UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Honorable Howard R. Tallman

In re:	)	
	)	
ANN MARILYN LEMBERG, a/k/a Anna Baranovka,	)	**Case No. 08-24668 HRT**
	)	
	)	**Chapter 13**
Debtor.	)	
	)	
MUTUAL OF OMAHA BANK, successor to Peak National Bank,	)	
	)	
Movant,	)	
	)	
v.	)	
	)	
ANN MARILYN LEMBERG, a/k/a Anna Baranovka, and SALLY ZEMAN, Trustee,	)	
	)	
Respondents.	)	
	)	

ORDER GRANTING MOTION FOR RELIEF FROM STAY OF ENFORCEMENT OF LIEN OF CREDITOR MUTUAL OF OMAHA BANK, SUCCESSOR TO PEAK NATIONAL BANK

This case comes before the Court on the *Motion for Relief from Stay of Enforcement of Lien of Creditor Mutual of Omaha Bank, Successor to Peak National Bank* (docket #24) [the "Motion"].

I. FACTS

The subject of Mutual of Omaha's Motion is a 4 acre tract of land owned by Ms. Lemberg and located in Boulder County [the "Property"]. The street address of the Property is 50 North Gulch Road. The Property once had an operating gold mine on it. The mine is currently out of operation and the Property contains approximately 400 short tons of tailings from the past operation of the mine.

On August 5, 2005, Ms. Lemberg executed a promissory note in the amount of $216,000 payable at 9.25% APR interest to Peak National Bank. The maturity date of the note was August 5, 2006. The note was secured by a deed of trust on the Property. On October 6, 2006, Peak National Bank entered into a Consumer Modification and Extension Agreement with Ms.

Lemberg. The modification increased the principal amount to $244,000; increased the interest rate to 11.25% APR; and extended the maturity date to August 5, 2007. On the same date, Ms. Lemberg executed a Modification of Deed of Trust to increase the principal amount secured by the deed of trust. The original deed of trust was properly perfected by recording on August 11, 2005, and the modification was perfected on November 20, 2006. As of August 5, 2007, the debt went into default with a principal balance of $244,000. As of November 4, 2008, Ms. Lemberg's debt, secured by the Property, was $301,919.63 with interest accruing at the rate of $120.33 per day. Movant Mutual of Omaha Bank is the successor in interest to Peak National Bank.

Ms. Lemberg filed her bankruptcy petition under chapter 13 on September 23, 2008. She filed her Chapter 13 Plan on October 8, 2008. The plan provides that Ms. Lemberg will make payments to the Chapter 13 Trustee in the amount of $225 per month for 6 months; $500 per month for 6 months; and $6,050 per month for 48 months. According to Ms. Lemberg's Schedule I, her current monthly disposable income is $225 per month.

Ms. Lemberg's evidence at hearing was primarily in the nature of expert testimony from persons involved in the mining industry in Colorado. In the main, the Court found her witnesses to have impressive credentials and to be very credible and effective witnesses. Ms. Lemberg established, through her witnesses, that her Property may well have significant value. The evidence established that the mine is an excellent prospect for mining development. Those matters were explicitly stated by Ms. Lemberg's witnesses and not rebutted by the Movant. But, in addition, Ms. Lemberg's witnesses also made clear that, in order to place even a speculative value on her Property, additional testing would be necessary.

Aside from value of the Property as raw land, the Property has two potential sources of value: the mine tailings located on the Property; and reopening and operating the gold mine.

The potential value of the mine tailings located on the Property results from the improved technology that is currently available, which permits residual gold to be recovered from the tailings. Ms. Lemberg has performed limited sampling on the tailings. She argues that the results of this analysis establish a value for the tailings located on the Property. However, the sampling was done in only one area of the tailings pile and it is impossible to know whether the gold recovered from this sample is representative of the whole pile. In fact the one sample analyzed was selected as material that may be representative of the material that is in the ground and was not taken in an effort to characterize the value of the material in the tailings dump. One of Ms. Lemberg's experts testified that it would cost $10,000 to perform a complete sampling of the tailings to make a reasonable estimate of the value represented by the tailings. The evidence presented as to the value of the mine tailings was too speculative to support any finding of value by the Court.

