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U.S. BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

In re:)	Chapter 11
GEORGIA C. BACH,)	No. 4:06-bk-01614-JMM
_____ Debtor.)	
)	MEMORANDUM DECISION
CEDAR FUNDING, INC.,)	
)	
Movant,)	
vs.)	
GEORGIA C. BACH, Debtor,)	
_____ Respondent.)	

This court heard evidence concerning Cedar Funding, Inc.'s Motion for Relief from the Automatic Stay on January 5, 2005. Cedar Funding was represented by Walter F. Wood; the Debtor appeared *pro se*. After consideration of the evidence, the arguments of the parties, and the law, the court now rules.

JURISDICTION

This court has jurisdiction over this core proceeding. 28 U.S.C. §§ 1334 and 157(b)(2)(G).

ISSUE

The issue is whether the automatic stay, created by operation of law pursuant to 11 U.S.C. § 362(a), should be modified or dissolved.

1 2. Georgia Bach's case was filed within hours of the hearing in which this Court lifted
2 the automatic stay in her husband's chapter 13 bankruptcy case.

3 3. The commercial property at issue in this lift stay proceeding (and described in the
4 caption, above) (the "Property") is encumbered by two consensual liens; a first lien to The San Juan
5 Company, in the current amount of approximately \$1,035,000, plus accruing interest, attorneys' fees and
6 costs; and a second lien in favor of Cedar Funding, in the current amount of \$1,050,000, including
7 foreclosure costs of \$9,938.30, and attorneys fees of approximately \$6,500.00. The second lien has a per
8 diem interest accrual of \$396.27.

9 4. On or about August 3, 2005, Thomas and Georgia Bach executed and delivered to
10 Cedar Funding a Promissory Note secured by a Deed of Trust dated July 29, 2005 (the "Note") (see Ex. 3.)
11 The Note subsequently was modified on September 6, 2005. (See Ex. 3.) A copy of the Note and
12 modification is attached as Exhibit B to the Motion for Relief filed at Docket 13 in Thomas Bach's case,
13 Case No. 4:06-bk-1124-JMM, and is incorporated herein by this reference.

14 5. The Note and Deed of Trust (see Ex. 2) create a valid, properly perfected, and
15 enforceable lien on the Property, in second place behind the first position lien held by The San Juan
16 Company, LLC, a California limited liability company.

17 6. Cedar Funding caused the recording of its Notice of Default and Election to Sell
18 Under Deed of Trust on May 24, 2006, in the Official Records of Monterey County (California) at Document
19 No. 55070. (See Ex. 1.)

20 7. The San Juan Company recorded its Notice of Default and Election to Sell Under
21 Deed of Trust on July 27, 2006, in the Official Records of Monterey County (California) at Document No.
22 2006065991.

23 8. The Property has unpaid real property taxes whose priority is senior to both
24 consensual liens, in the amount of roughly \$17,000, plus accruing interest.

25 9. Prior to the commencement of the case, Cedar Funding commenced a Trustee's Sale
26 scheduled to be held on September 22, 2006, for the Bachs' failure to make the required monthly payments
27 in the amount of \$10,500.00 each beginning March 1, 2006, and each month thereafter, plus accrued and
28 accruing interest, late charges, account servicing fees, and attorney's fees and costs , all in the amount shown

1 above. As of December 31, 2006, the amount claimed by Cedar Funding will be \$1,033,137, with a per
2 diem of \$396.27 and foreclosure costs of \$9,938.30 and attorneys' fees of approximately \$6,500.00 for a total
3 of approximately \$1,050,000.00.

4 10. No payments have been made on the San Juan Company first position lien since
5 March 2006. According to the Notice of Default filed by The San Juan Company, the principal amount of
6 its loan is \$980,000 and the amount owed as of July 7, 2006, was \$70,105.15, plus accrued and accruing
7 interest, late charges, account servicing fees, and attorneys' fees and costs. Cedar Funding believes that
8 without foreclosure costs or attorneys' fees, San Juan Company will be owed as of December 31, 2006,
9 \$1,034,816.

