

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

ABERDEEN LAND II, LLC,

Debtor.

Case No. 3:13-bk-04103-JAF
Chapter 11

JOINT MOTION FOR RELIEF FROM THE AUTOMATIC STAY
(2 hour evidentiary hearing requested within 30 days)

Aberdeen Community Development District (the "CDD") and U.S. Bank National Association as trustee under that certain Master Trust Indenture dated as of October 1, 2005 by and between Aberdeen Community Development District and the Trustee ("U.S. Bank," and together with the CDD, the "Movants"), by and through their undersigned attorneys and pursuant to 11 U.S.C. §§ 1112(b) and 362(d), hereby file this *Joint Motion for Relief from Automatic Stay* (the "Motion") and request that this Court enter an order granting Movants relief from the automatic stay for cause to allow Movants to proceed with all rights and remedies, including but not limited to rescheduling a foreclosure sale on the single asset real estate owned by Aberdeen Land II, LLC (the "Debtor"), or in the event the Court sets this Motion for hearing, schedule an evidentiary hearing for at least two hours within thirty (30) days after the filing of this Motion, and in support thereof, respectfully state as follows:

BACKGROUND

1. On July 1, 2013 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United State Code (the "Bankruptcy Petition").
2. This Court has jurisdiction to consider this Motion under 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2).

The Debtor's Only Significant Asset

3. The Debtor's sole significant asset consists of that certain real property identified on the Debtor's Schedule A (Doc. No. 27) as "912 undeveloped single family and multi-family residential lots in the Aberdeen Development as well as 28.1 +/- acres of property which is zoned for the development of commercial and or/ [sic] retail space" (the "Property"), valued by the Debtor at \$41,027,052.00.¹

4. The Debtor's Bankruptcy Petition (Doc. No. 1) characterizes the business of the Debtor as the development of "single asset real estate" as defined in 11 U.S.C. § 101(51B).

The Community Development District Foreclosure Action

5. The CDD was established pursuant to chapter 190, Florida Statutes, in connection with the development of the community in which the Property lies. The Property is subject to special assessments levied by the CDD pursuant to chapters 170, 190, and 197, Fla. Stat. for the construction and development of infrastructure and improvements related to the Property and surrounding community, including but not limited to operation and maintenance assessments to fund the CDD (the "CDD Liens"). Based on information derived from the Debtor's schedules, as of the Petition Date, the CDD Liens secure debts exceeding \$23.7 million.²

¹ The Debtor's only other assets consist of a bank account containing funds totaling \$138,809.88, and timber cutting and development rights of unknown value related to the Debtor's interest in the Property, as described on the Debtor's Schedule B (Doc. No. 27).

² Movants do not concede the accuracy of the Debtor's estimation of the value of the outstanding indebtedness, nor have they filed a proof of claim.

6. U.S. Bank serves as the trustee for a trust indenture that governs the bonds issued by the CDD, which are secured by the special assessments on the Property levied by the CDD.

7. Pursuant to Fla. Stat. § 170.09, the CDD Liens are “coequal with the lien of all state, county, district, and municipal taxes, superior in dignity to all other liens, titles, and claims, until paid.” The CDD has the authority to collect and foreclose the CDD Liens pursuant to chapters 170 and 173 of the Florida Statutes.

8. On or around December 3, 2010, the CDD commenced actions to foreclose the CDD Liens on the Property in the Circuit Court for the Seventeenth Judicial Circuit in and for St. Johns County, Florida (the “Foreclosure Actions”). At the time, the properties subject to the Foreclosure Actions were owned by Aberdeen Development, LLC and Aberdeen of St. Johns, LLC.

9. Aberdeen Development, LLC owned unplatted property anticipated to be developed with 652 residential lots plus the 28.1 +/- acres of commercial property and Aberdeen of St. Johns, LLC owned unplatted property anticipated to be developed with 260 residential lots.

Conveyance of the Property to the Debtor

10. Following the commencement of the Foreclosure Actions, Aberdeen Development, LLC conveyed its interests in the Property to the Debtor by way of that certain Warranty Deed executed on August 24, 2011 and recorded on September 9, 2011 at Book 3472, Pages 1562 to 1569, of the Official Records of St. Johns County, Florida.

11. Approximately five months prior to the Petition Date, Aberdeen of St. Johns, LLC conveyed its interest in the Property to the Debtor by way of that certain Quit Claim Deed

executed on January 31, 2013 and recorded on February 11, 2013 at Book 3684, Pages 1552 to 1562, of the Official Records of St. Johns County, Florida.

