

Ch 11

Relief from Stay § 562 (a)
Dismissal for Cause § 1112 (b)

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Waycross Division

In the matter of:)

ISAIAH JAMES DAVIS)
d/b/a Davco Realty)

Debtor)

FEDERAL LAND BANK OF COLUMBIA)

Movant)

v.)

ISAIAH JAMES DAVIS)

Respondent)

Chapter 11 Case

Number 587-00208

FILED

at 4 O'clock & 53 min. PM

Date 1/14/88

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia *MCB*

ORDER ON MOTION TO DISMISS
OR FOR RELIEF FROM STAY

Debtor filed this Chapter 11 case on November 4, 1987. On November 13, 1987, Federal Land Bank of Columbia ("Land Bank") filed its Motion to Dismiss which alternatively sought relief from stay in part because of Debtor's alleged bad faith in filing this case. After a lengthy evidentiary hearing on December 19, 1987, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1) Debtor previously filed a Chapter 11 case in this Court on October 6, 1980, Case Number 580-00069. Debtor's Disclosure Statement and Plan in said case were filed on February 2, 1981, proposing to pay Federal Land Bank all then existing delinquencies within three (3) years of confirmation.

2) Land Bank and two other creditors voted to reject the proposed plan and it could not be confirmed at the initial hearings on confirmation. During the time that confirmation was pending Debtor succeeded in selling some land and reducing his debt to some extent.

3) Debtor filed a Motion pursuant to 11 U.S.C. Section 1129(6)(2)(A) to obtain confirmation of his plan over the objection of Land Bank, a so called "cram-down" motion.

4) At the confirmation/cram down hearing held on November 9, 1987, the two creditors, other than Land Bank withdrew their opposition to the plan. Land Bank opposed confirmation. However, after an evidentiary hearing the Court held that Debtor had established the criteria necessary to overcome Land Bank's objection and the plan was confirmed November 12, 1981. The plan provided that Debtor would pay all

debts except Land Bank's within three (3) years and would cure all defaults on all Land Bank loans in a like period.

5) Pursuant to his plan Debtor proceeded to sell certain real estate from time to time, reduced his debt accordingly, and made other periodic payments to his creditors.

6) On September 25, 1987, Debtor filed a final report in response to a request from the Court which was sent to this Debtor and many others in an effort to ease the transition to the United States Trustee Program. On September 30, 1987, a "final order" was entered closing the case.

7) Pursuant to the confirmed plan Debtor was required to bring his loan from Land Bank current not later than December 12, 1984. Debtor in fact was current in his obligations to Land Bank as of December 31, 1981, and December 31, 1982. However, beginning in 1983 Debtor became delinquent and the cumulative amount of his delinquencies were as follows:

| | |
|----------|--------------|
| 12/31/83 | \$179,714.30 |
| 12/31/84 | \$359,737.00 |
| 12/31/85 | \$112,781.31 |
| 12/31/86 | \$306,665.09 |
| 12/31/87 | \$512,658.81 |

Debtor made substantial payments in 1985. However, the amounts paid were insufficient to place his loan on

a current basis, and it has been in default, under the terms of the confirmed plan, since sometime in 1983.

The balance due on the debt is \$849,626.31 with per diem interest of \$240.54. Land Bank sent statutory notice under Georgia law of its intent to collect attorney's fees on August 27, 1987, which presently amount to \$76,446.79 of the balance due. (Exhibits 5,9).

8) The August 27, 1987, attorney's fees notice was contained in a letter from Land Bank's representative to Debtor which also advised Debtor that the real estate pledged to Land Bank "had been called for foreclosure". Thereafter, on September 10, 1987, Debtor filed an action in State Court against Land Bank and others seeking an accounting and an injunction stopping any foreclosure for 60 days. (Exhibit 6).

9) On September 30, 1987, the Superior Court of Toombs County, Georgia, entered a consent order establishing a method whereby the parties would accomplish the accounting sought by Debtor. The Order recited that Land Bank agreed not to advertise the Debtor's land for foreclosure during September or October 1987, although no injunction was entered.

10) On November 4, 1987, Debtor filed this

Chapter 11 case, and on November 9, 1987, dismissed the Superior Court action without prejudice.

11) Debtor is semi-retired on Social Security from which he derives \$1,000.00 per month in income. He owns 5000-6000 acres of land in Southeast Georgia, most of it timberland. He was formerly in the lumber business but now would fund any debt reduction from timber or land sales only.

12) Debtor concedes that the debt owed Land Bank is correct. Although he still harbors some concern that all monies which should have been remitted to Land Bank by others on his behalf may not have been remitted properly, he knows of no payments which were actually tendered to Land Bank which were improperly credited.

