

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:) Chapter 11
)
Riverbend Community, LLC,) Case No. 11-11771 (KG)
)
Debtor.)
)
) **Re Dkt. Nos. 34, 37, 54, 60, 61**

**MEMORANDUM ORDER GRANTING, IN
PART, MOVANT CECIL BANK’S MOTION
FOR RELIEF FROM THE AUTOMATIC STAY**

The Court has before it the Motion of Cecil Bank (“the Bank”) for Relief from the Automatic Stay Pursuant to 11 U.S.C. § 362(d)(3) (the “Motion”) (D.I. 54).¹ Upon review of the pleadings, and following an evidentiary hearing on October 27, 2011 (the “Hearing”), the Court ORDERS that the Motion is GRANTED, IN PART. The Court orders the Debtor to formulate and present the Court with an amended plan that is confirmable under 11 U.S.C. § 1129, and further orders the Debtor to pay the Bank post-petition interest due under 11 U.S.C. § 362(d)(3)(B) since the petition date. Further, the Court orders that if the Debtor does not timely comply with the ordered obligations, the automatic stay will be automatically lifted as to the Bank.

JURISDICTION

The Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 157 and 1334(b). This is a core proceeding under 28 U.S.C. § 157(b)(2). Venue is proper pursuant

¹ Debtor also sought approval of a sale to an insider which the Court denied on the record at the Hearing.

to 28 U.S.C. § 1409.

BACKGROUND

Riverbend Community, LLC (the “Debtor”) owns various parcels of land located in the Riverbend at Old New Castle Subdivision, City of New Castle, New Castle County, Delaware (the “Riverbend Subdivision”). The Debtor owns approximately 176 lots of the total 210 lots in the Riverbend Subdivision (the “Real Property”). Transcript of Hearing on October 27, 2011 (“Hrg. Tr.”). Mr. Joseph Capano, Sr. (“Capano Sr.”) is the Debtor’s managing member. *Id.* There are twelve homes constructed in the Riverbend Subdivision and there is a completed clubhouse. *Id.* Additionally, there are seventy-five lots ready for sale and construction, meaning that there is water, sewer, the lots are rough graded and there are partially paved roads. *Id.*² The homes being constructed in the Riverbend Subdivision are between 1,400 square feet and 4,000 square feet. *Id.* The detached single family homes are priced at \$350,000.00 to \$600,000.00, the attached town-homes are priced from \$235,000.00 and higher. The Riverbend Subdivision is governed by a 55 and older lot

² Presently, there are two pending cases in the Delaware Superior Court and Delaware Court of Chancery against the Debtor for alleged violations of Delaware’s Wetlands Act, Title 7 of the Delaware Code. Debtor is charged with excavation, filling and construction in state regulated wetlands. Capano Sr. disputes these allegations and asserts that any environmental violations were caused by the prior owner of that property, but the Debtor does not own that property nor has the Debtor encroached on any wetlands. Hrg. Tr. Capano Sr. testified that he signed a tolling affidavit, giving the Army Core of Engineers additional time to investigate their claims while the cases are pending because the Debtor wants the issue resolved. *Id.* It was established at the Hearing that the pending litigation would not prevent the sale of the Real Property, rather the purchaser would take the Real Property subject to any claims. *Id.*

restriction.³ Hrg. Tr. Finally, there is a homeowners association that is run by Capano Sr.

The acquisition of the Real Property was financed with two loans from the Bank. The Bank loaned the Debtor \$4,750,000.00 and a second \$1,500,000.00 loan (collectively, the “Loans”). The Loans are secured by a first-priority mortgage lien and a second priority mortgage lien against the Real Property. *See Motion of Cecil Bank for Entry of an Order Determining that Debtor’s Real Property Constitutes Single Asset Real Estate that is Subject to 11 U.S.C. § 362(d)(3)* (the “SARE Motion”) (D.I. 12) at 2. The additional \$6 million cost of development and construction of the Real Property was financed by the Debtor out-of-pocket. Hrg. Tr. Additionally, the Debtor guaranteed a \$4,817,850.00 loan and a \$2,545,000.00 loan made by the Bank to Craft Built Homes, LLC which are secured by a third party mortgage lien against the Real Property. *Id.* The Bank’s secured claims against the Debtor are in the aggregate amount of \$11,819,967.45. *The Motion*, at 4. The Bank commenced foreclosure proceedings against the Debtor in the Delaware Superior Court in New Castle County, and a foreclosure sale was scheduled for June 14, 2011. *Id.* The foreclosure sale was stayed by the Debtor’s bankruptcy filing on June 9, 2011. *Id.*

³ At the Hearing, Capano Sr. testified that the 55 and over age restriction permits all of the lots to be sold to persons under 55. Hrg. Tr. The only requirement is that one resident member of the household must be over 55 years old. The title to the property can be in anyone’s name, regardless of age. *Id.* Capano Sr. further testified that about 40 units of the total 210 units do not have the 55 and over restriction. *Id.* The Debtor has had 3-4 meetings with the New Castle City Counsel to negotiate removing the age restriction in exchange for certain allowances such as constructing playgrounds, sidewalks on one side of a right of way, and a second emergency entrance to the development. *Id.*

On August 25, 2011, the Court entered an *Order Determining the Debtor's Real Property Constitutes Single Asset Real Estate that is Subject to 11 U.S.C. § 362(d)(3)* (the "SARE Order") (D.I. 30). On September 2, 2011, the Debtor filed two *Motions for Authority to Sell Real Estate Free and Clear of Liens, Claims and Encumbrances Pursuant to Section 363 of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 9014* (collectively, the "Sale Motions") (D.I. 33, 34). Respectively, the Sale Motions sought authority to sell 100 lots to Cornell New Castle Homes, LLC ("Cornell" and the "Cornell Sale") (D.I. 33) and a second set of 70 lots to KLC, LLC and JSR, LLC. (the "KLC-JSR Sale") (D.I. 34) *Id.* KLC, LLC ("KLC") is owned by Kathy Capano ("K. Capano"), who is Capano Sr.'s daughter-in-law. *Supplemental Objection of Cecil Bank to Debtor's Motions for Authority to Sell Real Estate Free and Clear of Liens, Claims, and Encumbrances, Pursuant to Section 363 of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 9014 [D.E. 33 and 34]* (the "Supplemental Objection") (D.I. 61), at 5. JSR Real Estate, LLC's ("JSR") sole member is James Rostocki ("Rostocki"). *Id.* at 7. Rostocki is the son of Ms. Jeanne Parrott who is a longtime close friend and business associate of Capano Sr. Hrg. Tr.

Both the Cornell Sale and the KLC-JSR Sale provide that Fox Chase Realty ("Fox Chase") will act as a broker, and that the Debtor will pay a commission to Fox Chase. *Supplemental Objection*, at 5.⁴ Fox Chase is wholly-owned by Joseph Capano II, who is the

⁴ At the Hearing, Capano Sr. testified that there would be no broker fees paid to Fox Chase with regard to the KLC-JSR Sale. Hrg. Tr. Capano Sr. also "hangs" his real estate license at Fox Chase. *Id.*

son of Capano Sr. and the husband of purchaser K. Capano. *Id.* at 5. Rostocki testified at his deposition that he is a Vice President of Fox Chase. Rostocki Transcript (“Rostocki Tr.”) 19:10-21:2. Debtor did not disclose these relationships in the Sale Motions.⁵ On September 13, 2011, the Bank filed a *Preliminary Objection to Debtor’s Motions for Authority to Sell Real Estate Free and Clear of Liens, Claims, and Encumbrances Pursuant to Section 363 of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 9014 [D.E. 33 and 34]* (the “Preliminary Objections”) (D.I. 37). The Bank deposed the three proposed purchasers: Rostocki of JSR, Greg Lingo of Cornell, and K. Capano of KLC. *Supplemental Objection* at 3. In anticipation of the Hearing, the Bank issued subpoenas for all three purchasers to testify at the Hearing. Only K. Capano appeared and testified. Subsequent to the depositions and prior to the Hearing, Cornell’s counsel told the Debtor that it would not proceed with the Cornell Sale. Hrg. Tr. Additionally, Rostoki was not present to testify at the Hearing. The Bank’s process server attempted to serve Rostocki seven times and was unable to serve him with the Bank’s subpoena. *Id.* The majority of Rostocki’s deposition transcript was designated for the record.⁶ *Id.*

⁵ The only disclosure made in the Sale Motion (D.I. 34), was that the Debtor had no “connections with JSR.” *Sale Motion*, at 3-4. The disclosure was misleading.

⁶ Debtor and the Bank stipulated that all of Rostocki’s prior deposition testimony would be designated except for page 62 line 2 through page 63 line 1. Hrg. Tr.

At the Hearing, K. Capano testified that the KLC-JSR Sale is to take the following form: KLC-JSR will purchase a single lot for \$80,000⁷ construct a model home on the lot and then use the model home to market and sell additional lots. Hrg. Tr. K. Capano and Rostocki formed a second company, the Riverbend Model Company, to oversee the construction of the home and hiring of subcontractors. *Id.* K. Capano testified that Riverbend Model Company has not yet secured building permits to start construction on the first lot. *Id.* K. Capano further testified that Keller Williams Realty, not Fox Chase, will be marketing the homes for Riverbend Model Company. *Id.* Once a construction contract is reached with a purchaser, KLC-JSR will then purchase a second lot and construct that purchaser's home and so on and so forth. *Id.* KLC and JSR have not made any commitment on how many of the 70 lots they will purchase and when.

