U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
STAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
	§	
STATEPARK BUILDING	§	**Case No. 04-33916 HDH-11**
GROUP, LTD., ***et al.***	§	**(Jointly Administered)**
	§	
Debtors	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW
REGARDING ORDER DENYING MOTION TO STAY PENDING APPEAL

CAME ON FOR CONSIDERATION the *Motion for Findings and Conclusions Related to Order on Motion to Stay Pending Appeal* (the "Motion"), filed by GBL Holding Company, Inc. ("GBL"). The Court, granting the Motion, hereby enters the following findings of fact and conclusions of law in support of the Court's *Order on Motion to Stay Pending Appeal* (the "Stay Order"). Where appropriate, a finding of fact shall be deemed a conclusion of law and a conclusion of law shall be deemed a finding of fact.

I. FINDINGS OF FACT

A. BACKGROUND

1. On April 5, 2004 (the "Petition Date"), StatePark Building Group, Ltd. ("Debtor"), filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.* (the "Bankruptcy Code"), thereby initiating its bankruptcy case (the "Bankruptcy Case") and creating the Debtor's bankruptcy estate (the "Estate"). By order entered April 19, 2004, the Court ordered the joint administration of the Bankruptcy Case with the bankruptcy cases of the Debtor's affiliates under case number 04-33916 HDH-11.

2. By order entered June 15, 2004, the Court confirmed the appointment of Robert Milbank, Jr. (the "Trustee") as the Chapter 11 trustee of the Debtor.

3. The Debtor's primary asset consists of an unimproved parcel of real property in the City of Dallas (the "Subject Property"). The likely fair market value of the Subject Property is currently between $4.5 million to $5 million.

4. The Debtor has defaulted on sizable real property taxes payable for the Subject Property prepetition and postpetition. Accordingly, several Dallas County and other local taxing authorities (collectively, the "Taxing Authorities") have secured claims and liens against the Subject Property.

5. Similarly, Mammoth Capital, L.L.P. ("Mammoth") and Texplex Investments, L.L.P ("Texplex", with the Taxing Authorities and Mammoth, (collectively the "Senior Creditors") hold secured claims exceeding $900,000, arising from a promissory note executed by the Debtor and secured by a first priority deed of trust lien encumbering the Subject Property. Mammoth and Texplex have not been paid for the previous two years, and substantial defaults exist and continue to occur under the note and related loan instruments

6. The Subject Property produced no income. The claims of the Senior Creditors continue to accrue postpetition interest, possibly at a default rate, as well as attorney's fees and other costs and expenses allowed under the law. Real property taxes continue to accrue and will continue to accrue against the Estate unless and until the Subject Property is sold. The Subject Property may diminish in value, as testified to by the Trustee and his broker, in light of increasing interest rates and in light of the possibility that the area surrounding the Subject Property is oversaturated and that supply there may soon exceed demand.

7 In short, the Estate incurs significant expenses and carrying costs with each day that the Subject Property remains unsold, while receiving no discernable benefit in return.

B. GBL'S CLAIMS AND ARGUMENTS

8. GBL Holding Company, Inc. alleges that, on or about February 8, 2002, the Debtor entered into a Commercial Contract of Sale (the "GBL Contract") to sell the Subject Property to GBL for the approximate purchase price of $2.7 million. The GBL Contract did not close GBL alleges that the Debtor breached the GBL Contract and that GBL is entitled to the remedy of specific performance of the GBL Contract.

9. GBL filed adversary proceeding number 04-03405-HDH, styled as *GBL Holding Co. Inc v. Blackburn/Travis/Cole, Ltd.* (the "Adversary Proceeding") on or about July 7, 2004, requesting (among other things) that the Court specifically enforce the GBL Contract by ordering the Trustee to file a motion for authority to sell the Subject Property to GBL free and clear of all liens, claims and encumbrances for the $2.7 million price.

