NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MB 11-014

Bankruptcy Case No. 09-22152-WCH

BROCK P. TUCY,
Debtor.

BROCK P. TUCY,
Appellant,

v.

DIGITAL FEDERAL CREDIT UNION,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. William C. Hillman, U.S. Bankruptcy Judge)

Before
Votolato, Kornreich, and Tester,
United States Bankruptcy Appellate Panel Judges.

Norman Novinsky, Esq., on brief for Appellant.

Robert K. Taylor, Esq., Patricia Antonelli, Esq., and Lauren F. Verni, Esq., on brief for Appellee.

September 15, 2011

Tester, U.S. Bankruptcy Appellate Panel Judge.

The debtor, Brock P. Tucy ("Tucy"), appeals from the bankruptcy court's orders granting Digital Federal Credit Union's ("Digital") motion for relief from the automatic stay and denying Tucy's motion for reconsideration. For the reasons discussed below, we **REVERSE** the orders of the bankruptcy court.

BACKGROUND

Tucy is the sole trustee and beneficiary of BKT Realty Trust and Glen Charlie Realty Trust. He is also the 100 percent shareholder of Maple Park Properties, Inc. ("Maple Park"), as well as its sole officer, director and general manager. Glen Charlie Realty Trust and BKT Realty Trust are the owners of a 400-acre parcel of land ("the Property") located in Wareham, Massachusetts, which includes woodlands, cranberry bogs, and an RV camping resort operated by Maple Park. The Property generates income from the sale of cranberries, sand and gravel, and from the rental of RV sites.

In March 2008, Tucy Enterprises, Inc. ("Tucy Enterprises"), as Trustee of the BKT Realty Trust, and Maple Park executed a $5,100,000.00 note ("the Note") in favor of Digital, which Tucy guaranteed. To secure the Note, BKT Realty Trust (by Tucy Enterprises, as trustee) granted Digital a mortgage and security agreement on the Property. To further secure the Note, Glen Charlie Realty Trust (by Tucy, as trustee) also granted Digital a mortgage and security agreement on the Property.

By March 2009, Tucy Enterprises and Maple Park had defaulted on their obligations under the Note. Thereafter, the parties entered into a forbearance agreement, and when Tucy Enterprises and Maple Park again defaulted, Digital commenced foreclosure proceedings.

Tucy filed a petition for chapter 11 relief on December 16, 2009.[1] As of the petition date, the balance due on the Note was $3,909,639.20. On March 22, 2010, Digital filed a motion for relief from the automatic stay pursuant to § 362(d),[2] without alleging the specific subsection of § 362(d) upon which it relied. In support of its request for relief, Digital alleged that Tucy failed to make post-petition monthly mortgage payments, to pay real estate taxes, and to file a plan of reorganization. It further alleged that Tucy lacked equity in the Property. On March 29, 2010, Tucy filed an objection to the motion for relief. Notwithstanding that his objection was equally lacking in a statutory reference, he argued, in pertinent part, that Digital was adequately protected by the value of the Property and that adequate protection payments would be funded from the sale of gravel.

The bankruptcy court conducted non-evidentiary hearings in April and May 2010, and evidentiary hearings in June and October 2010 without making a final determination of the Property's value. However, at the June hearing the bankruptcy court stated that the value was closer to Digital's assertion of $6,900,000.00 than to Tucy's suggestion of $11,500,000.00. We note that at $ 6.9 million, there would have been equity of $3 million based upon a debt of $3.9 million.

At the October 2010 hearing, the bankruptcy court concluded: "I think you've reached the limit of my ability to see a plan in the foreseeable future, as the Supreme Court requires."

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[1] On May 26, 2009, Maple Park also filed a petition for chapter 11 relief. The bankruptcy court entered an order for the joint administration of Tucy and Maple Park's bankruptcy cases on May 28, 2010. Although Digital's submissions in this appeal refer to the "Debtor" as Tucy and Maple Park, collectively, this opinion concerns only Tucy, as it is only his appeal which is presently before the Panel.

