IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
(Martinsburg)

In re	:	
	:	**BK No. 2:19-bk-00787**
PANTHERA ENTERPRISES, LLC,	:	
	:	**Chapter 11**
Debtor.	:	
	:	
	:	
WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY,	:	
	:	
	:	
Movant,	:	
	:	
v.	:	
	:	
PANTHERA ENTERPRISES, LLC,	:	
	:	
Respondent.	:	
	:	

WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY TO FORECLOSE AGAINST THE DEBTOR'S REAL PROPERTY AT 2506 FISH POND ROAD, OLD FIELDS, HARDY COUNTY, WEST VIRGINIA

West Virginia Economic Development Authority ("WVEDA") by its counsel, moves for an order terminating the automatic stay imposed by 11 U.S.C. § 362 in order for WVEDA to foreclose against the Debtor's real property.

1. Movant is West Virginia Economic Development Authority, a public corporation and government instrumentality under Chapter 31, Article 15 of the West Virginia Code.

2. Debtor Panthera Enterprises, LLC ("Debtor") is the owner of the real property at 2506 Fish Pond Road, Old Fields, Hardy County, West Virginia ("Real Property").

3. The Debtor filed its voluntary petition for protection under Chapter 11 of the United States Bankruptcy Code on September 13, 2019 ("Petition Date"), initiating this bankruptcy case. Dkt. 1.

4. WVEDA seeks relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1) for cause, the bases for which are (i) the Debtor consented to relief from the automatic stay for WVEDA; (ii) the Debtor filed its bankruptcy petition in bad faith; and (iii) the Debtor has failed to provide adequate protection for the use of the Real Property, which is WVEDA's collateral.

5. Contemporaneously with the filing of this Motion for Relief from Stay, WVEDA filed a *Motion to Convert this Case to a Chapter 7 Proceeding, or, in the Alternative, Dismiss this Bankruptcy Case for Cause* ("Motion to Convert"). WVEDA incorporates by reference as if stated herein its Motion to Convert, the facts and arguments stated therein.

BACKGROUND

A. WVEDA's Claim

6. WVEDA is a secured creditor of the Debtor. Prepetition, in 2013 and in 2014, WVEDA made two loans to the Debtor. Both loans are secured by Deeds of Trust against the Real Property. Attached as Exhibit A and incorporated herein by reference is a copy of WVEDA's proof of claim, to which are attached a number of the documents referenced in this Motion as Exhibits A-1 through A-9. In addition, attached as Exhibit E and incorporated herein by reference is the Affidavit of Steven Webb, Director of Financial Services for WVEDA.[1] Ex. E, ¶¶ 3, 4.

[1] The Exhibits with this Motion are given the same letter as used for the same Exhibit in WVEDA's Motion to Convert.

7. On August 21, 2013, WVEDA made a fifteen (15) year term loan to the Debtor[2] in the original principal amount of $5,000,000 ("2013 Loan"). The 2013 Loan financed a portion of the Debtor's cost to acquire 689.40 acres in Moorefield District, Hardy County, West Virginia. Ex. E, ¶ 3.

8. The 2013 Loan is evidenced by a Promissory Note, pursuant to which the Debtor was to make equal monthly payments of $37,849.50, beginning September 21, 2013, with a final payment of all unpaid principal and accrued and unpaid interest due on August 21, 2028. Ex. A-2.

9. The 2013 Loan is secured by a Credit Line Deed of Trust and Fixture Filing, granting WVEDA a first lien on the 689.40 acre tract acquired by the Debtor. Ex. A-3. The Credit Line Deed of Trust and Fixture Filing is recorded in the office of the Clerk of the County Commission of Hardy County at Trust Deed Book 277, page 158. The 2013 Loan is also secured by a Collateral Assignment of Leases and Rents. Ex. A-4.

10. WVEDA made a second loan to the Debtor on July 2, 2014, in the original principal amount of $1,871,505.00. This loan financed the acquisition of an additional 58.09 acre tract, adjacent to the 689.40 acre tract ("2014 Loan" and with the 2013 Loan, the "Loans"). Together, the 689.40 acre tract and the 58.09 acre tract constitute the Real Property of the Debtor. Proceeds of the 2014 Loan were also used to construct improvements and renovations on the Real Property. Ex. E, ¶ 4.

11. The 2014 Loan is evidenced by a Promissory Note, pursuant to which the Debtor was to make equal monthly payments of $13,734.66, for a term of fifteen (15) years, with a final installment of all unpaid principal and accrued and unpaid interest due on July 2, 2029. Ex. A-6.

[2] The Debtor is a limited liability company formed under the laws of the State of Delaware in 2011. It began its life as TenX Group LLC, and thereafter, changed its name to Panthera Enterprises LLC.

12. The 2014 Loan is secured by a Credit Line Deed of Trust and Fixture Filing, granting WVEDA a subordinate lien on the 689.40 acre tract and a first lien on the 58.09 acre tract. The Deed of Trust is recorded in the office of the Clerk of the County Commission of Hardy County at Trust Deed Book 282, page 818. Ex. A-7. It is also secured by a Collateral Assignment of Leases and Rents. Ex. A-8.

13. The Real Property is the site of a security operations training facility ("Facility"). Ex. E, ¶ 8. It offers tactical training for personnel involved in military and non-military protective services, including government, military and law enforcement personnel. Until June 1, 2018, operation of the Facility and the training provided there was conducted by Panthera Training Center, LLC ("PTC"), a subsidiary of the Debtor. Id. Effective June 1, 2018, the Debtor transferred operation of the Facility, and the training, to Panthera Training, LLC ("Panthera Training"), a third party unrelated to the Debtor. Ex. E, ¶ 15.

14. As of the Petition Date, the Debtor was indebted to WVEDA for $6,477,180.47, which includes principal and interest owed on each of the Loans, as well as attorney's fees and costs incurred prepetition. Ex. A, Claim # 4.

B. The Debtor's Defaults

15. The Debtor first defaulted on the Loans in February of 2015, not even a year after the 2014 Loan was made, by failing to make the monthly payments due under the terms of the respective promissory notes. Ex. E, ¶ 9. The Loans were brought current in May of 2015, but the Debtor defaulted again in August of 2015. Id. Attached as Exhibit E-1 and incorporated herein by reference is a copy of the payment histories for the Debtor's Loans. Ex. E-1.

16. The Debtor made no payments on the two Loans in 2016. Ex. E-1.

17. On May 20, 2017, the Debtor and WVEDA entered into a modified payment arrangement whereby the Debtor agreed to pay $20,000 per month for each of the Loans. Ex. E, ¶ 11.

18. The Debtor defaulted on the modified payment arrangement, making just three (3) of the nine (9) payments that were to be paid between May 20, 2017 and February 28, 2018. Ex. E, ¶ 12; Ex. E-1.

19. On February 28, 2018, WVEDA sent a notice of default and demand for payment to the Debtor and its guarantors, giving the obligors a deadline of March 31, 2018 to cure the default. The Debtor paid nothing. Ex. E, ¶ 13; Ex. E-1.

20. In May of 2018, WVEDA commenced a foreclosure under the two Credit Line Deeds of Trust that secured the Loans. Ex. E, ¶ 14.

21. On or about July 6, 2018, WVEDA, the Debtor, PTC, and the guarantors of the Debtor's indebtedness to WVEDA entered into a Forbearance Agreement. Attached as Exhibit A-9 and incorporated herein by reference is a copy of the Forbearance Agreement. The Debtor indicated, as it had done so numerous times before, that it was talking with potential investors, and needed additional time to bring one or more on board. Ex. E, ¶ 16.

22. Under the Forbearance Agreement, WVEDA agreed to forbear from exercising its rights under the Loan documents, including the Deeds of Trust, for a period of six (6) months. Monthly rent payments of $52,000 that Panthera Training was obligated to pay to the Debtor under its Commercial Lease with the Debtor were to be paid by Panthera Training directly to WVEDA, to be applied to the Loans. Ex. A-9 ¶ 6(a).

23. The Forbearance Agreement expired on January 6, 2019, at which time, the entire balance due and owing on the Loans was immediately due and payable. No investor had materialized at that time, nor has one materialized to date. Ex. E, ¶ 18.

24. Panthera Training has timely paid the monthly payment of $52,000 to WVEDA. Ex. E, ¶ 19. In fact, the time during which Panthera Training has been forwarding payments to WVEDA is the only time since 2014 WVEDA has consistently received timely payments on the Loans. Ex. E, ¶ 19; Ex. E-1.

