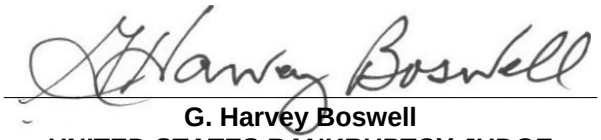
Dated: October 23, 2008
The following is SO ORDERED.



G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE

Vista International Development,	**CASE NO. 08-12582**
Debtor.	**Chapter 11**

MEMORANDUM OPINION AND ORDER RE: TEXTRON FINANCIAL CORPORATION'S MOTION FOR RELIEF FROM STAY AND ABANDONMENT OF CERTAIN PROPERTY

At issue in this case is a town home complex in Jackson, Tennessee, which the debtor has recently leased to Lane College. This town home complex is one of three parcels of real property that secure a claim in favor of Textron Financial Corporation ("Textron") in the amount of $1,559,736.73. Textron filed a "Motion for Relief from Stay and Abandonment of Certain Property" on August 26, 2008. In this motion, Textron alleges that (1) the debtor and Lane College are not complying with a provision in the lease requiring Lane College to pay a security deposit for the property; (2) this failure to comply with the security deposit requirement results in a lack of adequate protection for Textron; (3) the failure to comply with the security deposit requirement also constitutes a fraud on the Court; (4) the debtor has fraudulently concealed certain parcels of property; and (5) this concealment is grounds for relief from the stay.

The Court conducted a hearing on Textron Financial Corporation's "Motion for Relief from Stay and Abandonment of Certain Property" on September 17, 2008. FED. R. BANKR. P. 9014. Resolution of

this matter is a core proceeding. 28 U.S.C. § 157(b)(2). The Court has reviewed the testimony from the hearing and the record as a whole. This Memorandum Opinion and Order shall serve as the Court's findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

Vista International Development, ("Vista"), filed its chapter 11 voluntary petition on July 17, 2008. On September 9, 2008, Textron filed a claim in Vista's case in the aggregate amount of $1,559,736.73.[1] This claim is secured by deeds of trust on parcels of real property located at (1) 131 Cloverdale Street, Jackson, Tennessee, (2) 127 Regency Drive, Jackson, Tennessee, and (3) 8 Lewis T. Brantley Drive, Jackson, Tennessee. The property at issue for purposes of this opinion is the 131 Cloverdale Street property. According to the Deed of Trust filed as an exhibit to Textron's claim, the Cloverdale property consists of Lot Numbers 1 through 18 of Windgate Townhomes subdivision. Textron is the only entity which has filed a claim in this case.

Prior to the filing of Textron's claim, Vista filed a motion seeking approval of a lease agreement with Lane College for the Cloverdale property. According to the "Landlord and Tenant Lease Agreement" filed with the Court on July 24, 2008,[2] the one-year agreement provides for the lease of all eighteen of the town home units on Cloverdale to Lane College, ("Lane"), for use as student housing. The total rent for the one-year agreement is listed as $108,000.00. Pursuant to paragraph 3 of the agreement, Lane College agreed to pay a security deposit of $46,954.60 "for any damage caused to the Premises during the term hereof."[3] Paragraph 36 of the lease provides that:

> Security deposit will be held in an interest bearing account at First Tennessee Bank, Jackson, Tennessee. The Security deposit will be withheld if there are any damages to any units, including, but not limited to, damage to interior walls, ceilings, floors, windows, Doors, locks, hardware plumbing, fixtures, cabinets, shrubbery, lawn, heating and air conditioning apparatus, stove, refrigerator, water heater, electric lights and any fixtures, appurtenances, of the house or the premises (including other units in the complex).[4]

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[1] Claim # 1.

[2] Docket # 12.

[3] Docket # 12, paragraph 3.

[4] Docket #12, paragraph 36.

At the expiration of the lease, Vista would return the security deposit to Lane College "less any set-off for damages to the premises."[5] Paragraph 11 of the agreement is entitled "Maintenance and Repair; Rules." This paragraph provides that Lane College will, "at its sole expense, keep and maintain the" property during the term of the lease.[6]

Paragraph 7 of the lease addresses the topics of "Alterations and Improvements." According to this provision, Lane College was prohibited from making any alterations or improvements to the town homes without Vista's "prior written consent." Further, "any and all alterations, . . . shall, unless otherwise provided by written agreement . . . become the property of [Vista] and remain on the Premises at expiration or earlier termination of" the lease.[7] Finally, paragraph 34 of the lease states that:

> the parties hereby agree that this document contains the entire agreement between the parties and this Agreement shall not be modified, changed, altered or amended in any way except through a written amendment signed by all of the parties hereto.[8]

The lease was prepared on July 5, 2008. Mamie Hutcherson, CFO for Vista, and Wesley McClure, ("McClure"), President of Lane College, signed the lease on July 24, 2008.

