

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

In the matter of:)
)
 ALEXANDER SRP APARTMENTS, LLC)
)
 Debtor)
)
)
 LSREF2 BARON, LLC)
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 Movant)
)
)
 v.)
)
 ALEXANDER SRP APARTMENTS, LLC)
)
 Respondent)

Chapter 11 Case
 Number 12-20272

FILED
 Samuel L. Kay, Clerk
 United States Bankruptcy Court
 Savannah, Georgia
 By Ibarnard at 3:11 pm, Apr 20, 2012

**MEMORANDUM AND ORDER
ON MOTION TO DISMISS AND MOTION
FOR RELIEF FROM THE AUTOMATIC STAY**

Debtor filed Chapter 11 bankruptcy on March 5, 2012. Debtor owns a 232 unit apartment complex in Glynn County, Georgia, financed by Regions Bank in 2008. Movant is the current holder of the Promissory Note and the Deed to Secure Debt that secures the Note, which as of the filing date had a balance of principal and accrued interest

totaling \$17.3 million.¹ See LSREF2's Statement of the Case, Dckt. No. 103, 4.

The Court conducted a consolidated hearing on the motions in question and on the issue of Debtor's continued use of cash collateral, April 13, 2012. Cash collateral use was resolved on an interim basis by an Order dated April 17, 2012. Dckt. No. 109. After reviewing the evidence on Movant's Motion to Dismiss and Motion for Relief from the Automatic Stay, I enter the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The parties have filed a Joint Stipulation of Material Undisputed Facts which are reproduced here verbatim:

2. The Debtor is the owner and operator of a 232 unit apartment complex known as Odyssey Lake Apartments, located in Brunswick, Georgia, as well as other tangible and intangible assets (collectively, the "Property"). *Interim Order Authorizing Use of Cash Collateral And Scheduling A Final Hearing* [ECF No. 58] ("Interim Order"), ¶ 2.

3. On or about February 26, 2008, Regions Bank ("Regions") made a loan of \$17,199,000.00 (the "Loan") to the Debtor to finance development of the Property. The Loan was documented by, among other things, a Promissory Note dated as of February

¹ Except where the precise number is material, I will utilize rounded or approximate numbers throughout this opinion.

26, 2008 (the "Note") and a Construction Loan Document (the "Construction Loan Document"). Plf. Exh. Nos. 1 and 2; Interim Order ¶ 3.

4. The Loan was secured by, among other things, the Property, leases and rents and other personal property (collectively, the "Collateral"). Documents providing security for the Loan include, among other things, a Deed to Secure Debt and Security Agreement dated February 26, 2008 (Plf. Exh. No. 3), an Assignment of Leases and Rents dated February 26, 2008 (Plf. Exh. No. 4), a Security Agreement dated February 28, 2008 (Plf. Exh. No. 5), a UCC-1 Fixture Filing (Plf. Exh. No. 6) and a UCC-1 Personalty Filing (Plf. Exh. No. 7) (collectively, the "Security Documents"); see also Interim Order ¶ 3. The Note, the Construction Loan Document, the Security Documents, all assignment documents and other related documents are referred to herein collectively as the "Loan Documents."

5. The Note matured on January 26, 2011 and the Loan and all other indebtedness outstanding under the Note and the other Loan Documents became due and payable in full. Interim Order ¶ 3. The failure to pay the outstanding indebtedness created an event of default.

6. On March 8, 2011, counsel for Regions sent a default notice to the Debtor and guarantors of the Loan. Plf. Exh. No. 8.

7. On April 15, 2011, Regions and the Debtor entered into a Commercial Promissory Note Extension and Modification Agreement. Plf. Exh. No.9.

8. On or about May 9, 2011, Regions and the Debtor entered into a Forbearance and Modification Agreement (the "Forbearance Agreement"). Plf. Exh. No. 10; Interim Order ¶ 3. The Forbearance Agreement provided that Regions would forbear from

exercising its remedies under the Loan Documents until the earlier of January 26, 2012 or the occurrence of a Forbearance Termination Event (as defined in the Forbearance Agreement). Plf. Exh. No.10 (Forbearance Agreement) ¶ 3.

9. On or about July 1, 2011, Regions assigned the Loan to LSREF2 Baron Trust 2011. Plf. Exh. No. 11. Other documentation of this assignment includes, among other things, an allonge (Plf. Exh. No. 1), an Assignment of Deed to Secure Debtor (Plf. Exh. No. 12), a UCC Fixture Filing Agreement (Plf. Exh. No. 6) and a UCC Personalty Filing Assignment (Plf. Exh. No. 7); see also Interim Order ¶ 4.

