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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

UNPUBLISHED OPINION

In re	)	Bankruptcy Case No. 85C-00199
	)	
SUNSTONE RIDGE ASSOCIATES, a partnership,	)	
	)	
Debtor.	)	MEMORANDUM DECISION

Controversy moot via Tenth Circuit Ct of Appeals. See 153a

This matter is before the Court on the debtor's Motion for a New Hearing and for Amended Findings, and the response in opposition thereto submitted by counsel for Consolidated Capital Special Trust and Consolidated Capital Equities Corporation ("Consolidated Capital"). The Court, having read and considered the parties' memoranda, the supporting affidavits of Robert Anderson and Bruce Wycoff, and the transcript of the March 12, 1985 hearing in this matter, and the transcript of the March 13, 1984 ruling in In re Mountain View Holdings, Ltd., No. 84C-00226 (Bkrtcy. D. Utah), shall make its ruling without further evidence or argument.

FACTUAL AND PROCEDURAL BACKGROUND

The debtor's principal asset consists of an apartment complex located in Salt Lake County, Utah. On March 12, 1985, following presentation of evidence on March 7, 11, and 12, the Court granted relief from the automatic stay to the movant,

Consolidated Capital. The Court found that the current fair market value of the property was $8,000,000, and the secured debt was $10,385.096. In its ruling from the bench, the Court found that the debtor had failed to meet its burden of showing the feasibility of the property for condominiumization, and, therefore, ruled that the property was not necessary for an effective reorganization. Counsel for Consolidated Capital was directed to prepare and submit an appropriate order.

On March 13th, a proposed order was submitted by counsel for Consolidated Capital, but it has not been entered by the Court. On March 27th, counsel for the debtor filed a motion for a new hearing, supported by the affidavits of the attorneys who represented it at the relief from stay proceedings, Robert Anderson and Bruce Wycoff. They state that they based their litigation strategy in deciding not to present evidence bearing on the feasibility of condominiumization on this Court's prior bench ruling in In re Mountain View Holdings, Ltd., supra. In response, counsel for Consolidated Capital contends that (1) the motion is premature since an order has not been entered; (2) the matter is moot because the stay terminated upon the expiration of 30 days pursuant to Section 362(e); (3) the decision by the debtor's counsel to limit presentation of evidence, with the resulting failure to meet its burden of proof, does not provide

sufficient ground for granting a new hearing; and (4) the debtor was not entitled to rely on this Court's ruling in Mountain View Holdings, Ltd.

DISCUSSION

The basic question raised in the parties' moving papers is whether or not the Court articulated a standard for analysis of the necessity of property for an effective reorganization under Section 362(d)(2)(B) in Mountain View Holdings, Ltd., upon which the debtor's counsel was entitled to rely, and upon which they did rely to their detriment, in this case.

In Mountain View Holdings, Ltd., the debtor was engaged in the business of real estate development. Brian Head Corporation, the debtor's principal secured creditor, sought relief from the automatic stay in order to foreclose its first trust deed on the debtor's only substantial asset, 5.085 acres of real property located in Brian Head, Utah. At the hearing, the debtor produced evidence of its intent to develop the property as a condominium project in the near future. The evidence further showed that the debtor did not presently have a commitment for funding. Appraisal testimony fixed the fair market value of the property at $443,000, but as a condominium project with available funding, the value would increase substantially. The debt encumbering the property was found to be $446,568.73. The Court found, based

upon the intended use and the appraisal testimony, that there was equity in the property and the motion for relief was denied.

In the present case, the appraisal testimony found to be the most convincing to the Court established that there was no equity in the property. The Court found that the value of the debtor's apartment complex was $8 million, and the secured debt against it approximately $10 million. Having failed in its proof on the issue of equity, the Court considered the debtor's evidence as to the necessity of the property to an effective reorganization. In the Court's view and that of the parties, this issue turned on the feasibility of the property for condominiumization. On this question the Court received little testimony. Indeed, no evidence was introduced regarding the debtor's actual intent to condominiumize the apartment.

Collateral valuation in relief from stay proceedings is a difficult and often troublesome process. Congress recognized this fact and gave bankruptcy courts wide latitude in making such determinations, taking into account the particular facts of each case. Further, the determination of value is binding only for the purpose of the specific hearing and does not have a res judicata effect in subsequent proceedings. S. Rep. No. 95-989, 95th Cong., 2d Sess. 54 (1978).