Textron filed an objection to Vista's motion for approval of the lease agreement on July 29, 2008. In its objection, Textron alleged that section 5(h) of the Deed of Trust for the Cloverdale property "explicitly prohibits Debtor's lease of the Premises . . . without [Textron's] prior written consent"[9] and that Textron had refused to give consent to this lease. Textron further alleged that the "construction loan to the Debtor was made on the basis that the Debtor would construct the units for sale and not for lease."[10] Among other things, Textron alleged that the Court could not approve the lease because Vista was not offering Textron any adequate protection in its motion to approve the lease.

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[5] *Id.*

[6] Docket # 12, paragraph 11.

[7] Docket # 12, paragraph 7.

[8] Docket # 12, paragraph 34.

[9] Docket # 22, paragraph 3.

[10] *Id.*

The Court conditionally denied Textron's objection and conditionally granted the debtor's motion. An order memorializing the Court's ruling was entered on August 12, 2008. This order provides that:

1. The debtor could lease the property to Lane College "under a lease in the form attached to the motion . . . on the terms and conditions set forth in the Lease;"[11].

2. The debtor was required to provide Textron evidence of an insurance policy on the property naming Textron as the loss payee by July 31, 2008;

3. The debtor was required to obtain a certificate of occupancy for the property from the City of Jackson by August 10, 2008;

4. The debtor must make monthly adequate protection payments of $7,500.00 to Textron beginning August 10, 2008. If these payments are not paid, the automatic stay would be lifted in favor of Textron;

5. The debtor must amend its schedules and statement of affairs to properly set forth the debtor's partners on the date of filing and any information concerning pre-petition transfers of partnership interests in the debtor;

6. The debtor must provide a yearly operating budget for the Cloverdale town homes to its attorney by August 10, 2008. That budget would then be forwarded to counsel for Textron; and

7. The order is without prejudice to Textron's right to obtain relief from the stay in the case.[12]

Approximately fourteen days after entry of the order conditionally granting the debtor's motion to approve the lease of the Cloverdale property, Textron filed a "Motion for Relief from Stay and Abandonment of Certain Property."[13] In its motion, Textron alleged that P. Bardo Brantley, one of the debtor's two general partners, testified at the 11 U.S.C. § 341 meeting of creditors that

> Lane College had not and would not pay the damage deposit as the court-approved Lease requires. Instead, he testified under oath that he and the President of Lane College had agreed that Lane would spend this money on improvements to the leased premises allegedly necessary for lane College to occupy and use the Townhomes as student housing.[14]

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[11]Docket # 30, paragraph 1.

[12]Docket # 30.

[13]Docket # 39, filed August 26, 2008.

[14]Docket # 39, paragraph 6.

Textron alleged that neither Vista nor Lane ever intending on complying with the damage deposit requirement. According to Textron, the failure to pay the damage deposit, as well as the alleged intention not to pay, robs Textron of its adequate protection and is a fraud on the Court justifying relief from the stay or dismissal of the case. Textron also alleged that there was no equity in the Cloverdale property.

In its motion, Textron also alleged that it had presented evidence at the § 341 meeting of creditors that Vista owned four more parcels of real property than were disclosed on its bankruptcy schedules. According to Textron, Vista did not admit or deny the ownership of these properties. Textron alleges that the failure to disclose the property is a concealment of property which demonstrates this case was filed in bad faith. Such filing is a basis for relief from the stay.

The debtor filed an answer to Textron's motion on August 29, 2008, in which it opposed Textron's motion for relief. Vista stated in its answer that it will amend its petition to disclose any other assets and that there is equity in the Cloverdale property. Vista also stated that it had done nothing to justify the lifting of the stay nor had it committed any acts in bad faith.

