

Debtor with Multiple Commercial Properties is Subject to Single Asset Real Estate Provisions of the Bankruptcy Code

A recent decision by the United States Bankruptcy Court for the Southern District of Georgia holds that a debtor owning multiple commercial properties is nevertheless subject to the single asset real estate provisions of the Bankruptcy Code when a secured creditor holds a lien on one of the properties and that property generates substantially all the debtor's gross income and otherwise satisfies the "single asset real estate" definition.

Under the Bankruptcy Code, a secured creditor with a lien on single asset real estate is entitled to relief from the automatic stay, and therefore permitted to exercise default remedies notwithstanding the bankruptcy filing, unless the debtor either (a) files a plan of reorganization or (b) begins making monthly payments to the creditor within 90 days after filing the case.¹ The single asset real estate provisions were added to the Bankruptcy Code in 1994 to streamline bankruptcy cases that are, essentially, two-party disputes between debtors that own and operate single real property interests and creditors holding liens on the property. The Bankruptcy Code defines "single asset real estate" to mean:

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.²

In the case, *In re Coastal Realty Investments, Inc.*, the debtor owned and operated a 32-unit apartment complex called Coastal Condos in which Ozark Bank held a lien.³ The debtor also owned ten undeveloped properties it was trying to sell, and a house that was under a two-year lease. Some of the other properties were also subject to liens in favor of other secured creditors.

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¹ Or 30 days after the court determines that the single asset real estate provisions apply, whichever is later. 11 U.S.C. §362(d)(3). The court may extend the time upon a showing of cause.

² 11 U.S.C. §101(51B).

³ *Opinion and Order Determining that Real Property is Single Asset Real Estate*, Case No. 12-20564 (Bankr. S.D. Ga. July 20, 2012) (ECF Dkt. 43).

Soon after the bankruptcy filing, the court granted Ozark Bank's motion to take discovery on the debtor's properties and sources of income. Information obtained in discovery showed that Coastal Condos accounted for 89% of the debtor's income in 2011 and 94% in June 2012. Based on this information, Ozark Bank moved for a determination that Coastal Condos constituted "single asset real estate" within the meaning of the Bankruptcy Code. The debtor opposed the motion on the basis that it owned other real property besides Coastal Condos and had other secured creditors besides Ozark Bank.

The court granted Ozark Bank's motion and entered an order determining that Coastal Condos constituted "single asset real estate" within the meaning of the Bankruptcy Code. The court agreed with prior case law in concluding that "the focus of the definition is not on the number of properties owned by the Debtor," but instead "upon whether 'substantially all of the gross income of the debtor' was generated by the property."

Conclusion

While the decision is not surprising, it clarifies that secured creditors are entitled to insist upon application of the Bankruptcy Code's single asset real estate provisions in cases of commercial real estate debtors with multiple properties, when the property securing the creditor's lien generates substantially all the debtor's income.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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