

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

Case No.: 11-02958-jw

**ORDER CONDITIONALLY DENYING MOTION OF BANK OF THE OZARKS FOR
RELIEF FROM THE AUTOMATIC STAY PURSUANT TO 11 U.S.C. § 362(d)**

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

**FILED BY THE COURT
05/31/2012**



Entered: 05/31/2012

A handwritten signature in cursive script, reading "John E. Waites". The signature is written in dark ink and is positioned above a horizontal line.

Chief US Bankruptcy Judge
District of South Carolina

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

In re:

Charles R. Ferguson, d/b/a The Meridian
Company, a/k/a Charles R. Ferguson, Jr.,

Debtor.

Case No. 11-02958-jw

Chapter 11

**ORDER CONDITIONALLY DENYING MOTION OF BANK OF THE OZARKS FOR
RELIEF FROM THE AUTOMATIC STAY PURSUANT TO 11 U.S.C. § 362(d)**

This matter comes before the Court upon the motion (the “Motion”) filed on January 13, 2012 by Bank of the Ozarks, as successor in interest to Woodlands Bank (the “Bank”), seeking (i) relief from the automatic stay pursuant to 11 U.S.C. §§ 362(d)(1) and (2), and (ii) a waiver of the 14-day stay of the order provided in Federal Rule of Bankruptcy Procedure 4001(a)(3).¹ Charles R. Ferguson d/b/a The Meridian Company a/k/a Charles R. Ferguson, Jr. (the “Debtor”) filed an objection to the Motion on January 27, 2012 (the “Objection”). The Court conducted a hearing on the Motion on April 17, 2012.²

This Court has jurisdiction over this matter as a core proceeding pursuant to 28 U.S.C. §§ 1334 and 157. Pursuant to Fed. R. Civ. P. 52, which is made applicable to this matter by Fed. R. Bankr. P. 7052 and 9014(c), and based upon the filings of the parties in this matter, the Debtor’s filed schedules and statement of financial affairs, the testimony of the witnesses, the arguments and statements of counsel at the hearing, and the Debtor’s most recently filed plan and disclosure statement, the Court makes the following findings of fact and conclusions of law:³

¹ Further citations to sections of the United States Bankruptcy Code (11 U.S.C. § 101, *et seq.*) shall be by the cited section number only.

² The hearing on the Motion was originally scheduled for February 7, 2012, but was continued at the request of the Bank and the Debtor to April 17, 2012. Therefore, pursuant to SC LBR 4001-1(a)(1)(C), the Bank is deemed to have waived its rights under 11 U.S.C. § 362(e) relating to the lifting of the stay.

³ To the extent that any of the findings of fact constitute conclusions of law, they are adopted as such, and

FINDINGS OF FACT

1. The Debtor filed his voluntary petition for relief under Chapter 11 of the Bankruptcy Code on May 2, 2011 (the “Petition Date”).

2. Prior to the Petition Date, the Bank made two loans to The Meridian Company, LLP, an entity owned by the Debtor (collectively, the “Loans”), and each of the Loans was secured by, among other things, a mortgage on certain property located at 2735 Depot Road, Beaufort, South Carolina 29902 (the “Property”).⁴ In October 2010, the Bank commenced a foreclosure proceeding on the Loans, naming the Debtor and other defendants in the Court of Common Pleas for the County of Beaufort, Case No. 10-CP-07-5016 (the “Foreclosure Action”). Judgment against the Debtor and The Meridian Company, LLP in favor of the Bank was entered in the Foreclosure Action pursuant to a Master’s Order Granting Judgment for the Plaintiff and Judgment of Foreclosure Sale (Deficiency Demanded) dated February 9, 2011 and Supplemental Master’s Order dated March 22, 2011. The Debtor filed his bankruptcy petition prior to the commencement of the foreclosure sale on the Property.

3. On May 20, 2011, the Debtor filed his initial motion to use cash collateral (as subsequently amended, the “Cash Collateral Motion”). The Court held both an interim and final hearing on the Cash Collateral Motion. The Bank appeared at both hearings and consented to the Debtor’s request to use cash collateral and the amount of the monthly adequate protection payments proposed. On May 31, 2011, the Court entered an interim cash collateral order (the “Interim Cash Collateral Order”), and on July 6, 2011, the Court entered a second cash collateral order (the “Second Cash Collateral Order”) (collectively, the “Cash Collateral Orders”), which

to the extent that any of the conclusions of law constitute findings of fact, they are so adopted.