Ms. Lemberg asserts that the gold mine itself represents significant value. According to her expert testimony, the historical data shows that high quality ore was produced by the mine during its previous operations. In addition, the geology of the region suggests that the mine may be profitably operated. But the best that Ms. Lemberg's expert could say was that the mine represented an "excellent prospect."

The cost of carrying out a full study of the mine's potential would be approximately $110,000 and the cost to actually reopen the mine would be $1.65 million. At the mine's current depth, it could produce a recovery of $6 million if it produced 1 ounce of gold per ton of material. But at the rate of .5 ounce of gold per ton, it would only produce about $912,000 at current gold prices and would produce an operating loss. It would cost an additional $6.5 million to dig the mine 1,000 feet deeper.

Ms. Lemberg's expert evidence is too speculative to permit the Court to make any finding with respect to the value of the mine itself. It may be operated at a profit but, at the recovery rate of .5 ounce per ton, it would produce an operating loss. None of Ms. Lemberg's experts had sufficient data to accurately value the mine.

The testimony also indicated that to reopen and operate the mine would require millions of dollars of investment and that it would require expenditure of significant funds to do the testing required to interest investors in the mine. Ms. Lemberg produced no evidence to suggest that she has access to the funds necessary to perform the testing required to determine the viability of a mining operation on the Property.

Ms. Lemberg's schedules value the Property at $1,000,000 if sold as building lots and from $10,000,000 to $18,000,000 on the basis of gold resources located on the Property. The Movant's appraiser testified that the current market value of the Property is $250,000.

Movant's appraiser did not consider the value of any mineral resources on the Property. She appraised the Property strictly based on its value as raw land, suitable for building. Ms. Lemberg cross examined the appraiser in an effort to discredit her testimony. However, Ms. Lemberg did not present any appraisal evidence for the Court's consideration. The Court finds Movant's appraisal testimony to be credible and not effectively rebutted either by Ms. Lemberg's cross-examination or by Ms. Lemberg's expert testimony. Given the evidence that is before the Court, the Court values the Property at $250,000.

II. DISCUSSION

On December 12, 2008, the Court conducted a full day final hearing on Movant's Motion. Ms. Lemberg proceeded without the benefit of counsel. The Court allowed Ms. Lemberg wide

latitude in her examination of witnesses and presentation of exhibits. Many items have come into evidence that would have been excluded on hearsay or relevance grounds in trial to a jury.

On December 24, 2008, twelve days following the hearing, Ms. Lemberg filed a motion to allow admission of additional exhibits. By separate order released contemporaneously with this Order, the Court granted the motion in part and denied it in part. Again, because this issue was tried to the Court as opposed to a jury, the Court has allowed Ms. Lemberg a degree of latitude that it could not have allowed under other circumstances.

It is important to note that Movant has not been prejudiced by the latitude allowed to Ms. Lemberg. This Court, as the trier of fact, is able to evaluate the evidence and to give each item its proper weight even if it may have been excluded from evidence in a different context.

During the Course of the hearing, the Court also heard expert testimony from a medical witness with respect to Ms. Lemberg's medical condition. Ms. Lemberg has suffered a head injury. According to her expert, the injury affects Ms. Lemberg's emotional composure and organizational skills. That testimony was not relevant and cannot be considered with respect to the merits of the matter currently before the Court. The value of the medical testimony goes to the understanding of the Court and other hearing participants with respect to difficulties Ms. Lemberg experienced in conducting her defense of the Motion.

A. Grounds for Granting Relief from Stay and Burden of Proof

1. 11 U.S.C. § 362(d)(1)

Under §362(d)(1), the Court may grant relief from stay "for cause, including the lack of adequate protection of an interest in property of such party in interest . . .." 11 U.S.C. § 362(d)(1).

The Bankruptcy Appellate Panel for the Tenth Circuit has described "cause" under § 362(d)(1) as follows:

> Under § 362(d)(1) stay relief may be granted for cause. While cause under § 362(d)(1) includes "the lack of adequate protection of an interest in property," it is not so limited. Because "cause" is not further defined in the Bankruptcy Code, relief from stay for cause is a discretionary determination made on a case by case basis.

