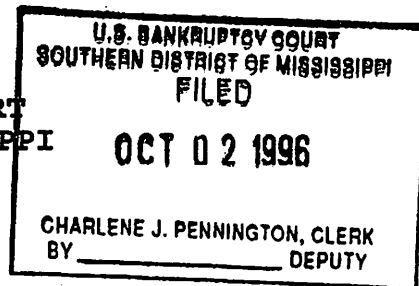


IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
JACKSON DIVISION



IN RE: WILLIAM MANN and  
DOROTHY D. MANN

CASE NO. 96-01303JEE  
CHAPTER 11

MOTION NO. M960403

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Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

The Court has before it for consideration, the *Motion to Lift Stay and for Other Relief* filed by American Federated Life Insurance Company ("AFLIC"). The motion in its entirety relates to two parcels of real property, the Debtors' home and an apartment complex. However, the parties are in agreement that the Court will only consider at this time that portion of the motion relating to the Debtors' home. After considering the evidence presented to the Court during the evidentiary hearing on the matter along with arguments of counsel, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On April 11, 1996, William Mann and Dorothy D. Mann filed a joint petition for relief under Chapter 11 of the Bankruptcy

Code<sup>1</sup>. Shortly thereafter, in May of 1996, AFLIC filed the *Motion to Lift Stay and for Other Relief* which is presently before the Court. AFLIC alleges that it holds a secured claim against the Debtors' residence and an apartment complex, both located in Jackson, Mississippi, and seeks relief from the automatic stay as to those two properties. The secured claims of AFLIC on the Debtors' residence and the apartment complex arise out of separate transactions and are unrelated to each other for the purposes of this motion. By agreement of the parties, the Court will only consider at this time the portion of the motion seeking relief from the automatic stay as it applies to AFLIC's claim against the Debtors' residence. Accordingly, at the hearing on the motion, the parties only presented evidence to the Court regarding AFLIC's claim secured by the Debtors' residence.

In support of its motion for relief from the automatic stay, AFLIC asserts that the Debtors do not have any equity in the property, that the property is not necessary to an effective reorganization, that the Debtors have no regular income and that there is no reasonable probability of confirmation of a successful reorganization plan within a reasonable period of time. In response to AFLIC's motion, the Debtors contend that a substantial equity cushion exists in the property to adequately protect AFLIC, and that they should be allowed to make some type of adequate protection payments while they market the property over a five year

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<sup>1</sup> Hereinafter all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

period commencing upon confirmation of their proposed plan of reorganization.

The parties are in agreement that AFLIC has a claim for approximately \$330,000 which is secured by the home of Mr. and Mrs. Mann in Jackson, Mississippi. The home is located at 1543 North State Street, next to Millsaps College, in what is known as the Belhaven/Millsaps area of Jackson. On October 14, 1994, the Debtors, William Mann and Dorothy D. Mann, borrowed from AFLIC the sum of \$255,000 for the purchase of the home. In connection with the transaction, Mr. and Mrs. Mann executed a promissory note in the principal amount of \$255,000 with interest accruing at 10 percent per annum. Under the terms of the promissory note, monthly payments of interest became due beginning November 15, 1994 and the entire principal amount and unpaid interest were due on October 15, 1995. As security for the promissory note, the Manns executed a deed of trust on the property in favor of AFLIC. On November 17, 1994, the Manns borrowed an additional \$35,000 from AFLIC and executed another promissory note for the amount borrowed with interest accruing at 12 percent per annum. Under the terms of the second promissory note the entire principal amount and accrued interest became due on December 17, 1994.

The office manager of AFLIC testified that as of the date of the hearing, the Debtors have made no reduction in the principal amount of the \$255,000 note and also have not made an interest payment on the note since June of 1995. As to the \$35,000 note, the evidence shows that in May of 1995, the Debtors made a

principal payment of approximately \$350 plus accrued interest on the \$35,000 note. No further payments have been made on the note.

Since the amounts due under the terms of the promissory notes are not in dispute, most of the evidence presented at the hearing related to the value of the property.

