

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

In the matter of:

BOUY, HALL & HOWARD
AND ASSOCIATES

Debtor

LINCOLN NATIONAL LIFE
INSURANCE COMPANY

Movant

v.

BOUY, HALL & HOWARD
AND ASSOCIATES

Respondent

Chapter 11 Case

Number 95-40676

FILED

at 8 O'clock & 45 min. A.M.

Date 12-4-95

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

MEMORANDUM AND ORDER
ON MOTION FOR RELIEF FROM STAY

Creditor, Lincoln National Life Insurance Company ("Lincoln National"), comes before this Court seeking relief from the automatic stay in this Chapter 11 proceeding. Lincoln National asserts that the debtor has failed to file a

plan of reorganization within ninety days or commence monthly payments to Lincoln National which are in an amount equal to interest at a current fair market rate on the value of Lincoln National's interest in the real estate pursuant to 11 U.S.C. § 362(d)(3). Based on the parties' briefs, the record on file, and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Bouy, Hall & Howard and Associates ("Debtor") is a partnership that owns and operates a single-asset piece of commercial real property, namely, the Quality Inn Hotel located proximate to the "old" terminal at Savannah International Airport. Debtor has continually owned and operated the motel since 1969.

The Savannah Airport Commission ("SAC") possesses a fee-simple interest in the property underlying the hotel. In 1969, the SAC and Debtor entered into a long-term ground lease which expires in the year 2029 and has approximately thirty-four years remaining. The agreement requires from the lessee a minimum payment of \$500.00 per month, a monthly percentage of the gross receipts generated by the lounge and restaurant revenue, and a significant annual payment derived from

a fixed percentage of the room rental.¹

On December 4, 1989, Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code in a case styled In re: Buoy, Hall & Howard and Associates, Ch. 11 Case No. 89-41946, U.S. Bankruptcy Court, S.D. Georgia. This Court ultimately confirmed a plan of reorganization over the objections of Lincoln National on December 16, 1992.² After experiencing a series of economic set-backs over the next two years, Debtor again filed for Chapter 11 reorganization on April 11, 1995.

Creditor, Lincoln National, holds a claim secured by a mortgage or assignment of the Debtor's leasehold interest in certain real property located at or near the Savannah International Airport. For purposes of this motion, Lincoln National does not dispute that it is fully secured.³ However, Lincoln National's motion does not allege lack of equity, but rather argues that the Debtor failed to

¹ In effect, the lease requires Debtor to make monthly payments of approximately \$5,000 and an annual lump-sum payment of approximately \$120,000.

² For the history and background of the initial plan of reorganization, See "Memorandum and Order on Cramdown and Objections to Confirmation," In re Buoy, Hall & Howard and Associates, Ch. 11 Case No. 89-41946, slip op. at 24-5 (Bankr.S.D.Ga., June 10, 1992)(Davis, J.).

³ Lincoln National filed a proof of claim in this case for \$1,519,013.43. This Court has heard no evidence regarding value of the leasehold and improvements owned by the Debtor, but it is not disputed that, at least for the purposes of this hearing, the subject property is worth at least \$1,500,000.00.

commence to make payments pursuant to the terms of 11 U.S.C. Section 362(d)(3) which provides as follows:

(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--

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period)--

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

According to Lincoln National, § 362(d)(3) requires a "single asset" debtor to either commence monthly cash payments to each secured creditor or file a

feasible plan of reorganization within ninety days.⁴ Lincoln National contends that because Debtor failed either to file a 362(d)(3)(A) plan of reorganization or pursuant to 362(d)(3)(B) commence monthly payments within ninety (90), relief from the automatic stay should be granted.

Regarding its position under 362(d)(3)(A), Lincoln National observes that Debtor filed for bankruptcy on April 11, 1995. The ninetieth day of this case occurred on or about July 10, 1995. Debtor submitted its plan of reorganization on September 25, 1995. Thus, Debtor failed to file a plan of reorganization within ninety days.

Lincoln National also asserts that Debtor failed to meet the requirements of 362(d)(3)(B). Specifically, Debtor should have made monthly payments to Lincoln National in the approximate amount of \$15,000 per month on or before July 10, August 10, September 10, and October 10, 1995, respectively. Thus, by the date of this motion's scheduled hearing on October 10, 1995, Debtor should have tendered approximately \$60,000. The facts reveal that Debtor tendered two payments of \$15,000 on September 15 and October 10, 1995, respectively.

