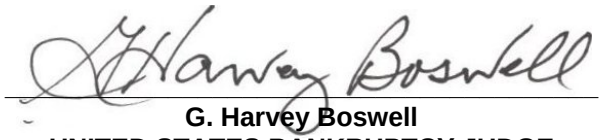
Dated: June 16, 2009
The following is SO ORDERED.



G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE

Madco Products, Inc. **CASE NO. 09-10745**

Debtor. **Chapter 11**

MEMORANDUM OPINION RE: "MOTION BY REGIONS BANK TO LIFT STAY"

The Court conducted a hearing on Regions Bank's motion to lift stay on May 27, 2009. 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 shall serve as the Court's findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

At issue in this case is a piece of real estate MadCo Products, Inc., ("debtor" or "MadCo"), owns in Jackson, Tennessee. The property is an 11.26 acre tract located in an industrial park on F.E. Wright Drive ("F.E Wright property"). Along with the debtor's accounts receivable, existing equipment, inventory, chattel paper and general intangibles and a guaranty by Jeffrey W. Palmer and Roy L. Rickets, the real estate serves as security for a promissory note with Regions Bank. As of January 20, 2009, the balance of the note was $267,352.58. The note has a maturity date of May 23, 2009. The 11.26 acre tract is the debtor's only asset.

MadCo filed its chapter 11 petition on February 20, 2009. At the time of filing, the debtor had ceased all operations and was no longer in the business of producing any goods or services. Roy Ricketts is the president of MadCo and 70% owner. Ricketts's son-in-law, Jeffrey Palmer, owns the other 30% of the company. Ricketts testified at the hearing in this matter and stated that once the F.E. Wright property is sold, MadCo will be dissolved. At the time of filing and throughout the pendency of this case, MadCo has not had any funds on hand or any source of income.

In addition to the deed of trust issued to Regions, the F.E. Wright property secures a second deed of trust in favor of Ricketts. When MadCo initially started having financial problems, Ricketts personally loaned the company $350,000.00 in order to continue operations. As of the hearing date on Regions' motion, MadCo had not paid any portion of that money back to Ricketts. The IRS also has a lien on the F.E. Wright property for approximately $3,800.00 in back taxes.

MadCo has not made a payment to Regions since May 2008. MadCo also owes approximately $14,000.00 in Madison County property taxes for the F.E. Wright property. Ricketts testified that neither he nor MadCo have any ability to make the payments to Regions or to pay the back property taxes owed to the county.

Although Ricketts has done approximately $150,000 to $200,000 in dirt work on the property, the F.E. Wright property is mostly unimproved. It is located in an industrial park in Jackson and is approximately 3/4 of a mile from Interstate 40. It has a railroad spur on one part of the tract. The F.E. Wright property was originally purchased by the debtor as part of a twenty-two acre tract. MadCo purchased the property with the intention of constructing a manufacturing plant on the land. Because of a bad economy, business problems and some personal medical issues with Ricketts's wife, MadCo eventually decided not to move their manufacturing operations to the F.E. Wright site. As a result, Madco sold ten acres of the land in 2002 for $343,000.00.

MadCo has been attempting to sell the F.E Wright property for the past few years.[1] The property was on the market for a year with a listed asking price of $650,000.00. The property did not sell and once the real estate listing contract expired, Ricketts attempted to sell the property on his own. In all this time no one has made any firm written offer to purchase the property. MadCo filed an application to employ RE/MAX Realtors to market the F.E. Wright property on April 3, 2009. According to Ricketts's testimony, MadCo entered into a listing contract with RE/MAX on April 1, 2009. Said agreement expired on May 18, 2009. The listed sales price was $450,000.00. Despite the fact that the contract has now expired, the Court has not yet ruled on the application to employ. No offers have been made on the property since it was listed for sale with RE/MAX.

Regions filed a motion to lift the stay on the F.E. Wright property on February 24, 2009. In anticipation of the hearing on this motion, both Regions and the debtor hired appraisers to examine the property and estimate the market value of the land. Both appraisers testified at the hearing on Regions' motion to lift on May 27, 2009.

