

**IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION**

IN RE: HARPER DEVELOPMENT, INC.

**4:01-bk-46062E
CHAPTER 11**

**ORDER DENYING REGIONS BANK'S
MOTION FOR RELIEF FROM STAY**

Regions Bank's Motion for Relief From Stay was heard on June 11, 2002, and the Court took the matter under advisement. Basil Hicks, Esq. appeared for the Debtor, Harper Development, Inc. Kenneth Harper, president and sole shareholder of Harper Development, Inc. was also present. Lee Tucker, Esq. appeared for Regions Bank ("**Regions**"). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G), and the Court has jurisdiction to enter a final judgment in this case.

FACTUAL BACKGROUND

The Debtor filed this chapter 11 bankruptcy on October 11, 2001, but has not yet filed a chapter 11 plan. The Debtor's exclusivity period to file its chapter 11 plan has been extended to July 30, 2002 by order of this Court. The Debtor is primarily a development company and only occasionally does excavation work for others. This matter concerns two parcels of real estate in Saline County owned by the Debtor, the "**Shaw Valley Property**" and the "**Germania Road Property**," on which Regions holds mortgages (collectively referred to as the "**Properties**"). The amounts owed and validity of Regions' mortgages are not in dispute. The Properties are described in more detail below.

The Shaw Valley Property

Regions lent Debtor \$250,000 for the purpose of developing a mobile home subdivision on

the Shaw Valley Property (the “**Shaw Valley Loan**”). The Shaw Valley Loan was secured by a mortgage on the Shaw Valley Property and is now in default. The Debtor owes Regions \$249,990 in principal and approximately \$25,468 in interest on the Shaw Valley Loan.

Rita Tarver, Regions’ loan officer responsible for the loans to Debtor, testified that the purpose of the Shaw Valley Loan was for the development of a subdivision for 20 mobile home lots. Ms. Tarver stated that she had inspected the property within the past couple of months, and that while there was a gravel road into the property, there were only five lots with mobile home pads. Ms. Tarver estimated the value of the property to be approximately \$100,000.

Mr. Harper testified that the Shaw Valley Property had been “fully developed” although the septic tanks are not installed and there is no electricity. Mr. Harper testified that the Debtor has put gravel roads into the subdivision, and that blacktopping the roads is not required. Mr. Harper testified that the Debtor has sold two lots on contract, one for \$10,000 and one for \$24,000, and has had offers on five other lots. Mr. Harper testified that the value of the remaining lots range from \$18,500 to \$22,000 per lot. Mr. Harper testified that once a lot is sold, he allows the buyer to choose the location of the mobile home pad, and then he installs the pad, driveway and septic tank. Mr. Harper testified that he has taken the offers he has received on the lots to Regions for approval but has had no response from Regions.

The Germania Road Property

The Germania Road Property consists of 40 acres within a larger 360 acre parcel of land previously owned by Debtor. Regions lent Debtor \$200,000 secured by a mortgage on the Germania Road Property (the “**Germania Road Loan**”). The Germania Road Loan is in default; the Debtor owes \$200,000 in principal and approximately \$15,389 in interest according to the testimony of Ms.

Tarver. Ms. Tarver testified that Debtor is delinquent on the 2000 and 2001 property taxes on the Germania Road Property as well.

At the time the loan was made, the Germania Road Property had standing timber, but the Debtor sold the merchantable timber (both hardwood and pine) on the Germania Road Property (as well as the adjacent 320 acres of property owned by Debtor) prior to the Germania Road Loan's closing. Mr. Harper testified that he used the timber sale proceeds to help pay for the 360 acre parcel of real estate he had previously purchased. Mr. Harper testified that he told Ms. Tarver and a Mr. Joe Caldwell at Regions that the timber was going to be sold. Ms. Tarver testified that Regions was not aware of Mr. Harper's plans to sell the timber, and that Regions had made the Germania Road Loan based on an appraisal of the property with standing timber and an assumption that the timber would remain on the property serving as additional collateral for the loan. Mr. Harper testified that he has not seen the appraisal Regions allegedly relied on in making the loan. Now that the Germania Road Property has been cleared, Regions believes its value to be approximately \$100,000 according to Ms. Tarver's testimony.

