IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

	) Chapter 11
In re:	)
	) Case No. 15-12507 (LSS)
NEWBURY COMMON ASSOCIATES, LLC, *et al.*,	) Jointly Administered
	)
Debtors.	) **Objections Due: April 1, 2016 at 4:00 p.m.**
	) **Hearing Date: April 18, 2016 at 3:00 p.m.**

MOTION OF U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE REGISTERED HOLDERS OF GREENWICH CAPITAL COMMERCIAL FUNDING CORP., COMMERCIAL MORTGAGE TRUST 2007-GG9, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-GG9, FOR RELIEF FROM THE AUTOMATIC STAY

COMES NOW, U.S. Bank National Association, as Trustee for the Registered Holders of Greenwich Capital Commercial Funding Corp., Commercial Mortgage Trust 2007-GG9, Commercial Mortgage Pass-Through Certificates, Series 2007-GG9 (the "Lender"), acting by and through its Special Servicer LNR Partners, LLC, by and through its attorneys, McCarter & English, LLP, for the entry of an order granting relief from the automatic stay (the "Motion") pursuant to Sections 362 and 553 of the United States Bankruptcy Code (the "Bankruptcy Code"), Rule 9013 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Rules 4001-1 and 9013-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), as follows:

PRELIMINARY STATEMENT

1. 300 Main Street Associates, LLP (the "Debtor") is the borrower under a loan held by the Lender. Repayment of the loan is secured by a mortgage on an office building in Stamford, Connecticut. The Lender seeks relief from the automatic stay to proceed with its

pending foreclosure action. Relief from the stay is warranted in this single asset real estate case because the Debtor lacks equity in the mortgaged property and because the Debtor is unable to propose a confirmable plan of reorganization.

2. In support of the Motion, the Lender relies upon the Affidavit of Aaron P. Guillotte (the "Guillotte Aff.") and the Affidavit of Eric D. Michel (the "Michel Aff."), which are filed simultaneously herewith, and incorporated herein by reference.

JURISDICTION

3. This Court has jurisdiction over the proceeding pursuant to Title 28, Sections 157 and 1334 of the United States Code.

4. This proceeding is a core proceeding pursuant to Title 28, Section 157 of the United States Code.

5. Venue is proper in this Court under Title 28, Section 1408 of the United States Code.

6. The predicate for the relief sought herein is Sections 362 and 553 of the Bankruptcy Code, Bankruptcy Rule 9014 and Local Rules 4001-1 and 9013-1.

BACKGROUND

The Debtor:

7. On February 3, 2016 (the "Petition Date"), the Debtor commenced a case in the United States Bankruptcy Court for the District of Delaware (the "Court") by filing a petition for relief under Chapter 11 of the Bankruptcy Code (the "Bankruptcy Case").

8. The Debtor has not filed its Schedules but based on pleadings previously filed in these jointly administered proceedings, the Debtor has one asset, namely its real property located at 300 Main Street, Stamford, Connecticut (the "Property"), and few creditors other than the

Lender and a junior mortgage holder, First County Bank ("First County"), holding a $2,000,000 loan.[1] The Debtor's sole business is to own and operate the Property. See Loan Agreement, Section 5.14 (Guillotte Aff., Exhibit A to the Amended Complaint). The Bankruptcy Case is, and should be designated as, a single asset real estate case under 11 U.S.C. §101(51B).

The Loan Documents and Property:

9. Prior to the filing of the Bankruptcy Case, the Lender had commenced a foreclosure action in the Connecticut state court (the "Foreclosure Action") to foreclose on real property of the Debtor pledged as security for repayment of a loan in the original principal amount of $11,500,000 (the "Loan"). The Loan and the documents executed in connection therewith (the "Loan Documents") are described in detail in the Lender's Proof of Claim (remitted to the Claims Agent on March 17, 2016), and in the Guillotte Aff., and are summarized as follows:

a. Loan Agreement and Promissory Note dated January 19, 2007, evidencing the Loan in the original principal amount of $11,500,000 made to 300 Main Owner LLC (the "Original Borrower");

b. Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing (the "Mortgage"), and Assignment of Leases and Rents (the "ALR"), each dated January 19, 2007 and each pertaining to the Property, executed and delivered for repayment of the Loan;

c. Assignment of the Loan and the Loan Documents to the Lender through a series of assignments;

d. Transfer of title to the Property to the Debtor and assumption of the Loan obligations pursuant to the terms of the Note and Mortgage Assumption Agreement dated September 10, 2013 (the "Assumption Agreement") under terms required by the Lender; and

