UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

KELVIN R. CREWS and
LOUANN D. CREWS,

Case No.: 3:09-bk-8641-JAF
Chapter 11

Debtors in Possession.
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ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR RELIEF FROM AUTOMATIC STAY

This case is before the Court on the motion for relief from the automatic stay provisions of 11 U.S.C. § 362, filed by Class 3 creditor, TD Bank, N.A. d/b/a Mercantile Bank, as successor by merger to Mercantile Bank, a Division of Carolina First Bank (the "Bank") (Doc. 287, Motion). Kelvin R. Crews and Louann D. Crews (the "Debtors"), did not file a responsive memorandum. On February 6, 2012, the Court held a final evidentiary hearing. At the hearing, the Debtors appeared and testified, and counsel for the parties argued their respective positions.

At the conclusion of the hearing, the Court took the matter under advisement. Upon consideration of the evidence presented at the hearing, and after considering the parties' arguments and relevant case law, the Court finds the Motion is due to be granted in part and denied in part as provided herein.

I. BACKGROUND

On December 12, 2005, the Debtors executed first and second mortgages in favor of the Bank. The mortgages encumber approximately 186 acres of real property and improvements located thereon. The mortgages and other loan documents were duly recorded in the public records of the county in which the property is located. In a prior adversary proceeding related to the underlying case, *Mercantile Bank v. Crews*, Adv. No. 3:10-ap-0031-JAF, the Court, after a trial on the merits, entered Findings of Fact and Conclusions of Law, wherein it determined the Bank

acquired an equitable lien on $350,000.00 in building loss insurance proceeds related to a fire loss that occurred on June 8, 2009 (Adv. No. 3:10-ap-0031-JAF [Doc. 70]).[1]

The building destroyed by the June 8, 2009 fire was an improvement on the subject mortgaged real estate and, pursuant to the loan documents, constituted collateral for the loans made by the Bank to the Debtors. The recorded mortgages and other loan documents obligated the Debtors to insure the subject building against fire loss, and to designate the Bank as a mortgagee and loss-payee with a right to any insurance proceeds derived therefrom. The Debtors insured the building against potential fire loss; however, they did not name the Bank as either a mortgagee or loss-payee on the policy of insurance. Subsequent to the fire, the Debtors did not inform the Bank about the loss of its collateral. Shortly after the fire, the Debtors requested from the insurer, and were provided, a $50,000.00 advance payment.

Upon learning of the fire loss from a local newspaper report, the Bank made demand upon the Debtors for payment of any building loss insurance proceeds. Additionally, the Bank requested from both the Debtors and the insurer that it be named as a mortgagee and loss-payee on the subject policy in accordance with the recorded mortgages and other loan documents. The Debtors vehemently opposed the Bank being named as either a mortgagee or loss-payee on the policy of insurance; however, after conducting a title search on the subject real property, the insurance company recognized the Bank's right to be named as a mortgagee.[2] Ultimately, the Debtors acquiesced and signed a sworn statement in proof-of-loss, wherein they acknowledged the Bank's

[1] The Court's September 12, 2011 Findings of Facts and Conclusions of Law (Adv. No. 3:10-ap-0031-JAF [Doc. 70]) is hereby fully incorporated by reference.

[2] Approximately forty-five (45) days prior to the fire loss, K.C. Earthmovers, Inc., a corporation wholly owned by the Debtors' daughter, Ms. Hannah Diggs, was added to the policy of insurance as a loss-payee (Adv. No. 3:10-ap-0031-JAF [Doc. 70 at 4]).

mortgage interest in the subject building and the Bank's right to any insurance proceeds related to its loss.

After receipt of the sworn statement of loss, *supra*, the insurance provider issued a check (No. 80214) for $300,000.00. The Bank was named on the check as an additional payee.[3] The check constituted the remaining balance of $350,000.00 in building loss insurance proceeds due on the policy for the fire loss.[4] Approximately one week after receiving the subject check, the Debtors, in their individual capacity, filed the instant Chapter 11 bankruptcy petition. Despite demand by the Bank for turnover of the $300,000.00 insurance proceeds check, the Debtors never delivered the same to the Bank. The check remains in the possession of the Debtors.

