

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

IN RE:

Case No.: 17-10942-RAM

900 RETAIL 101, LLC, ET. AL.,

Debtor,
_____ /

BRICKELL BANK'S MOTION FOR ORDER PROHIBITING THE DEBTOR'S USE OF CASH COLLATERAL OR, IN THE ALTERNATIVE, ADEQUATE PROTECTION AND MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR STAY RELIEF
(Expedited Hearing requested with respect to the Debtor's unauthorized use of Brickell Bank's Cash Collateral)

Brickell Bank f/k/a Espirito Santo Bank ("Brickell Bank") seeks an order prohibiting the Debtor's use of its Cash Collateral or, in the alternative, adequate protection, and ultimately, an order dismissing this case as a bad faith filing or, in the alternative, motion for stay relief to proceed with the stipulated foreclosure sale, and as good cause for same, states as follows:

I. LOAN

1. On or about July 16, 2008, 900 Retail 101, LLC ("900 Retail 101" or "Debtor"), 900 Retail 104, LLC and 900 Retail 105, LLC executed and delivered a Promissory Note to Brickell Bank in the original amount of \$6,760,000.00. On or about December 14, 2010 effective June 1, 2010, 900 Retail 101, LLC, 900 Retail 104, LLC and 900 Retail 105, LLC executed and delivered a First Replacement Note to Brickell Bank in the original amount of \$6,760,000.00. On or About December 14, 2010, 900 Retail 101, LLC, 900 Retail 104, LLC and 900 Retail 105, LLC executed and delivered a Second Replacement Note to Brickell Bank in the original amount of \$4,260,000.00 (collectively the "Note").

2. 900 Retail 101 executed and delivered a purchase money mortgage securing payment of the Note to Brickell Bank was recorded on July 23, 2008, in Official Records Book 26492 at pages 25022512 in the Public Records of Miami-Dade County, Florida, and modified on December 14, 2010, effective June 1, 2010, and was recorded on December 22, 2010, in Official Records Book 27531 at pages 0095-0097 in the Public Records of Miami-Dade County, Florida (collectively the "Mortgage"), which provided a first priority lien in the real property located at 900 Biscayne Boulevard, Unit 101, Miami, Florida 33132 (the "Real Property"). 900 Retail 104, LLC and 900 Retail 105, LLC also executed mortgages in favor of Brickell Bank that provided first priority liens on Unit 104 and Unit 105, respectively.

3. On or about July 16, 2008, 900 Retail 101, LLC executed and delivered an Assignment of Leases, Rents and Profits (the "Assignment of Rents"), which was recorded on July 23, 2008, in Official Records Book 26492 at pages 2513-2516 in the Public Records of Miami-Dade County, Florida.

4. 900 Retail 101, LLC, 900 Retail 104, LLC and 900 Retail 105, LLC defaulted under the Note and their respective Mortgages, having failed to make the payment due on February 15, 2016 and all subsequent payments, and as a result Brickell Bank properly executed its right to accelerate all sums due under the Note and Mortgages.

5. On June 14, 2016, Brickell Bank filed a foreclosure action against 900 Retail 101, among others, to foreclose on its Mortgage in the Miami-Dade County Circuit Court, Case No. 2016-CA-015217 (the "Foreclosure Action").

6. On or about June 28, 2016, Brickell Bank made demand under the Assignment of Rents.

II. STIPULATED FORECLOSURE

7. On or about October 19, 2016, Brickell Bank and Debtor and the other 900 Retail Entities entered into a Stipulation for Agreed Partial Judgments and Foreclosure Sale Upon Default, a true and correct copy of which is attached hereto as Exhibit "A" (the "Stipulation"). The Stipulation affirmed the foregoing facts, and in pertinent part with respect to Debtor, provided:

A. Debtor consented to the entry of Partial Final Judgment of Foreclosure in favor of Brickell Bank for the foreclosure of the Real Property and as of October 19, 2016 for damages in the amount of \$2,718,177.66, which includes the principal amount of \$2,548,771.13, interest in the amount of \$19,859.21 through June 15, 2016, interest from June 16, 2016 through October 19, 2016 in the amount of \$210,587.08, late fees in the amount of \$13,611.63, title search (prorated) in the amount of \$105.46, attorneys' fees (prorated) in the sum of \$14,000.27, filing fees (prorated) in the amount of \$1,367.93, process server (prorated) in the amount of \$296.60, clerk sale fee in the amount of \$70.00, notice of sale publication fee in the amount of \$245.00, less excess escrow in the amount of [\$50,091.63] and rent collected by Plaintiff in the amount of [\$40,645.00]. This Judgment was to bear interest at 4.75% per annum from the date of entry.

B. The foreclosure sales would be set for the last week in January, 2017.

C. In the interest of amicably settling this matter, Brickell Bank agreed to provide Debtor a reduction of \$112,099.35 towards satisfying and paying off the judgment, if paid in full by December 28, 2016.

