A

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

WAYCROSS DIVISION

IN RE:	)	
	)	CHAPTER 13 BANKRUPTCY
RUFUS E. HERSEY,	)	CASE NO. 93-50560
JOYCE M. HERSEY,	)	
	)	
Debtors	)	

BEFORE

JAMES D. WALKER, JR.

UNITED STATES BANKRUPTCY JUDGE

COUNSEL:

For the Debtors: MARY JANE CARDWELL
Post Office Box 177
Waycross, Georgia 31502-0177

For Southeastern Bank: MARVIN L. PIPKIN
Post Office Box 455
Darien, Georgia 31305

For the Chapter 13 Trustee: KARROLLANNE K. CAYCE
Post Office Box 10556
Savannah, Georgia 31412

MEMORANDUM OPINION

A preliminary hearing on Southeastern Bank's Motion for Stay Relief was held on December 9, 1993. A final hearing was held on January 6, 1994. Based on the evidence presented at the preliminary hearing and the final hearing, considered together with arguments of counsel, the court enters these Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Southeastern Bank, a creditor in this case, holds a security interest in the debtors' 1987 Ford automobile, 1984 Commodore mobile home and real property located in Coffee County, Georgia. The above-described collateral secures an indebtedness in the amount of Eleven Thousand Six Hundred Fourteen Dollars and Thirty-Six Cents ($11,614.36). The parties stipulated that the value of the collateral exceeds the amount of the debt claimed by this creditor.

Debtor Rufus E. Hersey has qualified under a policy of disability insurance to have the claim of this creditor paid with disability insurance proceeds as of September 1, 1993. Those payments are being received by the creditor in the full amount of the monthly contract installment payment. There remains an arrearage as of November 2, 1993, the date of the filing of this Chapter 13 Case, in the amount of approximately Three Thousand Dollars ($3,000.00).

The debtors' Chapter 13 Plan proposes to pay the current

installment payments to this creditor by insurance proceeds or, in the event insurance proceeds are non-existent or insufficient to pay the claim, by direct payment from the debtors. The debtors have further proposed to pay the amount of the pre-petition deficiency through the Chapter 13 Plan.

The procedure for payment of pre-petition deficiency claims in the Southern District of Georgia is to pay those claims in full without interest following the payment of all priority, administrative priority and secured claims. Any such arrearage claim is paid in full at that time ahead of all unsecured creditor disbursements.

Southeastern Bank contends that this payment priority is inappropriate and that its arrearage claim should be paid at the same time as other secured claims. Southeastern Bank specifically stipulates that it does not contend that the Trustee should pay interest on its arrearage claim. It argues instead that the postponement of the payment of its arrearage claim causes it to be exposed to the jeopardy of having the plan fail before the arrearage claim is paid thereby creating a result which it believes is properly characterized as a failure of adequate protection.

CONCLUSIONS OF LAW

If Southeastern Bank's Motion for Stay Relief is to be granted, it must be based on a conclusion of law that the

requirements of 11 U.S.C. § 362(d)(1)[1] are satisfied.[2] The court must consider the question of whether the stay should be granted "for cause" including a failure of the debtors to provide adequate protection to this creditor.

The argument poses an equitable dilemma. If Southeastern Bank's claim were fully secured by real estate, the collateral could be expected to retain its value and increase in some measure over time. The Trustee's procedure for the payment of arrearage claims is based on this scenario. If a debtor's case fails before the arrearage claim is paid, the creditor can be expected to have retained its collateral position or improved upon it to the extent post-petition payments have reduced the amount of the claim.

In this case, this assumption fails because a substantial portion of the value of Southeastern Bank's collateral is in several vehicles which can be expected to decline with the passage of time. If the case fails before the arrearage is paid, Southeastern Bank's equity cushion may be reduced or eliminated by the depreciation in the value of the vehicle.

---

[1] Section 362(d)(1) provides:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay...
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;....

[2] The Debtor has equity in the subject property, and consequently, relief is not available under § 362(d)(2).

If Southeastern Bank's claim were secured exclusively by a vehicle, there would be no issue as to the payment of an arrearage. Instead, the full amount of the claim would be allowed as a secured claim and paid by the Chapter 13 Trustee with interest before any other pre-petition real estate arrearage claim.[3]

If Southeastern Bank's claim were secured solely by a vehicle, and if Southeastern Bank were receiving a payment, such as it is, from a disability insurance policy, it is likely that the Trustee would suspend payments to Southeastern Bank for as long as it was receiving direct payments from the disability insurance policy. That result would be identical to the one which the debtors propose in this case, and to which Southeastern Bank objects.

