
In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)
)
LOUIS G. AMBOS, II) Chapter 11 Case
)
) Number 94-40734
Debtor)
and)
) Chapter 11 Case
HENRY F. AMBOS, JR.)
) Number 94-40735
Debtor)
)
)
)
THE COASTAL BANK)
SMALL BUSINESS)
ADMINISTRATION)
)
Movants)
)
)
)
v.)
)
LOUIS G. AMBOS, II)
HENRY F. AMBOS, JR.)
)
Respondents)

MEMORANDUM AND ORDER
ON OBJECTION TO ENTRY OF CONSENT ORDER

Debtors' cases were filed May 2, 1994. On August 3, 1994, a Motion for

Relief from the Automatic Stay was filed by The Coastal Bank ("Coastal Bank") on behalf of itself and the Small Business Administration ("SBA") seeking relief from the stay to pursue its remedies including foreclosure with respect to Debtors' principal asset, a parcel of real estate located in Thunderbolt, Georgia, with improvements which have been operated for a number of years by Debtors as a marina. The motion was scheduled for hearing September 7, 1994, at 11:00 a.m. When the case was called the counsel for Movant and counsel for Debtors announced that a consent order had been agreed upon and was submitted for the Court's consideration which provided in essence that: (1) Debtors concede there is no equity in the real estate which is the subject of the Motion; (2) Debtors consent that the stay should be lifted to permit Coastal Bank and SBA to pursue their state law remedies; (3) Coastal Bank and SBA waive any deficiency claim in the event the subsequent foreclosure fails to achieve a total payout of the outstanding balance of the indebtedness; and (4) Coastal Bank and SBA agree to reassign to the Debtors any interest Coastal and SBA would otherwise hold in a promissory note which is also pledged to a creditor Wister Lewis, but with respect to which Debtors enjoy some equity.

Upon announcement of the settlement the Court inquired as to whether any party in interest had an objection to the entry of the consent order. An objection was voiced by counsel for Virginia Hunter, the holder of the second priority deed to secure debt covering the premises which is the subject of the Motion. Because of the objection, a full evidentiary hearing was conducted and I make the following Findings of Fact and

Conclusions of Law.

FINDINGS OF FACT

Debtors are indebted to Coastal Bank and SBA as of the date of the hearing on three separate notes in the aggregate sum of \$1,226,163.00. The real estate is encumbered by an additional \$115,000.00 second mortgage obligation owed Ms. Hunter and is further encumbered by unpaid ad valorem taxes in the amount of approximately \$27,000.00. Accordingly, the total indebtedness which attaches to the subject real estate is \$1,368,163.00.

Movant brings its Motion under 11 U.S.C. Section 362 which provides in relevant part as follows:

(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; or

(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.

With respect to the "for cause" basis for granting stay relief, the evidence revealed that the largest of the notes payable to Coastal Bank in an amount of principal and accrued interest of \$965,201.55 is paid through December 1, 1993, with respect to principal, and through June 1, 1993, with respect to interest. At no time since the loans originated have the Debtors timely serviced the debt obligation, and as indicated above, the largest component of the debt owed to Coastal Bank is past due for a period of over one year. However, standing alone, and given the contentions that there is substantial equity in this property, I find that there are insufficient grounds for granting relief from stay "for cause."

With respect to the second prong of the stay relief motion, it was alleged by counsel for Ms. Hunter that the property is worth substantially more than the debt owed on it, that it should be offered for sale and marketed properly in order to achieve a maximum return to all creditors and that the Motion for Relief should be denied pending those sales efforts. Evidence on this point consumed most of the time devoted to the hearing.

It is clear that the property has been appraised on a number of different occasions since January 1989. Some earlier appraisals were based on the plans and specifications for the proposed marina and were intended for the purpose of obtaining

financing and, in addition to their age, are not particularly relevant because the size and the design of the marina were altered to some extent after the appraisals were rendered. Nevertheless, the property has been valued since it was completed at as much as \$3.1 million. Debtors in fact have a substantial investment in the property in that they owned the land on which the marina is located, free and clear of any liens at the time construction began. Even in the most conservative appraisal the land is valued at \$835,000.00. Debtors' testimony that they invested \$1.2 million in the improvements which constitute the marina project was uncontradicted. These facts suggest a value, measured on a cost basis of at least \$2 million. Nevertheless, the marina has not operated successfully since its completion and I conclude that valuing it on a cost basis is not an accurate reflection of its current market value. Instead it is clear that an income approach to valuation is the only reasonable basis on which to evaluate this property.

