SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: July 1, 2015

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

MERIDIAN DOWNTOWN DEVELOPMENT LLC,	**CASE NO. 15-00924-NPO**
DEBTOR.	**CHAPTER 11**

ORDER GRANTING MOTION FOR RELIEF FROM THE AUTOMATIC STAY, FOR ABANDONMENT OF PROPERTY OF THE ESTATE, AND FOR OTHER RELATED RELIEF

This matter came before the Court for hearing on June 19, 2015 (the "Hearing") on the Motion for Relief from the Automatic Stay, for Abandonment of Property of the Estate, and for Other Related Relief (the "Motion for Relief") (Dkt. 44) filed by BankPlus and the Responses to Motion for Relief from the Automatic Stay, for Abandonment of Property of the Estate, and for Other Related Relief (Dkt. 58) filed by the debtor in possession, Meridian Downtown Development LLC (the "Debtor"), in the above-referenced bankruptcy case (the "Bankruptcy Case"). At the Hearing, Timothy J. Anzenberger represented BankPlus, and J. Walter Newman represented the Debtor. At the conclusion of the Hearing, the Court ruled from the bench granting the Motion for Relief. This Order memorializes and supplements that bench ruling.

Jurisdiction

This Court has jurisdiction over the subject matter of and the parties to this proceeding pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G). Notice of the Motion for Relief was proper under the circumstances.

Facts

1. The Debtor was formed in 2011 by John C. Bounds ("Bounds") and Angela Bot, also known as Angela Barker ("Barker"), to take advantage of federal and Mississippi historic preservation tax credits available to real estate developers who rehabilitate "certified historic structures." *See* 26 U.S.C. § 47(c)(3); MISS. CODE ANN. § 27-7-22.31(1)(a). In general, the Debtor's business plan was to acquire and restore commercial buildings in the Meridian Downtown Historic District in Meridian, Mississippi. Currently, Bounds is the sole owner of the Debtor. Until August 2014, Barker also held an interest in the Debtor.

2. In late 2011 and early 2012, the Debtor borrowed the original principal amount of $688,390.00 from BankPlus, secured by deeds of trust that purportedly cover five (5) parcels of real property located in Lauderdale County, Mississippi.

3. BankPlus extended the first commercial loan (the "First Loan") (BP Ex. 1)[1] to the Debtor in the original principal amount of $95,625.00 on November 28, 2011. On February 28, 2012, the First Loan was modified pursuant to the Change in Terms Agreement (the "Modification") (BP Ex. 1), and the original principal amount of the First Loan was changed to $95,406.18 (*Id.*). The First Loan is secured by a deed of trust on a single-family residence (the

[1] The exhibits introduced into evidence at the Hearing by BankPlus are cited as "(BP Ex. ____)". The Debtor did not introduce any exhibits into evidence.

"Rental Home") located at 5903 19th Avenue, Meridian, Mississippi. (*Id*.).

4. BankPlus extended the second commercial loan (the "Second Loan") (BP Ex. 2) to the Debtor in the original principal amount of $240,000.00 on December 16, 2011. The Second Loan is secured by a deed of trust on a restaurant previously occupied by D.T. Grinders but is now vacant (the "Restaurant") and also by a deed of trust on a ten (10)-acre lot immediately adjacent to the Restaurant (the "Lot").[2] (*Id*.). The Restaurant and Lot are located near 1600 24th Avenue, Meridian, Mississippi.

5. BankPlus extended the third commercial loan (the "Third Loan") (BP Ex. 3) to the Debtor in the original principal amount of $352,765.00 on February 15, 2012. The Third Loan is secured by a furniture warehouse converted, in varying degrees, into four (4) condominiums (the "Warehouse Condos") located at 2319 4th Street, Meridian, Mississippi. (*Id*.). The Third Loan is also secured by a house converted into three (3) apartments (the "Triplex") located at 1414 24th Avenue, Meridian, Mississippi. (*Id*.).

