UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

LARRY PAUL CONWAY, Case No. 02-23559-L
Chapter 11

Debtor.

ORDER GRANTING RELIEF FROM AUTOMATIC STAY

BEFORE THE COURT is a motion for relief from the automatic stay of 11 U.S.C. § 362(a) filed May 1, 2002, on behalf of Edith Nusbaum (hereinafter "Trustee"), Trustee for the benefit of Dr. Mark Nusbaum. Appearing for the Trustee was Mr. David M. Dunlap; appearing for the Debtor was Ms. Wanda Abioto. The court heard testimony over a period of four days and made a visit, accompanied by counsel, to the hotel property which is the subject of this dispute. In addition, the court agreed to receive transcripts of the testimony of two real estate appraisers with respect to the value of the property given in the prior bankruptcy case of Jacmar Enterprises, Inc. (hereinafter "Jacmar"). Pursuant to FED. R. BANKR. P. 7052, the court makes the following findings of fact and conclusions of law. This is a core proceeding. 28 U.S.C. § 157(b)(2)(G).

FINDINGS OF FACT

The Debtor commenced this Chapter 11 bankruptcy case by filing a voluntary petition for relief on February 26, 2002. An earlier Chapter 11 petition, filed by the Debtor on November 7, 2001, was dismissed on January 30, 2002, upon the motion of the United States Trustee. In addition, Jacmar filed a Chapter 11 bankruptcy petition on June 21, 2000, which also was dismissed upon motion of the United States Trustee on February 9, 2001. The Debtor's primary source of income is distributions from the People's Place Car Wash, a business operated by the Debtor's wife.

Schedule I projects combined income for the Debtor and his wife of $13,200.00 per month. Schedule J reflects expenses of $16,913.33 per month. The Summary of Schedules shows assets of $13,882,267.00 exceeding liabilities of $3,818,004.69 by $10,064,262.31. As of this date, the Debtor has filed two operating reports. The first report, for the month ended March 31, 2002, reflects income of $7,323.00 (excluding loan proceeds of $950) and expenses of $8,758.40. The second report, for the month ended April 30, 2002, reflects income of $7,100.00 and expenses of $7,772.37. The Debtor's expenses exceeded his income in both months. The Debtor has continued in possession of his property, but has not yet proposed a plan of reorganization.

The Trustee is the holder of a promissory note dated November 7, 1997, in the original principal amount of $140,000.00 made by Jacmar, by Larry Conway, President,[1] payable to the order of Irving Goodman, Trustee, the predecessor trustee to Mrs. Nusbaum. The promissory note is secured by a first priority lien of a deed of trust on real property known as 1318 Lamar Avenue, Memphis, Tennessee. A non-operating hotel building formerly known as the Coach and Four is located on the property. The property was vacant at the time that it was purchased by Jacmar on November 7, 1997, for a purchase price of $210,000.00. Other than placing a fence around the property, boarding windows and removing debris, no physical improvements have been made to the property since its purchase. On June 16, 2000, five days prior to the filing of the Jacmar bankruptcy

[1] Larry Conway is not an officer of Jacmar at the present time. His wife, Marilyn Conway, is vice president and the office of president is vacant.

petition, Jacmar conveyed a 30% interest in the property to the Debtor via quitclaim deed. The Trustee maintains that this transfer was prohibited by the deed of trust, but this determination is not necessary to the court's consideration of the instant motion. It is clear that the Debtor has no personal liability for the indebtedness owed to the Trustee.

In each of the three bankruptcy cases described above, the Trustee has sought relief from the automatic stay. In the Jacmar case, the court heard testimony on October 30 and November 1, 2000, and then continued the hearing until November 29, 2000, to give Jacmar an additional opportunity to come forward with a loan commitment or written capital investment agreement as evidence renovation of the hotel property was economically feasible and necessary to the reorganization of Jacmar. On November 29, 2000, the parties announced a settlement, but were unable to agree on the language of a consent order. On December 19, 2001, the court entered its order reflecting the termination of the automatic stay by operation of law in accordance with 11 U.S.C. § 362(e). A subsequent motion for relief from the judgment and for new trial was denied. Jacmar appealed, but the appeal was dismissed as moot. On March 16, 2001, Goodman, Jacmar, the Debtor and his wife entered into an Agreement to cure the monetary defaults in the promissory note, whereby, among other things, Jacmar delivered to Goodman twelve post-dated checks drawn by Helm Enterprises, Inc. in various amounts dated the seventh day of March 2001 and of each succeeding month thereafter. In addition, Jacmar agreed to make provision for payment of delinquent real property taxes in the amount of $15,664.94 plus penalties, interest and assessments, on or before April 14,

2001. Jacmar was to provide a copy of any agreement reached with the taxing authorities and proof of each payment made toward the outstanding taxes to Goodman. In addition, the parties entered into a "Modification to Note dated November 7, 1997" to increase the principal balance of the note to reflect capitalization of certain expenses of Goodman and to reflect the other terms of the Agreement. According to Mrs. Marilyn Conway, the Debtor's wife, the Modification of Note and Agreement were entered into under "stress and duress." The only "duress" described by Mrs. Conway, however, was the fear of Jacmar losing its property to foreclosure. She did not describe any threat of physical harm or inability to consult counsel. The court finds that the Modification of Note and Agreement were freely entered into by the parties.

