

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

In the matter of:

HENRY L. JORDAN, III

Debtor

JOHN G. SCHAUER
and
DAVID P. BRAUN

Movants

v.

HENRY L. JORDAN, III

Respondent

Chapter 7 Case

Number 91-41663

FILED

at 10 O'clock & 00 min A M
Date 5/19/93 SH

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

MEMORANDUM AND ORDER

The first and second mortgageholders have filed Motions for Relief from Stay on certain real property owned by Debtor. Pursuant to the hearings on the

motions, the documentation submitted by the parties, and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor filed a Chapter 11 proceeding on October 22, 1991. On November 20, 1992, the Chapter 11 case was converted to a Chapter 7 proceeding. Prior to conversion, on May 18, 1992, the first mortgageholder, John G. Schaubert, filed a Motion for Relief from Stay on Debtor's Coffee Bluff Marina property. A hearing on the motion was held on June 16, 1992. At that hearing the court stated that it would approve an order requiring adequate protection payments to begin. Apparently the parties were unable to agree upon the terms of such order and it was never submitted to the court.

On September 23, 1992, a Motion for Relief was filed by the second mortgageholder, David P. Braun, who sought relief to foreclose the Coffee Bluff Marina property. At the October 14, 1992, hearing, the court denied Braun's motion on an interim basis. Although counsel argued that Braun had not been paid in twelve months, the court denied the motion considering Debtor's ongoing efforts to sell the

property and the United States Trustee's opposition to the motion and the possibility of substantial equity in the property.

The third mortgageholder, Trust Company Bank, subsequently filed an objection to the motion for relief of David P. Braun, the second mortgageholder. *See* Trust Company Bank's Objection filed December 14, 1992. The Braun Motion for Relief was reassigned for January 6, 1993. At that hearing the parties agreed to continue indefinitely the motions for relief of the first and second mortgageholders.

On January 25, 1993, the first mortgageholder requested a hearing on his motion for relief. A hearing was held on February 25, 1993, to consider the motions for relief filed by the first and second lienholder. At this hearing, the first lienholder presented the testimony of an appraiser, which established a value for the marina based on an income analysis of \$375,000.00. Using a comparable sales approach for residential property he valued the land alone at \$332,000.00. He testified that the value of the commercial docks and buildings was approximately \$100,000.00 but that value could not be added if residential use was contemplated because the existing commercial docks and buildings would have no utilitarian value. As a result, comparable sales of residential property are of limited value in my analysis. Since

there have been no comparable land sales of commercial marina property which would give the court any guidance on value, I hold that the income approach is the best indicator of value. On cross-examination it was revealed the certain income is derived from the property and certain expenses are borne by others that the appraiser did not include in his valuation. After considering these factors he conceded that the marina would be valued at approximately \$450,000.00.

Braun, the second mortgageholder, submitted an appraisal showing a \$474,000.00 investment/income approach appraisal and value/income approach appraisal of \$490,353.00 See Appraisal dated November 17, 1992. Braun compared these figures to the Debtor's 1990 appraisal, which reflected a much higher value. Debtor's 1990 appraisal reflects a market value and income approach appraisal of \$691,000.00 and a cost approach appraisal of \$718,500.00. See Appraisal filed October 22, 1992. Debtor's 1986 appraisal filed with the 1990 appraisal reflected a market value and cost approach appraisal of \$648,000.00 and an income approach appraisal of \$601,000.00. I rule, based on the most recent appraisal and the expert testimony, that the marina is worth \$450,000.00.

Although Debtor had an offer of \$650,000.00 for the property prior to

the Chapter 11 proceeding, this sale was never consummated. The Chapter 7 Trustee is currently trying to market and sell the property. All parties agree that the property, even using a low value, is valued at an amount substantially greater than the first mortgage.

The record in this case reflects that Debtor paid \$300,000.00 for the property and the balance on the first mortgage is \$162,581.20 with monthly interest accrual of \$1,336.28. See letter of Schaubert's counsel dated March 8, 1993. As of February 25, 1993, Braun, the second mortgageholder, was owed \$91,011.56. See letter of Braun's counsel dated March 12, 1993. Trust Company Bank, the third mortgageholder, which opposes the motion for relief, is owed approximately \$350,000.00. The total of the three mortgages is roughly \$603,000.00. Post-petition payments on the mortgages by Debtor are as follows:

Case filed August 22, 1991.