12. Foreclosure sales of the Property were scheduled in the Foreclosure Actions for July 2, 2013 (the "Foreclosure Sales"), one day after the Petition Date.

The Debtor's Scheduled Debts

13. Other than the CDD Liens, the only other secured debt encumbering the Property, all of which are inferior to the CDD Liens, consists of the following indebtedness:

- a. Various tax certificate liens on the Property totaling \$343,515.65, identified on Debtor's Schedule E;³
- b. A mortgage lien in favor of Aberdeen Lend, LLC secured by 652 of the undeveloped residential lots plus the 28.1 +/- acres of commercial property that make up the majority of the Property once owned by Aberdeen Development, LLC; and
- c. A mortgage lien in favor of BBX Capital Asset Management, LLC ("BBX") secured by 260 of the undeveloped residential lots that make up the remaining

³ Despite being listed as unsecured creditors on the Debtor's Schedule E (Doc. No. 27), the holders of tax certificate liens do not hold unsecured claims, but rather hold a non-recourse lien with the limited right to enforce such lien under the provisions of chapter 197 of the Florida Statutes. *See* § 197.432(2), Fla. Stat. ("A lien created through the sale of a tax certificate may not be enforced in any manner except as prescribed in this chapter."). Section 197.502 allows holders of outstanding tax certificates to apply for a tax deed after the expiration of two years from the issuance of the tax certificates. Any tax deeds issued as a result of a tax certificate holder's application are issued subject to any unsatisfied liens of a community development district. § 197.552, Fla. Stat. Therefore, the right to enforce the tax certificates listed in the Debtor's schedules may not have vested as of the Petition Date, and to the extent some rights did vest, the tax certificate holders simply had the right to apply for a tax deed, which likely did not occur as of the Petition Date. Even so, any tax deed would not affect the existence or priority of the CDD Liens.

portion of the Property that was once owned by Aberdeen of St. Johns, LLC (the “Aberdeen Wood Lots,” as defined in the Debtor’s Disclosure Statement).

14. According to the Debtor’s testimony at the section 341 meeting of creditors, Aberdeen Lend, LLC is an affiliate and insider of the Debtor.

15. Although the Debtor lists BBX as a secured creditor, at or around the time Aberdeen of St. Johns, LLC conveyed the portion of the Property it owned to the Debtor, (i.e., prior to the Petition Date), BBX offered to release its mortgage lien. According to the Affidavit of James Ricky Wood (“Wood”), the president of The Wood Development Company of Jacksonville (the “Wood Affidavit”), the managing member of Aberdeen of St. Johns, LLC, Wood expected to obtain a release of the BBX mortgage lien encumbering the Aberdeen Wood Lots prior to the transfer of the Aberdeen Wood Lots from Aberdeen of St. Johns, LLC to the Debtor. (Wood Affidavit, ¶ 6). The Debtor would not accept this and insisted on taking title to the Aberdeen Wood Lots subject to BBX’s lien. (Wood Affidavit, ¶ 6)

16. On or around July 1, 2013 (the Petition Date), the Debtor and BBX entered into an agreement to support confirmation of the Debtor’s chapter 11 plan (the “BBX Plan Support Agreement”), a copy of which is attached to the Disclosure Statement as Exhibit 2.

17. According to the Debtor’s Amended Schedule F (Doc. No. 51), the Debtor has no unsecured debts other than an equity contribution and alleged loan from the Debtor’s sole member, Aberdeen Portfolio, LLC, and a handful of alleged unsecured claims of unknown value owed to trade creditors and Stearns Weaver Miller.

18. At the meeting of creditors held pursuant 11 U.S.C. § 341 (“Meeting”), the Debtor’s representative, Edward Wendler, testified on behalf of the Debtor. Debtor’s counsel

confirmed at the Meeting that Mr. Wendler is the individual with the most knowledge of the Debtor's financial affairs and was authorized by the Debtor's officers to testify on behalf of the Debtor at the Meeting.

19. Mr. Wendler admitted at the 341 meeting that the debts listed on Schedule F, owed to Aberdeen Portfolio, LLC were treated in the Debtor's books and records as an equity contribution for the purchase of the Aberdeen Wood Lots.⁴

20. Mr. Wendler further testified that the Debtor does not owe any money to the other entities listed on Schedule F, and that the Debtor has never made a single payment to any of its purported creditors listed in its bankruptcy schedules.

