UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

AMERICAN BLUESTONE, LLC — CASE NO. 02-62596

Debtor — Chapter 11

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Presently before the Court is a motion filed on behalf of Heldeberg Bluestone of Unadilla, Inc. ("Movant") on May 20, 2002, seeking relief from the automatic stay pursuant to § 362(d) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"), to allow it to continue foreclosure proceedings in state court on certain collateral.[1] Opposition to the motion was filed on behalf of American Bluestone,

[1] Although not specified in its motion papers, at a hearing conducted on November 20, 2002, it was represented to the Court that Movant was seeking relief under both subsections of Code §362(d).

LLC ("Debtor") on May 31, 2002.

The motion was heard at the Court's regular motion term in Utica, New York, on June 25, 2002. Following oral argument on the motion, the Court signed an Order on July 8, 2002, providing that an evidentiary hearing would be held pursuant to a Scheduling Order of the Court. The Court also required the Debtor to provide written evidence to the Movant of liability insurance coverage on "the Debtor's mining business on or before July 1, 2002, naming the Secured Creditor as the additional loss payee."

An evidentiary hearing was scheduled for October 3, 2002, and was adjourned to November 20, 2002, at which time the Court heard testimony from several witnesses. The hearing was continued at the request of the Movant to January 22, 2003, in order to present the testimony of an additional witness, Walter Whitmore ("Whitmore"). The matter was submitted for decision on the latter date.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matters pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(A), (G), and (O).

FACTS

The Debtor filed a voluntary petition ("Petition") pursuant to chapter 11 of the Code on April 26, 2002. The Petition was signed by Whitmore as President of the Debtor. The "Statement Regarding

Authority to Sign and File Petition" indicates that the resolution authorizing him to file the case on behalf of the Debtor was duly adopted by Cheyenne Bluestone, Inc. According to Whitmore's testimony, the Debtor is solely owned by Cheyenne Bluestone, Inc.

The Debtor is a limited liability company which lists ownership of 85 acres of quarry and a saw shop located in Sidney, New York ("Quarry"). In its schedules, included with the Petition, Debtor estimates the value of the Quarry to be $1,000,000. *See* Schedule A. Movant is listed in Schedule D as a secured creditor with a claim of approximately $986,718. However, according to Schedule A, the claim is alleged to be $856,713, a difference of $130,000.

At the evidentiary hearing, the Court received into evidence a Note and Mortgage, dated December 1, 1999, and recorded in the Delaware County Clerk's Office on December 2, 1999, in the principal amount of $807,500. *See* Movant's Exhibit 7. Said Note and Mortgage were signed by Donald R. Mayes, Jr. ("Mayes") and Whitmore on behalf of the Debtor, as mortgagor. Movant is identified as the mortgagee.[2]

Paul Giebitz ("Giebitz"), president of the Movant, testified that the Debtor's last payment on the mortgage was May 2001. Sometime on or about September 5, 2001, Movant commenced an action to foreclose on its note and mortgage in New York State Supreme Court, Delaware County. *See*

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[2] Despite representations made to the Court, no evidence was presented establishing a security interest held by Movant in any of the equipment located at the Quarry. Movant included an Asset Purchase Agreement, dated October 7, 1999, which makes reference to a Security Agreement and Financing Statement, as well as the Mortgage (*see* Article 1.2.2.b.), as an exhibit to its motion seeking relief from the automatic stay. However, it was not offered into evidence at the hearing and cannot, therefore, be considered by the Court. The only related document admitted into evidence was a Contract Modification and Addendum referencing the contract of October 7, 1999. *See* Movant's Exhibit 4.

Movant's Exhibit 6. There was no testimony concerning the amount of the arrears or the principal balance owed on the mortgage as of the Petition date, however, according to the complaint allegedly filed in connection with the foreclosure action, Movant indicated that $784,433.67, with interest thereon, was due and owing. *See id.* Giebitz acknowledged having taken over the operation of the Quarry from October 13, 2001 to November 10, 2001. *See* Movant's Exhibit 2. Giebitz, who had 48 years in the stone business, estimated the value of the Quarry to be approximately $800,000, although he acknowledged that he had not been to the Quarry in over a year. The Movant presented no appraisal or expert testimony to support this estimate.

On January 10, 2002, a receiver was appointed by the Honorable Joseph P. Hester, Jr., Justice, New York State Supreme Court ("Judge Hester"). On April 25, 2002, Judge Hester entered an Order granting Movant a judgment of foreclosure as to the Quarry.[3] Debtor filed its Petition one day later on April 26, 2002.