The Movants' employed John Ganem Appraisal Company to perform an appraisal on this property. Andrew DeWitt was the appraiser who actually performed the appraisal and testified at the hearing. He rendered an opinion that the property is worth \$1.1 million as of June 1994. He acknowledged that there had been a prior appraisal by the principal in the company for which he works in December of 1989 of approximately \$1.7 million. Although some of the assumptions on which Mr. DeWitt based his calculation of the net operating income, which is a key analysis in determining the value of a piece of commercial property based on the income approach, were based on industry averages rather

than the actual cost and expense history of Debtors' business, I found his testimony and his methodology to be generally credible. However, I was presented with other indicators of value which suggest that his final conclusions concerning value may have been overly conservative.

For instance, the Court heard testimony by a local real estate broker, Scott Martens. Mr. Martens was a principal developer of a nearby marina known as Savannah Bend Marina, with which he maintains no current ties, and now works as a real estate broker employed by the Keenan Company. The marina was listed with Mr. Martens in late 1992 and he attempted to sell it through June of 1994 when his listing agreement expired. When he met with the owners of Ambos Marina he performed an analysis to determine the proper listing price and, based on *pro forma* financial information, utilizing an income approach, he estimated the value of the marina in late 1992 to be \$1.95 million. This was based on a projected occupancy rate of 75%. Because it was felt to be desirable to have some negotiating room, the marina was listed for \$2.2 million. During the period of time in which the property was marketed, only one firm offer was ever extended for the purchase of the marina. In May 1993 an offer of \$1.5 million for its purchase was tendered, together with substantial earnest money. The Debtors made a counteroffer of \$1.8 million and never received a response from the original offeror. Although several inquiries were made over the eighteen month period during which Mr. Martens marketed the property, he never received any other offer. During the entire eighteen month period that he attempted to sell

the marina, the actual occupancy rate of boats in both wet and dry storage hovered in the 40 to 50% range and the occupancy never exceeded 58% for that entire period of time. Adjusting the 75% anticipated occupancy rate to roughly a 50% occupancy rate, to bring it in line with actual occupancy rates, results in an adjustment to the value of the marina on an income basis to approximately \$1.28 million.

The Court also heard evidence that two nearby marinas are presently being offered for sale. The first, Savannah Bend Marina, is on the market with an asking price of approximately \$2.5 million. It has the advantage of offering enclosed dry storage to boatowners, but otherwise in many respects is comparable to the subject property. Similarly, Fountain Marina located immediately adjacent to this marina is being offered for approximately \$1.8 million. However, both of these marinas are operating in the range of 80 to 90% occupancy. One of the difficulties with the subject property is that a portion of the wet storage area in which boats can be berthed is not, in fact, located in deep water, but runs dry as tide ebbs and for a period of at least two hours on each low tide. This renders a significant number of the wet storage slips unusable during this period of time. In addition, the point at which boats are launched by use of a forklift truck from the stack area into the river likewise runs dry and cannot be used. Given the alternative of nearby marinas which offer competitive prices but which do not suffer this repetitive lack of access to the river, it is understandable that Ambos Marina would suffer from lower occupancy rates. The siltation which has caused this problem is a continuing and progressive problem which will

require constant maintenance in the future to reverse.

After this Chapter 11 case was filed, the Debtors and the Movants, apparently recognizing that the marketing through conventional channels had achieved no more success than that which is outlined in the above discussion, agreed to propose an auction sale of this property. A motion was filed in which both the Movants and the Debtors asked the Court for authority to conduct an auction sale of the marina using Rowell Realty and Auction Company. After notice and a hearing, this Court, by Order dated June 23, 1994, approved the employment of Rowell Realty with the proviso, among other things, that any offer received at the auction was subject to final approval of the Court. Tom Ellis, the Rowell Realty representative who handled the marketing and auctioning of this property under the auspices of the Court Order, also testified. Clearly, Rowell Realty went to extensive efforts to expose this property for sale. It spent over \$21,000.00 in advertising and promotional expenses, mailed out over 14,000 brochures showing this property and a number of other parcels that were offered for sale on the same day, did general maintenance and cleanup around the marina facility and responded to inquiries from all who responded to the various advertising and direct mail solicitations. SBA offered the opportunity for pre-qualification of borrowers with terms that were reasonably competitive with current market conditions and, in fact, five potential purchases pre-qualified for SBA loans in the event they were successful bidders.

