IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINSVILLE DIVISION

In re:	)	
	)	**CHAPTER 11**
CORNERSTONE MINISTRIES INVESTMENTS, INC.,	)	
	)	**CASE NO. 08-20355**
Debtor.	)	
	)	
FIRST UNITED BANK AND TRUST COMPANY,	)	
	)	
Movant,	)	
	)	
v.	)	**CONTESTED MATTER**
	)	
CORNERSTONE MINISTRIES INVESTMENTS, INC.,	)	
	)	
Respondent.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR DETERMINATION THAT AUTOMATIC STAY DOES NOT APPLY TO FORECLOSURE PROCEEDINGS AGAINST NON-DEBTOR PROPERTY, OR, ALTERNATIVELY, FOR RELIEF FROM STAY, OR, ALTERNATIVELY, FOR ADEQUATE PROTECTION

NOW COMES Movant First United Bank and Trust Company ("First United"), and makes and files this *Memorandum Of Law In Support Of Motion For Determination That Automatic Stay Does Not Apply To Foreclosure Proceedings Against Non-Debtor Property, Or, Alternatively, For Relief From Stay, Or, Alternatively, For Adequate Protection* (the "Motion").

SUMMARY

First United seeks to foreclose against non-debtor property (the "Property"). Because the Property is not owned by Cornerstone Ministries Investments, Inc. (the "Debtor"), it is not protected by the Debtor's automatic stay. Despite this fact, First United files this Motion out of

an abundance of caution, because Debtor's counsel has recently indicated his belief that the Debtor's automatic stay precludes foreclosure against the Property (based upon the Debtor's position as a junior lien holder against the Property). As noted below, the Debtor's argument is without merit, as nearly every published decision on this issue has held that the Debtor's junior lien position in non-debtor property is not a protectable interest under Section 362 of the Bankruptcy Code, except where the junior lien interest gives rise to rights of redemption and/or reinstatement or where the Debtor is a party defendant to the foreclosure proceeding. Accordingly, as a matter of law, this Court should determine that the Debtor's automatic stay does not apply to the Property.

Alternatively, if this Court were to determine that the automatic stay does apply, this Court should still grant relief from stay. As noted below, in cases where courts have held that the automatic stay applies because the debtor has a property right in the underlying collateral based upon its subordinate lien position, those courts have still granted relief from stay where the debtor is not able to redeem, reinstate, or otherwise protect its junior lien interest in the context of a state law foreclosure or is unable to service the senior debt on the property. In such cases, the junior lien is of no value and the debtor is unable to confirm a plan of reorganization, because the junior lien holder is unable to restructure the senior debt. Further, unless the junior lien holder is able to service the senior debt, there is no adequate protection for the senior lien holder and relief from stay is required. This case is no different, as the Debtor has no "equity" in the Property or its junior liens, the Property and junior liens are not necessary for the reorganization of the Debtor, and the Debtor is unable to adequately protect First United's interest in the Property by servicing the carry costs of approximately $290,000.00 per month. Accordingly, if the automatic stay applies, then relief from stay must be granted.

BACKGROUND

The Property is owned by three non-debtors: (1) Wellstone at Craig Ranch, LLC ("CR"); (2) Wellstone CL at Craig Ranch, LLC ("CL"); and (3) Wellstone Craig Ranch, II, LLC ("CRII", and collectively with CR and CL, the "Wellstone Entities").

The Wellston Entities are indebted to First United as follows: (i) CR currently owes First United $15,744,973.00 pursuant to that certain Promissory Note, dated December 6, 2005, executed in favor of Bank of the Ozarks in the original face amount of $22,500,000.00 and subsequently assigned to First United by Bank of the Ozarks (the "CR Note") and secured by that certain Deed of Trust, dated December 6, 2005, executed in favor of Bank of the Ozarks and subsequently assigned to First United by Bank of the Ozarks; (ii) CL currently owes First United $21,986,858.00 pursuant to the following notes (the "CL Notes"): (1) that certain Commercial Promissory Note, dated June 20, 2006, executed in favor of First United in the original face amount of $1,000,000.00 and secured by that certain Deed of Trust, Security Agreement, Financing Statement and Assignment of Rents, dated June 20, 2006, executed in favor of First United; (2) that certain Commercial Promissory Note, dated November 21, 2006, executed in favor of First United in the original face amount of $10,681,000.00 and secured by that certain Deed of Trust, Security Agreement, Financing Statement and Assignment of Rents, dated November 21, 2006, executed in favor of First United; and (3) that certain Commercial Promissory Note, dated January 26, 2006, executed in favor of First United in the original face amount of $10,319.000.00 and secured by that certain Deed of Trust, Security Agreement, Financing Statement and Assignment of Rents, dated January 26, 2006, executed in favor of First United; and (iii) CRII currently owes First United $3,500,000.00 pursuant to that certain Commercial Promissory Note, dated June 29, 2006, executed in favor of First United in the

