

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

In the matter of: ) ) ALEXANDER SRP APARTMENTS, LLC ) (Chapter 11 Case Number <u>12-20272</u> ) ) ) <i>Debtor</i> ) ) ) ) ALEXANDER SRP APARTMENTS, LLC ) ) <i>Plaintiff</i> ) ) ) ) v. ) ) LSREF2 BARON, LLC ) ) ) <i>Defendant</i> )	Adversary Proceeding Number <u>12-2015</u>  <p style="text-align: center;"><b>FILED</b></p> Lucinda B. Rauback, Acting Clerk United States Bankruptcy Court Savannah, Georgia By Ibarbard at 4:04 pm, Jun 04, 2012
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**ORDER ON DEBTOR'S EMERGENCY MOTION  
FOR PRELIMINARY INJUNCTION**

**FINDINGS OF FACT**

Debtor owns a 232 unit apartment complex in Glynn County, Georgia (the "Property"), which was financed by Regions Bank in 2008. The Note matured on January 26, 2011, and the Loan became due and payable in full. Joint Statement of Material Undisputed Facts, Dckt. No. 103.<sup>1</sup> Debtor failed to pay the outstanding indebtedness, creating an event

<sup>1</sup> For this Order, citations to the main bankruptcy case (12-20272) will appear as "Dckt. No. \_\_\_\_"; citations to the Debtor's Adversary Proceeding (12-2015) will appear as "A.P. Dckt. No. \_\_\_\_".

of default. Id. Regions Bank and Debtor entered into a forbearance agreement, which provided that Regions would forbear exercising its remedies under the loan documents until the earlier of January 26, 2012, or the occurrence of a Forbearance Termination Event. See Forbearance Agreement, LSREF2's Exh. 10. Regions subsequently assigned the Loan, and LSREF2 Baron Trust 2011 ("LSREF2") is now the current holder of the Promissory Note and the Deed to Secure Debt. The forbearance period expired on January 26, 2012, but Debtor did not repay the Loan. Joint Statement of Material Undisputed Facts, Dckt. No. 103. On March 5, 2012, Debtor filed its Chapter 11 case. As of the filing date, the Note had a balance of principal and accrued interest totaling \$17.3 million.<sup>2</sup> See Disclosure Statement, Dckt. No. 126 at 12; see also LSREF2's Statement of the Case, Dckt. No. 103 at 5.

On March 12, 2012, LSREF2 filed a Motion for Relief from Stay and a Motion to Dismiss. Dckt. Nos. 43, 42. The Court conducted a consolidated hearing on those motions on April 13, 2012, and entered an order granting LSREF2's Motion for Relief from Stay and denying on an interim basis LSREF2's Motion to Dismiss on April 20, 2012. Dckt. No. 110. This Court found that stay relief was warranted based on Debtor's pre-petition waiver of the automatic stay and the negligible, if any, equity in the Property. Id. On April 30, 2012, Debtor filed a Motion for Amended or Additional Findings or, Alternatively, Motion to Alter, Amend, or Grant Relief from Order and Reimpose Automatic Stay. Dckt. No. 121. In this motion, Debtor sought reconsideration of the Court's grant of stay relief to

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<sup>2</sup> Except where the precise number is material, I will utilize rounded or approximate numbers throughout this opinion.

LSREF2 and sought to present additional evidence as to the value of the Property. The Court denied this motion by order dated May 16, 2012. Dckt. No. 123.

On May 21, 2012, Debtor initiated this adversary proceeding (A.P. Case No. 12-02015) seeking injunctive relief pursuant to 11 U.S.C. §§ 105 and 362 and Bankruptcy Rules 7001(7) and 7065. Debtor contemporaneously filed an Emergency Motion for Preliminary Injunction and Request for Expedited Hearing. A.P. Dckt. No. 2. Debtor's Motion for Preliminary Injunction requested that the Court enter an order reimposing the automatic stay and enjoining LSREF2 from proceeding with a foreclosure sale currently scheduled for June 5, 2012. *Id.* at 5. Debtor also filed a Disclosure Statement and Chapter 11 Plan of Reorganization on May 21, 2012. Dckt. Nos. 125, 126. A hearing on this matter was held May 22, 2012, and the two parties submitted post-hearing briefs for the Court's consideration on May 29, 2012. A.P. Dckt. Nos. 10, 11.

