U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: **14-06586-jw**

ORDER ON MOTION FOR RELIEF FROM STAY

The relief set forth on the following pages, for a total of 14 pages including this page, is hereby ORDERED.

FILED BY THE COURT
10/08/2015

Entered: 10/08/2015

US Bankruptcy Judge
District of South Carolina

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: Birt Adams, Debtor(s).	C/A No. 14-06586-JW Chapter 11 **ORDER**

This matter comes before the Court pursuant to a Motion for Relief from Automatic Stay filed by Rock Funding LLC ("Rock Funding"). The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Pursuant to Federal Rule of Civil Procedure 52, which is made applicable to this contested matter by Federal Rules of Bankruptcy Procedure 7052 and 9014(c), the Court makes the following findings of fact and conclusions of law.[1]

FINDINGS OF FACT

1. Birt Adams ("Debtor") is the owner of mixed-use commercial real estate better known as 158-164 Rockaway Avenue in Brooklyn, New York (the "Property").

2. Ocean Bank, F.S.B. made a loan to Debtor in the amount of $332,500.00, as evidenced by a note dated November 29, 2006 (the "Note"). The Note is secured by a mortgage on the Property in favor of Ocean Bank, F.S.B (the "Mortgage").

3. Appended to the Mortgage is an assignment of rents dated November 29, 2006, which was executed by Debtor (the "Assignment of Rents").

4. Ocean Bank, F.S.B. assigned its interest in the Note, Mortgage and Assignment of Rents ("Loan Documents") to Bayview Financial, L.P. by an assignment dated December 23, 2006.

[1] To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such, and to the extent any of the following conclusions of law constitute findings of fact, they are so adopted.

5. Debtor defaulted on the Note in February of 2007 and Bayview Financial, L.P commenced a foreclosure action on April 17, 2007 against Debtor in the New York State Supreme Court for Kings County ("Foreclosure Action").

6. Pursuant to the Assignment of Rents, the New York State Supreme Court for Kings County entered an *Ex Parte* Order Appointing Receiver for collection of the rents on the Property on April 15, 2010.

7. During the Foreclosure Action, the Loan Documents were transferred on several occasions, as evidenced by the following assignments presented at the hearing:

a. On April 10, 2008, Bayview assigned its interest in the Loan Documents to Bayview Loan Servicing, LLC.

b. On April 24, 2008, Bayview Loan Servicing, LLC assigned its interest in the Loan Documents to CVM Partners I, LLC ("CVM").

c. On January 25, 2012, CVM assigned its interest in the Loan Documents to ACM Browncroft Trust ("ACM").

8. The New York State Supreme Court for Kings County entered an Amended Judgment of Foreclosure and Sale in the Foreclosure Action on January 13, 2014.

9. Debtor filed a petition for relief under Chapter 13 of the United States Bankruptcy Code on March 4, 2014 in the Southern District of New York in Case No. 14-10511 (the "New York Case"). The court later transferred venue of the New York Case to the Bankruptcy Court for the Eastern District of New York, where the case was assigned as Case No. 14-43174.

10. During the pendency of the New York Case, ACM assigned its interest in the Loan Documents to Rock Funding on April 23, 2014.

11. Upon the motion of the Chapter 13 Trustee, the Bankruptcy Court for the Eastern District of New York issued an order dismissing the New York Case on October 6, 2014 ("Dismissal Order") because of several deficiencies, including Debtor's failure to appear at the § 341 Meeting of Creditors, Debtor's failure to comply with local disclosure requirements, Debtor's failure to file a Chapter 13 Plan, and Debtor's failure to provide the Chapter 13 Trustee with copies of his federal income tax returns.

12. Upon the dismissal of the New York Case, Rock Funding proceeded with the Foreclosure Action.

13. On November 19, 2014, Debtor filed a petition under Chapter 11 of the United States Bankruptcy Code in the District of South Carolina ("Chapter 11 Case").

14. Unaware of the Chapter 11 Case, the state court sold the Property at a foreclosure sale to Rock Funding on November 20, 2014 ("Foreclosure Sale") contrary to the automatic stay.

