THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 98-17666
	)	
MADONNA HALL, INC.,	)	Chapter 11
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**

Creditor Scidem, Inc. filed a Combined Motion for Relief from Stay, Adequate Protection, and other relief, which the Debtor Madonna Hall, Inc. opposes. (Docket 73, 116). An evidentiary hearing was held on April 14, 1999, at which time the State of Ohio joined in the Debtor's opposition to the Motion.[1] For the reasons stated below, the Motion is denied.

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.§ 157(b)(2)(G).

THE PARTIES

The Debtor Madonna Hall, Inc. is a not-for-profit corporation organized under the laws of Ohio. The Debtor operates a nursing home on property located at 1906 East 82d Street, Cleveland, Ohio (the real estate and the building on it are collectively referred to as "the Property"). Scidem, Inc. ("Scidem") owns the Property and seeks to lift the automatic stay to

---

[1] Although the hearing had been set for an earlier date, it was rescheduled on the unopposed request of counsel. (Docket 100, 112, 115, 118, 119).

evict the Debtor. The State of Ohio ("the State") appeared as a party in interest based on the obligation of the Attorney General to protect charitable trust assets and beneficiaries.

THE POSITIONS OF THE PARTIES

The filing of a bankruptcy petition puts in place an automatic stay that prevents parties from taking certain actions against the debtor and property of the bankruptcy estate. 11 U.S.C. § 362(a). The Bankruptcy Code provides that a party in interest may ask the Court for relief from the automatic stay. 11 U.S.C. § 362(d).

Scidem argues that the automatic stay should be lifted under 11 U.S.C. § 362(d)(1) and (2). That section states:

> (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; . . . .

The party requesting relief has the burden of proof on the issue of the debtor's equity in the property and the debtor has the burden of proof on all other issues. 11 U.S.C. § 362(g).

Scidem argues under (d)(1) that cause exists because the City of Cleveland ("the City") found building code violations at the Property that expose Scidem and its officers and directors to criminal liability so long as the Property is used as a nursing home. If the stay is lifted and the

Debtor is evicted, Scidem proposes to move the nursing home residents to another facility. Scidem argues that its criminal exposure ends if the Property is not occupied and that the Debtor cannot adequately protect it against that exposure except by moving out. Scidem also contends under (d)(2) that the Debtor does not have any equity in the Property and it is not necessary for a reorganization because the Debtor has not shown that it can reorganize.[2]

The Debtor denies that Scidem, its officers and directors are under any realistic threat of criminal prosecution because the City is satisfied that progress is being made to correct the violations. The Debtor contends that the monthly rent being paid to Scidem adequately protects its interest in the Property.[3] The Debtor claims an equitable interest in the Property either as a month-to-month tenant or by virtue of possession, and also argues that its occupancy of the Property is critical to its efforts to reorganize.

The State supports the Debtor's position.

FACTS

Background

In 1974, Scidem entered into a 20-year written lease with the pre-petition Debtor with respect to the Property ("the Lease"). The Lease required the tenant to pay rent, insurance, taxes, and to make repairs. As contemplated by the parties from the outset, the Property has at all times been used to operate a nursing home that serves elderly, low income City residents. The nursing

---

[2] Scidem contended in its Motion that the Lease was a lease of nonresidential real property within the meaning of 11 U.S.C. § 365(d)(4). Scidem did not, however, present evidence on this issue or pursue it in argument at the hearing.

[3] Scidem did not challenge the amount of the rent as inadequate.

home is licensed by the State to operate 99 beds and the Debtor claims ownership of this license ("the License"). Scidem denies that the Debtor owns the License and claims ownership itself. The License dispute is not part of the present Motion.

After the Lease expired in 1994, the pre-petition Debtor continued to occupy the Property. That same year, Scidem asked Multi-Care Services, Inc. ("Multi-Care") to assume the daily management of the nursing home operations, including collecting funds and paying the bills. Multi-Care, Scidem, and the Debtor apparently proceeded as if there was a month-to-month tenancy for the Property.[4] From 1994 to the petition date, Multi-Care paid some, but not all, of the rent owed to Scidem.

