

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

FILED

2001 NOV 16 PM 2:09

U.S. BANKRUPTCY COURT  
DISTRICT OF SOUTH CAROLINA

IN RE:

Danner B. Kinard,

Debtor.

C/A No. 01-03621-W

JUDGMENT

Chapter 11

ENTERED

NOV 21 2001

R. S. S.

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, Enterprise Bank of South Carolina's ("Enterprise") Motion for Modification of Automatic Stay is granted. In addition, the Court determines that Danner B. Kinard's ("Debtor") bankruptcy protection does not apply to Debtor's father, Keith M. Kinard, or his property because Keith M. Kinard has not separately filed a petition seeking bankruptcy protection. Further, Debtor's request for an order enjoining Enterprise from proceeding with any action against Debtor's father, Keith M. Kinard, or his property is denied.

  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina  
November 16, 2001

**CERTIFICATE OF MAILING**

The undersigned deputy clerk of the United States  
Bankruptcy Court for the District of South Carolina hereby certifies  
that a copy of the document on which this stamp appears  
was filed on the date listed below for:

*BNK*

**NOV 21 2001**

✓  
DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

**RHONDA S. SMITH**

Deputy Clerk

*U.S.T.  
Huggins  
F. Gr.iffan*

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IN RE:

Danner B. Kinard,

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C/A No. 01-03621-W

**ORDER**

Chapter 11

**ENTERED**

NOV 21 2001

**R. S. S.**

THIS MATTER comes before the Court upon the Motion for Modification of Automatic Stay (the "Motion") filed by Enterprise Bank of South Carolina ("Enterprise"). In the Motion, Enterprise requests relief from the automatic stay pursuant to 11 U.S.C. §362(d)(1), (d)(2) and (d)(3)<sup>1</sup> with respect to a 5.7 acre parcel of land in Colleton County, South Carolina ("Debtor Collateral") and seeks a finding by this Court that the automatic stay does not apply to 205 acres of land owned by Keith M. Kinard located in Colleton County, South Carolina ("Third Party Collateral"). Bank of Walterboro filed a response to the Motion and joined in Enterprise's request for the relief sought. Danner B. Kinard ("Debtor") filed an Objection to the Motion and asked the Court to issue an order enjoining Enterprise from proceeding with any action against Debtor's father, Keith M. Kinard, as long as the automatic stay and or permanent injunction remains in effect as to the indebtedness owed by Debtor to Enterprise and for such time thereafter as Debtor is not in default under payments due under a plan of reorganization. Based upon the pleadings, including the Certifications of Fact filed by Enterprise as amended, Bank of Walterboro, and Debtor; counsels' arguments, and the entire record before the Court, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil

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<sup>1</sup> Further references to the Bankruptcy Code shall be by section number only.

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Procedure 52, made applicable in bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7052.<sup>2</sup>

### **FINDINGS OF FACT**

1. Enterprise holds a mortgage (the “Mortgage”) on the Debtor Collateral, which is property titled in Debtor’s name. Debtor and Debtor’s father, Keith M. Kinard, executed the Mortgage, and the Mortgage also covers the Third Party Collateral owned by Keith M. Kinard. The Third Party Collateral is not contiguous to the Debtor Collateral and is not used in connection therewith. The Debtor Collateral is, for all practical purposes, vacant land, and Debtor does not currently use the land for any business operations.
2. The Mortgage secures a note from Debtor dated February 10, 1998 in the original amount of \$400,000.00 (the “Note”). Debtor’s father, Keith M. Kinard, did not sign the Note.
3. On October 14, 1999, Enterprise instituted a foreclosure proceeding in the Court of Common Pleas for Colleton County, South Carolina, with respect to the Debtor Collateral and the Third Party Collateral as a result of Debtor’s default on his obligations to Enterprise under the Note. After a hearing in the state court foreclosure proceeding but prior to the court issuing any judgment or decree of foreclosure, Debtor filed a Petition for Relief in this Court on June 26, 2000 in Case No. 00-05531-W. The case was subsequently converted to a Chapter 7 case, and, on January 8, 2001, the case was dismissed because of Debtor’s failure to file timely a Statement of Intention as required by §521(2).
4. After the dismissal of Debtor’s first bankruptcy case, the state court issued a Judgment of

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<sup>2</sup> The Court notes that, to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

Foreclosure and Decree of Sale (“State Court Judgment”) on March 6, 2001. The State Court Judgment provided that Enterprise should have judgment of foreclosure with respect to the Debtor Collateral and the Third Party Collateral, and, pursuant to the State Court Judgment, the Debtor Collateral and the Third Party Collateral were advertised to be sold by the state court special referee on April 9, 2001 with the Third Party Collateral to be sold first at the sale.