At the September 17, 2008, hearing on Textron's motion, Textron argued three separate points in support of their motion to lift stay. First, Textron introduced a copy of Vista's Schedule D which shows that Textron has a $1,400,000.00 claim secured by "18 units apartment complex in Windgate Townhomes Subdivision at 131 Cloverdale St. in Jackson, TN; house & lot at 8 Lewis T. Brantley Dr. in Jackson, TN; House & lot at 127 Regency Dr. in Jackson, TN." Vista listed the value of this collateral as $1,132,800.00. Textron alleged that Schedule D demonstrates that there is no equity in the property at Cloverdale; therefore, pursuant to 11 U.S.C. § 362(g), the burden of proof on all other issues shifts to Vista.

Secondly, Textron introduced a partial transcript from the debtor's § 341 meeting of creditors in which one of Vista's general partners, P. Bardo Brantley, ("Brantley"), admitted that Lane had not made the $46,954.60 damage deposit mentioned in the lease, but had instead used the money to "ready the apartments for the school to move into."[15] According to Brantley's testimony, Brantley and Lane agreed to waive the damage deposit requirement and use the money to invest in the properties instead.

The third part of Textron's argument is that Vista has not included all of its assets on its bankruptcy schedules. Textron introduced collective exhibit 4 at the hearing which included a report from the Tennessee Real Estate Assessment Data website for the 2008 tax year as well as copies of

[15]Exhibit 3, page 3, lines 8 - 12.

various deeds. The Real Estate Assessment Data printout lists Vista International Development as the owner of seven pieces of property. The first, sixth and seventh entries on this printout show the properties listed on the debtor's schedules: 131 Cloverdale Street in Jackson, 8 Lewis T. Brantley Drive, Jackson and 127 Regency Drive, Jackson. The second, third, fourth and fifth properties listed on this report do not appear on the debtor's schedules: "Beech Bluff Rd (S OF), Jackson, 111 Regency Drive, Jackson, 21 Lewis T. Brantley Drive, Jackson, and 29 Lewis T. Brantley Drive, Jackson." When questioned by Textron's counsel at the § 341 meeting of creditors, Brantley stated he was unsure whether or not Vista still owned the properties. According to collective exhibit 4, Vista has the last recorded titles of record for these properties.

In defending itself against Textron's motion for relief, Vista called two witnesses to testify: Nathan Pride, ("Pride"), and Brantley. Pride is general counsel for Lane College. Both Pride and Brantley testified that between the time the lease was drafted and the time the lease was signed Vista and Lane had decided to delete the damage deposit requirement from the lease. Instead, Vista and Lane agreed to use the $46,954.60 to ready the properties for use by Lane students.

When questioned about why the parties had not amended the lease to reflect this decision, Pride testified that Lane's president, Dr. McClure signed the lease without informing Pride. According to both witnesses, the time surrounding execution of the lease was hectic. Lane had an imminent need for housing for its students and, as such, the negotiations were harried. Had Pride known Dr. McClure was preparing to sign the lease on July 24, 2008, Pride would have submitted an amended version of it for signing. This amended version would have altered the damage deposit requirement to reflect the parties' intentions. Brantley also testified that the parties had intended to amend the lease prior to signing.

At the beginning of the lease negotiations, Lane investigated the property. It became apparent from this inspection that there was a significant amount of work to be done to make the apartments liveable. Six of the apartments were shells and needed electrical and plumbing work completed. Vista did not have the capital at that time to finish this work. As a result, Lane and Vista decided to use the damage deposit money to finish those units. Lane presented Vista with a check for $46,954.60 and Vista then used that money to complete the work.

The lease that was presented to the Court stated that any part of the damage deposit that was not needed to make repairs at the end of the lease would be refunded to Lane. Under the parties' new agreement, Lane will not receive any of the money it used to enhance and complete the units back. The improvements it made will remain a part of the properties at the conclusion of the lease. Pursuant to paragraph 11 of the lease, Lane is required to maintain the properties during the lease at its own expense.

Pride testified that Lane has a maintenance staff that has and will continue to fix any minor problems on the properties. Lane reports any major problems to Vista for repair. In accordance with the order conditionally granting the debtor's motion to assume the lease, Vista has made two adequate protection payments of $7,500.00 to Textron.

Turning to the issue of unreported real property, the debtor filed amended Schedule A on September 26, 2008. This schedule was identical to the original Schedule A filed as part of the petition on July 17, 2008; however, Vista attached a title opinion from attorney H. Jack Holmes as an exhibit to the "amended" schedule. This opinion states that Vista conveyed the 29 acres on Beech Bluff Road in Jackson to Vista Mirage Subdivision on May 23, 2005; however, this deed was never recorded

II. Conclusions of Law

In the case at bar, Textron has alleged it is entitled to relief under 11 U.S.C. § 362(d)(1) and/or (d)(2). Section 362(d)(1) provides that a court shall grant relief from the automatic stay "(1) for cause, including the lack of adequate protection of an interest in property of such party in interest." 11 U.S.C. § 362(d)(1). The Bankruptcy Code does not define what constitutes "cause" under § 362(d)(1). As a result, courts must determine whether or not there is sufficient cause to lift the stay on a case-by-case basis. *In re Laguna Assoc. Ltd. P'ship.,*30 F.3d 734, 737 (6th Cir. 1994). It is a highly subjective inquiry and a bankruptcy court must use its discretion in making the determination. *In re Indian River Estates, Inc.,* 293 B.R. 429, 433 (Bankr. N.D. Ohio 2003). "Cause" is a broad and flexible concept. *Id.* "In determining whether cause exists, the bankruptcy court should balance the hardships imposed on the parties with an eye towards the overall goals of the Bankruptcy Code." *In re C & S Grain Co.,* 47 F.3d 233, 238 (7th Cir. 1995); *In re Nichols,* 440 F.3d 850, 856 (6th Cir. 2006). The creditor seeking to lift the stay carries the burden of proof as to the existence of "cause." *In re Arter & Hadden, L.L.P.,* 335 B.R. 666, 674 (Bankr. N.D. Ohio 2005).

Because the issue of whether or not "cause" exists in a case is a highly subjective inquiry, there is no set formula courts can use to make the determination. Some circumstances courts have found to satisfy the "cause" requirement of § 362(d)(1) include "lack of insurance, commission of waste, failure to pay post-petition taxes respecting the property in which the creditor has an interest, or the violation of government statutes or ordinances;" significant default under a lease, failure to pay state and federal taxes, malfeasance by the debtor(s) that was tantamount to an abuse of the bankruptcy process; and failure to comply with a court order. *In re Schewe,* 94 B.R. 938 (Bankr. W.D. Mich. 1989) (citations omitted). Very often a party seeks to have the automatic stay lifted when a debtor defaults on an obligation; however, "the failure to make payments, standing alone, . . . does not usually constitute

'cause' to modify or lift the stay. . .." *Nichols,* 440 F.3d at 856. The lack of adequate protection has also been found to constitute "cause" which justifies relief from the stay. *In re J & M Salupo Development Co., Inc.,* 388 B.R. 809, 812 (Bankr. N.D. Ohio 2008).

In the case at bar, Textron has alleged that the debtor acted in bad faith in filing its bankruptcy petition. The debtor's lack of good faith in filing a bankruptcy petition has been found to constitute "cause" which justifies the lifting of the stay under § 362(d)(1). *Id.* Determining whether or not the debtor acted in good faith in filing his bankruptcy petition requires a court to make a subjective inquiry into each case. "While no single fact is dispositive, courts have found the following factors to be meaningful in evaluating an organizational debtor's good faith:

> (1) the debtor has one asset;
> (2) the pre-petition conduct of the debtor has been improper;
> (3) there are only a few unsecured creditors;
> (4) the debtor's property has been posted for foreclosure, and the debtor has been unsuccessful in defending against the foreclosure in state court;
> (5) the debtor and one creditor have proceeded to a standstill in state court litigation, and the debtor has lost or has been required to post a bond which it cannot afford;
> (6) the filing of the petition effectively allows the debtor to evade court orders;
> (7) the debtor has no ongoing business or employees; and
> (8) the lack of possibility of reorganization.

Laguna Assoc., 30 F.3d at 378 (citing *In re Charfoos,* 979 F.2d 390, 393 (6th Cir. 1992)).

In the case at bar, the debtor has made all of the required adequate protection payments to Textron thus far. The debtor has finished construction on the units and within a very short period of time found a more-than-suitable tenant to occupy the property. The town homes are being lived in and monitored. The debtor has insured the property and complied with all of the Court's requirements under the August 12, 2008, order approving the lease. The debtor is making the payments to Textron and appears to have taken all necessary action to insure that Textron's collateral is being taken care of.

