

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:

Bk. No. 02-13194-MWV
Chapter 13

Thomas W. Peno,
Debtor

Peter J. Peno, Sr. and Eleanor Peno,
Movants

v.

Thomas W. Peno,
Respondent

Raymond J. DiLucci, Esq.
RAYMOND J. DILUCCI, P.A.
Attorney for Debtor/Respondent

Carl D. Hanson, Esq.
LAW OFFICES OF WILLIAM HOWARD DUNN
Attorney for Movants

MEMORANDUM OPINION

The Court has before it the motion of Peter and Eleanor Peno for relief from the automatic stay (the "Motion"). The movants are the mother and father of the Debtor, Thomas W. Peno. The Debtor filed a petition under Chapter 13 of the Bankruptcy Code on October 15, 2002. The Motion was filed on October 21, 2002. The Court held a hearing on the Motion on December 6, 2002, at which both parties testified and documentary testimony was presented. For the reasons set forth below, the Court denies the movants relief from the automatic stay.

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).

BACKGROUND

The Motion concerns real property located on 10 Hutchins Street, Concord, New Hampshire. Pursuant to a joint tenancy agreement (the “Agreement”) entered into by the parties on September 9, 1994, the property is owned in joint tenancy, with the movants holding a fifty percent interest and the Debtor holding a fifty percent interest. Under the Agreement, the Debtor agreed to pay to the movants the sum of \$58,000, which represents their investment in the property and other advances to the Debtor prior to September 9, 1994. This \$58,000 obligation is “on demand,” and no interest accrued and no interim payments were required. Further, the obligation is secured by a mortgage on the Debtor’s fifty percent interest to the movants, and it is this mortgage which is the subject of the instant Motion. The Court notes that this mortgage is distinct from a prior mortgage on the hundred percent interest of the parties, which is not the subject of this Motion.

Prior to the filing of the bankruptcy petition, demand was made by the movants, and foreclosure proceedings commenced. The Debtor brought a petition in equity in the New Hampshire Superior Court in an attempt to stop the foreclosure, but his petition was denied. The Debtor then filed this bankruptcy petition to obtain the benefits of the automatic stay. The movants stated that the Debtor is in payment default, demand having been made for payment of the \$58,000 plus costs. They also allege that the Debtor, pursuant to the Agreement, has the duty to maintain the premises and to pay the expenses thereof. The Debtor also has the obligation to pay the first mortgage and the real estate taxes on the property.

The Agreement gives the movants the right to occupy the basement and first floor of the premises, which they currently do. The movants had sold their homestead in Claremont, New Hampshire, and moved to the Hutchins Street property, which was to be their retirement home. The Debtor presently occupies a converted barn on the premises with his girlfriend and two children of which he has custody from a previous marriage. The premises also contains five rentable rooms on the second and third floors, which the Debtor intends to rent for four hundred dollars per month each. While the Agreement provides that the Debtor pay all of the expenses of the premises other than those specifically related to the space occupied by the movants, the Agreement is silent as to the collection of rents or to the distribution of any net income therefrom. It is also silent as to whether the movants or the Debtor has to pay rent.

Finally, the Debtor testified that he currently holds two part-time jobs, i.e., a maintenance man for Sacred Heart Church, which nets \$275 per week, and an office furniture assembler, which averages another \$300 per week. There was also testimony that while his girlfriend doesn't pay rent, she contributes to certain household expenses.

DISCUSSION

There is no question that the Debtor is currently in default on his payment obligation, demand having been made prior to the filing. However, most of the testimony concerned the condition of the premises and whether the Debtor was in default of his obligation to maintain it. The movants provided a list of necessary repairs, to most of which the Debtor disagreed. While the parties disagreed, the Court finds that the movants and the Debtor are credible witnesses. The Debtor, however, produced twelve photographs of the premises, which the Court finds to be more persuasive than the verbal testimony of the parties. The photographs show the premises to be in good repair and, in some cases, freshly painted. The Court does note that these photographs did not show the porch, which the parties agreed needed the most repair. The movants produced a photograph of two torn out closets, to which the Debtor testified was done in order to convert the area to a bathroom. The Debtor further testified that he believes the premises

was constructed in the 1880s. Given the age of the premises and taking note that old houses need some repair, the Court finds that the premises is being adequately maintained by the Debtor, and the Debtor is not in default of those provisions in the Agreement and/or mortgage. Additionally, although the Debtor has raised issues concerning the enforceability of the Agreement, claiming it to be unconscionable, these issues are not properly before this Court in the context of a motion for relief from the automatic stay. See Grella v. Salem Five Sav. Bank, 42 F.3d 26, 33 (1st Cir. 1994).

On the issue of equity in the premises, the movants produced an appraiser who testified that the value of the premises was \$220,000. The Debtor did not provide any contrary evidence. The parties agreed that the first mortgage on the premises is approximately \$94,000, leaving total equity, based on the above appraisal, of \$126,000, of which the Debtor would be entitled to one-half, or \$63,000. This equity is subject to the movants' mortgage with a face value of \$58,000, plus alleged costs. The Court finds that the Debtor has no equity in the property.

However, the Court finds that this property is necessary for a successful reorganization. Like most Chapter 13 cases, this case was filed to protect the Debtor's interest in the property. The movants argue that a successful Chapter 13 plan is impossible. In the early stages of this Chapter 13 proceeding, the Court is unwilling to make such a finding on the record before it.

CONCLUSION

In summary, the Court finds that, although there is a payment default, the property is being properly maintained, the first mortgage is substantially current, and adequate protection is unnecessary at this time. The Court further finds that the Debtor does not have equity in the property, but that the property is necessary for a Chapter 13 reorganization. Based on these findings, the motion for relief from the automatic stay is denied.

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 12th day of December, 2002, at Manchester, New Hampshire.

/s/ Mark W. Vaughn

Mark W. Vaughn

Chief Judge