IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

IN RE:	)	
	)	
ANTHONY WILSON SR.,	)	CASE NUMBER: 20-11359
	)	
Debtor.	)	

MEMORANDUM OPINION AND ORDER
GRANTING RELIEF FROM AUTOMATIC STAY

This matter came before the Court on the Motion for Relief from the Automatic Stay (Doc. 102)("Motion") of BancorpSouth Bank ("Bancorp") and the Objection thereto by the Debtor (Doc. 107 ("Objection"). Proper notice was given and appearances were noted on the record. Having considered the record, pleadings, exhibits, testimony and arguments of counsel, this Court finds that the Motion is due to be granted for the reasons set forth below.

JURISDICTION

The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §157 and §1334 and the Order of Reference of the District Court. This Court has the authority to enter a final order. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2).

FINDINGS OF FACT

The Debtor, Anthony Wilson ("Wilson") filed the above styled Chapter 11 proceeding on May 18, 2020. Wilson has not yet filed a disclosure statement or plan. Bancorp's Motion seeks relief from the automatic stay related to numerous pre-petition loans extended to Wilson, which are secured by thirteen rental properties ("Properties"). It is undisputed that the promissory notes and mortgages executed by Wilson in favor of the Bancorp (collectively, "Loan Documents") contain various provisions effectively cross-collateralizing all the indebtedness to Bancorp and securing it by all the Properties. Wilson defaulted on his obligations under the Loan Documents by failing to make payments, maintain insurance and pay ad valorem taxes. Four of the promissory

notes have matured with a collective outstanding balance due of approximately $239,031.07. (Movant's Ex. 2). The delinquency on the remaining unmatured notes totals approximately $70,928.46. (Movant's Ex.3). The total amount required to pay-off the total indebtedness to Bancorp secured by the Properties as of February 16, 2021 is approximately $718,892.70 with interest continuing to accrue. (Movant's Ex. 2). Wilson's failure to pay taxes resulted in the tax sale of five of the rental properties and a conservative estimate of the amount necessary to redeem is $29,140.31. (Movant's Ex. 1).

Wilson is a real estate investor (Doc. 45) owning various properties in addition to those mortgaged to Bancorp. (Doc. 41). The Operating Reports filed in this case, reflect that he has rental income of approximately $11,250.00 to $12,250.00 per month.(Docs.95-101). Debtor's counsel acknowledged that Wilson had approximately $42,500.00 cash on hand at the time of the hearing. It was uncontroverted that Wilson has not made any payments to Bancorp in over 600 days and the evidence established that many of the promissory notes are even further past due.

The bankruptcy schedules reflect $696,600.00 as the total value of the Properties when the case was filed. (Doc. 41). At the hearing, the Debtor proffered that his initial valuations were too low and opined that $796,958.00 is a more accurate valuation of the Properties. (Debtor's Ex. 2). Bancorp provided professional appraisals for the Properties (Doc. 102, Ex. A) which were also entered into evidence reflecting that the cumulative value of the Properties is $636,000.00. The Court heard conflicting testimony as to the present condition of some of the rental properties which may have sustained storm damage or be otherwise in disrepair but does not deem it necessary to make specific findings related to the existence or extent of any such damages at this time.

LEGAL ANALYSIS

Cause Exists for Relief from the Automatic Stay

The filing of a bankruptcy petition operates a stay as to the commencement or continuation of a judicial, administrative or other action or proceedings against the Debtor as well as actions to obtain property of the estate. 11 U.S.C. §362(a). However, Section 362 of the Bankruptcy Code further provides in pertinent part:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay --
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
>
> (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.
>
> * * * *
>
> (g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section --
>
> (1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and
>
> (2) the party opposing such relief has the burden of proof on all other issues.