10. On or about September 20, 2011, LSREF2 Baron Trust 2011 assigned the Loan to Wells Fargo Bank, N.A. ("Wells Fargo") Plf. Exh. No. 13. Documentation of this assignment includes, among other things, an allonge (Plf. Exh. No. 1), an Assignment of Security Instruments dated September 20, 2011 (Plf. Exh. No. 14), a UCC Fixture Filing Assignment (Plf. Exh. No. 6) and a UCC Personalty Filing Assignment (Plf. Exh. No. 7), see also Interim Order ¶ 4.

11. The forbearance period expired on January 26, 2012; however, the Debtor did not repay the Loan. Interim Order ¶ 3.

12. On or about February 10, 2012, Wells Fargo published a Notice of Sale Under Power (the "Foreclosure Notice") in the Brunswick News. The foreclosure sale was scheduled for March 6, 2012. Wells Fargo sent the Debtor a copy of the Foreclosure Notice with correspondence on or about February 10, 2012. Plf. Exh. No. 15.

13. On or about February 13, 2012, Wells Fargo assigned the Loan to LSREF2. Plf. Exh. No. 16. Other documentation of this assignment includes, among

other things, an allonge (Plf. Exh. No. 1), an Assignment of Security Instruments (Plf. Exh. No. 17), a UCC Fixture Filing Assignment (Plf. Exh. No. 6) and a UCC Personalty Filing Assignment (Plf. Exh. No. 7), see also Interim Order ¶ 4.

14. The Note is secured by a properly perfected, first priority security interest in the Debtor's property. Interim Order ¶ 5.

15. On March 5, 2012 (the "Petition Date"), the day before the foreclosure sale was to take place, the Debtor filed a voluntary petition under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). Plf. Exh. No. 18; Interim Order ¶ 1.

16. The Debtor has approximately \$122,324.16 in non-insider unsecured claims as of the Petition Date. Plf. Exh. No. 19.

CONCLUSIONS OF LAW

The Motions under consideration are based directly on the following Code provisions:

11 U.S.C. § 362(d)(1) and (2):

(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;

(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;

11 U.S.C. § 1112(b)(1) and (b)(4):

(b)(1) Except as provided in paragraph (2) and subsection (c), on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate:

(4) For purposes of this subsection, the term 'cause' includes— (in part)

- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;
- (B) gross mismanagement of the estate;
- (D) unauthorized use of cash collateral substantially harmful to 1 or more creditors;
- (I) failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief;
- (J) failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court;
- (M) inability to effectuate substantial consummation of a confirmed plan;

Imbedded in the Court's application of these two provisions, as well as the separate cash collateral issue, is the question of what the current value of the apartment

complex is. With a debt of \$17.3 million, the outcome of all the matters before the Court will be affected by the value the Court sets.

Detailed testimony taken at the hearing centered on this issue. Debtor advanced the opinion of John W. Wright and the accompanying report prepared by his firm and adopted by him in his testimony. Exh. D-1. It concluded a value of \$23.2 million. Movant utilized the report and testimony of Robert D. Crenshaw, who reached a value of \$16.7 million. Exh. P-26.

The Court has thoroughly considered their reports and the testimony, which consumed several hours. Each of the appraisers is well-qualified. The reports are professional, fact-intensive, and yet in the final analysis are driven by the individual choices of the appraisers on several key factors which will determine the question of equity. In this opinion, I will focus on three factors where significant distinctions exist in an effort to assess which appraisal has the best overall methodology. They are: what the appropriate capitalization rate should be; when and at what occupancy level stabilization will occur; and what is the cost of repairing design and construction defects.