[2] Unless otherwise indicated, the terms "Bankruptcy Code," "section" and "§" refer to Title 11 of the United States Code, 11 U.S.C. §§ 101, et seq., as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 37.

Accordingly, the court entered the order granting relief from stay. Tucy then filed a motion for reconsideration. At the November 19, 2010 hearing on reconsideration, the bankruptcy court suspended the granting of relief from stay and continued the matter to January 28, 2011 in order to consider it simultaneously with the adequacy of the disclosure statement.

During the pendency of the motions for relief from stay and reconsideration, the bankruptcy court received a plethora of evidence in support of the parties' positions, including: Digital's appraisal testimony; Tucy's appraisal testimony; Tucy's multiple financial projections; testimony from an individual indicating that he would invest $750,000.00 in the Property; and testimony from Tucy's accountant. During this period of time, Tucy also submitted an original and amended disclosure statement and plan of reorganization.

Ultimately, at the conclusion of the January 28, 2011 hearing, the bankruptcy court denied reconsideration, ruling from the bench as follows:

> [I]t's not unusual for the plans to keep changing, but what *is* unusual and makes this plan feel more like a bowl of jelly than it looks like anything else is that the numbers keep changing on which the plan is based. And what I have when I look at Plan #1 is certain income. When I look at the next plan the numbers have changed. I'm still not clear on exactly who can do what with the gravel.
>
> I am not satisfied that the Timbers test has been met. Now that's sort of taking it backwards, by saying that there is no likelihood for a plan that can be confirmed within a reasonable time, but that does affect whether the bank should be given relief to foreclose.
>
> I just don't see any reason to change my prior ruling granting relief from stay to Digital Federal Credit Union. I just have no confidence in this debtor going forward to a confirmable plan. So the motion to reconsider is denied. The amended disclosure statement I'll mark as withdrawn. . . .

The bankruptcy court did not issue a memorandum or written opinion memorializing findings of fact or conclusions of law. On February 9, 2011, Tucy filed this appeal.[3]

JURISDICTION

Before addressing the merits of an appeal, we must determine whether we have jurisdiction, even if the litigants do not raise the issue. Aja v. Emigrant Funding Corp. (In re Aja), 442 B.R. 857, 860 (B.A.P. 1st Cir. 2011) (citation omitted). We have jurisdiction to hear appeals from: (1) final judgments, orders and decrees; or (2) with leave of court, from certain interlocutory orders. Id. (citations omitted). A decision is considered final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," whereas an interlocutory order "only decides some intervening matter pertaining to the cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits." Id. (internal quotations omitted). Ordinarily, an order granting relief from stay is a final, appealable order. See Rodriguez Camacho v. Doral Financial Corp. (In re Rodriguez Camacho), 361 B.R. 294, 299 (B.A.P. 1st Cir. 2007). The same is generally true of an order denying reconsideration of an order granting relief from stay. Id. Often an appeal is taken from both an order granting relief from stay and an order denying reconsideration.

In this instance, the appeal was taken solely from the order denying reconsideration of the order granting relief from stay. The issues addressed by the parties, however, relate to the appropriateness of the underlying order granting relief from stay. This inconsistency may have emanated from the travel of this case. As mentioned above, the original order granting relief from stay was suspended for several months after Tucy sought reconsideration. During this

[3] The bankruptcy court stayed the order granting relief from stay pending appeal.

period the bankruptcy court considered new evidence on the propriety of relief from stay. In the end, the bankruptcy court declined to reconsider the original order and lifted the suspension. Thus, it is apparent that "the propriety of denying reconsideration [was] inextricably intertwined with the correctness of the original order." Alstom Caribe, Inc. v. George P. Reintjes Co., Inc., 484 F.3d 106, 112 (1st Cir. 2007). Accordingly, and because Digital appears to have acquiesced to our review of the underlying order, see Vicenty v. San Miguel Sandoval (In re San Miguel Sandoval), 327 B.R. 493, 504 (B.A.P. 1st Cir. 2005), we conclude that Tucy's limited notice of appeal does not present a jurisdictional bar to our review of the order granting relief from stay.

