

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF WISCONSIN

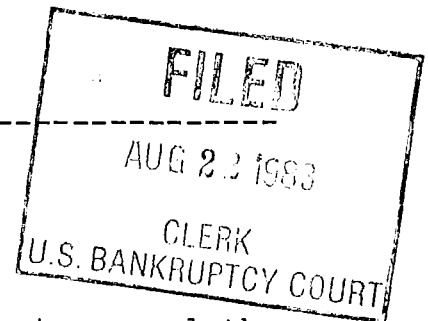
In Re:

JON C. SERUM and
LINDA C. SERUM

Bankruptcy No.
EF11-82-01732

Debtors

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER



The application of Borg-Warner Leasing to compel the adoption or rejection of lease coming on for hearing before the court; Bruce J. Brovold appearing for the applicant and Peter E. Grosskopf of the firm of Thornton, Black, Wachowski and Grosskopf, having been substituted for the original attorney, and first successor attorney, appearing for the debtors; and the debtors having raised the issue as to whether or not there is a lease or a financing agreement involved in the matter before the court; and evidence having been taken in open court; and the attorneys having made their oral arguments and having submitted memorandums; and the court being fully advised in the premises, FINDS:

1. That the debtors filed a Chapter 11 petition for relief and are debtors in possession under the Bankruptcy Code.

2. That on or about August 30, 1980, said applicant, by a certain instrument in writing designated as Lease number 13111 and referring to the parties as lessor and lessees, entered into a contract for a new dairy barn and Osseo silo for a term of ten years.

3. That the monthly rental was to be \$1,129.50 payable on the 10th day of each month commencing November 10, 1980, plus applicable taxes.

4. That said debtors paid rental in September, 1982, in the sum of only \$45.20; that they failed to pay the rent for the months of October, November and December, 1982, and January and February, 1983, and the ensuing months to the present time.

5. That the arrearage through February, 1983, was the sum of \$7,070.68.

6. That the debtors filed their petition under Chapter 11 on October 4, 1982.

7. That at the time of entering into the instrument designated as "lease" and related papers, there was also taken a mortgage on the real estate of said debtors, which mortgage is Exhibit #5 in said proceedings. The other exhibits are as follows:

Exhibit #1 - Equipment Lease.

Exhibit #2 - Supplementary Schedule listing barn and silo and related terms.

Exhibit #3 - Acceptance Notice by the debtors.

Exhibit #4 - Milk Assignment for \$1,129.50 to said applicant until the total sum of \$135,540.00 is paid to said Borg-Warner Leasing.

Exhibit #5 - The Mortgage above stated.

Exhibit #6 - Financing Statement under the Uniform Commercial Code filed in the office of the Register of Deeds of Buffalo County, Wisconsin, and covering "one new 16 x 60 Silo and other equipment, and all accessions, additions and replacements thereto, whether now owned or hereafter acquired.

Exhibit #7 - An Amended Financing Statement covering one new 14 x 60 Silo, Berg Barn Cleaner, Bo-Matic Milking Equipment, and one new 144 x 36 ft. Dairy Barn and other equipment and all accessions, additions and replacements thereto, whether now owned or hereafter acquired.

Exhibit #8 - Farmer's Exemption Certificate - Wisconsin Department of Revenue.

Exhibit #9 - Lessees' Tax Information Letter.

Exhibit #10 - Borg-Warner Leasing Utility Check.

8. The parties also obtained a mortgagee's waiver and consent from The American Bank of Alma, Wisconsin, which is not marked as an exhibit, in order to induce the execution of the proposed lease and waive any claim against said personal property.

9. That a court is not controlled by the names applied to legal documents and it becomes necessary in certain cases, such as this, to thoroughly examine each of the documents involved and as above listed.

10. In the case of Brookside Drug Store, Inc., 29 UCC 230 (Bankr. D. Conn. 1980) the court listed sixteen factors in determining whether a contract is a lease or a purchase contract. They are as follows:

(a) Whether there was an option to purchase for a nominal sum.

(b) Whether there was a provision in the lease granting the lessee an equity or property interest.

(c) Whether the nature of the lessor's business was to act as a financing agency.

(d) Whether the lessee paid a sales tax incident to acquisition.

(e) Whether the lessee paid all other taxes incident to ownership.

(f) Whether the lessee was responsible for comprehensive insurance.

(g) Whether the lessee was required to pay any and all license fees, and to maintain the property at his expense.

(h) Whether the agreement placed the entire risk of loss upon the lessee.

(i) Whether the agreement included a clause permitting the lessor to accelerate the payment of rent upon default of the lessee and granted remedies similar to those of a mortgagee.

(j) Whether the property subject to the agreement was selected by the lessee and purchased by the lessor for this specific lessee.

(k) Whether the lessee was required to pay a substantial security deposit.

(l) Whether the agreement required the lessee to join the lessor, or permit the lessor by himself, to execute security agreements.

(m) Whether there was a default provision in the lease inordinately favorable to the lessor.

(n) Whether there was a provision in the lease for liquidated damages.

(o) Whether there was a provision disclaiming warranties of fitness and/or merchantability on the part of the lessor.

(p) Whether the aggregate rentals approximate the value or purchase price of the equipment.

11. There is no purchase option in Exhibit #1 and the testimony is not clear as to whether or not an option to purchase had been discussed. According to the testimony the

mortgage was taken as security for the payment of the rent. However, it does not contain that statement and is a straight mortgage for \$75,000.00; that it states on its face that there are mortgages of record in favor of The American Bank, a Wisconsin corporation, and Production Credit Association and any financing statements given to Commodity Credit and Production Credit Association. The payment of \$75,000.00 in the mortgage is to be made in accordance with the terms of a lease and would appear to be in payment of a mortgage indebtedness.

12. The evidence showed that the contract cost of the barn and silo was the approximate sum of \$75,000.00, and if an interest rate of 11% or 11½% or a similar amount was applied it would be similar to the basis of the payments contained in the lease agreement.

13. The debtors paid the excavation costs of \$7,000.00 and they were reimbursed for the personal property costs expended by them.

14. It is my conclusion that said arrangement is a financing contract secured by the real estate mortgage, and that it is not a lease in the sense that we generally understand a lease to be.

15. That certainly a concrete barn and silo which are affixed to real estate do not constitute a lease in the general sense as leases are known.

16. That the motion to assume or reject the lease is not the proper procedure in this case.

CONCLUSIONS OF LAW

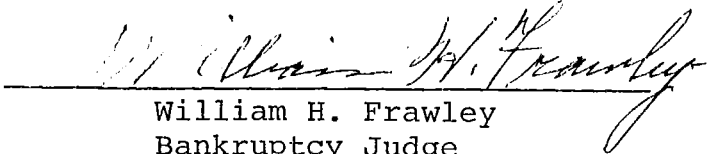
That the motion of Borg-Warner Leasing to assume or reject the lease be dismissed without costs to any of the parties.

O R D E R

NOW, THEREFORE, IT IS ORDERED: That the motion of Borg-Warner Leasing to assume or reject the lease designated in the application herein be and the same is hereby dismissed without costs to any of the parties.

Dated: August 22, 1983.

BY THE COURT:



William H. Frawley
Bankruptcy Judge