2023

# A Secured Creditor's Ability to Have an Automatic Stay Lifted Against a Single Asset Real Estate

Zachary Rozycki

ST. JOHN'S UNIVERSITY SCHOOL OF LAW

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2023 Volume XV No. 25

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**Zachary Rozycki, J.D. Candidate 2024**

Cite as: *A Secured Creditor's Ability to Have an Automatic Stay Lifted Against a Single Asset Real Estate*, 15 ST. JOHN'S BANKR. RESEARCH LIBR. NO. 25 (2023).

## Introduction

The filing of a petition for relief under title 11 of the United States Code (the "Bankruptcy Code") results in an automatic stay, which generally enjoins any creditor from taking action against the debtor or its property.[1] Pursuant to section 362(d)(1) of the Bankruptcy Code, an automatic stay may be terminated upon a showing of "cause."[2] Additionally, under section 362(d)(2) a stay may be terminated as to property if the debtor has no equity in the property, and the property is not necessary to an effective reorganization.[3] Further, under section 362(d)(3), an automatic stay may be lifted as to "single asset real estate,"[4] if the debtor has not "filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time," no later than 90 days after the creditor requests relief from the stay or 30 days

[1] *See* 11 U.S.C. § 362.
[2] 11 U.S.C. § 362(d)(1).
[3] 11 U.S.C. § 362(d)(2).
[4] According to section 101(51B) of the Bankruptcy Code, the term single asset real estate ("SARE") 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 who is not a family farmer 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. 11 U.S.C. § 101(51B).

after the court determines that the debtor is a SARE.[5] A court will not, however, lift the automatic stay under section 362(d)(3) if the debtor commences monthly payments made from the "rents or other income generated" by the property, and are equal in amount to the agreed upon interest payments.[6]

This article examines whether section 362(d)(3) is the exclusive basis for a court to lift the automatic stay as to a SARE. Part I of this article discusses how bankruptcy courts have concluded that section 362(d)(3) is not the exclusive basis to lift the automatic stay as to a SARE. Part II explains how secured creditors may obtain relief from an automatic stay under sections 362(d)(1) and (d)(2) as to a SARE.

## Discussion

### I. Courts Have Held that Secured Creditors are not Limited to § 362(d)(3) when Requesting Relief from a Stay Against a SARE

Debtors often argue that section 362(d)(3) is the exclusive basis for lifting an automatic stay as to a SARE. According to them, by adding paragraph (3) to section 362(d), "Congress intended to provide only one statutory measure of relief from the automatic stay in single asset real estate cases."[7] Courts, however, have concluded that paragraph (3) of section 362(d) is specifically designed for SARE cases, while paragraphs (1) and (2) "have general application."[8] Thus, courts have consistently held that creditors may obtain relief from an automatic stay under any paragraph of section 362(d).[9] Consistent with these holdings, courts have noted that the purpose of implementing section 362(d)(3) in the Bankruptcy Code, was "to protect secured

[5] 11 U.S.C. § 362(d)(3)(A).
[6] 11 U.S.C. § 362(d)(3)(B).
[7] *In re* Duvar Apt., Inc., 205 B.R. 196, 200 (B.A.P. 9th Cir. 1996).
[8] *In re* RYYZ, LLC, 490 B.R. 29, 34 (Bankr. E.D.N.Y. 2013).
[9] *See id.* at 202 (affirming the lower courts judgment to lift the automatic stay under section 362(d)(1)); *In re* East/Alexander Holdings, LLC, No. 22 20151 PRW, 2022 WL 1529730 at *6 (Bankr. W.D.N.Y. 2022) (granting relief to the secured creditor under section 362(d)(2)); *In re* 11447 Second Street I, LLC, No. 12-B-84690, 2013 WL 4051039 at *6 (Bankr. N.D. Ill. 2013) (same).

creditors by requiring debtors to act quickly."[10] Thus, bankruptcy courts have ruled that creditors are not limited to only section 362(d)(3), when seeking relief from an automatic stay against a SARE.

