

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

In the matter of:

KINGSMEADOW, INC.

Debtor

BARNETT BANK OF SOUTHEAST
GEORGIA, N.A.

Movant

v.

KINGSMEADOW, INC.

Respondent

Chapter 11 Case

Number 90-20397

FILED

at 4 O'clock & 45 min P.M

Date 7-16-91 CL

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

MEMORANDUM AND ORDER

On April 3, 1991, a hearing was held upon the Debtor's Chapter 11 Disclosure Statement, a Motion for Relief from Stay filed by Barnett Bank of Southeast Georgia, N.A. ("Barnett"), and an Application for Interim Attorney's Fees

filed by counsel for the Debtor.¹ At the commencement of the hearing, I determined that, inasmuch as the Debtor has proposed a Chapter 11 liquidation of a single asset real estate development, the hearing on the Debtor's Disclosure Statement would be stayed pending the outcome of the hearing on Barnett's Motion for Relief from Stay. Based upon the testimony adduced at that hearing, together with briefs, other documentation, applicable authorities, and a review of the history of this case, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Debtor corporation filed its case under Chapter 11 of the Bankruptcy Code with this Court on June 22, 1990. The Debtor is in the business of real estate development and essentially holds a single asset - approximately 177 acres of residential and commercial property known as "The Meadows" subdivision located in Kingsland, Georgia. The only other asset listed on the Debtor's schedules is cash in the amount of \$1,766.00. The Debtor's real property is encumbered by a properly perfected deed to secure debt executed in favor of Barnett for the principal amount of \$750,000.00, and guaranteed by two principals of the Debtor corporation,

¹ The attorney's fee issue was addressed in a separate order of the Court dated April 18, 1991.

which funds constitute "2 loans for the development of a subdivision" as described by the Debtor in its Schedule A-2. The only other outstanding debt in this case is an unsecured debt listed by the Debtor in Schedule A-3 as "unliquidated" in the amount of \$25,640.00 and for which a proof of claim has been filed in the amount of \$31,790.00 for surveying services rendered in connection with the development of the aforementioned subdivision.

"The Meadows" subdivision consists of approximately 160 acres of partially developed residential property divided into 298 residential lots and approximately 17.03 acres of undeveloped commercially zoned property located west of Kingsland, Georgia, on Highway 40.

Three qualified expert appraisers, two on behalf of the Movant and one on behalf of the Debtor, testified at the April 3rd hearing. The Movant's first expert witness, Richard C. Friedman, valued the subject property, utilizing the development approach,² at \$727,000.00.

² In the "development approach", a retail value is established for the subject property, expenses associated with holding and selling the property to the final retail buyer are deducted. Then, after the expenses are deducted to yield a net income, that figure is discounted to account for the time value of money, as well as risk. (See Exhibit P-1, Friedman's Appraisal).

In order to establish a retail value for the 298 residential lots, Friedman utilized 183 comparable lot sales, including 138 lots in the Meadows subdivision and 45 lots from other subdivisions in and around the Camden County area. The sales prices of the comparables ranged from \$7,500.00 to \$18,000.00, with the Meadows lots ranging from \$7,500.00 to \$11,000.00. The 1990 sales of the Meadows lots range from \$7,500.00 to \$10,000.00. Friedman testified that, based upon the over-built real estate market in Camden County, the subject lots should be valued near the lower end of the Meadows historic sales, or at \$8,000.00 per residential lot, or a total of \$2,384,000.00 for the residential property. (See Exhibit P-1, pp.37-44).

Friedman then deducted overall expenses of holding and selling the subject lots to the ultimate retail buyer, which he calculated to be 40%,³ to arrive at a figure of \$1,430,400.00 for the residential property. (See Exhibit P-1, p.45).