5. The State Court Judgment found that the Mortgage held by Enterprise is the first mortgage lien on the Debtor Collateral and the second mortgage lien on the Third Party Collateral, junior to a relatively small first mortgage held by First National Bank, which does not hold a lien on the Debtor Collateral. The other lienholders on the Debtor Collateral do not have liens on the Third Party Collateral.

6. On April 4, 2001, the special referee issued an Order Amending Prior Order to Add Supplemental Findings of Fact, and these additional findings relate primarily to the relationship between the Mortgage and the previously recorded mortgage held by Bank of Walterboro. In addition, the special referee found that Keith M. Kinard mortgaged the Third Party Collateral to Enterprise to aid Debtor in obtaining the loan from Enterprise.

7. Bank of Walterboro holds two mortgages on the Debtor Collateral, and one was recorded prior to the Mortgage held by Enterprise. Bank of Walterboro subordinated this prior mortgage. The total amount owed on the two mortgages held by Bank of Walterboro as of the filing of the Motion was \$259,111.65.

8. The special referee also issued an order on April 5, 2001 denying Keith M. Kinard’s Motion for Amendment of Judgment. In his motion, Keith M. Kinard sought to have the special referee reverse his earlier decision with respect to the order in which the mortgaged properties

would be sold at the foreclosure sale.

9. On April 6, 2001, Keith M. Kinard filed a Notice of Appeal and an Appeal Bond in the state court foreclosure proceedings; accordingly, the special referee stayed the foreclosure sale scheduled for April 9, 2001 pending further order of that court or until the resolution of the state court appeal.

10. On April 6, 2001, Debtor filed his Petition for Relief in this Chapter 11 case.

11. The Certification of Facts filed by Enterprise shows a value of the Debtor Collateral in the amount of \$528,000.00 based on an appraisal as of May 1, 1997. Debtor values the Debtor Collateral at \$750,000.00. The real estate taxes on the Debtor Collateral are delinquent for the past four years in the total amount of \$24,691.15. As of the filing of the Motion, the amount of Enterprise's Mortgage lien on the Debtor Collateral was \$452,102.92. The Debtor Collateral is further encumbered by three other mortgages, a judgment lien, and two liens held by the South Carolina Employment Security Commission. The total of the liens on the Debtor Collateral at the time of the filing of the Motion, including the delinquent real estate taxes, was \$792,176.23.

12. The Debtor Collateral has generated no income for Debtor since he filed his Petition for Relief on April 6, 2001; however, in Debtor's Plan of Reorganization filed on October 10, 2001, Debtor proposes to lease the Debtor Collateral to his father for \$6,000.00 per month for the sole purpose of funding plan payments to Enterprise and other creditors holding liens on the Debtor Collateral. Debtor's counsel conceded at the hearing that it is unlikely that such a lease can be arranged if the state court foreclosure proceeding moves forward with respect to the Third Party Collateral. The lease is motivated not by a business purpose but to assist Debtor in staving off foreclosure.

13. Debtor did not, within the ninety day period following the entry of the order for relief in this case, file any plan of reorganization or commence monthly payments to each creditor whose claim is secured by the Debtor Collateral. The ninety day period described in §362(d)(3) was not extended by any order of this Court during that ninety day period.

14. Debtor's Schedules do not reveal the existence of any significant assets other than the Debtor Collateral.

15. Debtor is currently engaged in the business of selling insurance, and the monthly operating reports for May, June, and July of 2001 reveal monthly income that is less than Debtor's monthly housing, automobile and living expenses. Debtor has no employees and has given no indication of any ability to pay the creditors who hold claims secured by the Debtor Collateral from any means other than the leasing of the Debtor Collateral to his father and any subsequent sale of the Debtor Collateral.

16. None of the creditors holding or claiming liens on the Debtor Collateral have objected to the relief sought by Enterprise in the Motion.