25. Nevertheless, there have been other defaults by the Debtor. The Debtor failed to pay the 2017 real property taxes due and owing on the Real Property, which is a breach of the Deeds of Trust that secure the Loans.

26. In November of 2018, the 2017 tax liens for the delinquent taxes were auctioned by the Hardy County Sheriff and certified to the West Virginia State Auditor's Office for disposition. As of the filing of this Motion, the cost to redeem the Real Property was approximately $55,000.[3] The redemption period expires April 1, 2020.

27. On March 26, 2018, the Debtor granted to SMI, LLC ("SMI") the "exclusive rights to all merchantable timber standing or fallen" on the Real Property. Attached as Exhibit F and incorporated herein by reference is a copy of the recorded Memorandum of Timber Agreement with the Timber Agreement executed by the Debtor. According to the Debtor, the Timber Agreement was given to SMI to secure payment of prior loan made to SMI. The Agreement will be released upon satisfaction of the terms of all loan documents between the Debtor and its affiliates and SMI. Ex. F, ¶ 2.

[3] Until November 6, 2019, the 2017 taxes would be paid to the State Auditor's office and the 2018 and 2019 taxes were be paid to Hardy County. After November 6, 2019, the State Auditor's office would collect all of the taxes.

28. WVEDA, by counsel, sent the Debtor a notice of default and demand for payment on August 14, 2019. A copy of the notice of default and demand for payment is attached hereto as Ex. E-2 and incorporated herein by reference. The Debtor did not respond; WVEDA again commenced foreclosure, this time with the right to redeem. Ex. E, ¶ 20. The foreclosure sale was scheduled and noticed for September 16, 2019. Id.

29. The Debtor filed its voluntary petition three days prior to the scheduled foreclosure sale, commencing this bankruptcy case. Dkt. 1.

ARGUMENT

30. Section 362(d)(1) of Title 11 provides that

> [o]n request of a party in interest, . . . the court shall grant relief from the stay, . . . for cause, including the lack of adequate protection of an interest in property of such party in interest.

11 U.S.C. § 365(d)(1).

31. Whether cause exists to warrant relief from the automatic stay is determined on a case-by-case basis, in the sound discretion of the court. *In re Robbins*, 964 F.2d 342, 345 (4th Cir. 1992). Movant has the burden initially to show cause for relief. *In re Kaplan Breslaw ASH, LLC*, 264 B.R. 309, 321-2 (S.D. N.Y. 2001). However, the debtor has the burden on all issues other than the debtor's equity in the real property. Id.; 11 U.S.C. § 362(g).

I. Cause exists because the Debtor consented to relief from the automatic stay as to WVEDA.

32. On or about July 6, 2018, the Debtor entered into a Forbearance Agreement with WVEDA and other parties, pursuant to which WVEDA agreed to forbear from exercising its rights under the relevant Loan documents for a period of six (6) months for so long as the terms and conditions of the Forbearance Agreement were met. The Debtor had been in default for nearly three (3) years, and the WVEDA had already commenced foreclosure for the second time.

The Debtor indicated it was talking with potential investors, and needed additional time to bring one or more on board. Ex. E, ¶ 16.

33. In consideration for WVEDA's forbearance, the Debtor consented to relief from stay in the event it filed for bankruptcy protection or was the subject of an order for relief issued by a bankruptcy court. Specifically,

> The Obligors hereby further agree that in the event that any Obligor shall (i) file for or be the subject of any petition under title 11 of the United States Code (as amended, the "Bankruptcy Code"), (ii) be the subject of an order for relief issued under the Bankruptcy Code, (iii) file or be the subject of any petition seeking any reorganization, composition, readjustment, liquidation, or similar relief under any present or future federal or state law or act relating to bankruptcy insolvency or other relief for debtors, or (iv) be the subject of any order, judgment, or decree entered by any court of competent jurisdiction approving a petition filed against such party for reorganization, composition, readjustment, liquidation, dissolution or similar relief, *WVEDA shall thereupon be entitled to relief from any automatic stay imposed by section 362 of the Bankruptcy Code, or otherwise, on or against the exercise of the rights and remedies otherwise available to WVEDA as provided in the Loan Documents, this Agreement, and/or as otherwise provided by law*. The Obligors further waive any right they may have to move in such proceeding to extend the exclusive period to file a plan or have a plan accepted, unless WVEDA has been granted relief from the stay. This provision shall survive any termination of this Agreement.