First Mortgage:

September 20, 1991	\$2,264.74
October 18, 1991	\$2,264.74
December 2, 1991	\$2,264.74
July 7, 1992	\$2,264.74
July 7, 1992	\$2,264.74
September 15, 1992	\$ 500.00
November 10, 1992	\$ 500.00

Second Mortgage:

April 1992 \$ 938.97
Summer of 1992 \$ 200.00

The third mortgageholder, Trust Company Bank, opposed the second lienholder's motion for relief and argued that the relief should be denied as there was equity in the property. See objection filed December 14, 1992. Trust Company asserts that it would benefit from an "unforced sale" of the property and that any equity would be lost if relief is granted and foreclosure proceedings begin.

CONCLUSIONS OF LAW

Under 11 U.S.C. Section 362(d)(1) and 362(d)(2) a creditor may obtain relief from the automatic 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.

11 U.S.C. §362(d). The burden of proof is upon the moving party to show Debtor's lack of equity in the property; once the moving party proves lack of equity, the burden shifts to the Debtor to prove that the property is necessary to an effective reorganization. 11 U.S.C. §362(g). See United Savings Association v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365, 375-76, 108 S.Ct. 626, 632-33, 98 L.Ed.2d 740 (1988); Matter of Sutton, 904 F.2d 327 (5th Cir. 1990).

First, to show absence of equity, the Movants need to prove the value of the collateral and show that the encumbrances against the property exceed the value. Sutton, 904 F.2d at 329. Valuation should be determined "case by case, taking into account the nature of the debtor's business, market conditions, the debtor's prospects for rehabilitation, and the type of collateral." Id. at 330. I have found the value of the marina to be \$450,000.00. Using this figure, the liens totalling \$603,011.56 are substantially greater than the value of the property. Thus, the Debtor has no equity in the property under Section 362(d)(2).

Upon the conclusion that Debtor lacks equity in the property, the burden shifts to the Debtor to show that the property is necessary for an effective reorganization. Trust Company argues that the term "effective reorganization" includes an effective liquidation of the Debtor's assets. See In re Independence Village, Inc., 52 B.R. 715 (E.D.Mich, 1985); In re W. S. Sheppley & Co., 45 B.R. 473 (N.D.Iowa 1984).

Considering Debtor's efforts to sell the property in this Chapter 7 case, I cannot conclude that the property is necessary for Debtor's rehabilitation and reorganization after the bankruptcy proceeding has ended. While I agree with Trust Company that an unforced sale would be in Debtor's best interest, would be in the creditors' best interests, and would further the Debtor's efforts to reorganize, and that a court may at times deny relief in the interim in order to allow a debtor time to conduct a reasonable sale of property (See W.S. Sheppley & Co., supra.) I find that Debtor is not entitled to any more time. The first mortgageholder's motion for relief was filed nearly a year ago. The motion for relief filed by the second mortgageholder has been pending over six months. Debtor is substantially behind in paying both of these lienholders. Property tax liabilities are accruing as are accruals of unpaid interest in a combined amount of \$70.90 per day or \$2,127.00 per month. Therefore,

I conclude that both motions for relief should be granted.

Trust Company cites In re Mellor, 734 F.2d 1396 (9th Cir. 1984) for the proposition that the court should not consider junior liens in deciding whether to grant or deny a motion for relief. In Mellor, the court stated that junior liens should be considered when determining "equity" under Section 362(d)(2), but that the presence of and amount owed to junior lienholders should not be considered under Section 362(d)(1) where the motion for relief is based on lack of adequate protection. Mellor, 734 F.2d at 1400-01.

However, in this case, I conclude that relief should be granted under Section 362(d)(2) for lack of equity and failure to show that the property is necessary for an effective reorganization or liquidation. Further, relief should also be granted for "cause" due to non-payment under Section 362(d)(1) considering the Debtor's default in payments to the first mortgageholder, considered separately, and the second mortgageholder, considered separately regardless of whether adequate protection exists. In re Sun Valley Ranches, Inc., 823 F.2d 1373, 1376 (9th Cir. 1987). See generally In re Senior Care Properties, Inc., 137 B.R. 527, 529-30 (Bankr. N.D.Fla. 1992); In re Novak, 121 B.R. 18, 19 (Bankr. W.D.Mo. 1990).

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
John G. Schauber is granted and that the Motion for Relief from Stay filed by David
P. Braun is granted.

FURTHER ORDERED that the objection filed by Trust Company
Bank to the Motions for Relief from Stay is overruled.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 18th day of May, 1993.