2000 BNH 013 **Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

UNITED STATES BANKRUPTCY COURT
for the
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 99-13373-MWV
Chapter 11

Perry Hollow Management Company, Inc.,
and Perry Hollow Golf Club, Inc.,
Debtors

Commerce Bank & Trust Company,
Movant
v. CM No. 00-127
Perry Hollow Golf Club, Inc.,
Respondent

MEMORANDUM OPINION

The Court has before it the motion for relief from the automatic stay of Commerce Bank & Trust Company ("Movant") seeking to foreclose on a certain mortgage and security interest in property of the Perry Hollow Golf Club, Inc. ("Debtor"). The alleged grounds for relief are: (1) that this is a single asset real estate case, and the Debtor has not complied with section 362(d)(3) of the Bankruptcy Code; and (2) that there is cause, including the lack of adequate protection under section 362(d)(1).

Jurisdiction

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

Facts

The facts are essentially not in dispute. At the time of the filing, the Debtor owed the Movant approximately $3.6 million with principal and interest accruing at the default interest rate of approximately $32,000 per month. For purposes of this motion, the Movant has agreed that the property, which is

primarily a golf course and related facilities, is worth $4.5 million. The property is leased to Perry Hollow Management, Inc. ("Management") pursuant to a 1992 lease for an amount equal to the mortgage payment of the Debtor. Management is also a Chapter 11 debtor being jointly administered with this case. No payments have been made to the Movant since June 1998. Edward Paquette owns 92% of the Debtor and 100% of Management and runs the daily operation of the golf course and related activities. The Movant is the loan servicing agent for David G. Massad, who apparently is the owner of the Movant and Mr. Paquette's second cousin.

The first issue before the Court is whether this is a single asset real estate case. Section 101(51B) defines single asset real estate as follows:

> "single asset real estate" means real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto having aggregate noncontingent, liquidated secured debts in an amount no more than $4,000,000.

11 U.S.C. § 101(51B). The Movant argues that the Debtor receives all of its income from the lease of its real estate and thus fits within the definition of single asset real estate. The Court disagrees and concurs with Judge Deasy's recent decision in Banc of America Commercial Fin. Corp. v. CGE Shattuck, LLC (In re CGE Shattuck, LLC), Bk. No. 99-12287-JMD, CM No. 99-747 (Bankr. D.N.H. Dec. 20, 1999), that such a finding would put form over substance.

Mr. Paquette testified that the lease arrangement was done at the advice of his financial advisors. However, it is clear for the following reasons that the golf course is operated as a single entity. First, the Debtor's schedules reflect that, in addition to the real estate, the Debtor holds approximately $247,000 worth of furniture, fixtures and equipment, mostly restaurant related; golf maintenance equipment worth approximately $232,000; and seventy golf carts on a lease-purchase agreement with Yamaha. Although not specifically included in the lease, all of these assets are utilized in the operation of the golf course and are partially responsible for the production of income, including greens fees and food and beverage revenues.

Second, the lease itself is further evidence that the golf course operates as a single entity as it recites no fixed rental amount. Instead, the rent is the amount of Debtor's mortgage payment, insurance and taxes unless otherwise agreed. No lessor or lessee would enter into this type of lease unless both were controlled by a common entity with a common purpose.

Having found that the golf course is operated as one entity, could that entity fit within the definition of single asset real estate? Once again, the Court finds it does not. The operation of a golf course includes revenues other than the return of investment on the real property. These include the operation of a pro shop, which includes the sale of golf related clothing and equipment. It also has a food and beverage operation, including the leasing of a portion of the premises for functions. It rents carts, collects greens fees, and maintains a greens keeper and a labor force. In short, the Court finds that running a golf course is a substantial business other than the operation of the real property itself. In re Larry Goodwin Golfing, 219 B.R. 391 (Bankr. M.D.N.C. 1997).

Having found that this is not a single asset real estate case, the motion for relief pursuant to section 362(d)(3) is denied.

The second ground for relief is more problematic. The Debtor argues that there is an equity cushion and that the Movant is adequately protected. Based on the figures stated above, there would appear to be approximately $900,000 in equity as of the filing date. However, the Town of New Durham has filed a claim for real estate taxes in the approximate amount of $70,000, and five months have elapsed since the filing, which would amount to another $150,000 owed to Movant if the default interest rate is allowed, thus reducing the equity cushion by $220,000 to date.

Along with adequate protection, the Debtor must also show that it will be able to confirm a plan of arrangement in a reasonable period of time. United States Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365, 370 (1988). The Debtor in the instant case has filed a plan of reorganization which provides that the Debtor shall have six months to sell the golf course after confirmation of the plan or

the property will go to the Movant. There is no purchase price, and the Court doubts that this type of plan can meet the "best interest of creditors test" required for confirmation of a plan of reorganization.

Accordingly, the Court will grant relief from the stay for cause effective July 1, 2000, unless there is a firm commitment to purchase obtained prior thereto. During this period, there is no reason why the Movant cannot also actively seek a purchaser which very well may be in its best interest. To assure the Court that every effort is made to find a purchaser, the Court is seriously considering the appointment of a Chapter 11 trustee, which issue will be taken up at the hearing scheduled for April 14, 2000.

This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 6th day of April, 2000, at Manchester, New Hampshire.

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Mark W. Vaughn
Chief Judge