

U.S. BANKRUPTCY COURT  
District of South Carolina

Case Number: 09-04624

Order

The relief set forth on the following pages, for a total of 11 pages including this page,  
is hereby ORDERED.

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**FILED BY THE COURT**  
**11/20/2009**



Entered: 11/20/2009

A handwritten signature in cursive script, appearing to read "John L. Currie".

US Bankruptcy Court Judge  
District of South Carolina

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA**

IN RE:

Ray Lyle Covington,

Debtor(s).

C/A No. 09-04624-HB

Chapter 11

**ORDER**

**THIS MATTER** came before the Court for hearing on November 12, 2009, pursuant to the Motion of First Palmetto Savings Bank, FSB for relief from the automatic stay of 11 U.S.C. § 362. After considering the testimony and documentary evidence, proffers of evidence and after careful consideration, the Court enters the following

**ORDER:**

**Findings of Fact**

1. Ray Lyle Covington filed for Chapter 11 protection on June 23, 2009. No trustee has been appointed in the case.
2. Covington filed a Motion to Extend the Exclusivity period for filing a plan of reorganization and has received a brief extension until November 27, 2009.
3. On October 13, 2009, First Palmetto filed its Motion for Relief involving three properties. This Order involves only the property located at 2321 Devine Street, Columbia, South Carolina.
4. Covington's schedules list various parcels of income producing and investment property. Covington is also a real estate agent in Columbia, South Carolina. Since 2003 he has operated a franchise of Weichert Realtors. This business associates numerous real estate agents and provides a portion of Covington's personal income.

5. 2321 Devine Street is a rental property that is not fully rented at this time, but Covington testified that he is optimistic that the property can soon reach the full monthly rental potential of \$2,700.00. Covington offered into evidence projections of the income and expenses for this property as set forth below:

<b>Property:</b>	2321 Devine Street	
<b>Income Rents: (Potential)</b>	32400	Only one of three units is rented at \$500.00 a month
<b>Expenses:</b>		
Advertising	0	
Auto and Travel	0	
Cleaning and Maintenance	1000	
Insurance	1200	
Commission	3240	
Repairs	4000	
Supplies	500	
Taxes	4815	
Utilities	500	
Regime Fees	0	
Pest Control	0	
Vacancy Rate	5400	
<b>Total Expenses</b>	<b>29655</b>	

6. According to Covington's projections, the property can produce annual rental income of \$32,400.00, assuming it is fully rented, with expenses of \$29,655.00, leaving a \$2,745.00 available per year for debt service.<sup>1</sup> Covington testified, and the Court agrees, that some of these expenses may be inflated, may not be incurred or may be avoidable.

7. First Palmetto's Motion seeks relief from stay pursuant to 11 U.S.C. § 362(d)(1) and (2). The Motion includes a Certification of Facts that stated information about the property as follows:

<sup>1</sup> The Court notes that \$260,719.00, the approximate amount of the first lien, amortized for 180 months at a modest 5% yields payments of approximately \$2,060.75 per month, or \$24,729.00 per year.

2321 Devine Street, Columbia, South Carolina 29205

Fair Market Value:	\$515,000.00
Movant's Lien:	\$267,198.04
Second Lien of Arthur State Bank:	\$180,070.79
Debtor's Net Equity:	\$67,731.17

8. Covington's objection to the Motion includes a Certification of Facts that values the property at \$515,000.00.

9. Evidence presented included a summary appraisal report from Palmetto Valuation & Appraisal, LLC dated September 9, 2009, indicating a value for the property of \$515,000.00. This evidence was presented in a document only and no specific testimony was offered to explain the variance between this value and the other values, other than general comments about a change in the real estate market.

10. Covington offered a market analysis of 2321 Devine Street from another independent third party as follows:

**Based on the above "Income Approach" assessment you can see that an "investor" who may have an interest in purchasing the property, in order to achieve a reasonable return on investment, would be able to pay approximately \$276,690 to \$307,433 and a "user" not necessarily having to achieve a required return on investment may be willing to pay as much as \$365,800 or \$118 PSF.**

**Based on the above assessment, I would recommend listing the property for sale in a range of \$325,000 to \$365,000, leaving room to negotiate. However, if you desire to place the property at a higher asking price, we would be happy to set the asking price above our suggestion.**

This information was offered in written form only and the party analyzing the property did not testify.