Finally, Friedman discounted the \$1,430,400.00 figure to account for the time value of money as well as risk. In so calculating, he assumed an interest rate to carry the investment of 12% per annum, and a risk factor of 3% for a total annual discount factor of 15%. Friedman anticipates that the gross sellout of the

³ The 40% overall expense figure includes sales expenses of 10%, overhead expenses of 5%, taxes of 5%, and a profit margin of 20%.

subject lots will be increased 3% per year after three years, when the existing oversupply is anticipated to ease. (See Exhibit P-1, p.45). The indicated value of the 298 residential lots utilizing the above-described approach, and anticipating a five year sellout, is approximately \$600,000.00. (See Exhibit P-1, table, p.46).

In valuing the commercial property, Friedman used eleven comparable commercial property sales from 1986 through 1989, and ranging from 3.1 to 14.75 acres.

The price range of the comparables was from \$20,327.00 to \$67,742.00 per acre. (See Exhibit P-1, pp.47-52). Friedman valued the subject commercial lots at \$25,000.00 per acre (See Exhibit P-1, p.53), and predicted that the subject property would be marketable in five years. He therefore valued the commercial property as follows:

17.03 acres X \$25,000.00/acre	=	\$425,750.00
Deduct expenses @ 40%		(170,300.00)
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	Net Sales	\$255,450.00
\$255.450.00 X .497177	=	\$127,004.00
(5th year discount factor)		
	(Rounded to	\$127,000.00)

(See Exhibit P-1, p.53).

The total present value for the subject property according to Mr. Friedman was:

298 residential lots	\$600,000.00
17.03 acres commercial property	\$127,000.00
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	\$727,000.00

(See Exhibit P-1, p.54).⁴

⁴ Friedman also calculated a figure of \$1,933,400.00 utilizing the "cost approach", "which is based on the proposition that the informed purchaser would pay no more than the cost of producing a substitute property with the same utility as the subject property". The first step in the "cost approach" is to estimate the reproduction cost of site improvements on the vacant land to yield improved and marketable building sites, which were calculated as follows:

Underbrushing and Clearing of Site 160 acres X \$500.00/acre	\$ 80,000.00
Architectural, Engineering & Surveying 160 acres X \$500.00/acre	\$ 80,000.00
Underground Water and Sewer 23,000 LF X \$25.00/LF	\$575,000.00
Underground Utilities 23,000 LF X \$5.00/LF	\$115,000.00
Base, Curbing and Paving 23,000 LF X \$35.00/LF	\$805,000.00
Common Area Landscaping & Erosion Control 160 acres X \$200.00/acre	\$ 32,000.00
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The Movant's second expert witness, Malcolm E. Seckinger, utilizing the "subdivision analysis" approach,⁵ valued the combined residential and commercial property at a present value of \$656,000.00. First, Seckinger spoke with various local developers to determine profit expectations, then looked at comparables and interest rates to develop five different models or "scenarios". (See Exhibit P-2). Seckinger relied on "Scenario #5" for his valuation, in which he estimated the development cost over a five year sellout period as follows:

Cost to complete the project	\$325,000.00
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Reproduction Cost New:	\$1,687,000.00
Land Value: 160 acres X \$2,000.00/acre	\$320,000.00
Total Hard Cost for 433 Lots on 160 acres	<u>\$2,007,000.00</u>

\$2,007,000.00 divided by 433 lots = \$4,635.00 per lot; Remaining lots: 298 lots X \$4,635.00 = \$1,381,230.00 (rounded to \$1,381,000.00).

To arrive at a gross sellout value, Friedman added expenses of sales, overhead and profit at 40% to arrive at a final cost of the project at \$1,933,400.00 using the cost approach.

Friedman further testified that it is his opinion that the cost approach is not a reliable indicator due to a sluggish selling market and that the cost approach will set the upper limit of value. It was his opinion that the development approach is a more reliable indicator.

⁵ The "subdivision analysis" approach utilizes a combination of the "cost approach" (which considers the new construction costs of the improvements, less all forms of depreciation, plus the value of the land), the "income approach" (in which a market rent is determined for the subject by comparison with similar properties, deductions are made for vacancy and other expenses, then the net income is capitalized into a value estimate at the required market interest rate), and the "market approach" (derived by comparison of recent sales of similar properties in the general area of the subject).