Regions' appraisal was done by David Whalley ("Whalley") of Appraisal Services, Inc., of Jackson in December 2008. According to his testimony, Whalley has over twenty-five years of full-time experience as an appraiser. Ninety percent of his appraisals are done on commercial property. After inspecting the property and comparing it to similar properties in the area, Whalley appraised the F.E. Wright property at $22,000.00 per acre with a total estimated market value of $245,000.00.

Although Whalley was able to find three similar properties in the Jackson area to compare to the F.E. Wright property, he testified that the industrial real estate market in Jackson is severely depressed. Whalley's first comparable, a 27.807 acre tract on Flex Drive in Jackson, sold on May 30, 2008, for $375,400.00. Whalley's other two comparables, a 21.20 acre tract on Lower Brownsville Road and a 2 acre tract on Malone Road, were sold over three years ago. The Lower Brownsville Road property sold for $331,000.00 on January 19, 2006, and the Malone Road property sold for $70,000.00 on May 25, 2005. Whalley testified that there have not been any other comparable industrial properties sold in the Jackson/Madison County area during that time.

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[1] When questioned by Regions' counsel at the hearing in this case, Ricketts was unable to recall the exact date or year he first put the F.E. Wright property on the market. Considering that MadCo originally purchased the F.E. Wright property as part of a larger tract and that MadCo sold a portion of this larger tract in 2002, the Court will assume that MadCo's efforts to sell the 11.26 acres at F.E. Wright Drive were not begun until after that sale.

In arriving at his appraised value for the F.E. Wright property, Whalley made some adjustments to each comparable property based on tract size and proximity to MadCo's property. Whalley testified that a good appraiser will try to limit the number and size of the adjustments he makes in attempting to arrive at a true value for the land being appraised. According to Whalley, the more adjustments an appraiser makes and the higher the adjustments are, the less accurate the appraisal will be. Also, if the comparable sales are too far apart in time from the current appraisal, the resulting value will be weak. According to Whalley if an appraiser makes several adjustments over the 20 - 30% range, the comparable property should be considered weak and not a good one to use in appraising realty. Additionally, Whalley stated that larger tracts of land are typically sold for a lower amount per acre. The smaller a piece of property is, the higher the per acre price. Lastly, Whalley stated that a piece of land either in a developed industrial park or that has been developed by the seller will bring a higher per acre price.

When questioned about his opinion of the $450,000.00 listing price for the F.E. Wright property, Whalley testified that he did not believe the property would sell for that amount no matter how long it remains on the market. He was aware that MadCo sold 10 acres of the F.E. Wright property in 2002 for $343,000.00; however, given the nature of today's market, Whalley did not feel MadCo would have been able to sell that same tract in today's market for that value.

Because his appraisal was done in December 2008, Whalley reviewed the figures prior to coming to the May 27, 2009, hearing on Regions' motion. Whalley stated that despite the economic downturn and the depressed market, he believed the $245,000.00 value he arrived at would still be an accurate assessment of the property's value in today's market.

MadCo also hired an appraiser to evaluate the market value of the F.E. Wright property. Ricketts, as president of MadCo, hired Horton & Associates in Jackson. Horton & Associates' employees David Horton and Brad Dean conducted their appraisal on the property in March 2009. They arrived at a $40,000 per acre price for a total market value of $450,000.00. Both David Horton and Brad Dean are certified general appraisers. David Horton has been appraising commercial properties for over twenty-five years. David Horton appeared at the May 27, 2009, hearing on Regions' motion to lift to testify about the appraisal done by his company.

In investigating MadCo's F.E. Wright property, Horton and Dean also used comparables in arriving at their value. Horton reiterated that there has been a lack of industrial sales in the Jackson/Madison County area over the last several years. The first comparable used by Horton was a 16.30 acre tract of land on F.E. Wright Drive which sold for $260,800.00 on May 6, 2005. Horton adjusted the price of this property up 20% for size, 40% for frontage/situated, 40% for topography and 30% for location arriving at a final price of