After exposure of the marina through the auction process, the highest bid received was the sum of \$765,000.00 which both Debtors and Movants rejected. Thereafter, Mr. Ellis was authorized to contact, and did contact, 24 prospective purchasers and advised them that he was authorized to solicit offers in the amount of at least \$1.1 million. As a result of those contacts, in fact, an offer with certain contingencies was extended for \$1.1 million. One of the contingencies, however, permitted the offeror to perform, for a period of ten days, a due diligence investigation and following that individual's further investigation of the marina facility the offer was withdrawn.

Based on all the evidence I conclude that the marina is worth \$1.3 million. While Mr. DeWitt's testimony as indicated above was certainly credible, it is also true that not all of the assumptions on which he based his conclusions mirror precisely the operating expense experience of this Debtor. I am mindful of the fact that a \$1.1 million offer was extended and later withdrawn within the past sixty days, strongly supporting the inference that Mr. DeWitt's appraisal is the correct one. However, while it might be inferred that the offer was withdrawn because the offeror concluded the property was not worth even \$1.1 million, it is equally possible to infer that it was withdrawn for other reasons, including lack of capital to close the sale or other reasons. It is also possible that, because the communication by Mr. Ellis specifically set a price of \$1.1 million, purchasers who might have been willing to pay slightly more for the property felt no pressure or incentive to do so. Accordingly, I do not feel bound by the DeWitt appraisal or by the unconsummated offer of

\$1.1 million. This is particularly true in view of the fact that a firm offer was made on this property in mid-1993 for \$1.5 million. That suggests that the property might be worth as much today. However, because of the continual and progressive siltation problems, continual low occupancy in the marina and normal depreciation and wear and tear which any facility of this type will experience over a period of fifteen months, I decline to adopt that value. Because the analysis of Mr. Martens, a knowledgeable marina operator and real estate broker, as adjusted to reflect the actual occupancy, falls between these two figures, I conclude that the fair market value of this property as of the date of the hearing was \$1.3 million. Having so concluded, however, I also determine that the Motion for Relief should be granted. Movant has carried its burden of showing that there is no equity in this property given the fact that the aggregate of first and second mortgage indebtedness and unpaid taxes is \$1,368,163.00. See In re Mellor, 734 F.2d 1396, 1400, n.2 (9th Cir. 1984).

I am mindful of the position of the second mortgage holder who argued in a post-hearing brief that the release of collateral by SBA to Debtors with a potential value of as much as \$100,000.00 as part of the consent order illustrates that there may in fact be some equity. If one adds that \$100,000.00 to the value of the marina then the total asset value reaches \$1,400,000.00 versus debt of \$1,368,163.00, leaving equity of approximately \$32,000.00. However, this figure would be consumed, even on an immediate sale if as little as 3% commission and expenses were incurred. If any marketing period were required and a more typical commission were charged, the total debt would clearly exceed \$1,400,000.00.

To the extent that interest accrual and expenses of sale exceed \$32,000.00, the estate will have been deprived of both the real estate and the equity in the note and junior lienholders, and unsecured creditors will receive nothing. In contrast, approval of the consent order results in release of the equity in the note receivable to the estate, a waiver of deficiency by SBA to Coastal, and thus a guarantee that approximately \$100,000.00 will be available for creditors. The second mortgagee retains all her state law rights at any foreclosure and, may assert a deficiency claim in this court if appropriate. Contrary to her assertion, Debtors do not have the "option of dismissing their bankruptcy proceeding after defeating the secured claim of the junior lienholder." *See* 11 U.S.C. §1112(b). While Debtors may convert to Chapter 7, they may not dismiss without notice and a hearing to determine whether dismissal is "in the best interest of creditors and the estate."

Given the fact that the Movants carried their burden on the issue of lack of equity and because the Debtors made no showing and indeed do not contend that the property is necessary to an effective reorganization, I find that the requirements of 11 U.S.C. Section 362 have been met and that the automatic stay should be lifted.

Accordingly, for the reasons set forth in this Order and because the Movants and the Debtors have consented to relief with specific provisions as contained in that Order, I overrule the objection to entry of the consent order and will contemporaneously herewith approve and execute the Consent Order submitted by the parties.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of September, 1994.