Mr. Harper testified that he had an appraisal of the Germania Road Property performed which concluded that a mobile home subdivision would be the highest and best use for the property. Mr. Harper testified that he used the Germania Road Loan proceeds to begin developing the property. Mr. Harper testified that he prepared the property for platting by clearing the remaining timber off the property, building a graded 800 foot long gravel road on the property, cleaning the creek and taking measures in accordance with Arkansas Pollution and Control to prepare the property for a mobile home subdivision. A list of expenditures on the property totaling \$218,036.58 prepared by Mr. Harper was introduced into evidence listing various development costs associated with

developing the property including the following items: labor, clearing property, engineers, gravel, erosion control, surveyors, sewer and an appraisal.

Ms. Tarver, the loan officer in charge of this loan, testified that the purpose of the loan was for working capital, not for development of the property. Ms. Tarver testified that she had recently seen the property and could not tell that the Debtor had developed the property. She said she could not see any roads or mobile home pads on the property. Upon cross-examination, Ms. Tarver admitted that she viewed the Germania Road Property while driving along Germania Road and did not inspect the property on foot. She testified that she did not see a locked gate on the property but feels comfortable that she viewed the correct property. Mr. Harper testified that the Germania Road Property is not adjacent to Germania Road, cannot be seen from Germania Road and can only be entered via a locked gate.

Mr. Harper testified that the development of the Germania Road Property has been stalled due to a lawsuit filed in Saline County Chancery Court (the “**State Court**”) by adjacent landowners to enforce a restrictive covenant on the property. The State Court entered a temporary restraining order preventing the Debtor from placing mobile homes on the Germania Road Property. Mr. Harper testified that the Debtor’s title insurance lists the Germania Road Property as unrestricted. Debtor had a \$990,000 title insurance policy on the entire 360 acre tract (of which he later disposed of 320 acres) and a \$200,000 title insurance policy on the Germania Road Property (*i.e.*, the remaining 40 acres). The Debtor and the company providing title insurance appealed the State Court’s order to the Arkansas Court of Appeals but the order was upheld, and the case remanded to the State Court for a trial on a permanent injunction. This trial is scheduled for July 10, 2002. Mr. Harper testified that if the lawsuit is lost, the Debtor will pursue a claim against the title insurance company.

DISCUSSION

Regions moves for relief from stay under 11 U.S.C. § 362(d)(2) alleging that the Debtor has no equity in the Properties due to a decline in value. Regions also moves for relief from stay “for cause” under 11 U.S.C. § 362(d)(1) alleging that it does not have adequate protection because it is inadequately secured. Regions has not argued that the Properties are not necessary to Debtor’s effective reorganization.

I. LEGAL STANDARDS AND BURDENS OF PROOF.

Relief from the stay against property may be granted under 11 U.S.C. § 362(d)(2) if a two-prong test is met. First, the debtor must have no equity in the subject property, and second, the subject property must not be necessary to the debtor’s reorganization. “Property is necessary for an effective reorganization ‘whenever it is necessary either in the operation of the business or in a plan, to further the interests of the estate through rehabilitation or liquidation.’” *In re Keller*, 45 B.R. 469, 472 (Bankr. N.D. Iowa 1984) (quoting *In re Koopmans*, 22 B.R. 395, 407 (Bankr. Utah 1982)). Additionally, a debtor must show that there is “‘a reasonable possibility of a successful reorganization within a reasonable time.’” *United Sav. Ass’n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 376 (1988) (citations omitted). Once a creditor has established the validity and perfection of its security interest and the amount of the debt and other allowable costs secured by its claim, the creditor carries the ultimate burden of proof with respect to a debtor’s equity, and the debtor opposing stay relief has the burden on the remaining issues. 11 U.S.C. § 362(g). *See also First Nat’l Bank in Sioux City v. Dahlquist (In re Dahlquist)*, 34 B.R. 476, 481 (Bankr. D.S.D. 1983). Thus, with respect to a motion for relief from stay under § 362(d)(2), the burden shifts to the debtor to show that the property is necessary for an effective reorganization once the creditor has

demonstrated that the debtor lacks equity in the subject property. *Id.*

Relief from the automatic stay may also be granted “for cause” under 11 U.S.C. § 362(d)(1). “Cause” may include, but is not limited to, the lack of adequate protection of an interested party’s interest in property. The concept of adequate protection is intended to protect an entity’s interest in property from a decline or threatened decline in value. *See In re Anthem Communities/RBG, LLC*, 267 B.R. 867, 871 (Bankr. D. Colo. 2001); *United Sav. Ass’n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. at 370. Where a creditor moves for relief under § 362(d)(1), “the creditor must carry its initial burden of going forward with evidence of ‘cause,’ including a lack of adequate protection and then the burden shifts to the debtor to persuade the court that the creditor is adequately protected.” *In re Anthem Communities/RBG, LLC*, 267 B.R. 867, 871 (Bankr. D. Colo. 2001). *See also In re Marchand*, 61 B.R. at 84. Additionally, the secured creditor’s initial burden also requires it to show that the threatened harm to its security interest is attributable to the stay. *In re Anthem Communities/RBG, LLC*, 267 B.R. at 871