6. The First Loan, Modification, Second Loan, and Third Loan are collectively referred to as the "Loans." The Loans are purportedly cross-collateralized by all five (5) properties: the Rental Home, Restaurant, Lot, Warehouse Condos, and Triplex (collectively, the "Property"). The Debtor receives no income from the Property.

[2] At the Hearing, an issue arose regarding the extent to which the deed of trust on the Lot is enforceable given that it was granted to BankPlus by the Debtor, but the Debtor does not own the Lot. BankPlus contends that the deed of trust is valid because it was signed by Bounds in his capacity as the owner of the Debtor, and Bounds owns the Lot. The Court notes that if the deed of trust on the Lot is invalid, BankPlus has less collateral to secure its indebtedness, which further supports the Court's decision to grant the Motion for Relief. The Court, however, finds it unnecessary to reach that decision and assumes for purposes of the Motion for Relief that BankPlus has a valid security interest in all of the real property subject to the deeds of trust.

7. Of the Property that secures the Loans, the Debtor owns only the Restaurant and Warehouse Condos. Neither the Restaurant nor Warehouse Condos are listed in the National Register of Historic Places or certified by the National Parks Service, an important step in the application process for claiming historic tax credits. *See* 26 U.S.C. §47(c)(3); MISS. CODE ANN. § 27-7-22.31.

8. As for the remaining Property that secures the Loans, the Rental Home is owned by Barker, and the Lot and Triplex are owned by Bounds.

9. The Debtor defaulted under the terms of the Loans. With respect to the Second Loan and Third Loan, the Debtor has not been current in its monthly payments since October 2014. Except for the Rental Home, the Property was set for foreclosure sales on March 17, 2015 at 11:00 a.m.

10. At 10:53 a.m. on March 17, 2015, the Debtor filed a voluntary petition for relief (the "Petition") (Dkt. 1) pursuant to chapter 11 of the Bankruptcy Code[3] to stop the foreclosure sales. The Debtor filed an amended petition for relief on May 6, 2015. (Dkt. 56).

11. The Debtor manages the Property as a debtor in possession under § 1107 and § 1108 and has the same duties set forth for a trustee. According to Bounds, the Property has not generated any income since 2013 and so far this year has lost income. The Debtor has not filed federal or state income tax returns since at least 2013.

12. On April 23, 2015, the Court entered the Agreed Scheduling Order (Dkt. 50) setting July 15, 2015 as the deadline for the Debtor to file a disclosure statement containing the

[3] Hereinafter, the "Code" refers to the Bankruptcy Code found at title 11 of the United States Code, and all code sections refer to the Code unless otherwise noted.

information set forth in § 1125 and a confirmable plan of reorganization.

13. The Debtor has not paid the United States Trustee ("UST") the quarterly fees required under 28 U.S.C. § 1930(a) and has not filed any of the monthly operating reports ("MORs") pursuant to the UST's *Chapter 11 Operating Guidelines and Reporting Requirements*.[4] Moreover, the Debtor has not opened a debtor-in-possession checking account.

14. Tommy Williams ("Williams"), a vice-president of BankPlus, testified at the Hearing that as of June 4, 2015, the total payoff amount of the Loans is $770,861.73, including interest and late fees. Specifically, the payoff amount of the First Loan and Modification is $108,790.82 (BP Ex. 8); the Second Loan, $264,213.48 (BP Ex. 9); and the Third Loan, $397,857.43 (BP Ex. 10). Williams also testified that the 2013-2014 *ad valorem* taxes on the Property are delinquent. (BP Ex. 4). Additionally, the Debtor has not maintained insurance on the Property, and BankPlus has exercised its contractual rights under the Loans to obtain force-placed insurance on all of the Property with the exception of the Lot.

15. Richard Eakes ("Eakes") is a Mississippi certified general real estate appraiser who qualified at the Hearing as an expert in the field of residential real estate appraisal. Eakes appraised the Rental Home at BankPlus's request. Eakes opined that as of April 28, 2015, the Rental Home had a fair market value of $116,000.00 using the sales comparison approach,[5] and

[4] On June 16, 2015, Henry G. Hobbs, Jr., Acting United States Trustee for Region 5, filed the United States Trustee's Motion to Convert or Dismiss (Dkt. 85) under § 1112(b) on the ground the Debtor has failed to file MORs or pay quarterly UST fees. That matter is scheduled for hearing on July 15, 2015.