$36,800.00 an acre. The second comparable used by Horton was a 2.40 acre tract in a light industrial district which sold for $140,000.00 on December 8, 2006. Horton adjusted this property down 20% for size with a final value of $46,666.00 per acre. The third comparable used by Horton was a 2.17 acre tract on Mill Masters Drive in Jackson which sold for $125,000.00 on June 22, 2004. Horton adjusted the value of this land down 20% for size and 10% for shape. Horton also adjusted the value up 10% for location arriving at a final per acre price of $46,083.00. The last comparable used by Horton was a 5.35 acre tract on Mill Masters Drive which sold for $140,000 on September 16, 2005. Horton adjusted the price of this land down 10% for size and down 10% for shape. He adjusted the value up 25% for frontage/situated and up 20% for location for a final per acre price of $32,710.00.

Horton testified that the F.E. Wright property could sell for $450,000 if the land were cleaned up somewhat and the property were marketed more aggressively. According to Horton, the land is an attractive piece of realty with a good location. The existence of the railroad spur makes it more valuable in Horton's opinion. Because of the dirt work done by Ricketts, the property is in good condition for someone looking to start construction of a building rather quickly. When asked by MadCo's attorney if he felt that the property would bring a higher or lower sales price in three months time, Horton stated that he felt it would bring a lower price in three months time.

In opposing Regions' motion to lift the stay, Ricketts asked the Court for the opportunity to continue marketing the land on his own until August 2009. Ricketts testified that he feels he could obtain a higher price for the land if it is marketed with a realtor rather than being foreclosed upon. Ricketts also feels like the property will bring more money in several months from now based on the possibility of a motor vehicle plant being built in Haywood County and/or the further development of the F.E. Wright Drive area.

II. CONCLUSIONS OF LAW

Section 362 of the Bankruptcy Code provides that the filing of a petition for bankruptcy relief operates as a stay of "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate . . . ." 11 U.S.C. § 362(a)(3). Section 362(d) provides that:

> 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 —
>
> . . .
>
> (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)(1) and (2). Section 362(d)'s use of the word "and" between subsections (1) and (2) means that both sections must be satisfied before a court can grant relief from the stay. A creditor seeking relief from the automatic stay under this section has the burden of proof on the issue of equity while the debtor has the burden of proof on the issue of whether or not the property is necessary for an effective reorganization. *Matter of Holly's, Inc.,* 140 B.R. 643, 697 (Bankr. W.D. Mich. 1992).

The Bankruptcy Code does not define the term "equity"; however, caselaw appears to be well settled on the term as it is used in 11 U.S.C. § 362(d)(2). According to the majority of courts, "equity" is defined as "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." *Stephens Indus., Inc. v. McClung,* 789 F.2d 386, 392 (6th Cir. 1986) (citing *In re Mellor,* 734 F.2d 1396, 1400 n. 2 (9th Cir. 1984)). "The classic test for determining equity under section 362(d)(2) focuses on a comparison between the total liens against the property and the property's current value." *Nantucket Investors II v. California Fed. Bank (In re Indian Palms Assoc., Ltd.),* 61 F.3d 197, 206 - 207 (3rd Cir. 1995) (citations omitted); *Prestwood v. U.S. (In re Prestwood),* 185 B.R. 358, 361 (M.D. Ala. 1995); *Stewart v. Gurley,* 745 F.2d 1194, 1196 (9th Cir. 1984); *First Agric. Bank v. Jug End in the Berkshires (In re Jug End in the Berkshires, Inc.),*46 B.R. 892, 901 (Bankr. D.Mass. 1985); *In re New Era Co.,* 125 B.R. 725, 728 (S.D.N.Y. 1991); *Lincoln Nat'l Life Ins. Co. v. Craddock-Terry Shoe Corp. (In re Craddock-Terry Shoe Corp.),* 98 B.R. 250, 252 (Bankr. W.D. Va. 1988). In the case at bar, the F.E. Wright property secures a first mortgage deed of trust in favor of Regions Bank for approximately $267,352.58. The F.E. Wright property also secures a deed of trust in favor of Ricketts in the amount of $350,000.00. The IRS has a tax lien of approximately $3,800.00 against the property and MadCo owes Madison County approximately $14,000.00 in back property taxes. Even if the Court were to accept the debtor's appraised value of $450,000.00, there is no equity in the property. The debtor owes $617,352.58 under the two deeds of trust alone. That is over $167,000.00 more than the $450,000.00 value offered by MadCo's appraiser. As a result, the Court finds that there is no equity in the F.E. Wright property. Regions has satisfied its burden of proof under the first prong of § 362(d).