In re Busch, 294 B.R. 137, 140 (10th Cir. BAP 2003) (internal citation omitted); *see also Pursifull v. Eakin*, 814 F.2d 1501, 1506 (10th Cir.1987). Ultimately, the Court must apply a

balancing test to weigh the hardships suffered by the creditor under the automatic stay against those suffered by the Debtors' if the stay is lifted. *See, e.g., In re Caldwell*, 101 B.R. 728, 732 (Bankr. D. Utah 1989); *In re Opelika Mfg. Corp.*, 66 B.R. 444, 449 (Bankr. N.D. Ill. 1986).

Under § 362(d)(1), the burden of proof shifts from the movant to the debtor after the movant makes an initial showing.

> If the movant satisfies its initial burden of showing cause, the burden shifts to the debtor to produce evidence that the creditor's collateral is not declining in value or that the creditor is adequately protected either through payments, an equity cushion, additional or replacement liens, or good prospects for a successful reorganization.

In re Webber, 314 B.R. 1, 5 (Bankr. N.D. Okla. 2004); *see, also, In re Steffens*, 275 B.R. 570, 574 Bankr. D. Colo. 2002) ("[T]he initial burden of going forward on lack of adequate protection is on [the movant], while the ultimate burden of persuasion on the issue of adequate protection rests on the Debtors.").

2. 11 U.S.C. § 362(d)(2)

The Court may grant relief under § 362(d)(2) "with respect to a stay of an act against property . . . if – (A) the debtor does not have an equity in such property; and (B) such property is not necessary to an effective reorganization . . .." 11 U.S.C. § 362(d)(2).

A debtor lacks equity in property if the total of all the property's encumbrances are greater than the property's value. *In re Indian Palms Associates, Ltd.*, 61 F.3d 197, 206 (3rd Cir. 1995) ("The classic test for determining equity under section 362(d)(2) focuses on a comparison between the total liens against the property and the property's current value.").

As to whether or not property is necessary to an effective reorganization, that elements requires

> not merely a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization *that is in prospect*. This means . . . that there must be "a reasonable possibility of a successful reorganization within a reasonable time."

United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 375-76, 108 S. Ct. 626, 632-33 (1988) (quoting *In re Timbers of Inwood Forest Associates, Ltd.*, 808 F.2d 363, 370-71 (5th Cir. 1987)).

Under § 362(d)(2), a movant bears the burden to prove the debtor's lack of equity in the property, but the debtor bears the burden with respect to whether the property is necessary for the debtor's reorganization. 11 U.S.C. § 362(g).

B. Cause Exists for Granting Relief Under § 362(d)(1)

Movant has carried its burden to prove that cause exists to lift the stay. It has demonstrated that it lacks adequate protection of its interest in the Property. The best evidence before the Court of the current value of the Property is Movant's appraisal evidence that the Property has a current market value of $250,000.

The vast majority of Ms. Lemberg's evidence sought to establish the Property's value as a gold mine. As the Court has explained above, all of the evidence presented as to the value of the minerals located on the Property is far to speculative to provide any basis for the Court to determine the mineral value.

Aside from the value of the minerals, Ms. Lemberg strongly disagrees with Movant's appraised value of her Property. She introduced two additional appraisal reports into evidence. The first, dated July 22, 2005, valued the Property at $360,000. The second, dated January 14, 2008, valued the Property at $310,000. The appraisal introduced by the Movant was the most recent and was dated November 10, 2008. The reports introduced into evidence by Ms. Lemberg were performed by the same appraisal company, but were not performed by the same appraiser as the most recent appraisal. Those reports were not supported by testimony from the appraiser who performed them.

Taken together, and at face value, the three appraisal reports suggest a pronounced downward trend in the value of the Property since 2005. This appears to be consistent with the general decline in real property values nationwide that has been the subject of numerous news headlines over the past two years. More specifically, Movant's appraiser testified that there has been a decline in real property values in the area where Ms. Lemberg's Property is located.

There was some disagreement as to the number of potential building lots on the Property. Ms. Lemberg based her testimony regarding value on dividing the Property into two building lots. However, the appraiser testified that, under Boulder's zoning regulations, even though the Property is divided by a public road, only one home may be built on it.