⁴ For purposes of this motion, it is undisputed by the Debtor that this case is a "single asset" real estate case within the meaning of the § 101 (51B).

In support of its position, Debtor argues that when the case was filed this Court issued an order on April 14, 1995, requiring that the Debtor file its Disclosure Statement together with the Plan on or before September 25, 1995.⁵ Because Debtor in fact filed its Disclosure Statement and Plan on the 25th of September and served it in accordance with the Court's Order requiring service on or before October 10, the date of the hearing on this Motion, Debtor contends that the ninety-day requirement has been obviated and that the Court should deny Lincoln National's motion.

Alternatively, Debtor contends that it has made payments to or for the benefit of Lincoln National which far exceed its minimal obligation under Section (d)(3)(B) and that Lincoln National should be estopped, or has expressly waived, its right to proceed under Section 362(d)(3).

In support of its alternative position, Debtor asserts that Lincoln National waived its right to payment under 362(d)(3)(B) when it entered into an interim consent order permitting the use of cash collateral. Debtor contends that the terms of the consent agreement as well as statements made by Lincoln National's

⁵ The Order reads in relevant part: "The Court orders that the Disclosure Statement . . . be filed with the plan, but not later than September 25, 1995." (Emphasis added).

counsel at June 9⁶ and July 7⁷ hearings demonstrate a waiver, either expressly or implicitly.

In regard to both hearings, this Court makes the following findings of fact. The evidence reveals that Debtor and Lincoln National entered into an interim Consent order permitting the use of cash collateral which was subsequently filed with this Court and noticed to all creditors. Following the submission of written objections, a hearing on the consent order was conducted on June 9, 1995, at which time there were appearances by LW-SP2, L.P., the holder of a second mortgage interest in the Debtor's property, the Savannah Airport Commission, and Lincoln National. At the conclusion of that hearing, this Court sustained objections in part and required by Order entered on June 30, 1995, that (1) Debtor be permitted an extension of time in order to move to accept or reject its lease with the Savannah Airport Commission and (2) that Debtor escrow for the benefit of LW-SP2, L.P., "any net operating income which would be payable to Lincoln under the terms of the Interim Consent Order, to the extent that such the [sic] netted operating income exceeds the aggregate post-petition average monthly payments to which Lincoln would be entitled under the terms

⁶ On June 9, 1995, this Court conducted a hearing to consider an interim consent order permitting the use of cash collateral.

⁷ On July 7, 1995, this Court held a hearing on Lincoln National's motion to dismiss Debtor's petition as an impermissible filing, or, in the alternative, motion for relief under §362(d)(1) for "cause."

of its promissory note from the Debtor."

On July 7, 1995, a hearing was held to consider (1) Debtor's request for an additional extension of time to assume or reject the lease and (2) Lincoln National's motion to lift stay or for a dismissal. The evidence revealed that Debtor's Chapter 11 case was necessitated, at least in part, because the Debtor in June 1994 had been unable to make its lump sum rental payment obligation to the Savannah Airport Commission, and that Lincoln National had advanced approximately \$135,000.00 in order to prevent the Savannah Airport Commission from terminating the lease and effectively extinguishing Lincoln National's collateral interest in the leasehold.

Debtor's motion to extend the deadline to assume or reject the lease was occasioned at least in part by the Debtor's desire not to be forced to make the assumption decision during the pendency of an independent action which it then contemplated and apparently has now commenced against the Savannah Airport Commission. That action seeks money damages or a reduction in Debtor's lease obligation because of what it contends were fraudulent acts or misrepresentations on the part of the Savannah Airport Commission concerning the longterm prospects for the terminal location which were never made known to the Debtor. The Savannah

Airport Commission objected to the lease assumption extension in light of the fact that the Debtor makes only minimal monthly rental payments and then pays a lump sum at the end of each leasehold year based on a percentage of the rents and revenues of the hotel, restaurant and bar. In partially sustaining the Savannah Airport Commission's objection while still granting the extension to the Debtor, I ordered the Debtor to immediately tender the annual lease obligation which came due at the end of June 1995. Unlike 1994, Debtor had been successful enough in its operation to the extent that it was able to make that payment.