#### CONCLUSIONS OF LAW

The question before the Court is whether to issue a preliminary injunction ordering that LSREF2 withdraw its scheduled foreclosure of the Debtor's apartment complex. Debtor requested this relief pursuant to 11 U.S.C. § 105 and Bankruptcy Rule 7065. Section 105 broadly permits the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). However, this code section is not without limitation. Section 105(a) "may not be invoked where the result of its application would be inconsistent with any other Code provision or it

would alter other substantive rights set forth in the Code.” In re Nosek, 544 F.3d 34, 44 (1st Cir. 2008). Additionally, an adversary seeking injunctive relief is not an opportunity to relitigate matters that were or should have been argued at the hearing on the merits of the motion for relief. In re Harris, slip copy, 2005 WL 6742488 at \*3 (Bankr. S.D. Ga. Mar. 21, 2005) (Davis, J.).

To obtain a preliminary injunction pursuant to section 105, Debtor must establish four elements. See Smith v. Regions Bank (In re Smith), slip copy, 2009 WL 3734322 at \*3 (S.D. Ga. Nov. 6, 2009) (Alaimo, J.). The Eleventh Circuit has articulated this standard for issuance of a preliminary injunction, stating that such relief may only be granted if the moving party shows that: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injury may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000) (*en banc*).

The Eleventh Circuit has cautioned that a preliminary injunction is an extraordinary and drastic remedy not to be granted unless the Debtor has shown that all four elements are satisfied. Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade County School Bd., 557 F.3d 1177, 1198 (11th Cir. 2009); Forsyth County v. U.S. Army Corps of Engineers, 633 F.3d 1032, 1039 (11th Cir. 2011). “Failure to show any of the four factors is fatal, and the most common failure is not showing a substantial likelihood of success on the merits.”

Am. Civil Liberties Union of Fla., Inc., 557 F.3d at 1198. Leaving aside a discussion of all four factors, I find that Debtor has not established elements one and four, and therefore the relief requested must be denied.

To meet its burden on the first element of a preliminary injunction, Debtor must show that it is substantially likely to succeed on the merits of the dispute. The parties have presented the Court with two differing views on what the “merits”<sup>3</sup> of this dispute are. LSREF2 argues that issuance of an injunction would be tantamount to this Court reversing its two earlier orders in this case, and thus to satisfy the first element, Debtor would need to establish that it is substantially likely to succeed in overturning the Court’s prior stay relief order where a motion to reconsider has already been denied. LSREF2’s Motion for Relief from Stay was granted on April 20, 2012, and Debtor’s motion seeking reconsideration of that Order was denied on May 16, 2012. Dckt. Nos. 110, 123. LSREF2 believes that enjoining the foreclosure in the aftermath of these rulings would be nothing more than impermissibly granting Debtor a “third bite at the apple.” Conversely, Debtor argues that the “merits” issue is the question of whether Debtor can demonstrate a substantial likelihood that

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<sup>3</sup>This “merits” issue is the subject of conflicting authority. See Matter of Commonwealth Oil Refining Co., Inc., 805 F.2d 1175, 1189 (5th Cir. 1986) (“Merits” for purposes of assessing the propriety of the issuance of a section 105 stay were whether Debtor would succeed in defending an EPA enforcement action, *not* whether a Debtor could later comply with EPA regulations as part of a plan of reorganization.); *but see* Chrysler Capital Corp. v. Official Committee of Unsecured Creditors (In re Twenver, Inc.), 149 B.R. 950 (D. Colo. 1993) (in a Chapter 11 business reorganization, the first element is met if the debtor has a reasonable probability of confirming a plan of reorganization (citing Smith v. Citifed (In re Smith), 111 B.R. 102, 105 (Bankr. E.D. Pa. 1990)); In re Salzer v. Gick (In re Salzer), 1991 WL 119153 at \*6 (Bankr. N.D. Ind. Feb 21, 1991) (first element “means the probability of a successful plan of reorganization . . . [a]s a result, it requires the court to return to its original analysis under § 362(d)(2) and consider whether or not there has been a substantial change in circumstances so that the debtor can now carry the burden, which it originally failed to prove, that the property in question is necessary for an effective reorganization.”).

it can obtain approval of its recently filed disclosure statement and plan. LSREF2's contention regarding what the "merits" are is quite logical and may be correct, but there is no clear answer and delving into that analysis is unnecessary because I conclude that Debtor has failed to carry its burden even under its own theory.