10
11 **B. Additional Facts, Found By the Court, After Trial**

12
13 1. The value of the commercial real property at issue lies within a range of \$2,150,000 -
14 \$2,400,000 (Affidavit of Glen J. Gurries, dated December 14, 2006).

15 2. The liens against the subject Property, as of December 31, 2006, are:

16
17

Real Property Taxes	\$ 17,000
First Lien (San Juan)	1,034,816
Second Lien (Cedar Funding)	<u>1,050,000</u>
	\$2,101,816

18
19
20
21

22 3. The Debtor and her husband have submitted a proposal for purchase of the Property
23 for \$2,200,000. (Ex. A.) There was no evidence that that offer was acceptable, but for purposes of this
24 hearing, the court will assume that the offer will be accepted, and also that it will close by February 15, 2007.

25 4. If the Property were to be sold, there would customarily be a broker's commission of
26 10%. Here, testimony revealed that the broker would accept only a 3% commission, or \$66,000.

27 5. No other admissible evidence regarding other possible sales was presented.
28

1 6. If the proposed sale were to occur, there would also be closing costs, title insurance,
2 and related fees which would result in at least another \$10,000 in deductions from the purchase price.

3 7. Interest runs on the existing liens at approximately \$803.72 per day, from
4 December 31, 2006, calculated as follows:

5		
6	Interest on Taxes	\$ 7.45 per day
7	Interest on San Juan Lien	400.00 per day
8	Interest on Cedar Funding Lien	<u>396.27 per day</u>
9		\$803.72 per day

10
11 8. Even if the \$2.2 million sale were approved today, such sale would take
12 approximately 30 - 60 days to close, adding an additional interest burden of between \$24,111.60 and
13 \$48,223.20.

14 9. Thus, the status of the proposed sale offer and payments to be made from the proceeds
15 is:

16	Sale Offer	\$ 2,200,000.00
17	<u>Less:</u>	
18	• San Juan Lien (12/31/06)	(1,034,816.00)
19	• Cedar Funding Lien (12/31/06)	(1,050,000.00)
20	• Broker's Commission	(66,000.00)
21	• Real Property Taxes (12/31/06)	(17,000.00)
22	• Interest at \$803.72 per day from 01/01/07 - 02/14/07 (45 days) ¹	<u>(36,167.40)</u>
23	Total necessary to clear all debt against Property upon sale	\$ 2,203,984.40
24		

25 10. Upon a sale, there would be no money available for payment to unsecured creditors, or
26 the administrative expenses of this case.

27 _____
28 ¹ This is an anticipated closing time, with all variables on timing tipped in favor of the Debtor.

1 11. The court therefore finds that there is no equity in the Property.

2 12. The Debtor has filed no plan of reorganization.

3 13. The first lienholder on the Property has received no payments on its loan since March,
4 2006.

5 14. The second lienholder on the Property has received no payments since at least August,
6 2006.

7 15. Of the seven (7) tenants using the subject commercial Property, only four (4) are
8 currently paying rent.

9 16. The Property is not producing sufficient income to pay its operating expenses and debt
10 service, and, as a consequence, each of the lienholders against the Property is being injured economically.

11 17. Even a sale at \$2,200,000 will not effectively result in a reorganized debtor. Such
12 sale will merely pay existing lienholders, which desire to proceed in a non-bankruptcy forum instead of
13 bankruptcy court. Unsecured creditors will receive no benefit from the consensual sale of the Property
14 proposed by the Debtor, in any event.

15
16 **THE LAW**
17

18 The Bankruptcy Code, 11 U.S.C. § 362(d) provides, in pertinent part:

19 (d) On request of a party in interest and after notice and a hearing, the
20 court shall grant relief from the stay provided under subsection (a) of this section,
21 such as by terminating, annulling, modifying, or conditioning such stay—

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

23 (2) with respect to a stay of an act against property under
24 subsection (1) of this section, if--

25 (A) the debtor does not have an equity in
such property; and

26 (B) such property is not necessary to an
27 effective reorganization;

28 11 U.S.C. § 362(d).