Ex. A-9, § 6(k) (emphasis added).

34. The majority of courts considering a prepetition waiver such as the one above find such waivers enforceable. *In re Citadel Properties, Inc.*, 86 B.R. 275, 276 (M.D. Fla. 1988) (prepetition agreement enforceable where court also found debtor filed petition for reorganization in bad faith); *In re Club Tower L.P.*, 138 B.R. 307, 312 (N.D. Ga. 1991) (prepetition waiver enforceable and "furthers the legitimate public policy of encouraging out of court restructurings and settlements"); *In re Powers*, 170 B.R. 480, 484 (D. Mass. 1994) ("waiver is a 'primary element' to be considered in determining if cause exists for relief from the automatic stay"); *In re Cheeks*, 167 B.R. 817, 818-19 (D. S.C. 1994) (enforcing prepetition waiver furthers

public policy); *In re Shady Grove Tech Center Associates Ltd.*, 227 B.R. 422, 425 (D. Md. 1998) (prepetition waiver is additional grounds for granting relief from stay).

35. In June of 2018, when the terms of the Forbearance Agreement were negotiated, the Debtor had been in default for at least three years, with more than enough time to come up with a workout plan. The Debtor already was afforded the respite that is accorded by the automatic stay, particularly in 2016, when no payments were made to WVEDA. Yet, the Debtor went further into default. Nothing has changed.

36. The default prior to June of 2018 was never cured, and the Debtor's principals have stripped assets of the Debtor to pay antecedent debts. The prepetition waiver should be enforced to grant WVEDA relief from the automatic stay. *In re Shady Grove*, 227 B.R. at 425 (waiver enforced where there was no "substantial change in circumstances, such as a reasonable prospect of reorganization within a reasonable time").

II. Cause exists because the Debtor filed its bankruptcy case in bad faith.

37. A bankruptcy petition for reorganization filed in bad faith constitutes cause for lifting the stay under § 362(d)(1). *In re RAD Properties, Inc.*, 84 B.R. 827, 829 (M.D. Fla. 1988) (citations omitted); *In re MacInnis*, 235 B.R. 255, 259 (S.D. N.Y. 1998) (It is well established that "a debtor's lack of good faith in filing a petition . . . constitutes sufficient 'cause' to lift the stay."). "The test for determining whether a bankruptcy case was filed in bad faith is the same under Section 362 and Section 1112(b)." *In re Club Tower L.P.*, 138 B.R. 307, 310 (N.D. Ga. 1991).

38. Contemporaneous with the filing of this Motion WVEDA filed its Motion to Convert, in which it argues this bankruptcy case should be converted to a Chapter 7 proceeding or, alternatively, dismissed on the grounds that the Debtor's bankruptcy petition was filed in bad

faith. The Motion to Convert and the arguments cited therein for a finding of bad faith are incorporated herein by reference.

39. In sum, in the Fourth Circuit, courts conduct a totality of the circumstances inquiry to determine if (1) the debtor's reorganization effort is objectively futile and (2) the debtor's filing was motivated by subjective bad faith. *Carolin Corp. v. Miller*, 886 F.2d 693, 700-01 (4th Cir. 1989). The two prongs must be met for a finding of bad faith, giving cause to convert or dismiss a Chapter 11 bankruptcy case.

40. The Debtor's bankruptcy filing exhibits nearly all of the characteristics of a bad faith filing. There is no realistic possibility of an effective reorganization of the Debtor, and therefore, the objective futility prong for a finding of bad faith is met. The Debtor has not manifested an intent to reorganize or to preserve the assets of the Debtor. Hence, the subjective bad faith prong for a finding of bad faith is met.

41. Upon finding cause exists to convert or dismiss the Debtor's bankruptcy case under 11 U.S.C. § 1112(b), cause likewise exists to grant WVEDA relief from the automatic stay under 11 U.S.C. § 362(d)(1).

III. Cause exists because the Debtor has not provided adequate protection to WVEDA for the use of its collateral.

42. WVEDA has received monthly payments of $52,000 from Panthera Training since July 2018, which have been applied to the outstanding indebtedness due and owing on the Loans. These payments are Panthera Training's monthly rent payments required pursuant to its Commercial Lease with the Debtor. Pursuant to the Forbearance Agreement, the monthly rent payments are paid directly to WVEDA for application to the Loans. [4]

[4] Pursuant to paragraph 6 of the Collateral Assignments of Leases and Rents, upon the Debtor's default, WVEDA may direct Panthera Training to pay all rental and other monies owed under the Lease to WVEDA. **Exs. A-4; A-8**.

