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WRITTEN DECISION – NOT FOR PUBLICATION

ENTERED <u>4/27/11</u>
FILED
APR 26 2011
CLERK, U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA BY _____ DEPUTY

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:) BANKRUPTCY NO: 10-15177-MM11
)
LAGOON BREEZE DEVELOPMENT) CHAPTER: 11
CORPORATION,)
) MEMORANDUM DECISION
)
Debtor,) DATE:
) TIME:
) CRTRM: 1
)
) JUDGE: Margaret M. Mann
)
_____)

1 **I. INTRODUCTION**

2 After its initial motion for relief from stay was denied, Pacific Western Bank ("Bank") brought
3 a second motion for relief from stay ("Motion") against Lagoon Breeze Development Corporation (the
4 "Debtor") to appoint a receiver for the seven unsold condominiums located at 236-258 Date Ave,
5 Carlsbad, CA ("Property"). Construction of the condominiums is nearly complete and one unit has
6 already been sold. The Court relies on the findings of fact and conclusions of law in its Memorandum
7 Decision issued in regard to Debtor's priming lien and the Bank's first motion for the remainder of the
8 background facts.

9 The Bank in its second Motion asserts that relief from stay must be granted under 11 U.S.C. §
10 362(d)(3)¹ since 90 days have now run since the order for relief was entered on December 21, 2010 in
11 this case. The Bank also argues that the involuntary petition identifies the Debtor as a single asset real
12 estate ("SARE") debtor as defined in §101(51B); and the Debtor has neither filed a plan of
13 reorganization nor commenced payments to the Bank as required by § 362(d)(3).

14 In opposition to the Motion, the Debtor disputes that it is a SARE debtor as defined in
15 §101(51B), and argues it should not be bound by the involuntary petition, which contained an
16 admission of the petitioning creditors, not of the Debtor. The Debtor also claims it satisfied the plan
17 filing requirement since this Court's priming lien order is tantamount to a finding that its plan of
18 reorganization would be feasible. The Debtor next asserts the Bank should be estopped from claiming
19 its plan is untimely since the Bank delayed the Debtor's reorganization. The Debtor finally claims it
20 can in any event still satisfy §§ 362(d)(3)(A) or (B) since the relevant statutory period runs from the
21 later of 90 days after entry of the order for relief, or 30 days after the Court determines that the Debtor
22 is a SARE debtor. After the Court makes its SARE finding, the Debtor contends it still has 30 days to
23 file a plan or commence payments to the Bank.

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27 ¹ All citations are to the United States Bankruptcy Code, Title 11, U.S. Code annotated, unless
28 otherwise stated.

1 II. ANALYSIS

2 Under §101(51B), "single asset real estate" is defined as real property consisting of a single
3 property or project, other than a residential property with fewer than four units, which generates
4 substantially all of the gross income of a debtor who is not a family farmer, on which no substantial
5 business is being conducted other than operating the real property. The Debtor does not contest that
6 the Property, although consisting of seven separate legal units, is a single project, or that the Property
7 generates substantially all of the Debtor's gross income. *In re Club Golf Partners*, 2007 Bankr. LEXIS
8 1225, 2007 WL 1176010, *5 (E.D. Bankr. Tex. 2007) (debtor owning several separate tracts of land
9 which were collectively operated as a golf club is a SARE debtor). The remaining element of the
10 statutory definition, whether the Debtor's ongoing construction and development activities constitute a
11 substantial business other than operating the Property, is where the parties' views diverge.

12 Most cases have held that construction and land development activities, such as those in which
13 the Debtor is engaged, do not constitute a substantial business activity separate from operation of the
14 property as required by §101(51B). In *Kara Homes, Inc. v. National City Bank, et al*, (*In re Kara*
15 *Homes, Inc.*), 363 B.R. 399, 405 (Bankr. D.N.J. 2007), the debtor's business was similarly the
16 development and sale of homes and condominiums. Even though that debtor's activities included the
17 acquisition, design, construction, marketing and sale of homes, it was found to be a SARE debtor since
18 these activities were not separate from the operation of the real property. *See also In re Webb MTN,*
19 *LLC*, 2007 Bankr. LEXIS 3202 (Bankr. E.D. Tenn. Sept. 17, 2007) (business activities of seeking to
20 sell, refinance, and/or entice investors to develop the property does not remove debtor from single
21 asset real estate classification); *In re Oceanside Mission Assocs.*, 192 B.R. 232 (Bankr. S.D. Cal. 1996)
22 (raw land/same). These cases reason that since the income from these development activities would
23 not be realized apart from a sale of the property, debtors engaged in only the development,
24 construction and sale of land are SARE debtors. *Id.*

25 In contrast, where the debtor employs a significant number of employees, and has business
26 activities that generate income from services to third parties apart from the sale or use of the real
27 property, such as from the operation of hotels, marinas, ski resorts, golf courses or timberlands, §
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1 362(d)(3) does not apply. *Centofante v. CBJ Dev. (In re CBJ Dev.)*, 202 B.R. 467, 471 (B.A.P. 9th
2 Cir. 1996) (hotel); *In re Dunes Hotel Associates*, 188 Bankr. 162 (Bankr. D.S.C. 1995) (hotel); *In re*
3 *Scotia Pacific Co., LLC*, 508 F.3d 214 (5th Cir. 2007) (timber harvesting); *In re Kkemko, Inc.*, 33
4 C.B.C.2d 757, 763, 181 B.R. 47, 51 (Bankr. S.D. Ohio 1995) (marina); *In re Prairie Hills Golf & Ski*
5 *Club, Inc.* 255 B.R. 228 (Bankr. D. Neb. 2000) (golf and ski resort).

6 Applying these cases, the Court finds the Debtor is a SARE debtor despite its construction and
7 development activities. The record before the Court demonstrates that all of the income from this
8 Debtor will be realized only upon a sale of the Property, and the Debtor does not provide any services
9 to third parties or employ anyone other than its principals. In making this finding, the Court gives no
10 weight to the SARE designation in the involuntary petition, nor does it find the Bank is estopped to
11 make this argument.

12 III. **CONCLUSION**

13 No later than May 26, 2011, which is a date 30 days after the Court makes this SARE finding,
14 the Court will require the Debtor to file a formal plan of reorganization as the Court is unaware of any
15 authority that an informal plan, even if feasible, suffices to satisfy § 362(d)(3)(A). Alternatively, the
16 Debtor must commence making adequate protection payments to the Bank in an amount equal to
17 interest at the Bank's nondefault contract rate of interest calculated on the Bank's secured claim of
18 \$9,590,000. The Court will excuse appearances at the April 28, 2011 hearing on the Motion, but will
19 set a status conference for June 2, 2011 at 2:00 p.m. for further proceedings on the Motion.

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21 IT IS SO ORDERED.

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23 Dated: April 26, 2011

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MARGARET M. MANN, JUDGE
United States Bankruptcy Court