## II. Bankruptcy Courts Have Granted Relief to Secured Creditors Under §362(d)(1) & (2) as Long as an Adequate Showing is Made

Courts have allowed creditors to obtain stay relief under any paragraph of section 362(d), despite a SARE debtors' efforts to confine creditors to paragraph (3).[11] In order to obtain relief under section 362(d)(1) or (2), a secured creditor must make an adequate showing under either paragraph.

### *A. A Secured Creditor may Obtain Relief from an Automatic Stay for "Cause" Under §362(d)(1)*

Under section 362(d)(1) of the Bankruptcy Code, a creditor may seek relief from an automatic stay if there is a sufficient showing of "cause."[12] Stay relief is also warranted under this section when there is a "lack of adequate protection of an interest in property."[13] Section 362(d)(1) "requires an initial showing of cause by the movant."[14] If the moving party fails to make the initial showing of cause, the court should deny relief.[15] Numerous circuits across the country "have recognized, a debtor's lack of good faith in filing a petition for bankruptcy," is

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[10] *In re RYYZ, LLC*, 490 B.R. at 34. *See also In re* LDN Corp., 191 B.R. 320, 327 (Bankr. E.D. Va. 1996).
[11] *See, e.g.*, *In re East/Alexander*, 2022 WL 1529730.
[12] 11 U.S.C. § 362(d)(1).
[13] Section 361 of the Bankruptcy Code states that "adequate protection" under section 362 may be provided by:

> (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title . . . results in a decrease in the value of such entity's interest in such property; (2) providing to such entity an additional or replacement lien to the extent that such stay . . . results in a decrease in value in the value of such entity's interest in such property; or (3) granting such other relief . . . will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property. 11 U.S.C. §361.

[14] *In re* Sonnax Industries, 907 F.2d 1280, 1285 (2d Cir. 1990).
[15] *Id.*

sufficient "cause" to lift the automatic stay under section 362(d)(1).[16] Additionally, courts have acknowledged that there is no substantive difference between the cause requirement for dismissal of a petition under the Bankruptcy Code and the cause requirement for relief from an automatic stay.[17] In both contexts, cause can be found based on "unenumerated factors, including 'bad faith.'"[18]

There is no exhaustive list of factors or scenarios that courts use to determine a lack of good faith on the part of the debtor.[19] No single fact is dispositive, but there are a number of factors that courts look to when evaluating the existence of good faith, including:

> (1) the debtor has one asset; (2) the pre-petition conduct of the debtor has been improper; (3) there are only a few unsecured creditors; (4) the debtor's property has been unsuccessful in defending against the foreclosure in state court; (5) the debtor and one creditor have proceeded to a standstill in state court litigation, and the debtor has lost or has been required to post a bond which it cannot afford; (6) the filing of the petition effectively allows the debtor to evade court orders; (7) the debtor has no ongoing business or employees; and (8) the lack of possibility of reorganization.[20]

These factors have been used to analyze the existence of good faith where creditors make the argument that a SARE debtor has filed its petition bad faith.[21] However, courts have cautioned to not apply these factors mechanically, because doing so could "automatically doom almost every single asset case."[22]

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[16] *See, e.g.*, *In re* Laguna Associates Ltd. Partnership, 30 F.3d 734, 737 (6th Cir. 1994) ("a debtor's lack of good faith in filing a petition for bankruptcy may be the basis for lifting the automatic stay."); *In re* Arnold, 806 F.2d 937, 939 (9th Cir. 1986) ("The debtor's lack of good faith in filing a bankruptcy petition has often been used as cause for removing the automatic stay.").
[17] *See In re Laguna Associates*, 30 F.3d at 737–38; *In re* AMC Realty Corp., 270 B.R. 132, 141 (Bankr. S.D.N.Y. 2001).
[18] *In re AMC Realty Corp.*, 270 B.R. at 140.
[19] *See In re Laguna Associates*, 30 F.3d at 738.
[20] *Id.* (internal citations omitted).
[21] *See In re AMC Realty Corp.*, 270 B.R. at 142 (finding that all these factors were present and thus the creditor had a strong showing for dismissal for cause).
[22] Matter of Willows of Coventry, Ltd. Partnership, 154 B.R. 959, 967 (Bankr. N.D. Ind. 1993).