In Matter of American Kitchen Foods, Inc., 2 B.C.D. 715, 722 (Bkrtcy. D. Me. 1976), Judge Cyr held that in collateral

valuation proceedings in bankruptcy "[t]he most commercially reasonable disposition practicable in the circumstances should be the standard universally applicable . . . ." In general, the nature of the debtor's business, its prospects for rehabilitation, and the nature of the collateral will be considered by the court in making determinations of value. 2 COLLIER ON BANKRUPTCY, ¶ 361.02, at 361-17 (15th ed. 1985). Where future or intended use of real property is considered in fixing its value, the projected use must be not only possible, but reasonably probable. State v. Jacobs, 397 P.2d 463, 464 (Utah 1964). See also State Road Commission v. Wood, 452 P.2d 872, 873 (Utah 1969) (potential development must be reasonably certain). In Olson v. United States, 292 U.S. 246, 257 (1934), the Supreme Court stated:

> Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value -- a thing to be condemned in business transactions as well as in judicial ascertainment of truth.

In the Mountain View Holdings, Ltd. case, this Court found equity in the property based upon the reasonable probability of condominiumization. In the present case, the evidence relating to potential condominiumization was insufficient to establish equity in the property. While the Court may consider future use

of the property in making a determination of its necessity for an effective reorganization, as well as for determining equity, nothing suggests that a lesser standard should apply. In this case, it was not shown that condominiumization was reasonably probable, i.e., "feasible." The venture, as it appeared from the evidence presented, was wholly speculative. The appraisal evidence bearing on this question might be summarized as follows: If the debtor intends to condominiumize the apartment, and if the debtor were able to do so, the value of the property would be greater. Or, stated differently, "if we had some ham, we could have ham and eggs, if we had some eggs." Barnette v. Evans, 673 F.2d 1250, 1252 (11th Cir. 1982). Based on the foregoing, the Court concludes that it did not impose heightened and prejudicial evidentiary requirements at the relief from stay hearing, and shall deny the debtor's motion for rehearing and execute the proposed order modifying the automatic stay which was submitted by counsel for Consolidated Capital, a copy of which is annexed hereto.

DATED this 12 day of April, 1985.

BY THE COURT:

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:

SUNSTONE RIDGE ASSOCIATES,

Debtor-Appellant.

MEMORANDUM DECISION AND ORDER

Civil No: C-85-0501W

This case is an appeal of the bankruptcy court's decision to lift the automatic stay protecting the debtor-appellant's only property. The appeal was orally argued on July 10, 1985. Appellant Sunstone Ridge Associates was represented by Robert M. Anderson and Bruce Wycoff. Appellees Consolidated Capital Equities Corporation and Consolidated Capital Special Trust ("Concap") were represented by Steven H. Gunn and William P. Weintraub. The court took the case under advisement following oral argument, and has since carefully reviewed the briefs submitted by counsel, the record on appeal, and various pertinent authorities. The court now renders the following decision.

There is one central issue on appeal: Is the test of whether a property is "necessary for an effective reorganization" under 11 U.S.C. § 362(d)(2) a test of necessity alone or can it include a determination of the feasibility of a successful reorganization? Appellant Sunstone argues that the test is

limited to whether the property is necessary to an effective reorganization. Appellees Concap argue that the test is more expansive, and that the debtor must show that reorganization based on the property is feasible in addition to showing that the property is necessary to an effective reorganization. This court agrees with the appellant and its narrow "necessity" test.

This court is convinced by the reasoning contained in the case of In re Koopmans, 22 Bankr. 395 (Bankr. D. Utah 1982). The Koopmans case is not squarely on point with this case. It concerned the tangential issue of whether "reorganization" includes "liquidation" as well as "rehabilitation" rather than the issue of whether a "necessity" test or a "feasibility" test is mandated by 11 U.S.C. § 362(d)(2)(B). Nevertheless, the analysis used to address the issue decided in Koopmans is equally useful in this case. The reasoning and arguments set forth in Koopmans support this court's adoption of the necessity test.

In enacting the modern bankruptcy code, Congress carefully erected a structure designed to protect and assist debtors without unduly harming the rights of creditors. A balance was struck between debtors' rights and creditors' rights. The federal courts, when interpreting the bankruptcy act, must

be sensitive to the balance struck by Congress. Unless the intent of Congress is painstakingly followed, the delicate balance Congress has struck will be upset.

It seems quite clear that Congress intended that a "necessity" test be used under § 362(d). The first clue indicating that is the language of the statute itself. The statute provides that the bankruptcy court shall grant relief from the automatic stay against a particular property 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). The language of subsection (B) clearly mandates a "necessity" test, but says nothing about a "feasibility" test.

The many courts that have adopted a feasibility test have derived it from the words "effective reorganization." See, e.g., In re Greiman, 45 Bankr. 574 (Bankr. N.D. Iowa 1985). If there can be no effective reorganization, they argue, then none of the debtor's property will be necessary to that reorganization. Therefore, the debtor must show that a reorganization is feasible in addition to showing that his property is necessary to that reorganization. If he fails to show that, the automatic stay will be lifted.

