UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

IN RE:	)	Case No. A-B-88-10261
	)	Chapter 11
ASHEVILLE BUILDING ASSOCIATES, a Texas Limited Partnership,	)	
	)	
Debtor.	)	
	)	

ORDER MODIFYING STAY

This matter is before the court on the motion of a secured creditor, Carlyle Real Estate Limited Partnership-VIII ("Carlyle"), for relief from the automatic stay in order to enforce its rights in its collateral. After considering all of the evidence and the argument of counsel the court concludes that the stay should be modified in the manner set out below.

Background Facts

1. On November 15, 1985, Carlyle executed a Deed of Trust (the "Carlyle Deed of Trust"), with respect to an office building known as the Northwestern Bank Building and Parking Garage (the "Property") located in Asheville, North Carolina, and a Note in the face amount of $3,000,000.00 (the "Carlyle Note") in favor of Northwestern Bank.

2. Northwestern Bank has become First Union National Bank of North Carolina ("First Union") by merger.

3. On November 15, 1985, Carlyle sold the Property to the Debtor subject to the Carlyle Note and the Carlyle Deed of Trust,

and the Debtor executed a Deed of Trust (the "Asheville Deed of Trust") and a Note in favor of Carlyle in the face amount of $6,500,000.00 (the "Asheville Wrap Note").

4. Under the terms of the Asheville Deed of Trust, all rents and royalties generated by the Property were assigned to Carlyle. Carlyle perfected its interest in such rents and royalties on January 27, 1988.

5. The Debtor's sole business is to own and rent the Property, and the Property is the Debtor's sole asset.

6. During 1987, the Debtor was periodically in default of its obligations under the Asheville Wrap Note and continuously has been in default of its obligations under the Asheville Wrap Note since November 7, 1987.

7. During 1987, Carlyle started foreclosure actions twice after the Debtor failed to make payments on the Asheville Wrap Note. Carlyle dismissed both foreclosure actions after the Debtor brought payments current.

8. On December 15, 1987, Carlyle initiated foreclosure proceedings (the "Foreclosure Proceedings") for a third time against the Property in the Superior Court, Buncombe County, North Carolina (the "Superior Court").

9. On February 1, 1988, a notice was issued in the Foreclosure Proceedings setting a foreclosure sale on the Property for February 22, 1988, at noon.

10. On January 27, 1988, JMB Property Management Company ("JMB") was appointed receiver of the Property by order of the Superior Court.

11. JMB remains receiver for the Property. JMB is currently collecting rents and revenues generated by the Property.

12. The Debtor filed a petition for relief under Chapter 11 of the United States Bankruptcy Code on February 22, 1988, in the United States Bankruptcy Court for the Southern District of Texas, Houston Division.

13. On April 26, 1988, venue of this case was transferred to the Western District of North Carolina.

14. The Debtor has not filed a plan of reorganization.

15. More than 120 days has passed since the filing of the petition initiating this case, and the Debtor has not been granted an extension of the exclusivity period set forth in 11 U.S.C. Section 1121(b).

16. The Property consists of the 18 story building known as the Northwestern Bank Building and an associated parking garage both located in the center of Asheville. The building has about 153,000 useable square feet and is approximately 80% rented.

17. The Debtor and related entities experienced financial difficulties beginning shortly after the Property was purchased. As a result, much needed maintenance was deferred. Approximately $400,000.00 in needed maintenance has been deferred.

18. The condition of the Property has deteriorated since the Debtor purchased it in 1985 and further deterioration will certainly occur unless major problems are corrected. The deteriorating conditions include:

a. The roof leaks. It is beyond further repair and must be replaced. Water leaks into the 18th floor equipment room directly under the roof. In several places the water is deflected by make-shift internal gutters into steel barrels. The equipment room contains the building's fire and safety equipment, emergency generator, heat and air conditioning equipment and the computer for the elevator system. All of this equipment is jeopardized by moisture from the leaks. If fact, sixty percent of the air conditioning controls do not operate because of moisture damage. There is also leakage into the elevator shaft and water damage evident as far down as the 10th floor stairwell -- eight floors below the roof.

b. The windows must be glazed. The caulking has deteriorated and is falling out, thereby permitting rain and wind to blow into the building. In many places the windows rattle when the wind blows.

c. The elevator needs major repairs. It does not level properly, does not dispatch to calls properly and doors open prematurely. It has been serviced only by the building engineer who is not licensed for elevator repair -- notwithstanding that state and local codes require maintenance only by licensed contractors.

d. The boiler smoke stack has deteriorated by rust. It must be replaced before the boiler can be fired-up for heating -- without which the building could lose its occupancy permit.

e. Carpeting in the main corridors is badly worn in places. A number of the bathrooms are in dis-repair and have tiles that have fallen off and have not been replaced. Some repair is necessary to exterior walks and planters.