D. Time was strictly of the essence regarding the Stipulation and every provision thereof. And Debtor's failure to satisfy in full the judgment entitled Brickell Bank to proceed with the Foreclosure Sale.

8. Pursuant to the terms of the Stipulation, on October 19, 2016, the State Court entered a Partial Final Judgment of Foreclosure in the amount of \$2,808,669.29,

scheduling the foreclosure sale of the Real Property for January 27, 2017 (the "Final Judgment"). A true and correct copy of the Final Judgment is attached hereto as Exhibit "B."

III. DEBTOR'S UNSUCCESSFUL EFFORT TO UPEND STIPULATED FORECLOSURE

9. Notwithstanding the Stipulation, on January 21, 2017, Debtor filed in the Foreclosure Action an emergency motion to cancel the sale, claiming that it had "a loan agreement with a third party that would include a payoff of the remaining loan balance owed to the Plaintiff," and that the loan had been scheduled to close on December 16, 2016, but did not close and that the Debtor and third party lender were still "actively involved in discussions to attempt to close the loan." (the "Emergency Motion"). A true and correct copy of the Emergency Motion is attached hereto as Exhibit "C." But when the Emergency Motion was heard by the State Court on January 26, 2017, Debtor provided no evidence that there was a committed lender in the offing, and the State Court denied the Emergency Motion. A true and correct copy of the Order denying the Emergency Motion is attached hereto as Exhibit "D."

10. Having failed to undue the stipulated foreclosure sale, on January 26, 2017, Debtor filed the instant chapter 11 case.

IV. THE BANKRUPTCY CASE

11. Debtor's bankruptcy filing was barebones, and even as of this date, it has failed to file any schedules. What is not in dispute is the fact that this is a single asset real estate case, and the rents from the Real Property are Brickell Bank's cash

collateral.¹ Yet, Debtor has neither contacted Brickell Bank with respect to the use of its Cash Collateral nor has it filed any motion requesting that this Court approve the use of its Cash Collateral.

12. There is no dispute that this is nothing more than a two-party dispute between the Debtor and its secured creditor. The Debtor has no other secured creditors and minimal unsecured creditors.

V. PROHIBITED USE OF CASH COLLATERAL

13. The Rents are Brickell Bank's cash collateral. See 11 U.S. C. § 363(a). Debtor is prohibited from using Brickell Bank's Cash Collateral without Brickell Bank's consent or an order from this Court. See 11 U.S. C. § 363(c)(2). Brickell Bank has not consented to the use of its Cash Collateral, nor has Debtor requested the use of Brickell Bank's Cash Collateral. Similarly, the Court has not authorized the Debtor's use of Brickell Bank's Cash Collateral, nor has the Debtor even requested the Court authorize the use of Brickell Bank's Cash Collateral. Brickell Bank has reason to believe that Debtor has not segregated its Cash Collateral as required by Section 363 of the Bankruptcy Code and, rather, is collecting Brickell Bank's Rents and using the Rents without Brickell Bank or the Court's authorization.

14. Section 363(e) of the Bankruptcy Code provides that "on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold or leased by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale or lease as is necessary to provide adequate protection of such interest."

11 U.S.C. § 363(e).

¹ In fact, the Rents are Brickell Bank's property, as the parties agreed that Brickell Bank was entitled to the Rents in excess of what was absolutely needed to maintain the Real Property. See the January 23, 2017 letter from Debtor's counsel attached hereto as Exhibit "E."

15. As a result, Brickell Bank is entitled to an order prohibiting the Debtor's use of its Cash Collateral. Should this Court determine however, that the Debtor is authorized to use any of Brickell Bank's Cash Collateral, Debtor should be required to make monthly adequate protection payments to Brickell Bank and provide weekly reports on its use of case collateral, in addition to any other forms of adequate protection that may be appropriate under the circumstances.

VI. MOTION TO DISMISS

16. The Courts in the Eleventh Circuit have consistently found that "bad faith" constitutes "cause" for dismissal under 11 U.S.C. §1112(b). *In re Phoenix Piccadilly, Ltd.*, 849 F.2d 1393 (11th Cir. 1988) (listing factors evidencing bad faith); *see also In re State Street Houses, Inc.*, 356 F.3d 1345 (11th Cir. 2004) (affirming dismissal of petition on "bad faith" grounds based upon the *Phoenix Piccadilly* factors); *In re Midway Inv., Ltd.*, 187 B.R. 382, 388 (Bankr. S.D. Fla. 1995) (noting that single asset real estate Chapter 11 debtor with few creditors and applying *Phoenix Piccadilly* factors are appropriate in single asset cases).

17. Moreover, with respect to single asset real estate cases, as in the instant case, the Eleventh Circuit has found that the *Phoenix Piccadilly* factors are the appropriate guidelines for consideration when evaluating whether a chapter 11 petition of a single asset real estate case was filed in bad faith. *In re State Street Houses, Inc.*, 356 F.3d at 1347. Specifically, the Eleventh Circuit stated in *Phoenix Piccadilly* that "there is no particular test for determining whether a debtor has filed a petition in bad faith." Instead, "the Court may consider any factors which evidence 'an intent to abuse the judicial process and the purposes of the reorganization provisions,' or in particular,

factors which evidence that the petition was filed 'to delay or frustrate the legitimate efforts of secured creditors to enforce their rights.' ” *Piccadilly* 849 Fed.2d at 1394 (quoting *In re Albany Partners, Ltd*, 749 Fed.2d 670, 674 (11th Cir. 1984)).

