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. 85, 91, 92, 103, 104, 105**

MEMORANDUM ORDER GRANTING THE RESPECTIVE MOTIONS OF THE UNITED STATES TRUSTEE AND CECIL BANK FOR ENTRY OF AN ORDER DISMISSING THE CHAPTER 11 CASE WITH PREJUDICE PURSUANT TO 11 U.S.C. § 1112(b)

The Court has before it the respective Motions of the United States Trustee ("UST") and Cecil Bank ("Cecil Bank") for Entry of an Order Converting Chapter 11 Case to Chapter 7, or Alternatively, Dismissing Chapter 11 Case with Prejudice Pursuant to Bankruptcy Code Sections 349(a) and 1112(b) (the "Motions to Dismiss") (D.I. 85, 103). Upon review of the pleadings, and following evidentiary hearings on the Motions to Dismiss on February 3, 2012, and March 14, 2012, the Court is granting the Motions to Dismiss with prejudice. The Court will further enjoin the Debtor from filing a second bankruptcy case while Cecil Bank's foreclosure proceeding and the sale are pending.

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 to 28 U.S.C. § 1409. The statutory predicate for the relief requested herein is 11 U.S.C. § 1112(b).

BACKGROUND

Riverbend Community, LLC, (the "Debtor") filed a voluntary petition for relief on June 9, 2011. This was over nine months ago and just five days prior to Cecil Bank's foreclosure sale scheduled for June 14, 2011. The Debtor owns 176 of 210 lots (the "Debtor's Property") located in

the Riverbend at Old New Castle Subdivision, City of New Castle, New Castle County, Delaware (the "Riverbend Subdivision"). Mr. Joseph Capano, Sr. ("Capano") is the Debtor's managing member. Cecil Bank holds three mortgages on the Debtor's Property. Two are liens from acquisition loans used to purchase the Debtor's Property, and the third is a guaranty. Cecil Bank's proofs of claim aver that on the two acquisition loans, it is owed $5,113,739.59 and $1,824,427.48, respectively, and on the guaranty it is owed $4,881,800.38 (collectively, the "Mortgages").

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). As a result of the SARE Order, the Debtor was required to comply with 11 U.S.C. § 362(d)(3). The relevant provisions of 362(d)(3) require the Court to grant 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 -
>
> (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).

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") (D.I. 33) and a second set of 70 lots to KLC, LLC and JSR, LLC (D.I. 34).

The Court placed no significance on the proposed sales. KLC, LLC ("KLC") is owned by Kathy Capano ("K. Capano"), who is Mr. Capano'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, LLC's ("JSR") sole member is James Rostocki ("Rostocki"). *Id.* at 7. Rostocki is the son of Ms. Jeanne Parrott, a longtime close friend and business associate of Mr. Capano and, as the Court discusses within, an insider. Prior to the hearing on the Sale Motions, prospective purchaser Cornell withdrew its purchase offer. In the Sale Motions, the Debtor failed to disclose the insider relationship to Debtor of the remaining purchaser, K. Capano. Also, the sale agreements were so conditional that they were illusory.[1] Additionally, the purchaser failed to disclose the source of financing to complete the transaction. Finally, K. Capano's partner, James Rostocki, failed to attend the sale hearing.

On October 27, 2011, in addition to the Sale Motions[2], the Court took evidence on Cecil Bank's Motion to Lift the Automatic Stay (the "Lift Stay Motion") (D.I. 34). On November 9, 2011,

---

[1] The KLC-JSR Sale Agreement only legally obligated the purchasers to purchase a single lot. Thereafter, KLC-JSR would have the option to purchase additional lots. However, the contract did not specify how many lots it would be legally obligated to purchase under the contract. Hearing Transcript ("Hrg. Tr."), October 27, 2011. In reality this was a contract for the sale of only one lot, with a buyer's option to purchase up to seventy additional lots.

