IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re	)	**Chapter 11**
	)	
NNN CYPRESSWOOD DRIVE 25, LLC	)	**Case No. 12-50952**
	)	
Debtor.	)	**Hon. Carol A. Doyle**
	)	

RESPONSE IN OPPOSITION TO MOTION OF WBCMT 2007-C33 OFFICE 9729, LLC FOR RELIEF FROM THE AUTOMATIC STAY OR, IN THE ALTERNATIVE, TO DISMISS THE CASE

NNN Cypresswood Drive 25, LLC, debtor and debtor in possession (the "Debtor"), by and through its counsel, Michael L. Gesas, George P. Apostolides, and Kevin H. Morse of Arnstein & Lehr LLP, hereby responds in opposition (the "Response") to the motion of WBCMT 2007-C33 Office 9729, LLC (the "Lender") for Relief from the Automatic Stay or, in the Alternative, to Dismiss the Case (the "Motion"). In opposition to the Motion, the Debtor states as follows:

I. Introduction

This Court should deny relief from the stay under 11 U.S.C. § 362(d)(2) for three reasons. First, the Debtor's Appeal of the Order (defined below) has divested this Court of jurisdiction over those aspects of the case involved in the Appeal. Second, the Lender has failed to meet its burden under 11 U.S.C. § 362(g)(1). Third, the Lender's arguments against an effective reorganization are premature as a confirmation hearing has not yet been set pending resolution of the Appeal.

This Court should also deny relief from the stay under 11 U.S.C § 362(d)(1) or dismissal of this case. The Debtor has presented a legitimate reorganizational objective, including formulating a plan of reorganization, filing an appeal of the Order and defending against all of

the Lender's tactics to take control of the Property from Debtor, and cause does not exist for dismissal of this case or relief from stay under § 362(d)(1). The Debtor's objective in this case has been straightforward – to protect the Property (defined below) which is a retirement investment for the Debtor's principal and other TIC (defined below) members. Lender's accusations of bad faith carry no weight and are clearly refuted by Debtor's actions in this bankruptcy proceeding.

II. Background Facts

On December 31, 2012 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, the Debtor remains in possession of its property and continues to have the rights, powers and duties of a debtor in possession. No trustee, examiner, or statutory creditors' committee has been appointed in this chapter 11 case.

A. The Debtor and Tenants in Common

The Debtor owns an undivided interest in real property located in Houston, Texas (the "Property") as a tenant in common (a "TIC") along with thirty-two other single purpose limited liability companies (collectively with the Debtor, the "TICs").[1] Since the Petition Date, at least twenty-six (26) of the co-tenant, non-debtor TICs obtained counsel and appeared in the Chapter 11 Case (collectively, the "Participating TICs").

[1] The thirty-three TICs, including the Debtor, are: NNN Cypresswood Drive, LLC, NNN Cypresswood Drive 1, LLC, NNN Cypresswood Drive 3, LLC, NNN Cypresswood Drive 4, LLC, NNN Cypresswood Drive 5, LLC, NNN Cypresswood Drive 6, LLC, NNN Cypresswood Drive 7, LLC, NNN Cypresswood Drive 9, LLC, NNN Cypresswood Drive 10, LLC, NNN Cypresswood Drive 11, LLC, NNN Cypresswood Drive 12, LLC, NNN Cypresswood Drive 13, LLC, NNN Cypresswood Drive 14, LLC, NNN Cypresswood Drive 15, LLC, NNN Cypresswood Drive 16, LLC, NNN Cypresswood Drive 17, LLC, NNN Cypresswood Drive 18, LLC, NNN Cypresswood Drive 19, LLC, NNN Cypresswood Drive 20, LLC, NNN Cypresswood Drive 21, LLC, NNN Cypresswood Drive 22, LLC, NNN Cypresswood Drive 23, LLC, NNN Cypresswood Drive 24, LLC, NNN Cypresswood Drive 25, LLC, NNN Cypresswood Drive 26, LLC, NNN Cypresswood Drive 27, LLC, NNN Cypresswood Drive 28, LLC, NNN Cypresswood Drive 29, LLC, NNN Cypresswood Drive 30, LLC, NNN Cypresswood Drive 31, LLC, NNN Cypresswood Drive 32, LLC, NNN Cypresswood Drive 33, LLC, NNN Cypresswood Drive 34, LLC.