15. On December 17, 2014, Debtor filed his sworn schedules in the Chapter 11 Case, in which he states the value of the Property to be $488,000. In Debtor's amended schedules filed on June 17, 2015, Debtor continues to state the Property's value as $488,000.

16. Upon Motion of Rock Funding, this Court entered an Order Granting *Ex Parte* Motion Confirming that the Automatic Stay Has Terminated on January 2, 2015 in the Chapter 11 Case based on the fact that Debtor filed the Chapter 11 Case within one year of the dismissal of the New York Case and Debtor did not extend the automatic stay under 11 U.S.C. § 362(c)(3).[2]

17. During the pendency of the Chapter 11 Case, Debtor filed a motion to reopen the New York Case with the Bankruptcy Court for the Eastern District of New York on January 5, 2015. In the motion to reopen, Debtor requested that the Bankruptcy Court for the Eastern District

[2] Further citations of the United States Bankruptcy Code (11 U.S.C. § 101, et seq.) shall be by section number only.

of New York vacate the Dismissal Order under Fed. R. Civ. P. Rule 60(b) and transfer the New York Case to the Bankruptcy Court for the District of South Carolina.

18. On April 27, 2015, the Bankruptcy Court for the Eastern District of New York entered an Order to reopen the New York Case, vacate the Dismissal Order and transfer the New York Case to the Bankruptcy Court for the District of South Carolina. In its Order, the New York court found that Debtor acted in good faith in the New York Case and reasonably relied on the actions of a disbarred attorney who represented to Debtor that he would be handling Debtor's New York Case. Additionally, the Court found that all grounds in the Dismissal Order resulted from misrepresentations of Debtor's New York counsel and not from the actions of Debtor. Upon the transfer, this Court assigned the New York Case as Case No. 15-02278-jw (hereinafter referred to as the "Chapter 13 Case").

19. Rock Funding filed a proof of claim with a total claim of $682,687.86 on April 2, 2015 in the Chapter 11 Case. On June 22, 2015, Rock Funding amended the secured portion of its proof of claim to reflect an updated valuation of the Property.

20. As a result of the Court's concerns that Debtor had two simultaneous cases pending in two different chapters of the Bankruptcy Code, Debtor and counsel for Rock Funding stipulated at the status hearing for the Chapter 13 Case held on May 14, 2015 that Debtor would dismiss the Chapter 13 Case, and Rock Funding agreed to have the automatic stay under § 362 reinstated as to Rock Funding's claim in the Chapter 11 Case. This Court entered an Order dismissing the Chapter 13 Case on May 18, 2015.

21. On May 26, 2015, Rock Funding filed its Motion for Relief from Stay ("Motion") asserting that it is entitled to relief under 11 U.S.C. §§ 362(d)(1), 362(d)(2), 362(d)(3) and 362(d)(4). In the Motion, Rock Funding seeks an order annulling the automatic stay to validate the

Foreclosure Sale. In the alternative, Rock Funding requests a termination of the automatic stay, including *in rem* relief, to proceed with the Foreclosure Action. Additionally, Rock Funding seeks a waiver of the 14-day stay of the § 362 relief order under Fed. R. Bankr. P. 4001(a)(3).

22. Debtor filed an objection to the Motion on June 8, 2015, asserting that there is equity in the Property, that Debtor has acted in good faith, and that the Property is necessary to Debtor's reorganization.

23. At the hearing, both parties presented evidence of the value of the Property. Rock Funding called Sam Shalumov, a licensed real estate broker, ("Rock Funding's Broker") to provide expert testimony regarding the value of the Property. Debtor testified as to the value of the Property as well. Further, both Rock Funding's Broker and Debtor testified about the expenses and potential income of the Property.

CONCLUSIONS OF LAW

1. Relief from the Automatic Stay

Rock Funding alleges that it is entitled to relief from the automatic stay under §§ 362(d)(1), 362(d)(2) & 362(d)(3). Section 362(d)(2), provides that the Court may grant relief from the automatic stay when "(A) the debtor does not have an equity in [the subject] property; and (B) such property is not necessary to an effective reorganization . . . ." Under § 362(g)(1), Rock Funding has the initial burden of proof of establishing that Debtor has no equity in the Property.