Turning to the second prong of § 362(d), the debtor must be able to prove that the property is necessary for an effective reorganization. This burden of proof is akin to a balloon: it expands with the progression of a case:

> The standard to be applied pursuant to § 362(d)(2)(B) is whether there is "a reasonable possibility of a successful reorganization within a reasonable time." The decisions also support the conclusion that the burden of proof upon the debtor under § 362(d)(2)(B) is a "sliding scale" which this court characterizes as a "moving target." The burden enlarges as the bankruptcy case progresses. Therefore, if the relief from stay is requested at the early stages of the bankruptcy case, the burden upon the debtor is less stringent.

Holly's, 140 B.R. at 698 - 99 (citing *United States Ass'n v. Timbers of Inwood Forest*, 484 U.S. 365, 376 (1987)); *In re Lake Ridge Assoc.,* 169 B.R. 576, 578 (E.D. Va. 1994). When relief from the stay is sought during the 120-day exclusivity period, "a somewhat relaxed standard of proof will be imposed upon the debtor." *In re Planned Systems, Inc.,* 78 B.R. 852, 866 (Bankr. S.D. Ohio 1987). When, however, relief is requested near expiration of the exclusivity period:

> the moving target burden of proof requires a greater showing than "plausibility." At these intermediate points in a bankruptcy case, . . . the debtor must demonstrate that a successful reorganization within a reasonable time is "'probable." . . . As the expiration of the exclusivity period to file a plan nears, . . . the balance between the reasonableness of the delay borne by the creditor and the debtor's ability to formulate a plan is approximately equal. If the court concludes that it is improbable that the debtor can formulate a plan, the creditor should not have to bear any additional delay and the stay should be lifted.

Holly's, 140 B.R. at 701. Once the exclusivity period expires, the debtor "must offer sufficient evidence to indicate that a successful reorganization within a reasonable time is 'assured.'" *Id.* Regardless of what stage the case is in, the debtor must be able to show that there is a "reasonable possibility of a successful reorganization" and this reorganization must occur "within a reasonable time." *Timbers,* 484 U.S. at 376.

Even if the debtor does not propose to resume business operations, but instead proposes to sell all of the business assets, he may still be able to satisfy his burden under § 362(d)(2)(B):

> Resumption of business is not the only objective which a Chapter 11 case may seek, for the statute itself, at 11 U.S.C. § 1123(b)(4), provides that a Chapter 11 plan may provide for the "sale of all or substantially all of the property of the estate." A liquidation advantageous to creditors clearly would satisfy § 362(d)(2)(B).

Hunter Savings Assoc. v. Padgett (In re Padgett), 74 B.R. 65, 68 (Bankr. S.D. Ohio 1987); *In re Independence Village, Inc.,* 52 B.R. 715, 723 (Bank. D. Mich. 1985); *In re Ocean Beach Prop.,* 148 B.R. 494, 497 (Bankr. E.D. Mich. 1992); *Lake Ridge Assoc.,* 169 B.R. at 578. Although there may be no equity in a piece of property the debtor intends to liquidate, a court may deny a creditor's motion for relief from the stay under 11 U.S.C. § 362(d) if it finds that the:

> property may be important to the liquidation of other property, as for example a warehouse or refrigerator which, although overencumbered, may be needed to store inventory or groceries pending sale. The property standing alone may have no equity, but when sold as a package, may bring a better price for other assets, as for example, workings for watches yet to be assembled, or contiguous parcels of real property. Or the property may be sold for the direct benefit of junior lienors and the indirect benefit of unsecured creditors.

