderate condition. Twenty-five percent are in borderline reproductive condition. Twenty-five percent are in thin, poor reproductive condition. Twenty-five percent are very thin with rebreeding chances slim to none.

f. One-half of Debtors' yearlings are not in good condition.

g. Debtors' 1991 death loss in their cattle herd to date is much higher than average.

h. The condition of Debtors' cattle herd has continued to deteriorate throughout 1991.

i. There was no epidemic in Debtors' cattle herd that precipitated the high death rate.

j. Debtors have some feed on hand for their cattle herd but the quality and quantity were not established.

k. Debtors have summer pasture available for only 60 cow-calf pairs; this available grazing will need to be supplemented to insure adequate feed for the 60 pairs. The remainder of the cattle herd will have to remain in the dry lot.

l. Debtors' dry lot does not have a dry place for the 1991 calves to lie down or find shelter.

m. Neither the value of Debtors' cattle herd nor Debtors' equity in the cattle herd was established.

n. Debtors have not timely deposited all income in their account at Bank.

o. Debtors have withdrawn funds from their account at Bank that were not for living expenses and were not approved by agreement of Debtors' counsel and Bank's counsel.

p. Debtors have made all plan payments due to date.

CONCLUSIONS OF LAW

1. Bank is not entitled to relief from the automatic stay under 11 U.S.C. § 362(d)(1) due to lack of adequate protection because the value of Bank's interest in its collateral was not established.

2. Bank is not entitled to relief from the automatic stay under 11 U.S.C. § 362(d)(2) because the Bank did not establish that Debtors do not have equity in Bank's collateral.

3. Bank is entitled to relief from the automatic stay under 11 U.S.C. § 362(d)(1) for cause. Cause is found due to the excessive death loss in Debtors' cattle herd, the poor to very poor condition of over one-half of the cattle in Debtors' herd, and Debtors' continued inability to adequately care for their cattle and because Debtors have failed to fully comply with the terms of the Order entered June 26, 1990 and the Preliminary Order entered March 25, 1991.

4. Bank is entitled to immediate possession of Debtors' cattle herd since continued lack of feed and poor facilities will cause further loss of value in or death of the cattle.

5. Bank is entitled to an order prohibiting Debtors' further use of cash collateral (that is, use of post-petition collateral proceeds) because Debtors have failed to fully comply with the terms of the Order entered June 26, 1990 and the Preliminary Order entered March 25, 1991.

6. The facts and circumstances of this proceeding do not warrant an award of attorney's fees or costs to any party.

Dated this 6th day of June, 1991.

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
SOUTHERN DIVISION

IN RE:) CASE NO. 486-00428-PKE
)
GERALD JEROME VOELKER and) CHAPTER 12
ANTOINETTE VOELKER,)
) ORDER GRANTING RELIEF FROM
) THE AUTOMATIC STAY AND
Debtors.) PROHIBITING USE OF
) CASH COLLATERAL
)

In recognition of and compliance with the Findings of Fact and Conclusions of Law Re: Motion for Relief From the Automatic Stay and Motion to Prohibit Use of Cash Collateral entered this day,

IT IS HEREBY ORDERED that creditor Dakota State Bank of Coleman's Motion for Relief From the Automatic Stay is GRANTED; and

IT IS FURTHER ORDERED that Dakota State Bank of Coleman shall take immediate possession of all cattle owned or otherwise possessed by Debtors Gerald J. Voelker and/or Antoinette Voelker to insure that the animals are provided adequate shelter, as needed, and feed and water and shall provide Debtors' counsel and the Chapter 12 Standing Trustee Rick A. Yarnall with a full accounting and report thereon until a final disposition of the cattle and Dakota State Bank of Coleman's secured interest therein is made; and

IT IS FURTHER ORDERED that Dakota State Bank of Coleman's Motion to Prohibit Use of Cash Collateral is GRANTED; and

IT IS FURTHER ORDERED that attorneys' fees and costs shall not be awarded to any party; and

IT IS FURTHER ORDERED that Dakota State Bank of Coleman may seek a Writ of Assistance pursuant to Fed. R. Civ. P. 70 if Debtors Gerald J. Voelker and/or Antoinette Voelker fail to timely comply with this Order.

So ordered this ____ day of June, 1991.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)