## **CONCLUSIONS OF LAW**

### **I. Applicability of Automatic Stay to Third Party Collateral**

The filing of Debtor's Petition for Relief in this case and the resulting automatic stay under §362 did not have the effect of staying the state court foreclosure proceedings with respect to the Third Party Collateral owned by Keith M. Kinard who has not separately filed a petition seeking the protection of the Bankruptcy Code.

Although Debtor concedes that the automatic stay does not protect the Third Party

Collateral or its owner, Keith M. Kinard, Debtor, in his Objection to Enterprise's Motion, requested the Court to issue an order under §105 that would extend the protection of the stay to Keith M. Kinard and the Third Party Collateral. The Court denies this request for two reasons. First, such a request must be made through an adversary proceeding, and Debtor failed to follow the proper procedure. Regardless of the procedural defect, the requirements that must be met in order to obtain such extraordinary relief have not been fulfilled in this case, particularly in light of Debtor's earlier Chapter 11 filing. To obtain such relief, Debtor must show the following: (1) irreparable injury to the movant, (2) the injunction will not cause substantial harm to others, (3) public interest is best served by issuing the preliminary injunction, and (4) a reasonable likelihood of successful reorganization. See In re Murall, Inc., 118 B.R. 400, 403 (Bankr. D. S.C. 1989). Because Debtor has not met the burden of proof with respect to any of these matters, the Court will not invoke its equitable powers as requested by Debtor.

## **II. Enterprise's Request for Relief from Automatic Stay Pursuant to §362(d)(2)**

Enterprise requests relief from the automatic stay pursuant to §362(d)(2) on the grounds that Debtor has no equity in the Debtor Collateral and that the Debtor Collateral is not necessary for an effective reorganization. Debtor concedes that he presently has no equity in the Debtor Collateral. Debtor does not argue that the value of the Debtor Collateral exceeds \$750,000.00, and Debtor concedes that the liens on the property at the time of the filing of the Motion totaled \$792,176.23. Accordingly, it is clear that Debtor has no equity in the property.

Debtor argues, however, that the Debtor Collateral will appreciate in value over the life of his proposed plan and that a future sale of the appreciated Debtor Collateral is the only way he will be able to pay all of the creditors holding liens on that property. Debtor further argues that



even though there is presently no equity in the Debtor Collateral, it is necessary for his reorganization.

The Court must determine whether the Debtor Collateral is necessary for reorganization. Initially, the Court notes that, pursuant to §362(g), the party opposing the relief sought has the burden of proof on all issues other than the lack of equity in the subject property. After reviewing the facts, the Court believes Debtor has failed to meet its burden of proving that the Debtor Collateral is necessary for reorganization. Although Debtor is hopeful that his real property will appreciate and provide him with the means to pay creditors and, presumably, reap a profit, this vision is speculative. In order for property to be necessary for reorganization, a confirmable plan of reorganization must be reasonably within a debtor's reach and must be based on something more than mere speculation. Indeed, Debtor must show that there is a "reasonable possibility of a successful reorganization in a reasonable time." In re Madden, No. 99-08282-W, at 3 (Bankr. D. S.C. Dec. 21, 1999) (citing In re Trius Corp., 47 B.R. 3, 5 (Bankr. D. S.C. 1984)).

An additional point that weakens the possibility of a successful reorganization is that Debtor's only proposed means of realizing any income from the Debtor Collateral will probably not be available to him after the entry of this Order. Debtor's Plan provides for a lease of Debtor Collateral to Keith M. Kinard. Debtor concedes that Keith M. Kinard will not likely enter the proposed lease agreement if Enterprise is allowed to proceed with a foreclosure sale of the Third Party Collateral owned by Keith M. Kinard. This Order previously indicated that Enterprise is entitled to move forward in all respects with the foreclosure of its Mortgage on the Third Party Collateral; consequently, the funding of any sort of plan of reorganization resulting from lease payments by Keith M. Kinard seems unlikely.

Finally, the two mortgage holders holding the vast majority of the amount of the total mortgage liens against the Debtor Collateral obviously oppose Debtor's plan and want the stay lifted, making confirmation of a plan unlikely. Accordingly, because Debtor has not met his burden of showing that the Debtor Collateral is necessary for an effective reorganization, Enterprise is entitled to have the automatic stay lifted with respect to the Debtor Collateral pursuant to §362(d)(2).

### **III. Enterprise's Request for Relief from Stay Pursuant to §362(d)(3)**

Enterprise also claims it is entitled to relief from the automatic stay pursuant to §362(d)(3) on the grounds that the Debtor Collateral is single asset real estate and because Debtor did not, within the ninety day period provided for by §362(d)(3), either file a plan of reorganization or commence monthly payments to each creditor whose claim is secured by the Debtor Collateral with such payments being in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate. Debtor does not argue that either action was taken within the ninety day period but argues that the Debtor Collateral does not fall within the definition of "single asset real estate."

The Bankruptcy Code defines "single asset real estate" as the following:

[R]eal property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto having aggregate noncontingent, liquidated secured debts in an amount no more than \$4,000,000 . . . §101(51B).

There is no dispute that the Debtor Collateral constitutes a single property or project, other than residential real property with fewer than four residential units. There is also no dispute that there

is no substantial business being conducted on the Debtor Collateral by Debtor other than the business of operating the real property and activities incidental thereto or that the \$4,000,000 limit on secured debts contained within the statutory definition is not exceeded. The parties disagree on whether the Debtor Collateral falls within the portion of the definition that provides that it “generates substantially all of the gross income” of Debtor. Debtor argues that the Debtor Collateral does not fall within the definition because it is vacant land on which no income is presently generated, notwithstanding the fact that Debtor proposes to fund his plan of reorganization through the leasing of this property.

Other courts have dealt with the issue of whether raw land that generates no income falls within the definition of “single asset real estate” and have concluded that such property falls within the statutory definition. See In re Syed, 238 B.R. 133, 140 (Bankr. N.D. Ill. 1999) (finding that a premises formerly used as rental property but that was vacant at the time of the debtor’s bankruptcy constituted single asset real estate regardless of the fact that the developed land generated no income); In re Pensignorkay, Inc., 204 B.R. 676, 682 (Bankr. E.D. Pa. 1997) (finding that an undeveloped 275 acre tract of land that did not generate income but that the debtor held for future development fell within the definition of single asset real estate); In re Oceanside Mission Associates, 192 B.R. 232, 236 (Bankr. S.D. Ca. 1996) (examining the Congressional intent and concluding “‘single asset real estate’ includes undeveloped real property which generates no income”). This Court concurs with the rationale of those opinions and concludes that Congress did not intend to exclude from the definition of single asset real estate undeveloped or vacant land currently generating no income for debtors, particularly where the only prospect for the funding of a plan of reorganization is through the leasing of that

property in order to obtain time to sell the property at a speculated appreciated value.

Accordingly, this Court concludes that Enterprise is also entitled to relief from the automatic stay pursuant to §362(d)(3).

#### **IV. Enterprise's Request for Relief from Automatic Stay Pursuant to §362(d)(1)**

Enterprise also requested relief from the automatic stay pursuant to §362(d)(1), alleging that Debtor's Petition for Relief was not filed in good faith but only to cause a last-minute delay of the pending foreclosure sale and that the delay was not reasonably expected to materially benefit Debtor or his creditors.

In determining whether the automatic stay should be lifted because of an allegation of a lack of good faith in a debtor's filing, this Court must analyze whether a reorganization is objectively futile and whether the case was filed in subjective bad faith. See Carolin Corp v. Miller, 886 F.2d 693, 700 (4th Cir. 1989); see also In re Long Bay Dunes Homeowners Assoc., Inc., 246 B.R. 810, 804 (Bankr. D. S.C. 1999); In re Dunes Hotel Assoc., 188 B.R. 162, 168 (Bankr. D. S.C. 1995).

Regarding the objective futility analysis, the evidence before the Court indicates that Debtor has no significant assets other than the Debtor Collateral and that Debtor has no source of income to fund a plan of reorganization other than the possible leasing of the Debtor Collateral to his father. In all likelihood, the lease will occur only if this Court issues an injunction preventing Enterprise from proceeding with its foreclosure action with respect to the Third Party Collateral owned by the Debtor's father; however, the Court has declined to provide such extraordinary relief. Debtor has no equity in the Debtor Collateral, no positive cash flow from any source at all, and no "going concern value" to preserved. Moreover, Bank of Walterboro, the holder of the

largest junior liens on the Debtor Collateral, joined in Enterprise's request for relief and filed its own separate motion seeking relief from the stay. Ultimately, the Court concludes there is no hope of financial rehabilitation through this Chapter 11 proceeding other than Debtor's speculation that the Debtor Collateral will increase significantly in value if he can continue to delay the foreclosure proceeding that was instituted over two years ago. The proposed leasing of the property to Debtor's father is not for the purpose of conducting any business activities on the property but for the apparent sole purpose of allowing further time for the Debtor Collateral to appreciate for Debtor to find a buyer at this increased price. Based on the totality of the facts of this case, the Court concludes that the reorganization is objectively futile.