The Court accepted, from Ms. Lemberg, a collection of printouts purporting to be information of comparable sales obtained from Multiple Listing Service. Some of the printouts described properties that appear to be currently for sale – not sold; other printouts were incomplete. However, three of the printouts offered by Ms. Lemberg and admitted by the Court

do describe properties that have sold in the last year. Ms. Lemberg contends that these are comparable sales that cast doubt on the validity of the Movant's appraisal. This evidence was not accompanied by any expert testimony explaining to the Court how these properties compare to Ms. Lemberg's Property.

Ms. Lemberg's assertions that this information represents comparable sales information, without more, is of little value to the Court. First of all, although Ms. Lemberg is competent to offer an opinion as to the value of her own Property, the Court has no means to evaluate the reliability of her testimony in the absence of detailed information of how the purported comparables actually do compare to her Property. By contrast, over the years, the Court has examined numerous reports produced by expert appraisers. In every case, where the appraisal relied on comparable sales, the report contained detailed information about each comparable property along with a listing of points of comparison and the value adjustments made based on how similar or dissimilar the comparable property was to the subject property.[1]

Here, the Court must choose the weight to be given to Ms. Lemberg's opinion of value with little explanation of how the purported comparable properties compare to her own as opposed to the systematic report of a qualified and experienced expert appraiser that does contain the normal detailed information concerning how other properties compare to the Lemberg Property and the dollar adjustments made based on the differences. It is the law in Colorado, as in most jurisdictions, that a property owner is competent to testify as to the value of his or her property. *Rodriguez v. People*, 450 P.2d 645, 647 (Colo. 1969) ("The rule is clear in this jurisdiction that an owner is always competent to testify as to the value of his property.") But to recognize that Ms. Lemberg is qualified to give testimony as to the value of her Property is not to say that her testimony can be accorded great weight when it is contradicted by qualified expert testimony. *See, e.g. In re Petrella*, 230 B.R. 829, 834 (Bankr. N.D. Ohio 1999) (Bankruptcy court found testimony of expert appraiser more credible than owner's opinion of value.). In this case, the Court finds that the report of Movant's appraiser, along with her supporting testimony, is the most reliable indicator of the Property's value as compared to Ms. Lemberg's testimony and her documents.

Thus, the Movant has demonstrated that it lacks adequate protection based on the absence of any equity in the Property. Based on Movant's accounting of amounts due under the note, updated to the hearing date, the amount due to the Movant was $306,492.13. Ms. Lemberg's Property's value is more than $56,000 less than the debt security by Movant's deed of trust. Ms.

---

[1] The Court will hasten to add that there is nothing magical about a real estate appraisal report. As in every area of expertise, the Court has observed great variation in the qualifications and competence of professional appraisers.

Lemberg has produced no evidence of her willingness and ability to offer adequate protection payments to the Movant or to offer the Movant additional liens in other property to shore up the Movant's position and protect its interest. Lacking adequate protection of its interest, Movant is entitled to relief from the automatic stay for cause under § 362(d)(1).

C. Relief May Also Be Granted Under § 362(d)(2)

Even if the Movant were adequately protected, the Court would still grant the Movant relief under § 362(d)(2) because Ms. Lemberg has no equity in the Property and it is not necessary to her reorganization.

The previous discussion demonstrates Ms. Lemberg's lack of equity in the Property. However, under § 362(d)(2) a debtor who lacks equity[2] in property may still defeat a creditor's motion for relief from stay if the property is essential to the debtor's reorganization.

To meet her burden of showing that the Property is essential to her reorganization, Ms. Lemberg would have to be able to show that she has a reasonable prospect for reorganization. *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 375-76, 108 S. Ct. 626, 632-33 (1988). Ms. Lemberg has not done so.

Ms. Lemberg's evidence tended to show that there is a strong possibility that the Property may be utilized to produce income either by extracting the residual gold from existing mine tailings on the Property or by placing the mine itself back into operation. But the testing required just to determine if processing the existing tailings is economically feasible would cost over $10,000. The cost to determine the feasibility of reopening the mine would be $110,000. In neither case has Ms. Lemberg produced any evidence that she has a source of funding to do the feasibility testing, let alone take the next step and create income from either the mine tailings or the mine itself. The Court has to conclude that there is no reorganization in prospect for Ms. Lemberg that involves using her Property to derive income from the minerals located on it.

