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**UNITED STATES BANKRUPTCY COURT
IN AND FOR THE DISTRICT OF ARIZONA**

WILLETTA, L.L.C.,

Debtor.

Chapter 11 proceedings

Case No. 2:09-bk-11977-CGC

**UNDER ADVISEMENT DECISION
RE: MOTION FOR RELIEF
FROM STAY**

I. Introduction

Willetta, L.L.C. (the “Debtor”) holds a single property, located at 2801 North Willetta Street, Phoenix, Arizona 85009 (the “Property”). Bank of the West (“BOTW”) is the senior secured creditor on the Property.

BOTW moves for relief from automatic stay under 11 U.S.C. § 362(d)(1) and (2) so that it can foreclose on the Property. BOTW claims that it is not adequately protected ((d)(1)), and that there is no equity in the Property and the Property is not necessary for a successful reorganization ((d)(2)). The Debtor opposes BOTW’s motion, urging that that the Property is necessary for a successful reorganization and that a plan for reorganization can be confirmed within a reasonable time. The Debtor also asserts that BOTW is adequately protected because the Debtor has been making payments to BOTW post-petition and will continue to do so throughout the life of any plan for reorganization.

II. Facts

The Debtor borrowed \$920,000 from Western National Bank (“WNB”) on May, 22, 2006. The Debtor executed and delivered a promissory note, executed a deed of trust encumbering the Property and executed an assignment of rents to WNB. On November 21, 2006, WNB assigned its interest in the Property to BOTW.

1 A single tenant rents the Property and provides the Debtor with its sole source of income
2 through monthly rent payments of \$12,800. The rent payments are scheduled to increase on
3 December 1st of each year. Rent increases to: \$16,400 in 2009, \$16,740 in 2010, \$17,080 in
4 2011, and \$17,420 in 2012. The tenant's lease expires on November 30, 2013.

5 The Debtor failed to make timely payments to BOTW starting on February 22, 2008, but
6 has since paid some late fees and catch-up payments. On February 27, 2009, BOTW issued its
7 final demand for payment of \$891,144.52 in principal remaining on the note and \$34,866.20 in
8 accrued interest. In addition to BOTW's lien, the Small Business Administration ("SBA") holds
9 a second lien on the Property for \$627,268.52. Moreover, there is a lien of \$38,993.05 held by
10 Maricopa County for unpaid property taxes. According to testimony from the Debtor's
11 principal, the Property currently has an approximate value of \$1 million and the Debtor currently
12 has approximately \$34,319 in cash reserves. For the purposes of this motion, BOTW does not
13 contest this value.

14 The Debtor filed for bankruptcy on June 1, 2009 and filed its First Amended Chapter 11
15 Plan of Reorganization (the "Plan") on September 25, 2009. According to the Plan, the Debtor
16 will: (1) cure all past due taxes and payments to BOTW upon confirmation; (2) pay \$11,943 in
17 property taxes a quarter; (3) pay BOTW the note amount, \$7,367 per month, commencing on
18 September 22, 2009; (4) pay unsecured creditors \$10,284 a quarter beginning three months after
19 the effective date; (5) pay \$2,672 a month in various other expenses associated with the
20 Property; and (6) pay \$160 a month in trustee fees. The Plan treats SBA as being totally
21 unsecured, and the payments under the Plan, if made, will satisfy approximately 20 percent of
22 SBA's claim. Moreover, under the Plan, the Debtor's principal will infuse \$10,000 of capital into
23 the Debtor through \$2,500 quarterly payments over the course of a year.

24 **III. Analysis**

25 *A. The Motion for Relief from Stay*

26 The Court declines to terminate the automatic stay but will condition its continued effect
27 as set forth in this memorandum. At bottom, the Debtor must provide adequate protection
28

1 payments pending confirmation of the Plan and the Plan must be confirmed within 120 days.

2 Under 11 U.S.C. § 362(d), a motion for relief from automatic stay will be granted by
3 terminating, modifying, or conditioning such stay either (1) “for cause, including the lack of
4 adequate protection of an interest in property of such party in interest;” or (2) the debtor has no
5 equity in the property and the “property is not necessary to an effective reorganization.” 11
6 U.S.C. § 362(d)(1), (2). These two provisions are disjunctive; only one is required to lift the
7 stay. *In re Sun Valley Ranches, Inc.*, 823 F.2d 1373, 1376 (9th Cir. 1987). Further, “section 362
8 gives the bankruptcy court wide latitude in crafting relief from the automatic stay.” *In re*
9 *Delaney-Morin*, 304 B.R. 365, 369 (9th Cir. BAP 2003). Under § 362(g), the secured creditor
10 has the burden of proof on the issue of a debtor’s equity in a property. A debtor carries the
11 burden on all other issues, including whether there is a reasonable possibility of a successful
12 reorganization within a reasonable period of time. *See, e.g., In re Development, Inc.*, 36 B.R.
13 998, 1005 (Bank.D.Haw.1984); *see also In re Sun Valley Ranches, Inc.*, 823 F.2d at 1376
14 (stating that besides the issue of the debtor’s equity in the property, the burden of proof lies with
15 the debtor).

