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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No. CC-10-1083-HDMk
6	F & F, LLC,)	Bk. No. 09-38204-TD
7	Debtor.)	
8	_____)	
9	F & F, LLC,)	
10	Appellant,)	
11	v.)	M E M O R A N D U M¹
12	U.S. HUNG WUI INVESTMENTS, INC.,)	
13	Appellee.)	
14	_____)	

Argued and Submitted on July 23, 2010
at Pasadena, California

Filed - September 21, 2010

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Thomas B. Donovan, Bankruptcy Judge, Presiding

Before: HOLLOWELL, DUNN and MARKELL, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 The debtor developed a large parcel of property into a
2 retail shopping and hotel complex and then defaulted on the loan
3 that financed the development. The secured creditor holding the
4 loan sought state court remedies including the appointment of a
5 receiver, but before the receiver could take control of the
6 property, the debtor filed bankruptcy. The creditor then sought
7 relief from the automatic stay to resume proceedings in state
8 court.

9 The bankruptcy court granted stay relief under § 362(d)(1),
10 for cause, based on its finding that the debtor filed its case in
11 bad faith, and, under § 362(d)(2) because the property lacked
12 equity and the bankruptcy court determined the debtor would be
13 unable to effectively reorganize in a reasonable time. The
14 debtor appealed. We AFFIRM the bankruptcy court's order for
15 relief under § 362(d)(2) and, therefore, do not reach the issue
16 of whether relief was appropriate under § 362(d)(1).

17 I. FACTS

18 F&F, LLC (the Debtor) is a limited liability company
19 established in 2005. The Debtor is co-managed and co-owned by
20 Choung Fann Yik and Ying Faung Ley, husband and wife, and their
21 four adult children. The Debtor owns 10 acres of real property
22 in the City of Rancho Cucamonga, California (the Property). The
23 Debtor has been developing the Property, since it purchased it in
24 2005, into a multi-building retail shopping center and hotel
25 complex (the Project).

26 East West Bank provided the Debtor with funding for the
27 Project (the Loan Agreement). As part of the Loan Agreement, the
28 Debtor executed a promissory note dated June 1, 2007, in the

1 amount of \$34,850,000 secured by a first position deed of trust
2 encumbering the Property (the Note). The Note provided funds for
3 the estimated \$17,000,000 in construction costs, as well as
4 satisfied an earlier secured loan that the Debtor had with East
5 West Bank. East West Bank recorded its deed of trust on June 14,
6 2007 (the DOT).

7 The Debtor hired Patterson Builders (Patterson) in 2007 to
8 serve as the general contractor for the Project. Thereafter,
9 construction disputes arose on the Project. Change orders
10 totaled over \$5,000,000. Patterson did not submit lien releases
11 or pay all of its subcontractors. To resolve some of these
12 disputes, Patterson, East West Bank, and the Debtor entered into
13 a Term Sheet Regarding Resolution of Disputes on November 13,
14 2008, which allowed Patterson an additional \$5,000,000 from the
15 loan proceeds but did not require Patterson to obtain lien
16 releases with subcontractors and materialmen before receiving the
17 additional funding. In February 2009, Patterson abandoned the
18 Project leaving in its wake approximately 40 subcontractors and
19 suppliers with asserted liens totaling nearly \$7,000,000 against
20 the Property (the Construction Claimants).

21 Approximately 28 of the Construction Claimants filed state
22 court actions to foreclose their mechanics' liens. Those actions
23 were consolidated, along with an action brought by Patterson to
24 foreclose its mechanics' liens against the Property, in Beta
25 Constr., Inc. v. Patterson Builders, et al., San Bernardino
26 County Superior Court of California (the Mechanics' Lien
27 Litigation). Most of the Construction Claimants allege that
28

1 their liens relate back to the date the work was first performed
2 in April 2007, and are senior in priority to the DOT.

3 When the Note matured by its terms on June 1, 2009, the
4 Debtor failed to pay. On August 6, 2009, East West Bank recorded
5 a Notice of Default and Election to Sell Under Deed of Trust.
6 At that time, the Debtor owed East West Bank \$35,440,641.09.

