

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK

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In re

RONALD KERN & SONS

Case No. 01-12835 K

Debtor

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Before the Court is a motion to lift the 11 U.S.C. § 362(a) stay to permit a lender to foreclose its mortgage and replevy its other collateral. The Debtor cross-moves for permission to sell certain encumbered assets and to use the proceeds.

This is a Chapter 11 case concerning a farming partnership. Such a case may not be converted to Chapter 7 against the will of the Debtor (see 11 U.S.C. § 1112(c)). Although a “farmer” (see 11 U.S.C. § 101(20)), the Debtor does not believe that it is a “family farmer” (11 U.S.C. § 101(18)), and consequently believes that it is not subject to the prohibition against repeat filings that applies to “family farmers” under some circumstances (11 U.S.C. § 109(g)). Because conversion of a farmer’s case may not be sought by an aggrieved creditor, dismissal of the case or lift of stay are the only remedies available to the U.S. Trustee or a creditor who demonstrates “cause” to terminate the farm-debtor’s control of the estate.<sup>1</sup>

This Court dismissed the case on motion of the United States Trustee on August 29, 2001, over the objection of the Debtor, for failure of the Debtor to have provided required financial information, etc. Thereafter, the Court granted a stay of the Dismissal Order only until

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<sup>1</sup>Appointment of a trustee might also be available, but not if the “sweat equity” of the farm’s owners is necessary to the estate, as is the case here.

the Debtor could obtain a determination from the District Court as to whether that Court would grant a stay pending appeal of the Dismissal Order. On the record in open court on September 5, 2001, this writer asked the parties to suggest “what kind of safeguards - - what kind of restrictions I have to place that will assure that prejudice will not result from this relatively brief delay. The reason that I want to address the matter of safeguards is that I do not want the District - - any of the District Judges, whichever District Judge draws this appeal, burdened with the necessity of having the drop all the other work . . . based on a risk or supposition that inappropriate things may be happening or - - I want the District Judge to know that appropriate safeguards are in place. That no one is being prejudiced while the District Judge clears whatever calendars are necessary in order to hear the motion for a stay.” (Transcript of proceedings of September 5, 2001, page 28-29.)

The United States Trustee consulted with the parties off the record and returned to the record setting forth six agreed safeguards and a seventh that was the matter of a dispute which this writer then resolved. The interim stay and the safeguard were memorialized in an order dated September 5, 2001.

The Debtor promptly petitioned the District Court for a stay pending appeal, which motion has not been decided by the District Court. It is clear to this writer that the safeguards put in place by this Court pending a disposition of the stay motion by the District Court must have been viewed by the Court as wholly adequate, pending its deliberations upon the matters presented in the appeal and the motion for stay pending appeal.

In substance, the Bank's present motion challenges the adequacy of those safeguards, and the Debtor's cross-motion also seeks a significant change in the status quo. Assuming for the sake of argument that this Court has jurisdiction to decide these issues (and the U.S. Attorney's papers suggest some doubt), it would not be proper for this Court to do so without leave of the District Court, in this writer's view. This is an unusual case in light of the fact that this Court has stayed the mandate of its own order dismissing the case, and unusual in the circumstances that led to that stay (particularly the fact that this is a farm reorganization case.) The District Court has relied upon the adequacy of the safeguards put in place by this writer specifically to accommodate the workload of the District Court (while not prejudicing the rights of the parties).

The present challenge to the adequacy of those safeguards will be expensive for the parties to try, and that expense will be wasted if this Court's Order of Dismissal is affirmed by the District Court.

The District Court must be notified that the status quo that this Court sought to maintain in the stay it granted alleged by the Bank and the Farm Services Agency to have collapsed. And all the parties are entitled to reassurance that this Court will not direct them to incur the substantial expense of evidentiary hearings while the appeal is pending, unless the Reviewing Court agrees that such expense is necessary.

Thus, the present motions are suspended until the Bank, in light of changed circumstances, moves in the context of the appeal to intervene in the appeal<sup>2</sup> and moves either for

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<sup>2</sup>The U.S. Trustee is the Appellee.

reargument of the Debtor's motion for a stay pending appeal, or for an order that remands the merits to this Court or otherwise provides further instruction to this Court.

SO ORDERED.

Dated: Buffalo, New York  
March 11, 2002

/s/ Michael J. Kaplan

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U.S.B.J.