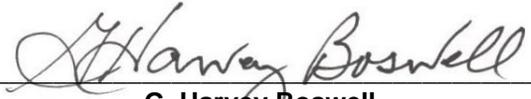


Not intended for publication



**Dated: July 26, 2004**  
**The following is SO ORDERED.**

  
**G. Harvey Boswell**  
**UNITED STATES BANKRUPTCY JUDGE**

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**UNITED STATES BANKRUPTCY COURT**  
**WESTERN DISTRICT OF TENNESSEE**  
**EASTERN DIVISION**

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**IN RE**

**Earl Gowan and**  
**Jo Ann Gowan,**

**debtors.**

**Case No. 03-13390**

**Chapter 11**

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**MEMORANDUM OPINION AND ORDER**  
**CONDITIONALLY DENYING DEBTOR'S MOTION**  
**TO BE ALLOWED TO CUT AND SELL TIMBER**

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The Court conducted a hearing pursuant to FED. R. BANKR. P. 9014 on the Debtors' Motion to be Allowed to Cut and Sell Timber and Bobby and Bonnie Morris' objection thereto on July 14, 2004. Resolution of these matters is a core proceeding. 28 U.S.C. § 157(b)(2). The Court has reviewed the testimony from the hearing and the record as a whole. This Memorandum Opinion and Order shall serve as the Court's findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

**FINDINGS OF FACT**

The Debtors in this case filed their motion to be allowed to cut and sell timber on June 2, 2004. Bobby and Bonnie Morris filed an objection to that motion on June 8, 2004. In their motion, the debtors seek permission from the court to cut and sell timber on their 330.62 acre tract of property in Hardeman County, Tennessee. The Morris' are creditors of the debtors by virtue of a \$60,000.00 promissory note.

Said note is secured by a deed of trust on the Hardeman County property on which the timber at issue is located, as well as 5.31 acres in Madison County. The terms of the promissory note and the deed of trust provide that the Morris' security interest covers the timber on the Hardeman County property. The note and the deed on the Hardeman County property prohibit the debtors from removing or cutting the timber on the property without written approval from the Morris' or payment of the entire amount of principal and interest due.

The promissory note matured on October 19, 2003. At the time the proof of claim was filed, the Gowans were indebted to the Morris in the amount of \$64,801.18. Union Planters Bank holds the first mortgage on the Hardeman and Madison County properties. The present balance of Union Planters' claim is approximately \$422,000.00. A house the debtor had built on the Madison County property was destroyed by fire during the pendency of this case. Union Planters anticipates receiving approximately \$200,000.00 in insurance proceeds for this loss.

In their motion, the debtors state that they estimate being able to sell the timber for enough money to payoff all liens on the property. At the hearing in this matter, Earl Gowan testified that he anticipates being able to make monthly adequate protection payments to the Morris' in the amount of \$1,000.00 and to Union Planters Bank in the amount of \$1,200.00. Although the debtors' motion states that they "have been in contact with a logging company to discuss the value of the timber," the debtors did not present any proof at the hearing on their motion as to the timbers' value; nor did the debtors present any proof as to the amount of timber that is ready for harvesting and selling. Earl Gowan testified that Reelfoot Lumber Company has agreed to purchase the timber, but he did not present any proof of this agreement or contract. Earl Gowan did testify that he plans on cutting the timber himself with the help of one of his employees, Dennis Robinson. Earl Gowan proposes paying Robinson 40% of the proceeds from the timber sale for his assistance.

At the hearing in this matter, Bobby Morris testified that he believes cutting the timber on the Hardeman County property would reduce the value of the land by one-half. Prior to selling the land to the debtors, Morris cut timber on forty acres of the Hardeman County property. Morris solicited bids from ten different companies before cutting the timber in 1999. The range of these bids was \$13,200.00 to \$38,364.70. TRIAL EXHIBIT 2. Morris testified that there are currently two hundred and ten (210) acres of forested land ready for harvesting on the Hardeman County property.

## CONCLUSIONS OF LAW

Section 363(e) of the Bankruptcy Code provides that:

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

11 U.S.C.A. § 363(e). Pursuant to 11 U.S.C. § 363(o), the debtor carries the burden of proof on the issue of adequate protection. *Delbridge v. Production Credit Ass'n and Federal Land Bank*, 104 B.R. 824, 827 (E.D.Mich.,1989); *In re McGlockling*, 296 B.R. 884, 889 (Bankr. S.D. Ga. 2003). In determining whether or not a secured creditor's interest is adequately protected in a given case, a Court must consider:

(1) the value of the interest; (2) the risk that the value of the encumbrance will decline; and (3) whether the debtor's adequate protection proposal protects value against such risks.

*In re Cambridge Woodbridge Apartments, L.L.C.*, 292 B.R. 832, 841 (Bankr. N.D. Ohio,2003).

In the case at bar, the debtor did not present any proof that the Morris' interest will be adequately protected if the timber is cut and sold. The debtors did not present any proof as to how the value of the land will be affected by the harvesting; nor did the debtors present any proof as to the amount of timber that is ready for harvesting or its value. Given the mandates of § 363(e), the Court is unable to make a determination on the debtors' motion until the debtor presents proof on the issue of adequate protection. The Court will reconsider the debtors' motion after the debtors present proof of the amount of the timber that is ready for harvesting as well as the timber's value.

## ORDER

It is therefore **ORDERED** that the Debtors' Motion to be Allowed to Cut and Sell Timber is **CONDITIONALLY DENIED**. The Court will reconsider the Debtors' motion after Debtors solicit and obtain bids on:

1. the value of the timber on the Hardeman County property; and
2. the amount of timber that is able to be sold.

It is **FURTHER ORDERED** that the Creditors' Objection to the Debtor's Motion to be Allowed to Cut and Sell Timber is **CONDITIONALLY GRANTED**.

It is **FURTHER ORDERED** that the (1) Debtors' "Motion to be Allowed to Cut and Sell Timber" and the (2) Morris' objection thereto are reset on the Court's calendar for August 30, 2004, at 10:30 a.m.

**mailing information:**

Debtors

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