Overhead and sales expenses at 8% of sales price	\$156,160.00
Management and Supervision Costs at \$20,000.00/year X 5 years for Field Supervision paid as salary to developer	\$100,000.00
Taxes at \$50.00 per lot for sellout period	\$ 16,000.00
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Total Cost	\$597,160.00

Seckinger estimated the income from the lot sales would increase in \$500.00 increments per year to the following figures:

64 lots @ \$4,500.00	\$ 288,000.00
64 lots @ \$5,000.00	\$ 320,000.00
64 lots @ \$5,500.00	\$ 384,000.00
64 lots @ \$6,000.00	\$ 448,000.00
64 lots @ \$6,500.00	\$ 512,000.00
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Total Anticipated Income	\$1,952,000.00
Less Expenses	(\$ 597,160.00)
Net before return on capital and profit	\$1,354,840.00

Seckinger found 12% to be an appropriate rate of interest and discounted the \$1,354,840.00 figure over a five year period to \$976,840.00. (See

Exhibit P-2, Scenario 5). Seckinger then divided that figure by 1.50 to account for a 50% profit margin to arrive at a final figure of \$651,226.00, which he rounded to \$650,000.00 for the total value of the residential lots.

Seckinger anticipated that the commercial property would not be marketable for some time and therefore based upon what he testified was his "gut feeling", valued it at \$3,000.00 per acre, or \$51,090.00 for the entire commercial tract, which he rounded to \$51,000.00. Thus, the total value of the commercial and residential properties should be \$701,000.00, using Seckinger's figures. It is unclear why he testified at the hearing that the total value of the subject property should not exceed \$656,000.00.

The Defendant's witness, Michael Rozier, used what he called a "market data approach" and compared the subject residential property with three similar improved subdivisions in the area.

The first, off of Scrubby Bluff Road, consisting of 17 acres, with all underground utilities and paved streets, sold for \$8,330.00 per lot, or \$12,000.00 per acre. The second, "Willow Lakes", which Rozier testified was "similar" to the subject property, consisting of 15.75 acres, sold for \$12,000.00 per acre, or \$6,300.00 per lot. Finally, the third comparable used, Kings Grant Subdivision, adjacent to the subject

property and consisting of 25 acres, sold for \$20,200.00 per acre, or \$6,400.00 per lot. Based upon his analysis of these comparables, Rozier valued the subject residential property at a wholesale value of \$12,750.00 per acre or \$3,993.00 per lot for a total of \$1,172,034.00, which he rounded to \$1,200,000.00.

Rozier also used a "comparison approach" for the commercial property, utilizing three "comparables". The first, located on Highway 40, consisted of just over one-half of an acre which sold for \$35,000.00. The second, 1.2 acres, sold for \$50,000.00. The third, of unspecified size, sold for \$38,000.00 per acre in 1986.

Based upon these "comparables", Rozier valued the subject commercial property at \$25,000.00 per acre, which he testified includes a built-in discount factor to account for the anticipated holding period. The total value for the 17.3 acre commercial tract using this figure is \$432,500.00. The total value Rozier placed on the combined residential and commercial property is \$1,632,500.00.

I find the value of the tract to be \$625,000.00 for the residential tract and \$336,000.00 for the commercial tract, or a total of \$961,000.00 for both. Movant's experts, Friedman and Seckinger, working independently, valued the residential tract at \$600,00.00 and \$650,000.00 respectively. Their methodology was

far superior to that of Debtor's appraiser who valued the property at twice that sum but failed to discount the gross selling price of the subdivision for expenses of sale, and failed to reduce the net figure realized over several years to a present-day figure. Friedman and Seckinger's figures were so close and their analysis so compelling that I have averaged their figures to reach the \$625,000.00 value for the residential tract. As to the commercial tract, Seckinger believes that there is no current market for commercial sales in the area where the 17 acre tract is located and characterized his figure of \$51,000.00 as guesswork. Friedman admitted that virtually all comparable sales for commercial tracts exceeded \$35,000.00, but fixed the current value at \$25,000.00 due to the market and then discounted that figure for carrying costs and to reach present day value. Rozier used comparables ranging from \$35,000.00 to \$50,000.00 per acre and discounted that to \$25,000.00 per acre to account for the holding period.

