

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF
IOWA

IN RE:)

) Chapter 11 SHALOM HOSPITALITY, INC.)
) Bankruptcy No. 02-00276

Debtor.)

ORDER RE MOTION FOR RELIEF FROM AUTOMATIC STAY (DOC. #16 AND #20)

On May 1, 2002, the above-captioned matter came on for hearing on a Motion for Relief from Stay filed by Maha-Vishnu Corporation (MVC). Debtor was represented by Attorney John Titler. MVC was represented by Attorneys Wesley Huisinga and Dennis McMenimen. Firstar Bank N.A., n/k/a U.S. Bank, N.A. was represented by Sean Pellitier. The U.S. Trustee's Office was represented by Assistant U.S. Trustee Janet Reasoner. Evidence was presented after which the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G).

STATEMENT OF THE CASE

MVC is a secured creditor by reason of a real estate contract executed November 30, 1999 between Debtor and MVC. The real estate contract involves a single asset consisting of a parcel of property upon which is located a 108 unit motel. MVC filed its Motion for Relief from Stay (Doc. #16) on February 27, 2002. It filed an Amended Motion for Relief from Stay (Doc. #20) on March 8, 2002. The Motion for Relief from Stay is brought pursuant to 11 U.S.C. § 362(d)(3). The Motion is resisted by Debtor as well as by Creditor Firstar Bank.

FINDINGS OF FACT

The property involved in this Motion consists of a tract of land located in Iowa County, Iowa, near Interstate 80, upon which a motel is situated. It has been operating under a Days Inn franchise. The property was owned and operated by MVC from 1993 until 1999 when it was sold on an installment contract to Debtor Shalom Hospitality, Inc. Mr. J.J. Patel, a principal of MVC, testified that during the time that MVC had ownership of the motel, the motel made a profit. MVC continues to make monthly payments on its underlying obligation in the approximate amount of \$10,900. Payments by Debtor Shalom to MVC are in the approximate amount of \$12,900 per month.

The motel was operated by Debtor as a going concern from November 30, 1999 through the year 2000 and into 2001. On August 24, 2001, the motel experienced a fire in which a substantial portion of the building was destroyed. Approximately 40 of the rooms remain intact. The testimony is not clear but it appears that Debtor continued operating the motel after the fire on a reduced level. The amount of revenue generated, however, was minimal. On April 1, 2002, the electricity was shut off. There has been no business operation since that date.

Debtor is in arrears on all of its obligations. At the time the electricity was shut off, Shalom owed approximately \$13,000 in electric bills. It has paid no bills of any substance since January 31, 2002. Debtor has not paid any property taxes, income taxes, or hotel/motel tax since January, 2002. Debtor states that it has paid no creditors during this calendar year with the possible exception of Firstar Bank which apparently has received payments up to March 2002. Debtor has not paid its monthly installments of \$12,900 to MVC since October 1, 2001. Debtor owes in excess of \$100,000 in delinquent contract payments. It has approximately \$2,000 in its bank account and

has no source of revenue. Quarterly fees to the U.S. Trustee were not timely paid.

The fire loss was apparently covered by an insurance contract with Westchester Surplus Lines Insurance Co. This policy covered loss by fire as well as business interruption. The policy expired approximately April 26, 2002. MVC took over coverage as of April 24, 2002 by paying a \$30,000 binder with Lloyds of London. The property has continuing insurance coverage under this binder.

In October 2001, a \$300,000 check was paid to Debtor by Westchester as an advance toward rebuilding this motel. The evidence is unclear why there appears to be such difficulty between Debtor and the insurance company in getting these matters adjusted. As of the time of hearing, the \$300,000 check had not been cashed. From the record presented and the testimony of representatives of Debtor, it is impossible to determine why this matter appears so confused. Apparently, the insurance company is willing to pay under its policy but information and records from Debtor are either slow in being produced or non-existent. Though Debtor testified that this will be resolved within 30 days, there is little factual support for this assertion and little progress has been made in settling the insurance claim so that construction or rebuilding of this motel may begin.

In summary, Debtor is in possession of a parcel of real estate with a largely destroyed motel building located on it. Though difficult to appraise in its present condition, the property is presently valued at \$880,000. The property generated a profit under prior ownership. However, Debtor's tax returns reflect a continuous loss from the time of transfer of ownership to Debtor until the time of the fire in August 2001. Obviously, the motel is generating no profit at the present time. At the time of hearing, the building is dark. The electrical utilities have been shut off and, though the building has water, it is not potable. There is a substantial risk that the remaining rooms will become mildewed because of the absence of electricity and the loss of air circulation in the unburned portion of the building. Debtor has almost completely terminated paying its obligations including its insurance premiums and taxes. There is no present source of income. Though there is insurance, it appears to be in a state of limbo with no reasonable assurances that funds from the insurance policy will be forthcoming at any time in the near future. Based on all of the foregoing, Debtors filed their reorganization petition on January 21, 2002. MVC filed its present Motion for Relief from Stay on February 27, 2002 and filed an amendment to that Motion for Relief from Stay on March 8, 2002.

MOTION FOR RELIEF FROM STAY

MVC files the presently pending Motion for Relief from Stay under 11 U.S.C. § 362(d) which provides in applicable part that:

(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 -

. . .

(3) with respect to a stay of act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) -

. . .

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

11 U.S.C. § 362(d)(3)(B). In its Amended Motion for Relief from Stay, MVC asks for additional relief from the automatic stay pursuant to § 362(d)(2)(A) and (B). This section states in applicable part:

(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 -

. . .

(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.