Equity

Rock Funding's amended proof of claim filed on June 22, 2015 lists its total claim at $682,687.86. "A proof of claim executed and filed in accordance with [the Federal Rules of Bankruptcy Procedure] shall constitute *prima facie* evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f). Debtor has not filed an objection to Rock Funding's amended

proof of claim or alleged that the amended proof of claim was not executed or filed in accordance with the Federal Rules of Bankruptcy Procedure. While Debtor stated at the hearing on the Motion that he disputes Rock Funding's claim, he has presented no significant evidence to place the validity of Rock Funding's amended proof of claim at issue. On behalf of Rock Funding, Doris Shen, its Secretary, testified to the details of Rock Funding's claim. In light of the testimony of Doris Shen and the *prima facie* validity of Rock Funding's amended claim, the Court finds for purposes of a determination of equity that the amount of Rock Funding's total claim is $682,687.86.

At the hearing, Rock Funding's Broker, who was qualified as an expert in valuation without objection, testified that the value of the Property is $597,500. Debtor testified to conflicting values for the Property, which ranged from $488,000 to $700,000.[3] Weighing the evidence, the Court finds the testimony of Rock Funding's expert to be more convincing.[4] Therefore, the Court finds that the value of the Property is $597,500 and that Debtor has no equity as to the Property.[5]

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[3] At the first hearing on the Motion, Debtor testified that the current value of the Property is $700,000. However, during counsel's reexamination of Debtor at the second hearing on the Motion, the following exchange occurred:

Debtor's Counsel: What do you feel the value of the property is today given those units are not rented out currently, they have not been renovated yet or in need of repair, what do you feel the value of the property is today?

Debtor: The value of today could be anywhere from five to six just the way it is.

Debtor's Counsel: Ok, so do you agree with what you placed in your schedules as $488,000.00 or are you deviating from that amount?

Debtor: Yes. Yes, I agree.

[4] Rock Funding's Broker is familiar with the area surrounding the Property and has experience conducting property valuations. Additionally, Debtor has provided different valuations throughout this case and did not offer an explanation for these changes.

[5] Rock Funding's amended Proof of Claim notes that part of its claim may be secured by the Property's rents held by the receiver, which Rock Funding asserts would be in the amount of $56,276.94. However, even if Debtor is entitled to application of the rents held by the receiver to Rock Funding's claim, Debtor would continue to have no equity as to the Property.

Property Necessary to an Effective Reorganization:

In order for the Court to grant relief under § 362(d)(2), the Court must also find that the Property is not necessary to an effective reorganization. Under § 362(g)(2), the burden is on Debtor to show that the Property is necessary to an effective reorganization. Additionally, this standard requires Debtor to demonstrate that there is "a reasonable possibility of a successful reorganization within a reasonable time." United States Savings Ass'n of Tex. v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365, 376 (1988). "This showing will require more than just 'naked hopes of the debtor . . . without any plausible explanation of how such results can be achieved,' and courts expect more than a 'vague and hopeful future' but a 'firm outline.'" In re Clifton Mill Lofts, LLC, C/A No. 08-02006-jw, slip op. at 9 (Bankr. D.S.C. Oct. 17, 2008) (quoting In re LDN Corp., 191 B.R. 320, 325 (Bankr. E.D. Va. 1996); In re Winwood Heights, 385 B.R. 832, 841 (Bankr. N.D. W. Va. 2008)).