Capitalization Rate

I have considered the two experts' reports carefully. See Exh. D-1, 94-99; Exh. P-26, 96-99. In essence, each report finds cap rates on comparable sales in this market

area have averaged very close to 6.50%. Wright also analyzes national data and concludes that there is a downward trend in average cap rates, as illustrated in his table. Exh. D-1, 97. Based on that trend he set a cap rate at 6.00%. *Id.* at 100. However, it is noteworthy that in the national data, cap rates vary substantially, from 3.75-10.00%. *Id.* at 97. In contrast, the comparable sales cap rates identified by both experts, which focused on our localized market area, are narrower in range and I find them inherently more informative. I therefore find the rate chosen by Crenshaw, 6.50% (Exh. P-26, 99), to be the better of the two, as it reflects the latest comparable cap rates based on sales since 2010 in the relevant market. Utilizing a similar universe of comparable rates, Wright's average rate is essentially the same (6.475 vs. 6.58). Exh. D-1, 94; Exh. P-26, 97. However, I find his downward adjustment for a general decline in cap rates unsupported by empirical data from the local market. Because a higher cap rate yields a lower value, all other factors remaining constant, my conclusion supporting Crenshaw's higher cap rate yields a lower indicated value for the apartment complex.

Stabilized Occupancy

Debtor's report was effective January 10, 2012, and has not been updated. In that report, the value conclusion was based in part on a projection that occupancy would stabilize at 95% by April 1, 2012. Exh. D-1, pp. 84, 100. Debtor did not achieve that target, undermining its conclusions on value. There remains a difference in the experts' opinion of how long it will take to stabilize occupancy at that level or indeed whether it will reach that level. I conclude that, on the question of occupancy stabilization, Crenshaw's appraisal is

the better of the two because it is more current in time, because the projections in Debtor's January 2012 report have already been proven incorrect, and because Crenshaw based his projections on actual conditions in the relevant market area. See discussion, Exh. P-26, 92.

Cost of Repairs

Crenshaw's report initially sets a value of \$18 million, which demonstrates equity, given the debt of \$17.3 million. However, he deducted anticipated repair costs of \$1.3 million to reach a net value of \$16.7 million, which renders the loan under-secured. Exh. P-26, 102. This repair cost was derived from an inspection and report by an engineer, qualified as an expert, revealing significant construction defects. *Id.*; Exh. P-21, 5. There is no question that remedial repairs are necessary, but at issue is how much they will cost. Debtor produced a witness who has bid \$5,500 per balcony to repair as many as eighty balconies that have suffered water damage. Debtor has budgeted \$520,000 for costs to repair these balconies and unspecified contingencies which may arise. Debtor contends that the Movant's \$1.3 million repair estimate is excessive, based on this competing bid, and because Debtor believes Movant's expert adopted an exaggerated view of the magnitude of the needed repairs based on a few isolated observations. Regardless of whether that is true, Debtor also argues it is pursuing a construction design and defect claim, which should recoup all costs of repairs it is forced to pay. If that occurs, Crenshaw's deduction of \$1.3 million would necessarily be reduced by any net recovery, or by the amount not spent if repairs can be completed at a lesser cost. In either event, his value would be adjusted upward dollar for

dollar above his \$16.7 million figure.

Since I find the Crenshaw appraisal of \$18 million more persuasive than Debtor's appraisal, determination of the actual repair costs, offset by any damage recovery from litigation, will control whether there is equity. For example, if the net repair costs are \$700,000, the property would be worth approximately the amount of the debt. If they total \$500,000, there may be as much as \$200,000 equity, at least as of the petition date. On the record before me, for the purpose of these Motions, I find there is negligible, if any, equity, but for resolution of any future issues I reserve the right to take additional evidence on this point.

Forbearance Agreement and Waiver of Stay Protection

Debtor and Regions entered into a Forbearance and Modification Agreement upon Debtor's default under the Loan. The Forbearance Agreement provided that Regions would forbear exercising its remedies under the Loan Documents in exchange for Debtor's waiver of its right to object to a motion for relief from stay in the event that Debtor later filed bankruptcy. Exh. P-10. The agreement stated, in relevant part:

Obligors further agree that, in the event that any Obligor (by its own action or the action of any of its beneficial owners or other creditors) shall (i) file with any bankruptcy court or be the subject of any petition for relief under the United States Bankruptcy Code, as amended, (ii) be the subject of any order for relief issued under the United States Bankruptcy Code, as amended, (iii) file or be the subject of any petition seeking any reorganization,

arrangement, composition, readjustment, liquidation, dissolution, receivership, or similar relief under any present or future federal or state act or law relating to bankruptcy, insolvency, or other relief for debtors, or (iv) seek, consent to, or acquiesce in the appointment of any trustee, receiver, conservator, or liquidator, Lender will thereupon be entitled to relief from any automatic stay imposed by Section 362 of the United States Bankruptcy Code, as amended, or otherwise, on or against the exercise of the rights and remedies otherwise available to Lender as provided in any of the Loan Documents, and as otherwise provided by law, and *Obligors hereby waive the benefits of such automatic stay and consent and agree to raise no objection to such relief.*

Id. at ¶ 13. LSREF2, as Region's assignee, has now moved for relief from stay, asserting that Debtor should be bound by this waiver. Dckt. Nos. 43, 44.

