UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF WISCONSIN

In re: Case Number:

SEVILLE PARTNERS, LF11-84-00994

Debtor.

FINDINGS OF FACT, CONCLUSION OF LAW
AND
ORDER TERMINATING AUTOMATIC STAY

Michael A. Jiracek, by Bosshard & Associates, having filed a Request for Relief from Automatic Stay; and a hearing having been held;[1] and Mr. Jiracek appearing in person and by Attorney James W. McNeilly, Jr.; and the Debtor appearing by general partners Thomas G. Markos and Reginald A. Gassen and by Attorney Donald J. Harman; and briefs having been filed; the Court, being fully advised in the premises, FINDS THAT:

1. On May 17, 1984, Debtor Seville Partners, a Hawaiian limited partnership, filed for relief under Chapter 11 of the Bankruptcy Code. Reginald A. Gassen and Thomas G. Markos are the Debtor's general partners.

2. On September 28, 1979, Michael A. Jiracek, as vendor, entered into a land contract with Gassen, as purchaser, to convey certain real property (the Seville Apartments).

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[1] See In re Seville Partners, LF11-84-00994, ___ B.R. ___ (Bankr.W.D.Wis. Sept. 12, 1984) (hearing ordered).

3. On January 24, 1980, Gassen, with Jiracek's approval, assigned the land contract to the Debtor.

4. In 1982 the land contract fell into default and Jiracek began foreclosure proceedings.

5. On April 1, 1983, the land contract was reinstated and amended. The first amended land contract provided for, inter alia, an interest rate of 11¼% and a "final due date for payment of the land contract principal balance and all accrued interest of May 1, 1984"--interest on any unpaid balance was to accrue at 18% per annum after May 1. The $13,280 monthly payments provided for under the amendment were less than the accruing interest.

6. In late 1983 Gassen determined that Seville would not be able to make the May 1, 1984, balloon payment and asked Jiracek to renegotiate. The result was a second amendment to the land contract in December of 1983.

7. The second amendment restructured the Seville debt as follows:

(a) The outstanding balance as of January 1, 1984, was established as $1,602,174.28.

(b) This amount was divided into two parts:

$510,000.00 (the "Principal Amount") to accrue interest at 2% over the Northwestern National Bank of Minneapolis prime rate;

$1,092,174.28 (the "Principal Balance Amount") to accrue interest at a rate "which is equal to the average weighted rate of interest charged Jiracek under two

notes to First Federal Savings and Loan Association of La Crosse".

(c) The Principal Amount was due in $100,000 payments on the date of execution of the Second Amendment,[2] May 10, 1984, and January 1, 1985, and a $130,000 payment on January 1, 1986; the Principal Balance Amount was payable in full in 1988 and 1989;

(d) Interest was to accrue at 18% after maturity--"whether by the passage of time, acceleration because of default or otherwise".

(e) Monthly payments, which varied prior to May 1, 1984, were set at $14,824 thereafter. The proceeds of these payments went toward (i) interest on the Principal Balance Amount, (ii) unpaid interest from prior months, (iii) interest on the Principal Amount and (iv) the Principal Balance Amount.

In addition, $40,000 was to be paid to Jiracek as consideration for the restructuring: $20,000 upon execution of the agreement,[3] $20,000 on May 10, 1984.

8. Gassen and Seville entered into the second amendment with the intention of re-syndicating to meet balloon payments.

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[2] This payment was made out of the proceeds of a December 30 loan--secured by a mortgage of the Debtor's land contract interest in the Seville Apartments--from Jiracek Companies, Inc.

[3] This payment was made as set forth at Paragraph 7, footnote [2], supra.

9. In early 1984, Gassen and Markos learned that, due to an ongoing investigation by the Wisconsin Securities Commission authorities, re-syndication was not practicable.

10. Throughout 1984 Gassen and Markos, as well as Jiracek, attempted to sell the Seville Apartments. Three purchase offers and letters of intent were received into evidence:

(A) The Decade Offer:

$1,975,000 total price. $1,647,000 to be paid with 10½% interest through January, 1985, 12¾% interest thereafter with a balloon payment in 7 years. (Expert testimony established that the present value of this offer is approximately $1,900,000.)

(B) The Ozark Hills Intent:

$2,500,000 total price as part of a larger package. $655,000 to be paid with 15% interest, $1,500,000 to be paid with 13% interest--both with a balloon payment in 15 years.

(C) Countywide Realty Intent:

Part of a larger package--Seville Apartment value not separately set forth.

11. The Debtor's asking price was $2,225,000 to $2,500,000 depending on terms. Both Gassen and Markos testified that they would accept a $1,975,000 cash offer.