[5] Under the sales comparison approach, an appraiser analyzes sales of reasonably similar properties and then adjusts the purchase price to account for differences between the subject property and the comparable properties. *Int'l Bank of Commerce v. Davis (In re Diamond Beach VP, LP*, 50 B.R. 701, 714 (Bankr. S.D. Tex. 2014).

$120,000.00 using the income approach.[6] (BP Ex. 11). The Rental Home is a single-story, three bedroom, two bathroom residence built 47 years ago. Eakes's appraisal was based solely on a visual inspection from the street. He was unable to inspect the interior of the Rental Home because Barker, who owns the Rental Home, refused to allow him access. Eakes's testimony was unrefuted by the Debtor at the Hearing.

16. Brad G. Belue ("Belue") is a Mississippi certified general real estate appraiser who qualified at the Hearing as an expert in the field of commercial real estate appraisals. Belue appraised the Restaurant, Lot, Warehouse Condos, and Triplex at BankPlus's request.

17. Belue opined that the "highest and best use" of the Restaurant was to remove the existing structure and redevelop the tract for another commercial use. (BP Ex. 12). He appraised the Restaurant as if it were a vacant site. Using a sales comparison approach of other vacant sites, he opined that the fair market value of the Restaurant is $200,000.00. With the Lot, the fair market value increases to $240,000.00. The Restaurant, according to Belue, has some historical architectural features but has been damaged by fire and is in need of substantial repairs. There are holes in the ceiling, missing windows, and leaks in the roof. Belue stated that the Restaurant is in the same, if not worse, condition than it was when he appraised it in 2012.

18. Belue used the sales comparison approach to determine the "as is" fair market value of the Warehouse Condos at $200,000.00. (BP Ex. 13). He described the Warehouse Condos as a two-story masonry building constructed in 1890. Only one of the four condominiums is complete; the others are still in the early stages of construction. He found the "highest and best

[6] Under the income approach, net income is determined by estimating market rent of the property, deducting for expenses, and "converting the net income into a present dollar estimate by capitalization to arrive at an indication of value." *In re Grind Coffee & Nosh, LLC*, No. 11-50011-KMS, 2011 WL 1301357, at *4 (Bankr. S.D. Miss. Apr. 4, 2011).

use" was to finish the condominiums and opined that the "as complete" value would be $300,000.00.

19. Belue opined that the fair market value of the Triplex is in the range of $83,000.00 to $86,000.00 using a sales comparison approach and a range of $82,000.00 to $86,000.00 using an income approach. (BP Ex. 14). Based on these ranges, he opined that the fair market value of the Triplex is $85,000.00. The Triplex is an 87-year-old multi-family residential building. Belue was unable to inspect the second floor of the two-story building because Bounds, who owns the Triplex, was unable to contact the tenant who lives there to obtain his consent. In one of the two apartments on the first floor inspected by Belue, there is a bathtub full of black, putrid water. The apartment stinks. There are holes in the ceiling and debris on the floor.

20. In the Motion for Relief, BankPlus asks the Court to terminate the automatic stay under § 362(d)(1) on the ground that it lacks adequate protection and under § 362(d)(2) on the ground there is no equity in the Property and the Property is not necessary to an effective reorganization. BankPlus also asks the Court to order the abandonment of the Property from the estate under §554(b) because the Property is burdensome to the estate and/or is of inconsequential benefit. The Debtor maintains that terminating the stay is premature and that it is ready to make an adequate protection payment to BankPlus.