To support its position that the Debtors lack equity in the property, AFLIC presented the expert testimony of Gary McFarland, a real estate appraiser. Mr. McFarland testified that in his opinion the present market value of the property is approximately \$325,000. Mr. McFarland based his opinion on an appraisal which he prepared at Mr. Mann's request in early April, 1996. Mr. McFarland testified that in August of 1994, at the realtor's request, he originally appraised the property for marketing purposes. At the time of the original appraisal, the house had been on the market for some time with a list price of \$475,000. The price was lowered to \$395,000, and no good offers were being made on the house. His opinion at that time was that its value for marketing purposes should be somewhere between \$325,000 and \$375,000. Mr. McFarland further explained that in arriving at the \$325,000 present market value for the April 16, 1996 appraisal, which he prepared at Mr. Mann's request, he considered, in addition to comparable sales, the fact that the house stayed on the market for 993 days and finally sold for \$250,000, only eighteen months prior to April, 1996. No changes of any significance had been made to the house since the time of purchase.

The Debtors also presented testimony regarding the value of the house to support their position that there is a substantial equity cushion in the property. The Debtors' offered the expert opinion of Van Duncan, also a real estate appraiser, who testified that the present market value of the property is \$425,000. To support his opinion, Mr. Duncan relied on an appraisal dated April 18, 1996, which he prepared at Mr. Mann's request. In his appraisal, Mr. Duncan used as comparable sales three homes situated one mile north of the Debtors' home in what is generally known as the Woodland Hills area of Jackson. Mr. Duncan testified that based on his knowledge of the Debtors' property and the comparable sales data, that the Manns' house should sell for \$425,000 within three to six months if properly priced and marketed. During cross-examination, Mr. Duncan stated that he was not aware that the Manns had purchased the home in October of 1994 for \$250,000 in the same state as it presently exists.

The attorney for the Manns placed into evidence a copy of a plan of reorganization which was filed the morning of the hearing. No testimony was offered regarding the feasibility of the plan and no disclosure statement has been filed.

CONCLUSIONS OF LAW

AFLIC seeks relief from the automatic stay in order to pursue its remedies under nonbankruptcy law. AFLIC is proceeding under § 362(d) which provides in relevant part as follows:

11 USC § 362  
§ 362. Automatic stay.

. . . .

(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) with respect to a stay of an act against property under subsection (a) of this section, if -

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

When relief from the automatic stay is sought pursuant to § 362(d)(2), the creditor has the burden of proving that the Debtor has no equity in the property. Once the creditor proves that the Debtor has no equity, the burden shifts to the Debtor to show that the property in question is necessary to an effective reorganization. 11 U.S.C. § 362(g). United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, LTD., 484 U.S. 365, 375, 98 L.Ed.2d 740, 751, 108 S.Ct. 626 (1988).

"'Equity' as used in section 362(d) portends the difference between the value of the subject property and the encumbrances against it." Sutton v. Bank One, Texas National Ass'n (Matter of Sutton), 904 F.2d 327, 329 (5th Cir. 1990) (citations omitted). Since the total amount due under the terms of the two promissory notes is not in dispute, the question of whether the Debtors have equity in the property is answered by a determination of the value of the property.

In considering the evaluation of property by bankruptcy courts Congress did not dictate a particular appraisal method. Rather, valuation is determined case-by-case, taking into account the nature of the debtor's business, market conditions, the debtor's prospects for rehabilitation, and the type of collateral. See 2 Collier on Bankruptcy ¶ 361.02 (15th ed. 1990); H.R. Rep. No. 595, 95th Cong., 2d Sess. 339, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 6295; In re Conquest Offshore Int'l, Inc., 73 B.R. 171 (Bankr. S.D. Miss. 1986).

Sutton v. Bank One, Texas National Ass'n (Matter of Sutton), 904 F.2d 327, 330 (5th Cir. 1990).