7 On or about September 30, 2009, U.S. Hung Wui Investments,
8 Inc. (Hung Wui) purchased the Loan Agreement and Note from East
9 West Bank for \$22,500,000. Pursuant to the purchase, East West
10 Bank assigned all its interests in the Note and DOT to Hung Wui.
11 On October 13, 2009, Hung Wui filed a complaint in state court
12 seeking judicial foreclosure and the appointment of a receiver
13 for the Property (the Foreclosure Action). The Debtor filed a
14 cross-complaint in the Foreclosure Action alleging that East West
15 Bank had made improper disbursements under the Loan Agreement.

16 On November 19, 2009, the state court entered an order in
17 the Foreclosure Action appointing a receiver for the Property
18 (the Receiver). A foreclosure sale was scheduled for December 4,
19 2009. On November 20, 2009, just before the Receiver was to take
20 possession of the Property, the Debtor filed a chapter 11²
21 bankruptcy petition.

22 Development of the Property was completed about one year
23 prior to the time the Debtor filed bankruptcy. On the petition
24 date, the Debtor had leases in place for approximately 70% of the
25 136,000 square feet of rentable space, which included a Sheraton

26
27 ² Unless otherwise indicated, all chapter and section
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
All Rule references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

1 Hotel and a Union 76 service station, along with nine retail
2 tenants. The hotel, service station and four of the retail
3 businesses were owned and operated by entities related to the
4 Debtor or controlled by insiders of the Debtor. Hung Wui has
5 alleged that because those leases are to insiders they are
6 generating either no rents or under-market rents.

7 The Property is the Debtor's main asset and source of
8 revenue. According to the Debtor's statement of financial
9 affairs, the operation of business from the Project generated no
10 income in 2007 or 2008, and \$571,064 in 2009.

11 On January 14, 2010, the bankruptcy court held a § 105(d)
12 status and scheduling conference on the Debtor's chapter 11 case.
13 It set March 20, 2010, as the date by which the Debtor had to
14 file a disclosure statement and plan of reorganization.

15 On February 4, 2010³, Hung Wui filed a motion for relief
16 from the automatic stay (the Stay Relief Motion) in order to
17 pursue its state court and contractual remedies under the Loan
18 Agreement. In its Stay Relief Motion, Hung Wui sought relief
19 under § 362(d)(1), (d)(2) and (d)(3). Hung Wui asserted that the
20 Debtor filed its bankruptcy case in bad faith, citing factors set
21 out in Little Creek Dev. Co. v. Commonwealth Mortg. Corp.
22 (In re Little Creek Dev. Co.), 779 F.2d 1068, 1072 (5th Cir.
23 1986), including that the Property is the Debtor's only asset;
24 the Property is fully encumbered; the Property was scheduled for
25

26 ³ Hung Wui initially filed its stay relief motion on
27 January 21, 2010. The Debtor filed an opposition on January 28,
28 2010. However, Hung Wui's motion did not properly notice the
Construction Creditors as required under Local Bankruptcy Rule
4001-1 and was re-filed on February 4, 2010.

1 foreclosure; and, the bankruptcy case was filed the day before
2 the Receiver was to take possession of the Property.

3 Additionally, Hung Wui asserted there was no equity in the
4 Property and the Debtor could not effectively reorganize because
5 it would be unable to propose a feasible plan with a consenting
6 impaired class of creditors. Furthermore, Hung Wui asserted that
7 the Debtor was a single asset real estate debtor who could not
8 propose a reasonable plan of reorganization within the 90-day
9 time limit of § 362(d)(3).

10 With its Stay Relief Motion, Hung Wui submitted an appraisal
11 of the Property, which valued it at \$25,910,000. Hung Wui
12 asserted a prepetition claim in the amount of \$36,238,504.23 and
13 a postpetition claim of \$584,081.24 consisting of accrued
14 interest.

15 On February 10, 2010, the Debtor filed an opposition to the
16 Stay Relief Motion. In its opposition, the Debtor denied it had
17 filed its case in bad faith and contended that it had been
18 working diligently to resolve operational and legal problems
19 fundamental to the formulation of a plan. The Debtor stated it
20 was "exploring all of its options" for reorganization and would
21 have a plan on file by the March 20, 2010 deadline set at the
22 status hearing.

23 At a separate hearing held on February 18, 2010, regarding
24 the Debtor's January 28, 2010 request to extend the 90-day
25 deadline of § 362(d)(3), the bankruptcy court ruled that the case
26 was a single asset real estate case and that the Debtor had to
27 submit a plan of reorganization or commence interest payments to
28 Hung Wui no later than March 20, 2010. At the hearing, the

1 Debtor and Hung Wui agreed that if no plan was filed by the
2 March 20 deadline, the Debtor would pay \$63,904.17 per month to
3 Hung Wui, which would constitute interest at the applicable
4 non-default contract rate pursuant to § 362(d)(3).