21. No foreclosure action has been commenced by the mortgage lien holders with respect to the Property.

The Reasons for Filing this Case

22. According to the Debtor's Chapter 11 Case Management Summary (Doc. No. 13), the Debtor has no employees or revenues, and the sole reason for filing the Bankruptcy Petition is to seek protection from the CDD's continuation of the Foreclosure Actions and the sale of the Property at the Foreclosure Sales which were scheduled one day after the Petition Date. *See*

⁴ At the time of the Meeting, the Debtor's initial Schedule F (Doc. No. 27) listed a total amount of \$306,201.67 owed to Aberdeen Portfolio, LLC. At the Meeting, Mr. Wendler testified that the Debtor owed \$306,201.67 to Aberdeen Portfolio, LLC was an equity contribution, and that no other equity contributions were made to the Debtor. At the end of the Meeting, the Debtor's attorney again questioned Mr. Wendler as to whether the \$306,201.67 was a loan or an equity contribution, and Mr. Wendler again testified that it was an equity contribution, which is the way the transaction was reflected in its records. The United States Trustee instructed the Debtor to amend Schedule F consistent with its testimony. Instead, on August 26, 2013, the Debtor filed its Amended Schedule F (Doc. No. 51) to increase the amount owed to Aberdeen Portfolio, LLC to \$890,192.86, and ambiguously describes the claim as both an "Equitable Contribution" and a "Loan" that incurs "Interest."

Chapter 11 Case Management Summary, ¶ 3 (“As a result of the parties’ inability to reach a consensual resolution of the [Foreclosure Actions], the Debtor was forced to seek bankruptcy protection prior to the Foreclosure Sale.”).

23. At the Meeting, Mr. Wendler testified that the Debtor’s sole reason for filing the Bankruptcy Petition was to avoid the Foreclosure Sales. When the United States Trustee asked Mr. Wendler why the Debtor filed the Bankruptcy Petition, Mr. Wendler testified, in relevant part, as follows:

We would like to develop the land And in order to do that, we had worked for some number of months with the other major bondholder to try to work out a deal to restructure the CDD debt. Couldn’t come to terms on anything and they filed a notice of foreclosure. And so we, you know, filed a bankruptcy plan in order to avoid that foreclosure and restructure the debt.

24. Following this testimony, Debtor’s counsel clarified that the debt is not owed to the bondholders, but is rather owed to the CDD, who in turn must repay bonds issued to bondholders represented by an indenture trustee (U.S. Bank). The United States Trustee then recognized that, despite the nuanced relationship between the Debtor and the CDD and the bondholders, this case sounds like a “two-party dispute” between U.S. Bank and the Debtor. In response, Debtor’s counsel stated that this is not a two-party dispute because the Debtor also owns the Aberdeen Wood Lots, which is subject to a lien held by BBX. However, as described above, the only apparent purpose for the Debtor’s purchase of the Aberdeen Wood Lots was to artificially create an impaired accepting class.

25. On July 23, 2013, the Debtor filed its Plan (Doc. No. 31) and Disclosure Statement (Doc. No. 32), in which the Debtor proposes to fund the Plan with exit financing from

Aberdeen Lend, LLC, secured by an inferior lien on the Property in favor of Aberdeen Lend, LLC.

26. The Debtor's Plan proposes to pay allowed unsecured claims (all of which are held by the Debtor's sole member) in full, including interest on such claims at 3.25% from the Petition Date to the Effective Date of the Plan. In addition, all equity interests in the Debtor will remain unaltered upon confirmation of the Plan.

27. The Debtor is also proposing to refinance the liens held by BBX, even though a release of BBX's lien against the Property could have been received. Accordingly, no consideration exists for the proposed payment of the BBX liens through the Plan.

28. In summary, the Debtor filed the Bankruptcy Petition not only to avoid the Foreclosure Sales, but also to use financing obtained with a security interest on the CDD's collateral to pay an equity contribution (in full, plus post-petition interest) and a mortgage lien (held by BBX, which lien could have been released prior to the Debtor's assumption) that were both obtained without consideration and for the sole purpose of artificially creating an accepting impaired class to cramdown the treatment of the CDD lien.

RELIEF REQUESTED

29. Movants request that this Court grant the Movants relief from the automatic stay for cause to reschedule and proceed with foreclosure sales of the Property pursuant to 11 U.S.C. § 362(d). As grounds for cause, Movants submit that this bankruptcy case was filed in bad faith under the factors considered by the Eleventh Circuit in *In re Phoenix Piccadilly, Ltd.*, 849 F.2d 1393, 1394 (11th Cir. 1988).