Subsequently, in a second adversary proceeding, *Crews v. Mercantile Bank*, Adv. No. 3:11-ap-809-JAF, the Court entered summary judgment in favor of the Bank, finding the Debtors cannot avoid the equitable lien on the $350,000.00 in fire loss insurance proceeds pursuant to 11 U.S.C. § 544 (Adv. No. 3:11-ap-809-JAF [Doc. 15]).[5]

Previously, on December 17, 2010, the Debtors moved, pursuant to 11 U.S.C. § 1129(b), for entry of an order confirming their proposed plan of reorganization notwithstanding the non-acceptance of the Bank (Doc. 186; *see also* Doc. 22, Plan of Reorganization). As part of its opposition to the Debtors' § 1129(b) motion, the Bank requested that the Court hold a hearing to value the real property securing Claims Nos. 14 and 26 pursuant to 11 U.S.C. § 506(a) (Doc. 187 at 2). Claim No. 14 represents the first mortgage lien on the subject real property in the amount of

[3] The check was issued payable to: (1) Erosion Stoppers, Inc. (a corporation wholly owned by Debtor Louann D. Crews) and K.C. Earthmovers, Inc., as their interests may appear; and (2) the Bank. Neither Erosion Stoppers, Inc. nor K.C. Earthmovers, Inc. are presently in bankruptcy.

[4] As noted previously, the Debtors received a $50,000.00 advance payment prior to the insurance claim being fully adjusted. These monies have not been remitted to the Bank.

[5] The Court's January 12, 2012 Order granting summary judgment in favor of the Bank (Adv. No. 3:11-ap-809-JAF [Doc. 15]) is hereby fully incorporated by reference.

$744,808.78 and Claim No. 26 represents the second mortgage lien on the property in the amount of $87,171.26. The Court granted the Bank's request and held a § 506(a) valuation hearing on September 6, 2011.

After considering the testimony at the hearing and reviewing the parties' submitted appraisal reports, the Court found the present market value of the subject real property is $591,000.00 (Doc. 267).[6] In accordance therewith, the Court valued Claim No. 14 as $591,000.00 secured and $153,808.78 unsecured. Additionally, Claim No. 26 was valued as $0.00 secured and $87,171.26 unsecured.[7] As of the Petition Date, the Debtors' total indebtedness to the Bank, under the first and second mortgages, *supra*, is $831,980.04.

II. DISCUSSION

In the Motion, the Bank seeks relief from the automatic stay provisions of 11 U.S.C. § 362: (1) to authorize the Bank to pursue, in state court, enforcement of its equitable lien in the subject $350,000.00 in building loss insurance proceeds against the Debtors, Erosion Stoppers, Inc., K.C. Earthmovers, Inc., the insurance provider, and any other party asserting an interest in the insurance proceeds; (2) to authorize the Bank to pursue enforcement of its equitable lien in the subject $300,000.00 insurance proceeds check (No. 80214) by seeking re-issuance of the check payable solely to the Bank; and (3) to pursue *in rem* remedies against the underlying real property (Doc. 287 at 8). Additionally, the Bank maintains that any monies recovered as a result of enforcing its equitable lien should be applied to the total indebtedness of the Debtors as of the date of the filing of the petition ($831,980.04) rather than the present market value of the property ($591,000.00) (Doc. 287 at 8).

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[6] The Court's Order (Doc. 267) is hereby fully incorporated by reference.

[7] In valuing Claim Nos. 14 and 26, the Court did not consider the Bank's equitable lien on the $350,000.00 in insurance proceeds or the Bank's interest in the $300,000.00 insurance proceeds check (No. 80214).

For their part, the Debtors argue: (1) the Bank's motion for relief from the automatic stay should be denied because the subject real property is essential to an effective reorganization; and (2) any application of monies recovered with respect to the insurance proceeds at issue should be applied to the present market value of the property ($591,000.00) rather than the total indebtedness of the Debtors to the Bank ($831,980.04).

The parties' arguments will be addressed in turn.

Although the filing of a bankruptcy petition operates as an automatic stay of any initiation or continuation of a proceeding against a debtor, a party in interest may obtain relief from the automatic stay after notice and a hearing "for cause." 11 U.S.C. § 362(d)(1). In determining whether cause exists warranting relief from the automatic stay, "[c]ourts conduct a case-by-case inquiry and apply a totality of the circumstances test." *Beane v. United States (In re Beane*), 404 B.R. 942, 948 (M.D. Fla. 2008). In this regard, bankruptcy courts examine a number of factors including, *inter alia*, the following:

> (1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether the action primarily involves third parties; (4) whether litigation in another forum would prejudice the interests of other creditors; and (5) the interests of judicial economy and the expeditious and economical resolution of litigation.