13) The property securing Land Bank's loan and the values testified to are as follows:

| <u>Tract</u> | <u>Debtor Value</u> | <u>Movant Value</u> |
|---------------|---------------------|---------------------|
| I 1082 acres | \$587,635 | \$316,000 |
| II 773 acres | \$244,165 | \$172,000 |
| III 740 acres | \$370,000 | \$140,000 |
| IV 403 acres | \$ 80,500 | \$ 78,000 |
| V 334 acres | \$127,000 | \$ 60,000 |
| Wayne County | no evidence | \$104,000 |
| | <hr/> | <hr/> |
| | \$1,208,410 | \$870,000 |

On balance I found the testimony of Land Bank's expert more credible. The Debtor's expert had examined the tracts but had made no timber cruise to determine the amount of marketable timber on the tracts. Instead, he took the figures from a 1984 timber cruise and reduced the merchantable timber by the amount which Debtor told him had been harvested since 1984. This method was particularly unreliable as to Tract V. There, as a result of harvesting of timber by Brunswick Pulp under a timber lease virtually all of the timber has, in fact, been taken, yet based on the method he used, Debtor's expert placed a substantial value on the timber. Likewise, on Tract III he assumed that no timber had been cut when, in fact, a significant amount has been used.

The Land Bank expert, on the other hand, estimated the amount of merchantable timber actually left on each tract in arriving at his values. While Debtor testified that substantially more timber was left on several tracts than the Land Bank expert it was clear that much of the best, most accessible timber has already been harvested and what remains is either cut over, inaccessible or otherwise much reduced in potential value. However, I found the value placed on Tract I by this expert to be too low in view of the fact that the best timber is on this tract, and the opinion of Debtor's expert as to its value.

As a result I conclude the land values to be as follows:

| | |
|--------------|-----------|
| Tract I | \$400,000 |
| Tract II | \$172,000 |
| Tract III | \$140,000 |
| Tract IV | \$ 78,000 |
| Tract V | \$ 60,000 |
| Wayne County | \$104,000 |
| | <hr/> |
| | \$954,000 |

14) Although during trial and throughout this order all the above tracts are described as being owned by Debtor, in reality, tracts II and III were conveyed by Debtor, at some time prior to the filing of this case, to an irrevocable trust for the benefit of his grandchildren. Debtor's counsel argued that it would be possible to obtain the consent of the beneficiaries and the trustee to revest title to these tracts in the Debtor. However, the trust instrument itself was not introduced and title to these parcels of real estate was not vested in Debtor as of the date this case was filed.

CONCLUSIONS OF LAW

Land Bank seeks to have this Chapter 11 case

dismissed "for cause" pursuant to 11 U.S.C. Section 1112(b) or in the alternative seeks relief from stay pursuant to 11 U.S.C. Section 362(d).

Dismissal

11 U.S.C. Section 1112(b) provides in relevant part:

" . . . after notice and a hearing, the court may . . . dismiss a case . . . for cause, including--

- (1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;
- (2) inability to effectuate a plan;
- (3) unreasonable delay by the debtor that is prejudicial to creditors;
- (8) material default by the debtor with respect to a confirmed plan;"

While the list of examples of what constitutes "cause" is not exclusive, the evidence presented fairly raises the question whether the grounds given in the quoted subsections have been satisfied so as to demand a dismissal of this case.

In support of its position Land Bank has cited a number of cases which stand generally for the proposition that

the filing of a Chapter 11 case on the eve of foreclosure may be suspect on "good faith" grounds and subject to dismissal "for cause" under Section 1112. In re Little Creek Development, 13 C.B.C. 2d 1231 (5th Cir. 1986); In re Dolton Lodge Trust, No.35188, 7 C.B.C. 2d 303 (Bankr. N.D.Ill. 1982); In re Weathersfield Farms, Inc., 5 C.B.C. 2d 312 (Bankr. D.Vt. 1981); In re Cassavaugh, 11 C.B.C. 2d 1181 (Bankr. W.D.Mo. 1984). An examination of the facts in those cases reveals certain similarities to the case at bar. However, Little Creek and Dolton were single-creditor/single asset cases and Weathersfield and Cassavaugh involved cases in which debtors had proposed plans which had failed to be confirmed. In this case debtor has substantial other assets than those held by Land Bank and other creditors as well. His present case has not been pending an unreasonable period of time, and there is no demonstrated inability to propose or effectuate a plan within a reasonable time. Thus, I conclude that Land Bank has failed to prove the requisite bad faith in the filing of this case for dismissal to occur under the cited authorities.

Nor do I find that dismissal is warranted under 11 U.S.C. Section 1112(b)(1), (2) or (3). As to these, only Land Bank, of all the creditors in this case has sought dismissal. Since Land Bank's rights as the only objecting creditor can be fully protected by an analysis of whether relief from stay should

be granted "for cause" I will not consider taking the more drastic step of dismissal "for cause". Finally, I conclude that while Debtor materially defaulted under his prior Chapter 11 plan such default in a prior case does not warrant dismissal of this case under subsection (8) if it is otherwise deemed to be a good faith effort to reorganize.

Accordingly, the Motion to Dismiss is denied.

Stay Relief

11 U.S.C. Section 362(d) provides:

"(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 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."

Land Bank bears the burden of proof on the issue of lack of equity and Debtor has the burden of proving adequate protection of Land Bank's interest, and that the asset is necessary to an effective reorganization. 11 U.S.C. §362(g).