On balance, I conclude that Rozier is closer to the true value of the commercial tract than Friedman, whose reduction of comparable sales to \$25,000.00 due to the current market followed by a discounted present day value analysis, in effect, doubled the discount. That is, Friedman could have discounted gross sales of \$35,000.00 per acre or more to present day value to account for a sell-out period or he could reduce the price up-front to \$25,000.00 to stimulate the market and make property move faster - but in doing both he discounted the value too deeply.

Rozier, on the other hand, used comparables well in excess of \$25,000.00 but, recognizing the weak current market, discounted the price to account for the delay in selling, or alternatively to stimulate immediate sales. Nevertheless, the tract could not sell *instantly* even at that price. I do, however, conclude that at \$25,000.00 the sell-out time should be substantially reduced. I will therefore discount that value for a one year delay at 12% and 10% costs of sale to \$336,000.00.

The parties initially stipulated the debt on the date of filing this petition to be \$1,428,919.90.

By Supplemental Stipulation and Affidavit filed June 4, 1991, it appears that an additional \$22,300.23 has been paid by guarantors on the debt and there is an agreement to pay an additional \$377,699.77 in reduction of the Barnett claim. (See Supplemental Stipulation paragraphs 3 and 4). Thus, I find that the net principal claim of Barnett, for purposes of this Motion, is \$1,028,919.10. Inasmuch as the total value of the property is \$961,000.00, I conclude that the Debtor has no equity in the subject property.

Assessing a value on property of this nature is certainly a difficult and often imprecise task. However, even if the value were as much as \$200,000.00

greater than my determination, there would still be no equity in the property. The parties stipulated to an outstanding pre-petition debt of \$1,428,919.90, plus post-petition interest to April 3, 1991, of \$136,593.11. The parties also stipulated that the promissory notes given to the Movant by the Debtor call for reasonable attorney's fees in an amount not less than \$162,837.56⁶ (See Stipulation for Use in Hearing on Objection to Disclosure Statement and Motion for Relief from Stay of Barnett Bank, paragraphs 5, 6 and 7, filed on April 3, 1991), giving a total potential debt as of April 3, 1991, of \$1,728,350.57. By Supplemental Stipulation dated May 31, 1991, the parties established that the guarantors had paid the additional sum of \$22,300.23 over to the Movant on April 25, 1991, and had agreed to but had not yet signed a promissory note to the Movant for the amount of \$377,699.77, said amounts to "be applied to reduce the Kingsmeadow, Inc., indebtedness to the Bank".

⁶ The stipulation further states: "Other instruments given to the Bank by the Debtor specify fifteen percent attorney's fees. This stipulation shall be used only in the Bankruptcy Court in this specific proceeding and shall not preclude the Bank from claiming a larger amount in any other legal action." The \$162,837.56 figure represents ten percent attorney's fees as set forth in the promissory notes. *But see* note 8 below.

Assuming that the debt is oversecured,⁷ and reducing the \$1,728,350.57 debt by the \$400,000.00 paid or credited as set forth in the Supplemental Stipulation, leaves a debt of \$1,328,350.57 plus whatever post-petition interest has accrued since the hearing date. Reducing that amount by the full value of the assessed attorney's fees⁸ would leave an outstanding debt in excess of \$1,165,513.01, which still reveals a lack of any equity in the property.

The Debtor proposes a liquidation plan calling for a conveyance to Barnett in full satisfaction of the debt. In response, Barnett brought the present Motion for Relief from Stay in order to foreclose upon the subject property.

