UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF VIRGINIA
Lynchburg Division

In re GREENWOOD, LLC,	)	Case No. 07-62155-LYN-7
	)	
Debtor.	)	
	)	
	)	

MEMORANDUM AND ORDER

This matter comes before the court on a motion by Farm Credit of the Virginias, ACA ("Farm Credit") for relief from the automatic stay. The motion will be granted.

Jurisdiction

This court has jurisdiction over this matter. 28 U.S.C. §§ 1334(a). This is a core proceeding. 28 U.S.C. § 157(b)(2)(A). Accordingly, this court may render a final order. This memorandum shall constitute the Court's findings of fact and conclusions of law as directed by Fed.R.Civ.P. 52 which is made applicable in this contested matter by Fed. R. Bankr. P. 9014(c) and 7052.

Facts

On November 13, 2007, Greenwood, LLC, ("the Debtor") filed a chapter 11 petition. The Debtor is a "single asset real estate" entity as that term is defined under 11 U.S.C. §

101(51B)[1]. Paul Quinn is the sole member and 100% owner of the Debtor.[2] The Debtor has no income[3] and no employees.[4]

The Debtor scheduled real estate consisting of one parcel of approximately 154 acres ("the 154-acre parcel") and a second parcel of approximately 40 acres ("the 40-acre parcel") (together "the Real Property"). The Debtor scheduled the value of the 154-acre parcel at $3,859,500.00 and the 40-acre parcel at $1,222,920.00. The Debtor scheduled the total claims secured by the Real Property at $3,666,037.05.

By virtue of a note and deed of trust dated about November 15, 2006, Farm Credit of the Virginias, ACA ("Farm Credit") holds a first-priority claim against the Debtor secured by both parcels. The original amount of the loan was $2,975,000.00 ("the Farm Credit Loan"). The Debtor defaulted on the loan in July of 2007[5], Farm Credit initiated foreclosure proceedings and the Debtor filed a petition initiating this bankruptcy case. On December 3, 2007, Farm Credit filed a proof of claim in the amount of $3,208,488.35. The Debtor has made no payments to Farm Credit during the pendency of this case.[6] The debt owed to Farm Credit continues to accrue interest at the rate of approximately $19,000.00 per month.

Steven Demeter holds a second priority claim against the Debtor secured by the 154-acre parcel. The original amount of the loan was approximately $555,000.00 He filed a proof of

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[1] See discussion below.

[2] Statement of Financial Affairs, Item 21.

[3] Testimony of Paul Quinn, Transcript of Hearing, Feb. 11, 2008: p. 47.

[4] Testimony of Paul Quinn, Transcript of Hearing, Feb. 11, 2008: p. 50.

[5] The Debtor has made no payments to Farm Credit since June of 2007. Testimony of Paul Quinn, Transcript of Hearing, Feb. 11, 2008: p. 46.

[6] Id.

claim in the amount of $2,007,063.26.

Mr. Quinn and his wife own approximately 96 acres of land that is situated between the two parcels owned by the Debtor.[7]

On September 15, 2006, the Debtor conveyed a conservation easement ("the Easement") to Virginia Outdoors Foundation by "Deed of Gift of Easement" in return for tax credits. Farm Credit voluntarily subordinated its secured claim to the Easement.[8] The Debtor sold its tax credits to a third party for at least $609,000.00.[9]

At the same time, Mr. Quinn and his wife granted Virginia Outdoors Foundation a conservation easement on the 96-acre parcel. The Easement provides that the total acreage of approximately 280 acres may only be divided into three homesteads, one of which must be less than ten acres.

On or about October 30, 2006, an appraisal was prepared for Mr. Quinn indicating that the total fair market value of the three parcels, the 154-acre parcel, the 40-acre parcel and the 96-acre parcel (owned by Mr. Quinn) was $5,700,000.00 without the Easement in place and $2,100,000.00 with the Easement in place.