[1] The List of the 30 Largest Creditors filed with the Debtor's Petition notes that it is a "Consolidated" list, presumably relating to creditors of all of the 24 jointly administered debtors.

e. Joinder By and Agreement of New Indemnitors (the "Guaranty") by John J. DiMenna, Jr., William A. Merritt, Jr. and Thomas A. Kelly, Jr. (the "Guarantors") effective as of September 10, 2013.

10. The Property is an office building in Stamford, Connecticut. As of December 4, 2015, the "as is" appraised value of the Property was $11,650,000. See Michel Aff. According to pleadings filed by the Debtor in connection with applications to use cash collateral, the Property generates rents of approximately $115,000 per month. [Docket No. 176-10, at p.8 (Cash Collateral Budget)].

The Defaults and the Lender's Remedies

11. The Debtor defaulted under the Loan as a result of: (a) its failure to make monthly payments due beginning on July 6, 2015 and each month thereafter, (b) its failure to pay real estate taxes for the Property, resulting in the Lender making a payment of $126,228 from reserves held by the Lender for purposes other than for payment of real estate taxes, (c) the filing of this Bankruptcy Case on February 3, 2016, (d) the failure of the conditions of the Assumption Agreement, namely delivery of valid guaranties,[2] and (e) the First County mortgage lien and debt in violation of various provisions of the Loan Agreement, including Sections 4.6 (representation that there are no other liens on the Property) and 4.21 (representation that the Debtor has no "Other Debt").

12. By letters dated September 28, 2015 and November 13, 2015, the Lender notified the Debtor of the defaults arising from its failure to make monthly debt service payments and of the Lender's entitlement to the rents, issues and profits from the Property (the "Rents"). The Lender demanded repayment of the Loan. The Debtor failed to cure these defaults under the

[2] One of the Loan assumption conditions imposed by the Lender was the delivery of the Guaranty by the Guarantors. Two of the Guarantors, Thomas Kelly, Jr. and William A. Merritt, Jr., now claim they did not execute the Guaranty.

Loan so the Lender commenced the Foreclosure Action, seeking, among other things, to foreclose on the Property and certain collateral subject to its security interest, and for the appointment of a rent receiver.

13. As of the Petition Date, the Lender is owed at least $13,774,864.37, of which $11,500,000 is the unpaid principal balance. See Guillotte Aff., ¶13.

14. By this Motion, the Lender seeks relief from the automatic stay to proceed with the Foreclosure Action, including enforcing its rights to the Rents. Relief from the automatic stay should be granted in this single asset real estate case as a result of the Debtor's lack of equity in the Property, its inability to confirm a plan of reorganization and its inability to make payments to the Lender.

ARGUMENT

15. Section 362(d) of the Bankruptcy Code governs the granting of relief from the automatic stay and is intended to balance the interests of the debtor and its secured creditors. In re Indian Palms Associates, Ltd., 61 F.3d 197, 206 (3d Cir. 1995). Section 362(d) provides, in pertinent part:

> (d) On request of a party in interest and after notice and a 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 the lack of adequate protection of an interest in property of such party in interest…
>
> (2) with respect to a stay of any act against property under subsection (a) of this section, if –
>
> (A) the debtor does not have equity in such property; and
> (B) such property is not necessary to an effective reorganization;
>
> (3) . . . with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate unless . . .

> (A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or
> (B) the debtor has commenced monthly payments . . . ;

11 U.S.C. § 362(d) (emphasis added). The Lender is entitled to relief from the automatic stay under each of these provisions.