---

[2] Adequate protection is different from equity. Adequate protection analysis focuses on the secured creditor's lien position. An individual senior creditor may be adequately protected by the margin between its lien position and the value of the property when, at the same time, the debtor possesses no equity because one or more junior liens are also attached to the property. In this case the distinction makes no difference. Even if the Court disregards any potential junior liens, Ms. Lemberg has no equity because the property is worth less than Movant's lien and, for the same reason, Movant lacks adequate protection.

Ms. Lemberg argued that she would raise money to exploit the minerals on the Property through investors. But, from the evidence of Ms. Lemberg's own experts, the Court must disregard investors as a potential source of funds. First of all, Ms. Lemberg produced no potential investors. More importantly, her own expert witnesses testified that someone in Ms. Lemberg's position needs to be able to provide potential investors with evidence of the Property's profitability in order to attract investment. Thus, she has to have the resources to do the testing and prove profitability before she has a reasonable hope for obtaining investment money. She produced no evidence that she has access to the funds necessary to do the necessary testing and analysis. To the contrary, the evidence persuades the Court that she has no such resources or any potential source of those resources.

Aside from the potential mineral value of the Property, it represents no value to her as an asset that could be useful in a reorganization. There is no dwelling on the Property and Ms. Lemberg does not use it as residential property. For Ms. Lemberg to retain the Property without the ability to exploit the minerals would be a positive detriment to any conceivable reorganization. There is no equity in the Property. It is not an asset to the her bankruptcy estate; it represents only a liability.

The Court concludes that the stay must be lifted under § 362(d)(2). There is no equity in the Property and the Property is not necessary to her reorganization. The Court is persuaded that Ms. Lemberg has no reasonable prospect for operating the Property as a profit-making enterprise by exploiting the mineral potential. Other than mineral exploitation, the Property is far from a necessity for effective reorganization, it is a positive hindrance.

D. Excluded Evidence

In the Court's order on Ms. Lemberg's post-hearing motion to admit additional evidence, the Court denied the motion in part. Had the Court admitted all items of evidence proposed by Ms. Lemberg and fully considered them in connection with this matter, it would have been of no benefit to her.

The two primary areas of concern to the Court were the value of the Property and Ms. Lemberg's potential to reorganize, using the Property as a profit-making element of that reorganization. Much of what Ms. Lemberg sought to introduce was in the nature of background information on the potential gold production of mines in her area that have produced gold from the same geologic formations underlying her Property. But the Court has already heard testimony from her highly credible expert witnesses. They testified to the gold mining history of the mines in the area Ms. Lemberg's Property as well as the historical production of Ms. Lemberg's Golden Age No. 2 mine. The Court found Ms. Lemberg's witnesses to be highly

informative and the Court is persuaded that there is excellent potential to profitably exploit the minerals underlying Ms. Lemberg's Property.

The problem, of course, is that the Court has no evidence of current testing conducted on Ms. Lemberg's Property. With the exception of one single non-representative sample taken from the mine tailings, none of Ms. Lemberg's witnesses could do no more than speculate on the results of either resuming full mining operations or extracting the residual gold from the tailings. Had the Court admitted all of the items that Ms. Lemberg offered in her post-hearing motion, that evidence could not change the speculative nature of the value evidence that the Court has in front of it.

The same goes for the Court's conclusion that Ms. Lemberg has no reasonable prospect of successfully reorganizing the Property into a profit-making enterprise. The Court accepts the conclusions of the expert witnesses that the Property represents excellent mining potential. Additional evidence going to a proposition the Court already accepts is quite unnecessary and its exclusion does not harm Ms. Lemberg's cause. But, Ms. Lemberg's experts further testified that the real potential of the Property is unknowable without further testing. The evidence convinced the Court that Ms. Lemberg does not have access to funds that would even allow her to do testing, let alone to obtain necessary operating funds to ultimately realize a profit. Thus, none of the items of evidence offered by Ms. Lemberg and rejected by the Court could have influenced the Court's conclusions one way or the other.

An accordance with the above discussion, it is

ORDERED that the *Motion for Relief from Stay of Enforcement of Lien of Creditor Mutual of Omaha Bank, Successor to Peak National Bank* (docket #24) is GRANTED.