The only other assets scheduled by the Debtor are accounts (notes) receivable valued by the Debtor at $980,938.00. Included in the notes receivable is a debt owed by the Renaissance Golf Club, LLC, in the amount of $609,000.00. A creditor holding a claim secured by The Renaissance Golf Club has foreclosed on that entity.[10] It appears that the value of the

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[7] Comments of counsel, Transcript of Hearing, Feb. 11, 2008: p. 5 and 16.

[8] Farm Credit asserts that it would not have subordinated its lien if it had known the extent to which the Easement reduced its interest in the 154-acre parcel and the 40-acre parcel.

[9] Statement of Financial Affairs, Item 7.

[10] Testimony of Paul Quinn, Transcript of Hearing, Feb. 11, 2008: pp. 41 & 76.

Renaissance Golf Club note and the other notes actually represents the face value of those notes. The actual value of the notes appears to be zero. The Debtor's plan does not provide for the Debtor to attempt to collect any of the monies owed under the notes.

Farm Credit has filed a motion for relief from the automatic stay.

Discussion

Section 362(a)[11] provides that the filing of a petition creates a stay against certain acts including acts to obtain possession of property of the estate. Section 362 (d) provides conditions under which a party may be granted relief from the automatic stay.

The Debtor is a "single asset real estate" Debtor. "The term 'single asset real estate' means real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental." 11 U.S.C. § 101(51B).

Three requirements must all be met for a debtor to be considered a "single asset real estate " debtor: (1) debtor must have real property constituting a single property or project, other than residential real property with fewer than four residential units, (2) which generates substantially all of the gross income of the debtor, and (3) on which no substantial business is conducted other than the business of operating the real property and activities incidental thereto. 11 U.S.C.A. § 101(51B). In re Scotia Pacific Co., LLC, 508 F.3d 114, 220 (5th Cir. 2007). The Debtor has a single project consisting of an investment in two parcels of land. The debtor

[11] "Section" herein refers to the associated section in the Bankruptcy Code, title 11 of the United States Code.

receives no income from the land or any other source. The Debtor conducts no other business on the parcels.

Because the Debtor is a single asset real estate debtor, Farm Credit's motion for relief from the automatic stay must be granted under Section 362(d)(3)[12] unless the Debtor has either (a) filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time or (b) commenced monthly payments that are in an amount equal to the interest at the then applicable non-default contract rate of interest on the value of the creditor's interest in the real estate.

The petition was filed on November 13, 2007. The Debtor admits through its principal that it has made no payments, including post-petition payments, to Farm Credit since June of 2007, a date that was more than five months prior to the date of petition. In order for Farm

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[12]Section 362(d)(3) provides::

> (d) 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--
> . . .
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
> (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;
> (3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later--
> (A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or
> (B) the debtor has commenced monthly payments that–
> (I) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and
> (ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate;

Credit to be granted relief from the stay, it remains to be shown that the Debtor's plan of reorganization does not have a reasonable possibility of being confirmed within a reasonable time.

A West Virginia Bankruptcy Court has considered the applicable standard under this first prong of Section 362(d)(3). After observing that the language "a reasonable possibility of being confirmed within a reasonable period of time" is nearly identical to the standard set forth by the Supreme Court in United Savings Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365 (1988), the court reasoned.