12. The Debtor's appraiser set a fair market value of $2,100,000. Jiracek's appraiser set a fair market value of $1,925,000.

13. Assuming a 2% broker's fee, the cost of sale of the Seville Apartments would be approximately $110,000.

14. The value of Seville Apartments is $1,850,000.

15. Under the second amendment the Debtor owed Jiracek approximately $1,553,000 in principal and interest[4], $8,000 in legal fees and $3,000 in appraisal fees as of October 15, 1984. In addition, unpaid 1983 taxes amount to $20,000.

16. The Debtor has not paid the May 10, 1984, Principal Amount payment, see Paragraph 7(c) supra, nor the May 10, 1984, restructure fee, see Paragraph 7 supra. Since January of 1984, the Debtor has made none of the monthly payments to the tax escrow account required by the second amendment and is now over $30,000 in arrears.

17. The Debtor has paid Jiracek $13,280 a month since filing for relief. Compare Paragraph 5 supra ($13,280 a month required

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[4] Jiracek's ledger shows a balance due--with 18% interest after a May 15, 1984--of $1,726,905.38.

About $139,000 of that total is due on account of the Jiracek Companies loan, footnote 1 supra. Jiracek Companies has not joined in Jiracek's relief from stay motion and junior encumbrances are not considered under 11 U.S.C. sec. 362(d)(1). In re Mellor, 734 F.2d 1396, 1400-1401, 12 B.C.D. 147, 149-150 (9th Cir. 1984).

Of the approximately $1,593,000 remaining, roughly $40,000 is on account of the accelerated interest rate. Cf. In re Madison Hotel Associates, 83-2006, page 26, ___ B.R. ___, ___ B.C.D. ___, ___ (7th Cir. Nov. 6, 1984) ("The intended purpose of 11 U.S.C. §1124(2) is to permit a Chapter 11 debtor to cure a default of an accelerated loan, reinstate the maturity of that loan as it existed before default, and thereby 'reverse a contractual or legal acceleration.' (citation omitted)).

under first amended land contract) with Paragraph 7(e) supra ($14,842 a month required under second amended land contract). Assuming that the current loan balance is $1,553,000[5] and that interest accrues at 12%, the Debtor's interest obligation grows by approximately $2,250 a month and its tax escrow obligation grows by over $3,000 a month.

18. The Seville Apartments are well maintained.

Discussion

19. Under 11 U.S.C. sec. 362(d)(1), the automatic stay may be terminated when a secured creditor's interest is not adequately protected. See generally Annot., 66 A.L.R. Fed. 505 (1984).

20. Jiracek argues that his interest is not adequately protected because the cushion between the value of the property and the amount of the debt is not sufficient to guarantee that he will receive the indubitable equivalent of his interest. See In re Schaller, 27 B.R. 959 (W.D.Wis. 1983) (cushion as adequate protection).

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[5] Even assuming, as the Debtor argues, that the inability of the Debtor's general partners to re-syndicate the Seville Apartments provided a basis for the application of the impossibility doctrine, the first amended land contract would not be revived. See In re Fuzzy Thurston's Left Guard, 6 B.R. 955 (Bankr.W.D.Wis. 1980) (doctrine operates to discharge or suspend performance); cf. In re Madison Hotel Associates, Paragraph 15, footnote 4, supra. Accordingly, this Court looks to the terms of the second amended land contract to determine Jiracek's interest in the Debtor's property.

21. Jiracek has a cushion of roughly $236,000 (about 12.8%) which is eroding at a rate exceeding $5,250 a month. Paragraphs 14-17 supra.

22. "The adequacy of a cushion amount must be evaluated on a case-by-case basis." In re Schaller, Paragraph 20 supra, at 962 (citation omitted).

CONCLUSION OF LAW

Mr. Jiracek's interest is not adequately protected.

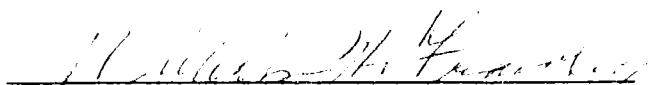
ORDER

IT IS ORDERED THAT the 11 U.S.C. sec. 362 automatic stay be, and the same hereby is, TERMINATED to permit Michael A. Jiracek to commence and prosecute state court foreclosure proceedings for the purpose of foreclosing the Debtor's interest in the Seville Apartments:

> Lots 1 through 9 in Block 2 of Mid-City Industrial Park Addition to the City of La Crosse. La Crosse County, Wisconsin.

Dated: December 11, 1984.

BY THE COURT:



William H. Frawley
U. S. Bankruptcy Judge