original face amount of $7,241,354.00 (the "CRII Note" and collectively with the CR Note and the CL Notes, the "Wellstone Notes") and secured by that certain Deed of Trust, Security Agreement, Financing Statement and Assignment of Rents, dated June 29, 2006, executed in favor of First United. Each of the above referenced deeds of trust are first in priority and, collectively, secure the Property (the deeds of trust are collectively referred to as the "Deeds of Trust").

The Debtor holds second in priority deeds of trust (the "Junior Deeds of Trust") in the Property, which secure indebtedness owed by the Wellstone Entities to the Debtor. The Junior Deeds of Trust are pledged to First United as collateral for two loans (the "CMI Loans") made by First United to the Debtor, as evidenced by (1) that certain Commercial Promissory Note, dated August 28, 2007, executed in favor of First United in the original face amount of $3,000,000.00 and (2) that certain Commercial Promissory Note, dated January 10, 2008, executed in favor of First United in the original face amount of $3,000,000.00.

The Wellstone Entities are currently in default under each of the Wellstone Notes. The non-default interest accruing on the Wellstone Notes per month is approximately $290,000.00. No payments have been made on the Wellstone Notes since February 2008, other than a pay down of principal on the CR Notes resulting from the sale of First United's collateral, and the current amounts due of approximately $885,000.00 are, in some cases, approaching 90 days past due.[1]

First United has not received any payment on the CMI Loans since the Debtor commenced this bankruptcy case. Interest on the CMI Loans continues to accrue at a rate of

[1] First United released these residences from its Deeds of Trust as part of the sale transaction.

approximately $32,000 per month at the non-default rate. Accordingly, the debt level on the Property is increasing at the non-default rate of approximately $322,000.00 per month.

Between the Wellstone Notes and the CMI Loans, First United is undersecured on the Property. In fact, when considering the Wellstone Notes in isolation, First United believes that it is undersecured. First United has commissioned an appraisal and the preliminary reports are that First United is likely undersecured on the Wellstone Notes and fully unsecured on the CMI Loans in relation to the Property.

ARGUMENT

A. The Automatic Stay is not Applicable to a Foreclosure of Non-Debtor Property.

The scope of the automatic stay is outlined by Section 362(a) of the Bankruptcy Code. Section 362(a) stays the following actions:

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
> (4) any act to create, perfect, or enforce any lien against property of the estate;
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
> (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
> (8) the commencement or continuation of a proceeding before the United States Tax Court concerning a corporate debtor's tax liability for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

11 U.S.C. § 362(a).

Subsection (1) of Section 362(a) is not applicable, because First United is not seeking to take any action against the Debtor by foreclosing on the Property. Subsection (2) is not implicated, because First United is not seeking to enforce a judgment. Subsection (3) is not implicated, because First United is not seeking to "obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." To the contrary, First United is seeking to foreclosure on non-debtor property. Likewise, subsections (4) through (8), relating to enforcement of liens, perfection of setoffs, corporate tax, and actions against a debtor, do not apply in this case. Accordingly, First United's proposed foreclosure does not violate the Debtor's automatic stay. See, e.g., In re Geris, 973 F.2d 318, 319-321 (4th Cir. 1992) (holding that the automatic stay did not prevent foreclosure on non-debtor property where debtor held a subordinate deed of trust and was obligated to the senior lien holder on the senior note); In re Holiday Lodge, Inc., 300 F.2d 516, 519 (7th Cir. 1962) (reversing trial court and holding that the "District Court had no jurisdiction to restrain state court proceedings to enforce a lien on property that did not belong to the debtor"); In re Everchanged, Inc., 230 B.R. 891, 893-94 (Bankr. S.D. Ga. 1999) (Davis, J.) (holding that where the debtor was not the owner of record, but merely held an option to purchase the property and was liable on the mortgage, the debtor's automatic stay was inapplicable); In re March, 140 B.R. 387, 389 (E.D. Va. 1992) (holding that foreclosure of senior lien interest where debtor held a junior lien did not implicate property of the bankruptcy estate to prevent foreclosure) *aff'd* at 988 F.2d 498 (4th Cir. 1993); In re Le Peck Constr. Corp., 14 B.R. 195, 196 (Bankr. E.D.N.Y. 1981) (holding that automatic stay was not implicated where senior lien holder sought to foreclose on property where the debtor held a