CONCLUSIONS OF LAW

⁷ If the property is oversecured, then 11 U.S.C. §506(b) provides:

To the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

⁸ The parties stipulated that the statutory notice of attorney's fees was given Debtor by correspondence dated June 12, 1990, and received by Debtor according to return receipt on June 13, 1990. The Debtor filed this case on June 22, 1990. Georgia Law, O.C.G.A. §13-1-11 requires as a condition precedent to enforcement of a provision of attorney's fees in a note, the debtor must be given 10 days notice of the holder's intent to enforce such provision. I have previously ruled that the holder whose attorney's fees notice was given pre-petition but which expired post-petition is barred from collecting attorney's fees. Matter of Rice, 82 B.R. 623, 626 (Bankr. S.D.Ga. 1987). Therefore, for purposes of this Motion, I will not consider attorney's fees as part of the debt.

Pursuant to 11 U.S.C. Section 362(d), a party in interest shall be entitled to relief from the automatic stay as to actions against property if:

- (A) the debtor does not have any equity in such property; and
- (B) such property is not necessary to an effective reorganization.

"Once the movant under 11 U.S.C. §362(d)(2) establishes that he is an undersecured creditor . . . [the burden shifts to the debtor] to establish that the collateral at issue is necessary to an effective reorganization. What this requires is not merely the showing that if there is conceivably to be an effective reorganization this property will be needed for it; but that the property is essential for an effective reorganization that is in prospect. This means . . . that there must be 'a reasonable possibility of a successful reorganization within a reasonable time'." United Savings Assoc., Ltd., of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365, 375, 108 S.Ct. 626, 632, 98 L.Ed. 2d 740 (1988).

At the time of the hearing on April 3, 1991, the reorganization process was more than nine months old and only nine of the 304 lots had been sold. None of the commercial property had been sold. The Debtor's Chapter 11 Plan,

dated January 11, 1991, proposes: "Class 4: The allowed claim of Barnett Bank will be paid in full, in kind, by the quitclaim of the Debtor's real estate to the Bank on the effective date of the plan." The Movant has expressed its objection to that portion of the plan, which raises serious doubts as to whether the plan may be confirmed in light of the requirements of Section 1129(a).⁹ As stated before, Barnett has objected to its treatment under the proposed plan. Inasmuch as there are guarantors on the note accompanying Barnett's deeds to secure debt, I do not find that the Debtor's proposed deed back in "full satisfaction" of the debt due Barnett meets the requirement of Section 1129(a)(7)(A)(ii) that Barnett receive the

⁹ §1129(a) provides in relevant part:

(a) The court shall confirm a plan only if all the following requirements are met:

(7) with respect to each impaired class of claims or interest-

(A) each holder of a claim or interest of such class-

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims. (Emphasis provided).

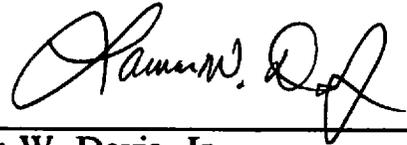
equivalent of what it would receive under a Chapter 7 liquidation plan as, under a Chapter 7 liquidation, Barnett would retain the right to seek a deficiency from the guarantors. Finally, I note that the Section 1111(b)(2) election has not been made and therefore Section 1129(a)(7)(B) is inapplicable. In short, the Debtor has failed to propose a confirmable plan in this reorganization proceeding.

Moreover, the Debtor has failed to introduce any evidence as to how the plan may be amended to be confirmable. This case has been pending for nearly a year and there appears to be no reasonable prospect of reorganization within a reasonable length of time. Although a plan has been formulated, there is nothing to indicate that it can be amended to make it confirmable. Accordingly, since I find that the Debtor has no equity in the subject property and that it is not necessary to an effective reorganization within the meaning of Timbers, the Motion for Relief from Stay filed by Barnett shall be granted. The present ruling moots the Disclosure Statement issue as the subject property is the Debtor's sole asset, excepting a small amount of cash on hand.

This case, by subsequent order, will be dismissed unless the Debtor or a party in interest moves to convert to a case under Chapter 7 within fifteen (15) days of the effective date of this Order.

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 Barnett Bank of Southeast Georgia, N.A., is granted.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 12th day of July, 1991.