11 U.S.C. §362 (d); 11 U.S.C. §362 (g)

Bankruptcy Courts have broad discretion to determine what constitutes sufficient cause to warrant relief from stay. *In re Dixie Broad., Inc.*, 871 F.2d 1023 (11th Cir. 1989). Since "cause" is not specifically defined by the Bankruptcy Code, courts must determine whether relief is

appropriate by examining the totality of the circumstances in each case. *In re West Pace, LLC*, 2020 WL 6140389 (Bankr. M.D. Ala.); *In re Robertson*, 244 B.R. 880 (Bankr. N.D. Ga. 2000); *In re Mack*, 347 B.R. 911 (Bankr. M. D. Fla 2006). Many courts have deemed significant unexcused failure to make post-petition payments sufficient cause to justify relief from the automatic stay. *In re Williams*, 68 B.R. 442 (Bank. M.D. Ga. 1987)(lifting the automatic stay despite equity in the property based upon significant post-petition payment default); *In re Ellis*, 60 B.R.432 (9th Cir. BAP 1985(citing, *In re Gauvin,* 24 B.R. 578 (9th Cir. BAP1982) (explaining section 362(d)(1), provides that the stay must be terminated for "cause." and lack of adequate protection is but one example of "cause")); *see also*, *In re Nichols*, 440 F.3d 850 (6th Cir. 2006) (noting failure to make payments to creditor can constitute cause to lift the automatic stay); *In re Neals*, 459 B.R. 612 (Bankr. D.S.C. 2011)(holding debtor's failure to make direct post-petition payments to creditor for nearly a year since filing the bankruptcy was a substantial default that established cause as such failure was not due to unexpected job loss or other circumstance beyond debtor's control).

In light of the totality of the circumstances in this case, Wilson's failure to make payments constitutes sufficient cause to lift the automatic stay under 11 U.S.C §362 (d)(1). Wilson's contractual defaults are significant. There is no dispute that Wilson failed to make any payments to Bancorp for over 600 days. Many of the individual promissory notes are even farther behind, four of the promissory notes have matured and five of the rental properties have been sold at tax sales. Further, Wilson has not maintained insurance on the Properties. Moreover, although the Debtor made a Subchapter V election, this case has been pending since May 2020 without a disclosure statement or plan. Wilson has continued to receive income from the Properties during the pendency of this proceeding and has accumulated substantial cash on hand without making

any payments to Bancorp, the taxing authorities or even to obtain insurance on the Properties; while the indebtedness to Bancorp has continued to increase.

Although Debtor's counsel indicated that Wilson held funds in anticipation of a potential objection to discharge and the outcome of this Motion, the Court does not find such arguments compelling considering the extent, numerosity and manner of defaults. Hence, in the view of this Court, Wilson's considerable contractual defaults and sizeable delinquencies without justification or even the prospect of a viable plan favor granting relief. Further, the Debtor does not have sufficient equity in the Properties to warrant continuing the protections of the automatic stay.

Lack of Adequate Protection

Bankruptcy courts must lift the automatic stay if movant prevails under either of two grounds: (1) lack of adequate protection of movant's interest in property or (2) if the debtor lacks equity in the property and it is not necessary for an effective reorganization. *In re 412 Boardwalk Inc*., 520 B.R. 126 (Bankr. M.D. Fla. 2014)(citing *In re Elmira Litho, Inc*., 174 B.R. 892 (Bankr. S.D.N.Y. 1994). The purpose of adequate protection is to guard the secured creditor's interest in the value of the collateralized property. *See* 11 U.S.C. § 361; *United Sav. Ass'n of Tex v. Timbers of Inwood Forest Assocs., Ltd, ,* 484 U.S. 365, 108 S.Ct. 626 (1988). When adequate protection is in issue, factors commonly considered include the sufficiency of an equity cushion, periodic payments and the prospects of a successful reorganization. *In re Panther Mountain Land Development, LLC,* 438 B.R. 169 (Bankr. E.D. Ark. 2010). Equity cushion is a term of art defined as the amount by which the value of the property exceeds the outstanding liens. Interest accruals, non-payment of property taxes and potential for sudden loss can demonstrate a post-petition erosion of the creditor's security. *In re Anthem,* 267 B.R. 867(Bank. D. Colo. 2001).