Whitmore testified that he had been in the quarry business for the past 49 years. In 1999 he and Mayes formed the Debtor and purchased the Quarry from the Movant. Whitmore and his wife owned a 50% interest in the Debtor; Mayes and his wife owned the other 50%. It was Whitmore's testimony that in mid-2000 he turned over the management of the Quarry to Mayes because of a dispute concerning its operation. He testified that when he left in 2000 he had asked that the Movant keep him apprized if a default on the note and mortgage occurred. However, he never received any notice and

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[3] The Order specifically excepted the entry of a judgment for $130,000 in consulting fees, as provided for in an undated Consulting Agreement entered into by the Debtor and Giebitz, as well as Giebitz's wife, Eleanor. *See* Movant's Exhibit 7.

in mid-2001 he learned that the Debtor was having financial problems. According to Whitmore, he approached the Movant and offered to pay the eight months of mortgage arrears. He testified that he tendered $80,000 covering five of the eight months; however, according to Whitmore, Movant refused to accept the monies.

Whitmore testified that he transferred his interest in the Debtor to Cheyenne Bluestone, Inc. at the end of 2001 or the beginning of 2002. Mayes also had transferred his interest in the Debtor to Cheyenne Bluestone, Inc. sometime in 2001. According to Whitmore, Cheyenne Bluestone, Inc. has no obligation to the Debtor; however, he viewed it and the Debtor as one and the same company.

Whitmore testified that he continued to serve as president of the Debtor and Cheyenne Bluestone, Inc. until July 2002 when he resigned due to health reasons, and Douglas Brown assumed the office. *See* Movant's Exhibit 11 (Minutes of Board Meeting of the Debtor, July 30, 2002). Whitmore testified that he continues to remain active in the daily operations of the Debtor, assisting Brown, who resides in Connecticut, in learning the quarry business.

There was testimony from Dane Clark ("Clark") who indicated that he had become affiliated with the Debtor as a result of a $25,000 investment in Cheyenne Bluestone, Inc. He testified that he served as treasurer of the Debtor and Cheyenne Bluestone, Inc., as well as on-site manager of the day-to-day activities of the Debtor. He explained that he had a full-time position with Broome County, New York, which position allows him some flexibility. He testified that he works evenings and weekends at the Quarry handling sales and paying bills.

According to Clark, the Debtor most recently started operating the Quarry again beginning in the summer of 2002 as it had taken six to seven months for things "to get straightened around" after the

Movant vacated the Quarry in November2001. Clark testified that over the last few months the Debtor has been "operating on a shoestring" uncertain of the outcome of the bankruptcy proceedings. Debtor's checking account statement for September 21, 2002 through October 21, 2002, showed an ending balance of $10,741.93. *See* Movant's Exhibit 10. The prior monthly statement covering the period from August 22, 2002 through September 20, 2002, showed a balance of $4,329.04. *See* Movant's Exhibit 9. According to the Profit and Loss Statement for the month ending November 30, 2002, Debtor's revenues totaled $46,080.64. *See* Movant's Exhibit 12. Debtor has no paid employees, but according to the testimony of Clark, when questioned concerning the operating report filed with the Court, he testified that the Debtor had paid monies to Cheyenne Bluestone, Inc. for contracted labor. *See id.* According to Clark, Debtor also leased a drill rig from Cheyenne Bluestone, Inc. for which the Debtor had paid $7,000 in November 2002. Expenses for the month of November 2002 exceeded revenues by $8,752.29. *Id.* Year to date expenses exceeded revenues by $4,726.46. *Id.* However, Clark testified that the Debtor has requests for stone but until recently it has not had any available to sell. Clark indicated that there were now approximately 100 blocks of stone in the Debtor's inventory, which he estimated would sell for approximately $3,500 each for finished block or $1,100 for unfinished block. It was Clark's testimony that the Quarry was now in a position to "start making some money" and was in the process of seeking financing.

DISCUSSION

Code § 362(d) provides two bases for a court to award relief from the automatic stay:[4]

> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; [or]
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> (2) with respect to a stay of an act against property under subsection (a) of this section, if
>
> > (A) the debtor does not have an equity in such property; and
> > (B) such property is not necessary to an effective reorganization
> > . . . .

Sections 362(d)(1) and (d)(2) are disjunctive, and the Court must lift the stay if the Movant prevails under either. *See In re Kaplan Breslaw Ash, LLC*, 264 B.R. 309, 321 (Bankr. S.D.N.Y 2001) (citation omitted). Whether to lift the stay is left to the Court's discretion and requires that it make its determination on a case by case basis. *Id.*, citing *Sonnax Industries, Inc. v. Tri Component Products Corp. (In re Sonnax Industries, Inc.)*, 907 F.2d 1280, 1286 (2d Cir. 1990).

Code § 362(d)(2)

The Court will first address the second subsection of Code § 362(d). The section requires that the Movant show "(1) the amount of its claim; (2) that its claim is secured by a valid, perfected lien in property of the estate; and (3) that the debtor lacks equity in the property." *Kaplan Breslaw*, 264 B.R. at 322 (citation omitted). If the Movant meets its burden, then the burden of proof shifts to the Debtor to establish that the Quarry is necessary for its effective reorganization. *Id.*, citing 11 U.S.C. § 362(g).

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[4] Arguably, subsection (3) of Code § 362(d) has the potential to be applicable if it were to be determined that the Quarry is a single asset real estate, but the Court need not address it as the Movant has not sought relief under it.