AFLIC presented evidence to the Court in the form of expert testimony that the present market value of the Debtors' home is \$325,000. The Manns presented their expert testimony that the present market value of their home is \$425,000. After considering all of the evidence presented, the Court finds that the present market value of the property is \$325,000. In arriving at this conclusion, the Court finds of great significance that the house was on the market for an extended period of time when the Manns purchased it in 1994. During that time the property was listed with a realtor with an original asking price of \$475,00, which was later lowered to \$395,000. In October of 1994, the house was finally sold to the Manns in an arms length transaction for \$250,000. No evidence was presented that any substantial improvements have been made to the property during the two years that the Manns have owned the house or that the market has changed significantly in the last two years. Additionally, the Court did not find the comparable sales used by Mr. Duncan, the expert

witness for the Manns, to be convincing. While the Manns' house is located directly on North State Street, a major commercial thoroughfare in the Belhaven/Millsaps area of Jackson, all of the comparable sales used by Mr. Duncan in determining market value are located on large lots in the Woodland Hills area of Jackson, on exclusively residential streets.

Having found that the value of the property in question is \$325,000 and that the liens against the property amount to approximately \$330,000, the Court concludes that AFLIC has met its burden under §362(d)(2)(A) of showing that the Debtors do not have equity in the property. Next, the Court must consider whether the Debtors have met their burden of showing that the property is necessary to an effective reorganization.

The United States Supreme Court has stated that the Debtor's burden of showing that the property is necessary to an effective reorganization requires:

"not merely a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization that is in prospect. This means, as many lower courts, including the en banc court in this case, have properly said, that there must be 'a reasonable possibility of a successful reorganization within a reasonable time.' 808 F2d, at 370-371, and nn 12-13, and cases cited therein."

United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, LTD., 484 U.S. 365, 375-6, 98 L.Ed.2d 740, 751, 108 S.Ct. 626 (1988).



In support of their argument that the home is necessary to an effective reorganization, the Debtors rely on their plan of reorganization that was filed the day of the hearing. While counsel for the Debtor argued in support of the plan, no testimony was offered regarding the content of the plan or the feasibility of the plan. Since the Court takes judicial notice of its own file, and the plan has been filed with the Court, the Court has reviewed the Manns' proposed plan of reorganization. The plan is a liquidating plan that proposes to sell the Debtors' house and two apartment complexes within five years from the date of confirmation, while litigating in state court certain claims against AFLIC and other Defendants which arise out of the same transactions that gave rise to AFLIC's secured claims against the Debtors' estate. The Debtors propose to use the proceeds from the sale of the home first to satisfy the \$330,000 secured claim of AFLIC. After satisfying the secured claim of AFLIC, the Debtors propose to retain half of the remaining proceeds and distribute the other half of the remaining proceeds to the unsecured creditors. The Debtors' plan further proposes to sell the estate's two apartment complexes within five years from the date of confirmation, and after satisfying the secured claims against the property, to retain 85 percent of the remaining proceeds, while distributing 15 percent to the unsecureds. Likewise, the plan proposes that the Debtors retain 85 percent of any proceeds from the state court lawsuit and distribute 15 percent to unsecureds.

The Debtors' case has been pending for over five months, but as of the date of the hearing the Debtors have not attempted to sell the property. By their own expert testimony, the house should sell within three to six months time if properly priced and marketed. The Court finds that the Debtors have not met their burden of showing that the property is necessary to an effective reorganization. The property in question is an expensive home, not a revenue generating property. The estate resources expended to maintain the property and to service the debt on it are unlikely to yield a return for the benefit of the unsecured creditors. Even if the property were to sell for \$425,000 at the end of five years, when the liens against the property, the expenses of selling the property, the funds expended to service the debt on the property for five years, and the Debtors' retention of half of the net proceed are all taken into account, there still would be little or no benefit for the unsecured creditors<sup>2</sup>.

The Court finds that the Debtors have not met their burden of showing that the property in question is necessary to an effective reorganization, and therefore, AFLIC is entitled to relief from the automatic stay. However, the Court recognizes that

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<sup>2</sup> Hypothetically, the Court assumes a sales price of \$425,000 less a six percent sales commission, less \$330,000 in liens, which would result in net proceeds of \$69,500. The Debtors' plan proposes to retain half of the net proceeds, leaving \$34,750 for the benefit of the unsecureds, assuming a best possible case scenario on the sales price and expenses. The estate would expend at least \$165,000 on interest alone, excluding taxes and insurance, to service a \$330,000 secured claim at the contract rate of 10 percent per annum for 60 months (the second note for \$35,000 provides for interest at 12 percent per annum).

the property is likely to sell for a better price if it is actively marketed by a qualified professional rather than being sold at foreclosure. By their own expert testimony, the Debtors presented evidence to the Court that three to six months should be sufficient time to bring the present market value for the property.