An ownership interest of a tenant in common contains significant differences from ownership interests in other business entity forms, such as limited partnerships or limited liability companies. Each of the thirty-three TICs is entitled to the undivided possession or right to possession of the Property. See In re Sturman, 222 B.R. 694, 709 (Bankr. S.D.N.Y. 1998). Unlike a partnership or limited liability company, where each member owns an interest in personal property, the TICs own an interest in the Property. Therefore, regardless of each TIC's percentage of ownership, each has an equal right to possession and an undivided interest in the entire Property.

The use of the tenant in common structure allows the individual owners of the tenants in common to use section 1031 of the Internal Revenue Code ("IRC") for financial planning purposes. Section 1031 of the IRC permits a "like kind" exchange, which provides for the gains from the sale of property to be deferred by an adjustment in the tax basis of a newly acquired property. See 26 U.S.C. § 1031(a)(1). The IRC currently does not provide such "like kind" exchange benefits when property is owned by limited liability companies or partnership because those ownership interests are in personal property. The Internal Revenue Service permits a maximum of thirty-five (35) co-tenants in the ownership of real property. Rev. Rul. 2002-22, 2002 WL 417295.

B. The Property

The Property consists of a four-story office building containing approximately 82,000 square feet (the "Office Building") and an adjacent one-story building zoned for restaurant use containing approximately 11,000 square feet (the "Restaurant"). Construction of the Property was completed in 2005, and the TICs purchased the Property in 2007. The Office Building has a common address of 9720 Cypresswood Drive. The adjacent Restaurant has a common address

of 9730 Cypresswood Drive and is entirely occupied and operated by Perry's Grille & Steakhouse. The Office Building and Restaurant offer parking to accommodate a total of 465 vehicles at the Property.

C. The Foreclosure Proceeding and the Order

On December 11, 2012, pursuant to Texas law, Lender sent a letter advising the TICs that Lender would be exercising its right to accelerate the outstanding principal indebtedness and the right to foreclose on the Property under Texas law. The letter provided the required 20-day notice of the January 1, 2013 foreclosure sale of the Property (the "Foreclosure Proceeding"). The Debtor filed its petition for relief on December 31, 2012.

On January 15, 2013, Lender filed a Motion for Relief from the Automatic Stay as to Non-Debtor Affiliates [Dkt. #16] (the "Lender Motion"). Lender sought to continue the Foreclosure Proceeding against all of the non-Debtor TICs, including the Participating TICs, under the guise that co-tenant interests were not property of the Debtor's bankruptcy estate and none of the Debtor's property rights in the Property or otherwise would be affected by the Foreclosure Proceeding. The Debtor's response focused on the significant impact the Lender Motion would have on the Debtor's estate and ability to reorganize and restructure the Property. The Response highlighted that the Foreclosure Proceeding would impair the Debtor's equitable right of redemption under Texas law and also destroys the "going concern" value of the Property, thereby irreparably harming the Debtor's estate. The Participating TICs filed a Joinder to the Response [Dkt. #48]. Lender filed a reply in support of the Lender Motion [Dkt. #53].

On March 4, 2013, the Debtor filed a disclosure statement and plan of reorganization (the "Plan") that would provide a new value contribution of $250,000 and repay the Lender in full over 10 years.

On March 6, 2013, this Court entered an Order denying the Lender Motion (the "Order"). The Order denied the Lender Motion because "the stay does not apply to the interests held by the thirty-two non-debtor TICs or to any redemption rights held by the debtor." Based on the holding of the Order, Lender "is free to pursue its remedies under state law against" the non-Debtor TICs, including, but not limited to, the continuation of the Foreclosure Proceeding. The Debtor will suffer irreparable harm if a stay of Lender's remedies under state law is not granted pending appeal.

On March 15, 2013, the Debtor filed a Notice of Appeal of the Order, which is fully briefed and awaiting decision from the District Court (the "Appeal"). The issues on appeal, as agreed by the Debtor and Lender are as follows:

1. Whether the Bankruptcy Court erred in concluding that the automatic stay in 11 U.S.C. § 362(a) does not protect the Debtor's ownership interest in commercial real property, as a tenant in common, from the foreclosure of the other tenant in common interests?

2. Whether the Bankruptcy Court erred in concluding that the automatic stay in 11 U.S.C. § 362(a) does not protect the Debtor's equitable right of redemption in the commercial real property as held in In re Bialac, 712 F.2d 426, 431-32 (9th Cir. 1983)?