A determination of whether this case was filed in subjective bad faith cannot be made on the basis of any one fact but requires this Court to consider the "totality of the circumstances."

Carolin Corp, 86 F.2d at 701. To determine the existence of subjective bad faith, the Court will examine the following factors:

1. The debtor has one asset;
2. Secured creditors' liens encumber the asset;
3. There are generally no employees except for the principals and there is no ongoing business activity;
4. The debtor has little or no cash flow and no available sources of income to sustain a plan of reorganization or make adequate protection payments;
5. There are few, if any, unsecured creditors whose claims are relatively small;
6. There are allegations of wrongdoing by the debtor or its principals;
7. The timing of the debtor's filing evidences an intent to delay or frustrate the legitimate efforts of secured creditors to enforce their rights;
8. The debtor is afflicted with the "new debtor's syndrome" in which a one asset entity is credited or revitalized on the eve of foreclosure to isolate the insolvent property and its creditors;
9. There is no realistic possibility of reorganization of the debtor's business;
10. The reorganization essentially involves a two-party dispute; and
11. Bankruptcy offers the only possibility of forestalling loss of the property.

Dunes Hotel, 188 B.R. at 171.

After reviewing the factors, the Court concludes there is sufficient evidence to indicate subjective bad faith. Debtor has only one meaningful asset, the Debtor Collateral. The Debtor Collateral is fully encumbered by the liens of secured creditors, and Debtor has no equity. Debtor has no employees, and there is no ongoing business activity relating to the Debtor Collateral. Debtor's cash flow from his activities in insurance sales does not exceed his personal living, housing and automobile expenses. The only suggested available source of income to sustain a plan of reorganization or to make adequate protection payments is the proposed lease of Debtor Collateral to Keith M. Kinard. The existence and timing of Debtor's prior bankruptcy case, the subsequent dismissal of that case, and the timing of Debtor's filing in this case evidence an intent to delay or frustrate the legitimate efforts of secured creditors to enforce their rights. There is no realistic possibility of a reorganization, and the proposed reorganization essentially involves what amounts to a two-party dispute for purposes of this analysis, even though there are other junior lienholders involved in the foreclosure proceeding.<sup>3</sup> It further appears that while the appeal of the State Court Judgment temporarily stopped the foreclosure sale, bankruptcy offers Debtor the only real possibility of forestalling the loss of the Debtor Collateral.

Based on the foregoing, the Court concludes that Enterprise is also entitled to relief from the automatic stay with respect to the Debtor Collateral pursuant to §362(d)(1) because of Debtor's bad faith filing.

For the reasons stated herein, any one of which constitutes a sufficient basis for this Court

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<sup>3</sup> Any issues between the parties to that proceeding should be dealt with in the state court proceeding.

to grant the relief requested, it is

**ORDERED** that Enterprise is granted relief from the automatic stay, which allows Enterprise to exercise all of its remedies available under applicable state law and under its Mortgage, including, but not limited to, the completion of the foreclosure process with respect to its Mortgage in state court; and

**ORDERED** that the automatic stay does not apply to the Third Party Collateral owned by Keith M. Kinard and that Debtor's filing bankruptcy did not have the effect of stopping the state court foreclosure proceeding with respect to the Third Party Collateral and that the state court foreclosure proceeding, including the appeal filed in that proceeding, in so far as it relates to the Third Party Collateral, was not and is not affected in any way by the automatic stay under §362; and

**DEBTOR'S REQUEST** for an order enjoining Enterprise from proceeding with any action against Debtor's father, Keith M. Kinard, or his property is **DENIED**.

**AND IT IS SO ORDERED.**

  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina  
November 16, 2001.

**CERTIFICATE OF MAILING**

The undersigned deputy clerk of the United States  
Bankruptcy Court for the District of South Carolina hereby certifies  
that a copy of the document on which this stamp appears  
was mailed on the date listed below to:

*BNC*

**NOV 21 2001**

*UST*

*Huggins*

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

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