5 A week later, on February 25, 2010, the bankruptcy court
6 held a hearing on Hung Wui's Stay Relief Motion. The hearing was
7 combined with a hearing on stay relief that had been filed by
8 Patterson to allow the Mechanics' Lien Litigation to continue in
9 state court. The Debtor and Patterson announced at the hearing
10 that they agreed to modify the automatic stay so that the state
11 court could determine the validity, amounts, and priority of the
12 Construction Claimants' liens in the Mechanics' Lien Litigation.

13 The bankruptcy court determined that the nature and
14 complexity of the disputes among the various parties, including
15 the Construction Claimants, which was going to be resolved in
16 potentially lengthy litigation in state court, combined with a
17 lack of any identified capital to fund a plan of reorganization,
18 would make it unlikely that the Debtor could confirm a plan of
19 reorganization in a reasonable time. Additionally, the
20 bankruptcy court found that the Debtor's bankruptcy was "an act
21 of forum shopping." On March 3, 2010, the bankruptcy court
22 entered its order granting the Stay Relief Motion pursuant to
23 § 362(d)(1), (d)(2), and, under (d)(3) if there was no plan of
24 reorganization or no contractual monthly payments tendered in the
25 agreed upon amount by March 20, 2010. The Debtor timely
26 appealed.

1 The Debtor obtained a stay pending appeal from the Panel on
2 March 5, 2010.⁴ However, before the stay was obtained, the
3 Receiver took possession of the Property. Under the terms of the
4 stay, the Receiver is to collect \$63,904.17 per month from rents
5 and/or the Debtor.

6 II. JURISDICTION

7 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
8 § 157(b)(2)(G). The Panel has jurisdiction pursuant to 28 U.S.C.
9 § 158.

10 III. ISSUE

11 Did the bankruptcy court err by granting Hung Wui relief
12 from the automatic stay?

13 IV. STANDARDS OF REVIEW

14 We review a bankruptcy court's order granting relief from
15 the automatic stay for an abuse of discretion. Arneson v.
16 Farmers Ins. Exch. (In re Arneson), 282 B.R. 883, 887 (9th Cir.
17 BAP 2002).

18 In determining whether the bankruptcy court abused its
19 discretion, we first "determine de novo whether the [bankruptcy]
20 court identified the correct legal rule to apply to the relief
21 requested." United States v. Hinkson, 585 F.3d 1247, 1262 (9th
22

23 ⁴ On March 4, 2010, the Debtor filed an emergency motion
24 with the BAP for a stay pending appeal. A temporary stay was
25 granted March 5, 2010. Through subsequent orders of the BAP,
26 entered March 8, March 9, March 11, and April 22, 2010, the stay
27 has been clarified, and payments to the Receiver have been set at
28 the \$63,904.17 amount the parties agreed upon at the February 18,
2010 hearing. To the extent the Receiver does not collect this
amount in rents, the Debtor is obligated to make up the
difference. On May 17, 2010, the BAP entered an order denying
the Debtor's motion to remove the Receiver.

1 Cir. 2009). If the bankruptcy court identified the correct legal
2 rule, we then determine whether its "application of the correct
3 legal standard [to the facts] was (1) illogical, (2) implausible,
4 or (3) without support in inferences that may be drawn from the
5 facts in the record." Id. (internal quotation marks omitted).
6 Therefore, if the bankruptcy court did not identify the correct
7 legal rule, or if its application of the correct legal standard
8 to the facts was illogical, implausible, or without support in
9 inferences that may be drawn from the facts in the record, then
10 the bankruptcy court has abused its discretion. Id.

11 **V. DISCUSSION**

12 Section 362(d) requires the bankruptcy court, on request of
13 a party in interest, to grant relief from the automatic stay when
14 there is "cause," including a lack of good faith on the part of
15 the debtor; when there is no equity in a property and the
16 property is not necessary for an effective reorganization; or,
17 when the debtor is a single asset real estate debtor who has not,
18 within 90 days of the petition date, filed a feasible
19 reorganization plan or commenced monthly payments to the secured
20 creditor.