The relationship between Multi-Care and the Debtor's Board of Trustees did not go smoothly. From the outset, Multi-Care refused to allow the Board of Trustees to continue to meet at the Property and threatened to bring trespass charges against the Board members if they came on to the Property.

In August 1998–and at a time when the Board of Trustees had been barred from the Property for several years–the City inspected the Property. The inspection team was headed by Robert Vilkas, Deputy Commissioner and Chief Building Officer for the City. The inspectors issued five notices of violations of City ordinances. The Board of Trustees heard rumors about problems at the facility and tried again to meet at the Property. They were turned away at the door by armed guards.

---

[4] The evidence did not establish the precise nature of the pre-petition Debtor's role during this time frame.

The Debtor filed this bankruptcy case on October 8, 1998. Post-petition, Multi-Care has continued to manage the facility by agreement of Scidem, Multi-Care, and the Debtor[5] and Scidem is being paid monthly rent of $8,000. The Board of Trustees once again has access to the Property.

The Building Code Violations

Mr. Vilkas and five inspectors from the City's Building Department testified at the hearing. Their testimony explained the process by which the City enforces the building code and the status of the Property violations.

1. General Procedures

City inspections are triggered in one of three ways: (1) a routine annual visit; (2) the receipt of a complaint; or (3) an inspection of a building's exterior that warrants proceeding to inspect the interior as well. If violations are found, the City issues a notice to the responsible parties.

There are two general approaches that responsible parties take--they either cooperate or they fail to cooperate. For cooperating parties, the City's policy is to work with them to achieve the goal of bringing the building into compliance with the code. The City issues permits before repair work begins and inspects the work as it progresses. If the parties do not cooperate, the City issues a summons or "ticket" to bring the parties into Housing Court. Such a summons has to be countersigned by either Mr. Vilkas or a chief inspector. Building code violations are punishable as criminal offenses.[6] Typically, the City charges an offending corporation rather than its officers

---

[5] Docket 20, 29, 40, 62, and 94.

[6] See CITY OF CLEVELAND, OHIO, BUILDING CODE § 3103.99. (Scidem Exh. G).

and directors. There is, though, a potential for corporate officers and directors to be charged under the criminal statutes. Conviction of such a charge can result in a fine, imprisonment, or both.

2. The Property Violations

On August 25, 1998, the City issued notices that violations existed at the Property in the areas of plumbing, HVAC and refrigeration, building, electrical, and elevator. (Scidem Exhs. B, C, D, E, and F). The notices were addressed to the pre-petition Debtor and Scidem as the responsible parties. Scidem has not taken any steps to make the repairs. Chester Herrod, President of the Debtor's Board of Trustees, acknowledged that the pre-petition Debtor had the responsibility under the Lease to repair the Property and believes the Debtor still has that obligation as a month-to-month tenant.

The City witnesses testified that the Debtor has been cooperating in addressing the violations since the Board of Trustees regained access to the Property and progress is being made. Charles Stroud, the electrical inspector, testified that all of the electrical violations have been corrected. (The City had ranked these violations as having the highest priority). Richard Soeder, HVAC inspector, testified that the Debtor replaced its boiler on an emergency basis at significant expense. Of the remaining problems, some, but not all, have been corrected. He is satisfied that progress is being made. Alton Jones, plumbing inspector, testified that satisfactory progress is also being made on the areas under his control. Elevator inspector Carl Mueller has a follow-up inspection scheduled for May 22, 1999. He does not know at the moment if that will establish that all violations have been fixed. Derrick Cooley, building inspector, testified that some of the building violations have not yet been resolved. There was no testimony as to the details.

No inspector said he was dissatisfied with the Debtor's efforts to remedy the problems. No inspector said he had the present intention to issue a summons to any responsible party. Mr. Vilkas, who oversees the work of the inspectors, stated the City's position unequivocally: as long as satisfactory progress is being made, the City does not intend to charge any responsible party with criminal violations of the building code.

Certain inspectors also testified that the building code violations under their purview will continue to exist whether the Property is occupied or not. In other words, evicting the nursing home residents will not relieve Scidem or its officers and directors from liability for the condition of the Property.