Feasibility of Debtor's Reorganization

In order to satisfy the standard in Timbers, Debtor must show that a plan of reorganization is feasible. Debtor filed a proposed plan of reorganization on June 18, 2015 ("June 18, 2015 Plan").[6] At the second hearing for the §362 Motion, Debtor testified that his gross monthly wages of $2,614.64 (rather than his take-home wages of $1,648.98) would be used to fund the June 18, 2015 Plan. Debtor did not provide an explanation for why he utilized his pre-tax wages in calculating his available monthly income for contribution to the June 18, 2015 Plan. Additionally, Debtor testified that the June 18, 2015 Plan is based on an estimated maintenance cost for the

[6] At the second hearing held on the Motion, counsel for Debtor noted that the June 18, 2015 Plan needed to be amended. At the status hearing on August 19, 2015, counsel for the Debtor stated to the Court that she intended to file an amended plan of reorganization. The Court entered a consent order agreed to by Debtor, Rock Funding and the U.S. Trustee denying the Disclosure Statement filed on June 18, 2015 and providing leave for Debtor to file a new plan and disclosure statement. However, as of the date of this Order, Debtor has not filed a new proposed plan.

Property of $996.05 a month, which includes property taxes, insurance and maintenance repairs. In light of the testimony of Rock Funding's Broker that the actual real property and sewage taxes for the Property for the current year alone are $1,265.75 a month,[7] the Court finds that Debtor's estimates are significantly understated. No convincing explanation was offered by Debtor as to how he arrived at the $996.05 figure. In light of the evidence, the Court questions the Debtor's estimates and his ability to fund the June 18, 2015 Plan.

Additionally, the Court finds that Debtor has not provided sufficient specific information to substantiate how he would achieve a successful reorganization. At the hearing, Debtor testified that the central component of his reorganization would be his management of the Property, under which the Property would be at full occupancy and produce additional income to fund a plan.[8] To accomplish this, Debtor stated that he intends to hire a property manager for the Property; however, Debtor did not offer sufficient further information, including the name of the specific property manager he will retain, the property manager's plan of action for the Property and the additional costs to Debtor for the property manager, which are all critical details of the Debtor's reorganization. Further, Rock Funding's Broker testified that the Property is need of repairs due to water damage and that it is unlikely the vacant units will be leased until repairs are made. Beyond asserting that the damage may not be significant, Debtor did not offer clear evidence regarding the cost and extent of the repairs needed to the Property.

While Debtor has proposed a framework of how he would like to reorganize, Debtor lacks a concrete plan based on reliable estimates of income and expenses to accomplish this reorganization. Additionally, this case has been pending for ten months, and Debtor has had

[7] Rock Funding's Broker estimates that the maintenance expenses of the Property is $2,710.66 a month, including utilities, insurance, property taxes, maintenance repairs and management fees.
[8] Debtor's June 18, 2015 Plan is based on the current occupancy of the Property, which includes two units not being leased. However, at the hearing, Debtor testified at length as to his hope of obtaining full occupancy of the Property.

adequate opportunity to propose a sufficiently detailed and clear plan of reorganization. See Timbers, 484 U.S. at 376. ("And while the bankruptcy courts demand less detailed showings during the first four months in which the debtor is given the exclusive right to put together a plan, see 11 U.S.C. § 1121(b), (c)(2), even within that period the lack of any realistic prospect of effective reorganization will require § 362(d)(2) relief."). Therefore, the Court finds that Debtor has not successfully demonstrated that a reorganization as proposed in the June 18, 2015 Plan is feasible.

Likelihood of Confirmation of Debtor's Plan of Reorganization

In addition, the likelihood of confirmation of a debtor's proposed plan of reorganization is indicative of whether a debtor has the reasonable possibility of a successful reorganization within a reasonable time. See In re Remington Forest, C/A No. 95-76069, slip op. (Bankr. D.S.C. Dec. 14, 1995) (finding that Debtor failed to show a reasonable possibility of reorganization when confirmation of debtor's plan was not possible because no truly impaired class of claims would vote to accept the plan).

Section 1129(a)(10) provides that, when a plan contains an impaired class, a Court shall only confirm the plan if at least one impaired class of claims accepts the plan. Further, § 1126(c) provides that "[a] class of claims has accepted a plan if such plan has been accepted by creditors . . . that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors. . . that have accepted or rejected such plan."

