

In the United States Bankruptcy Court

for the Northern District of Iowa

BRAZELTON CEDAR RAPIDS GROUP LC
Debtor(s).

Bankruptcy No. 00-02300-C
Chapter 11

ORDER RE RELIEF FROM STAY AND ADEQUATE PROTECTION

This matter came before the undersigned on December 14, 2000 on Brenton Bank's Motion for Relief from the Automatic Stay and Request for Adequate Protection. Brenton Bank was represented by attorney Thomas Burke. Debtor Brazelton Cedar Rapids Group, L.C. was represented by attorney David Nadler. After the presentation of evidence and argument, the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(G).

FINDINGS OF FACT

Brenton Bank wishes to enforce its mortgage by foreclosing on Debtor's hotel real estate or, in the alternative, to receive adequate protection of its secured claim. Debtor received financing from Brenton Bank in 1998 to construct a hotel near the Cedar Rapids, Iowa airport. The hotel is a 74-room Howard Johnson Express and construction was completed in 1998. By June 30, 1998, Debtor had taken total advances of \$2,900,000 from Brenton Bank. Robert Grote, an officer of the Bank, testified that Brenton Bank did not intend to be a long-term lender for Debtor, but only intended to provide construction financing. As of September 8, 2000 when Debtor filed its Chapter 11 petition, the principle amount due on the loan remained \$2,900,000. Additionally, Debtor owes accrued interest. Brenton Bank recently filed its Proof of Claim, asserting a total claim of \$3,534,473.38. This claim is secured by mortgages on Debtor's hotel real estate.

After the completion of the hotel construction, Debtor's payments to the Bank were irregular. Debtor sought permanent financing from Southern Mortgage Insurance Co ("SMI"). After negotiations, SMI ultimately refused to provide financing to Debtor. Debtor asserts that SMI made a commitment to provide financing but failed to perform. It believes it has a claim against SMI for breach of this commitment. Debtor proposes to assign this claim against SMI to Brenton Bank as part of its offer of adequate protection.

In late 1999, Debtor and Brenton Bank entered into a forbearance agreement. See Exhibit 12. The Bank agreed to forego foreclosure in return for a payment of \$130,000, deposit of \$60,000 in a reserve account from which monthly payments of \$10,000 would be made to the Bank, plus additional monthly payments of \$13,000 from Debtor. Debtor acquired the funds necessary to perform under the forbearance agreement from Mr. Terrence Mealy, who afforded Debtor a cash infusion of \$330,000. In return, Mr. Mealy received a junior real estate mortgage against the hotel property.

Under the parties' agreement, Debtor was to arrange for substitute financing to pay off Brenton Bank by April 2000. When this did not occur, Debtor continued to make monthly payments through June 2000. The Bank has received no payments from Debtor since then. Brenton Bank notes that Debtor is delinquent in paying real estate taxes. The Bank projects Debtor will experience a net loss for the 2000 fiscal year.

By Order filed December 1, 2000, the Court appointed Richard Binder to appraise Debtor's hotel real estate. His ultimate opinion is that the property has a value of \$2,350,000 as of November 13, 2000. His appraisal has been entered into the record.

The average occupancy rate for Debtor's hotel in 2000 was approximately 50%. Mr. Grote testified that the occupancy rate greatly impacts the property's value. He stated that in order to be profitable, a hotel property should have 60-65% occupancy rates. As the appraisal shows, there has been a downward trend of occupancy rates in Cedar Rapids hotels and motels. More rooms exist than are currently in demand in the area because of a building boom in the 1990s.

Debtor offered testimony of Greg Watson, one of its managing members. Mr. Watson stated occupancy growth has been slower than anticipated. The hotel operation is now at the end of its second year. Mr. Watson testified the business will reach full growth after its fourth year. Mr. Watson believes Debtor can propose a confirmable plan. He anticipates the business might need an additional \$500,000 cash infusion. He believes the hotel will turn a profit when it reaches 56-58% occupancy, which he predicts will occur within 18 to 24 months.