If this Forbearance Agreement is enforceable, I hold that stay relief should be granted "for cause." 11 U.S.C. § 362(d)(1). In re Jim's Maint. & Sons, Inc., 418 Fed. Appx. 726, *2 (10th Cir. 2011) ("cause" is a discretionary determination by the court based on the circumstances of each case); In re Wilson, 116 F.3d 87, 90 (3rd Cir. 1997); In re Robbins, 964 F.2d 342, 342 (4th Cir. 1992); In re Nofziger, 227 Fed. Appx. 788, 789 (11th Cir. 2007).

The enforcement of such waivers has been the subject of conflicting authority. It is well-settled that contractual provisions waiving the right to *file* a bankruptcy case are unenforceable and violative of public policy. Fallick v. Kehr (In re Fallick), 369

F.2d 899, 904 (2d Cir. 1966); In re Pease, 195 B.R. 431, 432 (Bankr. D. Neb. 1996); In re Madison, 184 B.R. 686, 690 (Bankr. E.D. Pa. 1995). Pre-petition waivers of stay relief are a different matter. These ordinarily will not be enforced if the waiver was contained in the initial loan document but will be given greatest effect if entered into during the course of prior Chapter 11 proceedings. In re Bryan Road, LLC, 382 B.R. 844, 848 (Bankr. S.D. Fla. 2008). This Court has previously enforced a pre-petition waiver of the automatic stay, based on the principles of collateral estoppel, where the waiver was part of a court-approved consent order entered in a prior bankruptcy case. In re Blocker, 411 B.R. 516 (Bankr. S.D. Ga. 2009) (Davis, J.).

I now hold that waivers of the automatic stay are not *per se* unenforceable, but the party opposing enforcement of the waiver has the burden of proving that the waiver should not be enforced. In re Frye, 320 B.R. 786, 791 (Bankr. D. Vt. 2005); In re B.O.S.S. Partners I, 37 B.R. 348, 351 (Bankr. M.D. Fla. 1984). Certainly the weight of case law upholds enforcement of waivers of the automatic stay under appropriate circumstances. In several cases factually similar to the present case, pre-petition forbearance agreements waiving a debtor's right to contest stay relief have been upheld as valid and enforceable. In re Club Tower Ltd. P'ship, 138 B.R. 307 (Bankr. N.D. Ga. 1991); In re Cheeks, 167 B.R. 817, 819 (Bankr. D.S.C. 1994) ("perhaps the most compelling reason for enforcement of the forbearance agreement is to further the public policy in favor of encouraging out of court restructuring and settlements"); In re Trans World Airlines, Inc., 261 B.R. 103, 116 (Bankr.

D. Del. 2001) (the argument in favor of enforcing a pre-petition waiver of the automatic stay is strongest in single asset real estate cases); In re Desai, 282 B.R. 527 (Bankr. M.D. Ga. 2002); In re Atrium High Point Ltd. P'ship, 189 B.R. 599 (Bankr. M.D.N.C. 1995).

Courts have articulated various factors to consider in determining whether a pre-petition waiver of the automatic stay should be enforced. These decisions emphasize that a waiver is not self-executing, but will be enforced if the balance of the equities weighs toward enforcement. *See Frye*, 320 B.R. at 790-91 (enumerating ten factors important in determining whether a waiver should be enforced); *see also Desai*, 282 B.R. at 532 (delineating a four factor test).

Other courts have refused to enforce pre-petition waivers, asserting that such waiver is against public policy in a single asset real estate case because it effectively acts as a prohibition to filing bankruptcy. *See In re DB Capital Holdings, LLC*, 454 B.R. 804 (Bankr. D. Colo. 2011) (creditor can still obtain enforcement of the waiver unless debtor can show "sufficient" equity and likelihood of reorganization or prejudice to other creditors); In re Jenkins Court Assocs. Ltd. P'ship, 181 B.R. 33 (Bankr. E.D. Pa. 1995).