10. Prior to the Petition Date and prior to the filing of the Adversary Proceeding, GBL failed to obtain any judgment, decree, or award, either in a Texas court or from this Court, finding that the Debtor breached the GBL Contract, that GBL is entitled to anything from the Debtor under the GBL Contract, or that GBL is entitled to the remedy of specific performance.

11. On July 22, 2004, the Trustee filed his motion under Rule 12(b)(6) (the "12(b)(6) Motion") requesting a dismissal of the Adversary Proceeding for GBL's failure to state a claim upon which relief can be granted, arguing that GBL was not entitled to the remedy of specific performance under the Bankruptcy Code.

12. On or about August 3, 2004, the Trustee filed the *Trustee's Motion for Authority to Sell Real Property of Blackburn/Travis/Cole, Ltd, for Approval of Auction Procedures in Connection Therewith, and for Authority to Pay Certain Claims From the Proceeds Thereof* (the "Sale Motion") in the Bankruptcy Case. The Trustee requested authority to sell the Subject Property free and clear of liens, claims, interests, and encumbrances at an auction to be held pursuant to Court order (the "Auction").

13. On August 24, 2004, GBL filed its objection to the Sale Motion, arguing, essentially, that its alleged right to specific performance compelled the Trustee to sell the Subject Property to it and that the Subject Property should be sold to GBL in any event as being in the bests interests of the Estate.

C. **THE SALE ORDER**

14. After extensive briefing by GBL and the Trustee, and after a hearing conducted on September 2, 2004, whereafter the Court took the 12(b)(6) Motion and the Sale Motion under advisement, the Court entered two orders on September 23, 2004 granting the Sale Motion and granting the 12(b)(6) Motion.

15. The Court's *Order on Trustee's Motion to Sell, for Approval of Auction Procedures, and for Authority to Pay Certain Claims from Proceeds* (the "Sale Order"), entered in the Bankruptcy Case, granted the Trustee's proposed sale of the Subject Property at Auction and overruled GBL's objection to the Sale Motion The Sale Order provides that GBL's monetary claim against the Estate, if any, will attach to the proceeds of the Auction

16. The Court's *Order on Trustee's Motion to Dismiss* (the "Dismissal Order"), together with the Sale Order (the "Subject Orders"), entered in the Adversary Proceeding, granted the

12(b)(6) Motion and dismissed the Adversary Proceeding without prejudice to GBL asserting a monetary claim against the Estate.

D. THE STAY MOTION

17. On October 1, 2004, GBL appealed both Subject Orders to the United States District Court for the Northern District of Texas, Dallas Division (the "Appeal").

18. On October 26, 2004, GBL filed its *Motion for Stay Pending Appeal of Orders on Trustee's Motion to Sell, for Approval of Auction Procedures, and for Authority to Pay Certain Claims From Proceeds and Granting Sale Motion and (ii) Motion to Dismiss* (the "Stay Motion"), whereby GBL requested that the Court stay the Sale Order pending the Appeal (GBL filed a similar motion in the Adversary Proceeding requesting the Court to stay the Dismissal Order pending the Appeal).

19. On November 4, 2004, the Trustee filed his objection to the Stay Motion and, in the alternative, his request that any stay pending the Appeal be conditioned on GBL posting a good and sufficient supersedeas bond to protect the Estate.

20. After considering the Stay Motion, the Trustee's objection thereto, and the facts and the law, the Court, by order entered November 8, 2004 (the "Order Denying Stay"), denied the Stay Motion (the Court also denied GBL's motion for stay in the Adversary Proceeding).

21 GBL filed this Motion on November 15, 2004, requesting that the Court enter findings of fact and conclusions of law explaining the Order Denying Stay to enable GBL to seek redress in the United States District Court for the Northern District of Texas, Dallas Division These findings and conclusions are entered pursuant to GBL's Motion.