⁴ In the Motion, the Bank makes reference to the collection of other loans as an additional basis for Foreclosure Action, but such loans are not the subject of this Motion. Therefore, the Court will not address the other loans and will not consider the other loans when determining whether the relief requested by the Bank in the Motion is appropriate.

called for monthly adequate protection payments from the Debtor to the Bank. The Cash Collateral Orders also incorporated a budget that allocated monthly payments for taxes related to the Property and the source of such payments was the monthly income generated by the Property.⁵

4. On August 9, 2011, Debtor's original attorney, Felix B. Clayton, withdrew as counsel for the Debtor. The Debtor subsequently filed an application to employ the Law Office of Michael W. Mogil, PA. as substitute bankruptcy counsel, which was approved on September 13, 2011.

5. On February 14, 2012, after filing two previous disclosure statements, the Debtor filed a modified version of the amended disclosure statement originally filed on January 31, 2012 (as modified, the "First Amended Disclosure Statement").

6. On February 22, 2012, after filing two previous plans of reorganization, the Debtor filed a modified version of the amended plan of reorganization originally filed on February 1, 2012 (as modified, the "First Amended Plan").

7. On February 23, 2012, the Court entered its order approving the adequacy of the First Amended Disclosure Statement.

8. The Court held a confirmation hearing on the First Amended Plan on April 17, 2012. At the time of the hearing, six objections to the First Amended Plan were filed with the Court, and no class voted to accept the First Amended Plan. Seven classes voted to reject the First Amended Plan. The Court denied confirmation of the First Amended Plan, but granted the Debtor a ten-day extension to file an amended plan of reorganization.

9. A hearing on the Motion was also held on April 17, 2012. The Bank argued that

⁵ The Interim Cash Collateral Order allocated a monthly amount of \$236.18 for taxes and the Second Cash Collateral Order allocated a monthly amount of \$243.60.

cause existed to grant relief from the automatic stay under § 362(d)(1) because of the delay due to the Debtor's case having been pending almost a year by the time of the hearing and the Debtor failing to pay the real property taxes due on the Property for 2011 (the "2011 Property Taxes"), which were due on January 15, 2012. In addition, the Bank asserted that relief was warranted under § 362(d)(2) because the Property was not necessary for an effective reorganization. The Bank further argued that no effective reorganization was in prospect because the Debtor failed to propose a confirmable plan prior to the hearing on the Motion. In response, the Debtor argued that if the Bank's request for relief was granted, the Debtor would be unable to reorganize because the Property was the "heartbeat" of his custom building and cabinetry operations. The Debtor also testified that while finding a replacement facility for his operations was a possibility, the prospective facility would be cost prohibitive because it would require upfitting costs estimated at \$150,000.

10. On April 27, 2012, the Debtor filed the Second Amended Plan of Reorganization Dated April 27, 2012, Amending Plan Dated February 14, 2012 (the "Second Amended Plan") and the Disclosure Statement for Second Amended Chapter 11 Plan Dated April 27, 2012 (the "Second Amended Disclosure Statement"). The Court has scheduled a hearing on the adequacy of the Second Amended Disclosure Statement for June 25, 2012.

CONCLUSIONS OF LAW

The Bank asserts that it is entitled to relief under either § 362(d)(1) or § 362(d)(2), which provide:

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.

As set forth below, the Bank's request for relief under both § 362(d)(1) and § 362(d)(2) is conditionally denied at this time without prejudice, and the automatic stay shall remain in effect subject to the terms and conditions set forth herein.⁶

I. Relief Under § 362(d)(1)

The Bank seeks relief from the automatic stay pursuant to § 362(d)(1), which provides that a party may be granted relief from the automatic stay for cause, including the lack of adequate protection of that party's interest in property. As this Court has previously noted, bankruptcy judges have "broad discretion to determine what constitutes 'cause' sufficient to warrant relief from stay." In re Lee, 428 B.R. 667, 669–70 (Bankr. D.S.C. 2009) (quoting In re Breibart, No. 03–07440–W, slip op. at 2 (Bankr. D.S.C. Feb. 17, 2004) (citations omitted)). However, since the Bankruptcy Code does not define cause, "the decision as to whether to grant relief from stay is made on a case by case basis." In re Gyro-Trac (USA), 441 B.R. 470, 489 (Bankr. D.S.C. 2010) (citing In re Ramkaran, 315 B.R. 361, 363 (D. Md. 2004)).

The Bank maintains that cause exists to warrant relief from the automatic stay under § 362(d)(1) because the Debtor failed to file a confirmable plan by the time of the hearing on the Motion and the Debtor failed to pay the 2011 Property Taxes.