Dated this 9th day of January, 2009.

BY THE COURT:

Howard Tallman

Howard R. Tallman, Chief Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Honorable Howard R. Tallman

In re:	)	
	)	
ANN MARILYN LEMBERG,	)	**Case No. 08-24668 HRT**
a/k/a Anna Baranovka,	)	
a/k/a Golden Liberty	)	**Chapter 13**
a/k/a Golden Age #2 Mining	)	
	)	
Debtor.	)	

ORDER ON MOTION FOR STAY PENDING APPEAL

This matter comes before the Court on Debtor's *Motion to Stay Court Order Lifting Stay for Pendency of Appeal* (docket #86) [the "Motion"]. The Debtor's Motion came on for an evidentiary hearing on February 20, 2009. The Court has considered the pleadings and the evidence presented at hearing and is ready to rule.

The Court entered its *Order Granting Motion for Relief from Stay of Enforcement of Lien of Creditor Mutual of Omaha Bank, Successor to Peak National Bank* (docket #81) lifting the automatic stay in favor of the Mutual of Omaha Bank [the "Bank"] on January 9, 2009. The Debtor timely filed a Notice of Appeal and filed the instant Motion seeking a stay pending appeal.

The Court received a number of exhibits from Ms. Lemberg during the hearing on this Motion and heard testimony from Ms. Lemberg and from one Michael Thomas, a metallurgist who serves as an adjunct professor at the Colorado School of Mines.

A number of other witness names appeared on Ms. Lemberg's witness and exhibit list. At hearing, Ms. Lemberg made an oral motion to present other witness testimony by telephone. That oral motion was denied. This Court's practice is to hear witness testimony by telephone only in the rarest of circumstances. The Court has allowed telephonic testimony where the burden of producing the witness in person is great and the testimony to be given is somewhat ancillary to the main thrust of the proceeding.

The proposed witness was an individual that Lemberg described as having an interest in a partnership with respect to operating the mine on her property. The testimony would have gone to a primary element of her case. The Court requires an opportunity to observe and evaluate testimony that goes to the core of a party's case and the opposing party deserves a greater opportunity to observe and interact with the witness than can be afforded through telephonic testimony. Moreover, in this case, the request was made only at the last minute and constituted unfair surprise to the opposing party.

On February 23, 2009, after the hearing on this Motion was concluded, Ms. Lemberg filed her *Motion to Accept Evidence Anticipated in Presentation on 2-20* (docket #144). She requests that the Court to enter a number of new exhibits into evidence. Under the best of circumstances, such a request would be highly irregular. In this case, the proffered exhibits were not the subject of testimony during the hearing and are completely without foundation and cannot be considered. The Court will consider only those exhibits which were offered and admitted into evidence on the record during the hearing.[1]

The Court must consider four factors in relation to this motion for stay pending appeal. "They are (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will suffer irreparable injury unless the stay is granted; (3) whether granting the stay will result in substantial harm to the other parties to the appeal; and (4) the effect of granting the stay upon the public interest." *In re Lang*, 414 F.3d 1191, 1201 (10th Cir. 2005).

1) The Likelihood That Ms. Lemberg Will Prevail on the Merits of the Appeal.

As a threshold matter, the Court notes that much of the evidence submitted at hearing was evidence of actions taken subsequent to entry of the order that is presently on appeal. Had those actions taken place prior to the hearing on the Bank's *Motion for Relief from Stay of Enforcement of Lien of Creditor Mutual of Omaha Bank, Successor to Peak National Bank* (docket #24) [the "Motion for Relief from Stay"] and had that evidence been presented at that time, this Court would have had an opportunity to consider such evidence in rendering its opinion. The Court will not speculate whether it would have led to a different outcome but at least it could have been considered.

It is well settled that the record on appeal consists of "the original papers and exhibits filed in the [trial] court together with the transcript of proceedings and a copy of the docket entries in the [trial] court." *Fleming v. Gulf Oil Corp.*, 547 F.2d 908, 911 (10th Cir. 1977); *see,*

---

[1] The denial of Ms. Lemberg's motion to admit additional exhibits does not prejudice her. She offered:

1. a letter from one Robert Fabrizio of Empress Gold Mining stating that he is in the process of reviewing her information and looks forward to negotiating with her;
2. a copy of the front of a program brochure and her attendee badge for the 2009 annual meeting of the Colorado Mining Association;
3. business cards from individuals apparently connected to the mining industry; and
4. a registration form for the 2009 annual meeting of the Colorado Mining Association.