3. Whether the Bankruptcy Court violated Federal Rule of Bankruptcy Procedure 7001(9) by granting the appellee, WBCMT 2007-C33 Office 9729, LLC, declaratory relief in declaring the automatic stay not applicable without an adversary proceeding?

Attached as **Exhibit A** is the Joint Appellate Status Report filed by the Debtor and Lender. At a minimum, the first issue is directly involved in this Motion, and any relief for the Debtor on Appeal will directly affect any relief this Court grants.

On May 7, 2013, the Lender successfully credit bid $6,925,500 of its debt at the non-judicial foreclosure sale of the non-Debtor TIC interests.

III. Argument

A. This Court Should Deny Relief from the Stay under 11 U.S.C. § 362(d)(2).

This Court should deny relief from the stay under 11 U.S.C. § 362(d)(2) for three reasons: (1) the Debtor's Appeal has divested this Court of jurisdiction over those aspects of the case involved in the Appeal; (2) the Lender has failed to carry its burden under 11 U.S.C. § 362(g)(1); and (3) the Lender's arguments against an effective reorganization are premature as a confirmation hearing has not yet been set pending resolution of the Appeal.

1. The Appeal has divested this Court of jurisdiction over those aspects of the case at issue in the Appeal.

The Motion must be denied because the Appeal has divested this Court of jurisdiction from deciding issues that are currently on Appeal at the District Court.

This Court does not have jurisdiction to rule on issues that may be affected by the Appeal. It is well-established law in the federal courts that that "filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the Appeal." Apostol v. Gallion, 870 F.2d 1335, 1337 (7th Cir. 1989) (citing Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) and Berman v. United States, 302 U.S. 211, 214 (1937)). This rule was established because "only one tribunal handles a case at a time." Apostol, 870 F.2d at 1337. The divestiture of jurisdiction is necessary because "simultaneous proceedings in multiple forums create confusion and duplication of effort; the notice of appeal and the mandate after its resolution avoid these by allocating control between the forums." Id.

The issues on Appeal are at the core of the Motion and any relief provided by this Motion would create confusion and duplication of effort. The main issue on Appeal is whether the nature of tenant in common ownership precluded the Lender's foreclosure of the non-debtor

TICs' interests in the Property based on 11 U.S.C. § 362(a)(3) and the Debtor's ownership interest in the property. Lender now seeks relief from the stay to foreclose on the Debtor's interest before the District Court has had an opportunity to determine whether the automatic stay protected the Debtor from the foreclosure of the non-debtor TICs' ownership interest. If the District Court is to rule in the Debtor's favor – which it should – then any relief this Court grants will undoubtedly be affected because the entire status of the case would change.

The District Court can order the Lender to return the ownership interests to the non-debtor TICs and award damages to the Debtor for violation of the automatic stay. The Seventh Circuit has found that the sale or transfer of property in bankruptcy does not preclude a Court, on appeal, from undoing any post-sale or transfer actions:

> A case is moot when no further judicial relief is possible. . . . By that standard, this dispute is live. A court could order the Trustee to return Chastang's money, reinstate its claims for damages and payment on the note, and direct Chastang to deliver the gas to the lenders. Unscrambling a transaction may be difficult, but it can be done. No one (to our knowledge) thinks that an antitrust or corporate-law challenge to a merger becomes moot as soon as the deal is consummated. Courts can and do order divestiture or damages in such situations. Perhaps Chastang has in mind not mootness but judicial reluctance to upset legitimate reliance interests.

In re Resource Tech. Corp., 430 F.3d 884, 886-87 (7th Cir. 2005). A decision favorable to the Debtor on Appeal would undoubtedly require this Court to reconsider any relief it would possibly grant to the Lender in the Motion. The District Court could "unscramble" the credit bid sale of the non-Debtor TICs' interest to the Lender. Accordingly, the Lender would have violated the automatic stay and the Debtor's ability to reorganize the entirety of the Property greatly enhanced. See In re Shamblin, 890 F.2d 123, 125 (9th Cir. 1989) ("Numerous federal courts have followed Kalb and held . . . foreclosure sales in violation of the automatic stay to be void) (citing Richard v. City of Chicago, 80 B.R. 451, 453 (N.D.Ill.1987) (Illinois tax sale); In re

Greer, 89 B.R. 757, 759 (Bankr.S.D.Ill.1988) (Illinois tax sale); In re Young, 14 B.R. 809, 811 (Bankr.N.D.Ill.1981) (Illinois tax sale)).

