SO ORDERED.

SIGNED this 26th day of March, 2015.

LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

IN RE:	)	
	)	**CASE NO. 15-50036**
CAROLINA PEDIATRIC EYE PROPERTIES, LLC.	)	**CHAPTER 11**
	)	
	)	
Debtor.	)	
	)	

ORDER GRANTING MOTION TO DESIGNATE AS A SINGLE ASSET REAL ESTATE

This matter came before the Court on March 19, 2015, for a hearing on the Motion to Designate Case as a Single Asset Real Estate Pursuant to 11 U.S.C. § 362(d) (the "Motion") filed by Wells Fargo Bank, N.A. ("Wells Fargo"). At the hearing, James C. White appeared on behalf of Carolina Pediatric Eye Properties, LLC (the "Debtor" or "CPEP"); Ashley Edwards and Nicholas Lee appeared on behalf of Wells Fargo; and Robert E. Price, Jr., appeared on behalf of the Bankruptcy Administrator.

FACTUAL BACKGROUND

In March 2008, Wachovia Bank, N.A. ("Wachovia"), entered into a loan agreement ("Note 1") with the Debtor to advance the sum of $1,303,880.00. To secure its obligation, the Debtor executed a Deed of Trust and Assignment of Rents dated March 19, 2008, conveying

commercial real estate located at 1025 Vinehaven Drive NE, Concord, North Carolina (the "Property") to a third-party trustee for the benefit of Wachovia. Later that year, in December 2008, Wachovia entered into a second loan agreement ("Note 2"), this time with both the Debtor and Dr. Buhilda McGriff, the Debtor's sole member, for the sum of $113,000.00. To secure this obligation, the Debtor and Dr. McGriff executed and delivered a second Deed of Trust for the benefit of Wachovia. Wells Fargo succeeded to Wachovia's interests in this case by way of a merger of the two banks.

The real property that is the subject of the two Deeds of Trust is, by all accounts, the Debtor's only asset. It is the only real property listed on the Debtor's Schedule A; the Debtor's Schedule B reflects no personal property other than a potential legal claim against Wells Fargo. Dr. McGriff testified at the hearing that CPEP was formed specifically for the purchase of the Property and construction of the office building. The Property houses Carolina Pediatric Eye Specialists, PLLC ("CPES"), Dr. McGriff's pediatric eye surgery practice.[1] Dr. McGriff is the sole owner and manager of both the Debtor and CPES. The Debtor and CPES entered into a net lease agreement,[2] under which CPES would transfer funds from its own operating account to the Debtor's account in amounts sufficient so the Debtor could make payments on the notes. The Debtor has no other income, has no employees, and does not participate in the operation of the medical practice. The Debtor's only creditors appear to be Wells Fargo, the City of Concord, and the Cabarrus County Tax Administration, the latter two allegedly holding property tax claims.[3]

[1] At present, CPES is the Property's sole tenant. However, the building contains some empty space, for which the Debtor hopes to find an additional tenant.
[2] This lease agreement seems to have been purely oral prior to the bankruptcy filing, but was memorialized in writing on the filing date of January 15, 2015.
[3] The Cabarrus County Tax Administration filed a Proof of Claim on January 26, 2015, in the amount of $9,965.78. On March 12, 2015, Cabarrus County filed a second Proof of Claim for $0.00, noting that taxes had been paid in full.

Following difficulty making payments on the Notes and complying with the terms of a Strict Compliance Letter issued by Wells Fargo,[4] the Debtor filed a voluntary Chapter 11 petition on January 15, 2015. Wells Fargo filed a motion for relief from the automatic stay on January 21, 2015, and then followed with this Motion on January 23, 2015. The Debtor filed a response to both motions on February 13, 2015. Following a scheduling conference, the two motions (as well as the Debtor's own motion for limited relief from the stay) were set for special hearing on March 19, 2015.

LAW

The Bankruptcy Code defines a "single asset real estate" as the following:

> The term "single asset real estate" 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). Case law has interpreted the definition to require that three elements be met in order for a debtor to be designated a single asset real estate ("SARE"): (1) the debtor must own real property constituting a single property or project (other than residential real property with fewer than four units); (2) the real property must generate substantially all of the debtor's gross income; and (3) the debtor must conduct no substantial business other than that of operating the real property and performing activities incidental thereto. In re Scotia Pacific Co. LLC, 508 F.3d 214, 220 (5th Cir. 2007). The definition is relevant under Bankruptcy Code

[4] Both parties elicited lengthy testimony on this subject at the hearing. Because the parties presented conflicting accounts, the events precipitating the bankruptcy filing are unclear and in dispute. Nonetheless, they are not relevant to this decision.