Debtor's June 18, 2015 proposed plan contains two impaired classes: Class 2 Secured Claims and Class 3 Unsecured Claims.[9] Under the proposed plan, Rock Funding appears to

[9] After an examination § 1122, the Court questions the similarities of the claims classified together by Debtor in the June 18, 2015 Plan. However, the Court must rely on that plan to determine if relief should be granted to Rock Funding under the Motion.

represent a majority of the amount of claims in each of these impaired classes and appears to control the vote in these classes.[10] While no balloting has occurred in this case, Rock Funding's actions in filing the Motion and throughout the case clearly suggests that it would not vote in favor of the June 18, 2015 Plan. Therefore, it appears that the Debtor cannot satisfy the requirements of § 1129(a)(10) for confirmation.

Further, the Court has concerns over Debtor's ability to confirm the June 18, 2015 plan in light of the absolute priority rule under § 1129(b)(2)(B)(ii). "In brief, the absolute priority rule provides that if a proposed plan allows 'the debtor to retain property, any dissenting [class of] creditors must be paid in full in order for the plan to be crammed down.'" In re Ferguson, 11-02958-jw, slip op. at 17 (Bankr. D.S.C. July 6, 2012) (quoting In re Maharaj, 681 F.3d 558, 562 (4th Cir. 2012)). The United States Court of Appeals for the Fourth Circuit held in In re Maharaj that the absolute priority rule continues to apply to individual Chapter 11 debtors. Maharaj, 681 F.3d at 560.

As previously discussed, it appears that Rock Funding would not vote to accept the June 18, 2015 proposed plan. Considering Rock Funding's dissent, Debtor has not provided an explanation as to how the June 18, 2015 Plan, which pays less than 100% to the unsecured creditors but provides for the retention of the Property by the Debtor, complies with the absolute property rule, including whether the plan provides for an additional new value contribution or how the plan could provide for payment in full of all dissenting creditor classes. Therefore, for the foregoing reasons, the Court finds that the Debtor has not satisfied its burden of demonstrating that the

[10] The secured portion of Rock Funding's claim, as valued in the June 18, 2015 proposed plan, represents 84% of the Class 2 claims of secured creditors. The unsecured portion of Rock Funding's claim, as valued in the June 18, 2015 proposed plan, represents 89% of the Class 3 claims of general unsecured creditors. Further, considering the $597,500 value of the property and the possible credit to Rock Funding's claim for the rents held by the receiver, Rock Funding would continue to represent a majority of the amount of claims in the impaired classes, and therefore, control those classes.

property is necessary to an effective reorganization and Rock Funding is entitled to relief under § 362(d)(2).[11]

In light of the granting of relief, the Court need not address whether to grant relief under §§ 362(d)(1) & 362(d)(3) at this time. Additionally, the Court finds that termination of the stay is a sufficient remedy under the circumstances of this case, and therefore, the Court denies the request to annul the automatic stay.

2. In Rem Relief under § 362(d)(4)

Rock Funding also alleges it is entitled to *in rem* relief as to the Property under § 362(d)(4). "To obtain relief from the automatic stay under § 362(d)(4), the creditor 'must establish three elements: (1) that [Debtor] engaged in a scheme, (2) to delay, hinder, [or] defraud the creditor, and (3) which involved . . . multiple filings.'" In re The Action Team, LLC, 12-02086-jw, slip op. at 4 (Bankr. D.S.C. Apr. 25, 2012) (quoting In re Davis, 10-02249-JW, slip op. at 11–12 (Bankr. D.S.C. Oct. 12, 2010). For purposes of § 362(d)(4), a scheme "'is an intentional artful plot to delay, hinder [or] defraud creditors.'" Id. (quoting In re Wilke, 429 B.R. 916, 922 (Bankr. N.D. Ill. 2010)).