A. Pendency of the Chapter 11 Case

In the instant matter, the Court finds that the Debtor's failure to have a confirmed plan at

⁶ Based on the Court's conditional denial of the Bank's request for relief under §§ 362(d)(1) and (2), the Court also denies the Bank's request for a waiver of Fed. R. Bankr. P. 4001(a)(3) at this time. However, in the event that the Debtor fails to comply with the requirements of this Order, and the Court grants the Bank's request for relief set forth in the Motion, the Court will reconsider the Bank's request for a waiver of Fed. R. Bankr. P. 4001(a)(3) at such time.

the time of the hearing on the Motion does not constitute cause sufficient to warrant the granting of relief from the stay as to an asset that is critical to the reorganization. Prior to hearing the Motion, the Court granted the Debtor an extension of ten days to file an amended plan of reorganization, and the Debtor complied with the Court's deadline. Based on the reduction in the number of properties the Debtor will retain under the Second Amended Plan and the increased amount of creditor support as indicated in both the Second Amended Plan and Second Amended Disclosure Statement, the Court finds that the extension was justified. While the Court recognizes that the Debtor's Chapter 11 case has been pending for over twelve months at the time of the Order, it also notes that the Bankruptcy Code does not provide an express limitation on the duration of a Chapter 11 case. In finding that the duration of the Debtor's Chapter 11 case does not constitute cause under §362(d)(1), the Court also gives weight to the fact the Debtor's original bankruptcy attorney withdrew as bankruptcy counsel almost 100 days after Petition Date, which forced the Debtor to find replacement counsel while the case was already pending.

B. Real Property Taxes

The Court also finds that cause does not exist pursuant to § 362(d)(1) based on the Debtor's failure to pay the 2011 Property Taxes. The Court recognizes that other courts have held that the failure to pay real and personal property taxes may constitute "cause" sufficient to warrant relief from the automatic stay. See Equitable Life Assurance Soc'y of the U.S. v. James River Assocs. (In re James River Assocs.), 148 B.R. 790, 797 (E.D. Va. 1992). However, the Court finds that the facts of this case are distinguishable from those set forth in James River Assocs. because the debtor in James River Assocs. also failed to make any adequate protection payments.

Pursuant to the Cash Collateral Orders, the Debtor is currently making monthly adequate

protection payments to the Bank, the purpose of which is to protect the Bank's interest in the Property from any decline in value during the pendency of this Chapter 11 case, and the Debtor appears current on those payments.⁷ Furthermore, the Court notes that the Bank consented to the Debtor's use of cash collateral at both the interim and final cash collateral hearings and did not object to the proposed amount of the adequate protection payments.

In addition, the Bank did not argue that the current adequate protection payments have become insufficient as a result of a subsequent decrease in the value of the Bank's interest in the Property or the threat of a decline in such value. Furthermore, no evidence was presented to demonstrate a decrease in the value of the Bank's interest in the Property or an immediate threat of a decline in value. Therefore, the Court finds that no additional adequate protection is necessary at this time.

The Court also recognizes that the Cash Collateral Orders contemplate the Debtor setting aside a pro rata amount for taxes on a monthly basis for the purpose of paying postpetition tax obligations, including the 2011 Property Taxes. As of the date of this Order, the Debtor should be holding approximately \$2,908.36 for the payment of tax obligations related to the Property.⁸ The Second Amended Plan acknowledges that the Debtor owes 2011 property taxes on certain real property being retained and proposes to pay those taxes plus any accrued interest and penalty on or before the effective date of a confirmed plan. The Court finds that the setting aside of such amounts for the 2011 Property Taxes would provide further adequate protection for the Bank's interest. If there is a deficiency in the funds to be held by the Debtor for this purpose, the Debtor shall cure any deficiency within thirty (30) days of the entry of this Order, file an

⁷ Although the budget incorporated by the Cash Collateral Order only ran through October 2011, the Debtor has continued to make adequate protection payments to the Bank pursuant to the terms of the Cash Collateral Order, and the Bank has made no request to the Court for additional adequate protection.

⁸ This amount covers June 2011 through June 2012 and is based on the calculation of two months at \$236.18 under the Interim Cash Collateral Order and ten months at \$243.60 under the Second Cash Collateral Order.

affidavit with the Court stating that no deficiency exists, and continue to escrow the aforesaid amount in a timely manner until the 2011 Property Taxes are paid through the confirmed plan. If the Debtor fails to comply with the conditions set forth in this paragraph, the automatic stay may be lifted with respect to the Property upon the filing of an affidavit of the Bank's counsel and entry of an order of the Court, without further notice or hearing, to allow the Bank to proceed against the Property.