A. Stay Relief is Proper Because the Debtor Lacks Equity and Has No Ability to Reorganize:

16. The Lender is entitled to relief from the automatic stay pursuant to Section 362(d)(2) of the Bankruptcy Code. As discussed herein, the Debtor lacks equity in the Property and the Property is not necessary for an effective reorganization.

17. The "as is" appraised value of the Property as of December 2015 is $11,650,000. See Michel Aff. The Lender is owed in excess of $13,700,000. See Guillotte Aff., ¶ 13. If the appraised value is the fair market value ultimately determined by the Court, there is no equity for the estate. The Debtor has discussed a sale process for the Property, and equity owners/investors have indicated they wish to "preserve" equity that may exist. However, neither the Debtor, nor the owners or investors, have presented persuasive evidence that there is equity to be preserved.

18. Having shown that the Debtor does not have equity in the Property, the next inquiry is whether the Property is necessary for an effective reorganization. In accordance with Section 362(g)(2), the Debtor bears the burden of proving that the Property is necessary to an effective reorganization. See also, John Hancock Mut. Life Ins. Co. v. Route 37 Business Park Associates, 987 F.2d 154, 157 (3rd Cir. 1993) ("John Hancock v. Route 37") (Where there is no equity in the property, "the dispositive question is whether the property is necessary for an effective reorganization.").

19. In discussing the Debtor's burden under Section 362(d)(2)(B), the United States Supreme Court has ruled that the Debtor's burden is:

> [N]ot merely a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization that is in prospect . . . there must be a reasonable possibility of a successful reorganization within a reasonable time. . . . [L]ack of any realistic prospect of effective reorganization will require §362(b)(2) relief.

United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 366, 108 S. Ct. 626, 633 (1988) (emphasis added). Here, to demonstrate that the Property is necessary for an effective reorganization, the Debtor must show that there is "a reasonable possibility of a successful reorganization within a reasonable time." The Debtor cannot make such a showing.

20. A reorganization in this case would involve either a sale of the Property (but based on the Appraisal, sale proceeds will be insufficient to pay the Loan in full), or an attempted de-acceleration of the Loan under Section 1124 of the Bankruptcy Code.[3] Effectuating a plan under Section 1124, however, would require the Debtor to cure all of the defaults, which means, in the very least, (a) resolution of the disputed Guaranty, and (b) an infusion of substantial funds. The Debtor cannot satisfy these requirements. First, resolution of the disputed Guaranty would require the contesting Guarantors to acknowledge and reaffirm their Guaranty obligations, but these Guarantors have stated repeatedly in these proceedings and before the Court that they have no intention of acknowledging this obligation. As for the need for substantial funds, Section 1124(2) requires that in order to reinstate the Loan, the Debtor must pay the Lender, among other things, all past due sums, including Contract and Default Rate interest, expenses, and attorney's fees and costs, replenish the reserves required under the Loan Documents, and reimburse the Lender for payment of real estate taxes advanced. In short, the Debtor would need at least $1,100,000.[4] The Debtor has not and cannot demonstrate that any

[3] If the Debtor is able to satisfy the requirements of Section 1124(2), the Lender would be deemed to be unimpaired and its consent to a Plan would not be required. For the reasons discussed herein, however, the Debtor will not be able to satisfy the conditions of this Section.

[4] At a minimum, and assuming an unlikely April 1, 2016 cure date, the Debtor would have to pay the Lender Contract Rate interest from June 7, 2015 through March 31, 2016 of

such funds are available. Thus, as a fundamental matter, the Debtor has no reasonable prospects of a reorganization.

21. Further, assuming the Debtor proposes a Plan, it would not be confirmable over the Lender's objection. To confirm a Plan, the Debtor must obtain the acceptance of at least one class of impaired claims in order to satisfy Section 1129(a)(10). Absent any attempts as gerrymandering, as discussed herein, any proposed Plan of Reorganization would appear to have only two impaired classes – secured creditor claims and unsecured creditor claims. It is likely that the Lender will have a claim in both classes. The Lender would reject any Plan that seeks to pay less than the full amount of its secured claim. In addition, the Lender would vote "no" on any Plan that seeks to pay unsecured creditors less than the full amount of unsecured claims, including interest. Any Plan, therefore, would be unconfirmable for failure to satisfy Section 1129(a)(10).