DISCUSSION

This Court's SARE Order provides that the Debtor and the Real Property are subject to 11 U.S.C. § 362(d)(3). The relevant provisions of 362(d)(3) govern the Court's granting of stay relief:

(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, not later than the date that is 90 days after the entry of an order for relief . . . or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later -

⁷ The \$80,000 was for the purchase price of one lot, and was funded equally by KLC, and JSR. Hrg. Tr. The \$80,000.00 purchase price for the first lot was placed in escrow with K. Capano's attorney. *Id.*

- (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 that -
 - (i) may ... be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property ... and
 - (ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate[.]

11 U.S.C. § 362(d)(3).

It has been more than thirty days since this Court entered the SARE Order on August 25, 2011. Additionally, the Debtor has not made monthly payments to the Bank within the applicable thirty-day statutory window. On September 24, 2011, the Debtor filed its *Chapter 11 Plan of Reorganization Proposed by Riverbend Community, LLC, the Debtor and Debtor-In-Possession* (the “Plan”) (D.I. 47) and an accompanying *Disclosure Statement Pursuant to Section 1125 Of The Bankruptcy Code Describing Plan Of Reorganization Proposed by Riverbend Community, LLC, The Debtor And Debtor-In-Possession* (the “Disclosure Statement”) (D.I. 48) which was within 30 days of the entry of the SARE Order. The Plan classifies the Bank’s secured claim as a Class 1 impaired claim.⁸ *See Plan*, at 7-8. It is the only creditor in Class 1. *Id.* Paragraph 4.1 of the Plan and the proposed budget(the “Proposed Budget”) attached as Exhibit A to both the Plan and Disclosure Statement details

⁸ There is a dispute as to the amount of the Bank’s secured claim, whether it is the full \$11.8 million (which includes the guarantee) or only the two Loans the Bank made to the Debtor (for the Real Property) which total \$6,938,167.07. *See Motion*, at 3. Without deciding the issue, the Court accepts as fact that the secured claim is at least the amount of the Bank Loans.

the treatment of the Class 1 claim. *Id.* The Plan provides that Class 1 will be paid from the proceeds from the sale of the Real Property. *Id.* Paragraph 4.1 also references the executed agreements of sale with JSR and Cornell. *Id.* Additionally, the Proposed Budget details the timing and amount of all principal payments to Class 1 and provides that the Bank will receive principal payments under the Plan that total \$1,010,000.00. *Id.* at Exhibit A. The Disclosure Statement also states that the Real Property is worth \$10,000,000.00.⁹ *Disclosure Statement*, at 9.

The Bank asserts that the Plan is unconfirmable under Section 1129. The Court is not prepared to rule on whether or not the Plan is confirmable under § 1129. However, the Court notes that the sale of a single home to KLC-JSR for \$80,000.00, without any other legally binding obligation on KLC-JSR to purchase additional lots, is insufficient protection for the Bank. It is in reality an option to purchase. Moreover, the lack of disclosure and subsequent testimony, as to the insider relationships of the various parties involved in the Sale Motions borders on bad faith. Finally, the Debtor has not made any post-petition monthly payments to the Bank, as required under 11 U.S.C. § 362(d)(3)(B). At the same time, despite the many shennanigans, the Court is prepared to give Debtor, who has made a major investment, a brief but fair opportunity to extend the stay upon compliance with SARE.

⁹ The Bank reserves all rights as to the accuracy of the \$10,000,000 value. *See Motion*, at 5 n.2.

For the foregoing reasons IT IS ORDERED THAT:

1. The Motion is GRANTED and will become self-executing unless:

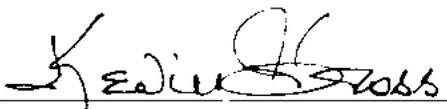
(a) On or before November 30, 2011, at 4:00 p.m., Debtor brings current from the petition date (June through November, 2011) all interest payments on the Loans for the Real Property, the principal sum which is \$6,250,000. The Bank shall forthwith provide to Debtor the interest due for June, July, August, September, October and November, 2011.

(b) Debtor shall file a Disclosure Statement and Amended Plan on or before December 14, 2011, and shall promptly schedule a hearing on the Disclosure Statement to be held at the earliest convenience of the Court.

(c) The Bank shall file a certification if Debtor does not comply with the foregoing requirements.

2. The Motion for the sale to KJC-JSR is denied without prejudice to a sale through a plan.

Dated: November 9, 2011

A handwritten signature in black ink, appearing to read "Kevin Gross", written over a horizontal line.

KEVIN GROSS, U.S.B.J.