Default has occurred under the Agreement and promissory note as modified. Specifically, the November 2001, and January and February 2002, checks were returned upon presentation for insufficient funds. In addition, Jacmar has failed to pay real property taxes and has defaulted in the terms of its Repayment Plan Agreement with the Shelby County Trustee with respect to real property taxes. The Trustee gave notice of default and demand for payment to Jacmar and Helm Enterprises on November 16, 2001, and again on November 30, 2001. Mr. Conway's first Chapter 11 case was filed on November 23, 2001. As described above, after the dismissal of this case, Jacmar again defaulted when the January and February checks were also returned unpaid for insufficient funds.

The current outstanding balance under the promissory note is $149,900.00, principal and interest. There are outstanding property taxes owed in the amount of $22,273.79. Further, an additional deed of trust encumbers the hotel property securing a debt to Helm Enterprises in the amount of $982,000.00. Thus, the total indebtedness secured by the hotel property is not less than $1,154,173.79.

Concerning the value of the hotel property, the Trustee presented the following proof: (1) the original purchase price of $210,000.00 on November 7, 1997; (2) the testimony of Todd Glidewell, M.A.I., commercial real estate appraiser, given October 30, 2000, indicating a value of between $177,000.00 and $229,000.00 consisting of land value less demolition costs; and (3) the testimony of Mr. Alan Goldreich that he has received an offer of $225,000.00 to purchase the property free and clear of all liens and encumbrances in the event the Trustee is the successful bidder at a foreclosure sale. In response, the Debtor presented the following evidence concerning the value of the property: (1) the testimony and written market analysis report of Bill Sexton, State Certified General Appraiser, dated October 12, 2000, indicating a value "as is" of $2,160,000.00, and a value "upon completion of renovations" of $9,842,000.00; and (2) the testimony and written report of Rick Howarth, MBA, ASA, indicating an "'as completed' prospective date August 2002" value of $16,500,000.00, and an "'as stabilized' prospective date August 2004" value of $17,745,000.00. The court has reread the prior testimony of Glidewell and Sexton.

All of the expert witnesses agree on the following. The property is vacant. It has no electrical power. It has no windows. There is evidence of fire damage. The ceilings are in disrepair. The windows are boarded up, but according to the Debtor the boards are frequently removed by unknown persons. Plumbing fixtures, lavatories and toilets have been removed or are broken. The electrical fixtures have been removed. Glidewell reported evidence of vagrants living in the building at the time of his inspection. When the court visited the property on June 5, 2002, all of the conditions described by the expert witnesses were observed. The hotel contained a significant amount of debris consisting of broken glass and fixtures; torn carpeting; broken ceiling tiles, soda machines and furniture; empty food containers; old cleaning supplies; and clothing. A large number of the rooms, even on the lower floors, were open to the elements. On the second floor, there was evidence of persons living in the building. On the other hand, the building did appear to be structurally sound.

The Debtor apparently told Sexton at one point in time that he and/or Jacmar intended to spend $7.5 - 8 million in renovating the property. Sexton agreed that renovation at that level would produce a functional hotel property and Glidewell relied upon this representation. Although Howarth's report includes a cost estimate for improvements to the property in the amount of $6,992,280, apparently prepared by a James A. Holtzman, A.I.A., it is not clear what use, if any, was made of this information. In his Cost Analysis, Howarth derives a "Total Estimate of Replacement Cost New for the Building and Improvements" of $18,203,015 and an indicated value via the cost

approach of $16,500,000. Because Howarth did not attempt to value the property as is in his written report, the court cannot determine how much of the estimated cost represents new investment. The primary difference between the approach of Sexton and Howarth on the one hand, and that of Glidewell on the other was that Sexton and Howarth believed that the property could be feasiblely renovated assuming the structural integrity of the building, and Glidewell did not. Sexton and Howarth assumed that the renovated hotel would compete in the downtown convention market, while Glidewell felt that the renovated hotel would more likely compete in the medical center market. All the appraisers agree that the property is closer to the medical center than it is to the downtown entertainment district. The choice of market for comparison is crucial to the evaluation of this property. If the property would be capable of obtaining convention business, it would be expected to achieve higher revenues than if it were merely able to attract medical center customers. Because Glidewell looked at room revenue of comparable hotels in the medical center area, he derived a potential value for the hotel, as renovated, of $7.2 million, which was less than the projected renovation costs of $7.5-8 million. Thus, Glidewell concluded that the building added no value to the value of the land, but rather represented a liability equal to the cost of demolition. Sexton, on the other, using different hotels as comparables, derived a value for the subject upon completion of $9,842,000.00, which exceeds the projected costs of renovation by $2,342,000.00. Howarth derived a value as completed of $16,500,000, which obviously also exceeds the projected cost of renovation.