mechanics' lien); see also Kreisler v. Goldberg, 478 F.3d 209, 214 (4th Cir. 2007) (holding that ejectment proceeding against debtor's subsidiary was not an action in violation of the automatic stay)

In March, a lender held a first-priority deed of trust encumbering two parcels of real property owned by a non-debtor. March, 140 B.R. at 387. The two parcels of property were encumbered by junior deeds of trust held by two debtors; one the debtor in the March bankruptcy case and the other a debtor in a bankruptcy case pending in the Southern District of New York. Id. at 387-88. The lender filed a motion for declaratory relief or, alternatively, for relief from stay in the bankruptcy case pending in Virginia, but not in the bankruptcy case pending in New York. Id. The bankruptcy court in Virginia granted relief from stay as against the debtor in the March bankruptcy case, but refused to grant relief from stay in relation to the junior deeds of trust held by the New York based debtor. Id.

On appeal, the District Court for the Eastern District of Virginia reversed the bankruptcy court's finding that it lacked jurisdiction to decide the case involving property encumbered by the junior deeds of trust held by the New York based debtor. Id. at 389. The court held that the property in question was not estate property and, although the New York based debtor had an "interest" in the property, "the '*legislative history indicates that Congress intended to exclude from the estate property of others in which the debtor had some minor interest such as a lien or bare legal title.*'" Id. (emphasis in original) (*citing* United States v. Whiting Pools, Inc., 462 U.S. 198, 204 n.8 (1983)). Accordingly, the court rendered its decision that the lender was

entitled to proceed with foreclosure against the real property free from the automatic stay of either debtor. Id. at 389-90.[2]

In Everchanged, Judge Davis in the Southern District of Georgia concluded that non-debtor property was not property of the estate where the debtor conveyed title to the property to another, retained an option to purchase the property, and remained liable on the debt to the senior lender. Everchanged, Inc., 230 B.R. at 893-94. The court first looked to state law and concluded that an option to purchase property does not, under state law, constitute an interest in property. Id. at 894. The court further noted that the automatic stay protects the debtor's interest in property, not debtor's interest in having non-estate property's value maximized. Id. (*citing* Geris, 973 F.2d at 321.) Finally, the court noted that foreclosure is an *in rem* proceeding and, unless the property is estate property, the automatic stay does not prevent foreclosure. Id. at 894. As noted above, numerous other Courts have reached similar conclusions.

In certain states, state law property rights do vest rights in a junior lien holder which implicate a debtor's automatic stay. These include a junior lien holder's rights of redemption and reinstatement and a junior lien holder's right to be a party in any judicial foreclosure proceeding. See, e.g., In re Bibo, Inc., 200 B.R. 348, 351 (9th Cir. B.A.P. 1996) (noting that the debtor had a state law right of redemption); In re A Partners, LLC, 344 B.R. 114, 122 (Bankr. E.D. Cal. 2006) (noting that under California real property law, a junior lien holder has rights in the property in the form of reinstatement and redemption); In re Cardinal Indus., Inc., 105 B.R. 834, 855 (Bankr. S.D. Ohio 1989) (noting that the debtors would have to be named as a defendant in the underlying state law judicial foreclosure actions).

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[2] This decision was affirmed on appeal at In re March, 988 F.2d 498 (4th Cir. 1993) as being moot.

No such rights are implicated in this case. The Property is located in Texas and Texas does not grant holders of junior liens any property rights, such as rights of redemption and reinstatement. Moreover, Texas is a non-judicial foreclosure state and, accordingly, the debtor is not a required party to any foreclosure proceeding. Accordingly, the debtor has no rights in the Property which the stay would protect and the automatic stay does not prevent the *in rem* foreclosure proceeding against non-debtor property. Everchanged, Inc., 230 B.R. at 894.