The relief requested in the Motion directly interferes with these possibilities. Lender wants this Court to prematurely grant relief from stay against the Debtor while the Appeal is pending so Lender can quickly proceed to foreclosure sale – only 20-days' notice required in Texas – and make the simple transaction more difficult to unscramble by flipping the Property to an unknowing third party. The Debtor's interest in the Property is directly affected by the Appeal and jurisdiction over the Appeal and extent of the automatic stay as to the Property is currently vested in the District Court. The Lender cannot proceed for relief from stay until the District Court ruled that the Debtor's tenant in common interests in the Property did not preclude the foreclosure of the non-Debtor TICs' interests. Jurisdiction over the Property remains with the District Court until that time and this Court should deny the Motion.

2. The Lender has failed to carry its burden under 11 U.S.C. § 362(g)(1).

The Lender has failed to carry its burden under 11 U.S.C. § 362(g)(1) and demonstrate that the Debtor has no equity in the property.

Section 362(g)(1) provides that "the party requesting [relief from the automatic stay] has the burden of proof of the issue of the debtor's equity in property". 11 U.S.C. § 362(g)(1). This burden requires the secured creditor to show by a preponderance of the evidence "that the value of its entire security package is less than the debt due. If not, the debtor clearly has equity in the property and the creditor is precluded from receiving relief under § 362(d)(2)." In re Opelika Mfg. Corp., 66 B.R. 444, 447-48 (Bankr. N.D.Ill. 1986). The Lender's motion is clearly inadequate to fulfill its burden by a preponderance of the evidence.

Lender simply concludes that because the Debtor's appraisal from February, 2013 listed the value at $8.6 million this Court should agree that "this is less than half the total indebtedness [and the Lender] has satisfied its burden." However, Lender never provides any evidence – let alone establish a preponderance of the evidence – of the amount of debt due. In fact, the amount of debt has actually been reduced by nearly half since the Lender credit bid nearly $7,000,000 of its debt. Moreover, the demand for commercial real estate in the Houston area "for top-quality buildings helped commercial real estate prices rise in April above an August 2007 record."[2] The Lender has provided this Court with no evidence of the amount of debt owed or the current value of the Property given the demand for commercial real estate in the Houston, Texas area. Therefore, this Court cannot find the Lender met its burden to show the Debtor has no equity in the Property and must deny relief under 11 U.S.C. § 362(d)(2).

3. The Lender's arguments against an effective reorganization are premature as a confirmation hearing has not yet been set pending resolution of the Appeal.

As the Lender has not met its burden under 11 U.S.C. § 362(g)(1) the Motion must be denied. Should this Court find that Lender has demonstrated that the Debtor has no equity in the Property – which it should not – then it should find that the Debtor has shown the Property is necessary for an effective reorganization.

The Lender's arguments against an effective reorganization are premature as a confirmation hearing has not yet been set pending resolution of the Appeal. The Lender's retroactive attacks on the Plan filed by the Debtor, but not presented for confirmation, are a venerable display of legal shadow boxing. The Debtor has already demonstrated a reasonable possibility of a successful reorganization within a reasonable time. Shortly after filing the Plan

[2] Hui-yong Yu & Kathleen Chu, *Houston is an Attractive Location for Real Estate Investors*, Houston Chronicle, June 4, 2013, at http://www.chron.com/homes/article/Houston-is-an-attractive-location-for-real-estate-4574786.php. A copy of the Houston Chronicle article is attached as **Exhibit B**.

only nine weeks after the Petition Date, the Debtor filed a motion to set a joint hearing on approval of the disclosure statement and Plan [Dkt. #73] (the "Confirmation Motion"). The Confirmation Motion requested the Court set a combined hearing on the approval of the disclosure statement and confirmation of the Plan. However, when the Court denied the Debtor's request for a stay pending approval, all parties agreed that the Confirmation Motion should be continued pending resolution of the Appeal. The Confirmation Motion has now been continued four times without objection from the Lender.

Furthermore, without repeating the arguments above, the terms of any plan proposed by the Debtor are contingent on the outcome of the Appeal. The Lender's overly aggressive tactics should not pressure the entry of an order denying the Debtor an ability to propose a Plan. The Debtor has already shown its willingness to realistically and reasonably put forth a Plan in this bankruptcy case. While the Plan that was filed in March, and not currently set for confirmation, may not be confirmable that does not prevent the Debtor from proposing any further Plans, especially when most of the Lender's issues with the Plan are affected by the Appeal. The Plan filed by the Debtor proposed actual money in new value ($250,000) and payment of $17,500,000 to the Lender. The Debtor acknowledges that the Plan, as currently constituted, will need to be amended before it can be presented for confirmation. The Debtor's actions in this case have shown this Court that not only is the Property necessary for an effective reorganization but the Debtor will wholeheartedly pursue a plan that will pay the Lender's claim the full principal amount owed. Denying the Debtor the ability to propose a plan prior to a decision on the Appeal will cause great prejudice to the Debtor's significant and honest efforts to protect its interests in the Property, and this Court should deny the Motion.

B. The Debtor has Presented a Legitimate Reorganizational Objective and Cause does not Exist for Relief from the Stay or Dismissal.

The Debtor has presented a legitimate reorganizational objective and cause does not exist for relief from the stay or dismissal of this bankruptcy case.

The Debtor has taken numerous steps to protect its interests in the Property that clearly demonstrate that the Debtor did not file this case in bad faith. The Lender relies on a series of cases where the debtor has not "presented a legitimate reorganization objective" and where the "debtor enters [title] 11 knowing that there is no chance to reorganize." See In re Orig. IFPC Shareholders, Inc., 317 B.R. 738, 749-50 (Bankr. N.D.Ill. 2004) and In re Sparrgrove, 313 B.R. 283, 288 (D. Wisc. 2004). The cases cited by the Lender all contain debtors who either did not propose a plan, did not take any proactive actions in bankruptcy or proposed plans of reorganization that would pay creditors *de minimis* amounts of the debt owed.

This case and the Debtor's actions are distinguishable from the Lender's cases. The Debtor in this case has proposed a Plan that put forth significant funds ($250,000) in new value and proposed to pay the Lender $17,500,000 after 10 years. The Plan is not the only evidence that the Debtor has a legitimate reorganization objection. The Debtor has legitimately defended itself against all of the Lender's actions to take control over the Property and filed an appeal of the Order which has been fully briefed before the District Court. If the Debtor did not have a legitimate reorganization objective it would have "walked away" from this case once the Lender filed the Lender Motion, however, the Debtor has significant investments in the Property that it will continue to seek to advance as long as this Court or the District Court permit.

The Lender then seeks to focus on its negative perspective of third parties, Breakwater Equity Partners and Highpoint Management Solutions, LLC. The fact that the Lender, Breakwater and Highpoint are involved in other cases around the country is not relevant to the

matter before this Court. The Lender disingenuously attacks Breakwater, not a party to this proceeding, while ignoring the real parties in interest in this case. The Debtor has proposed a plan that would pay the Lender $17,500,000 over 10 years. The Lender's solution to the problems facing the Property is to foreclose on the Property, credit bid its interest, and flip the Property for a profit. The real parties in interest in this case are the Debtor's principal and the other TIC investors, many of whom, including the Debtor's principal, invested their life's savings in the Property when § 1031 exchanges were popular and real estate prices were soaring.

To suggest that the Debtor does not have a legitimate interest in the reorganization of the Property could not be further from the truth. Mr. James Love, the principal of the Debtor ("Mr. Love"), while he might not have the same pecuniary amount invested in the Property as the Lender, has significantly more at stake than the billion dollar investment fund. Mr. Love is a seventy-nine year old retiree who, with his wife of fifty years, has invested much of his retirement savings in TIC properties around the country, several of which are being foreclosed on by this Lender or its affiliates. The Debtor is one of Mr. Love's retirement nest eggs and, with the approval of Mr. Love, the Debtor has pursued a plan of reorganization, defended against the Lender Motion, and filed an Appeal all in an effort to protect his retirement. The Debtor's efforts have been nothing but a forthright effort to protect its interests in the Property and cause does not exist, based on the Lender's bad feelings towards third parties, for this Court to grant relief from the automatic stay or dismissal of the Chapter 11 case. This Court should permit the District Court to make its ruling on the Appeal and, should the District Court decide in Debtor's favor, allow the Debtor to propose a legitimate and confirmable plan of reorganization.

IV. Conclusion

For the foregoing reasons, NNN Cypresswood Drive 25, LLC respectfully requests this Court deny the Motion with prejudice and provide the Debtor with such other relief as this Court may deem just and proper.

Respectfully submitted,
NNN CYPRESSWOOD DRIVE 25, LLC

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