Dated: May 18, 2010
The following is SO ORDERED.

G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE:

Southern Farmland Properties, Inc.,	**Case No. 09-14165**
Debtor(s).	**Chapter 11**

MEMORANDUM OPINION RE: (1) Debtor's "Motion to amend or make additional findings of fact, to alter or amend the judgment, or for relief from judgment or order" and (2) Danny and Donna Montgomery's response thereto

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On February 19, 2010, this Court issued a "Memorandum Opinion re: (1) Danny and Donna Montgomery's Motion for Relief from Automatic Stay or Alternatively to Require Commencement of Adequate Protection Payments, (2) Debtor in Possession's Response in Opposition thereto, and (3) Danny and Donna Montgomery's Amended Motion for Relief." The debtor filed a motion to alter or amend that judgment pursuant to Federal Rule of Bankruptcy Procedure 7052, 8002, 9023, and 9024 on March 3, 2010. The Montgomerys filed a response opposing the motion on March 17, 2010.

The Court conducted a hearing on the motion to amend and the creditors' response thereto on April 14, 2010. FED. R. BANKR. P. 9014. 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.

FACTS

In its February 19, 2010, opinion, the Court made several factual findings and conclusions of law. First, the Court found that debtor's two tracts of land in Union City, Tennessee, an 11.718 acre tract and a 26.411 acre tract ("two tracts"), secured a promissory note executed between Danny and Donna Montgomery and the debtor on September 7, 2004. This promissory note was in the amount of $750,000.00. At the time the debtor filed for bankruptcy relief, the balance on the note was $643,029.04. Although the promissory note states that the note is secured by a deed of trust on the two tracts of land, neither party to this proceeding presented a copy of the deed of trust to the Court.

Secondly, the Court found that the 11.718 tract of land also serves as collateral for a note executed between Danny Montgomery and First State Bank[1] prior to September 7, 2004. According to the parties, the balance on that note at the time of the original hearing in this case was $229,000.00. Neither party disputes this finding. Neither party to this proceeding presented a copy of that deed of trust to the Court.

Both the debtor and the Montgomerys presented appraisals to the Court for use in determining the value of the two tracts of Union City land. The Montgomerys' appraiser determined that the value of the 11.718 acre tract and building was $680,000 and the value of the 26.411 acre tract of vacant land was $132,000 for a total value of $812,000. Southern Farmland's appraiser valued the 11.718 acre tract and building at $760,000 and the 26.411 acre tract at $132,000 for a total value of $892,000.

[1]At the original hearing in this matter, Danny Montgomery testified that he pledged the 11.718 acre tract as collateral for a loan with First State Bank. The promissory note executed between the Montgomerys and the debtor indicates that First Citizens National Bank, and not First State Bank, holds the deed of trust on the 11.718 acre tract. In the order issued contemporaneously herewith, the Court will order that all references to "First State Bank" are changed to "First Citizens National Bank;" however, in order to avoid confusion in this opinion, the Court will simply refer to the $299,000 lienholder as "the bank."

After determining that the debtor was not a "single asset debtor" within the meaning of 11 U.S.C. § 362(d)(3), the Court turned its attention to the issue of whether the Montgomerys were entitled to relief from the stay under 11 U.S.C. § 362(d)(2). That section provides that a creditor is entitled to relief from the automatic stay if the debtor does not have equity in the property and the property is not necessary for an effective reorganization. 11 U.S.C. § 362(d)(2). In making its determination that the debtor did not have equity in the two tracts of land, the Court subtracted $299,000 for the bank's lien. The Court then subtracted the unpaid county and city taxes along with the accrued, but unpaid, pre-petition interest on the debtor's note with the Montgomerys. After making these deductions, the Court concluded that the remaining value of the two tracts that could serve to secure the Montgomerys' lien was $622,977.04. Because the balance on the Montgomerys' note was $643,029.04, the Court concluded that the debtor did not have equity in the property.