Moreover, as a matter of policy, the bankruptcy filing of a junior lien creditor should not have an impact on a senior lender's right to exercise its state law right of foreclosure. As a practical matter, a lender is able to pick its borrower and can anticipate the risk associated with loaning that borrower funds. For instance, the lender can check credit histories, financial assets, and interview the borrower to determine if the borrower is a significant risk of defaulting or filing for bankruptcy. The lender generally has no such protections in relation to junior creditors. Accordingly, to allow the bankruptcy of a junior creditor to prevent the senior creditor from exercising state law remedies would force lenders to evaluate not just a borrower, but all of the borrower's potential junior creditors. In such a case, the bankruptcy of any home service provider would render countless third-parties immune from foreclosure on their assets by virtue of their **NOT** paying their bills to the service provider and allowing that service provider to file a mechanic or materialman's lien against their property. Such a result would not be equitable and should not be entertained by this Court.

B. Even if the Automatic Stay Applies, Cause Exists for Granting Relief From Stay.

Section 362(d) governs relief from stay and provides, in pertinent part, as follows:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay –
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, 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)(1).

In this case the Debtor has no equity in its Junior Deeds of Trust, its Junior Deeds of Trust are not necessary for an effective reorganization, and the Debtor has no ability to adequately protect First United's interests in the Property. Accordingly, even if the automatic stay is applicable, stay relief must be granted so that First United may foreclose on the Property.

1) The Debtor has no Equity in the Junior Deeds of Trust.

Even if the Debtor's junior lien position gave it rights in the Property, the Debtor has no ability to protect those rights. As noted in the A Partners case, under California law a junior "lien is an interest in real property, but it is also a contract right, and the Debtor stands in the shoes of a creditor of [the third-party]. When a creditor's collateral consists of a contract right, the value of the collateral is a function of the creditor's ability to exercise that right." A Partners, 344 B.R. at 123. The court concluded that the value of the junior lien was the "Debtor's ability to exercise its rights as a junior lienholder…to redeem [the senior] note to protect its junior lien." Id. at 124. In A Partners, the debtor had no resources available to redeem the senior secured note and the court held that the value of the junior lien was of "no practical value to the bankruptcy

estate." Id. Accordingly, unless the Debtor , as the junior lien holder, has the present ability to purchase the senior debt held by First United, the Debtor's junior lien has no value. Id.

Further, even if the Debtor owned the Property, which it does not, and it were subject to the Deeds of Trust in favor of First United, the Debtor can still not demonstrate that there is any value in the "equity" position of the Debtor. For starters, if there is sufficient value to pay First United in full on the Wellstone Notes, the Debtor will still have to pay the first $6 million of any recovery to First United under the CMI Loans. The value of the Property is likely insufficient to pay the Wellstone Notes, much less the CMI Loans. Accordingly, even if the automatic stay applied, and even if the Debtor's interest in the Property was that of owner rather than a junior lien holder, the Junior Deeds of Trust still have no value and, accordingly, the Debtor has no "equity" in the Junior Deeds of Trust or the Property.

2) The Junior Deeds of Trust are not Necessary to an Effective Reorganization.

As a preliminary matter, the Debtor has the burden of establishing that the Junior Deeds of Trust are necessary for an effective reorganization. 11 U.S.C. § 362(g). As noted below, the Debtor is unable to meet this burden.

As noted in the A Partners case, a junior lien creditor cannot restructure a senior lien against the same property through a chapter 11 plan. A Partners, 344 B.R. 124-25. Further, the Debtor is unable to show that it is even feasible to confirm a plan that retains the Junior Deeds of Trust, because the Debtor is unable to service the senior indebtedness on the Property (*i.e.*, the debt on the Wellstone Loans). See 11 U.S.C. § 1129(a)(11). To prove feasibility in this case, the Debtor will have to prove that it can service the debt on the Property which, as demonstrated below, it is a burden that it is unable to meet.

3) The Debtor is Unable to Adequately Protect First United's Interests in the Property.

As noted above, debt on the Wellstone Notes continue to accrue interest at a monthly rate of approximately $290,000.00. If relief from stay is not granted to First United, the Debtor must adequately protect First United's interest in the Property. See 11 U.S.C. § 362(d)(1). Because the Debtor's interests are subordinate to the interests of First United, the Debtor must, at a minimum, service the Wellstone Notes in order to adequately First United's interests in the Property. See A Partners, 344 B.R. 114 at 126-27 (holding that because there was no source of money to service the senior debt, cause existed for granting relief from stay).