[2] The Cornell sale did not proceed because the purchaser withdrew his offer, so the Court only heard argument on the KLC-JSR Sale Motion at the October 27, 2011 hearing.

the Court issued its Memorandum Order granting, in part, the Lift Stay Motion (the "Memorandum Order"). In the Memorandum Order the Court denied the KLC-JSR Sale Motion, granted the Lift Stay Motion and provided that it would become self-executing unless (1) by November 30, 2011, the Debtor made all interest payments owed to Cecil Bank since the petition date (approximately $600,000); and (2) the Debtor filed an Amended Disclosure Statement and Amended Plan by December 14, 2011. The Court noted that it was "prepared to give Debtor, who has made a major investment, a brief but fair opportunity to extend the stay upon compliance with SARE." The Debtor failed to make the required interest payments and failed to file an Amended Plan and Disclosure Statement by December 14, 2011.[3]

On January 5, 2012, the United States Trustee filed its Motion to Dismiss. On January 27, 2012, the Debtor filed a response to the UST's Motion to Dismiss (the "Debtor's Response") (D.I. 92). In the Debtor's Response, it referenced two new sale agreements that it believed would fund its Plan through the proceeds. Filed concurrently with the Debtor's Response, the Debtor filed an Amended Plan of Reorganization and Amended Disclosure Statement (D.I. 93, 94). The salient terms of the two new sale agreements were described therein. The first unsigned agreement was with NVR, Inc. (Ryan Homes) for the purchase of twenty-four total lots, at a rate of six lots per quarter, for a purchase price of $75,000.00 per lot. *Amended Plan* at 8-9. The agreement was not only undated and unexecuted, but it contained a ninety (90) day investigation period and thereafter one year to complete the acquisition.

[3] *See Cecil Bank's Certification of Non-Payment*. (D.I. 81).

The second signed agreement was with JM Land Trust LLC.[4] The second agreement was for the purchase of ten lots at a cost of $50,000 per lot.[5] In the Debtor's Objection to Cecil Bank's Motion to Dismiss, the Debtor informed the parties that NVR, Inc. would not be purchasing the previously referenced twenty-four lots from the Debtor. Nonetheless, the Debtor expressed its intent to revisit negotiations with NVR, Inc. for the purchase of lots in the future.

The Debtor's latest filed monthly operating report for October 2011, reveals that its sole asset is the Debtor's Property and approximately $976 in cash. The Debtor has no current operations or cash flow (D.I. 101). At the March 14, 2012 hearing on the Motions to Dismiss, Cecil Bank informed the Court that the foreclosure sale is scheduled for April 10, 2012.

DISCUSSION

The Motions to Dismiss are premised on Bankruptcy Code Section 1112(b), which provides, in relevant part, that:

> (1) On request of a party in interest, and after notice and a hearing, absent unusual circumstances specifically identified by the court that established that the requested conversion or dismissal is not in the best interests of creditors and the estate, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, if the Movants establishes cause.
>
> * * *

[4] JM Land Trust LLC is owned, in part, by Jeanne Parrott. The parties have disputed whether she is an insider of the Debtor based on her personal relationship with Mr. Capano. There is no question that Ms. Parrot is a non-statutory insider based upon her close relationship with Mr. Capano. See, e.g., *In re Winstar Communications Inc.*, 554 F.3d 382, 395 (3d Cir. 2009); *In re A. Tarricone, Inc.*, 286 B.R. 256 (Bankr. SDNY 2002); *In re Lopresti*, 2006 WL 2708605 (Bankr. D. N.J. 2006).

[5] This purchase price per lot is for unimproved lots.

> (4) For purposes of this subsection, the term "cause" includes –
>
> (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;
>
> * * *
>
> (B) Gross mismanagement of the estate; [or]
>
> * * *
>
> (J) Failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by an order of this court[.]

11 U.S.C. § 1112(b).

Section 1112(b) is clear that the Court must dismiss or convert Debtor's case if Movants' establish "cause," which is defined in Section 1112(b)(4). See, e.g., *In re Products Int'l Co.*, 395 BR. 101, 107-09 (Bankr. D. Ariz. 2008).[6] The only "but" to the mandatory conversion or dismissal is if a debtor can prove the existence of "unusual circumstances specifically identified by the court" showing that dismissal or conversion is not in the best interests of the creditors and the estate.11 U.S.C. § 1112(b)(1).

The Court believes that the UST and Cecil Bank have met their burden and established that cause exists under §1112(b)(4) to grant the Motions to Dismiss. Preliminarily, the Court again notes that this Debtor was declared a SARE Debtor on August 25, 2011. The SARE Order placed certain requirements on the Debtor under § 362(d)(3), and if those requirements were not satisfied, the Court was obligated to lift the automatic stay. The Debtor failed to comply with § 362(d)(3) by not making

[6] Congressional intent that "shall" really does mean "must" in the convert or dismiss provision is readily apparent. In 2005, Congress removed the word "may" from Section 1112(b) and substituted "shall" if a moving party establishes "cause." Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8. 119 Stat. 23 (2005). Congress clearly intended to make conversion or dismissal mandatory upon proof of "cause."