MEMORANDUM OF LAW

30. Movants are entitled to relief from the automatic stay for “cause” pursuant to 11 U.S.C. § 362(d). Cause for relief may include the filing of a petition in bad faith. *In re Dixie Broadcasting, Inc.*, 871 F.2d 1023, 1026 (11th Cir. 1989); *Phoenix Picadilly*, 849 F.2d at 1394; *Matter of Coastal Nursing Ctr., Inc.*, 164 B.R. 788, 794 (Bankr. S.D. Ga. 1993) (“A Chapter 11 petition filed in bad faith may be ‘cause’ for a court to grant relief from the automatic stay under section 362(d)(1), as well as for dismissal of a case under section 1112 of the Code”).

31. The Debtor meets all of the factors identified by the Eleventh Circuit in *Phoenix Piccadilly* for a bad faith filing: (i) the Debtor is admittedly a single asset real estate entity; (ii) the Debtor has no known unsecured debt; (iii) the Debtor has no employees; (iv) the Debtor’s sole asset is subject to the Foreclosure Actions; (v) the Debtor’s only financial problems (and according to the Debtor, the sole reason for this bankruptcy filing) consist of a dispute between the Debtor and the CDD, its only genuine non-insider secured creditor, and such dispute can be easily resolved in the pending Foreclosure Action; and (vi) the Debtor filed the Bankruptcy Petition on the eve of the Foreclosure Sales. *Phoenix Piccadilly*, 849 F.2d at 1394-95.

32. The factors in *Phoenix Picadilly* are not an exhaustive list of factors to be considered in evaluating the good faith of a debtor’s bankruptcy filing. “[T]he courts 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.’” *Id.* at 1394 (quoting *In re Albany Partners, Ltd.*, 749 F.2d 670, 674 (11th Cir. 1984)). Other factors in this case support a finding of bad faith.

33. In addition to the *Phoenix Picadilly* factors, perhaps the most significant factor that supports a bad faith finding in this case is the fact that the Debtor purchased the Aberdeen Wood Lots from Aberdeen of St. Johns only five months before the Petition Date and required the secured debt on that property to remain attached to the property despite the ability to have it released for the apparent purpose of creating an artificial secured creditor to accept a chapter 11 plan in an effort to cramdown the Debtor's treatment of the CDD Liens. *See, e.g., In re Bal Harbour Club, Inc.*, 316 F.3d 1192, 1194 (11th Cir. 2003) (upholding bankruptcy court's finding of bad faith on record evidence including, *inter alia*, the fact that the Debtor "borrow[ed] [] \$1.145 million dollars, without agreeing to any repayment or an interest rate, from a person holding the control of an insider . . . in a last minute rush in order to gain a strategic advantage over another interested party").

34. All facts surrounding the Debtor's purchase of the Aberdeen Wood Lots support the conclusion that the purpose of such purchase was to gain a strategic advantage over the CDD in the event the Debtor filed a chapter 11 case, which was admittedly filed simply to avoid the Foreclosure Sales, including the following:

- a. The lots purchased from Aberdeen of St. Johns, LLC make up a relatively minor portion of the bankruptcy estate;
- b. The lots purchased were over-encumbered at the time of purchase. According to the Debtor's Disclosure Statement, the total debt owed to BBX as of the Petition Date was approximately \$16,857,764.90. The Debtor values the Aberdeen Wood Lots at \$14,659,010.00 on its Schedule A.

- c. A release of BBX's lien on the Aberdeen Wood Lots could have been achieved as part of the Debtor's acquisition, but the Debtor refused to purchase the Aberdeen Wood Lots absent the mortgage lien remaining on the property.
- d. The Debtor acquired the Aberdeen Wood Lots over two years after the commencement of the Foreclosure Action against the lots, and within five months prior to the Debtor's bankruptcy filing.
- e. BBX subsequently entered into the BBX Plan Support Agreement which included an agreement to a secured claim of \$2,600,000.00.
- f. This bankruptcy case is admittedly a two-party dispute but for the fact that BBX holds a lien on part of the Debtor's property.

35. As a result of the BBX Plan Support Agreement, BBX is the only impaired non-insider creditor of the Debtor voting in favor of the Plan, a requirement for confirmation under 11 U.S.C. § 1129(a)(10).