This Court has previously held that the mere existence of an equity cushion does not constitute adequate protection *per se*. *In re Big Dog II, LLC*, 602 B.R. 64 (Bankr. N.D. Fla. 2019).[1] Although generally a 20% or greater equity cushion is deemed sufficient, an equity cushion of 0% to 11% has generally been held to be insufficient, and case law is divided on whether a cushion of 12% to 20% constitutes adequate protection. *Id.* at 70 (citing *In re Senior Care Properties, Inc.,* 137 B.R. 527, 528-29 (Bankr. N.D. Fla. Feb. 25, 1992)(analyzing the sufficiency of various equity cushions); *see also*, *In re James River Assocs.,* 148 B.R. 790 (E.D. Va. 1992).

There being no dispute that the Loan Documents were all cross-collateralized and secured by the mortgages on the Properties, the Court deems it appropriate to conduct the equity analysis collectively. The evidence presented established that the total amount of the cross-collateralized debt owed to Bancorp secured by the Properties totaled $718,892.70 as of February 16, 2021 with interest continuing to accrue. Although the parties presented differing opinions as to the valuation of the Properties, it is not necessary for the Court to determine an exact valuation to arrive at a dispositive finding. This is true because even if the Court assumes the Debtor's valuation of $796,958.00, the equity cushion in the Properties would at most be $78,065.30 (less than 10%). Hence, under the *Big Dog* analysis, the equity cushion is not sufficient to protect Bancorp's interest even when valuation is viewed most favorably to the Debtor. Further, this calculation does not take into account the amounts necessary to redeem the Properties from tax sale, continued interest accrual or forced placed insurance premiums which will further diminish any potential equity. As motions for relief and motions to sell are routinely filed in this Court, the Court is cognizant that a ten percent equity cushion is not sufficient to cover the amounts generally associated with

1 This Court presided over the Big Dog II, LLC case pursuant to a General Order of the Eleventh Circuit Judicial Counsel whereby this Court received a special transfer appointment to hear cases filed in the Northern District of Florida on an as needed basis.

obtaining possession and liquidating the collateral, considering legal fees, holding expenses, realtor commissions and closing costs.

Further, although Debtor's counsel indicated that if Wilson were allowed to keep some of the rental properties and surrender others, it would change the analysis, the Court does not find that to be true. With the undisputed fact that all the loans are cross-collateralized, the valuation of the Properties and the total indebtedness must be considered as a whole and not piecemeal. The Debtor cannot simply "cherry pick" certain rental properties as if they are only subject to one note and contend there is sufficient equity when all the properties serve as collateral for all the indebtedness. As noted hereinabove, even with the Debtor's valuation, there is just not sufficient equity to deem Bancorp adequately protected. Therefore, under §362(g)(2) the burden shifts to the Debtor to controvert the Motion as to all other issues. The evidence proffered by Wilson did not meet such burden. Although Wilson has not filed a disclosure statement or proposed a plan, his schedules and information presented at the hearing indicate he owns other rental properties which are not mortgaged to Bancorp. Further, no testimony or projections were offered at the setting to convince the Court that the Properties were necessary for an effective reorganization or that Wilson would be able to propose a viable plan even if relief was not granted. Hence, taking into account the totality of circumstances, it is evident that Bancorp is not adequately protected and therefore relief from the automatic stay is due to be granted.

CONCLUSION

Based on the foregoing, the Court finds sufficient grounds exists to grant relief from the automatic stay. Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that Bancorp's Motion for Relief (Doc. 102) is GRANTED.

Dated: March 16, 2021

JERRY C. OLDSHUE, JR.
U.S. BANKRUPTCY JUDGE