II. ANALYSIS.

Applying the legal standards and burdens of proof outlined above, Regions must make a *prima facie* case that it is entitled to relief from stay under § 362(d)(1) or § 362(d)(2). The parties do not dispute that Regions has a valid security interest in the Properties. Accordingly, to make its *prima facie* case, Regions must prove that Debtor has no equity in the Properties, or show some evidence that Regions otherwise lacks adequate protection in the Properties.

Lack of Equity in Properties.

Although Regions argues that the Debtor has no equity in the Properties, it failed to meet its burden of proof on this issue with respect to both Properties. With respect to the Shaw Valley

Property, Ms. Tarver testified that the property was not completely developed, and in her opinion, the property was worth only \$100,000. Regions introduced no other evidence to prove that the property is worth less than the amount owed. Given the lack of any evidence establishing Ms. Tarver as a qualified real estate appraiser, the Court finds her opinion without other collaboration to be unpersuasive. This is particularly the case in light of Mr. Harper's testimony that the Debtor has made some improvements to the Shaw Valley Property, has sold two lots on the property, and is currently trying to sell the other lots.

The Court finds Ms. Tarver's opinion as to the value of the Germania Road Property unpersuasive for the same reasons. Ms. Tarver's opinion was that the value of the Germania Road Property was reduced due to the cutting of timber on the property. Ms. Tarver also testified that she had visited the property and found it largely undeveloped; however, it was established through Ms. Tarver's cross-examination that she had merely viewed the property from the road, and may not have even viewed the correct property. Mr. Harper testified that the Debtor had taken substantial measures to improve the property at a cost of over \$218,000 in development expenses.

In conclusion, Regions has failed to prove that Debtor has no equity in the Properties, and accordingly, it has not made a *prima facie* case showing that it is entitled to relief from stay. Accordingly, it is not necessary to determine that the Properties are necessary to the Debtor's effective reorganization. However, the Court notes that Debtor is in the business of developing property, and has demonstrated the necessity of the Properties to the Debtors' reorganization, at least at this stage of the Chapter 11 case. Specifically, Debtor is in the process of developing and selling lots on the Shaw Valley Property and may be able to continue development of the Germania Road Property following the resolution of the lawsuit in State Court.

Lack of Adequate Protection.

Regions also alleges that it lacks adequate protection because it is inadequately secured. As discussed above, Regions failed to prove that it is inadequately secured. Furthermore, no evidence was introduced to show that the Properties were declining in value due to the automatic stay. Rather, Regions argues that the Properties' values have declined due to timber cutting and a lack of or slowness in Debtor's development of the Properties. However, the timber was cut prior to the Debtor's bankruptcy, and Regions has not shown that a lag in development has caused the Properties to decrease in value since the Debtor filed bankruptcy. Additionally, although the development of the Germania Road Property is currently stalled due to the State Court lawsuit, the Debtor testified that it has title insurance on the Property in an amount equal to the amount owed Regions and plans to pursue a claim against the title insurance company if it loses in State Court. Finally, although Ms. Tarver testified that the Debtor had not paid property taxes on the Germania Road Property for 2000 and 2001, the Court finds that fact alone insufficient to find Regions' security interest lacks adequate protection. Accordingly, because Regions has failed to show that its collateral is at risk, the Court finds that no cause exists to warrant lifting the automatic stay at this time.

CONCLUSION

Because Regions failed to prove that Debtor has no equity in the Properties or that it otherwise lacks adequate protection, the Court must deny its Motion for Relief From Stay. However, because the Debtor has not yet filed its chapter 11 plan, the State Court lawsuit has not been resolved (as far as the Court knows), and Regions' claims may continue to accrue postpetition interest, the Court denies Regions' motion without prejudice to a later refiling upon a change in circumstances or a showing of actual decline in the Properties' values. Accordingly, it is hereby

ORDERED that Regions' Motion for Relief from Stay is **DENIED** without prejudice.

IT IS SO ORDERED.

HONORABLE AUDREY R. EVANS
UNITED STATES BANKRUPTCY JUDGE

DATED: _____

cc: Mr. Basil Hicks, Esq. for Debtor
Mr. Lee Tucker, Esq. for Regions
U.S. Trustee