19. The building manager testified that she was unable to obtain needed funds for maintenance and service from the Debtor. Many vendors had cut off service because of non-payment by the Debtor. These included the gas company and the elevator maintenance contractor; and the power company had threatened to terminate service.

20. During the less than three years that the Debtor controlled the Property it declined from almost 90% occupancy to less than 80% occupancy. In addition a number of tenants had no signed leases and were on a holdover or month-to-month basis.

21. Carlyle commissioned an appraisal of the value of the Property by Thomas Steitler, a professional appraiser and MAI. Steitler conducted a proper and quite thorough appraisal of the Property using accepted methods -- cost, market and income approaches. The values of the Property he established are as follows: Cost approach - $6,420,000.00; market approach - $6,630,000.00; and income approach - $6,050,000.00. He concluded

that the value of the Property was best evidenced by the income approach.

22. Carlyle has a written agreement for the sale of the Property (contingent on obtaining relief from the stay) for cash of $6,840,000.00.

23. The Debtor's current indebtedness to Carlyle is $7,237,945.00. Interest is accruing on this debt at the rate of approximately $57,000.00 per month (or about $1,900.00 per day). The Debtor's only secured creditor is Carlyle. The debtor has approximately $120,000.00 in unsecured debts.

Discussion

24. Section 362(d) of the Bankruptcy Code provides for relief from the automatic stay (1) for cause and (2) where the debtor has no equity in the property and it is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(1) and (2). The court has concluded that Carlyle is entitled to relief from the stay on both bases.

Relief for Lack of Equity and Necessity for Reorganization:

(A) Equity in the Property:

25. The competent evidence demonstrates that the Debtor has no equity in the Property. The Debtor owes Carlyle $7,237,945.00 and the highest competent evidence of the Property's value of $6.8 million.

26. The court finds Steitler's appraisal to be thorough and reliable. It was prepared in accordance with professional standards and methodology and based on reasonable assumptions. The Debtor was unable to demonstrate any serious flaw in the

appraisal. The court is convinced by the testimony of the expert appraiser that the value of the Property is in the range he determined -- $6,050,000.00 to $6,630,000.00.

27. The evidence of the contingent contract for sale for a cash price of $6.8 million is the best evidence of the value of the Property. Although higher than Steitler's appraised value, it actually confirms that appraisal. The $6.8 million offer was made by a group of people which includes large tenants of the building. That type of buyer is likely to offer a premium for the building because of factors that do not apply to other potential buyers -- e.g. the ability to assure expansion space, control of space needs, prestige and the like. It would not have been proper for the appraiser to base his opinion on such a potential sale because that market (and thus the likelihood of such a sale) was so limited. The fact that this premium offer price is so near the range of value given by the appraiser tends to support his opinion. In fact, the offer and the appraiser's opinion tend to confirm one another.

28. The Debtor has argued that Steitler's appraisal was a "joke," but the evidence does not support that. The Debtor has argued, inter alia, that the appraiser failed to consider the "100% location" of the building, the opportunity created by the vacancy rate, the proper gross rent multiplier, and the fact that the building now had a bank anchor tenant. From the appraiser's testimony and his report, the court is convinced that all relevant factors were considered by the appraiser and given their proper weight in his determination. The court finds none of the

Debtor's criticisms of the appraisal to have merit or to affect the opinion of value of the Property in any significant way.