The Court understands that Textron is concerned about the lack of a large amount of money on deposit with a bank to cover any damage to the property by the college students living in the units; however, instead of taking the almost $50,000 deposit and letting that money sit in a bank for a year, Lane allowed the money to be invested in the properties to ready them for rental. Representatives from both Lane and Vista testified that Lane will not receive any portion of that money back when the lease expires. Right away that is a $50,000 addition to Textron's collateral. Additionally, the representatives from Lane and Vista also testified that Lane is clearly aware of its duty to make all necessary repairs during the term of the lease. Lane has done so thus far and there is no indication that it will cease doing

so. Although Textron may have legitimate fears about potential damage to the property given the age of the tenants, fear alone is not enough to justify the lifting of the automatic stay.

Turning to Textron's second argument, 11 U.S.C. § 362(d)(2) provides that a court shall grant relief from the automatic stay:

> (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)(2). Subsection (g) of § 362 puts the burden of proof on the creditor requesting relief from the stay to demonstrate that there is no equity in the property. 11 U.S.C. § 362(g). Once the creditor has proven no equity exists, the burden of proof shifts to the debtor on all other issues. *Id.*

"Equity . . . is the value, above all secured claims against the property, that can be realized from the sale of the property for the benefit of the unsecured creditors." *Matter of Holly's, Inc.,* 140 B.R. 643, 697 (Bankr. W.D. Mich. 1992). At the hearing in the case at bar, neither party submitted proof as the current value of the property. Vista's Schedule A does show a value of $1,000,000 for the Cloverdale property; however, both Brantley and Pride testified that the properties have been improved since the case was filed. Lane has invested at least $46,954.60 into the properties since July and Brantley has made the required adequate protection payments of $7,500.00 per month since August 2008. The values listed on schedules have been found insufficient to satisfy the burden under § 362(d)(2)(A). *In re New American Food Concepts, Inc.,* 70 B.R. 254, 258 - 59 (Bankr. N.D. Ohio 1987). As a result of this lack of proof, the Court finds that Textron has failed to carry its burden with respect to subsection (A) of § 362(d)(2).

Even if this Court were to determine that the Cloverdale property did not have equity, such a determination would be defeated by subsection (B) of § 362(d)(2). Subsection (B) of § 362(d)(2) contains the word "and" between subsections (A) and (B). As a result, both prongs must be satisfied in order to grant relief from the stay. The second part of § 362(d)(2) requires the debtor to prove that the property is necessary for an effective reorganization.

> Establishing the property is "necessary to an effective reorganization" "requires [ ] not merely a 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 with[in] a reasonable time."

In re Plastech Engineered Products, Inc., 382 B.R. 90, 109 (Bankr. E.D. Mich. 2008) (citing *United Savings Assoc. of Texas v. Timbers of Inwood Forest Assoc., Ltd.,* 484 U.S. 365, 375-76, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988)).

In the case at bar, Vista has completed and leased the Cloverdale townhomes to a very reputable tenant: a local and well-established institution of higher learning. The Cloverdale property consists of 18 townhome units, all of which have been rented for twelve months. As stated supra, the Court can appreciate Textron's apprehension regarding use of the units by college students; however the college has invested almost $50,000 into the properties to make them liveable and monitors the properties on a daily basis for any and all damage. That which the maintenance staff at Lane can fix is fixed by the college at their own expense. That which the college cannot fix is referred to Vista for repair. Representatives from both parties testified that Lane understood it was responsible for any damages to the premises under paragraph 11 of the lease during the term of the lease as well at expiration of the agreement. Lane is, in the eyes of this court, a dream tenant that will make Vista's chapter 11 plan of reorganization viable. Lane will pay a total of $108,000.00 towards the properties this year alone. If Vista were forced to lease these properties to individuals on a unit-by-unit basis, there is a very real risk that some of the town homes would sit empty for at least a portion, if not all, of the year. By working with Lane College to keep these units occupied, the debtor has made a very real and concrete step towards a successful chapter 11 case.

III. ORDER

It is therefore **ORDERED** that Textron Financial Corporation's "Motion for Relief from Stay and Abandonment of Certain Property" is **CONDITIONALLY DENIED based on the Debtor and Lane College filing an amended lease for the Cloverdale property which reflects the fact that the $46,954.60 damage deposit was invested in the property and Lane will not receive any portion of that investment back at termination of the lease.**

IT IS SO ORDERED.

Mailing List

Robert Goodrich, attorney for Textron Financial Corporation

F. David Arens, attorney for Textron Financial Corporation

Tim Latimer, attorney for debtor

Steven Wilkes, U.S. Trustee