Debtor has failed to show a substantial likelihood that it can confirm a plan. Debtor's Plan, filed May 21, 2012,<sup>4</sup> proposes the following:

- 1) Debtor's principals will inject \$450,000.00 in new value into the Debtor. \$150,000.00 will be used to reduce the principal balance of the debt due LSREF2. \$300,000.00 will be used by Debtor to make necessary repairs to the complex. Disclosure Statement, Dckt. No. 126 at 13.
  
- 2) Debtor will pay \$144,000.00 in post-petition interest calculated at the non-default contract rate of 4% from accumulated cash of approximately \$200,000.00. Id. at 15, Exh. B.

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<sup>4</sup>A week after the hearing, Debtor filed a First Amended Plan of Reorganization and an accompanying Amended Disclosure Statement. Dckt. Nos. 134, 135. Debtor argues that the terms of these documents address the alleged defects, which according to LSREF2, made Debtor's original Disclosure Statement and Plan unconfirmable. I find that the Amended Plan and Amended Disclosure Statement have no evidentiary value for the purpose of this Order, having been filed after the close of the evidence at trial. There was no evidence taken then to authenticate the new information provided, nor was there an opportunity for LSREF2's counsel to cross examine the proponent or to introduce rebuttal evidence. Accordingly, even if the Court were able to rule based on what is contained in these documents, it would be forced to do so using its own best judgment as to what, if anything, they show unfettered by any evidentiary support. This is not a proper judicial role. See Fireman's Fund Insurance Co. v. Wilburn Boat Co., 259 F.2d 662, 664 (5th Cir. 1958) (Fact that evidence was "exhibited to the Court" after the record had been closed with no record indication that the adverse party was given an opportunity either to object or to refute it in fact, did not constitute the admission of it into evidence.).

- 3) Debtor proposes a 4% post-confirmation rate of interest, and a new note principal balance of \$16,900,000.00. Id. at 16.
  
- 4) Debtor will refinance the net debt owed of \$16,900,000.00 at 4% per annum, paying monthly interest of \$57,000.00 plus a monthly principal reduction of \$15,000.00 for a total payment of approximately \$72,000.00. The note will mature in two years with some provisions for a six month extension if a sale or refinance is imminent. See id. at 16-17.

LSREF2 argues that this plan is not confirmable, and I agree. I have previously ruled that a lender is entitled to pendency interest at the contract default rate. In re Del-a-Rae, Inc., 448 B.R. 303 (Bankr. S.D. Ga. 2011) (Davis, J.). In re Gillikin, slip copy, 2011 WL 7704353 (Bankr. S.D. Ga. 2011) (Davis, J.). I reaffirm that ruling and hold that the proposed payment of the non-default rate is impermissible, and that Debtor is obligated to pay the higher default rate through confirmation. Contract default interest is 9% per annum or approximately \$125,000.00 per month using the Debtor's proposed new note balance of \$16,900,000.00. See Promissory Note, LSREF2's Exh. 1 at Art. 5. With a disclosure statement and plan filed May 21, 2012, the earliest foreseeable confirmation hearing would be late July or early August. By August 5, 2012, five months of post-petition interest will have accrued, totaling some \$625,000.00. Debtor does not have the accumulated cash coupled with projected net income to fund this \$625,000.00 obligation.

Further, even the payment of interest at the non-default rate of 4% plus the proposed \$15,000.00 monthly principal reduction is insufficient. First, to amortize the \$16,900,000.00 at 4% for 30 years would require a payment of \$81,000.00 per month. Debtor's plan contemplates a monthly payment of only \$72,000.00 yielding a monthly shortfall of \$9,000.00 and minuscule net income under \$5,000.00 to cover all contingencies and working capital needs. As a result, the plan is underfunded, and thus is not financially feasible as written. Moreover, LSREF2 objects to the 4% rate. If the appropriate confirmation rate were set at 5% the required payment would rise to \$90,000.00 and the monthly short fall would increase from \$9,000.00 to \$18,000.00 placing Debtor in a deeper negative cash flow position. Although no evidence was taken on the interest rate issue, it is unnecessary to set a final rate for the purposes of this order in light of the fact that even the proposed 4% rate cannot be funded.

Finally, LSREF2 contends that this amount will not pay its loan balance in full. It argues that its total debt will exceed \$18 million based on a balance of \$17.3 million as of the filing date, post-petition default interest of \$625,000.00 plus an unknown amount of attorney's fees. That principal balance would need to be reduced by the amount of any post-petition principal reduction plus the \$150,000.00 principal reduction proposed at confirmation. With these reductions taken into account, the net amount to be financed would be less than \$18 million but would exceed \$16.9 million, and to the extent it does, the plan is even further underfunded.

Debtor is also unable to show that issuance of the injunction is in the public interest. As pointed out in my earlier orders, the public interest is served by enforcement of contract provisions agreed to, that do not violate public policy, and are not the result of fraud, duress, mistake, and the like. See In re Alexander SRP Apartments, LLC, Case No. 12-20272, Dckt. No. 110 at 12, 15 (Bankr. S.D. Ga. Apr. 20, 2012) (Davis, J.); see also In re Cheeks, 167 B.R. 817, 819 (Bankr. D.S.C. 1994). Here not only was the pre-petition waiver agreed to, but the waiver was upheld by this Court's prior orders. The public interest is served when the goal of finality in legal proceedings is achieved. See In re Alexander SRP Apartments, LLC, Case No. 12-20272, Dckt. No. 123 at 7 (Bankr. S.D. Ga. May 16, 2012) (Davis, J.); see also In re Blocker, Case No. 09-60004, Dckt. No. 83 at 4-5 (Bankr. S.D. Ga. Jun. 25, 2009) (Davis, J.) (stay pending appeal against public interest where it would circumvent the terms of a Court-approved consent order and "permit the Debtor to do indirectly what [the Court has] previously ruled he cannot do directly."). Debtor, having failed to convince the Court on two occasions that the pre-petition waiver should not be enforced, makes another run, albeit indirectly, at achieving the same goal.

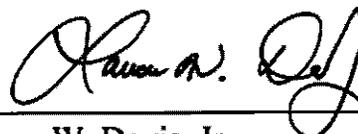
Courts may look to congressional intent in assessing the public interest factor of injunctive relief. Johnson v. U.S. Dep't of Agriculture, 734 F.2d 774, 788 (11th Cir. 1984) ("Congressional intent and statutory purpose can be taken as a statement of public interest."). The congressional intent behind 11 U.S.C. § 362(d)(1) is evidenced by

Congress's failure to require consideration of a debtor's prospect of reorganization in determining whether stay relief should be granted "for cause", but inclusion of such a requirement in sections 362(d)(2) and (d)(3). Here, stay relief was granted "for cause" under section 362(d)(1). The Court agrees with LSREF2 that granting injunctive relief to allow Debtor to pursue a plan of reorganization following a "for cause" stay relief order would effectively rewrite section 362(d)(1) to include an assessment of reorganizational prospects before the stay could be lifted. Congress did not include this requirement in the statute, and the public interest is not served by bypassing Congress's directives.

Although the form of the pleadings differs, the substance of the relief sought is tantamount to a second effort to have this Court revisit its ruling on stay relief. This I will not do. Debtor argues that it does not "seek reversal" of this Court's prior order granting stay relief. A.P. Dckt. No. 11 at 10. Instead, Debtor's brief states that the Court's prior order "enforced the waiver" and Debtor only seeks to enjoin the "planned foreclosure." *Id.* at 11. The weakness in this argument is apparent. There is a "planned foreclosure" only because this Court earlier granted stay relief. To enjoin that foreclosure, even if not styled as a reversal of the stay relief order, is substantively the equivalent. To argue otherwise promotes form over substance and lends itself to a result that does not serve the public interest.

ORDER

Pursuant to the foregoing, IT IS THE ORDER OF THIS COURT that  
Debtor's Emergency Motion for Preliminary Injunction is DENIED.



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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 4<sup>th</sup> day of June, 2012.