3. The Debtor's ability to pay for the repairs

The Debtor's Operating Report for the period ended February 28, 1999 shows that the Debtor has approximately $96,000 in its bank accounts. Mr. Herrod testified that the Debtor is able to pay for the repairs and points out that the Debtor is paying a monthly fee to Multi-Care, part of which fee should also be available for this work. (*See* Debtor's Exh. 6). He was not able to estimate the cost of the remaining repairs because all of the bids are not yet in. There was no credible evidence to the contrary.

Scidem's Proposal for Moving the Residents

Edward Wilkerson, M.D. is the President of Scidem, as well as a shareholder and member of its Board of Directors. Dr. Wilkerson is 77 years old and retired from the practice of medicine. He has no criminal record, has never been in jail, and is distressed at the thought that he may face criminal prosecution because of the Property's building code violations.

He testified that Scidem does not intend to make any repairs because it cannot afford to do so and it is not sensible to make a further investment in the Property. Scidem's plan is to sell the Property, its contents, and operating rights to the nursing home beds as a unit. This is contingent on a finding that Scidem owns the operating rights.

Recognizing a responsibility to the nursing home residents, Multi-Care and Scidem have a proposal for moving them if this Motion is successful and the Debtor is evicted. William Weisberg, regional director of Multi-Care, oversees the operations of a number of nursing homes, including the one at the Property. He testified that if the Debtor is evicted, the residents can be moved via ambulance to Rudwick Manor and Cleveland Rehabilitation. Multi-Care leases and operates Rudwick Manor. Rudwick has 174 licensed beds; as only 91 are occupied, there is room to add the 82 residents who live on the Property. Multi-Care would also offer jobs to the staff currently employed by the Debtor. Multi-Care would not allow the Debtor or any entity other than Multi-Care to manage the operations at Rudwick Manor.[7]

At the moment, the residents at the Property have contracts with the Debtor for the Debtor to provide their care.[8] Mr. Weisberg believes that provisions in those contracts will permit the contracts to be transferred to Multi-Care on an emergency basis. He believes that a problem with the fire alarm system could give rise to such an emergency situation. The fire alarm company sent

---

[7] The Debtor and the State question Multi-Care's motives in suggesting a move that will boost the occupancy of an under-utilized facility to the benefit of Multi-Care. Multi-Care's motivation is not, however, relevant to this Motion.

[8] The exact nature of these contracts was not part of the evidence. It appears that they are contracts linked to reimbursement through Medicaid. (*See* Debtor Exh. 8).

a letter to Multi-Care saying it cannot guarantee that the system works. Mr. Weisberg acknowledged, though, that the City feels the alarm is satisfactory. Also, as noted above, a group of city inspectors testified, some of whom were called by Scidem. No one testified that there was an emergency situation with the fire alarm. As a result, the evidence on the issue of whether the residents' contracts could, in fact, be transferred without interruption to Rudwick Manor because an emergency exists was inconclusive.

The Debtor offered the testimony of Susan Axelrod, Director of the City's Department of Aging, in response to the moving plan. Ms. Axelrod oversees all services offered by the City to older residents and has been the liaison for the City in addressing the issues at the Property. She testified that older people frequently suffer when they are moved from familiar surroundings, particularly if they are not physically or mentally well. This syndrome, called transfer trauma, is often a problem when nursing home residents are transferred from one facility to another.

Ms. Axelrod also testified that Rudwick Manor has below average occupancy which she believes is linked to concerns raised by the families of individuals who live there. She acknowledged that the code violations at the Property also cause serious concerns. On the issue of the fire alarm, the City Fire Chief has assured her that there is no danger at the facility. And overall, she believes that the Debtor's staff is made up of "quality people attempting to give quality care" to the City's residents.

The Debtor's Plan of Reorganization

The Debtor has filed a Plan of Reorganization and a Disclosure Statement. (Docket 63, 64). The plan contemplates a transaction with Eliza Bryant Center, Inc. ("Eliza Bryant"), another non-profit that provides nursing home services to inner City residents. The plan calls for the

Debtor to continue to occupy the Property for a limited period, during which time Eliza Bryant will manage the operations in place of Multi-Care. To begin this change, the Debtor has filed a motion to reject the Multi-Care contract and enter into a management agreement with Eliza Bryant. (Docket 47, 69). The motion to reject is set for hearing on May 17, 1999, after an unopposed request from the Debtor for a continuance was granted. (Docket 111). The plan contemplates that the Debtor's residents will ultimately move out of the Property and into an Eliza Bryant-related facility.