As the Court found in its original opinion, once a creditor demonstrates that a debtor does not have equity in property, the burden shifts to the debtor to prove that the property is necessary for an effective reorganization. After examining the relevant caselaw, the Court concluded that the debtor in this case was unable to prove that the "property is essential for an effective reorganization that is in prospect." As a result, the Court granted the Montgomerys motion and lifted the automatic stay.

On March 3, 2010, the debtor filed a "motion to amend or make additional findings of fact, to alter or amend the judgment, or for relief from judgment or order" in which it alleged that the Court had miscalculated the equity in the debtor's property. According to Southern Farmland, the warranty deed from the Montgomerys to the debtor does not contain an exception to the warranty for the indebtedness the Montgomerys owe to the bank. Additionally, Southern Farmland asserted that the September 7, 2004, promissory note provides that the indebtedness owed to the bank by the Montgomerys is contained within the debt Southern Farmland owes to the Montgomerys and is not in addition to it. Based on these allegations, Southern Farmland asserted that there is equity in the property and the shifting of the burden on to the debtor to demonstrate the necessity and probability of a successful reorganization was in error.

On March 5, 2010, the parties to this proceeding filed a "Joint Stipulation" with the Court. Pursuant to this pleading, the parties stipulated that the Montgomerys are obligated to pay off the

$299,000 promissory note with the bank "upon payment in full by the Debtor of the debt owed by the Debtor to the Montgomerys."

Since issuance of the Court's February 19, 2010, opinion, the debtor has filed its chapter 11 disclosure statement and plan. Pursuant to these pleadings, the debtor proposes to surrender the 11.71 acre tract of land and the building to the Montgomerys. The debtor also proposes to surrender approximately 6 acres of the 26.411 acre tract of vacant land to the Montgomerys. With the exception of $80,000, these two conveyances will satisfy the debt owed to the Montgomerys. The debtor will retain the remaining 20 acres of the 26.411 acre tract and will use this land to secure the $80,000 obligation to the Montgomerys. The debtor proposes to rent 1/4 of the industrial building on the 11.71 acre tract from the Montgomerys. The debtor proposes to fund the plan with rental income it receives from North American Fiberglass, Inc. The U.S. Trustee filed an objection to the disclosure statement in May 10, 2010. A hearing on the disclosure statement and the trustee's objection thereto is set for May 19, 2010. The debtor's monthly operating reports do not indicate that the debtor has received any rental income from North American Fiberglass during the pendency of this case. As the Court recognized in its original opinion, North American has not made a lease payment to the debtor since 2008.

Discussion

A. Federal Rules of Bankruptcy Procedure 7052 and 9023

The debtor's motion to alter or amend was brought pursuant to Federal Rule of Bankruptcy Procedure 7052 and/or 9023 (hereinafter referred to as "Bankruptcy Rule 7052" or "Bankruptcy Rule 9023").[2] Motions brought under Bankruptcy Rule 7052 or 9023 must be filed no later than fourteen days after entry of the underlying judgment. Fed. R. Bankr. P. 7052; Fed. R. Bankr. P. 9023.

[2]The debtor also sought relief under Federal Rules of Bankruptcy Procedure 8002 and 9024. Rule 8002 concerns the tolling effect a timely-filed Rule 7052, 9023 or 9024 motion has on the time for appealing a bankruptcy court judgment. Fed. R. Bankr. P. 8002(b). It does not provide an independent basis for altering or amending an underlying judgment. As a result, the Court will not address the matter under Rule 8002.

Additionally, because the Court finds that it has authority under either Rule 7052 or 9023 to alter or amend its February 19, 2010, memorandum opinion and order, it will not address the debtor's request for relief under Rule 9024.

Because the debtor's motion in the case at bar was filed twelve days after issuance of the Court's memorandum opinion and order, it was timely under both Bankruptcy Rule 7052 and Bankruptcy Rule 9023. The decision to grant or deny a Rule 52(b) motion or a Rule 59(e) motion lies soundly within the discretion of the trial court. *Huff v. Metropolitan Life Ins. Co.*, 675 F.2d 119, 122 (6th Cir. 1982).