I conclude that Land Bank has proven lack of equity in the property. While the total debt is approximately \$850,000.00 and I found the various tracts to be worth \$954,000.00, the "theoretical" equity of \$104,000.00 does not, in fact, exist. In the first place, the typical commission to sell property of this type would be 10% or \$95,400.00. While in many cases a debtor might avoid this expense by marketing his property without a realtor or auctioneer, Mr. Davis has demonstrated his inability or unwillingness to sell these tracts and/or the timber on them since 1981, even though he has been in default to the Land Bank for four years. Thus, I must conclude that the energy and expertise of outsiders would be necessary to market those lands in prompt fashion. Moreover, pending any sale, interest would accrue at a rate of \$240.54 per day or \$7,216.20 per month resulting in a complete erosion of the equity within a 30 day period without consideration of any other potential expenses of sale. Finally, although the total debt includes over \$76,000.00 in attorney's fees, the elimination of which would enhance the equity position, I conclude that those fees are properly included in the debt owed, since Land Bank's right to enforce the attorney

fee provision had vested prior to the filing of this case. See In re Rice, No.187-00832 (Bankr. S.D.Ga. December 14, 1987).

Alternatively, the showing of lack of equity can be sustained because of the fact that Tracts II and III are not property of the Debtor's estate. 11 U.S.C. §541. Since title is vested in a trust for the benefit of Debtor's grandchildren, in the truest sense, this estate owns property worth only \$642,000.00 but those tracts are encumbered by the entire debt of \$850,000.00. The potential that Debtor could extinguish the trust and reacquire the two tracts is speculative at best, given the record before me.

Having concluded that there is a lack of equity in the lands in question the burden of providing adequate protection and of showing necessity to an effective reorganization is on Debtor.

The showing of necessity has not been made. The evidence was that Debtor owns at least 1800 additional acres of land encumbered by debts of approximately \$500,000.00. Debtor testified that his equity position in these tracts was good. Given the fact that the property securing Land Bank's debt is generating no income and has no equity I cannot find any benefit to the estate in its retention. Indeed, elimination of this debt

and the mounting interest burden should enhance Debtor's ability to rehabilitate using his remaining assets. Furthermore, Land Bank stipulated that it would accept the lands in question in full satisfaction of its debt; that is, there would be no deficiency claim by Land Bank even if it is unable to dispose of the property at a price sufficient to pay its debt in full. This commitment removes any concern that by granting stay relief a creditor may dispose of property, without court oversight, in a manner that results in a deficiency claim which is detrimental to the debtor's estate and his other creditors.

Finally, Debtor has not carried the burden of showing that adequate protection is being afforded to Land Bank. Adequate protection can be provided in a number of ways. 11 U.S.C §361. The most common is for a debtor to maintain his regular payments on secured obligations, or at least to pay the current interest which is accruing. Here, Debtor made no such offer and from the testimony about his income it is clear that he would be unable to make such payments. Nor has Debtor offered any alternative method of protecting the Land Bank's interests. He has no prospects for actively harvesting timber and applying the proceeds to his debt and he has no apparent prospects for selling any of the land to liquidate his debt. The evidence revealed that Debtor had sold no timber since 1985, has been in default under the terms of his prior confirmed plan since 1983,

and had offered two tracts of land for sale since 1983 and withdrawn them. Debtor offered no explanation for this state of affairs existing during the time that his obligations under the prior plan were in default and no specifics as to how his future performance could improve to the extent that Land Bank would receive the "indubitable equivalent" of its interest. 11 U.S.C. §361(3).

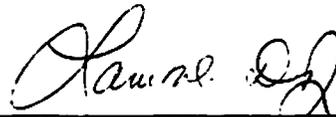
Were this the Debtor's first effort to reorganize under Chapter 11 the allowance of additional time to formulate such plans might be defensible, but Debtor has been under the protection of this Court, off and on, since 1980, and received his "fresh start" in 1981. While I have declined to dismiss his case for cause due to his multiple filings in this Court, I find that his previous case, the default thereunder, the State Court litigation last fall and the filing of this case do constitute cause for granting relief to Land Bank. In re Albany Partners, Ltd., 749 F.2d 670 (11th Cir. 1984).

Accordingly, the Motion of Federal Land Bank of Columbia for relief from stay is granted, pursuant to 11 U.S.C. Section 362(d)(1) and (2) subject to the limitation that:

- 1) The personal liability of Debtor Isaiah James Davis to Federal Land Bank of Columbia is discharged in its entirety,

upon consummation of any foreclosure by Land Bank of its interest in the subject tracts of land; and

- 2) The Court reserves the right, but will not be required, to reimpose the stay at any time prior to sale as to some or all of the tracts, should Debtor file, on or before February 15, 1988, under oath, a bona fide sales contract for any of the above tracts at a net price equal to or in excess of the "Debtor Value" amount to Tracts I-V or the "Movant Value" as to the Wayne County property set forth on page 5 of this Order. In the meantime, the stay is lifted to permit Moyant to initiate any action necessary to commence foreclosure under state law.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 14th day of January, 1988.