In order to protect the interest of the Debtor, its creditors and the Airport Commission, I ordered the June 1995 payment be made and further ordered that Debtor escrow, in a separate account and on a monthly basis, the proportional amount necessary to make the payment that will come due at the end of June 1996. Debtor ultimately made that payment in the amount of approximately \$133,500.00 and, for the purposes of its compliance under Section 362(d)(3)(B), now argues that only the portion of the \$133,500.00 payment *which accrued after the filing date* was required to be paid as a matter of law.

Debtor contends that it could have paid the post-petition accrued obligation and held the pre-petition funds accrued until the time of assumption or

rejection or until the time of confirmation of a plan. With the benefit of this substantial additional cash it would have been in a position to make the July and August monthly debt service obligations to Lincoln National. Debtor also contends that because the payment to the Airport Commission directly benefits Lincoln, which in the absence of payment would be forced, as it was in 1994, to advance the funds, and that because Lincoln National raised no objection when the Court ordered the full lump sum payment to be made, it has waived any right to insist upon its rights under Section (d)(3)(B) to a monthly payment at least for the two months during which time Debtor failed to commence making its monthly payments, or that Debtor should be excused from strict compliance with Section 362(d)(3)(B).

CONCLUSIONS OF LAW

Because I agree with the Debtor's first contention regarding the timeliness of its filing of a plan of reorganization, I conclude that the Motion for Relief from Stay must be denied and that it is unnecessary to address the alternative contention of the Debtor regarding its obligations to make periodic payments under Section 362(d)(3)(B). As alluded to earlier, Debtor's case was commenced April 11, 1995, by the filing of a voluntary Chapter 11 petition. On April 12, 1995, a notice of the commencement of the case under Chapter 11 was issued by the Clerk which established a bar date for the filing of claims and set a date, time and location of the

meeting of creditors pursuant to 11 U.S.C. Section 341 for May 26, 1995. On the reverse of this Court's notice of case commencement, there appears a September 25, 1995, deadline for the filing of Debtor's plan and disclosure statement. Because Debtor filed a disclosure statement and plan on September 25, 1995, I find that the Debtor is in compliance with the terms of the April 14, 1995, Order and therefore is in compliance with the requirements of 11 U.S.C. Section 362(d)(3)(A).

Movant argues that the April 14 Order did not excuse the Debtor from its payment obligation in essence because the Order in question is a "form order" which set a deadline without any specific finding of cause for extension of the 90 day period. Without belaboring the obvious, it is true that the Order is a form order which, under the procedures established in this Court for the administration of Chapter 11 cases, is filed at the inception of every Chapter 11 case. It is also true that the September 25 deadline set forth in the Order made no specific finding of cause for an extension. I conclude, however, that the Order, unappealed from at the time of its entry, must be given full force and effect and Debtor should not be penalized by the drastic remedy of lifting of the automatic stay for failing to file a plan sooner in reliance on that Order.

It may very well be that had there been a request to reconsider that

deadline or other objection to its entry brought in a timely fashion that the Court, after conducting a hearing, might have concluded that the plan would be due for filing on or about July 14, 1995. However, no such objection or request for reconsideration was made. As a result, I consider that Order to constitute the law of the case whether it was improvidently entered or not and again because of the drastic result which would befall Debtor were I to ignore Debtor's reliance on the entry of this Order, I decline to impose the deadline which otherwise would be unquestionably required by the terms of Section 362(d)(3). "An erroneous decree which is not void on its face is forever binding and conclusive upon the parties named, upon the status defined, or upon the property described, unless upon motion seasonably made it be vacated or upon appeal it be reversed." In re Kellerman, 980 F.2d 737 (9th Cir. 1992); *quoting* In re Estate of Gardiner, 45 Cal.App.2d 559, 563 (1941)).

In so ruling I am not unmindful of the fact that, viewed in a strict sense, the result may infringe upon rights that the Movant would otherwise have under Section 362(d)(3) which have been engrafted in the Code by Congress for a very good reason. This does not, however, mean that the time granted the Debtor by the April 14 Order should be disregarded and I further observe that notwithstanding the Debtor's failure to make the August and September monthly payments, it did, by virtue of its compliance with this Court's previous Order, make a substantial lump sum

payment of the accrued 1995 rental obligation, most of which had accrued pre-petition. In doing so, as Debtor has contended in its alternative grounds for denial of the Motion, it provided substantial protection to the Movant as against a possible lease termination.

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 The Lincoln National Life Insurance Company is denied.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 1st day of December, 1995.