

FILED

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

APR 21 1986

CLERK
U.S. BANKRUPTCY COURT

In re:

Case Number:

RICHARD E. WENZEL
JUDY J. WENZEL

WF7-84-02321

Debtors.

RICHARD E. WENZEL and
JUDY J. WENZEL,

Plaintiffs,

Adversary Number:

v.

85-0231-7

RHINELANDER STUCCO & STONE,

Defendant.

OPINION AND ORDER

The debtors have filed this adversary proceeding requesting this court to determine the extent of the security interest of the defendant, Rhineland Stucco & Stone (RSS), in certain property of the debtor. RSS is the holder of a construction lien on a tavern of the debtors. Stratford State Bank holds a prior mortgage on the tavern and also holds a mortgage on the debtors' home. After the debtors filed for relief under Chapter 7 of the Bankruptcy Code, RSS filed an objection to discharge. RSS and the debtors then entered into a stipulation by which RSS withdrew its objection to discharge and the debtor granted RSS relief from

the § 362 automatic stay in order that RSS could continue Marathon County Circuit Court Civil Action No. 84 CV 1079. This stipulation was approved by the Court Order of May 31, 1985.

RSS now attempts to use the equitable doctrine of "marshalling of assets" to assist in recovering its construction lien claim. Under this doctrine RSS attempts to have Stratford State Bank recover its mortgage debt from the debtors' home, instead of the tavern, to the extent necessary to create sufficient equity in the tavern to satisfy the lien of RSS. The debtors argue that marshalling of assets, as a doctrine of equity, should not be used in a manner that impairs the debtors' homestead exemption. The debtors have filed this complaint seeking the protection of the bankruptcy court.

The court has considered the arguments of counsel, and it is the conclusion of the court that the state court civil action should be allowed to continue as provided in the May 31, 1985, Court Order. RSS was granted relief from a portion of the § 362 stay with the consent of the debtors. That portion of the stay enjoining and prohibiting RSS from collecting any judgment that may arise out of the proceeding or from levying on any property of the debtor is still in full force and effect. The state court is a proper forum for determining these issues dealing with state law and policy and the civil action should be allowed to continue.

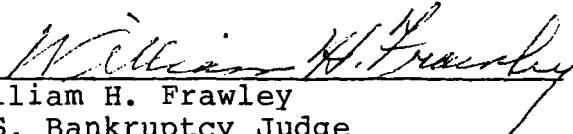
This opinion shall constitute findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052.

ORDER

NOW, THEREFORE, IT IS ORDERED THAT, the debtors' complaint is hereby dismissed.

Dated: April 21, 1986.

BY THE COURT:



William H. Frawley
U.S. Bankruptcy Judge

cc: Attorney Terrence J. Byrne
Melby & Schiek, S.C.