§ 362(d)(3) as one of several options under which a creditor may seek relief from the automatic stay.[5]

ANALYSIS

Wells Fargo seeks an order designating the Debtor as a SARE. The creditor contends that the Debtor fits the definition in § 101(51B) because the Debtor's only property is a commercial office building (and the lot on which it sits), the Property generates substantially all of the Debtor's gross income, and the Debtor conducts no substantial business other than collecting rent and maintaining the Property. The Debtor responds with a "common entity" theory: Dr. McGriff is the sole owner and manager of both the Debtor and CPES, the Property requires active labor and effort in order to generate income, and the lease between the two companies is one which " '[n]o lessor or lessee would enter into . . . unless both were controlled by a common entity with a common purpose.' " Debtor's Resp. at 5 (quoting Commerce Bank & Trust Co. v. Perry Hollow Golf Club, Inc. (In re Perry Hollow Mgmt. Co), Nos. 99-13373-MWV, CM 00-127, 2000 WL 33679447, at *1 (Bankr. D.N.H. April 6, 2000)). The Debtor compares itself with the debtors in two cases, Perry Hollow, 2000 WL 33679447, and In re Larry Goodwin Golf, Inc., 219 B.R. 391 (Bankr. M.D.N.C. 1997), in which the courts found that the debtors were not SARE entities.

Although the Debtor calls these two cases "nearly identical" (in reference to Perry Hollow) and "identical" (in reference to Larry Goodwin), the cases are distinguishable from the present case in very significant ways. In Perry Hollow, the management company was also in

[5] "On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay . . . with respect to a stay of an act against [SARE] . . . by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later," the debtor has either filed a reasonably confirmable plan or has commenced making monthly payments to the creditor. 11 U.S.C. § 362(d)(3).

Chapter 11 bankruptcy, and the holding company (which owned the real estate) and the management company were being jointly administered. Further, in addition to the real estate, the holding company owned nearly $500,000 in equipment, fixtures, and furniture, and was party to a lease-purchase agreement for seventy golf carts. All of those assets were used in the operation of the golf course and, the court pointed out, were partially responsible for the golf course's production of income. Perry Hollow, 2000 WL 33679447, at *1. The court thus found that the so-called holding company was involved in running the golf course, which was a substantial business beyond operation of the real property. See id. at *2. Likewise, in Larry Goodwin, the debtor itself operated a golf course, including golf cart rental, a pool, and concessions, and owned adjacent land that it was attempting to sell. Larry Goodwin, 219 B.R. at 393. The court concluded that "these activities constitute operating a *business* on the property versus simply the holding of real property solely for income." Id. (emphasis in original). By contrast, CPEP merely owns the land on which a separate entity operates a business; it does not hold any of the equipment that CPES uses to run its pediatric eye surgery practice, nor does it participate in CPES's business operations. Cf. In re City Loft Hotel, LLC, 465 B.R. 428, 434 (Bankr. D.S.C. 2012) (designating the debtor as a SARE where it owned the real property but did not actually operate the hotel).

Furthermore, courts have flatly rejected the "common entity" theory on which the Debtor relies in cases where a holding company does not participate in its affiliate's business. For example, the Ninth Circuit held that

> the plain language of § 101(51B) gives no basis for a 'whole business enterprise' exception. Absent a substantive consolidation order, we must accept [the debtor's] chosen legal status as a separate and distinct entity . . . and look only to its assets, income, and operations in determining whether [it] is a single asset real estate.

In re Meruelo Maddux Properties, Inc., 667 F.3d 1072, 1077 (9th Cir. 2012). Similarly, the bankruptcy court in City Loft, 465 B.R. 428, declined to attribute to the debtor-holding company the conduct of an affiliated entity, which was wholly owned by the same principal as the debtor and which operated the hotel that the debtor held. See id. at 434 ("No business is actually conducted by [the holding company]. It does not operate the hotel or the other businesses on the property . . . ."). The bankruptcy court granted the creditor's motion to designate the holding company as a SARE. See id.

Finally, CPEP is precisely the type of debtor the drafters of the Bankruptcy Code had in mind when formulating §§ 101(51B) and 362(d)(3). Congress created the SARE designation to protect under-secured lenders when real property owners file for bankruptcy, despite the lack of any reasonable likelihood of reorganization, in an attempt to avert the loss of their buildings. In re Kkemko, Inc., 181 B.R. 47, 51 (Bankr. S.D. Ohio 1995); see also S. Rep. No. 168, 103d Cong., 1st Sess. (1993) ("This amendment will ensure that the automatic stay provision is not abused, while giving the debtor an opportunity to create a workable plan of reorganization."); NationsBank, N.A. v. LDN Corp. (In re LDN Corp.), 191 B.R. 320, 327 (Bankr. E.D. Va. 1996) (section 362(d)(3) "was enacted to assist secured creditors in single asset real estate cases"). For this reason, cases that fall within the SARE designation are forced to proceed on an expedited timeline. In re Philmont Dev. Co., 181 B.R. 220, 223 (Bankr. E.D. Pa. 1995). SARE debtors generally have either 90 days from filing or 30 days after the court makes the SARE designation (whichever is later) to file a reasonably confirmable plan of reorganization or commence payments to the creditor. § 362(d)(3). The Debtor argued at the hearing that Wells Fargo did not need such special protection, given that Dr. McGriff was a guarantor on Note 1 and a co-debtor

on Note 2. However, the Debtor has made no showing that Dr. McGriff is able to pay the more than $1.3 million debt that appears to be owing to Wells Fargo on the two notes.

CONCLUSION

In sum, the Debtor fits within the definition of "single asset real estate" as provided under 11 U.S.C. § 101(51B). Thus, it is hereby ORDERED that Wells Fargo's Motion to Designate Case as a Single Asset Real Estate Pursuant to 11 U.S.C. § 362(d) is GRANTED.

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