

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: January 30 2006

Mary Ann Whipple  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

In Re:	)	Case No. 04-70461
	)	
Holland Investments,	)	Chapter 11
	)	
Debtor.	)	
	)	JUDGE MARY ANN WHIPPLE

**ORDER TERMINATING AUTOMATIC STAY**

On July 19, 2005, the court entered an order conditionally granting a motion for relief from stay filed by Capital City Finance Ltd. ("Capital City"). The court ordered that the automatic stay be modified to permit Capital City to foreclose on its interest in certain property owned by Debtor unless, among other things, Debtor commenced interest payments in accordance with § 362(d)(3)(B) within twenty-one days of the date of that order. [Doc. # 46]. Debtor has failed to make the required interest payments and Capital City now renews its request for relief and for entry of an order permitting it to foreclose on its interest in Debtor's real property [Doc. ## 66, 94].

In connection with the July 19 order, the court determined that single asset real estate, as defined at 11 U.S.C. § 101(51B), was at issue in this case. Capital City sought relief from stay under 11 U.S.C. § 362(d)(3), which provides additional, specific grounds for relief from stay when single asset real estate is involved. Section 362(d)(3) provides for relief as follows:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay ... by terminating, annulling, modifying, or conditioning such stay--

....

(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)--

(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 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), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

11 U.S.C. § 362(d)(3) (emphasis added). The purpose of this section is to impose an expedited time frame for filing a plan in a single asset real estate case. *In re Kkemko*, 181 B.R. 47, 49 (Bankr. S.D. Ohio 1995). Congress was “apparently concerned about the delay in the bankruptcy process and the resulting unfairness to secured lenders when single asset real estate projects were involved.” *NationsBank, N.A. v. LDN Corp. (In re LDN Corp)*, 191 B.R. 320, 326 (Bankr. E.D. Va. 1996). Under § 362(d)(3), the court was required to grant relief if Capital City’s claim was secured by an interest in single asset real estate, unless Debtor proved that it had timely filed a plan of reorganization that had a reasonable possibility of being confirmed within a reasonable time, or that it had commenced monthly interest payments to Capital City. *See* 11 U.S.C. § 362(g) (providing that the party opposing relief has the burden of proof on all issues other than the issue of debtor’s equity in property).

Debtor had filed a proposed plan of reorganization within 90 days after the entry of the order for relief. But the court found that Debtor had not met its burden of demonstrating that the plan had a reasonable possibility of being confirmed within a reasonable time. Among other problems, Debtor had not filed any proposed disclosure statement and the proposed plan failed to set forth clearly the manner in which Capital City’s claim would be treated. The Debtor had also failed to make any post-petition payments to Capital City in any amount. The court accordingly concluded that Debtor had not met its burden under § 362(d)(3)(A) or (B).

Under these circumstances, § 362(d) mandated that the court grant relief from the automatic stay, with the court retaining the discretion to fashion the appropriate relief. *Condor One v. Archway Apartments, Ltd. (In re Archway Apartments, Ltd.)*, 206 B.R. 463, 465 (Bankr. M.D. Tenn. 1997). The statute provides that relief may include “terminating, annulling, modifying, or conditioning such stay.” 11 U.S.C. § 362(d). As expressly permitted by the statute, the court conditioned continuation of the automatic stay in favor of Debtor. The July 19 order imposed two conditions for continuation of the automatic stay:

Debtor was required to file a disclosure statement and an amended plan of reorganization that clearly set forth treatment of Capital City's claim and to commence monthly payments in accordance with § 362(d)(3)(B). These actions were to occur within 21 days of the date of the order, or by August 10, 2005. The order and accompanying memorandum of decision were clear in directing that both actions occur. They were not in the alternative.

On motion of the Debtor, the court extended the deadline for action to August 31, 2005. Debtor timely filed the amended plan<sup>1</sup> and disclosure statement, but did not commence making payments. By the November 17, 2005, continued hearing on approval of the amended disclosure statement, no payments had been tendered to Capital City by Debtor, although immediately following the hearing Debtor tendered one check. By that time, payments should have been made for the months of August, September, October, and November.

Debtor raised the question of alleged confusion as to the amount of the payment. The July 19 order did not specify an amount, just that payments be made in accordance with § 362(d)(3)(B). Section 362(d)(3)(B) states that the payments are to be "in an amount equal to interest at a current rate on the value of the creditor's interest in real estate." The court acknowledges the very substantial likelihood of a dispute between the parties over both what the appropriate "fair market" rate of interest is and what the value of the real estate in issue is. In confirmation proceedings, however, Debtor asserted that the real estate was worth \$230,000 to \$250,000. Ultimately, the potential dispute over the appropriate amount of the payments is irrelevant to Capital City's entitlement to further relief. Debtor failed to tender payments in any amount on a timely basis or with the requisite frequency, and never sought the input of either Capital City or the court to resolve any dispute as might exist. Finally, with the court's denial of confirmation of Debtor's amended plan approximately 13 months after commencement of this Chapter 11 case, Debtor obviously has no plan with a reasonable possibility of being confirmed within a reasonable time.

Capital City is now entitled to further relief from the automatic stay, this time by termination of the automatic stay so as to permit it to realize on its interest in Debtor's real estate. Relief is appropriate both because Debtor did not comply with the court's July 19 order and because it is now otherwise not in compliance with either of Sections 362(d)(3)(A) and (B). Termination of the stay is the appropriate form of relief at this time because of the age of the case and Debtor's demonstrated inability to propose a confirmable plan. Moreover, while Debtor has failed to pay Capital City anything, other pre-petition and post-petition creditors that should not have been paid absent court approval have been paid. Debtor has

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<sup>1</sup>Confirmation of the amended plan has since been denied. [Doc. #93].

done nothing to rectify those inequities. That fact contributes not to Capital City's entitlement to further relief from stay, but to the appropriate form of relief as termination of the automatic stay instead of conditioning it further.

Good cause appearing,

**IT IS ORDERED** that Capital City Finance Ltd.'s Motions for Entry of an Order [Doc. ## 66, 94] be, and hereby are, **GRANTED**; and

**IT IS FURTHER ORDERED** that the automatic stay of 11 U.S.C. § 362(a) is hereby terminated with respect to Capital City Finance Ltd. in order to allow it take all steps necessary to foreclose on its interest in Debtor's real property.