

**United States Bankruptcy Court
Western District of Wisconsin**

Cite as: [Unpublished]

**In re Zeien Farms, Debtor
In re Donald Vincent Zeien and Doreen Jane Zeien, Debtors**
Bankruptcy Case Nos. 94-33454-12 and 94-33455-12

United States Bankruptcy Court
W.D. Wisconsin

February 27, 1995

J. David Krekeler, Collins, Beatty & Krekeler, Madison, WI, for Collins, Beatty & Krekeler.

Edward A. Corcoran, Brennan, Steil, Basting & MacDougall, S.C., Madison, WI, for objecting creditors.

William A. Chatterton, Ross & Chatterton, Madison, WI, Chapter 12 Trustee.

Robert D. Martin, United States Bankruptcy Judge.

MEMORANDUM DECISION

On December 20, 1994, Zeien Farms, a farm partnership, filed chapter 12 bankruptcy along with two of its individual partners, Donald and Doreen Zeien (the "Zeiens").⁽¹⁾ Both Zeien Farms and the Zeiens seek to employ Collins, Beatty & Krekeler, S.C. ("Collins") as legal counsel in their respective bankruptcies. Neither debtor paid a cash retainer to Collins. Instead, the Zeiens agreed to provide Collins a lien in their residence to secure fees incurred not only in their case, but in Zeien Farms' bankruptcy case as well.⁽²⁾ Several of Zeien Farms' and the Zeiens' unsecured creditors objected and a hearing on both employment applications was held on February 21, 1995. The applications were taken under advisement.

A debtor is not prohibited from giving a lien to an attorney to secure future fees in her bankruptcy case. In re Shah Inter., Inc., 94 BR 136, 137 (ED Wis 1988). The lien stands as security for fees which may be approved by the court. The lien is little different from a cash retainer and does not create any problems which are significantly different from what is the common practice in this and other courts. Id. The Zeiens may provide Collins a lien on their residence to secure fees in their own case, and their doing so does not adversely affect their application to retain Collins. That application may be granted.

However, Zeien Farms also proposes to secure its legal fees with the Zeien's residence. In order to do so, the Zeiens must satisfy the requirements of 11 USC § 363(b) (1995)⁽³⁾ to use, sell, or lease property of their bankruptcy estate outside of the ordinary course of business.⁽⁴⁾ Because the Zeiens have not done so,⁽⁵⁾ Zeien Farms has no access to the proposed collateral.

In seeking to use, sell, or lease property of the estate outside of the ordinary course of business, the debtor bears the burden of demonstrating that the use is supported by a good business justification and will aid in reorganization. In re Ionosphere Clubs, Inc.,

100 BR 670, 675 (Bankr SDNY 1989); see also In re Lionel Corp., 722 F2d 1063, 1070 (2nd Cir 1983). The debtor must articulate some sound business reason for the use of the property. Lionel, 722 F2d at 1070. In considering whether the debtor has met this burden, the court should consider a variety of factors including:

the proportionate value of the asset to the estate as a whole, the amount of elapsed time since the filing, the likelihood that a plan will be proposed and confirmed in the near future, the effect of the proposed disposition on future plans of reorganization, the proceeds to be obtained from the disposition vis-a-vis any appraisals of the property, which of the alternatives of use, sale or lease the proposal envisions and, most importantly perhaps, whether the asset is increasing or decreasing in value.

Id at 1071. The Zeiens have articulated no business justification for granting the lien nor have they provided any evidence on the factors relied upon by the Lionel court.

Nor has there been a demonstration that a plan of reorganization is likely to be confirmed. What facts that have been produced would suggest otherwise. The Zeiens are in the business of finishing beef cattle. However, they currently have no cattle and have not obtained financing to acquire cattle. Until three years ago, the Zeiens were dairy farmers. They are relatively inexperienced at finishing cattle. Their most recent ventures in that field netted little, if any, profit.

It appears that the Zeien's residence is the only tangible asset available to unsecured creditors in either bankruptcy estate. Further encumbrances are likely to have a substantial impact on any future plans of reorganization the Zeiens may file. The Zeiens have provided no evidence as to how their bankruptcy estate will benefit from granting a lien to secure the payment of Zeien Farms' legal fees.

Because the Zeiens did not sustain their burden of proof under 11 USC § 363(b)(1), they cannot encumber their residence to secure legal fees in Zeien Farms' chapter 12 bankruptcy. To the extent that the Zeien Farms' application to employ Collins is dependent on the granting of that lien, it is denied. To the extent it is independent of that payment feature, it is subject to the objection that there may be a conflict of interest between Collins' representation of the Zeiens and of Zeien Farms. The potential for such a conflict has been demonstrated by the effort of Zeien Farms to use assets available to the Zeien's creditors but not its own. It may be that the interests of the partnership and these partners are not in conflict at this time. The actual conflict has been resolved by this decision. Since the present application of Zeien Farms to employ Collins is denied, there is no need to address the additional objections. Nor is Collins hereby precluded from seeking compensation from Zeien Farms for services to date, other than those services connected with the application to retain counsel which is hereby denied.

END NOTES:

1. Larry and Rhonda Zeien are also partners in Zeien Farms and are themselves in chapter 12, but have withdrawn their application to employ Collins.

The Zeiens filed a joint case as husband and wife.

2. There is believed to be equity in the residence in excess of any homestead or general exemptions.

3. 11 USC § 363(b)(1) (1995) provides:

(b)(1) The trustee, after notice and hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

4. In attempting to use, sell or lease property, the Zeiens would not have to provide adequate protection to the unsecured creditors under 11 USC § 363(e) (1995). That section provides:

Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

The unsecured creditors have no specific interest in the homestead and therefore are not entitled to adequate protection under § 363(e).

5. Nor is it certain that the Zeiens satisfied the notice requirements of FRBP 6004(a).