THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 95-14780
	)	
ROBERT FINCH,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**
	)	

In re:	)	Case No. 95-14778
	)	
MELVIN FINCH and	)	Chapter 7
BARBARA FINCH,	)	
	)	Judge Pat E. Morgenstern-Clarren
Debtors.	)	
	)	**MEMORANDUM OF OPINION**
	)	

In re:	)	Case No. 95-14779 (PMC)
	)	
JOSEPH WILLIAMS and	)	Chapter 7
ELSIE WILLIAMS,	)	
	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**

Keybank National Association ("Keybank") filed motions in these three cases seeking relief from stay with respect to two parcels of real estate in which it has a lien interest. Debtors oppose the requested relief.[1] For the reasons stated below, the motions will be granted.

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[1] Keybank's motions also request relief from stay with respect to a third parcel of real estate; and abandonment of all three parcels. Those requests have been resolved by separate Orders.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C.§ 152 (b)(2)(G).

FACTS

The Court held an evidentiary hearing on November 25, 1997. Based on the testimony, exhibits, and the file,[2] the Court finds these facts:

I. Relevant Chapter 11 Events

Debtors Robert Finch, Melvin and Barbara Finch, and Joseph and Elsie Williams filed Chapter 11 cases on October 27, 1995. These cases are related based on a common ownership of property; debtors in each of the cases own an undivided one-third interest in two parcels of real estate located at 10646 and 10626-40 Leuer Avenue, Cleveland, Ohio (collectively, the "Property"). On April 29, 1996, the Court entered an Agreed Order authorizing the sale of the Property to E.Z. Building Component Corp. for $630,000, with the liens and interests of all parties to be transferred to the fund generated by the sale.[3] That sale has never closed.

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[2] Judgments were entered in each of these cases converting them, after evidentiary hearing, to Chapter 7 on motions of the United States Trustee. (Case No. 95-14778 Docket 84; Case No. 95-14779 Docket 82; Case No. 95-14780 Docket 84). Reference is, therefore, made to the case history and findings of fact made in those proceedings. (Case No. 95-14778 Docket 83; Case No. 95-14779 Docket 81; Case No. 95-14780 Docket 83, Memorandum of Opinion).

[3] Case No. 95-14478 Docket 25; Case No. 95-14779 Docket 25; Case No. 95-14780 Docket 28.

II. The Chapter 7 Conversion

All three cases were converted to Chapter 7 on motion of the United States Trustee by Orders entered on May 19, 1997. The decision to convert was based in part on Debtors' failure to consummate a sale of the Property:

> [Debtors] have proposed plans which provide for the sale of the Property as a portion of plan funding, with ongoing payments to be made from Debtors' wages. The sale of the Property which was authorized by this Court over a year ago has still not closed and the purchaser has not obtained financing to date. It appears unlikely, therefore, that the sale will be consummated. Debtors have not sought authority to sell the Property to any other buyer . . . .[4]

III. The Trustee's Position

Brian Bash is the appointed Trustee in all three Chapter 7 cases. In that capacity, he employed David J. Sarver, a licensed real estate broker, to sell the Property. The Trustee has not received any written offers to purchase the Property. He has agreed in open court that Keybank can pursue a foreclosure action as to the Property and that he will abandon his interest in the Property in the event that no funds exist to pay him after the foreclosure sale.

IV. Keybank's Position

Keybank holds a promissory note and mortgage deed with respect to each of the parcels of real estate and has an undisputed, valid, first lien with respect to the Property. There was no evidence to establish the amount currently owed to Keybank. Debtors do not, however, dispute that Keybank was owed, as of the Chapter 11 filings, $190,513.12 plus interest at the rate of 10.75% per annum with respect to the 10626-40 Leuer property and $109,799.88 plus interest at

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[4] Case No. 95-14778 Docket 83; Case No. 95-14779 Docket 81; Case No. 95-14780 Docket 83, Memorandum of Opinion.

the rate of 8.18 % per annum with respect to the 10646 Leuer property. Debtors have not made payments to Keybank since these cases were filed. No evidence was offered regarding the existence or amount of other liens and encumbrances on the Property.[5]

V. Debtors' Position

Debtors acknowledge that the Property must be sold as part of these Chapter 7 proceedings. They believe that a private sale, rather than a foreclosure, will maximize the purchase price. They did not present evidence of any written offer to purchase the Property nor did they identify any prospective purchaser.

VI. Valuation of the Property

Both Keybank and Debtors presented testimony as to the value of the Property. The parties agree that 10626-40 Leuer Avenue includes a building which has approximately 37,132 square feet and 10646 Leuer Avenue includes a building which has approximately 16,870 square feet. Mr. Sarver, who is not an appraiser, testified for Keybank. He has some experience with selling commercial real estate, but the bulk of his work is in residential real estate. As part of his broker duties in these cases, Mr. Sarver prepared a Broker Price Opinion listing a range of values. The combined "as is value" is listed as $480,000 and the combined "quick sale value" is listed as $375,000. (Keybank Exh. A). Mr. Sarver testified that the "as is" value is the amount a typical informed buyer would likely pay in a normal market time. He testified that the "quick sale" value is akin to a liquidation value. He acknowledged that his numbers are quite subjective. Due to Mr. Sarver's lack of appraisal credentials, and his confusing explanations

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[5] The Court is aware , however, based on related Adversary Proceedings that various other entities claim secured positions with respect to the Property. (Adv. Pro. 96-1162; Adv. Pro. 96-1164; Adv. Pro. 96-1165).

regarding the methods and standards he used to reach his opinion, his valuation carries little weight in this context.[6]