21 The bankruptcy court granted stay relief to Hung Wui based
22 on a finding of bad faith (§ 362(d)(1)), as well as a finding
23 that the Property lacked equity and was not necessary for an
24 effective reorganization because it was unlikely that the Debtor
25 could successfully reorganize within a reasonable time
26 (§ 362(d)(2)). Our discussion begins with the bankruptcy court's
27 findings and analysis under § 362(d)(2).
28

1 **A. Section 362(d)(2)**

2 Section 362(d)(2) of the Bankruptcy Code provides that "on
3 request of a party in interest and after notice and hearing, the
4 court shall grant relief from the stay . . . if - (A) the debtor
5 does not have an equity in such property; and (B) such property
6 is not necessary to an effective reorganization." 11 U.S.C.
7 § 362(d)(2).

8 As provided in § 362(g), the party opposing relief from the
9 stay has the burden of proof on all issues other than the
10 debtor's equity in a property. Thus, once a movant establishes
11 that a debtor has no equity in a property, "it is the burden of
12 the debtor to establish that the collateral at issue is necessary
13 to an effective reorganization." United Sav. Ass'n of Tex. v.
14 Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 375 (1988).

15 Equity, for purposes of § 362(d)(2)(A), is the difference
16 between the value of the property and all the encumbrances on it.
17 Sun Valley Newspapers, Inc. v. Sun World Corp. (In re Sun Valley
18 Newspapers, Inc.), 171 B.R. 71, 75 (9th Cir. BAP 1994) (citing
19 Stewart v. Gurley, 745 F.2d 1194, 1196 (9th Cir. 1984)). The
20 Debtor listed Hung Wui as a secured creditor with a claim of
21 \$35,244,690.45. Additionally, the Construction Claimants hold
22 liens against the Property in the approximate amount of
23 \$7,000,000.

24 Hung Wui attached an appraisal to its Stay Relief Motion
25 that valued the Property at \$25,910,000. The Debtor has not
26 contested the appraisal and concedes there is no equity in the
27 Property.

1 Therefore, the Debtor had the burden of demonstrating that
2 the Property is necessary for an effective reorganization. The
3 Debtors argue that they "met the minimal or relaxed burden of a
4 chapter 11 debtor in the early stages of a reorganization case"
5 to show that it could propose a plausible plan of reorganization.
6 Appellant's Opening Br. at 18-19. Under the standard set by the
7 Supreme Court in Timbers, to establish that property is necessary
8 for an effective reorganization under § 362(d)(2)(B), a debtor is
9 required to show that "the property is essential for an effective
10 reorganization that is in prospect. . . . This means a reasonable
11 possibility of a successful reorganization within a reasonable
12 time." 484 U.S. at 376 (internal quotations omitted); In re
13 Dev., Inc., 36 B.R. 998, 1005 (Bankr. D. Haw. 1984) (cited with
14 approval by Timbers).

15 The Property is the Debtor's principal asset and source of
16 all the Debtor's operating income. The Debtor conceded that in
17 order to successfully reorganize, it would require an infusion of
18 capital. To demonstrate that it would be able to effectively
19 reorganize, the Debtor submitted a declaration from Chaung Fann
20 Yik that stated, in relevant part:

- 21 (1) the Debtor was working toward formulating a plan;
- 22 (2) the Debtor would likely regain any value the
23 Property lost in the recession and would
24 eventually create equity to provide recovery to
25 the estate's creditors;
- 26 (3) the Debtor was exploring its options for
27 formulating a plan;

- 1 (4) the Debtor was examining a number of potential
2 avenues to obtain additional funding;
- 3 (5) the Debtor was working to identify third-parties
4 potentially interested in providing financing or
5 equity investment to the Debtor;
- 6 (6) the Debtor was negotiating with related parties
7 for the possible acquisition of ownership interest
8 in the Debtor; and that
- 9 (7) the Debtor anticipated it would conclude the
10 negotiations before the March 20, 2010 deadline
11 for filing a plan of reorganization.

12 At the stay relief hearing, the Debtor contended that it
13 "harbored no illusions" that its plan for reorganization could
14 rely on the Property to generate sufficient cash flow to make
15 payments to its creditors. However, it contended there was
16 "progress" in the effort to bring in equity investment that would
17 allow a feasible reorganization and that the Debtor "believed" an
18 agreement would be in place by March 20, 2010.