The same factors supporting relief from stay in the A Partners case are likewise present in this case. Assuming that the Debtor's junior liens constitute a property interest under state law, which they do not, the value of that interest is the Debtor's ability to pay off the senior debt held by First United and preserve the Debtor's lien rights. Id. at 124. If the Debtor desires to retain that interest, even if it is worthless, the Debtor must be able to service the Wellstone notes. If not, the Debtor is unable to adequately protect First United's interests in the Property and cause exists for granting relief from stay. Id.

Further, First United notes that cause exists for immediate relief from stay. During a recent tour of the Property, representatives of First United observed that the Property was not being maintained, grass and weeds were past knee level, and the Property was not adequately secured. Further, a real estate agent near the location of the Property was recently murdered and that fact, together with the appearance of the Property, is significantly reducing the value of the Property. Moreover, First United notes that some of the Property has been developed and third-parties are living in homes on the Property. However, Wellstone has run out of money and is no

longer building new homes. Accordingly, the third-party homeowners are left wondering when their development will be completed and whether their investment will be harmed by the lack of progress in completing the development. These innocent home owners are currently in danger of experiencing great financial loss and potential criminal activity, because the Debtor seeks to hold the Property hostage, with no security to protect the innocent homeowners, while the Debtor hopes and prays that some hero with a suitcase full of cash will purchase the Property at a price that is sufficient to pay the Debtor a return on its investment. Such a scenario is not equitable and the bankruptcy court should not be used to hold non-debtor Property hostage to the detriment of First United and innocent third-parties.[3]

CONCLUSION

For the foregoing reasons, First United requests that the Court enter an Order determining that the Debtor's automatic stay does not prevent First United from foreclosing on the Property or, alternatively, granting First United relief from stay, or, alternatively, requiring the Debtor to adequately protect First United's interests in the Property by requiring the Debtor to make monthly adequate protection payments to First United in an amount sufficient to cover the monthly carry costs of approximately $290,000.00 due under the Wellston Notes.

[3] First United notes that in prior hearings, vague allegations have been made about "relationships" between First United and Wellstone. Obviously, First United is not granted a release by virtue of obtaining relief from stay. Accordingly, the Court should view any such allegations for what they are, a desperate attempt to "muddy" the waters and delay First United's stay relief efforts. If the Debtor or others have claims against First United, they should bring them in an adversary proceeding, rather than seeking to hold the Property for ransom.

This 9th day of May, 2008.

Respectfully submitted,

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ATTORNEYS FOR FIRST UNITED BANK AND TRUST COMPANY

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR DETERMINATION THAT AUTOMATIC STAY DOES NOT APPLY TO FORECLOSURE PROCEEDINGS AGAINST NON-DEBTOR PROPERTY, OR, ALTERNATIVELY, FOR RELIEF FROM STAY, OR, ALTERNATIVELY, FOR ADEQUATE PROTECTION upon each of the persons listed on the attached Exhibit A by causing copies of the same to be deposited in the United States mail, first-class postage prepaid.

This 9th day of May, 2008.

/s/ John F. Isbell
John F. Isbell

EXHIBIT A

CONERSTONE SERVICE LIST

James H. Morawetz, Esq. Office of the United States Trustee 362 United States Courthouse 75 Spring Street, S. W. Atlanta, GA 30303	Robert F. Jackson Trust 333 Woodstone Dr. Marietta, GA 30068
US Attorney Civil Process Clerk 1800 Richard B. Russell Building 75 Spring Street, S.W. Atlanta, GA 30303	John C. Ackerman 1760 Ocean Grove Drive Atlantic Beach, FL 32233
Secretary of Labor U.S. Department of Labor Frances Perkins Building 200 Constitution Ave., NW Washington, DC 20210	Charles E. McLeod Living Trust dated 2/9/2006 4664 Haddlesay Drive Evans, GA 30809
Cornerstone Ministries Investments, Inc. Attn: Mr. John T. Ottinger, Jr. Chief Executive Officer 2450 Atlanta Highway Suite 904 Cumming, GA 30040	Robert F. Silva 211 Willow Valley Square Apt B322 Lancaster PA 17602
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Internal Revenue Service Insolvency Room 400 - Stop 334D 401 West Peachtree Street NW Atlanta, GA 30308 Attn: District Director	David & Judith Page Trustees Page Living Trust dated 6/6/96 1326 N. Peninsula Ave. New Smyrna Beach, FL 32169
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