A hearing is not yet set on the Disclosure Statement. The Debtor has filed a Motion to Increase Time for Acceptance of Plan on the ground that the motion to reject the Multi-Care contract and a pending motion to remand a lawsuit to the state court must be decided before the plan issues can go forward. (Docket 114).

Ms. Axelrod addressed whether it would be possible for the Debtor to make an interim move now in the event of eviction. Under that scenario, the residents would move to another building where the Debtor could continue to provide care until its plan of reorganization is reviewed and approved. Ms. Axelrod is familiar with this issue from other work she has done and does not believe that such an alternative facility exists for an interim move. There was no testimony to the contrary. Mr. Herrod testified that for the time being, the Debtor would be out of business if it cannot operate in the Property. Again, there was no evidence to challenge this.

DISCUSSION

1. Does "cause" exist to lift the stay under 11 U.S.C. § 362(d)(1)?

Section 362(d)(1) provides that relief from stay shall be granted for cause, including lack of adequate protection.[9] The Bankruptcy Code does not define "cause" beyond the reference to adequate protection. The decision as to whether relief should be granted is left to the sound discretion of the court based on the facts of each case. *Laguna Asocs. Ltd. Partnership v. Aetna Casualty & Surety Co. (In re Laguna Assocs. Ltd. Partnership)*, 30 F.3d 734 (6th Cir. 1994). Adequate protection may be provided in the form of periodic cash payments. 11 U.S.C. § 361(1).

In closing argument, Scidem focused on its ownership of the Property. While admitting that no criminal citation has yet been issued based on the building code violations, Scidem contends that the potential for such prosecution is an "affront or attack on the property rights of Scidem and its owners." Scidem then argues that the Debtor cannot provide adequate protection to Scidem against such potential exposure. In the absence of adequate protection, Scidem believes that cause exists to lift the stay to permit the Debtor to be evicted. The Debtor counters that there is no realistic danger of prosecution and evicting the Debtor will not release Scidem from its responsibilities for the violations.

The evidence clearly supported the Debtor's position. The City building inspectors all said that the Debtor is showing good faith and cooperating to remedy the problems. When the City identified the electrical violations as the highest priority, the Debtor addressed and resolved

---

[9] Related § 363(e) provides that "[o]n request of a party that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased . . . the court . . . shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest."

that area first. The Debtor also replaced the boiler on an emergency basis. Mr. Vilkas, who is one of the individuals who would have the authority to escalate the situation by signing a Housing Court summons, said the City does not intend to take that step so long as the Debtor continues to cooperate.

There was a suggestion through cross-examination that the Debtor lacks the funds to continue with the repairs. In that case, the potential for the City to become dissatisfied would certainly be increased. As found above, however, the evidence did not establish either the total cost for the repairs or that the Debtor does not have the ability to meet that cost. For the time being, the possibility that funds may not be available is only that: a possibility, not a fact.

An equally important point is that evicting the Debtor will not relieve Scidem, or its officers and directors, from any liability. Scidem took the position in its opening statement that the building code violations stem from the use of the Property as a nursing home and that evicting the Debtor would make the violations moot. The testimony from certain of the City inspectors was to the contrary. They stated that the violations will still exist regardless of whether the Property is occupied. As noted above, Scidem also argued in its closing that the potential for criminal prosecution is an attack on the property rights of Scidem and its owners. Even if this is so, the evidence established that evicting the Debtor will not change the situation.

Under these facts, the Court finds that there is no reason at the present time to think that any responsible party is at risk of imminent criminal prosecution and cause does not exist to grant Scidem relief from stay under § 362(d)(1).

2. Under § 362(d)(2), does the Debtor have equity in the Property and is the Property necessary to an effective reorganization?

