FILED IN UNITED STATES DISTRICT COURT, DISTRICT OF UTAH

AUG 6 1987

PAUL L. BADGER
Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

238

In re:

CLARK TANKLINES COMPANY,

Debtor.

ZIONS FIRST NATIONAL BANK and WILLIAMSBURG SAVINGS BANK,

Appellant,

-vs-

CLARK TANKLINES COMPANY,

Appellee.

MEMORANDUM DECISION AND ORDER

Civil No: 86-C-982W

Bankruptcy No. 86C-00545

This matter is before the court on appeal from the Bankruptcy Court for the District of Utah. Oral arguments were held on April 22, 1987. Appellants Zions First National Bank ("Zions") and Williamsburg Savings Bank ("Williamsburg") were represented by Jeffrey L. Shields, Michael L. Allen and Andres' Diaz. Appellee Clark Tanklines Company ("Clark") was represented by R. Mont McDowell and Judith A. Boulden. Following oral argument the court took this matter under advisement. After considering the arguments of counsel, the memoranda and the relevant authority the court now renders the following decision and order.

I.

Procedural Background

The debtor in this bankruptcy case, Clark, filed its

voluntary petition for relief under Chapter 11 of the Bankruptcy Code on February 7, 1986 and is operating its business as a debtor in possession.[1] On April 3, 1986 Zions filed its motion for relief from the automatic stay seeking an order from the bankruptcy court allowing Zions to repossess its collateral. On April 7, 1986 Williamsburg filed a notice of joining in motion for relief from the automatic stay. Williamsburg and Zions have also filed a joint memorandum on this appeal.

On August 6, 1986 the bankruptcy court executed an order based on Findings of Fact and Conclusions of Law dated July 7, 1986, resolving the issues raised by appellants.[2] The order denied appellants' request for relief from the stay, but ordered that adequate protection payments be made by Clark to the appellants. Appellants have appealed, and present seven issues for review by this court.[3]

II.

Factual Background

Clark is engaged in the interstate transportation of

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[1] Following oral arguments, on April 24, 1987, Clark filed a motion to convert the Chapter 11 proceeding to one under Chapter 7.

[2] Paragraph 2 of the conclusions of law was deleted, by order of the bankruptcy court, on October 22, 1986.

[3] Zions and Williamsburg both filed appeals in August, 1986, following the bankruptcy court's August 6, 1986 order (86-C-0726W and 86-C-757W). At the same time, Clark filed a motion to amend with the bankruptcy court. After that issue was resolved, appellants filed this appeal (86-C-982W). The two previous appeals, 86-C-0726W and 86-C-0757W are hereby dismissed, as they are superceded by 86-C-982W.

goods as a licensed commercial motor carrier. Clark's business is located in Salt Lake City, with a terminal in Duchesne, Utah.

Clark obtained part of its financing through a series of loans made by appellants.[4] These loans were secured by Clark's real property in Salt Lake City and Duchesne, specific rolling stock and other personal property. Some of the equipment purportedly held as collateral by appellants included some vehicles leased to Clark by third parties. Clark's only interest in these vehicles was a leasehold interest. Appellants attempted to perfect a security interest in Clark's leasehold interest in these vehicles by having appellants' names noted as lienholders on the titles. Appellants also attempted to perfect a security interest in the debtors' interest in the leases by filing a UCC-1 listing the specific vehicles by unit number, make and designation, but failed to indicate Clark owned only a leasehold interest in the vehicles. The bankruptcy court found that appellants had not perfected a security interest in the leased vehicles.

III.

Analysis

A. Date Adequate Protection Payments Should Commence

The bankruptcy court structured a protection order

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[4] Williamsburg is owed, as of the trial in this matter, a total of $626,486.85. The figures given by Zions and Clark differ regarding the amount owed Zions. Zions lists its debt as $2,068,637.04 while Clark lists the debt as $1,974,023.80. If a dispute exists regarding the amount of the debt, this issue should be resolved by the bankruptcy court.

relating to the various assets of the debtor after three days of hearings. This order required the debtor to begin making payments to appellants 30 days after May 15, 1986, the date of the final hearing. Appellants argue that the court committed error by not requiring adequate protection payments to commence on February 7, 1986, the date Clark filed for bankruptcy.