16 A creditor must show that a debtor lacks equity in the property, and under § 362(d)(2)(A)
17 equity is “the difference between the property value and the total amount of liens against it.”
18 *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Particularly, equity is the “value, above
19 all secured claims against the property that can be realized from the sale of the property for the
20 benefit of all unsecured creditors.” *Pistole v. Mellor (In re Mellor)*, 734 F.2d 1396, 1400 n. 2
21 (9th Cir. 1984). Here, there is no dispute in the Debtor’s lack of equity in the Property. The
22 Debtor’s principal testified that the Property currently has an approximate value of \$1 million.
23 The secured lien held by BOTW has \$891,144.54 in remaining principal plus \$34,866.20 in
24 accrued interest. There is also a lien for \$38,993.05 in unpaid property taxes and SBA has a
25 junior lien of \$627,268.52. As the value of all the liens against the Property is well above \$1
26 million, the Debtor has no equity in the Property.

27 Nevertheless, to lift the stay the Court must find that the Property is not necessary for an
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1 effective reorganization under § 362(d)(2)(B). As it is the Debtor's sole property, it is certainly
2 necessary to reorganization; the question remains whether such reorganization would be
3 effective.

4 Thus, the key issue is whether the Debtor meets the "effective reorganization"
5 requirement. A debtor must show that there is "a reasonable possibility of an effective
6 reorganization within a reasonable time." *In re Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S.
7 365, 375-76 (1988). A relief from stay hearing should not be converted into a confirmation
8 hearing under the "effective reorganization" requirement, but a debtor must show that "a
9 proposed or contemplated plan is not patently unconfirmable and has a realistic chance of being
10 confirmed." *In re Sun Valley Newspapers, Inc.*, 171 B.R. 71, 75 (9th Cir. BAP 1994) (quoting
11 *John Hancock Mut. Life Ins. v. Route 37 Bus. Park Assoc.*, 987 F.2d 154, 157 (3d Cir. 1993)).
12 The burden is a "moving target" that gets more difficult to prove as the bankruptcy case
13 progresses. *Id.* (quoting *In re Holly's Inc.*, 140 B.R. 643, 700 (Bankr.W.D.Mich. 1992)). The
14 relief from stay should be granted if reorganization of the business is not feasible or because
15 creditor dissent makes a successful plan unlikely. *See Timbers of Inwood*, 484 U.S. at 375-76.

16 Here, the Debtor just meets the low threshold to show that the Plan is not facially
17 unconfirmable. Under the Plan, the Debtor is projected to have a slight amount of cash reserves
18 at the end of every month until the tenant's lease expires on November 30, 2013. The rent is
19 \$12,800 until November 30, 2009, but increases each December to: \$16,400 in 2009; \$16,740 in
20 2010; \$17,080 in 2011; and \$17,420 in 2012. Along with the rent payments, the Debtor
21 currently has approximately \$34,319 in cash reserves, and the Debtor's principal plans to infuse
22 \$10,000 through quarterly payments of \$2,500 over the course of the first year. The five-year
23 Plan proposes continuing payments to BOTW under the Debtor's obligation through monthly
24 payments of \$7,367. Also, the Debtor will pay \$2,672 a month in other expenses associated with
25 the Property and \$160 a month in trustee fees. Quarterly, the Debtor will pay \$11,943 in
26 property taxes and \$10,284 to unsecured creditors, including SBA. Exhibit "A" is a spreadsheet
27 based on the projected payments and income listed above and shows that if all goes as planned
28

1 the Debtor will have a positive amount of cash remaining at the end of every month through the
2 fourth year of the Plan. Therefore, at this time the Plan is not patently unfeasible; thus the
3 Debtor has carried its burden under § 362(d)(2)(B) and the *Timbers* effective reorganization
4 requirement.

5 Alternatively, the stay could be lifted under § 362(d)(1) if there was “cause,” including if
6 BOTW’s interest in the Property was not adequately protected. “Because there is no clear
7 definition of what constitutes ‘cause,’ discretionary relief from the stay must be determined on a
8 case by case basis.” *In re Delaney-Morin*, 304 B.R. at 369 (quoting *MacDonald v. MacDonald*
9 (*In re MacDonald*), 755 F.2d 715, 717 (9th Cir. 1985)). “The purpose of adequate protection
10 under § 361 is to insure that the secured creditor receives in value essentially what [it] bargained
11 for.” *Pistole v. Mellor (In re Mellor)*, 734 F.2d 1396, 1401 (9th Cir. 1984). Essentially,
12 “[s]ecured creditors should not be deprived of the benefit of their bargain.” *In re Am. Mariner*
13 *Indus., Inc.*, 734 F.2d 426, 431 (9th Cir. 1984) (effectively overruled on other grounds by
14 *Timbers of Inwood*, 484 U.S. at 368). There are three non-exclusive examples of adequate
15 protection in § 361: (1) periodic cash payments equivalent to the decrease in value on an interest
16 in the property; (2) “an additional or replacement lien on other property”; and (3) any “other
17 relief that that provides the indubitable equivalent” to the secured creditor’s interest in the
18 property. *In re Mellor*, 734 F.2d at 1400 (citing *In re Curtis*, 9 B.R. 110, 111-12
19 (B.Ct.E.D.Penn. 1981)). The last example, § 361(3), is essentially a “catch-all” provision. *Am.*
20 *Mariner*, 734 F.2d at 432.