Brenton Bank holds a first position security interest in the property. Phoenix Leasing holds a claim of \$279,403 with a second mortgage on the real estate. As noted above, Terrance Mealy has a third mortgage on the property with a claim of \$330,000. Real estate taxes of approximately \$63,780 constitute a lien against the property, as does a judgment held by Simmons Co. in the amount of \$13,054.72.

The Bank estimates that Debtor would need to make monthly payments of approximately \$29,000 to service the total debt of \$3.6 million at 8.5% interest over 25 years. It acknowledges that its secured claim to the value of the real estate, or \$2.35 million, could be serviced by monthly payments of \$18,923, amortized over 25 years with an interest rate of 8.5%. Debtor proposes as adequate protection of the Bank's secured claim, payments to the Bank of \$13,000 per month during the winter months through March 2001. Thereafter, Debtor proposes to pay \$23,000 per month. These payments are in addition to assignment of Debtor's claim against SMI to Brenton Bank.

The Court calculates that total payments over the next nine months under each of these three scenarios are as follows: (1) payment towards the Bank's total claim of \$3.6 million: \$257,202; (2) payment towards the Bank's claim to the appraised value of \$2.35 million: \$167,896.28; (3) payments under Debtor's proposal for adequate protection: \$167,000, plus assignment of the SMI claim.

CONCLUSIONS OF LAW

Under §362(d), the Bank may have relief from the automatic stay to enforce its remedies (1) for cause, including the lack of adequate protection of an interest in property or (2) if the debtor does not have equity in the property and it is not necessary to an effective reorganization. A creditor may obtain relief from the automatic stay on either ground. In re Bowman, 253 B.R. 233, 238 (B.A.P. 8th Cir. 2000).⁽¹⁾

"CAUSE" AND "ADEQUATE PROTECTION" UNDER §362(d)(1)

The Court must grant relief from the automatic stay if it determines that "cause" exists. "Cause" under §362(d)(1) includes "any reason whereby a creditor is receiving less than [the parties'] bargain . . . and is without remedy because of the bankruptcy proceeding." In re Bunke, 172 B.R. 63, 66 (Bankr. D.S.D. 1994).

In applying §362(d)(1), the most basic component of adequate protection is reimbursement to the creditor for a decrease in the value of the security, and thus of its lien, caused by the imposition of the automatic stay or use of the collateral by the debtor. United States Savs. Assoc. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 370 (1988); In re Offerman Farms, Inc., 67 B.R. 279, 281 (Bankr. N.D. Iowa 1986). The interest protected "includes the right of a secured creditor to have the security applied in payment of the debt upon completion of the reorganization; . . . [T]hat interest is not adequately protected if the security is depreciating during the term of the stay." Timbers of Inwood Forest, 484 U.S. at 370.

In order to determine whether a creditor's interest is adequately protected, the Court should value the collateral at the time the creditor requested relief from the stay and determine the amount the collateral has or will depreciate thereafter. In re Deico Elecs., Inc., 139 B.R. 945, 947 (B.A.P. 9th Cir. 1992). An equity cushion may support adequate protection, but is not necessarily an element of proof. In re Elmira Litho, Inc., 174 B.R. 892, 904 (Bankr. S.D.N.Y. 1994). Without an equity cushion, a debtor must provide adequate protection by some other method.

Under §361, the court has the discretion to order lump sum or periodic payments as adequate protection in such amounts and in such frequency as dictated by the circumstances of the case. Deico Elecs., 139 B.R. at 947. Periodic payments, which are meant to compensate for depreciation, might, but need not necessarily be, in the same amount as the payments due on the secured obligation. In re South Village, Inc., 25 B.R. 987, 994 (Bankr. D. Utah 1982) (quoting Senate Reports regarding §362(d)(1) adequate protection).