Therefore, based on the current adequate protection payments being made to the Bank and the conditions set forth above, the Court finds that the Bank has failed to demonstrate that cause exists at this time to warrant relief from the automatic stay under § 362(d)(1).

II. Relief Under § 362(d)(2)

The Bank further argues that relief from the automatic stay is warranted under § 362(d)(2) when (a) the debtor lacks equity in the property, and (b) the property is not necessary to an effective reorganization. Pursuant to § 362(g)(1), the party requesting relief under § 362(d)(2), in this case, the Bank, has the initial burden of proof on the issue of the debtor's equity in the property.

Based on the certifications of fact filed in connection with both the Motion and the Objection and the statements of counsel for both parties at the hearing, there is no equity in the Property. Therefore, the Court finds that Bank has satisfied its burden under § 362(g)(1).

Once the movant establishes that there is no equity in the collateral, the burden shifts to the party opposing the requested relief, in this case, the Debtor, to demonstrate that the property is necessary for an effective reorganization. § 362(g)(2). In order for property to be necessary for an effective reorganization, the party opposing relief under § 362(d)(2) must also demonstrate that there is a reasonable possibility of a successful reorganization within a reasonable time. See

In re Henderson, 395 B.R. 893, 900-901 (Bankr. D.S.C. 2008) (citing United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd. (In re Timbers of Inwood Forest Associates, Ltd.), 484 U.S. 365, 376 (1988)).

Based on the Debtor's testimony at the hearing, the Court finds that the Property is necessary for an effective reorganization. The Property houses the Debtor's cabinetry and woodworking business, which generates a substantial portion of the income that will be used to fund the Plan. The Property also generates rental income that is currently being used to fund both the Debtor's first mortgage on the Property and the adequate protection payments required under the Cash Collateral Orders. If the Bank's request for relief from the automatic stay is granted and the Debtor is forced to close or relocate from the Property, the Debtor would suffer a substantial and potentially fatal disruption of its business operations. In addition, the costs of upfitting a replacement facility, which the Debtor estimates to be approximately \$150,000, would jeopardize the Debtor's ability to continue its business operations. Therefore, the Court finds that the Property is essential to the Debtor's ability to reorganize.

The Court also finds that there is a reasonable possibility of a successful reorganization within a reasonable time. Both the Second Amended Disclosure Statement and the Second Amended Plan demonstrate progress from the Debtor's previously filed plans of reorganization, including a reduction in the properties the Debtor proposes to retain and indications that the Debtor has reached agreements regarding plan treatment with several classes of impaired creditors. In balancing the fact that it has taken the Debtor a significant amount of time to gain some creditor support and propose a more reasonable plan with the possibility that the Debtor's Second Amended Plan should be considered for confirmation within a three month period, the Court believes that it is in the best interests of all parties, including the unsecured creditors, to

provide the Debtor an additional and final opportunity to confirm his plan. Therefore, the Bank's request for relief under § 362(d)(2) is conditionally denied at this time.⁹

A supplemental hearing on the Motion (the "Supplemental Hearing") will be held on July 10, 2012 at 1:30 p.m. If the Court approves the Second Amended Disclosure Statement before the Supplemental Hearing, the Supplemental Hearing will be continued to the confirmation hearing on the Second Amended Plan, including any subsequent modifications.¹⁰ However, if the Court does not approve the Second Amended Disclosure Statement, including any subsequent modifications, before the Supplemental Hearing, the Supplemental Hearing will go forward and the Bank's request for relief from the stay will be considered.

CONCLUSION

For the foregoing reasons, the Motion is hereby conditionally denied without prejudice at this time, and the automatic stay shall remain in effect subject to the terms and conditions set forth in this Order. Furthermore, this Order shall not prejudice the rights of the Bank to seek emergency reconsideration of these conditions or file another motion or seek other relief on the basis of other grounds not addressed herein.

AND IT IS SO ORDERED.

⁹ Although the Court hereby denies the Motion on a conditional basis, it will only afford the Debtor a limited amount of additional time to obtain the approval of the Second Amended Disclosure Statement and confirmation of the Second Amended Plan.

¹⁰ The Court may modify the date of the Supplemental Hearing based on the modification or extensions of any deadlines set forth in this Order or if it is in the best interest of the creditors, the Debtor, or other parties in interest.