the required interest payments and not filing a plan of reorganization within thirty days of the entry of the SARE Order.[7] Rather, the Debtor filed two Sale Motions to sell certain lots. In response, Cecil Bank filed its Motion to Lift the Automatic Stay for failure to comply with SARE. After the October 27, 2011, hearing on the Sale Motions and Cecil Bank's Lift Stay Motion, the Court entered its Memorandum Order giving the Debtor "who has made a major investment, a brief but fair opportunity to extend the stay upon compliance with SARE" and section 362(d)(3). *Memorandum Order*, at 8. Once again, the Debtor failed to comply with the Court's Order and section 362(d)(3).[8]

The Court believes that dismissal of this case, with prejudice, is in the best interest of creditors and the estate. The Court finds that the UST and Cecil Bank have met their burden establishing that cause exists to grant the Motions to Dismiss. The Court notes that the Debtor failed to file timely the requisite plan or disclosure statement under § 362(d)(3) and this Court's November 9, 2011 Memorandum Order. The plans Debtor filed were patently unconfirmable, particularly in their treatment of Cecil Bank's secured loans. Additionally, over the course of this case the Debtor has presented the Court with four contemplated sale agreements to four different purchasers. However, before the agreements were executed and binding, three of the four purchasers decided not to proceed. To date, the only surviving agreement is for the purchase by an insider, Ms. Parrott, of 10 unimproved lots through JM Land Trust LLC, for $50,000.00 per lot. This will net the Debtor $500,000.00. Cecil

---

[7] Mr. Capano testified at the hearing on the Motions to Dismiss. He was asked why the Debtor failed to make the interest payment to Cecil Bank that was expressed in the Court's November 9, 2011 Memorandum Order. Mr. Capano testified that the Debtor didn't make the interest payment "because it doesn't resolve anything." Hrg. Tr., March 14, 2012. Mr. Capano was correct. The Debtor's financial and bankruptcy related problems cannot be resolved which is why dismissal is necessary.

[8] *See Cecil Bank's Certification of Non-Payment*. (D.I. 81).

Bank's Mortgages on the Debtor's Property total almost $11,000,000.00. The Amended Disclosure Statement states that the Debtor's Property is appraised at $10,000,000.00. *Amended Disclosure Statement*, at 9. Four[9] of the general unsecured creditors are insiders of the Debtor.[10] Additionally, the Debtor has failed to make any interest payments to Cecil Bank as is required under § 362(d)(3) and this Court's Memorandum Order.

Moreover, the Debtor does not have a reasonable likelihood of rehabilitation. The Debtor has no other assets - - less than $976 cash on hand, and no operations or cash flow. The Debtor has not presented the Court with any other ready, willing and financially capable purchasers for any lots. Although the Debtor asserts that it intends to revisit negotiations with NVR, Inc., this summer, NVR, Inc. has already walked away from a contemplated agreement once. The future prospect of the Debtor successfully negotiating with a potential purchaser who has already walked away from one agreement is too far-fetched for this Court to believe that there is a reasonable likelihood of rehabilitation that would justify, let alone permit, the Court to deny the Motions to Dismiss.

The Court will enjoin Debtor from re-filing for bankruptcy protection in order to prevent interference with Cecil Bank's foreclosure and sale. At this point, Cecil Bank would suffer irreparable harm were it to have to reinstate foreclosure proceedings; Cecil Bank would prevail in dismissing any new bankruptcy filing; Debtor is, on balance and given the record of this case, not harmed by enjoining its refiling; and the public interest is served by preventing the harassment that comes from serial filings which interfere with legal process. *Ammond v. McGahn*, 532 F.2d 325 (3d

---

[9] Capano Sr. (individually), and Soya, Inc. (owned by Mr. Capano's wife), Rufus, LLC and Signature Design Homes, LLC (owned by Ms. Parrott) and Jean Parrott (individually).

[10] The Court recognizes and respects Debtor's lawyers' zealous representation of their client. Here, however, they have persisted in delaying the inevitable and dangerously approached bad faith.

Cir. 1976).

CONCLUSION

For all of the foregoing reasons it IS ORDERED THAT:

(1) The Court hereby grants the Motions to Dismiss, and will dismiss the case with prejudice to allow Cecil Bank's foreclosure proceedings and sale to occur; and

(2) The Debtor is enjoined from filing another Chapter 11 petition until after the foreclosure sale has occurred.

Dated: March 23, 2012

KEVIN GROSS, U.S.B.J.