The Court finds *in rem* relief is not appropriate under these circumstances. While Debtor has filed two bankruptcy petitions on the eve of Rock Funding's foreclosure sales, the Court finds

[11] Rock Funding additionally alleged that Debtor could not fund a plan because the rents from the Property were not property of estate due to Rock Funding's enforcement of the assignment of rents. The bankruptcy courts in the Southern and Eastern Districts of New York are split on whether the rents under an enforced assignment of rents are property of the bankruptcy estate under New York law. Compare In re South Side House, LLC, 474 B.R. 391 (Bankr. E.D.N.Y. 2012) (determining that debtor is owner of the rents and the rents were property of the debtor's estate under an assignment of rents after a receiver was appointed pre-petition to collect the rents); In re Koula Enters., Ltd., 197 B.R. 753 (Bankr. E.D.N.Y. 1996) ("[Creditor's] argument boils down to the proposition that under New York law, the appointment of a receiver in a mortgage foreclosure action transfers title of the rents to the bank. However, the Court does not believe that New York law permits such a conclusion.") with SOHO 25 Retail, LLC v. Bank of Am. N.A. (In re SOHO 25 Retail, LLC), Adv. Pro. No. 11-1286, C/A No. 10-15114, 2011 WL 1333084 (Bankr. S.D.N.Y. Mar. 31, 2011) (holding that creditor's pre-petition affirmative steps to enforce the assignment of rents prevented the rents from becoming property of estate); In re Loco Realty Corp., C/A No. 09-11785, 2009 Bankr. LEXIS 1724 (Bankr. S.D.N.Y. June 25, 2009) (holding that Debtor retained only an accounting in the rents after the Debtor executed an absolute assignment of rents and, therefore, the rents are not property of the estate). In light of the Court's finding that relief is proper under other grounds and in the interest of judicial economy, the Court need not address this unsettled question of New York property law.

that the unique circumstances related to the dismissal of Debtor's First Bankruptcy Case demonstrates that Debtor has not engaged in an intentional, artful plot to delay Rock Funding's collection efforts. Debtor's New York Case was dismissed because of the negligence of Debtor's New York counsel and not due to the actions of Debtor. As stated by the Bankruptcy Court for the Eastern District of New York in its Order Reconsidering Dismissal of the New York Case: "Debtor . . . entrusted the case to Eisner, a disbarred attorney and convicted criminal. It would be patently unjust to punish the Debtor for Eisner's wrongdoing." Due to the misrepresentations of his New York counsel, Debtor did not receive an adequate opportunity for reorganization in the first case he filed; therefore, the Court finds that Debtor's filing of the present case is similar to a debtor filing a bankruptcy case for the first time. For these reasons, the Court denies Rock Funding request under § 362(d)(4).

3. Waiver of Fed. R. Bankr. P. 4001(a)(3)

Rock Funding moved to waive the temporary stay of an order lifting the automatic stay under Fed. R. Bankr. P. 4001(a)(3). "[W]hen contested, [Fed R. Bankr. P. 4001(a)(3)] should be waived only when there is a clear showing by the movant of equitable reasons that would warrant the waiver of the presumptive stay afforded to a debtor by the rule." In re Maude H. Henderson and Daniel S. Henderson, IV Irrevocable Trust, C/A No. 08-01814, slip op. at 14 (Bankr. D.S.C. May 7, 2008). In light of Debtor's objection to the Motion and the fact that Rock Funding will not suffer significant harm by the imposition of the temporary stay, the Court does not find sufficient equitable reasons to warrant the waiver of the stay under Fed. R. Bankr. P. 4001(a)(3), and therefore, denies Rock Funding's request.

CONCLUSION

Based on the foregoing, it is hereby ORDERED that:

(1) Rock Funding's motion is granted, and the automatic stay is lifted pursuant to 11 U.S.C. § 362(d)(2) so that Rock Funding may commence such actions as are necessary to continue the foreclosure and sale of the Property in the New York State Court.

(2) Rock Funding's request for annulment of the automatic stay under 11 U.S.C. § 362(d) is denied.

(3) Rock Funding's request for *in rem* relief as to the Property under § 362(d)(4) is denied.

(4) Rock Funding's request for waiver of Fed. R. Bankr. P. 4001(a)(3) is denied.

AND IT IS SO ORDERED.