Bankruptcy Rule 7052 makes Federal Rule of Civil Procedure 52, (hereinafter "Rule 52"), applicable to bankruptcy proceedings.[3] Rule 52(b) provides that "the court may amend its findings—or make additional findings—and may amend the judgment accordingly." The party bringing a Rule 52(b) motion "has the burden of showing that amendment is necessary to correct 'a manifest error in the court's findings of fact or conclusions of law,' to present newly discovered evidence, to supplement or amplify findings, or because of a change in law." *Kenney v. U.S.*, 2010 WL 147212, *1 (E.D. Ky. 2010) (internal citation omitted).

Bankruptcy Rule 9023 incorporates Federal Rule of Civil Procedure 59, (hereinafter "Rule 59"), and provides that a court may alter or amend a judgment to "correct manifest errors of law or fact or to present newly discovered evidence." *McClatchey v. Nicole Energy Mktg., Inc., (In re Nicole Energy Servs., Inc.)*, 2009 WL 4250024, *1 (S.D. Ohio 2009) (internal citation omitted). With regard to correcting errors, the purpose of a Rule 59(e) motion is to give a court "the power to rectify its own mistakes in the period immediately following the entry of judgment." *Liberte Capital Group v. Capwill*, 630 F.Supp.2d 835, 837 (N.D. Ohio 2009) (internal citation omitted).

Whether the Court proceeds under Rule 52(b) or Rule 59(e) is immaterial to the decision in the case at bar. "[T]he standards under both rules are similar because their purposes are to provide the court an opportunity to reconsider its decisions . . . .." *Kenney*, 2010 WL 147212 at *1. In the case at bar, the debtor has asked the Court to alter or amend its finding to reflect that the bank's $299,000 lien is included within the $643,029.04 indebtedness the debtor owes to the Montgomerys. After reviewing the March 5, 2010, joint stipulation and the January 20, 2010, hearing exhibits, the Court finds that the $299,000 indebtedness the Montgomerys owe to the bank is included within the

[3]Federal Rule of Bankruptcy Procedure 7052 states that Rule 52 "applies in adversary proceedings;" however, by virtue of Bankruptcy Rule 9014(c), Rule 52 is also applicable in contested matters.

$643,029.04 the debtor owes them. The Court will grant the debtor's motion as it relates to this issue and will enter an order amending its February 19, 2010, opinion to reflect this amendment.

The Montgomerys' appraiser valued the two tracts of land and the building thereon at $812,000. The debtor's appraiser valued the land and building at $892,000. There is a county tax lien against the two tracts for unpaid 2008 and 2009 taxes in the amount of $13,972.96. The debtor owes $15,850.00 in unpaid 2008 and 2009 city taxes. The pre-petition arrearage on the note is approximately $10,200. Subtracting those three amounts from the appraised values, the Court finds that the debtor has between $128,948 and $208,948 in equity in the two tracts of land. The Court will grant the debtor's motion as it relates to the issue of equity and will enter an order amending its February 19, 2010, opinion to reflect this amendment.

Pursuant to Rule 52 and Rule 59, the Court may amend the underlying judgment based on its amended findings of fact. Fed. R. Civ. P. 52(b); Fed. R. Civ. P. 59(e). In its original opinion, the Court lifted the stay in favor of the Montgomerys pursuant to 11 U.S.C. § 362(d)(2). The Court based its decision on the conclusion that (1) the debtor did not have equity in the property and (2) the debtor could not show that the property was necessary to an effective reorganization. As the Court recognized in its original opinion, the debtor's burden to demonstrate that the property is necessary does not arise unless the creditor first proves that equity is lacking in the property. The record in the case at bar clearly demonstrates that there is equity in the property. As a result, the debtor had no burden to demonstrate that the property is necessary. The Court therefore finds that the Montgomerys were not entitled to relief from the automatic stay under 11 U.S.C. § 362(d)(2). The Court will grant the debtor's motion as it relates to this issue and will enter an order amending its February 19, 2010, opinion to reflect this amendment.