Discussion

A debtor that files for protection under chapter 11 of the Code is entitled to an automatic stay of most actions against the debtor, the debtor's property, or property of the estate to recover a debt that arose prior to the petition date. *See* 11 U.S.C. § 362(a); *In re Mantachie Apt. Homes, LLC*, 488 B.R. 325, 331 (Bankr. N.D. Miss. 2013). The automatic stay is a "key component of

federal bankruptcy law [and] is one of the fundamental debtor protections provided by the bankruptcy laws." *S.I. Acquisition, Inc. v. Eastway Delivery Serv., Inc. (In re S.I. Acquisition, Inc.)*, 817 F.2d 1142, 1146 (5th Cir. 1987) (quotation omitted).

In this matter, not all of the Property that secures the Loans is property of the Debtor or the bankruptcy estate. Acknowledging this fact, BankPlus contends that a discussion of all of the Property is necessary to evaluate fully its position and to dispel any attempt by the Debtor to apply the doctrine of marshaling of assets.

A. Stay Relief: § 362(d)(1)

Section 362(d)(1) authorizes relief from the automatic stay for "cause," which includes the lack of adequate protection of an interest in property. 11 U.S.C. § 362(d)(1). Whether "cause" exists for terminating the stay must be determined on a case by case basis. *Little Creek Dev. Co. v. Commonwealth Mortg. Corp. (In re Little Creek Dev. Co.)*, 779 F.2d 1068 (5th Cir. 1986); *Mendoza v. Temple-Inland Mortg. Corp. (In re Mendoza)*, 111 F.3d 1264, 1271 (5th Cir. 1997). The party seeking termination of the stay has the burden of proving the debtor's lack of equity in the property. 11 U.S.C. § 362(g). The debtor has the burden of showing that the moving party's interest in the property is adequately protected. *Id.*

The unrefuted evidence at the Hearing established that the Debtor has defaulted on the Loans and has not made any payments on the Second Loan or Third Loan since October 2014. Moreover, the Debtor has not maintained insurance on the Property and has failed to keep current the *ad valorem* taxes on the Property. Additionally, the fair market value of the Property is less than the total payoff amount of the Loans. According to Williams, the payoff amount, not including attorney's fees, for each of the Loans as of June 4, 2015, is as follows:

First Loan and Modification (Rental Home)	$108,790.82
Second Loan (Restaurant and Lot)	$264,213.48
Third Loan (Warehouse Condos and Triplex)	$397,857.43

(BP Exs. 8-10). No evidence was offered at the Hearing to dispute Williams's calculation of the payoff amounts. The total payoff amount of $770,861.73 is more than $641,000.00, which is the total value of the Property according to Eakes and Belue, as shown in the following chart:

Rental Home	$116,000.00
Restaurant and Lot	$240,000.00
Warehouse Condos	$200,000.00
Triplex	$85,000.00

(BP Exs. 11-14).

The Debtor did not present any expert witnesses at the Hearing to dispute the valuation of the Property by Eakes and Belue. Bounds, however, criticized Belue's decision to appraise the Restaurant as if it were vacant land. Bounds was adamant that the removal of the wooden structure would result in the loss of historic tax credits and might even violate preservation laws given the Restaurant's historical significance. The evidence at the Hearing showed, however, that no tax credits have yet been authorized and, indeed, that final step in the application process would require full restoration of the Restaurant. *See* 26 U.S.C. § 47(c)(3); MISS. CODE ANN. 27-7-22.31. But the Court agrees with Bounds that any hope of the Debtor claiming tax credits would be lost if the Restaurant is demolished, abandoned, or removed by the Debtor. *See Id*. Even so, the Debtor did not provide any evidence supporting its contention that the fair market

value of the Restaurant would be substantially higher if the historic tax credits are left intact, and the Court found Bounds's testimony regarding the probability of claiming tax credits in the near future unconvincing and speculative. Based on the testimony of Williams, Eakes, and Belue, the Court finds that BankPlus has met its burden of proving that no equity exists in the Property to protect its interest. For that reason, the Court finds that the burden of proof has shifted to the Debtor to prove that BankPlus is adequately protected. *See* 11 U.S.C. § 362(g).