36. Despite the Debtor's efforts to artificially create an impaired accepting class, "[t]he possibility of a successful reorganization cannot transform a bad faith filing into one undertaken in good faith." *Phoenix Piccadilly*, 849 F.2d at 1395 ("the taint of a petition filed in bad faith must naturally extend to any subsequent reorganization proposal; thus, any proposal submitted by a debtor who filed his petition in bad faith would fail to meet section 1129's good faith requirement") (quoting *Natural Land Corp. v. Baker Farms, Inc. (In re Natural Land Corp.)*, 825 F.2d 296, 298 (11th Cir. 1987)).

37. In addition to the six factors listed above, the Eleventh Circuit in *Phoenix Piccadilly* dismissed the bankruptcy case as a bad faith filing based in large part on the

admissions of the Debtor's agents that "reveal[ed] the debtor's motive for filing its petition" was to forestall a foreclosure. 849 F.2d at 1395. As with *Phoenix Picadilly*, the Debtor's agent at the Meeting, Mr. Wendler, clearly testified that the only purpose for the Debtor's filing of the Bankruptcy Petition was to avoid the CDD's Foreclosure Sales and restructure the CDD liens. The Debtor argued that this case is not a two-party dispute because BBX holds a secured lien on the Debtor's property but has no relationship with the transactions between the Debtor and the CDD. The Debtor failed to mention to the United States Trustee that it also refused to purchase the Aberdeen Wood Lots unless they were encumbered by the BBX lien. The Debtor should not be allowed to artificially create secured debt in an attempt to convince this Court or the United States Trustee that this case is about anything other than an attempt to frustrate the CDD and the bondholders, the Debtor's only true non-insider creditors.

38. Other factors also support a finding that the Bankruptcy Petition was filed in bad faith, including but not limited to the fact that the Plan provides an apparent windfall to the Debtor's equity interest holder to the detriment of the only legitimate secured creditor, the CDD. The Plan proposes to satisfy in full the alleged unsecured claim of the Debtor's sole member, and to pay post-petition interest on such claim, despite the fact that the Debtor has previously made no payments on such claim in the past. To the extent the claim of the Debtor's sole member is an equity contribution rather than a loan, such claim is not entitled to any payment as an unsecured creditor. The Debtor's attempt to schedule unsecured claims that do not exist is just another façade raised by the Debtor, in addition to the BBX transaction, to avoid the inevitable conclusion that the Bankruptcy Petition was filed merely to stop a two-party dispute and frustrate the CDD's efforts to foreclose its lien.

39. In summary, based on the foregoing, the Bankruptcy Petition was filed with an intent to delay or frustrate the legitimate efforts of the CDD to enforce its rights. In addition, the Debtor's purchase of the Aberdeen Wood Lots from Aberdeen of St. Johns further evidences the Debtor's clear intent to abuse the chapter 11 process by artificially and unnecessarily creating an impaired accepting class of creditors. Despite the veneer of other secured and unsecured debt, the Debtor's manipulation of the bankruptcy process, only supports dismissal of this case as a bad faith filing. Every factor identified by the Eleventh Circuit in *Phoenix Piccadilly* for a bad faith filing is met here. This case is a textbook example of bad faith and Movants are entitled to relief from the automatic stay.

WHEREFORE, Movants, Aberdeen Community Development District and U.S. Bank National Association as trustee under that certain Master Trust Indenture dated as of October 1, 2005 by and between Aberdeen Community Development District and the Trustee, respectfully request that this Court: (i) enter an order granting Movants relief from the automatic stay for cause to allow Movants to proceed with all rights and remedies against the Property, including but not limited to rescheduling a foreclosure sale on the single asset real estate owned by the Debtor; (ii) in the event the Court sets this Motion for hearing, schedule an evidentiary hearing for at least two hours within thirty (30) days after the filing of this Motion; and (iii) for such other and further relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

I, Jonathan Sykes, hereby certify that a true and correct copy of the foregoing was served on September 25, 2013 via electronic mail using the Court's CM/ECF system and/or via First Class U.S. Mail to all parties on the attached creditor mailing matrix.

Respectfully submitted,

/s/ Jonathan Sykes

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Label Matrix for local noticing
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Case 3:13-bk-04103-JAF
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The preferred mailing address (p) above has been substituted for the following entity/entities as so specified by said entity/entities in a Notice of Address filed pursuant to 11 U.S.C. 342(f) and Fed.R.Bank.P. 2002 (g)(4).

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The following recipients may be/have been bypassed for notice due to an undeliverable (u) or duplicate (d) address.

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End of Label Matrix
Mailable recipients 47
Bypassed recipients 1
Total 48