Had the Court considered the above exhibits in connection with this matter, the Court's conclusions would not have been affected.

also, Allen v. Minnstar, Inc. 8 F.3d 1470, 1475 (10th Cir. 1993) (Evidence "not filed below or presented to the [trial] court could not properly be considered by the court and, *ipso facto*, cannot be considered by us in reviewing the court's judgment . . . ."). Thus when this Court examines the likelihood of the Debtor prevailing on her appeal, it must do so under the assumption that the appellate court will limit its consideration to the evidence heard by this Court during the hearing on the Bank's Motion for Relief from Stay.

An appellate court reviews a lower court's determination of a motion for relief from the automatic stay for abuse of discretion. *Pursifull v. Eakin*, 814 F.2d 1501, 1504 (10th Cir. 1987). "The 'high' standard for abuse of discretion requires a showing of 'an arbitrary, capricious, whimsical, or manifestly unreasonable judgment.'" *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1259 (10th Cir. 2005) (quoting *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 777 (10th Cir. 1999). Thus, an appellant seeking to prevail on the merits of an appeal of an order granting relief from stay faces a high standard of review in the appellate court.

This Court did not lift the automatic stay in this matter at the preliminary hearing based only upon offers of proof. Instead, it set the motion over for a evidentiary hearing. The hearing on the Bank's motion was conducted over the course of a full day. The Court heard from seven witnesses – five from Ms. Lemberg – and the Court considered 34 exhibits – 22 from Ms. Lemberg. At the conclusion of the hearing, the Court took the matter under advisement and issued a written order which ran to ten pages analyzing the evidence that it heard. The Court recounts the history of the motion and its consideration of the evidence only to make the point that the Court took a long time to review the merits of the motion and fully consider the evidence before making its determination.

In the process of reviewing this motion to stay the Court's order pending the appeal, the Court has, once again, had occasion to review its prior order lifting the automatic stay. The Court cannot find that Ms. Lemberg is likely to prevail on the merits of her appeal.

The Court's conclusions were drawn directly from the evidence heard during the hearing on the Bank's Motion for Relief from Stay. Ultimately, Ms. Lemberg's own expert witnesses were a key component leading to the Court's decision to lift the stay. The Court was favorably impressed with Ms. Lemberg's witnesses and found them highly credible. But the very best characterization of their testimony is that it established a good possibility that further testing might confirm some amount of mineral value on Ms. Lemberg's property. The Court was left with a choice between value evidence given by an expert appraiser presented by the Bank and value evidence that is highly speculative presented by Ms. Lemberg.

Ultimately, based upon the available evidence, the Court could not make a finding that Ms. Lemberg has equity in her property. The Court also found that the likelihood of successful reorganization in this case is remote. It followed from those findings that the Bank was entitled to relief from the automatic stay. In the course of reviewing that order in preparation for today's

hearing, the Court is persuaded that, if it heard the same evidence today, its ruling would be the same.

2) The Likelihood That Ms. Lemberg Will Suffer Irreparable Injury Unless the Stay Pending Appeal Is Granted.

The Court cannot find that Ms. Lemberg will suffer irreparable harm if this Court does not stay its order pending her appeal. This Court's order lifting the automatic stay in Lemberg's bankruptcy case in no way prejudices her rights under state law to assert any defense she may have to the Bank's foreclosure action. The Court does not mean to imply that granting relief from the automatic stay in bankruptcy is an insignificant matter. These are determinations that are taken very seriously by all bankruptcy courts. But, it is important to recognize that the action for relief from stay in this Court did not address or decide any substantive issues with respect to whether or not Colorado state law permits the Bank to foreclose its deed of trust on Ms. Lemberg's property. The concerns of a bankruptcy court in making its determination whether or not to lift the automatic stay focus on the utility of an asset to a debtor's realistic plan of reorganization and whether a creditor's position is well enough protected so that it is not harmed by allowing the debtor to have an opportunity to reorganize. Those determinations were made by this Court adversely to Ms. Lemberg. But, to the extent that she has defenses to the Bank's state law foreclosure, that have not already been ruled on or waived, nothing in this Court's order lifting the stay prevents her from asserting those defenses.