James Edward Prewitt testified on behalf of the Debtors as to the Property's value. He is an experienced, certified appraiser. He initially appraised the Property in 1995 for an unrelated party at a market value of $780,000. (Debtors' Exh. 2). In November 1997, he updated this appraisal for the Debtors and concluded that the market value had remained the same. (Debtors' Exh. 1). Based on cross-examination at the hearing, however, Mr. Prewitt acknowledged some errors in his appraisal analysis. He adjusted his appraisal to $750,000 as a result of one error regarding potential rental income which formed the basis of his original appraisal. Despite Mr. Prewitt's qualifications as an appraiser, the market value which he espouses is questionable. Debtors previously requested and obtained Court authority to sell the Property for $630,000. Almost 20 months later, that sale is still unconsummated and no other written offers have been made to purchase the Property. The opinion that the Property is worth more than $630,000 is, therefore, inconsistent with market interest (or the lack thereof) in the Property. In short, neither party offered credible evidence as to the current fair market value of the Property.

DISCUSSION

11 U.S.C. § 362 (d) provides for relief from the automatic stay, in relevant part, as follows:

> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

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[6] This conclusion does not, of course, reflect on Mr. Sarver's competence as a real estate broker.

(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 . . . .

Keybank requests relief under both subsections. Keybank has the burden of proof on the issue of Debtors' equity in the Property and Debtors have the burden of proof on all other issues. 11 U.S.C. § 362(g).

A. 11 U.S.C. § 362(d)(2)

Keybank argues that relief from stay to pursue foreclosure is appropriate under § 362(d)(2) because Debtors lack equity in the Property and it is not necessary to an effective reorganization. Equity under this section "is 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 Industries, Inc. v. McClung*, 789 F.2d 386, 392 (6th Cir. 1986), quoting *In re Mellor*, 734 F.2d 1396, 1400 n. 2 (9th Cir. 1984). Keybank, however, did not establish the amount of its debt and the amount of other liens encumbering the Property. In the absence of these facts, it is not possible to determine that Debtors lack equity in the Property. Relief under 11 U.S.C. § 362(d)(2) is, therefore, inappropriate.

B. 11 U.S.C. § 362(d)(1)

Keybank also requests relief from stay for "cause" under 11 U.S.C. § 362(d)(1), making the argument that cause exists to lift the stay because its interest in the Property is not adequately protected. Debtors have not provided Keybank with any adequate protection payments during the pendency of these cases. Nevertheless, they argue that an equity cushion exists that adequately protects Keybank. They contend that as long as there is an equity cushion, efforts

should continue to sell the Property at its fair market value, rather than through foreclosure proceedings, because the price paid at a foreclosure sale will not benefit anyone.

Lack of adequate protection constitutes cause for relief under § 362(d)(1). An equity cushion can serve as a form of adequate protection for secured debt in various circumstances. *In re Mellor*, 734 F.2d 1396 (9th Cir. 1984). "'Equity cushion' has been defined as the value in the property, above the amount owed to the creditor with a secured claim, that will shield that interest from loss due to any decrease in the value of the property during the time the automatic stay remains in effect." *In re Mellor*, 734 F. 2d 1396, 1400 n.2 (9th Cir. 1984).

Here, it is possible that Keybank is protected by an equity cushion; however, based on the insufficient evidence regarding the Property's value and the amount of Keybank's debt, the extent of the cushion is uncertain. The Court does not, therefore, have an appropriate evidentiary basis for finding that Keybank is adequately protected based solely on the existence of an equity cushion. Debtors have not met their burden of proving that an equity cushion adequately protects Keybank. And so, relief for cause based on lack of adequate protection is appropriate.

Additionally, the concept of cause for relief under § 362(d)(1) is broader than just a lack of adequate protection. "Because the Code provides no definition of what constitutes 'cause' under . . . Section 362(d) . . .courts must determine whether discretionary relief is appropriate on a case-by case basis." *In re Laguna Assocs. Ltd. Pshp.*, 30 F.3d 734, 737 (6th Cir. 1994). The court must take "into account the purposes of the automatic stay, the behavior of the parties, considerations of judicial efficiency, and the balance of the hardships involved." *In re Sonnax Industries, Inc.*, 99 B.R. 591, 595 (D.Ct. D. Vt. 1989), *aff'd.* 907 F.2d 1280 (2d Cir. 1990) . In a Chapter 7 case, the existence of a valid security interest, the absence of objection by the trustee,

and the failure to make payments are significant considerations supporting the existence of cause for relief from stay. *In re O'Hara Brothers, Inc.*, 151 B.R. 702 (Bankr. E.D. Pa. 1993); *In re Cohen*, 141 B.R. 1 (Bankr. D. Mass. 1992).

At this point in these cases, the parties do not dispute that the Property must be sold. The Debtors have not made payments to Keybank in the more than two years that the cases have been pending. During the period these cases were in Chapter 11, Debtors were given ample opportunity to complete a sale of the Property and yet the Property remains unsold. The Chapter 7 Trustee, the party vested with the responsibility for administering the estate assets, has determined that foreclosure is appropriate. Under these circumstances, cause to lift the stay clearly exists.

CONCLUSION

Keybank's Motions for Relief From Stay are granted for cause under 11 U.S.C. § 362(d)(1). A separate judgment in accordance with this decision will be entered in each of these cases.

Date: 19 Dec 1997

Pat E. Morgenstern-Clarren
United States Bankruptcy judge

Served by mail on: Phyllis Ulrich, Esq.
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By: Joyce L Gordon, Secretary

Date: 12/19/97