11 U.S.C. § 362(d)(2)(A) and (B).

In its Motion for Relief from Stay, MVC asks the Court to modify the stay to permit MVC to serve the notice of forfeiture of the real estate contract on Debtor and proceed with the forfeiture unless the amount stated in the notice of forfeiture is timely paid, and for such other and further relief as the Court deems just and equitable. After the presentation of evidence and at the close of the proceedings, the Movant MVC asked the Court, by way of oral amendment, to expand the relief sought to include the ability of MVC to pursue a foreclosure action and application to appoint a receiver in addition to the previously sought relief of forfeiture under Chapter 656 of the Iowa Code. Since the time of hearing, the Movant has filed a brief in support of this oral amendment.

Forfeiture of a real estate contract under Iowa law is controlled by Chapter 656 of the Code of Iowa. Foreclosure and redemption of real estate is controlled by Chapter 654 of the Code of Iowa. Each is a separate remedy with a separate methodology. The contract in controversy appears to allow the contract seller to utilize either provision in the event the contract is in default. Movant did not seek relief under Chapter 654 until its oral motion at the end of hearing on May 1, 2002.

ANALYSIS

The Court will first address the provisions of § 362(d)(2). The evidence supports the finding that Debtor does not have any equity in this property. As a single asset case, the property in question clearly is necessary for a reorganization. To modify a stay under this clause of § 362, both conditions must be satisfied. Movant here is only able to satisfy the first condition, and as such, this provision does not support modification of the stay.

Movant also seeks modification of the stay under § 362(d)(3). This provision is tailored specifically toward a single asset case. The financial picture of Debtor is bleak. The motel has generated little, if any, income since the fire on August 21, 2001. For whatever reason, Debtor seems

incapable of resolving its claim with the insurance company. Even if insurance funds were immediately available, Debtor does not appear to have a viable plan in place to begin reconstruction of this motel. Even prior to the fire, the tax records of Debtor establish that this business was not making a profit. If construction were to commence immediately, this property would still not be ready to operate as a going concern for an extended period of time. There is no showing, based on prior history, that this facility would be able to pay the obligations envisioned under § 362(d)(3) as an operating motel. Any hope of ultimate reorganization appears remote. MVC is required to make monthly payments of \$10,900. Representatives of Movant MVC testified that, unless relief is granted in the near future, the

burden of these monthly payments will be financially devastating to MVC. The facts do not require extensive analysis. The showing has been made that the requirements of § 362(d)(3) are satisfied in that Debtor is financially incapable of generating income or meeting its financial obligations at the present time.

The only issue remaining is the extent of the relief which should be granted. Movant, in both its original Motion for Relief from Stay filed February 27, and again in its Amended Motion for Relief from Stay filed March 8, MVC asks the Court to modify the stay to permit Movant to serve the notice of forfeiture on Debtor and proceed with the forfeiture. Movant, in its oral amendment, now asks the Court to grant additional relief which was not sought, noticed or tried. This relief appears to be a request to pursue alternate relief which is authorized by the contract; that is, foreclosure and appointment of a receiver. Movant also appears to be seeking relief under the forfeiture statute (Chapter 656) beyond that sought in the original motion. Movant has filed a Brief in Support of Oral Amendment to Motion for Relief from Stay. This brief was filed after the May 1, 2002 hearing.

The Court has carefully considered the oral amendment. Movant filed for the relief it apparently thought appropriate in its original motion on February 27. Movant had the opportunity to amend whatever relief it sought in its amended motion on March 8, 2002. The Court heard extensive evidence on May 1, 2002 and it was not until almost the close of oral arguments that the issue of expanded relief was sought. Movant suggests that all evidence on this subject has been presented and nothing would be gained by denying additional relief. However, this case was presented to the Court on the basis of the relief pled. Debtor did not have the opportunity to consider the expanded relief or address it in any way prior to its proposal. Fundamental fairness requires that Debtor be apprised of the relief sought at a time when any issues presented can be addressed. It would be presumptuous of this Court to conclude or unilaterally decide that there is no prejudice to Debtor by granting the expanded relief sought by Movant. The Court will, therefore, deny the motion for expanded relief and enter its ruling on the basis of the relief sought in the Motion originally filed and amended.

In that regard, the Court concludes that Movant has satisfied the requirements of § 362(d)(3) and the automatic stay must be modified to grant the relief sought by Movant in its Motion for Relief from Stay and the Amendment thereto.

Additionally, the Court feels that there are significant issues concerning the \$300,000 check issued by Debtor's insurance carrier which is apparently being passed around for endorsement. Issues exist as to its ownership as well as to proper disposition of the proceeds. Unless disposition of these proceeds are addressed judicially, further problems with administration of this case may well follow. Therefore, on its own motion and under § 105 of the Code, the Court will enter a temporary restraining order, restraining disposition of the proceeds of this check until a full hearing can be held on how to properly treat and dispose of these funds.

WHEREFORE, for all the reasons set forth herein, the Court finds that the Movant has established grounds for modification of the automatic stay under § 362(d)(3).

FURTHER, the automatic stay is modified to permit Movant to serve the notice of forfeiture on Debtor and proceed with forfeiture of the land contract in question under State law.

FURTHER, Debtor is restrained and enjoined from disposing of the \$300,000 check issued by its insurance carrier until a full hearing can be held on its proper disposition. Debtor is directed to turn the check over to its attorney, John Titler, to be held by him until further order of Court.

SO ORDERED this 8th day of May, 2002.

PAUL J. KILBURG
CHIEF BANKRUPTCY JUDGE