Alternatively, Scidem seeks relief under 11 U.S.C. § 362(d)(2) which provides that the court shall grant relief from the automatic stay against the Property if the Debtor does not have equity in the Property and if the Property is not necessary to an effective reorganization. Scidem's position is that the Debtor does not have equity in the Property because Scidem is the owner, the Lease expired in 1994, and the Debtor is a "squatter." The Debtor contends that it is a tenant under a month-to-month tenancy which gives it an equitable interest in the Property or, alternatively, that possession alone gives it an equitable interest. On the reorganization issue, Scidem argues that the Debtor has not proven it is capable of being reorganized. More specifically, Scidem pointed out that the Debtor filed a plan and disclosure statement, but a hearing has not been set with respect to those filings.

Relief from stay under § 362(d)(2) requires these two findings: (1) lack of an equity in the Property; and (2) that the Property is not necessary to an effective reorganization. *Stephens Indus. Inc. v. McClung*, 789 F.2d 386 (6th Cir. 1986). With respect to the first prong, equity is generally defined as "the value, above all secured claims against the property, that can be realized from the sale of the property for the benefit of unsecured creditors." *Id. at* 392, *quoting In re Mellor*, 734 F.2d 1396, 1400 at n. 2 (9th Cir. 1984). Some courts have, however, discussed equity in property in terms of the debtor having an economic interest in the property. *See, for example, In re Elder-Beerman Stores Corp.*, 195 B.R. 1012 (Bankr. S.D. Ohio 1996); *In re Food Barn Stores, Inc.*, 159 B.R. 264 (Bankr. W.D. Mo. 1993). The second statutory prong requires the Debtor to show that the Property is necessary to an effective reorganization.

> What this requires is not merely a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization that is in prospect . . . [T]here must be a reasonable possibility of a successful reorganization within a reasonable time.

United Savings Assoc. of Texas v. Timbers of Inwood Forest Assocs., Ltd. 484 U.S. 365, 376 (1988) (internal quotation omitted).

The Debtor proved that its continued occupancy of the Property is necessary to its effective reorganization. The Debtor has filed a plan which contemplates a transaction with Eliza Bryant under which Eliza Bryant will manage the nursing home operations for a limited period of time until the residents move to another facility associated with Eliza Bryant. This plan is contingent on a finding that the Debtor owns the License. The Debtor has moved the disputed issues forward by filing a motion to reject the contract with Multi-Care and to enter into a contract with Eliza Bryant. Logically, the motion to reject must be decided before the plan and the disclosure statement are considered. The evidence showed that if the Debtor is evicted from the Property at this point, the residents cannot be moved to another facility where the Debtor can continue to care for them until the contract and plan issues are resolved. Based on these facts, the Debtor proved that there is a reasonable possibility of a successful reorganization within a reasonable time[10] and that the Property is necessary to an effective reorganization.

In light of this conclusion, it is not necessary to decide whether the Debtor has an equity in the Property within the meaning of § 362(d)(2).

---

[10] The Court is not making any findings as to whether the plan meets the requirements for confirmation under the Bankruptcy Code.

CONCLUSION

For the reasons stated, Scidem's Combined Motion for Relief from Stay, Adequate Protection, and other relief is denied. A separate Order will be entered in accordance with this decision.

Date: 20 April 1999

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Marvin Sicherman, Esq.
Ann Marie Hawkins, Esq.
Sherry Phillips, Esq.
Mary Ann Rabin, Esq.
Sheila Cooley, Esq.
Derrick Rippy, Esq.

By: Joyce L. Gordon, Secretary
Date: 4/20/99

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 98-17666
	)	
MADONNA HALL, INC.,	)	Chapter 11
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**ORDER**

For the reasons stated in the Memorandum of Opinion filed this same date,

IT IS, THEREFORE, ORDERED that the Combined Motion of Scidem, Inc. for Relief from Stay, Adequate Protection, and other relief is denied.

Date: 20 April 1999

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Marvin Sicherman, Esq.
Ann Marie Hawkins, Esq.
Sherry Phillips, Esq.
Mary Ann Rabin, Esq.
Sheila Cooley, Esq.
Derrick Rippy, Esq.

By: Joyce L. Gordon, Secretary

Date: 4/20/99