B. 11 U.S.C. § 362(d)(1)

Although the Court finds that lifting the automatic stay pursuant to 11 U.S.C. § 362(d)(2) was not appropriate in the case at bar, the inquiry is not over. In filing their original motion, the Montgomerys sought relief under 11 U.S.C. § 362(d)(1) and (2). The Court did not engage in an analysis of the case under § 362(d)(1) in its original opinion because it found that the stay could be lifted under § 362(d)(2). Because the Court has now found that the Montgomerys were not entitled

to relief from the automatic stay pursuant to § 362(d)(2), the Court will review the case under § 362(d)(1).

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) and courts have found that it is a broad and flexible concept. *In re Indian River Estates, Inc.,* 293 B.R. 429, 433 (Bankr. N.D. Ohio 2003). Whether cause exists under § 362(d)(1) is a highly subjective inquiry and a bankruptcy court must use its discretion in making the determination on a case-by-case basis. *Laguna Assocs. Ltd. P'ship v. Aetna Casualty & Surety Co. (In re Laguna Assocs. Ltd. P'ship.),*30 F.3d 734, 737 (6th Cir. 1994); *In re Indian River Estates, Inc.,* 293 B.R. 429, 433 (Bankr. N.D. Ohio 2003). "[T]he 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); *Americredit Fin'l. Servs. v. Nichols (In re Nichols),* 440 F.3d 850, 856 (6th Cir. 2006). The creditor has the initial burden of demonstrating that cause justifying relief from the automatic stay exists. *Sumitomo Trust & Banking Co. v. Holly's, Inc. (Matter of Holly's, Inc.)*, 140 B.R. 643, 683 (Bankr. W.D. Mich. 1992). The burden then shifts to the debtor on all other issues except the debtor's equity in the property. *Id.*; 11 U.S.C. § 362(g).

Because the inquiry is so fact-specific, there is no set formula courts can use in determining if cause exists under § 362(d)(1). Some courts have found that the lack of insurance, failure to pay taxes and failure to comply with a court order all constitute cause under § 362(d)(1). *Schewe v. Fairview Estates (In re Schewe),* 94 B.R. 938 (Bankr. W.D. Mich. 1989) (citations omitted). By virtue of its own language, § 362(d)(1) also provides that the lack of adequate protection is cause for lifting the stay. 11 U.S.C. § 362(d)(1). A debtor has the burden of proving that a creditor's interest is adequately protected. 11 U.S.C. § 362(g); *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.)*, 793 F.2d 1380, 1388 (5th Cir. 1986).

"Adequate protection" is not defined by the Bankruptcy Code. Section § 361 provides a non-exhaustive list of examples of adequate protection including periodic cash payments and the granting of additional or replacement liens. 11 U.S.C. § 361. Courts have also found that the existence of equity in collateral may serve to adequately protect a creditor. *Nichols*, 440 F.3d at 856. Even a

small equity cushion can constitute adequate protection and defeat a motion for relief. *Id.* "An equity cushion exists when the appraised value of the collateral is greater than the amount owed on the loan." *Id.*

The Sixth Circuit has also found that a debtor's bad faith in filing a petition for bankruptcy relief may constitute "cause" to lift the stay under § 362(d)(1). *Trident Assocs. Ltd. P'ship. v. Metropolitan Life Ins. Co. (In re Trident Assocs. Ltd. P'ship.)*, 52 F.3d 127, 131 (6th Cir. 1995). 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. In order to help with this task, the Sixth Circuit has developed the following list of factors a court should consider when determining if a reorganizing debtor has the indicia of 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.