Adequate protection is not defined in the Code, but examples of adequate protection are found in § 361. One of the examples in § 361 is a cash payment in an amount necessary to compensate the party requesting relief for any decrease in value of the property of the estate during the bankruptcy case. 11 U.S.C. § 361. In an attempt to satisfy § 361, Bounds testified at the Hearing that he is willing to pay BankPlus $60,000.00 in cash as an adequate protection payment. Because the Loans exceed the fair market value of the Property by more than $120,000.00, the Court concludes that a highly speculative payment of $60,000.00 does not adequately protect BankPlus's interests.[7]

The poor condition of the Restaurant and Warehouse Condos and the Debtor's failure to maintain them are well documented in the photographs that accompanied Belue's appraisal. In particular, a side by side comparison of photographs of the same bathroom taken in 2012 and 2015 shows that very little effort was made by the Debtor after 2012 to finish the construction of the Warehouse Condos. That the Debtor was unable to dispose of a bucket of trash sitting in a bathtub for three (3) years fosters no great expectation that Debtor will properly maintain the

[7] The Debtor did not present any proof of the source of these funds. During opening statements, counsel for the Debtor informed the Court that Bounds's father would testify on behalf of the Debtor, but he never made an appearance.

Property during the Bankruptcy Case. For all of these reasons, the Court finds that BankPlus has shown that it is entitled to relief under § 362(d)(1). The Court next examines the ground for relief asserted by BankPlus under § 362(d)(2).

B. Stay Relief: § 362(d)(2)

Section 362(d)(2) grants relief from the automatic stay if the debtor has no equity in the property and the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(2)(A) and (B). The test under § 362(d)(2) is twofold; the stay cannot be terminated unless both conditions are satisfied. First, the Court must determine whether there is any equity in the property. As used in § 362(d)(2)(A), "equity" is the difference between the value of the property and the encumbrances against it.[8] *Sutton v. Bank One, Tex., Nat'l Ass'n (In re Sutton)*, 904 F.2d 327, 329 (5th Cir. 1990). Second, the Court must determine whether the property is necessary to an effective reorganization. *Id*. That question depends on whether the debtor can show a reasonable prospect for a successful reorganization within a reasonable time. *Id*. at 330. The party requesting termination of the stay has the burden of proving the debtor's lack of equity in the property. 11 U.S.C. § 362(g). The debtor has the burden of proving that the property is necessary to an effective reorganization. *Id*.

1. Debtor's Equity in the Property

As discussed previously, the Property is encumbered by liens held by BankPlus in the amount of $770,861.73, which exceed its fair market value of $641,000.00. In addition to the

[8] The concept of equity differs under § 362(d)(1) and § 362(d)(2) in that equity under § 362(d)(1) is concerned only with the creditor's interest in the collateral whereas equity under § 362(d)(2) is concerned with the debtor's interest in the collateral, and all liens against the collateral are relevant to that inquiry. *See Nantucket Investors II v. Calif. Fed. Bank (In re Indian Palms Assoc.)*, 61 F.3d 197, 207 (3d Cir. 1995).

Loans, the Debtor's bankruptcy schedules indicate that the Debtor is indebted to a subcontractor in the amount of $60,000.00 (Schedule F, Dkt. 39 at 10) and a taxing authority in the amount of $40,413.61 (Schedule E, Dkt. 39 at 9). Clearly, the Debtor has no equity in the Property.

2. Necessity of the Property to an Effective Reorganization

Because BankPlus has established that the Debtor retains no equity in the Property, the burdens falls on the Debtor to demonstrate the Property is necessary for an effective reorganization. In order to satisfy this burden, the Debtor must make "not merely a showing that if there is conceivably to be an effective reorganization, this [P]roperty will be needed for it; but that the [P]roperty is essential for an effective reorganization that is in prospect." *United Sav. Assoc. of Tex. v. Timbers of Inwood Forest Assocs., Ltd*., 484 U.S. 365, 376-77 (1988).