When a waiver adversely affects other creditors, offending the underlying purpose of the automatic stay to treat creditors equally, courts generally refuse to uphold the waiver. In re Sky Grp. Int'l, Inc., 108 B.R. 86, 89 (Bankr. W.D. Pa. 1989); In re S.E. Fin.

Assocs, Inc., 212 B.R. 1003, 1005 (Bankr. M.D. Fla 1997); In re Deb-Lyn, Inc., 2004 WL 452560 at *2 (N.D. Fla. Feb. 20, 2004). This policy goal also explains why courts give greater effect to waivers that are part of a negotiated Chapter 11 plan of reorganization, but give lesser effect to agreements made without court approval. In cases where a waiver has been approved by the court, the court was able to review the agreement in advance and third-party creditors had an opportunity to object.

After a thorough review of the authority on both sides of this issue, I find those cases permitting the enforcement of pre-petition waivers “in appropriate circumstances” persuasive. Debtor only agreed to waive a single benefit of the Bankruptcy Code, rather than waiving bankruptcy protection entirely. Debtor still received the benefit of the automatic stay, when the case was filed, both as to other creditors and as to LSREF2, all of whom were prohibited from collection activity unless and until stay relief was granted. Thus, Debtor retained the right to a hearing, permitting Debtor to present evidence that the Forbearance Agreement should not be enforced, before any determination that the stay should be lifted. Waivers of stay relief are not per se unenforceable on public policy grounds.

I now turn to whether “appropriate circumstances” exist in this case to enforce the waiver. This is not a case where waiver of the automatic stay was inserted into the initial Loan Documents. Rather, Debtor’s loan matured in January 2011, default notice was sent in March, and ultimately the loan was modified and extended a full year beyond its

original maturity. Significant concessions were granted by the lender, by forbearing action in 2011, and in exchange Debtor, a sophisticated, knowledgeable, and experienced developer and borrower, agreed to the waiver. While the Forbearance Agreement was not incorporated into a Chapter 11 Plan and was not approved by court order, when viewed with hindsight, there is no fact attendant to the transaction which reveals fraud, mistake, coercion, or any other factor where public policy would negate the waiver.²

No creditors or parties in interest have objected to the motion for stay relief. Indeed, even if other creditors might arguably be harmed today by the Court's enforcement of the waiver, in the absence of this Forbearance Agreement the property at issue would have long since been foreclosed or restructured in an earlier bankruptcy. When Debtor defaulted over a year ago, the lender had a present right to foreclose but withheld exercising its rights under the Loan Documents because Debtor agreed to waive any subsequent objection to a motion for relief from stay. The agreement was supported by significant consideration, and served the salutary purpose of parties reaching dispute resolution consensually and without resort to the legal system. As noted above, I am unable on this record to set a firm value of the apartment complex, *supra* at 10, but the equity margin, if any, is so thin and the interest accrual on the loan is so significant that the question of equity does not alter my conclusion.

² Debtor believed Regions would grant a further extension if necessary at the end of the forbearance period, but there was no commitment to do so, and any refusal to grant a further extension is not actionable.

I hold Debtor's pre-petition waiver should be enforced. While enforcing the waiver, I emphasize that upholding enforceability in the abstract does not entitle LSREF2 to stay relief without a hearing. Waivers of relief from stay are not self-executing. In re Powers, 170 B.R. 480, 483 (Bankr. D. Mass. 1994); Cheeks, 167 B.R. at 819; Sky Grp. Int'l, 108 BR at 86; Frye, 320 B.R. at 791. Enforcement of the waiver always depends upon final review by a bankruptcy court after notice and a hearing. Any circumstance that in equity and good conscience a court could not condone in connection with the obtaining or enforcement of the waiver will always authorize a United States Bankruptcy Judge to restrict the waiver. Here, however there is no such circumstance.

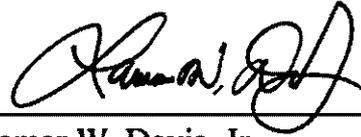
Therefore, the waiver is enforceable and LSREF2 is entitled to relief from stay.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Motion for Relief from Stay filed by LSREF2 Baron, LLC, is GRANTED, for cause.

IT IS FURTHER ORDERED that the Motion to Dismiss is DENIED on an interim basis and a continued hearing will be scheduled. The Court reserves the question of whether there is sufficient equity to permit use of cash collateral beyond May 22, 2012,

which will be addressed at a continued hearing on that issue.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 21st day of April, 2012.