II. CONCLUSIONS OF LAW

A. STAY PENDING APPEAL AS A MATTER OF RIGHT

22. Bankruptcy Rule 7062, incorporating Federal Rule of Civil Procedure 62 ("Rule 62"), has been interpreted as providing for a stay pending appeal as a matter of right if: (i) the judgment appealed from is a 'money judgment', i.e. it binds a party to pay money; and (ii) the appealing party posts a supersedeas bond. *See Culwell v Texas Equipment Co Inc (In re Texas Equipment Co Inc)*, 283 B.R. 222, 226 (Bankr. N D. Tex. 2002).

23. Rule 62 applies only to adversary proceedings. *See* FED. R. BANKR. P. 9014(c). The Sale Motion did not initiate an adversary proceeding. Accordingly, Rule 62 does not apply to the Sale Order and GBL is not entitled to a stay of the Sale Order as a matter of right.

24. Additionally, the Sale Order is not a 'money judgment' as that term is defined by the Fifth Circuit and for this reason, as well, GBL is not entitled to a stay of the Sale Order as a matter of right. *See In re Texas Equipment Co. Inc.*, 283 B.R. at 226.

B. DISCRETIONARY STAY

25. Notwithstanding GBL's inability to obtain a stay of the Sale Order as a matter of right under Rule 62(d), GBL may be able to obtain a discretionary stay pending appeal under Bankruptcy Rule 8005 *See, e g, In re Texas Equipment Co Inc*, 283 B.R at 226 While Rule 8005 grants the Court the discretion to issue a stay pending appeal, this discretion is not limitless and is not based on general notions of equity or fairness. *See In re First South Sav Ass'n*, 820 F.2d 700, 709 (5th Cir. 1987). Instead, the decision to issue a discretionary stay must be based on the movant satisfying well established and clearly delineated elements. Only after the movant meets

these elements may the Court employ its discretion to issue a stay – the Court may refuse to issue a stay even if the movant meets his burden. *See id.*

26. The Fifth Circuit has instructed bankruptcy courts to employ the following four element test in determining whether to exercise their discretion to grant a discretionary stay pending appeal under Rule 8005: "(1) whether the movant has made a showing of likelihood of success on the merits; (2) whether the movant has made a showing of irreparable injury if the stay is not granted; (3) whether the granting of the stay would substantially harm the other parties; and (4) whether the granting of the stay would serve the public interest." *Ruiz v Estelle*, 666 F.2d 854, 856 (5th Cir. 1982). *Accord Arnold v. Garlock Inc.*, 278 F.3d 426, 438-39 (5th Cir. 2001); *In re First South Sav. Ass'n*, 820 F.2d 700, 709 (5th Cir. 1987)

27. GBL bears the burden of proof on each of these elements. *See, e.g., In re Texas Equipment Co. Inc.*, 283 B.R. at 227. Each of these elements must be met before the Court may exercise its discretion to grant a stay pending appeal. *See Arnold*, 278 F.3d at 438-39, *id.*

C. GBL HAS FAILED TO SATISFY THE ELEMENTS FOR A DISCRETIONARY STAY

1. Likelihood of Success on the Merits

28. GBL has failed to demonstrate that it has a reasonable likelihood of success on the merits with respect to its Appeal of the Sale Order. The Trustee properly exercised his sound business judgment in requesting the sale of the Subject Property at Auction.

29. The Court exercised its discretion to grant the Sale Motion based upon the following considerations, among others.

- The likelihood that the fair market value of the Subject Property far exceeds the purchase price under the GBL Contract.

- GBL has not obtained any prepetition judicial determination that: (a) the Debtor breached the GBL Contract, or (b) GBL would be entitled to specific performance of the GBL Contract

- The sizable postpetition claims of the Secured Creditors, which continue to accrue interest possibly at the default rate, and continuing postpetition real property taxes, burden the Estate while at the same time the Subject Property generates no income for the Estate. Litigation concerning GBL's alleged right to specific performance, including appeals, could take years.