22. Specifically as to the unsecured creditor class, with a claim amount of $13,774,864.37, and an appraised value of $11,650,000, the Lender would appear to have a deficiency claim of $2,124,864[5]. First County appears to have an unsecured claim of approximately $2,000,000. There are no other creditors having any meaningful claims. Thus, even if First County voted in favor of a Plan, a "no" vote by the Lender means the Debtor cannot obtain the requisite 2/3 (two-thirds) in amount of voting creditors to obtain acceptance of the class.

23. The Third Circuit, in deciding John Hancock v. Route 37, recited the law on granting relief from the automatic stay in this jurisdiction where a debtor cannot propose a plan

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$548,727.79, Default Rate interest from July 7, 2015 through March 31, 2016 (assuming a resolution of the Guaranty issue and resulting default) of $428,054.96, Late Fees of $16,786.24, reimbursement of the tax advance paid by the Lender of $126,228.58, attorney's fees of no less than $57,571.44, and replenishment of all of the reserves required under the Loan Documents (which is not calculated into the $1,100,000 figure noted above).

[5] This assumes a Court determination of the secured portion of the Lender's claim equal to the appraised value.

that an impaired class would accept. Specifically, the John Hancock v. Route 37 Court confronted a situation where a debtor had no equity in its real property and a mortgagee had an unsecured deficiency claim substantial enough to dominate the general unsecured class of claims for purposes of voting on the plan of reorganization. John Hancock v. Route 37, 987 F.2d at 156. The Third Circuit's analysis in John Hancock v. Route 37 makes clear that relief from the automatic stay should be granted under such circumstances because any plan of reorganization proposed would be patently unconfirmable (since neither Section 1129(a)(8) nor (a)(10) could be satisfied over the objection of the mortgagee who, by virtue of the size of its claim, would control the vote of the general unsecured class of claims). Id. at 157. The only possible exception would be the case in which a debtor can demonstrate that a separate classification of a mortgagee's dominant unsecured claim is justified. Id.[6]

24. The Debtor cannot justify a separate classification of the unsecured claim of the Lender from the other general unsecured claims. Thus, once the Lender votes "no" on a Plan, the Debtor will have no impaired class of claims accepting the Plan under 11 U.S.C. §1126(c) and the Debtor would be unable to satisfy the requirements of 11 U.S.C. §1129(a)(10). Any Plan that the Debtor proposes would be patently unconfirmable, warranting relief from the automatic stay in accordance with the dictates of John Hancock v. Route 37.

25. The above discussion involves payment of only secured and unsecured creditors. The Court is aware of the substantial administrative claims which the Debtor seeks to pay from income of this Debtor and the other debtors that generate rental revenue. Stated simply, the Debtor has not identified a source of funds to pay these obligations, let alone the payments due to the Lender as required by the Bankruptcy Code.

26. The conditions for relief under Section 362(d)(2) have been met in that the Debtor has no equity in the Property and the Property is not necessary for an effective reorganization.

[6] The Third Circuit has determined that separate classification is permitted only if it is demonstrated to be reasonable and justified. See John Hancock v. Route 37, 987 F.2d at 161.

As such, the Lender should be granted relief from the automatic stay to proceed with the Foreclosure Action.

B. Stay Relief Based on the Requirements of a SARC Under Section 362(d)(3):

27. Section 362(d)(3) provides that relief from the automatic stay *shall* be granted on a request of a creditor in a single asset real estate case, *unless* within the first 90 days of the bankruptcy, the debtor makes monthly payments to the creditor of contract interest, or proposes a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time. Because the Debtor is unable to satisfy either prong of Section 362(d)(3), the Lender's Motion should be granted.