LACK OF EQUITY; NECESSARY FOR REORGANIZATION

Under § 362(d)(2), the Court shall grant relief from the automatic stay to allow a creditor to pursue an action against property if (1) the debtor lacks equity in the property and (2) the property is not necessary for an effective reorganization. The burden is on the Bank to prove that Debtor lacks equity in the property. 11 U.S.C. § 362(g). If the Bank proves this element of §362(d)(2), the burden shifts to Debtor to show that the property is necessary for an effective reorganization. In re Anderson, 913 F.2d 530, 532 (8th Cir. 1990).

The test for determining equity under the first part of §362(d)(2) involves a comparison between the total liens against the property and the property's current value. Bowman, 253 B.R. at 238. The second prong of the analysis requires Debtor to show that there is a reasonable possibility of a successful reorganization within a reasonable time. Anderson, 913 F.2d at 532. "[Section 362(d)(2)] requires a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; and that the reorganization is in prospect." In re Holiday Assocs. Ltd. Partnership, 139 B.R. 711, 717 (Bankr. S.D. Iowa 1992) (citing Timbers of Inwood Forest, 484 U.S. at 375). Bankruptcy courts demand less detailed showings during the four months in which the debtor is given the exclusive right to put together a plan to ensure the debtor is given the breathing room Congress intended the stay to provide. Anderson, 913 F.2d at 533.

CONCLUSIONS

The Bank is entitled to adequate protection to the extent it has an interest in the hotel property. It has a first priority security interest to the extent of the value of the property, or \$2.35 million. The Bank is undersecured for the amount of its claim which exceeds the value of the property.

Debtor has no equity in the property. The property, obviously, is necessary for Debtor's successful Chapter 11 reorganization, as it is Debtor's sole asset in which to operate its business. This case was filed September 8, 2000. Debtor's 120-day exclusivity period to file a Plan expires within a few days. No Plan of Reorganization has yet been filed.

Cause exists for relief from the automatic stay under §362(d)(1) unless Debtor is able to provide the Bank adequate protection of its secured claim. Debtor offers to assign its claim against SMI to the Bank as part of its adequate protection. The Court finds such claim is too speculative at this time to constitute any protection for the Bank.

Debtor had originally offered adequate protection payments to the Bank of one-half of its monthly net profits pending confirmation. At the hearing, Debtor amended its offer to propose payments of \$13,000 through March 2001 and \$23,000 thereafter. This offer is sufficiently concrete to be considered. As noted above, the Court calculates that after nine months of such payments, the Bank would receive approximately the same amount as would be due if Debtor paid level payments on the \$2.35 million debt. The Court anticipates that a Plan of Reorganization will be in effect, if ever, within that period of time. As Debtor's exclusivity period is just now expiring, it is appropriate to allow Debtor a bit more breathing room in order to put a Plan into action.

The Court concludes Debtor's offer adequately protects the Bank. Debtor shall pay the Bank \$13,000 for January, February and March 2001 with the first payment due within 10 days of the date of this order. After March, Debtor shall make monthly payments of \$23,000 to the Bank. If Debtor fails to timely pay the Bank, the Bank is entitled to relief from the automatic stay without further notice or hearing, upon certifying such default to the Court.

WHEREFORE, Brenton Bank's Motion for Relief from the Automatic Stay is DENIED.

FURTHER, the Bank's Request for Adequate Protection is GRANTED.

FURTHER, Debtor Brazelton Cedar Rapids Group, LC shall pay Brenton Bank \$13,000 per month through March 2001 and \$23,000 per month thereafter. The first payment is due within 10 days of the date of this Order.

FURTHER, if Debtor fails to timely pay the Bank, the Bank is entitled to relief from the automatic stay, without further notice or hearing, upon certifying such default to the Court.

SO ORDERED this 5th day of January, 2001.

Paul J. Kilburg
Chief Bankruptcy Judge

1. Section 362(d) also provides a third ground for relief from the automatic stay in the case of single asset real estate. The parties have not addressed this third ground, nor asserted this is a single asset

real estate case. See In re CBJ Development, Inc., 202 B.R. 467, 472 (B.A.P. 9th Cir. 1996) (finding hotel property does not fit the definition of "single asset real estate").