In re Charfoos, 979 F.2d 390, 393 (6th Cir. 1992). With regard to the last factor, several courts have found that the inability of a chapter 11 debtor to propose a feasible plan of reorganization may serve as cause for lifting the stay under § 362(d)(1). *Centofante v. CBJ Development, Inc., (In re CBJ Development, Inc.)*, 202 B.R. 467, 473 (B.A.P. 9th Cir. 1996); *In re Smith*, 333 B.R. 94, 102 (Bankr. M.D.N.C. 2005); *In re Wald*, 211 B.R. 359, 367 (Bankr. D.N.D. 1997); *In re Calvanese*, 169 B.R. 104, 115 (Bankr. E.D. Pa. 1994); *In re Gulph Woods Corp.*, 84 B.R. 961, 974 (Bankr. E.D. Pa. 1988). When analyzing a motion for relief under the *Charfoos* factors, a court must balance the harm the creditor would suffer if the stay were not lifted against the harm a debtor would suffer if the stay is lifted. *In re Plastech Engineered Products, Inc.*, 382 B.R. 90, 116 (Bankr. E.D. Mich. 2008).

In the case at bar, the debtor is a small business with no employees. Its sole business activity consists of leasing the industrial building to North American. The debtor's president, William

Lohman, testified at the original hearing in this matter that North American's rental payment is the debtor's sole source of income. Lohman also testified that North American has not made a lease payment since 2008. The debtor's monthly operating reports confirm that North American is still delinquent in its rental payments. It is clear from this testimony and the reports that the debtor has had no income since 2008.

As the Court set forth in its original opinion, Lohman also testified that North American was originally set up to manufacture and distribute swimming pools. Because of the downturn in the economy, North American ceased manufacturing pools and refocused all of its efforts on distribution. Lohman further testified that North American's distribution business has decreased because of the economy. The resulting effect of North American' business difficulties is its inability to make its monthly rental payment to the debtor. When asked at the hearing in this matter what its plans for the future were, Lohman stated that North American would resume the manufacture of swimming pools "when the economy turned around."

The debtor's disclosure statement and proposed plan state that the debtor proposes to make its monthly plan payment with income it receives from North American. If North American has not made a payment since 2008, the Court cannot see how the debtor has any hopes of generating income in the foreseeable future. Lohman testified at the original hearing that North American would not be able to resume manufacturing swimming pools until the economy recovered. The debtor did not present any proof to the Court that North American's business had picked up recently. The debtor's own monthly operating reports do not indicate that North American's business prospects have improved.

The debtor's proposed plan indicates it wants to surrender 6 of the 26.411 acres and the entire 11.71 acre tract and the industrial building located thereon. The debtor proposes that this surrender of property would satisfy all but $80,000 of the Montgomerys' debt. The debtor then wants to lease 1/4 of the industrial building from the Montgomerys for $2,500/month. The income for this rental payment would be generated by the income the debtor receives from North American–which has not made a payment since 2008. The Court simply cannot see how the debtor will be able to make a monthly plan payment with money it does not have and has not had for over two years. The facts in this case do not indicate that the debtor's chances at a successful reorganization are feasible. As

the court in *Gulph Woods* recognized, "[t]he poor prospects for a successful reorganization and performances under the Plan result in our conclusion that cause for relief from the stay exists, pursuant to § 362(d)(1)." *Gulph Woods*, 84 B.R. at 974 - 75

Additionally, the debtor is proposing to surrender the 11.71 acre tract, the industrial building and 6 of the 26.411 acres in almost full satisfaction of the Montgomerys' debt. The debtor then proposes to lease 1/4 of the industrial building from the Montgomerys to, presumably, continue North American's pool manufacturing business. The debtor may well be able to lease the industrial building from the Montgomerys whether or not the stay is lifted.

The Court concludes that the Montgomerys have demonstrated that cause to grant them relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1). The Court will enter an order amending its February 19, 2010, findings of fact and conclusions of law in accordance herewith.