43. At the initial scheduling conference with the Court, the Debtor suggested these payments would constitute adequate protection and would continue until a plan of reorganization was in place. Dkt. 20. However, shortly thereafter, the Debtor declared the Commercial Lease with Panthera Training in default, and filed an adversary proceeding to terminate the Commercial Lease with Panthera Training and remove Panthera Training from the Real Property. Dkt. 33.

44. Termination of the Commercial Lease will terminate the monthly payments to WVEDA. The Debtor has offered no assurance the monthly payments would continue.

45. More significantly, though, is the Debtor's failure to pay the real property taxes assessed on the Real Property, which is WVEDA's collateral. The Debtor failed to pay the 2017 real property taxes. In November 2018, the 2017 tax liens for the delinquent taxes were auctioned by the Hardy County Sheriff and certified to the West Virginia State Auditor's Office for disposition. The redemption period expires April 1, 2020.

46. When asked its plan for redeeming the Real Property, the Debtor simply responds that they will redeem the Real Property by April 1, 2020. No assurances are provided.

47. On March 26, 2018, the Debtor granted SMI the exclusive right to "timber" the Real Property. This right is to be released only upon the Debtor's satisfaction in full of indebtedness owed SMI by the Debtor and its affiliates. Ex. C, ¶ 2.

48. Aside from constituting another breach of the Deeds of Trust given WVEDA, timbering the Real Property is waste of the asset. It will destroy the ability to use the Real Property as a training facility, and it will devalue the asset. The Debtor has provided no assurance that the debts to SMI will be paid to release the Timber Agreement.

RELIEF REQUESTED

49. For the reasons stated above, WVEDA requests relief from the automatic stay in order for it to foreclose against its collateral, the Real Property at 2506 Fish Pond Road, Old Fields, Hardy County, West Virginia. Relief is sought for cause under U.S.C. § 362(d)(1) because (i) the Debtor consented to relief from the automatic stay for WVEDA; (ii) the Debtor filed its petition in bad faith; and (iii) the Debtor has failed to provide adequate protection for the use of WVEDA's collateral.

WHEREFORE, the West Virginia Economic Development Authority respectfully requests the Court to enter an order terminating the automatic stay imposed by 11 U.S.C. § 362 in order to foreclose against the Debtor's real property at 2506 Fish Pond Road, Old Fields, Hardy County, West Virginia, and to grant such other and further relief as the Court deems appropriate.

Dated: November 2, 2019

WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY

By: Spilman Thomas & Battle, PLLC

/s/ Debra Lee Allen

Debra Lee Allen (WV Bar No. 9838)
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v.	:	
	:	
PANTHERA ENTERPRISES, LLC,	:	
	:	
Respondent.	:	
	:	

CERTIFICATE OF SERVICE

I, Debra Lee Allen, hereby certify that on this 2nd day of November, 2019, the foregoing *West Virginia Economic Development Authority's Motion for Relief from the Automatic Stay to Foreclose Against the Debtor's Real Property at 2506 Fish Pond Road, Old Fields, Hardy County, West Virginia* was served through the Court's ECF system on all parties registered to receive CM/ECF notices, including:

Mark A. Lindsay
John J. Richardson
Robert S. Bernstein
Bernstein-Burkley, P.C.
707 Grant Street, Ste. 2200
Pittsburgh, PA 15219
Counsel for the Debtor

Gary O. Kinder
U.S. Trustee's Office
300 Virginia Street East, Rm. 2025
Charleston, WV 25301
U.S. Trustee

and the Debtor and its members will be mailed a copy by U.S. Mail, prepaid postage, addressed to the following addresses, with a separate Certificate of Service to follow:

Panthera Enterprises, LLC
215 Depot Court, SE
Leesburg, VA 20175

James V. Punelli, Member
11654 Plaza America Drive #320
Reston, Virginia 20190

Raymond C. Jones, Member
43787 Bent Creek Terrance
Leesburg, Virginia 20176

/s/ Debra Lee Allen
Debra Lee Allen, WV Bar No. 9838