Empire Enterprises, Inc. v. Koopmans (In re Koopmans), 22 B.R. 395, 407 (Bankr. D. Utah 1982); *Planned Systems,* 78 B.R. at 865. If the debtor is proposing to reorganize by liquidating its assets, a court must make inquiry into whether "there is a reasonable possibility of an effective reorganization (in the form of an orderly liquidation) within a reasonable time." *In re Bloomingdale Partners,* 155 B.R. 961, 988 (Bankr. N.D. Ill. 1993). At least one court has found, however, "where the debtor is a single asset corporation which is not conducting any business, there is no basis to conclude that property lacking equity has any value to the estate in a liquidating plan." *In re 6200 Ridge, Inc.,* 69 B.R. 837, 844 (Bankr. E.D. Pa. 1987). Additionally, where a debtor merely makes a "naked assertion" that he *expects* the business to be profitable in the future, a court will not find that he has met his burden of proof under § 362(d)(2). "Such testimony, being grounded solely on speculation, has uniformly been held to be insufficient to meet the requirements of § 362(d)(2)." *Planned Systems,* 78 B.R. at 867; *Rextrusion Sys., Inc. v. Kors, Inc. (In re Kors, Inc.)*, 11 B.R. 324, (Bankr. D. Vt. 1981); *First Connecticut Small Bus. Inv. Co. v. Clark Technical Assoc. Ltd. (In re Clark Technical Assoc., Ltd.),* 9 B.R. 738, 740 (Bankr. D. Conn. 1981) ("If all the debtor can offer at this time is high hopes without any financial prospects on the horizon to warrant a conclusion that a reorganization in the near future is likely, it cannot be said that the property is necessary to an 'effective' reorganization.").

In the case at bar, the parties offered two different values for the F.E. Wright property. Regions' appraiser valued the 11.26 acres at $245,000.00. MadCo's appraiser concluded that the property was worth $450,000.00; however, he admitted during the hearing on Regions' motion that he felt the value of the property would decline over the next three months based on the sagging economy and the poor state of Jackson's industrial property real estate market. Regions has a lien on the property with a balance of $267,352.58. The property also secures a deed of trust in favor of Ricketts for $350,000.00. There is an IRS

lien on the property for $3,800.00 and the debtor owes Madison County approximately $14,000.00 in back property taxes. Even if the property sells for MadCo's appraised value of $450,000.00, there would be no money realized for distribution to MadCo's unsecured creditors. Ricketts testified that once the F.E. Wright property is sold, MadCo will be dissolved. MadCo does not have any other assets and so the F.E. Wright property is all that is available to use to pay creditors.

Ricketts testified that the property has been on the market for several years without anyone making even an informal offer on it, let alone a formal written one, for any amount of money. Ricketts stated that he believed if he were allowed the opportunity to market the land until August 2009, he could obtain a higher price for it than if the Court lifts the stay in favor of Regions now. Ricketts did not offer any evidence to support his assertion and the fact that he has had the property on the market for at least three years contradicts his claim. MadCo's own appraiser testified that the property's value will continue to decline over the next three months.

The Court therefore concludes that MadCo has not met its burden of proof as to the second prong of a § 362(d) inquiry. The debtor simply has not, and cannot, show that the property is necessary for an effective reorganization. Even if the property sells for the debtor's appraised value of $450,000.00, the sale will not realize any funds for the debtor's unsecured creditors, let alone satisfy all of the debtor's secured debt. Ricketts claim that, if given until August 2009, he can sell the property for a larger sum is just that: a claim. Although the court can understand Ricketts' hope and belief that the land will increase in value if an automobile manufacturing plant opens in Haywood county or that the F.E. Wright Drive area is developed more heavily, the Court cannot conclude that the debtor has met its burden of proof based on prospective hopes for the Jackson economic community. MadCo did not present any proof to the Court that the automobile manufacturing plant or any further development of the F.E. Wright Drive area is imminent or even likely. Even if such growth was likely, it certainly would not occur by the debtor's requested August 2009 deadline. As a result, the Court finds that the stay should be lifted in favor of Regions Bank.

The Court hereby finds that Regions Bank's Motion to Lift Stay should be GRANTED. Counsel for Regions Bank is instructed to enter an order consistent with this opinion within seven days from the date of entry of this order.

Mailing List

Bill R. Baron, attorney for debtor
Laura A. Williams, attorney for Regions Bank
U.S. Trustee