28. The Debtor must concede the Property falls under the definition of "single asset real estate" ("SARC") under Section 101(51B) of the Bankruptcy Code. It must also concede that Section 362(d)(3) mandates relief from the automatic stay if by May 3, 2016 (90 days after the Petition Date), the Debtor does not make monthly payments of Contract Rate interest to the Lender or file a plan of reorganization which has a reasonable possibility of being confirmed within a reasonable time. Contract interest accrues at the rate of $1,835.21 per day. A monthly payment of Contract Rate interest, only, would be about $55,056.30. The information filed by the Debtor in connection with the various cash collateral hearings suggests the Debtor does not generate sufficient Rents to make these monthly payments and satisfy its operating expenses. Secondly, as discussed above, the Debtor is unable to propose a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time. See ¶ 19-25, supra. Accordingly, the Debtor will not be able to satisfy its burden of proof under Section 362(d)(3) to prevent relief from the automatic stay in favor of the Lender.

C. Stay Relief for Cause is Appropriate Here:

29. Cause is not defined in the Bankruptcy Code, however, the Bankruptcy Court is given "wide latitude" to balance the equities when granting relief from an automatic stay. In re

Myers, 491 F.3d 120, 124 (3d Cir. 2007). Courts apply a totality of the circumstances test based upon the specific facts of each case to determine whether the automatic stay should be lifted "for cause." In re Fairchild Corp., 2009 Bankr. LEXIS 3815, 23 (Bankr. D. Del. Dec. 1, 2009) (citing Bandolino v. Wilson (In re Wilson), 116 F.3d 87, 90 (3d Cir. 1997)).

30. In addition, the Third Circuit has developed a three-part balancing test to evaluate whether cause exists: "(1) Whether any great prejudice to either the bankrupt estate or the debtor will result from continuation of the civil suit; (2) Whether the hardship to the non-bankrupt party by maintenance of the stay considerably outweighs the hardship to the debtor; and (3) The probability of the creditor prevailing on the merits." In re DBSI, Inc., 407 B.R. 159, 166-67 (Bankr. D. Del. 2009) (quoting In re SCO Group, Inc., 395 B.R. 852, 857 (Bankr. D. Del. 2007)).

31. Under these factors, cause exists to grant the Lender relief from the automatic stay. First granting the Motion will not result in great prejudice to the Estate or the Debtor because the Debtor has no prospects for reorganization. With no equity in the Property, the Debtor has shown no source of funds to fund a plan of reorganization. If it wants to pursue a sale process, it can do so while the Foreclosure Action proceeds. If there are equity funds available, that funding mechanism and attempted cure also can occur during the pendency of the foreclosure. While the Lender will prosecute the Foreclosure Action if stay relief is granted, the inevitability of the foreclosure after nine months of non-payment, diversion of rents and unpaid real estate taxes cannot be deemed to be the source of "great prejudice" to the Debtor or its Estate. Second, and in contrast, the hardship to the Lender if the Motion is denied "considerably outweighs" the hardship to the Debtor. The Lender is owed in excess of $13,700,000, with interest accruing daily subject to Section 506. Thus, hardship will result to the Lender if it is further delayed from pursuing its contractual remedies. Finally, under the third DBSI factor, the

Lender has a strong probability of prevailing on the merits of its Foreclosure Action as there are no apparent defenses. Accordingly, both under the general totality of the circumstances standard and under the DBSI factors, the Lender's Motion should be granted.

32. The Bankruptcy Case was filed February 3, 2016, but those in control of the Debtor have been involved since December, 2015. There has been sufficient time for the Debtor to evaluate its prospects for reorganization, and the challenges it must overcome. Under the facts of this case, it cannot overcome such challenges.

33. Bankruptcy Rule 4001(a)(3) provides that "[a]n order granting a motion for relief from an automatic stay made in accordance with Rule 4001(a)(1) is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise." FED. R. BANKR. P. 4001(a)(3). The Lender should be permitted to proceed with the Foreclosure Action with no 14 day stay.

34. The undersigned certifies that attorneys for the Lender and the Debtor have and/or will discuss the request for relief set forth herein prior to the hearing on the Motion. *See* DEL. BANKR. L.R. 4001-1(d).

WHEREFORE, the Lender respectfully requests that this Honorable Court enter an order granting relief from the automatic stay; and such other relief as this Court deems just and necessary.

Dated: March 18, 2016
Wilmington, Delaware

McCARTER & ENGLISH, LLP

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