The Court is of the opinion that the interest of AFLIC in the property can be adequately protected, while allowing the Debtors an opportunity to realize the fair market value of the property, by implementing the following terms and conditions:

1. On or before the 25th day of October, November and December, 1996, and the 25th day of January and February, 1997, the Debtors shall pay to AFLIC \$3,250 for a total of \$16,250, which is the equivalent of 10 percent per annum on \$325,000 for six months.

2. On or before January 31, 1997, the Debtors shall pay all ad valorem taxes on the property for the tax year 1996.

3. The Debtors shall maintain casualty insurance on the property as required by the terms of the deed of trust on the property and shall also provide proof of coverage to AFLIC.

4. In the event of default by the Debtors of any of the aforesaid requirements, the attorney for AFLIC shall give written notice to the attorney for the Debtors. If the default is not cured within five (5) days, the stay of all actions by AFLIC to enforce its lien as contained in that deed of trust recorded in Book 4366 at Page 1, in the Office of the Chancery Clerk of Hinds County, at Jackson, Mississippi shall be terminated completely, without further notice or hearing.

5. If the stay has not previously terminated, on March 3, 1997, the stay of all actions by AFLIC to enforce its lien as contained in the aforementioned deed of trust shall terminate in all respects, except for the conduct of an actual foreclosure sale which will not be permitted until after April 3, 1997.

6. On April 3, 1997, the stay of all actions by AFLIC to enforce its lien as contained in the aforementioned deed of trust shall be terminated completely.

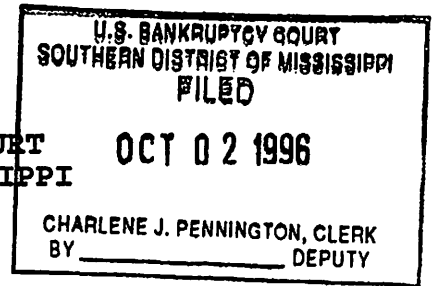
7. The property is not abandoned from the estate.

A separate order consistent with this opinion will be entered in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

This the 2<sup>nd</sup> day of October, 1996.

  
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
JACKSON DIVISION



IN RE: WILLIAM MANN and  
DOROTHY D. MANN

CASE NO. 96-01303JEE  
CHAPTER 11

MOTION NO. M960403

FINAL JUDGMENT

Consistent with the Court's opinion dated contemporaneously herewith, it is hereby ordered and adjudged that the automatic stay shall terminate as to AFLIC on that parcel of real property located at 1543 North State Street, Jackson, Mississippi subject to the following conditions:

1. On or before the 25th day of October, November and December, 1996, and the 25th day of January and February, 1997, the Debtors shall pay to AFLIC \$3,250 for a total of \$16,250 which is the equivalent of 10 percent per annum on \$325,000 for six months.

2. On or before January 31, 1997, the Debtors shall pay all ad valorem taxes on the property for the tax year 1996.

3. The Debtors shall maintain casualty insurance on the property as required by the terms of the deed of trust on the property and shall also provide proof of coverage to AFLIC.

4. In the event of default by the Debtors of any of the aforesaid requirements, the attorney for AFLIC shall give written notice to the attorney for the Debtors. If the default is not cured within five (5) days, the stay of all actions by AFLIC to enforce its lien as contained in that deed of trust recorded in Book 4366 at Page 1, in the Office of the Chancery Clerk of Hinds

County, at Jackson, Mississippi shall terminate completely, without further notice or hearing.

5. If the stay has not previously terminated, on March 3, 1997, the stay of all actions by AFLIC to enforce its lien as contained in the aforementioned deed of trust shall terminate in all respects, except for the conduct of an actual foreclosure sale which is not be permitted until after April 3, 1997.

6. On April 3, 1997, the stay of all actions by AFLIC to enforce its lien as contained in the aforementioned deed of trust shall terminate completely.

7. The property is not abandoned from the estate.

SO ORDERED this the 2<sup>nd</sup> day of October, 1996.

  
UNITED STATES BANKRUPTCY JUDGE