- The potential that a sale of the Subject Property to GBL for the GBL Contract purchase price may not lead to a 100% distribution on unsecured claims, whereas it is highly likely that a sale of the Subject Property at Auction would lead to a 100% distribution on unsecured claims, including a return to equity interest holders, even after taking into account GBL's potential claim against the Estate

- The possibility that the Subject Property's fair market value may diminish due to any deteriorations in the real estate market.

- The Subject Property does not generate income and neither the Debtor nor the Trustee have the funds to pay senior claims or other claims and expenses as they may arise.

30. The Court's decision on a motion to sell is reviewed for abuse of discretion. *See, e g*, *Moldo v. Clark (In re Clark)*, 266 B.R. 163, 168 (B.A.P. 9th Cir. 2001). Accordingly, and in light of the above considerations, the Court is of the opinion that an appellate court would be unlikely to reverse the Sale Order and that GBL does not, therefore, have even a reasonable likelihood of success on the merits of its Appeal of the Sale Order.

31. Moreover, having considered the arguments and the extensive briefing provided by the Trustee and GBL, the Court concludes that GBL does not have a likelihood of success on the merits with respect to its Appeal of the Dismissal Order. Consequently, it is unlikely that, as a matter of law, GBL will be able to demonstrate that it is entitled to the remedy of specific performance even if it could demonstrate that the Debtor breached the GBL Contract To the extent,

therefore, that the Dismissal Order factors into the Court's determination with respect to the Sale Order, the Court's conclusion that the Sale Order is unlikely to be reversed is not altered.

32. Namely, section 101(5) of the Bankruptcy Code defines a "claim" as a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. § 101(5)(B) (2004). The Supreme Court has explained this provision as follows: "[f]or example, in some States, a judgment for specific performance may be satisfied by an alternative right to payment in the event performance is refused; in that event, the creditor entitled to specific performance would have a 'claim' for purposes of a proceeding under title 11." *Ohio v Kovacs*, 469 U.S. 274, 280, 105 S. Ct. 705, 708 (1985).

33. Accordingly, every reported opinion that has considered the issue has held that specific performance may not be enforced postpetition when state law provides the claimant with the remedy of money damages as an alternative to specific performance. *See, e g , In re Bergt*, 241 B.R. 17, 35 (Bankr. D. Alaska 1999); *TKO Props LLC v Young (In re Young)*, 214 B.R. 915, 912-13 (Bankr. D. Idaho 1997); *DSR Inc v. Manuel (In re Hamilton Roe Int'l Inc.)*, 162 B.R. 590, 595 (Bankr. M.D. Fla. 1993); *In re Aslan*, 65 B.R. 826, (Bankr. C.D. Cal. 1986); *Sweinhart v. Stubbeman, Mcrae, Sealy Laughlin & Browder Inc.*, 48 S.W.3d 865, 885 (Tex. App. – Houston [14th Dist.] 2001, pet. denied); *Glass v. Prcin*, 3 S.W.3d 135, 138-39 (Tex. App. – Amarillo 1999, pet. denied).

34. Conversely, the only reported opinions that allow the remedy of specific performance postpetition involved situations where: (i) the claimant obtained a decree of specific performance prepetition, which had the effect of removing the availability of money damages as an alternative to specific performance; or (ii) the property subject to specific performance did not become property

of the bankruptcy estate under section 541 of the Bankruptcy Code under theories of constructive trust. *See Proyectos Electronics S.A. v. Alper*, 37 B.R. 931 (E.D. Pa. 1983); *Software Customizer Inc. v. Bullet Jet Charter Inc. (In re Bullet Jet Charter Inc.)*, 177 B.R. 593 (Bankr. N.D. Ill. 1995).

35. Texas law allows a party otherwise entitled to specific performance to obtain money damages as an alternative to specific performance. *See, e g., Foust v Hanson*, 612 S.W 2d 251, 253 (Tex. App. – Beaumont 1981, no writ); *Seegers v Spradley*, 522 S.W 2d 951, 957 (Tex Civ App – Beaumont 1975, writ ref'd n.r.e.); *Manley v Holt*, 161 S.W.2d 857, 859 (Tex Civ App Amarillo 1942, writ ref'd w.o.m.). It is immaterial that the claimant insists upon the remedy of specific performance and refuses to seek monetary damages. *See Glass v Prcin*, 3 S.W 3d 135, 138-39 (Tex. App. – Amarillo 1999, pet. denied).