> [A]djudicating a relief from stay motion under § 362(d)(3)(A) is not to be a mini confirmation hearing. E.g., In re LDN Corp., 191 B.R. 320, 325 (Bankr.E.D.Va.1996) ("In the context of relief from stay litigation, the analysis of the potential for a successful reorganization is not the same as the standard employed at a confirmation hearing."). At a confirmation hearing, a debtor must prove its entitlement to confirm a plan under 11 U.S.C. § 1129 by a preponderance of the evidence . . . must demonstrate that the confirmation of the plan is not "likely" to be filed by liquidation or the need for further financial reorganization. E.g., Kane v. Johns-Manville Corp., 843 F.2d 636, 649 (2d Cir.1988) (stating that success need not be guaranteed-the possibility that a plan may fail is not fatal-but a plan must be supported by adequate evidence that some reasonable assurance of success exists); In re Featherworks Corp., 25 B.R. 634, 642 (Bankr.S.D.N.Y.1982) ("As the proponent of the plan, the debtor had the burden of establishing that it met the requirements of the Code"), aff'd 36 B.R. 460 (E.D.N.Y.1984). By comparison, the showing required by a debtor under § 362(d)(3)(A) is only that the plan have a reasonable possibility of being confirmed, which is a lesser showing than that required at confirmation. E.g., In re Kent Terminal Corp., 166 B.R. 555, 560 (Bankr.S.D.N.Y.1994) (analyzing a case under § 362(d)(2)(B) and concluding that "[i]n a run of the mill relief from stay motion, a debtor need not satisfy the higher level of scrutiny imposed at a confirmation hearing.... [A]t confirmation .... most courts require that a plan offer a probability of success, rather than a mere possibility."). The terms of § 362(d)(3)(A) have been characterized as "rather vague and hopeful" In re Hope Plantation Group, LLC, No. 07-1171, 2007 Bankr.LEXIS 2381 at *12 (Bankr.D.S.C. June 14, 2007) ("[T]he terms ... 'reasonable possibility' within a 'reasonable time' are rather vague and hopeful terms that require a far lower standard of proof that will be required of the Debtor [at the confirmation hearing].").
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> In proving a "reasonable possibility" of plan confirmation, the stage of the proceeding assists in the showing a debtor must make: " 'At a minimum the debtor must show that (1) it is proceeding to propose a plan of reorganization, (2) the proposed or contemplated plan has a realistic chance of being confirmed and (3) the proposed or contemplated plan

> is not patently unconfirmable.' " In re National/Northway Ltd. P'ship, 279 B.R. 17, 24 (Bankr.D.Mass.2002) (citations omitted). The court is not aware of any requirement, and will not impose one, that the plan filed at the time the stay relief motion is pending is the only benchmark for determining whether or not stay relief is appropriate; rather, all that is required is that an effective reorganization be "in prospect," Timbers, 484 U.S. at 376, and be attainable within a reasonable period of time.

In re Windwood Heights, Inc., 2008 WL 519410 at 4-5 (Bankr. N.D.W.Va. 2008).

In summary, the standard by which a creditor must demonstrate that the plan does not have a reasonable possibility of being confirmed within a reasonable time is higher than the standard for opposing confirmation. (Conversely, in order to successfully counter a motion for relief from the say under Section 362(d)(3), the Debtor need not show that the plan as filed is confirmable by a preponderance of the evidence as would be required at a confirmation hearing.) Under the standard promulgated in Windwood, this requirement is met if the creditor can demonstrate that either the debtor is not proceeding to propose a plan of reorganization, the plan as proposed does not have a realistic chance of being confirmed or the proposed plan is patently unconfirmable.[13] In this case, the plan is not confirmable and the evidence indicates that it cannot be confirmed within a reasonable period of time.

The Debtor's plan as proposed is patently unconfirmable. A court may confirm a plan only if each of the requirements in Section 1129(a) is met. The Debtor's plan cannot be confirmed because it does not, at a minimum, meet the requirements found at 11 U.S.C. § 1129(a)(1) & (8).

Section 1129(a)(1). Section 1129(a)(1) provides that the plan must comply with the applicable provisions of title 11. A plan complies with applicable provision of chapter 11 if it contains what is required for a plan and what is permitted for a plan. See, e.g., Acequia, Inc., v.

[13] This standard is presented in an form that is different from the presentation provided in Windwood and Northway solely for the purpose of emphasizing that the burden of proof is on the creditor.