STANDARD OF REVIEW

A bankruptcy court's findings of fact are reviewed for clear error and its conclusions of law are reviewed *de novo*. See Lessard v. Wilton-Lyndeborough Coop. School Dist., 592 F.3d 267, 269 (1st Cir. 2010). Usually, orders granting relief from the automatic stay are reviewed for abuse of discretion. See Aguiar v. Interbay Funding, LLC (In re Aguiar), 311 B.R. 129, 132 (B.A.P. 1st Cir. 2004) (citing Soares v. Brockton Credit Union (In re Soares), 107 F.3d 969, 973 (1st Cir. 1997)).

DISCUSSION

"Upon the filing of a petition for bankruptcy an automatic stay arises by operation of law." First Agricultural Bank v. Jug End in the Berkshires, Inc. (In re Jug End in the Berkshires, Inc.), 46 B.R. 892, 898 (Bankr. D. Mass. 1985). The Bankruptcy Code provides "a procedure whereby a creditor can seek to have the stay lifted with respect to its claim . . . ." Id. (citing 11 U.S.C. § 362(d)). Section 362(d) provides for the lifting of the automatic stay as follows:

> 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; [or]

(2) with respect to a stay of an act against 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).

Because § 362(d) is "phrased in the disjunctive, the moving party need prevail on only one of the . . . alternative tests to obtain relief from the automatic stay." In re Jug End in the Berkshires, Inc., 46 B.R. at 898 (citation omitted). However, because the requirements set forth in subparagraphs (A) and (B) of paragraph (2) are expressed in the conjunctive, each must be met if relief is to be obtained under that paragraph. United States v. Smithfield Estates, Inc. (In re Smithfield Estates, Inc.), 48 B.R. 910, 913 (Bankr. D.R.I. 1985) (citations omitted). Under subparagraph (A), it must be shown that "the debtor does not have an equity in such property;" and under subparagraph (B) it must be shown that "such property is not necessary to an effective reorganization." The burden of proof under subparagraph (A) falls upon the party seeking relief and the burden of proof under subparagraph (B) falls on the opposing party. See 11 U.S.C. § 362(g).

In denying reconsideration, the bankruptcy court stated that "the Timbers test" had not been met. In light of that reference and the bankruptcy court's earlier statement upon granting relief from stay that "I think you've reached the limit of my ability to see a plan in the foreseeable future, as the Supreme Court requires," we conclude that the bankruptcy court based its decisions upon paragraph (2) of § 362(d). See United Sav. Ass'n of Texas v. Timbers of

Inwood Forest Assocs., Ltd., 484 U.S. 365, 368 (1988). Specifically, it appears that the bankruptcy court concluded after months of hearings that Tucy had failed to meet his burden of establishing that the Property was "necessary to an effective reorganization" under subparagraph (B) of § 362(d)(2) by showing that he had "'a reasonable possibility of a successful reorganization within a reasonable time.'" See id. (citations omitted). There is ample evidence in the record to sustain that conclusion, including the operational history of Tucy's enterprises, his ever changing financial projections, and what appears to have been a questionable and potentially burdensome loan commitment from a third party. Yet despite great effort on our part to comb the record, we found no facts to support a finding of no equity under § 362(d)(2)(A). Thus, it is our conclusion that the bankruptcy court erred in granting Digital relief from stay solely on the basis of § 362(d)(2)(B).

CONCLUSION

Based on the foregoing, we **REVERSE** the orders of the bankruptcy court granting relief from stay and denying reconsideration.