This court believes that reading a feasibility test from the words "effective reorganization" is simply reading something that is not there. It strains belief to imagine that Congress used the phrase "necessary to an effective reorganization" to mean "necessary to effect a reorganization" and that there be a "reasonable probability of successful rehabilitation within a reasonable time." In re Terra Mar Assocs., 3 Bankr. 462, 465-66 (Bankr. D. Conn. 1980). If Congress had meant that, it would have said it. Congress clearly knew how to state such a test, since it did so in 11 U.S.C. § 1112(b)(1). See In re Koopmans, 22 Bankr. 395, 398 (Bankr. D. Utah 1982). The lack of a feasibility test in the language of § 362(d)(2) shows that Congress did not intend that a feasibility test be used. Id.

There is an even more compelling argument against the feasibility test in addition to the semantic argument discussed above. A feasibility test is simply impractical under § 362(d)(2). If such a test is read into that section, a debtor must prove[1] that he can propose a viable plan of reorganization before he has had the opportunity to prepare such a plan. That puts the cart

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[1] A debtor has the burden of proof in a § 362(d) hearing on all issues except for the existence of equity. 11 U.S.C. § 362(g).

before the horse. What Congress intended to be a mere preliminary becomes the main event. It seems clear that a feasibility test under § 362(d) is completely inconsistent with Congress' decision to defer a feasibility test to a later, more appropriate stage in the bankruptcy proceedings. See Koopmans, 22 Bankr. at 401, 404 n.17.

A debtor must be allowed the opportunity to formulate a plan, free from creditor pressures, before he is forced to prove the feasibility of that plan. See id. at 404 n.17. The provisions of § 362(d)(2) were not designed to take away that opportunity. Instead, they were designed to allow creditors to strip off any property from the debtor's estate that will not be needed in an effective reorganization. For example, a creditor should be allowed to foreclose on the home of a self-employed engineer, since the home is not necessary to reorganizing his business of engineering. His drafting tools, however, would be necessary to reorganizing his business.

Clearly, the scope of § 362(d)(2) is quite narrow if that section is read to include only a "necessity" test. Most creditors will be unable to obtain relief from the automatic stay. However, that appears to be the intent of Congress.

Congress intended that debtors not be forced to prove that they have a feasible plan of reorganization until they have had time to prepare a plan.

Concap argues that there is no need to "prolong the agony" of both the creditor and debtor when it becomes apparent at the § 362(d)(2) hearing that any reorganization is hopeless. There is some merit to that argument. Bankruptcy courts generally have the expertise and experience to quite accurately predict the final outcome of a bankruptcy case. But it is clear that Congress declined to give the courts the power to require proof of feasibility at the § 362(d) hearing stage. If Congress erred in declining to do so, Congress must correct its error. The courts are not empowered to tinker with Congress' statutory schemes even if they can improve them.

In a one-asset case such as this one, the necessity test is almost tautological. A company with only one asset is always going to need that asset in any effective reorganization. From the evidence in the record, it is clear that there will be no reorganization in this case without the disputed property. The bankruptcy court's findings that the property was not necessary to an effective reorganization were based on a feasibility test. See Order Modifying Automatic Stay, Findings of

Fact Nos. 7, 8, & 9, at R. 141, 143. Because this court holds that applying a feasibility test under § 362(d)(2) is in error,[2] the order lifting the automatic stay is vacated.

Accordingly,

IT IS HEREBY ORDERED that the bankruptcy court's order modifying the automatic stay is vacated. The case is remanded for any further proceedings consistent with this opinion.

Dated this 17th day of July, 1985.

David K. Winder
United States District Judge

Mailed a copy of the foregoing to the following named counsel this 16th day of July, 1985.

Robert M. Anderson, Esq.
Bruce Wycoff, Esq.
50 South Main, Suite 1250
Salt Lake City, Utah 84144

Steven H. Gunn, Esq.
P. O. Box 45385
400 Deseret Building
Salt Lake City, Utah 84110

2 The issue of stare decisis and the decision of In re Mountain View Holdings, 84C-00226, appear to this court to be irrelevant to this appeal. Consequently, they are not discussed in this memorandum decision. The issue of whether the rents are cash collateral need not be addressed given this ruling.

MARCH TERM - APRIL 10, 1986.

Before Honorable Monroe G. McKay and Honorable Stephanie K. Seymour, Circuit Judges, United States Court of Appeals

SUNSTONE RIDGE ASSOCIATES, Appellee, v. CONSOLIDATED CAPITAL SPECIAL TRUST, CONSOLIDATED CAPTIAL EQUITIES CORP., Appellants.	)	No. 85-2242

This matter comes on for consideration of appellants' motion to clarify our order of March 3, 1986, dismissing the appeal. Upon consideration of appellants' motion, we recall the mandate and vacate the order of March 3, 1986.

The appeal is dismissed on the grounds that the controversy has become entirely moot. Further, the district court and bankruptcy court are directed to vacate the orders underlying this appeal.

Appeal dismissed.

ROBERT L. HOECKER
Clerk