Thus, this Court's ruling does not deprive Lemberg of her property; that is a function of state law. What this Court's ruling does deny her is the opportunity to keep her property, despite the state law, and use that property in an attempted reorganization. But the evidence the Court heard in the relief from stay hearing and the hearing on this Motion persuades the Court that genuine reorganization in this case is illusory. In the absence of a credible reason to believe that Lemberg has some prospect for successful reorganization, the Court cannot find that she has been harmed even if the Bank does ultimately complete a foreclosure on her property. The evidence – again from Lemberg's own expert witnesses – is that the road to bringing the Golden Age mine back into production is a long and costly one. The prerequisite to raising capital is doing the testing to prove the mine's productive capacity. The same is true for even marketing the property for its mineral value as opposed to its value as raw land. The Court has not seen persuasive evidence that funds are available to Lemberg to make her property productive.

Moreover, even if the Debtor were to demonstrate a high degree of harm resulting from the failure to obtain a stay pending appeal, that harm must be balanced against the likelihood of success on the merits. That relationship has been described as follows:

> The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury [the movant] will suffer absent the stay. Simply stated, more of one excuses less of the other. This relationship, however, is not

> without its limits; the movant is always required to demonstrate more than the mere "possibility" of success on the merits. For example, even if a movant demonstrates irreparable harm that decidedly outweighs any potential harm to the [opposing party] if a stay is granted, he is still required to show, at a minimum, "serious questions going to the merits."

Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153-54 (6th Cir. 1991) (citations omitted). Lemberg has not demonstrated serious questions going to the merits of her appeal.

3) Whether Granting the Stay Will Result in Substantial Harm to the Bank.

Being forced to wait until the end of the appeal process to exercise its state law rights will be harmful to the Bank. However, the Court doubts that harm would be severe. The Bank has a lien in Lemberg's property, which is unimproved real estate. The character of the asset is not such that it requires constant and substantial maintenance to maintain its value. It is not an asset that is movable or subject to destruction. Nonetheless, the evidence showed that Lemberg has never made a payment on a debt that was originated well over three years ago; that she has never offered any form of adequate protection payments to the Bank during the pendency of her bankruptcy case; and that there is no equity in the property. Interest and expenses are accruing to the Bank that it is unlikely to recover. Further delay in exercising its rights is clearly harmful to the Bank.

4) The Effect of Granting the Stay upon the Public Interest.

This factor favors the Bank. Certainly, public policy disfavors unnecessary forfeiture of property. That policy is embodied in the Bankruptcy Code by the automatic stay. That section of the Code provides an extra layer of review not present under state law and, in some circumstances, even when a secured loan is in default, it allows a debtor an opportunity to cure the default and retain the property.

But the Code's automatic stay provision also embodies a countervailing policy choice to allow a secured creditor to enforce its state law remedies if, after a bankruptcy judge has reviewed the matter, the court cannot find that the creditor's position is protected during the pendency of the bankruptcy.

In this case, the Debtor has had the full advantage of the automatic stay for the last five months. During that time, the Bank has been prevented from exercising its state law rights. Also, during that time, it has not been offered nor has it received adequate protection payments to keep its position from deteriorating during the pendency of the case.

The public policy aims of the automatic stay have been satisfied. The Debtor has had an opportunity to demonstrate that the Bank's position is protected and that she has a viable reorganization in prospect. She has not done so to this Court's satisfaction and, as explained above, this Court cannot find a significant likelihood that the Debtor will prevail on the merits of her appeal.

Therefore, it is

ORDERED that Debtor's *Motion to Accept Evidence Anticipated in Presentation on 2-20* (docket #144) is DENIED; it is further

ORDERED that Debtor's *Motion to Stay Court Order Lifting Stay for Pendency of Appeal* (docket #86) is DENIED; it is further

ORDERED that the automatic stay shall remain in effect for ten (10) days following the date of this Order.

Dated this 24th day of February, 2009.

BY THE COURT:

Howard R. Tallman, Chief Judge
United States Bankruptcy Court