Id. In addition, all factors will not be relevant in every case. *Id.*

Here, the Court finds cause exists to lift the automatic stay for the limited purpose of permitting the Bank to enforce its equitable lien in the $350,000.00 in fire loss insurance proceeds. A primary factor considered by the Court in this regard is that any such action would necessarily involve third parties not before the Court (*i.e.*, Erosion Stoppers, Inc., K.C. Earthmovers, Inc., and the insurer). Due process considerations weigh heavily in favor of lifting the stay so as to allow the Bank to enforce its equitable lien against all interested parties. Additionally, the Court finds such an

action would neither interfere with the bankruptcy case, nor prejudice other creditors. Moreover, an action in state court could result in an economical resolution of the matter.

With respect to the Debtors' argument that any insurance proceeds recovered by the Bank be applied to the real property's present market value of $591,000.00 rather than the Debtors' total indebtedness to the Bank, the Debtors have not submitted any authority in support of this proposition, and the Court is aware of none. In fact, the authority the Court has found supports the opposite conclusion—that is, insurance proceeds such as those at issue here are to be applied to the mortgaged debt rather than the market value of the property. *South Carolina Ins. Co. v. Pensacola Home & Sav. Ass'n*, 393 So. 2d 1124, 1125-26 (Fla. 1st DCA 1980); *Calvert Fire Ins. Co. v. Environs Dev. Corp.*, 601 F.2d 851, 856 (5th Cir. 1979).[8]

It should be noted the Bank acknowledges that, once any recovered insurance proceeds are applied to the Debtors' total indebtedness to the Bank, such indebtedness may become less than the present market value of the property (*i.e.*, providing an equity interest in the property in favor of the Debtors) (Doc. 287 at 7). Since the Court has already found the automatic stay should be lifted for cause under 11 U.S.C. § 362(d)(1) as to the $350,000.00 in insurance proceeds, it is not necessary for the Court to determine whether the factors that pertain to 11 U.S.C. § 362(d)(2) have been met (*i.e.*, whether the Debtors retain an equity interest in the property and whether the property is necessary for an effective reorganization). Such matters are premature at this juncture since the outcome of any state court action regarding the insurance proceeds could determine whether the Debtors retain an equity interest in the underlying real estate. Consequently, the Court will deny the motion to lift the automatic stay, as it relates to *in rem* remedies against the real property, without prejudice.

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[8] Decisions of the Fifth Circuit rendered on or before September 30, 1981 are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

III. CONCLUSION

For the foregoing reasons, it is **ORDERED**:

1. The motion for relief from the automatic stay provisions of 11 U.S.C. § 362, filed by Class 3 creditor, TD Bank, N.A. d/b/a Mercantile Bank, as successor by merger to Mercantile Bank, a Division of Carolina First Bank (Doc. 287) is granted in part and denied in part as set forth below.

2. The motion to lift the automatic stay is granted for the purpose of permitting TD Bank, N.A. to pursue, in state court, enforcement of its equitable lien in the subject $350,000.00 in building loss insurance proceeds against the Debtors, Erosion Stoppers, Inc., K.C. Earthmovers, Inc., the insurance provider, and any other party asserting an interest in the subject insurance proceeds.

3. The motion to lift the automatic stay is further granted for the purpose of permitting TD Bank, N.A. to pursue enforcement of its equitable lien in the $300,000.00 insurance proceeds check (No. 80214) by seeking re-issuance of the check payable solely to TD Bank, N.A.

4. The motion to lift the automatic stay is denied with respect to TD Bank, N.A. pursuing *in rem* remedies against the subject real property.

5. The Court reserves jurisdiction with respect to any possible lifting of the automatic stay as it relates to the real property.

6. Any monies collected by TD Bank, N.A. as a result of enforcing its equitable lien in the building loss insurance proceeds will be applied to the total indebtedness of the Debtors to TD Bank, N.A. as of the date of the filing of the petition ($831,980.04).

7. Upon collection of any building loss insurance proceeds, TD Bank, N.A. shall amend its claim(s) accordingly.

DATED this 13th day of February, 2012 in Jacksonville, Florida.

/s/ Jerry A. Funk
Jerry A. Funk
United States Bankruptcy Judge

Copies To:

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