Although adequate protection is not defined in the bankruptcy code, adequate protection should, as nearly as possible, provide a creditor with its bargained for rights. Ahlers v. Norwest Bank, (In re Ahlers), 794 F.2d 388, 394 (8th Cir. 1986) cert. granted 55 U.S.L.W. 3852 (1987). Bankruptcy courts making these decisions must review the unique facts in each bankruptcy on a case by case basis. Id. In the instant case, appellants claim they are entitled to approximately four months of adequate protection payments.[5] This court, however, believes it was not error for the bankruptcy court to commence adequate protection payments on June 15, 1986. As noted by the Eighth Circuit in Ahlers, protection payments should ordinarily be given for the interim period beginning with the date the secured creditor could, under state law, obtain possession of the collateral.[6] The timing of adequate protection payments should

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5 For payments between February 7, 1986 and June 15, 1986.

6 Appellants argued that Ahlers applies only to adequate protection for loss opportunity costs. This court does not agree. The Ahlers court's reasoning is equally applicable to adequate protection for a decline in value caused by market depreciation. See In re Asbridge, 66 Bankr. 894, 901-02 (Bankr. D.N.D. 1986).

reflect the expense and time involved in repossessing collateral under state law. Since creditors would not be able to protect themselves from declines in value during that time period, it is not unfair to creditors to take such factors into account. Although the bankruptcy court does not make reference to these factors in its Findings of Fact and Conclusions of Law, this court does not believe that a four-month interval between the bankruptcy petition and the commencement of adequate protection payments is unreasonable. Given the complexity of this matter, it is not unlikely that appellants could have faced a four-month delay in repossession efforts under state law.[7] This court will not disturb the conclusion of the bankruptcy court that adequate protection payments should commence on June 15, 1986. In the absence of congressionally mandated fixed dates for the commencement of adequate protection payments, this court believes the bankruptcy court should be granted some measure of discretion in fashioning these remedies.

B. <u>The Cash Purchase</u>

Appellants next argue that the bankruptcy court erred when it allowed Clark to purchase appellants' interest in units numbers 511, 1084 and 1088. The bankruptcy court found that these pieces of equipment had a monetary value of $4,623.00, and

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[7] Although appellants claim that repossession under state law could be had without any delay, appellants did not provide the court with any statutory or case authority supporting this contention. However, even in the face of such authority, a four-month delay is simply not unreasonable; especially when the money involved, as it is here, is minimal.

allowed the appellee to purchase this equipment for that price.

Appellants argue that this is an impermissible form of adequate protection not provided for by 11 U.S.C. § 361. This court does not agree. Section 361(3) allows the bankruptcy court to provide creditors with the "indubitable equivalent of such entities' interest in such property." Clearly the receipt of the assets' cash value constitutes an indubitable equivalent. To rule otherwise reduces the flexibility required by bankruptcy courts to fashion adequate protection remedies.

C. Foreclosure on the Office Equipment

The bankruptcy court refused to consider adequate protection relief on "office equipment" purportedly held as security by appellants. The bankruptcy court, in its Findings of Fact and Conclusions of Law states:

> Zions has not requested in its motion, nor its proposed findings of fact, that it be granted relief from stay in order to foreclose on the office equipment. Therefore the court makes no findings whether Zions is entitled to relief from stay regarding that collateral.

Zions claims that it did request the relief the court refused to grant. However, a review by this court of the record indicates that Zions never clearly requested this relief. Moreover, there appears to be some evidence in the record supporting Clark's contention that the office equipment has not declined in value, and that appellants' interest in the collateral has not been impaired. This evidence and appellants' failure to specifically request relief from the stay convinces

this court that it should not disturb the decision of the bankruptcy court.