18. The Eleventh Circuit has identified the following factors which evidence a lack of good faith filing: (1) whether the debtor is a so-called single asset debtor; (2) whether the debtor has relatively few unsecured claims whose claims are small in relation to those of secured creditors; (3) whether the debtor has a limited number of employees; (4) whether the asset of the debtor is subject to a pending foreclosure action as a result of arrearages on the indebtedness; (5) whether the debtor's financial problems involve largely a dispute between the debtor and secured creditor which can be resolved in a pending state court action; and (6) whether the timing of the debtor's filing evidences an attempt to delay or frustrate the legitimate efforts of the secured creditors to enforce their rights under state law. *In the Matter of Vallambrosa Holdings, LLC (In re Vallambrosa Holdings)*, 419 B.R. 81, 85 (Bankr. S.D. Ga. 2009) (citing *Phoenix Piccadilly*, 849 F.2d at 1395) (internal citations omitted).

19. The *Phoenix Piccadilly* factors “are appropriate guidelines for consideration when evaluating whether a Chapter 11 petition in a single asset real estate case was filed in bad faith.” *Id.* (quoting *In re State Street Houses*, 356 F. 3d at 1347). In the instant case, the Debtor's bankruptcy should be dismissed as all of the *Phoenix Piccadilly* factors are present:

- A. the Debtor has only one asset, the Real Property;
- B. the Debtor has few unsecured creditors—three—whose claims are relatively small compared to the claim of Brickell Bank;
- C. it is believed that the Debtor has no employees;

- D. the Real Property is the subject of a final judgment of foreclosure as a result of arrearages on the debt;
- E. the Debtor's financial problems essentially are a dispute between Debtor and Brickell Bank that have already been resolved in State Court; and
- F. the timing of Debtor's bankruptcy filing—on the eve of the stipulated foreclosure sale after the State Court denied Debtor's Emergency Motion to cancel the foreclosure sale—evidences the Debtor's intent to delay and frustrate Brickell Bank's efforts to enforce its stipulated to state law rights.

**VII. ALTERNATIVELY, STAY RELIEF IS WARRANTED TO RENOTICE
FORECLOSURE SALE**

20. Inevitably, Debtor will make the same argument to this Court that was rejected by the State Court upon hearing its Emergency Motion; that it has a third party lender in the offing ready and willing to pay off Brickell Bank. Should the Debtor be able to convince this Court of what it was unsuccessful in convincing the State Court or, if it is unsuccessful in convincing the Court, there remains no reason why this Court should not grant Brickell Bank stay relief to allow it to seek an order from the State Court rescheduling the foreclosure sale and to proceed with the sale. This process will take no less than 35 days from whenever the Court grants the requested relief—and actually, the Debtor would have substantially more time considering the time between its bankruptcy filing and the time the Court grants the requested relief. If the Debtor can close on the third party loan and pay off Brickell Bank before the rescheduled foreclosure sale, then the foreclosure sale would necessarily be cancelled.

21. Section 362(d) of the bankruptcy code states:
On request of a party in interest and after notice and 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 lack of adequate protection of an interest in property of such party in interest.

22. Here, cause exists because not more than four months ago, this Debtor stipulated to the entry of a final judgment of foreclosure and the January 27, 2017 foreclosure sale. In exchange for its agreement, Brickell Bank agreed to take a lesser payoff if the Debtor paid by December 28, 2016. Having obtained the benefit of the bargain—the right to pay a discounted amount—the Debtor is now attempting to use this Court to renege on its part of the bargain. Having filed the instant case only as a desperate delay tactic, there is sufficient good cause to grant Brickell Bank relief from the stay as suggested. And because Section 362(d) is in the disjunctive, and having showed good cause for granting relief from the stay, Section 362(d)(3) should provide the Debtor no refuge. Moreover, under the circumstances presented here, Brickell Bank also requests that the Court waive the 14 day stay of Rule 4001(a)(3), and order that stay relief be effective immediately.

WHEREFORE, Brickell Bank respectfully requests that this Court hear its Motion to Prohibit the Use of its Cash Collateral on an expedited basis and enter an order granting the Motion or, in the alternative, require the Debtor to provide Brickell Bank adequate protection, and to ultimately enter an order dismissing the instant bankruptcy case or, in the alternative, grant it relief from the automatic stay to allow Brickell Bank to reschedule and proceed with its stipulated foreclosure sale, and for such other and further relief as Court deems just and proper.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via CM/ECF to all registered to receive electronic noticing in this case and via First Class U.S. Mail to all parties on the attached service list on February 1, 2017.

Respectfully submitted,

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