36. GBL has not obtained any prepetition award or decree of specific performance. There has been no allegation that the Trustee holds the Subject Property in constructive trust for the benefit of GBL, or that the Subject Property is not property of the Estate. GBL may claim money damages as an alternative to specific performance. Accordingly, the Bankruptcy Code requires that GBL's claim to specific performance be converted into a monetary claim.

37. The Court does not believe that this conclusion is likely to be reversed on appeal in light of the clear dictate of the Bankruptcy Code and in light of the overwhelming case law. Indeed, such a reversal would constitute new law. However, even if GBL were to succeed on the Appeal of the Dismissal Order, GBL would still have to obtain from the Court a judgment finding: (i) the Debtor breached the GBL Contract; (ii) GBL may, based on that breach, obtain specific performance of the GBL Contract; and (iii) GBL is entitled to the enforcement of that remedy. GBL will bear the burden on each of these issue. Therefore, even aside from the Dismissal Order, GBL is far from

obtaining an award of specific performance.

2. No Irreparable Injury to GBL in Absence of Stay

38. GBL is free to purchase the Subject Property at the Auction. Thereafter, if GBL is found to be entitled to the remedy of specific performance on Appeal, and if that remedy is granted after a trial, GBL will presumably have a claim against the estate in the amount of GBL's winning bid at the Auction less the GBL Contract purchase price. Since the Sale Order orders that GBL's claim attach to the proceeds of the Auction, to the extent that GBL's claim is allowed, GBL will be made whole.

39. Accordingly, GBL will suffer no irreparable injury in the absence of a stay of the Sale Order.

3. Injury to Other Parties

40. The only way for the Estate to promptly pay the claims of the Senior Creditors is for the Estate to promptly sell the Subject Property. Granting GBL a stay pending appeal will subject the Estate to continuing postpetition taxes, interest, possible default interest, attorney's fees, and other costs and fees recoverable under section 506(b) or section 503(b) of the Bankruptcy Code. Moreover, granting a stay pending appeal may lead one or more of the Senior Creditors to move for relief from the automatic stay for the purpose of foreclosing on their liens, which could subject the Estate to a loss of all equity in the Subject Property. This is a potential that is not capable of being protected against by the posting of a supersedeas bond. Finally, there is a substantial risk that the fair market value of the Subject Property may decline during the pendency of the Appeal, to the injury of the Estate, its creditors, its equity interest holders, and all other parties in interest.

41. For these reasons, the Court concludes that there is a substantial risk of injury to other

parties to this Bankruptcy Case if the Court grants GBL a stay pending the Appeal, and that this risk may not be fully protected against by the posting of a supersedeas bond.

4. Public Interest

42. The Court does not believe that the Sale Order affects the public interest and that this element is applicable to the Sale Order. *See In re Texas Equipment Co. Inc.*, 283 B R. at 228 ("[t]he final element – public interest – usually plays a prominent role when the court's judgment involves public rights, or the private rights of many individuals").

III. CONCLUSION

43. GBL has failed to demonstrate that: (i) it has a reasonable likelihood of success on the merits on its Appeal; (ii) denying the stay would result in irreparable injury to GBL; (iii) granting the stay would not lead to injury to other parties interested in this Bankruptcy Case, and (iv) that the Sale Order or the Appeal involves a matter of public interest. Therefore, GBL has not sustained its threshold burden. Also, even assuming GBL had satisfied its threshold burden, the Court otherwise determines that a stay pending appeal is not in the best interests of justice and should be denied.

SIGNED: 12/3/04

Honorable Harlin D. Hale
United States Bankruptcy Judge