Clinton, (In re Acequia, Inc.), 787 F.2d 1352 (9th Cir. 1986). Section 1129(a)(1) is interpreted (primarily) as requiring that the plan comply with the provisions of Section 1122 and 1123(a). See Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy §1129.03[1] (15th Ed. 2007) (And citations therein.).

Section 1123(a)(5) provides that the plan must "provide adequate means for [its] implementation[.]" This requirement is sometime referred to as *a* feasibility requirement.[14] Section 1123(a)(5) lists examples of ten matters for which adequate means must be provided in a debtor's plan. Among the list is the requirement that the plan must include the means by which the Debtor will effect "the transfer of all or any part of the property of the estate to one or more entities whether organized before or after the confirmation of" the plan. 11 U.S.C. § 1123(a)(5)(B).

The plan provides for the sale of two 100-acre parcels. But the Debtor does not own two 100-acre parcels or land that could be divided into two such parcels. The Debtor's sole member, Paul Quinn, however, does own 96 acres, situated between the two parcels. Mr. Quinn testified that the 100-acre parcels would be created from parts of the two parcels that the Debtor owns and the 96-acres parcel that he owns. In order to sell two 100-acre parcels as proposed under the plan, the Debtor must effect transfers of property to and from the Debtor and Mr. Quinn. The Plan does not any provide the means by which the transfers will be effected. In fact, the plan does not even mention that the transfers will be required before the parcels may be sold.

The transfers are complicated by the fact that there are two liens against the 96-acre parcel. The two liens total more than $2,000,000.00. If either of the two lienholders declines to

[14] Section 1129(a)(11) separately requires that a plan must be feasible and not likely to be followed by liquidation.

accept substitute collateral, the transfers cannot be effected. If the transfers cannot be effected, the Debtor will not be able to perform as provided in the plan. The plan will not be feasible. Accordingly, the plan must provide the means by which the lienholders on the 96-acre parcel will be convinced to agree to the transfers or the plan cannot be confirmed.

The Article[15] in the Debtor's plan entitled "Means for Execution" does not acknowledge this problem. The Article simply refers to a letter from Mitchell Kambis, Principal Broker of Virginia Estates, to counsel for the debtor.[16] But the letter also fails to acknowledge this problem.[17] The Debtor's plan cannot be confirmed without either a recitation of the means by which the transfers will be effected or evidence that the creditors who have claims against Mr. Quinn secured by the 96-acre parcel have given their consent to the transfers.

Also included in the list in Section 1123(a)(5) is the requirement that the plan must include the means by which the Debtor will effect "the sale of all or any part of the property of the estate . . ." 11 U.S.C. § 1123(a)(5)(D). If the Debtor is able to combine the three parcels through transfers of property between Mr. Quinn and the Debtor and if the Debtor is able to create two 100-acres parcels of land from the resulting 280 acres of land, the three resulting parcels will run afoul of the Easement, which requires that there be only three homestead parcels and that one of them be less than 10 acres in size. Neither the plan nor the attached letter acknowledge this problem. Neither the plan nor the attached letter provide the means by which the Debtor will effect a change in the Easement to accommodate the plan. Mr. Quinn testified

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[15] This portion of the plan is designated as a separate Article, but it appears that it was meant to be.

[16] See letter of Mitchell Kambis, Principal Broker of Virginia Estates to counsel for the debtor attached to the proposed plan.

[17] Even if the letter did provide a plan for effecting the land swap and the adjustment to the Easement, the letter is simply an attachment that has not been made a part of the plan. It would, therefore, not bind the Debtor or creditors even if it did provide a means to effect the transfers.

that he had not taken any steps with Virginia Outdoor Foundation to negotiate the necessary change since the Easement was recorded in December of 2006.[18]

The Debtor's plan cannot be confirmed because the it does not meet the feasibility requirement under Section 1123(a)(5).