11. Covington listed the 2321 Devine Street property on his schedules as having a value of \$207,800.00 under the "Current Value" entry, with the following explanation:

*Commerical Rental 2321 Devine Street, Columbia,  
SC; TMS No R11312-03-06; Tax value \$207,800;  
2009 Online appraisal based on comps unavailable.  
Debtor believes property is worth \$207,800 in  
today's market.*

12. Covington offered into evidence a draft of a disclosure statement that included a summary of a draft plan of reorganization. It includes the following regarding the property located at 2321 Devine Street: “Debtor obtained an appraisal on the property which estimated the ‘Income Approach’ value is between \$276,690 and \$307,433 in this market. The absolute most Debtor could conceivably expect to receive is \$365,000 in the best of conditions for this property in the current market and that would be for someone purchasing the property without an expectation of a return on the investment. . . . The Debtor believes the fair market value of the property is \$325,000.00.”

13. First Palmetto holds a first mortgage of between \$260,719.20 (draft disclosure statement) and \$267,198.00 (proffer at hearing); Arthur State Bank holds a second mortgage of approximately \$180,070.00, for total debt of approximately \$447,268.00. In addition to the mortgages on the real estate, First Palmetto claims a lien on the rents and profits from 2321 Devine Street to secure the obligations. Since filing, Covington has collected the rents from the building without payment to First Palmetto and without the permission of that lender or of the Court.

14. The draft plan proposes to pay the First Palmetto claim in full, based on the proposed \$325,000.00 value, plus 2% interest annually, by making monthly payments of \$541.67 over 180 months with at least \$50.00 from each payment applied towards the principal with a balloon payment due at the end of 180 months. The draft does not include complete repayment terms for the second lienholder (left partially blank).

15. In the draft Covington proposed similar repayments terms—2% interest only payments with a balloon note at the end of a 180 month term—on various other obligations. He testified that this was simply a “wish list” of terms that he would hope to have, but he was willing to pay more. He conceded that the prime rate of interest exceeds 2%.

16. The draft proposes to pay 1% to general unsecured claims. Covington offered evidence indicating that this distribution may be proposed in a higher amount depending on any recovery from a lawsuit and the amount of claims in this class.

17. Covington presented his monthly operating reports into evidence. Those reports indicate income from rental properties with little debt service deducted because he is paying only limited debt service to mortgage holders. The reports also include income from his business Weichert Realtors, but there was very little evidence presented to indicate the income and expenses of that company, debt structure, or sustainability of that company and its associated personal and rental income stream to Covington.

18. Covington testified that he has offered adequate protection payments to First Palmetto and other creditors but those offers have not been accepted. Covington testified that currently the market for his property is poor and the realty is not appreciating.

### **Discussion and Conclusions of Law**

First Palmetto has the burden of proof regarding equity in the property; Covington has the burden of proof on all other issues. 11 U.S.C. §362(g).

Section 362(d)(2) provides the following regarding when stay relief may be granted:

[W]ith 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.

First Palmetto's Motion indicates that Covington does have equity in the property based on the value of \$515,000.00 stated in that Motion. Covington's objection likewise states that the value of the property is \$515,000.00, and the parties introduced a recent summary appraisal report supporting this value. Various other values were discussed and offered into evidence indicating values of \$207,800 and \$515,000, but the numbers were not supported by sufficient testimony explaining the variation that would allow a finder of fact to determine the best value of the property, unless the Court were to arbitrarily pick one of the numbers. Therefore, First Palmetto—for the purposes of this Motion only—has not met its burden of proving that Covington has no equity in the property as is required for relief under § 362(d)(2). Relief from stay pursuant to this section of the code is not warranted.

Although the Court need not reach the second requirement for relief under § 362(d)(2), it is noted that from the evidence presented the Court is skeptical about Covington's reorganization prospects in today's real estate market. However, Covington proposed at the hearing that he was willing to alter the draft plan to surrender property that is not necessary to an effective reorganization, and to incorporate the Court's rulings on this matter and others heard by the Court on the same day.<sup>2</sup> He offered evidence of income from his business and other rental properties to assist in reorganization. He also has offered some evidence that he can continue towards some form of reorganization. The Court can find from the evidence presented that this property could have value in a

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<sup>2</sup> Relief from stay has been granted regarding several properties since the hearing on this matter. The Debtor must file a plan by November 27, 2009.

plan of reorganization *if* it can be fully rented and *if* expenses are minimized *if* the value of the property is on the lower end of the range of values asserted (likely less than as stated in the draft plan). Alternatively, if the value of this property exceeds the mortgages and is closer to \$515,000, it could have some value for the estate if sold through a plan.

Although relief is not appropriate under §362(d)(2), some relief is warranted pursuant to §362(d)(1), which provides:

(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.