The difficulty in identifying the potential market for this property arises from the fact that it lies upon the boundary between some of the most desirable residential property in the Memphis area and an economically depressed area that at least historically has been characterized by crime, prostitution and drug traffic. The Debtor believes that the area is experiencing a renaissance, caused in large part by his purchase of this and other contiguous properties and the operation of the new People's Place Car Wash next door. As much as the court would like to believe in the Debtor's vision for the renovation of this property and resulting revitalization of the surrounding area, the sad truth is that in neither the Jacmar case of eighteen months ago nor in either of his individual bankruptcy cases has the Debtor been able to provide any third-party confirmation of his dream. As indicated above, the court delayed the conclusion of the hearing in the Jacmar case for twenty-nine days to permit the Debtor to present proof of potential financing of or investment in the property. He failed to do so. Eighteen months later, the Debtor still cannot provide proof of third-party interest in the property. The Debtor has no available means of performing the renovations that would be necessary to make this property viable. The Debtor's inability to obtain financing or investment, together with the court's own knowledge of the Memphis area and visit to the hotel site, leads to the conclusion that Glidewell's assessment of the potential market for the property is more accurate than that of Sexton and Howarth. The court does not believe that, even in a fully renovated state, the property would attract significant downtown convention traffic. While the subject property is a relatively short drive from downtown, the most direct route from the downtown area to the

property involves navigating some of the poorest areas of the city. The desirable residential areas that admittedly lie within the immediate area of the hotel are to the east of the property, while the drive from downtown lies to the west. The medical center, on the other hand, lies to the north of the property, through a more desirable neighborhood and a shorter drive than that from downtown. While it is true that the Memphis downtown area is expanding and developing at a pace unimaginable just ten years ago, the lack of any third-party interest in the development of this property convinces the court that downtown development has not yet reached the area of the subject property. Based upon the convergence of the original purchase price, Glidewell's testimony and the offer to purchase received by Goldreich, the court finds that the value of the hotel property is $225,000.00. The total outstanding indebtedness secured by the property is at least $1,154,173.79, excluding attorney fees and other costs. The Debtor owns a 30% interest in the real property. The Debtor has no equity in the property.

CONCLUSIONS OF LAW

Pursuant to 11 U.S.C. § 362(d), a court should grant relief from the automatic stay for cause, including the lack of adequate protection, or when the debtor does not have equity in property and the property is not necessary to a successful reorganization. Although the Trustee raised the issue of adequate protection in closing argument, the court finds that the position of the Trustee is adequately protected. The Trustee's appears to be fully secured by property that does not appear capable of further deterioration. Rather, the Trustee has carried her burden of proving the Debtor's

lack of equity in the property. *See* 11 U.S.C. § 362(g)(1). Even if a debtor lacks equity in a particular piece of property, however, relief from the automatic stay can be avoided if the debtor is able to demonstrate that the property is necessary for an effective reorganization. The Supreme Court had provided guidance concerning a debtor's burden under section 362(d)(2)(b):

> What this requires is 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, as many lower courts, including the en banc court in this case, have properly said, that there must be "a reasonable possibility of a successful reorganization within a reasonable time." 808 F. 2d, at 370-71, and nn. 12-13, and cases cited therein. The cases are numerous in which § 362(d)(2) relief has been provided within less than a year from the filing of the bankruptcy petition. And while the bankruptcy courts demand less detailed showings during the four months in which the debtor is given the exclusive right to put together a plan, see 11 U.S.C. §§ 1121(b), (c)(2) even within that period lack of any realistic prospect of effective reorganization will require § 362(d)(2) relief.

United Savings Assoc. v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365, 375-76, 108 S. Ct. 626, 633 (1988) (footnotes omitted). While this particular bankruptcy case is less than four months old, the court knows that the actual attempts to reorganize this property are at least eighteen months old. The automatic stay terminated in the Jacmar case with respect to this property on December 19, 2000, as the result of the passage of time and Jacmar's inability to show a reasonable likelihood of reorganization. The Debtor has utterly failed to demonstrate that he is any closer to reorganization now than he was in December of 2000. The court sadly must conclude that there is no realistic prospect for effective reorganization of this property. This conclusion is reinforced by

the rather small amount of debt owed to the Trustee relative to the projected value of the renovation project. If the Debtor has a reasonable prospect of being able to launch a multi-million dollar renovation project, he should be able to find a means of paying a $150,000.00 debt. As the court pointed out in Jacmar, payment of the debt owed to the Trustee would free the Debtor (or Jacmar) to pursue his renovation plans. The fact that the Trustee still has not been paid only confirms the court's conclusion that the project is not viable.

Based upon the foregoing, the court finds that the Debtor has no equity in the property and that the property is not necessary to the Debtor's effective reorganization because there is no reasonable likelihood of a successful reorganization within a reasonable time. Accordingly, the motion for relief from the automatic stay is granted. The automatic stay is terminated as to the actions of the Trustee with respect to the real property at 1318 Lamar Avenue, Memphis, Tennessee.

IT IS SO ORDERED.

BY THE COURT,

_____
JENNIE D. LATTA
United States Bankruptcy Judge

Date: _____

cc: Debtor
Movant
Debtor's Attorney
Movant's Attorney
United States Trustee