21 Here, the Debtor is providing adequate protection to BOTW through monthly payments
22 under its obligation. These payments are not the equivalent to any decrease in value of BOTW’s
23 interest in the Property, but are the amount called for per month under the Debtor’s obligation to
24 BOTW. While adequate protection is not limited to the three examples set forth above, the
25 payments, in effect, fall within the “catch-all” provision of § 361(3). As long as the Debtor
26 continues to make the payments, BOTW will be receiving essentially what it bargained for,
27 satisfying the requirements of adequate protection. Thus, there is no “cause” under § 362(d)(1)

1 to lift the automatic stay at this time. BOTW is adequately protected until the Plan can be
2 confirmed.

3 *B. Plan Confirmation*

4 While the Plan is not facially unfeasible, several issues could derail confirmation,
5 including, but not limited to:

6 (1) The Plan lasts five years, however, the sole tenant's lease expires in four years and
7 there is no prospect for income to the Debtor in the final year of the Plan. *See* 11 U.S.C. §
8 1129(a)(11) (stating that liquidation or the need for further reorganization cannot be
9 "likely" after the confirmation of the plan). *But see In re Patrician St. Joseph Partners*,
10 169 B.R. 669, 674 (D.Ariz. 1994) ("The prospect of financial uncertainty does not defeat
11 plan confirmation on feasibility grounds since a guarantee of the future is not required.").

12 (2) The Plan will not fully satisfy the obligation to BOTW and the Debtor has not shown
13 that it can refinance or pay off the loan when the Plan is completed. *See* 11 U.S.C. §
14 1129(a)(11).

15 (3) The Debtor has not provided for a contingency to get the Plan confirmed if SBA
16 objects to its confirmation. *See* 11 U.S.C. § 1129(a)(8) (requiring that impaired creditors
17 accept the plan for it to be confirmed); § 1129(a)(10) (requiring that *at least one* class of
18 impaired creditor accept the plan for it to be eligible for a judicial "cramdown"); *see*
19 *generally* § 1129(b), et. seq. (outlining the requirements for judicial "cramdown" of a
20 plan over the objection of an impaired class of creditors).

21 (4) The Plan calls for the Debtor's principal to infuse \$10,000, but the principal has not
22 proven any financial ability to do so, nor has the Debtor shown that this infusion of
23 capital will satisfy the new value exception to the absolute priority rule in the event the
24 unsecured class rejects. *See* 11 U.S.C. § 1129(b)(2)(B)(ii) (giving the absolute priority
25 rule); *Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434,
26 458 (1999) (assuming a new value corollary to the absolute priority rule and holding that
27 the absolute priority rule prohibits junior interest holders from being granted an exclusive
28 opportunity to purchase a new interest in the reorganized entity).

These issues, and possibly other issues, must be adequately addressed before the Plan can be
confirmed.

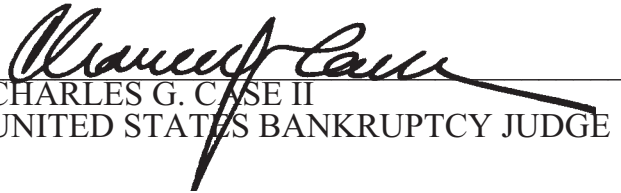
IV. Conclusion

The Debtor must keep BOTW adequately protected by continuing to make monthly
payments under the obligation. By making the payments, the Debtor will have the chance to get
the Plan confirmed. Accordingly, the stay will not be lifted at this time. The Debtor has 120
days, a fair period, to ensure that the Plan will be confirmed.

The Debtor's counsel is to submit a form of order consistent with this decision and the
October 26, 2009 Minute Entry.

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DATED: November 5, 2009


CHARLES G. CASE II
UNITED STATES BANKRUPTCY JUDGE

Copy of the foregoing sent via facsimile and/or mailed to:

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Exhibit A

	Oct-13	Nov-13
Gross Rent	\$17,420	\$17,420
General expenses	\$-2,792	\$-2,792
Bank of West	\$-7,367	\$-7,367
RE Taxes		
Unsecureds	\$-10,284	
UST fees	\$-160	\$-160
Net monthly cash	\$-3,183	\$7,101
Cash at end of month	\$3,276	\$10,377