First Palmetto argues that Covington has used its cash collateral, the rents of 2321 Devine Street, since the filing of this case without its consent or court order and that this conduct is inappropriate and constitutes cause for relief. *See* 11 U.S.C. §363; *In re R & G Props.*, 2009 Bankr. LEXIS 2100 (Bankr. D. Vt. July 6, 2009); *In re FCX, Inc.*, 54 B.R. 833, 838 (Bankr. E.D.N.C. 1985) (holding that debtors are “prohibited from using cash collateral without court approval or the consent of the secured creditor . . .”). The Bankruptcy Code’s “[u]se of the word ‘cause’ suggests an intention that the bases for relief from the stay should be broader than merely lack of adequate protection.” 3-362 Collier on Bankruptcy P 362.07. “Because the Bankruptcy Code provides no definition of what constitutes ‘cause,’ the courts must determine when discretionary relief is appropriate on a case-by-case basis.” *Cloughton v. Mixson*, 33 F.3d 4, 5 (4th Ct. App. 1994).

Covington has collected the rents from the property and used First Palmetto's cash collateral without consent or authority from the Court.<sup>3</sup> As a result and based on other facts set forth above, cause exists for "terminating, annulling, modifying, or conditioning" the automatic stay. Of these choices, the Court elects to keep the automatic stay in place at this time, conditioning its continuance on First Palmetto's adequate protection of its interest in the property and the rents and profits. Covington has had the use of the rent from this property since before the filing of this case without making scheduled payments to First Palmetto. The Court finds that all rent from the property should be paid to First Palmetto, without any reduction for expenses, for the months of November, December, and January. The first payment for November of \$500.00 shall be made on or before November 30, 2009. The second and third payments shall be due on the 15<sup>th</sup> of each month in December and January, and the amount of those payments shall be the actual amount of rent for each month, without deduction for expenses. Exact application of those funds to First Palmetto's mortgage(s) shall be determined by agreement of the parties, by a confirmed plan or by further order of this Court. Payments shall be made payable to First Palmetto and delivered to Ian D. McVey, attorney for that creditor in this matter, unless the parties agree to the contrary in writing. Should Covington fail to make the payments as set forth herein on the date that they are due, First Palmetto may file an Affidavit detailing the default and a proposed order granting relief from the automatic stay.

This adequate protection is to be paid to First Palmetto because Covington has not met his burden of proving that this creditor is adequately protected by equity in the

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<sup>3</sup> Covington filed a Motion to Use Cash Collateral on November 11, 2009. A hearing is scheduled for December 10, 2009.

property, after a showing that cause exists for terminating, annulling, modifying or conditioning the stay. Although First Palmetto failed to meet its burden of proving that Covington *lacks* equity in the property as required by §362(d)(2), the Court cannot establish the exact value of the property from this record and Covington has therefore not met his burden of proof on this issue as it relates to adequate protection and §362(d)(1). It appears that there *may* be some equity in the property in excess of First Palmetto's lien that will further adequately protect its interest, but the turnover of rent is ordered out of an abundance of caution and is warranted on this evidentiary record. Therefore the Court orders that the rents from the property shall be paid to First Palmetto to protect that creditor's interest during the plan proposal and confirmation process, and as a result of the use of its cash collateral without permission prior to this time.

**IT IS THEREFORE, ORDERED:**

1. That the Motion for relief from the automatic stay of 11 U.S.C. §362 as to 2321 Devine Street, Columbia, South Carolina, is granted in part and denied in part. Relief pursuant to §362(d)(1) is warranted, and as a result the Court conditions the continuation of the stay on the following: The rents due from 2321 Devine Street should be delivered to Ian D. McVey, attorney for First Palmetto in this matter, unless the parties agree to the contrary in writing, as follows: \$500.00 on or before November 30, 2009; the gross rent received for the month of December shall be paid on or before December 15, 2009; and the gross rent for the month of January shall be paid on or before January 15, 2010. Should Covington fail to make the payments as set forth herein, delivered to Ian D. McVey **on or before the date that they are due**, First Palmetto may file an

Affidavit detailing the default and a proposed order granting relief from the automatic stay.

2. Take notice that the Court will hold a hearing on **January 15, 2010, at 9:30 a.m. in the J. Bratton Davis Federal Courthouse, 1100 Laurel Street, Columbia, SC 29201-2423**, to review the adequate protection terms set forth herein and if necessary, the Debtor's progress towards confirmation of a plan of reorganization. If appropriate, the Court will also hear further evidence and arguments from the parties at that time regarding whether the stay should be further conditioned, modified or terminated.