Section 1129(a)(8). Section 1129(a)(8) provides that for each class of claims or interests, the class must either accept the plan or the class must not be impaired. The claim of Farm Credit constitutes a separate class under the plan.[19] Its claim is impaired.[20] It has not accepted the plan and has filed an objection to the plan. The plan does not meet the criteria required under Section 1129(a)(8).

If Section 1129(a)(8) is not met, but all other requirements are met, the court shall confirm the plan if does not discriminate unfairly and is fair and equitable with respect to each claim that is impaired and has not accepted the plan. 11 U.S.C. § 1129(b). A plan is said to be fair and equitable if one of the following three requirements is met: (1) the creditor will retain its liens and receive payments equal to the value of the creditor's interest in property of the estate; (2) the creditor's lien will attach to the proceeds of any sale of the collateral under Section 363(k); or (3) the debtor will receive the indubitable equivalent of its claim. 11 U.S.C. § 1129(b)(2). The Debtor's plan does not attain any of these three alternative to Section 1129(a)(8).

The Debtor's plan does not provide Farm Credit with the indubitable equivalent of its claim. Something is "'indubitable' if it is not open to any doubt". See Alan N. Resnick &

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[18] Testimony of Paul Quinn, Transcript of Hearing, Feb. 11, 2008: p. 75.

[19] See Debtor's Plan or Reorganization, Article III, at p. 2.

[20] See Debtor's Plan or Reorganization, Article II, at p. 1.

Henry J. Sommer, Collier on Bankruptcy §1129.05[2][c] (15th Ed. 2007) (Quoting In re Freymiller Trucking, Inc., 190 B.R. 913, 915 (Bankr. W.D.Okla. 1996). In this case, there is much doubt that Farm Credit would receive the full equivalent of its claim if the Debtor's plan were confirmed.

The Debtor does not propose to sell the property under Section 363(k).

Nor can it be reasonably concluded that Farm Credit will receive payments equal to the value of its interest in property of the estate if the plan is confirmed. The Debtor's plan does not provide for any payments to Farm Credit during its pendency. Such a treatment is referred to as "negative amortization". Most courts have concluded that negative amortization is not per se prohibited by the Code, but it is rarely permitted unless the original loan terms included negative amortization or there is an ample equity cushion. William L. Norton, Norton Bankruptcy Law Practice, Cramdown (Code § 1129(B) § 113:12 (2008) (And opinions cited therein).

The original loan terms between the Debtor and Farm Credit did not include negative amortization. It remains to be determined if there is ample cushion under the provisions of the Debtor's plan.

If the Debtor's assertion is accepted, Farm Credit will receive payment in the amount of $3,500,000.00[21] if both of the proposed 100-acre are sold. Given that the plan is not yet otherwise confirmable it will more than likely take at least one year, and perhaps more, for this to happen. Farm Credit now holds a claim in excess of $3,200,000.00 that will increase under the plan at the rate of approximately $19,000.00 per month based on interest at the contract rate. By the time the property is sold, the amount of the claim will equal or exceed the expected return

[21] The Debtor notes that Farm Credit listed the value of its collateral on its proof of claim at $5,000,000.00. This amount clearly does not include a reduction in value caused by the placement of the Easement on the Real Property.

to Farm Credit even if all of the Debtor's assumptions come to fruition. The probability of the Debtor's plan unfolding just as it proposes is very small. The Plan is not fair and equitable to Farm Credit.

The Court need only consider Sections 1129(a)(1) and (8) to conclude that the plan as filed by the Debtor is patently unconfirmable.[22] Under the standard promulgated in Windwood, this if sufficient for a finding that the plan is does not have a reasonable possibility of being confirmed within a reasonable time.