D. The Leased Equipment

The bankruptcy court also determined that appellants were not entitled to adequate protection payments on certain rolling stock units leased by Clark from third parties.[8] This provision of the order was based on the bankruptcy court's conclusion that appellants did not appear as lienholders on the titles to these vehicles and that the UCC-1 financing statements filed by the appellants failed to perfect a security interest in Clark's leasehold interest.

Appellants apparently contend that automatic stay hearings are not the place to resolve issues of proper perfection of collateral. Appellants also claim that Clark lacked standing to challenge appellants' interest in these vehicles because Clark has no interest in the collateral. The court rejects appellants' arguments. In order to comply with the relief from automatic stay provisions found in § 362, the court must first determine if the creditor in question has a security interest in the collateral. Without such a determination, the automatic stay is meaningless. Since Clark has an interest, as lessee, in the vehicles Clark also has standing to raise this issue.

Appellants also argue that it was error for the bankruptcy court to conclude that the UCC-1 financing statement

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[8] Retain rolling stock unit numbers 109, 526, 527, 529, 720, 727, 728 and 729.

describing the leased vehicles did not perfect a security interest. Although the issue is a close one, this court will affirm the bankruptcy court. Security interests in a specific physical asset are substantially different than an interest in a lessee's lease. The bankruptcy court's decision is supportable by the evidence and will not be disturbed.

E. Interest for Lost Opportunity Costs

Appellants also appeal the bankruptcy court's determination that adequate protection does not include compensation for delay in enforcing rights against the collateral. This issue has been addressed by four circuits equally split on the issue.[9] The Bankruptcy Court for the District of Utah has taken the position that undersecured creditors are not entitled to compensation for delay in enforcing rights to repossess collateral. General Electric Mortgage Corp. v. Self Village, Inc., 25 Bankr. 987 (Bankr. D. Utah 1982). Judge Aldon Anderson has also followed the lead of the Fifth Circuit in adopting the rule followed by the bankruptcy court. Bank of American Fork v. Ralsu, Inc., C-85-1410A slip op. at 1423 (D. Utah, Sept. 30, 1986). Given the precedent established by Judge Anderson's decision in this district, and

[9] Crocker National Bank v. American Mariner Industries, Inc., 734 F.2d 426 (9th Cir. 1984); Grundy National Bank v. Tandem Mining Corp., 754 F.2d 1436 (4th Cir. 1985) (adequate protection includes compensation for delay in enforcing rights against the collateral). United Savings Association v. Timbers of Innwood Forest Associates, Ltd., 793 F.2d 1380 (5th Cir. 1986); Lendlease v. Briggs Transportation Co., 780 F.2d 1339 (8th Cir. 1985) (adequate protection does not include the payment of interest for delay in enforcing rights against the collateral).

the sound reasoning of these decisions, this court affirms the decision of the bankruptcy court.

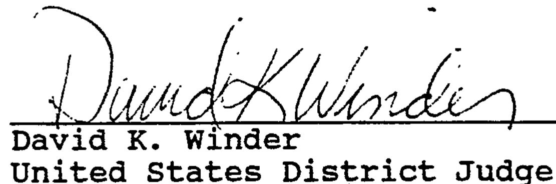
F. <u>Mootness</u>

Appellants also argue that the bankruptcy court's order in this matter was moot inasmuch as the automatic stay had been terminated by operation of law pursuant to 11 U.S.C. § 362(e). Because the debtor's case has been converted from Chapter 11 to Chapter 7, this issue is now moot and will not be addressed by the court.

Accordingly,

IT IS HEREBY ORDERED that the decision of the bankruptcy court is AFFIRMED.

Dated this 6th day of August, 1987.



David K. Winder
United States District Judge

Mailed a copy of the foregoing to the following named counsel this 6th day of August, 1987.

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