Southeastern Bank argues that the Trustee's method of handling arrearage claims is unfair. It is tempting to consider this motion as one which presents a properly postured case for the purpose of deciding whether that procedure is correct. The court should always be willing to examine the procedures which are regularly followed in the administration of bankruptcy cases to see whether those procedures are in compliance with the law and result in treatment to creditors which is fair and

[3] It should be noted, however, that in such a case, it would be assumed that the secured creditor is not receiving payments from any other source, such as from a disability insurance policy, as is the case here.

equitable. To do so in this case, however, would exceed the bounds of the question presented by the motion.

If Southeastern Bank's motion is to be granted, the court must conclude that the debtors have failed to carry the burden of proof as required by 11 U.S.C. § 362(g).[4]

The court concludes that the debtors have carried the burden in this case of showing that there is no cause for granting the stay relief. The court bases such a conclusion on several factors. First, Southeastern Bank is oversecured, and possesses an equity cushion to protect against possible depreciation. Although the existence of an equity cushion by itself does not always adequately protect a secured creditor's interest, its existence is some evidence of adequate protection. In re Liona Corp., N.V., 68 B.R. 761, 767 (Bankr. E.D. Pa. 1987).

Second, the debt of Southeastern Bank is being reduced on a monthly basis by the payments it is receiving from the disability insurance policy. Such periodic payments also

---

[4] Section 362(g) provides:

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section--

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

Hence, it is the debtor's burden to show that Southeastern Bank is adequately protected.

prevent the erosion of the equity cushion.

Finally, at some point in the future, the debt will be further reduced by payments from the Trustee on the arrearage claim. Even if the case fails before Southeastern Bank receives any payment on its arrearage claim, it is reasonable to conclude that the regular monthly payments which are being received by Southeastern Bank are sufficient to provide adequate protection, even where the collateral is depreciating in value.[5]

Southeastern Bank argues that the size of the arrearage which was created during a previous unsuccessful Chapter 13 Case should be considered by the court as a factor in concluding that the payments proposed by the debtors are adequate. It is impossible to come to that conclusion where the court finds that there is equity in the collateral and, further, where the plan provides for the creditor to receive its regular monthly contract payment for as long as it takes to pay this claim in full. Even without any payment on the arrearage claim, it appears that the debtors' plan adequately provides for the protection of the interest of this creditor.

An order in accordance with this memorandum opinion will be entered on this date.

DATED this _____ day of _____, 1994.

---

[5] An equity cushion coupled with periodic payments on secured debt is evidence of adequate protection. See In re Liona Corp., N.V., 68 B.R. 761, 768 (Bankr. E.D. Pa. 1987), and cases cited therein.

_____
JAMES D. WALKER, JR.
United States Bankruptcy Judge

CERTIFICATE OF SERVICE

I, Cheryl L. Spilman, certify that a copy of the attached and foregoing was mailed to the following:

MARY JANE CARDWELL
Post Office Box 177
Waycross, Georgia 31502-0177

MARVIN L. PIPKIN
Post Office Box 455
Darien, Georgia 31305

KARROLLANNE K. CAYCE
Post Office Box 10556
Savannah, Georgia 31412

This 24th day of February, 1994.

_____
Cheryl L. Spilman
Deputy Clerk
United States Bankruptcy Court

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

WAYCROSS DIVISION

IN RE:	)	
	)	CHAPTER 13 BANKRUPTCY
RUFUS E. HERSEY,	)	CASE NO. 93-50560
JOYCE M. HERSEY,	)	
	)	
Debtors.	)	
_____	)	

ORDER

In accordance with the memorandum opinion entered this date, it is hereby

ORDERED that the Motion for Stay Relief filed by Southeastern Bank is hereby denied.

SO ORDERED this ____ day of _____, 1994.

_____
JAMES D. WALKER, JR.
United States Bankruptcy Judge

CERTIFICATE OF SERVICE

I, Cheryl L. Spilman, certify that a copy of the attached and foregoing was mailed to the following:

MARY JANE CARDWELL
Post Office Box 177
Waycross, Georgia 31502-0177

MARVIN L. PIPKIN
Post Office Box 455
Darien, Georgia 31305

KARROLLANNE K. CAYCE
Post Office Box 10556
Savannah, Georgia 31412

This 24th day of February, 1994.

_____
Cheryl L. Spilman
Deputy Clerk
United States Bankruptcy Court