Unfortunately, Movant has failed to meet its burden as to the first and third elements. While it did establish that it had a valid and perfected lien in the Quarry, it offered no proof of the amount of its claim as of April 26, 2002, when the Debtor filed its Petition. In addition, there was no sworn testimony by a qualified appraiser as to the present value of the Quarry. The Debtor in its Petition valued the Quarry at $1,000,000. Giebitz testified that he estimated the value to be $800,000. Without competent evidence concerning the present value of the Quarry, as well as the amount of Movant's claim, the Court is unable to determine if equity in the property exists. Accordingly, the Court need not address whether the Quarry is necessary for the Debtor's reorganization and must deny Movant's request for relief from the automatic stay pursuant to Code § 362(d)(2).

Code § 362(d)(1)

"'Neither the statute nor the legislative history defines the term 'for cause' and the legislative history gives only very general guidance.'" *In re Mazzeo*, 167 F.3d 139, 142 (2d Cir. 1999), quoting *Sonnax Industries*, 907 F.2d at 1285; *In re Tirey Distrib. Co.*, 242 B.R. 717, 723 (Bankr. E.D. Okla. 1999). The Movant has the burden of showing that continuation of the stay would cause some affirmative harm to its interest in the property. *See Capital Communications Federal Credit Union v. Boodrow (In re Boodrow)*, 126 F.3d 43, 53 (2d Cir. 1997). Only if the Movant establishes the existence of its secured claim, as well as facts to support its allegation of "cause," does the burden shift to the Debtor to refute the existence of cause to grant relief from the automatic stay. *Mazzeo*, 167 F.3d at 142.

As noted above, Movant has established its lien on the Quarry based on the Note and

Mortgage executed and recorded in December 1999. It has not established that the value of the Quarry is depreciating. While Giebitz testified that if the stone were left exposed to the winter frost, it would negatively impact on its value, he also acknowledged that he had not been to the Quarry in over a year and did not know the physical condition of the property as of the date of the hearing. According to Clark, the Debtor has taken steps to see that the stone is protected. He also testified that there has been regular maintenance performed on the equipment used in the Debtor's mining operation.

Other factors courts have examined in determining whether to modify the automatic stay for "cause" include:

> (1) an interference with the bankruptcy; (2) good or bad faith of the debtor; (3) injury to the debtor and other creditors if the stay is modified; (4) injuries to the movant if the stay is not modified; and (5) the portionality of the harms from modifying or continuing the stay.

Tirey Distributing, 242 B.R. at 723 (citation omitted).

In this case, if the Court were to grant the relief sought by Movant and allow it to proceed with the foreclosure of its mortgage, it is clear that such action would likely end the Debtor's efforts to reorganize since its existence depends on the income from the operation of the Quarry. Whitmore and Clark testified that the Debtor is positioned to begin selling its inventory of stone and both men were optimistic that the Debtor will be able to obtain financing and reorganize.

The Petition was filed in an effort to obtain a temporary "breathing spell" after the Movant refused to accept payment from Whitmore and discontinue its foreclosure action. "It is well settled that the filing of a bankruptcy petition on the eve of a foreclosure or eviction does not, by itself, establish a bad faith filing or 'cause' for relief from the stay." *Kaplan Breslaw*, 264 B.R. at 333 (citations

omitted).

The Court of Appeals for the Second Circuit has recognized that the filing of a bankruptcy petition in good faith "furthers the balancing process between the interests of debtors and creditors which characterizes so many provisions of the bankruptcy laws and is necessary to legitimize the delay and costs imposed upon parties to a bankruptcy." *In re C-TC 9th Avenue Partnership*, 113 F.3d 1304, 1310 (2d Cir. 1997). There have been no allegations of bad faith and no allegations that the Debtor has in any way abused the bankruptcy process. The Court is of the opinion that the balancing of the injury to either party favors the Debtor at this point in the chapter 11 case. If, as alleged, it is able to sell the stone and also obtain financing, its reorganization should not only benefit the Movant but also the unsecured creditors as well. Movant has not established any irreparable harm to it should the Court deny the relief it seeks until the Debtor has had an opportunity to formulate its plan. The Court believes, however, that Movant is entitled to some form of adequate protection in the form of monthly payments on its mortgage. Accordingly, the Court will require the Debtor to commence payments of $1,500 per month, beginning March 1, 2003. This represents the approximate amount payable on a monthly basis on principal according to the amortization schedule provided to the Court by the Movant. *See* Movant's Exhibit 7.

Based on the foregoing,

ORDERED that Movant's request for relief from the automatic stay pursuant to Code § 362(d)(1) or (2) is denied without prejudice; and it is further

ORDERED that the Debtor commence making adequate protection payments of $1,500 per month, beginning March 1, 2003, subject to reconsideration by the Court in 120 days, on motion by

the Movant, in the event that the Debtor has failed as of that date to file a plan and disclosure statement.

Dated at Utica, New York

this 11th day of February 2003

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge