IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 94-60371

IN THE MATTER OF: CLARENCE E. WINCHESTER and JUANITA C. WINCHESTER, Debtors.

UNITED STATES OF AMERICA, COMMODITY CREDIT CORPORATION, UNITED STATES DEPARTMENT OF AGRICULTURE, Appellant,

versus

CLARENCE E. WINCHESTER and JUANITA C. WINCHESTER, Appellees.

Appeal from the United States District Court for the Northern District of Mississippi
(2:93 CV 12 B; BK 89 31324)

March 28, 1995

Before REAVLEY, DUHÉ and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge[*]:

This appeal arises from Appellees Clarence E. Winchester and Juanita C. Winchester's ("the Winchesters") Chapter 12 filing for bankruptcy relief in June 1989. In October 1990, Appellant United States of America, Commodity Credit Corporation, United States Department of Agriculture ("the Government") filed a motion with

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession."
Pursuant to that Rule, the Court has determined that this opinion should not be published.

the bankruptcy court seeking to lift the automatic stay provided by 11 U.S.C. § 362 to permit a setoff. After a hearing on the Government's motion, the bankruptcy court entered an order on February 21, 1991 denying relief from the automatic stay on the ground that the debt claimed by the Government was not final or mature.

The Government sought reconsideration of the order, which was also denied by the bankruptcy court on August 14, 1991. The bankruptcy court reasoned that the Government was not entitled to setoff because (1) it had already exercised the setoff prior to moving for relief from the stay and (2) the obligations claimed by the Government were not final and determined prior to the filing of the petition, and thus a prerequisite for setoff, mutuality of obligation, was lacking.

The Government appealed to the district court, which affirmed the decision of the bankruptcy court by memorandum opinion and order entered March 25, 1994. The district court concluded that the bankruptcy court's finding upon reconsideration that the Government's motion for setoff was not well taken because it had effectuated the setoff prior to moving to lift the stay was a sufficient ground to affirm that court's ruling. The district court declined to decide whether or not the bankruptcy court's alternative basis for denying the Government's motion on reconsideration was in error. This appeal followed.

Although the district court reviewed the bankruptcy court's February 21 and August 14, 1991 orders denying the Government's

motion to lift the automatic stay and for reconsideration, we review the bankruptcy court's findings as we would in an appeal directly from the district court.[1] "The bankruptcy court's findings of fact are reviewed for clear error; its conclusions of law are reviewed de novo."[2] Relief from the automatic stay is within the discretion of the bankruptcy court.[3]

The filing of a bankruptcy petition imposes an automatic stay that explicitly prohibits a creditor from exercising a setoff without moving for relief.[4] Section 553(a) allows a creditor to setoff mutual claims that arise prepetition, subject to the automatic stay.[5] Thus, a creditor may setoff mutual debts that arose prepetition, but the creditor must first obtain relief from the automatic stay. In order to exercise the right to a setoff, the creditor must first file a motion for setoff and to lift the automatic stay with the bankruptcy court.[6] If the creditor exercises a setoff without first obtaining relief from the bankruptcy court, the creditor's actions will be in violation of

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[1] *Matter of Murexco Petroleum, Inc.*, 15 F.3d 60, 62 (5th Cir. 1994) (citing *Matter of Killebrew*, 888 F.2d 1516, 1519 (5th Cir. 1989)).

[2] *Id.*

[3] *See Small Business Admin. v. Rinehart*, 887 F.2d 165, 169 (8th Cir. 1989).

[4] *See* 11 U.S.C. § 362(a)(7) (1988); *see also Matter of Corland Corp.*, 967 F.2d 1069, 1076 (5th Cir. 1992).

[5] *See* 11 U.S.C. § 553(a) (1988).

[6] *See generally MNC Commercial Corp. v. Joseph T. Ryerson & Son*, 882 F.2d 615, 618 (2d Cir. 1989).

the automatic stay.

The Government contends that it never exercised a setoff because it merely withheld paying the debt it owed to the Winchesters. The Government relies on *Matter of Corland Corp.*, in which this Court held that a creditor may assert its setoff rights by retaining the owed funds and waiting for the Trustee to bring a turnover action, at which time the creditor may interpose setoff as a defense.[7] Thus, the Government argues, a creditor with a potential setoff right has two options: (1) withhold payment and raise its setoff rights when it is sued by the debtor for turnover or (2) withhold payment and then later move to lift the stay and ask the bankruptcy court to authorize the setoff. The Government asserts that it exercised the second option.

We find the facts of this case are distinguishable from *Matter of Corland Corp.* The Government did not merely withhold the funds owed to the Winchesters and then later file a motion to lift the stay. In its order entered August 14, 1991, the bankruptcy court found that, prior to filing its motion for setoff and to lift the automatic stay, the Government had already exercised a setoff, as evidenced by the letter of Joseph R. Boyd, Jr., dated June 30, 1989, and by the reduction by way of a setoff of the funds paid to the Trustee on August 1, 1990. Based on the record before us, we can find no clear error in the bankruptcy court's finding. The Government's affirmative act of making a reduced payment to the Trustee cannot be construed as merely withholding funds. The

[7] 967 F.2d at 1076-77.

August 1, 1990 reduced payment to the Trustee is evidence that the Government was affirmatively exercising a setoff. Therefore, we find that the bankruptcy court did not abuse its discretion in denying the Government's motion for setoff and to lift the automatic stay. The ultimate issue of whether the Government has established its entitlement to setoff is not before us, and therefore we will not address it in this appeal.

Therefore, the district court's order affirming the bankruptcy court's order denying the Government's motion for relief from the automatic stay is AFFIRMED.

REAVLEY, Circuit Judge, dissenting:

The Government claims that the debtor owes it $6,449 for overpayments made but not earned for 1988 rice production. The Agricultural Stabilization and Conservation County Committee determined the overpayment by virtue of the fact that debtor earned none of that advance. The debtor was entitled to appeal that decision pursuant to 7 C.F.R. 780. The appeals process, however, was stopped to comply with the automatic stay. If the appeals process cannot be completed, apparently the setoff has been lost, even though this court says that has not been decided.

The district court has said that setoff may be denied if the creditor exercises the setoff prior to modification of the stay. The majority writing here seems to agree. If so, that is surely contrary to this court's opinion in Matter of Corland Corp. where the setoff was allowed for payments by the creditor to a third

party despite the creditor's failure to recognize or lift the automatic stay.

Whatever the procedure, we should follow Matter of Corland Corp. and protect the Government from the loss of its right of setoff.