A consideration of the changes that would be necessary to the plan for confirmation only reenforces the conclusion that the Debtor cannot confirm a plan within a reasonable period of time. At least three changes would be necessary before the plan could be confirmed. First, the Debtor would have to demonstrate that the lienholders on the 96-acre parcel owned by Mr. Quinn and his wife are willing to make the proposed exchanges of collateral. Second, the Debtor would have to demonstrate that the Virginia Outdoors Foundation is willing to accept an alteration in the restrictions placed on the parcels by the Easement. The Debtor has not initiated any steps to accomplish thee two tasks. Third, the Debtor would have to provide for the payment of adequate protection payments to Farm Credit in order to avoid subjecting its secured claim to increased risk in the form of a decreasing its equity cushion.

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[22] There is at least one additional, technical issue that would require modification of the plan. The plan appears to provide that Farm Credit will be precluded from foreclosing on the property for a period of at least one year from the date of confirmation even though it will receive no payments during that period. The language in the plan is vague but could plausibly be interpreted to mean that Farm Credit would not be able to foreclose on the property unless the Debtor sold the property and did not turn the proceeds over to Farm Credit.

Article III, ¶2, provides that the secured "debt of Farm Credit of the Virginias will be paid at the time of the sale of the Debtor's real estate." Article [V] provides that the "Debtor will not be in default of [the Farm Credit payment] unless [Farm Credit] has not been paid in accordance with the terms set out above within 12 months after confirmation of this Plan." Read together these two sentences could be fairly interpreted to mean that the Debtor will not be in default unless Farm Credit is not paid at the time the real estate is sold, which means that if the real estate is not sold, the Debtor will never be in default on the debt owed to Farm Credit. In either event, the plan would have to be modified to eliminate this ambiguity.

The case was ninety days old when the Debtor filed its plan. The Debtor presented no evidence that it attempted during that time to solve any of these problems. Nor did the Debtor present any evidence regarding the possibility that they could be resolved within a reasonable time period.[23]

> [T]he terse extant history and the statute's own structure suggest that Congress was concerned about the relative unfairness of lengthy delay in Chapter 11 cases involving single-asset real estate projects, In re LDN Corp., 191 B.R. [320,] 326 [(Bankr.E.D.Va.1996)]; that one of its goals aims to expedite the proposal of meritorious plans of reorganization in such cases, In re Kkemko, Inc., 181 B.R. [47,] 49 [(Bankr.S.D.Ohio 1995)]; and that, where the case does not early kick forward toward confirmation, a debtor must compensate its mortgagee for the time-value of the mortgagee's debt investment, by the payment of interest at the original contractual rate.

In re Heather Apts. Ltd. P'ship, No. 06-43101, 2007 WL 926299, at *4 (Bankr.D.Minn. Mar. 28, 2007).

The Debtor has made no post-petition payments to Farm Credit. The Debtor's plan does not have a reasonable possibility of being confirmed within a reasonable time. Accordingly, the motion of Farm Credit for relief from the automatic stay imposed under 11 U.S.C. § 362(a) will be granted.

ORDER

The motion of Farm Credit of the Virginias, ACA, for relief from the automatic stay imposed by 11 U.S.C. § 362(a) shall be and hereby is, granted.

So ORDERED.

Upon entry of this Order, the Clerk shall forward a copy to the United States trustee, W. Stephen Scott, Esq., counsel for the debtor, William E. Shmidheiser, III, Esq., counsel for Farm Credit of the Virginias, ACA, Steven C. Demeter, Paul Quinn, and Frank Ghergurovich.

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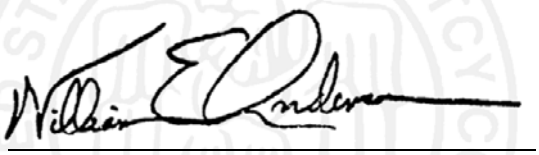
[23] As noted, the Debtor asserted that there was the possibility of obtaining a source for adequate protection payments. The Debtor did not provide any information regarding the identity of the source..

Entered on this 14th day of March, 2008.



William E. Anderson
United States Bankruptcy Judge