1 Congress intended that stay relief proceedings be summary in nature, wherein the only issues
2 are to be the "lack of adequate protection, the debtor's equity in the property, and the necessity of the
3 property to an effective reorganization of the debtor, or the existence of other cause for relief from the stay."
4 *Computer Communications, Inc. v. Codex Corp. (In re Computer Communications, Inc.)*, 824 F.2d 725, 729
5 (9th Cir. 1987) (quoting S.Rep. No. 989 at 55, *reprinted in* 1978 U.S.C.C.A.N. at 5841). The validity of a
6 lien or claim may not be litigated during the hearing, but only whether there is a "colorable claim of a lien"
7 on the property. See *In re Vitreous Steel Prods. Co.*, 911 F.2d 1223, 1234 (7th Cir. 1990); *Johnson v.*
8 *Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985).

9 "Cause" is not clearly defined in the Bankruptcy Code: its existence must be determined on
10 a case-by-case basis in the court's discretion. *Benedor Corp. v. Conejo Enters., Inc. (In re Conejo Enters.,*
11 *Inc.)*, 96 F.3d 346, 352 (9th Cir. 1996); *Deronde v. Shirley (In re Shirley)*, 134 B.R. 940, 943 (9th Cir. BAP
12 1992).

13 "Equity" is defined as "the value, above all secured claims against the property, that can be
14 realized from the sale of the property for the benefit of the unsecured creditors." *Pistole v. Mellor (In re*
15 *Mellor)*, 734 F.2d 1396, 1400 n.2 (9th Cir. 1984). All liens against the encumbered property should be
16 counted in determining whether the debtor has equity in the property under § 362(d)(2)(A). *Id.*; *Stewart v.*
17 *Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984) (equity is "the difference between the property value and the
18 total amount of liens against it").

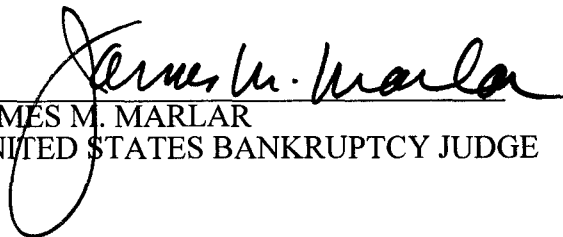
19 Lack of equity alone is not sufficient to grant relief from the automatic stay under § 362(d).
20 In addition, such property must not be necessary to an "effective" reorganization. The Supreme Court has
21 interpreted this provision to require a debtor to prove not just that the property is indispensable to its
22 reorganization effort, but that the property is essential for an effective reorganization that is "in prospect."
23 This means that there must be a "*reasonable possibility of a successful reorganization within a reasonable*
24 *time.*" *United Savings Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 375-76, 108 S. Ct. 626,
25 633, 98 L. Ed. 2d 740 (1988) (emphasis added). A reorganization plan that is "wholly speculative" is not
26 feasible and cannot be confirmed. See *Wiersma v. O.H. Kruse Grain & Milling (In re Wiersma)*, 324 B.R.
27 92, 112 (9th Cir. BAP 2005).

28

1 real property. Simultaneously with the entry of this Memorandum Decision, the court will issue its order
2 denying the Debtor's request to use the cash collateral.

3 A separate order will issue pursuant to FED. R. BANKR. P. 9021. Any party wishing to appeal
4 has ten (10) days from the entry of the order within which to do so. FED. R. BANKR. P. 8002. Arrangements
5 may be made with the court's reporter to obtain copies of the transcript.

6
7 DATED: January 5, 2007.

8
9 
10 JAMES M. MARLAR
11 UNITED STATES BANKRUPTCY JUDGE

11 COPIES served as indicated below
12 this 5th day of January, 2007, upon:

13 Georgia C. Bach
14 1967 West Calle Mecadora
15 Tucson, AZ 85745-2124
16 U.S. Mail

17 Walter F. Wood
18 110 S. Church Ave., Ste 4398
19 Tucson, AZ 85701
20 Email walterfwood@aol.com

21 Office of the United States Trustee
22 230 North First Avenue, Suite 204
23 Phoenix, AZ 85003-1706
24 U.S. Mail

25 By /s/ M. B. Thompson
26 Judicial Assistant
27
28