Many bankruptcy courts have found sufficient cause to lift automatic stays as to a SARE under section 362(d)(1).[23] Courts have expressed concern for the "new debtor syndrome," which results when on the eve of foreclosure, a property owner will create a single asset entity, and transfer the property to that entity to isolate the property from creditors.[24] According to the United States Court of Appeals for the Ninth Circuit, a creditor may "establish a prima facie case of bad faith filing by showing the transfer of distressed property to the debtor within close proximity to the bankruptcy filing."[25] Once a creditor can establish a prima facie case of bad faith filing, the debtor must "demonstrate a good faith business reason for the transfer and the filing" to avoid having the stay lifted.[26] The Ninth Circuit has held that a bankruptcy petition that was filed two weeks after a notice to cure, and six months after the distressed property was transferred to the debtor, was sufficient for a prima facie finding of bad faith.[27] Similarly, the United States Court of Appeals for the Sixth Circuit has held a Chapter 11 petition filed the day after property was transferred to the debtor, which was created less than a month prior, evidenced a lack of good faith by the debtor.[28] In both of these cases, the courts held that cause existed to lift the automatic stay under section 362(d)(1) based on such bad faith.[29]

In some SARE cases, debtors have been able to prove that there is not sufficient "cause" to lift the stay.[30] In *In re Cambridge,* a bankruptcy court in Ohio held that a SARE debtor that "is a real business entity with operations and revenue," and "was not created on the eve of bankruptcy for the purpose of isolating insolvent property and its creditors," did not show a lack

[23] *See, e.g.*, *In re Laguna Associates*, 30 F.3d at 738; *In re* Duvar Apt., Inc., 205 B.R. 196, 202 (B.A.P. 9th Cir. 1996).
[24] *See In re Laguna Associates*, 30 F.3d at 738.
[25] *In re Duvar*, 205 B.R. at 201.
[26] *Id.*
[27] *Id.* at 201.
[28] *In re Laguna Associates*, 30 F.3d at 738.
[29] *Id.*; *In re Duvar*, 205 B.R. at 202.
[30] *See In re* Cambridge Woodbridge Apartments, LLC, 292 B.R. 832, 838 (Bankr. N.D. Ohio 2003).

of good faith in its filing.[31] Additionally, a bankruptcy court in New Jersey, held that "the opportunity for a brief breathing spell, in order to obtain financing necessary," for the closing of a real estate deal, was a good faith reason for a Chapter 11 filing.[32] In both of these cases, the courts refused to grant stay relief to the secured creditors because there was not sufficient cause.[33]

### *B. Under §362(d)(2)(A) a Secured Creditor is Required to Show that the Debtor has no Equity in the Property*

Under section 362(d)(2) of the Bankruptcy Code, a creditor may seek relief from a stay as to property if the debtor has no equity in the property and the property is not necessary to an effective reorganization.[34] The burden of proving that the debtor has no equity in the property lies with the party requesting relief from the stay.[35] The term "equity" in this context has been interpreted by courts to mean "the difference between the value of the property and the total amount of claims that it secures."[36] Further, courts have held that "[a] debtor has no equity in its property when the debts secured by liens on the property exceed the property's value."[37] When determining the value of the property, the court will look at the "property's value as of the date of the hearing on the motion for relief from stay."[38]

### *C. Under §362(d)(2)(B) a Debtor has the Burden of Proving that Their Property is Necessary to an Effective Reorganization*

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[31] *Id.*
[32] *In re* Walden Ridge Development, LLC, 202 B.R. 58, 63 (Bankr. N.J. 2003).
[33] *Id.*; *In re Cambridge Woodbridge Apartments, LLC*, 292 B.R. at 838.
[34] 11 U.S.C § 362(d)(2).
[35] 11 U.S.C. § 362(g)(1).
[36] *In re* Elmira Litho, Inc., 174 B.R. 892, 901 (Bankr. S.D.N.Y. 1994).
[37] *In re* East/Alexander Holdings, LLC, No. 22 20151 PRW, 2022 WL 1529730 at *2 (Bankr. W.D.N.Y. 2022) (internal citations omitted).
[38] *Id.*

If a creditor is able to establish that the debtor has no equity in the property, the burden then shifts to the debtor to prove that its property is necessary to an effective reorganization.[39] Unless the debtor is able to meet this burden, a court will likely grant relief from the automatic stay.[40] In *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.* the United States Supreme Court clarified a debtor's evidentiary requirement under this statute.[41] The Court found that a debtor must prove "that the property is essential for an effective reorganization that is in prospect" to satisfy its burden under the second prong of section 362(d)(2).[42] According to the Court, "this means that there must be a 'reasonable possibility of a successful reorganization within a reasonable time.'"[43] Given this standard, courts have applied a "sliding scale" analysis under section 362(d)(2)(B), meaning that the "burden enlarges as the bankruptcy case progresses."[44] Thus, early in a bankruptcy case, a debtor has a smaller burden of showing that the possibility of reorganization is "plausible."[45] As the case gets into its later stages, a debtor's burden changes to demonstrating a reorganization that is "probable."[46]

The Supreme Court has provided guidance as to the standard to be applied under section 362(d)(2)(B), yet outcomes tend to vary from case to case because the determinations are very fact intensive.[47] In the context of SARE cases, courts have held that although the property is the debtor's sole asset and is clearly necessary for any potential reorganization, this is not enough to

[39] *See* 11 U.S.C. § 362(g)(2).
[40] *See In re East/Alexander*, 2022 WL 1529730 at *6.
[41] 484 U.S. 365 (1988).
[42] *Id.* at 376.
[43] *Id.* (internal citation omitted).
[44] Matter of Holly's, Inc., 140 B.R. 643, 699–700 (Bankr. W.D. Mich. 1992).
[45] *Id.* at 701.
[46] *Id.* at 702.
[47] *Id.* at 700.

deny relief to the creditor.[48] A bankruptcy court in New York found that a debtor with an ambiguous forecast of a "potentially confirmable plan," along with the creditor's "clearly stated opposition," of such a plan, did not satisfy the debtor's burden under section 362(d)(2).[49] Conversely, a bankruptcy court in Michigan found that the financial projections of unbiased experts, paired with improvements made by the debtor, was sufficient evidence to show that a reorganization within a reasonable time was plausible.[50]

## Conclusion

Following section 362(d)(3)'s inception, bankruptcy courts have allowed secured creditors to obtain stay relief as to a SARE under any paragraph of subsection (d). Courts have lifted automatic stays against a SARE under section 362(d)(1) when a creditor is able to make a sufficient showing of "cause," that a debtor is unable to rebut. Additionally, courts have consistently lifted stays against a SARE under section 362(d)(2) when the debtor has no equity in the property and the property is not necessary to an effective reorganization. Courts have not interpreted section 362(d)(3) as a limitation on creditors of a SARE, but rather as an avenue to obtain quick relief in applicable SARE cases.[51]

[48] *See id.* at 703; *In re* East/Alexander Holdings, LLC, No. 22 20151 PRW, 2022 WL 1529730 at *3 (Bankr. W.D.N.Y. 2022) (stating that acceptance of this argument "would effectively mean stay relief could never be granted under §362(d)(2) in a single asset real estate case.").
[49] *In re East/Alexander*, 2022 WL 1529730 at *5 (granting stay relief to the creditor under § 362(d)(2)).
[50] *Matter of Holly's, Inc.*, 140 B.R. at 704–05 (denying stay relief to the creditor).
[51] *See In re LDN Corp.*, LDN Corp., 191 B.R. 320, 327 (Bankr. E.D. Va. 1996); *In re RYYZ, LLC*, RYYZ, LLC, 490 B.R. 29, 35 (Bankr. E.D.N.Y. 2013).