BankPlus is the largest creditor in this Bankruptcy Case, and the Debtor's only substantive assets (the Restaurant and Warehouse Condos) secure the Loans. BankPlus has indicated it will not vote for a plan, making the success of a plan unlikely. 11 U.S.C. § 1129(8). Moreover, according to Bounds, the Debtor has failed to generate any income since 2013 and so far this year has generated a negative income. For this reason, the Debtor has not filed income tax returns since at least 2013. Yet, the foundation of the Debtor's plan of reorganization appears to be the opportunity for historic tax credits. Bounds, however, was unable to explain at the Hearing how the Debtor will benefit from historic tax credits if the Restaurant and Warehouse Condos are not generating any taxable income.

Bounds testified at the Hearing that the Debtor recently leased the Restaurant to a new tenant, but Bounds was unable to produce a written lease agreement or provide a date when the new tenant would occupy the Restaurant. Moreover, no evidence was presented at the Hearing to

substantiate the source of funds for the renovations. Although Bounds testified that he and his family will pay for the costly renovations to the Restaurant through a line of credit, none of his family members testified at the Hearing to confirm their financial commitment to the Debtor.[9] His testimony about completing the construction of the Warehouse Condos was just as conjectural. In short, the reorganization plan of the Debtor was left to the Court's speculation. How much will the renovation of the Restaurant and Warehouse Condos cost? How will the Debtor pay for the renovations? When will the renovations be finished? When will the Restaurant and Warehouse Condos generate rental income? What if the Debtor's application for tax credits is not approved? At best, Bounds presented only a bare sketch of a possible plan. "[T]he debtor [must] do more than manifest unsubstantiated hopes for a successful reorganization." *Canal Place Ltd. P'ship v. Aetna Life Ins. Co. (In re Canal Place L.P.)*, 921 F.2d 569, 577 (5th Cir. 1991).

The Debtor points out that the Motion for Relief was filed only thirty (30) days after the Petition and contends that the Motion for Relief is premature. The Debtor insists that it should have an opportunity to file a confirmable plan on July 15, 2015 without termination of the stay. The Court is aware that in the early stages of a bankruptcy case a finding of no reasonable possibility of reorganization should be weighed against the statutory objective favoring reorganization, but the Court finds that the Debtor's stated intent to renovate the Restaurant and Warehouse Condos where the Debtor has taken no action toward that end for almost three (3) years is insufficient to carry its burden of persuasion that there is a reasonable prospect for a successful reorganization. Even within the four months in which a chapter 11 debtor is given the exclusive

[9] As previously noted, the Debtor had expected Bounds's father to testify at the Hearing, but he failed to appear.

right to submit a plan, the "lack of any realistic prospect of effective reorganization will require § 362(d)(2) relief." *Timbers of Inwood Forest Assocs.*, 484 U.S. at 375-76. As the Court stated at the conclusion of the Hearing, there does not appear to be any chance for confirmation of a plan in this Bankruptcy Case.

C. Abandonment of Property from the Estate: § 554

In the Motion for Relief, BankPlus also asks that the estate's interest in the Property be abandoned. Pursuant to §554(b), property may be abandoned from the estate when the property "is of inconsequential value and benefit to the estate." Because the Debtor retains no equity in the Property and because the Court has found that BankPlus is entitled to a termination of the stay in order to enforce its interest in the Property, abandonment of the Property from the estate is appropriate under § 554(b).

Conclusion

For the above and foregoing reasons, the Court finds that the Debtor has failed to provide adequate protection to BankPlus, the Debtor does not have equity in the Property, and the Property is not necessary for an effective reorganization. The Court further finds that the Property is of inconsequential value and benefit to the estate. Accordingly, the Court finds that the Motion for Relief should be granted.

IT IS, THEREFORE, ORDERED that the Motion for Relief is granted.

IT IS FURTHER ORDERED that pursuant to § 362(d)(1) and § 362(d)(2), the automatic stay of § 362(a) is terminated with respect to BankPlus.

IT IS FURTHER ORDERED that pursuant to § 554(b), the Property is abandoned from the Debtor's bankruptcy estate.

IT IS FURTHER ORDERED that the fourteen (14)-day stay in Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived.

##END OF ORDER##