

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

FILED
APR 14 1986
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U.S. BANKRUPTCY COURT

In re:

Case Number:

ROBERT W. ROSENBERG

EF11-85-01857

Debtor.

OPINION AND ORDER

The First Interstate Bank of Wisconsin (Bank), by Jeffrey Guettinger, has motioned this court seeking relief from the 11 U.S.C. § 362 automatic stay. The debtor appears by Bruce Zito and contests the motion. A hearing on this matter was held on April 8, 1986, at which both parties were provided opportunity to offer evidence and make statements. It is the conclusion of the court, upon the facts disclosed at said hearing, that the motion of the Bank requesting relief from the automatic stay should be granted.

The property that is the subject of this motion is a supper club that is called "Rosenberg's Ranch Supper Club" (Ranch). The Bank has a mortgage on the real property of the Ranch and has a perfected security interest on the personal property used to operate the Ranch. The real property is also encumbered by a prior land contract held by Thomas and Beverly Colombe. The Colombes, by Thomas Sazama and Kevin McElhenny, do not object to the Bank's motion but request that if the Bank is granted relief

that they should be granted the same relief so that they can protect their interest in the property. The debtor owes approximately \$77,000 to the Colombes on the land contract. The debtor's obligation to the Bank amounted to \$62,619 at the time of the hearing. The debtor and the Bank have both submitted appraisals of the Ranch. The debtor's appraisal lists the value of the supper club to be \$90,071 and the Bank's appraisal lists the value to be \$130,000. The 1984 real estate tax statement lists the value of the property to be \$99,800. It is apparent from these figures that the debtors do not have any equity in the property.

At one time the debtor owned and operated the Ranch jointly with his wife Diane Rosenberg. The debtor and his wife are now separated and the debtor is running the Ranch operation by himself. The debtor presently lives in an apartment on the property. Diane Rosenberg filed for relief under Chapter 7 of the Bankruptcy Code several months before the debtor filed this petition under Chapter 11. The trustee of Diane Rosenberg's Chapter 7 estate, Peter Herrell, does not object to the Bank's motion but requests the court to order the Bank to account to the trustee for funds received from the liquidation of personal property.

The Bank argues that the debtors have not offered adequate protection and therefore relief should be granted pursuant to 11 U.S.C. § 362(d)(1). The Bank also argues that the debtors have not shown that an effective reorganization is possible and there-

fore relief should be granted pursuant to 11 U.S.C. § 362(d)(2). There is no equity in the property and, therefore, the debtor has the burden of proof with respect to both of these issues. 11 U.S.C. § 362(g).

The debtor is current on his payments to the Colombes on the land contract. These payments amount to \$680 per month. The debtor is also current with his property tax payments. The debtor has offered to pay the Bank \$400 per month and contends that this constitutes adequate protection pursuant to 11 U.S.C. § 361. The Bank argues that this payment is insufficient. The Bank also argues that the offer to make payments does not constitute adequate protection unless there is an ability to make payments.

The evidence reveals that the Ranch is located in a financially depressed area. The evidence indicates that this property is not appreciating in value, and in fact is depreciating. Absent sufficient finances this depreciation would be more dramatic. Hence, the value of the Bank's security is diminishing while interest is accruing on the outstanding debt at a significant rate. The debtor's cash flow problems were the cause of his need for relief under the Bankruptcy Code. The debtor has not offered any evidence to indicate that his financial situation has improved. Obviously a mere offer to make payments in the future does not constitute adequate protection unless there is an ability to make such future payments. The court cannot cause the Bank to suffer the expense of additional delay in protecting its

interests absent a showing by the debtor that he is capable of compensating the Bank for such expenses. The burden of proving that the Bank is adequately protected is on the debtor. 11 U.S.C. § 362(g). It is the conclusion of the court that the debtor has failed to carry his burden.

The Bank's second basis for relief from stay is that the debtor has not shown that an effective reorganization is possible. "In order to succeed in resisting the relief sought by the plaintiff, the Debtor must offer some evidence that an effective reorganization is, in fact, a realistic possibility." In re Discount Wallpaper Center, 19 B.R. 221, 222 (Bankr. M.D. Fla. 1982).

[w]here the debtor contends that relief from the stay should not be granted because the property which is sought to be foreclosed is necessary for an effective reorganization, the debtor must offer some evidence that an effective reorganization of the debtor is realistically possible.

In re Dublin Properties, 12 B.R. 77, 78 (Bankr. E.D. Pa. 1981). The record is devoid of any evidence that would indicate that an effective reorganization is feasible. The debtor has not offered any evidence to indicate that he is even capable of paying his \$400 monthly payment to the Bank for adequate protection. It is doubtful that the debtor can make payments of \$680 a month to the Colombes and payments of \$400 a month to the Bank and still retain sufficient finances to effectuate a reorganization. The burden of proving that an effective reorganization is possible is

on the debtor. 11 U.S.C. § 362(g). It is the conclusion of the court that the debtor has failed to sustain his burden of proof.

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

ORDER

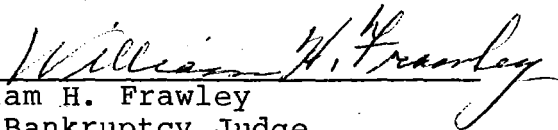
NOW, THEREFORE, IT IS ORDERED THAT, the motion of the First Interstate Bank of Wisconsin requesting relief from stay is hereby granted.

IT IS FURTHER ORDERED THAT, Thomas and Beverly Colombe are denied relief from the stay.

IT IS FURTHER ORDERED THAT, the First Interstate Bank of Wisconsin shall account to the trustee of Diane Rosenberg's bankruptcy estate for all personal property and proceeds of personal property that the Bank recovers.

Dated: April 14, 1986.

BY THE COURT:



William H. Frawley
U.S. Bankruptcy Judge

cc: Attorney Jeffrey W. Guettinger
Attorney Bruce Evan Zito
Attorney Thomas J. Sazama
Attorney Kevin S. McElhenny
Attorney Peter F. Herrell