19 The bankruptcy court found that while the Debtor:
20 today gives me a positive report that a deal is just
21 around the corner and will be filed within a matter of
22 three weeks or so and that it's going to be a terrific
23 deal, . . . there's absolutely no evidence of a
24 reasonable likelihood of a successful deal that can be
25 concluded within a reasonable time. . . . I think to
26 conclude otherwise or to credit the Debtor's hopes
27 today would be basing my decision on pure speculation
28 that flies in the face of the weight of the evidence in
this case.

Hr'g Tr. (Feb. 25, 2010), at 25:4-16.

"Courts usually require the debtor to do more than manifest
unsubstantiated hopes for a successful reorganization." In re

1 Sun Valley Newspapers, Inc., 171 B.R. at 75; see also In re Dev.
2 Corp., 36 B.R. at 1006. A debtor must do more than merely assert
3 that it can reorganize if only given the opportunity to do so.
4 See, e.g., Am. State Bank v. Grand Sports, Inc. (In re Grand
5 Sports, Inc.), 86 B.R. 971, 975 (Bankr. N.D. Ill. 1988). Thus,
6 while the evidence demonstrated that the Debtor may have taken
7 some preliminary steps toward obtaining the funding necessary to
8 formulate a feasible plan of reorganization, any negotiations
9 were still in a speculative stage. There was no term sheet,
10 agreement, or other documentation (even in the form of emails or
11 letters) that demonstrated there were investors or loan
12 commitments in place. See Pegasus Agency, Inc. v. Grammatikakis
13 (In re Pegasus Agency, Inc.), 101 F.3d 882, 887 (2d Cir. 1996)
14 (an effective reorganization cannot be based on speculation).

15 Furthermore, the bankruptcy court determined that it would
16 be a "fairly complex problem" to sort out the various liens and
17 claims among Patterson, the Construction Claimants, Hung Wui, and
18 the Debtor. Hr'g Tr. (Feb. 25, 2010), at 22:1-6. It found that
19 those issues would "exacerbate the problem that the Debtor is
20 going to have in trying to arrive at any kind of resolution that
21 will preserve the Debtor's business and equity coverage." Id. at
22 24:19-23.

23 The bankruptcy court determined that in order to confirm a
24 plan of reorganization within a reasonable time, the Debtor would
25 need to propose "payment in full or something pretty close to
26 that until all these things are sorted out and it can be
27 determined who owes what to whom and who has liens and who
28 doesn't." Id. at 22:3-10. Because the bankruptcy court found

1 that the Debtor was unable to demonstrate it could secure the
2 funding necessary to make payment in full, the bankruptcy court
3 concluded that the Debtor did not provide evidence to satisfy the
4 Timbers test by being able to effectively reorganize within a
5 reasonable time. Id. at 25:8-20.

6 The bankruptcy court identified the correct legal standard
7 for granting relief to a secured creditor under § 362(d)(2). The
8 Debtor did not produce evidence that it had secured the capital
9 it needed to support a plan of reorganization. Additionally,
10 there were many parties with competing liens on the Property.
11 The bankruptcy court determined that the time involved in sorting
12 out the issues of validity and priority would preclude
13 confirmation of a plan within a reasonable time unless a plan
14 offered full or near full payment to garner the consent of all
15 those with impaired claims.

16 As the Ninth Circuit held in United States v. Hinkson, we
17 may not substitute our own view for that of the bankruptcy court
18 and may only be able to have a "definite and firm conviction"
19 that the bankruptcy court abused its discretion by making a
20 clearly erroneous finding of fact if the bankruptcy court's
21 application of the facts to the legal standard was illogical,
22 implausible or without support in the record. 585 F.3d at 1262.
23 The bankruptcy court's findings supporting stay relief were not
24 illogical, implausible, or unsupported by the record.
25 Accordingly, we conclude that the bankruptcy court did not abuse
26 its discretion in granting Hung Wui relief from the automatic
27 stay under § 362(d)(2).

1 **B. Section 363(d)(1)**

2 Because we have concluded that the bankruptcy court did not
3 abuse its discretion in granting Hung Wui relief from the
4 automatic stay under § 362(d)(2), we need not reach the issue of
5 whether the bankruptcy court erred in granting relief under
6 § 362(d)(1) when it found that the Debtor filed its chapter 11
7 case in bad faith.

8 **VI. CONCLUSION**

9 For the foregoing reasons, we affirm the bankruptcy court's
10 order granting relief from the automatic stay to Hung Wui.