29. The Debtor offered no competing appraisal of the Property. Mr. Starnes, the principal of the Debtor, testified that the Property was worth $9 million, but he had no support for that figure. In fact, the figure might as well have been pulled "off the wall" for its evidentiary value. Mr. Starnes testified about two buildings he bought and then sold at multi-million dollar profits prior to his purchase of this Property. Those buildings were in Columbia and Greenville, South Carolina. They are in no way comparable to this building because of: significant differences in the markets (for instance, Starnes' own testimony was that rental rates were about three times higher in Greenville than Asheville); the buildings were about half the age of this Property; there was no evidence of deferred maintenance problems in the other buildings; and, significantly, those buildings were sold prior to the onset of the very conditions that have caused the Debtor's bankruptcy.

30. The Debtor has also asserted that the receiver has allowed the Property to continue to deteriorate when it could have performed the required maintenance -- thereby increasing the value of the Property. Given the Debtor's history of operating this building, the court is reluctant to even consider such suggestions from that corner of the ring. But, considering that argument, the court finds that the receiver has managed the

Property prudently and in the exercise if proper business judgment. The court finds no evidence of any effort to subvert the property for Carlyle's benefit.

31. JMB Property, JMB Realty (which executed the offer on the building) and Carlyle are all related. The court understands the Debtor's skepticism about these relationships, but there is no evidence of any improper relationship or actions on this record.

32. The evidence demonstrates that the Property is in real jeopardy of declining in value significantly because of the deferral of major items of maintenance. In fact, the building appears to be in violation of building codes and is in jeopardy of losing its occupancy permit when the heating season arrives.

33. From all of the above the court has concluded that the Debtor has no equity in the Property.

(B) Necessity for an Effective Reorganization:

34. The reorganization contemplated by 11 U.S.C. §362(d)(2)(B) must be one that is "in prospect." United Sav. Assoc. v. Timbers of Inwood Forest Assoc., Ltd., _____ U.S. _____, 108 S.Ct. 626, 632 (1988). It is the Debtor's burden to prove that these is a "reasonable possibility of a successful reorganization within a reasonable time." Id. at 632. The exclusive period for offering a plan of reorganization has elapsed and the Debtor has offered no plan. Mr. Starnes testified, without support, that he "believed" that the Debtor could reorganize and operate the building, but that he was willing to acquiesce to the desires of his partners (and his creditors) and

sell the Property. Nothing the Debtor has offered demonstrates any realistic ability to sell the building in a reasonable time. And, nothing shows that the Debtor is able to reorganize in order to operate the Property successfully.

35. The Debtor's first effort to sell the Property appears to have occurred a scant three weeks prior to the hearing on Carlyle's motion -- and as many weeks after the 120 day exclusivity period. At that time the Debtor contacted officers of Kruse, Int'l. and Kruse Satellite Financial Services, Inc. -- reputed to be one of the largest auction companies in the world. Mr. Peter Vescobo, of that organization, testified about his plan to auction the Property in late November at an "international satellite auction" that would be beamed to "150,000 pre-qualified buyers" in such farflung places as Tokyo, Zurich, Paris, Frankfurt, as well as in the United States and Canada. While this plan sounds impressive, it lacks substance. Mr. Vescobo had only met with officers of the Debtor ten days before. He had never been in this building and admitted that his inspection of the building consisted of driving around it in a cab on his way from the airport to the courthouse to testify. In such circumstances, this "Star Wars" marketing scheme cannot constitute a realistic plan to sell the Property for the benefit of creditors. In fact, the evidence demonstrates that the Debtor has made no real effort to market this Property.

36. Likewise, there is nothing in the history of the Debtor's ownership of this Property or in its plans that indicates an ability to reorganize so as to operate the building. The evidence of the Debtor's ownership prior to the receiver taking control is one of neglect, inability to perform needed maintenance, tenant loss, vendor loss and general deterioration of the building and tenant base. The Debtor's financial condition is such that it is not capable of providing the maintenance that the Property needs. The Debtor offered evidence of a semblance of a preliminary plan to operate the Property -- but it required $600,000 to $800,000 new capital which the Debtor had no evidence of a realistic ability to supply -- from itself or others. In short, the Debtor's plan is no more than "hope" and is not a realistic prospect for a successful reorganization.

37. Timbers held that more was required than merely showing that "if there is conceivably to be an effective reorganization, this property will be needed for it...." 108 S.Ct. at 632. That is the most that has been shown by the Debtor here -- if even that much has been shown. Where, as here, the Debtor's "plan" lacks any "realistic prospect of effective reorganization" relief from the stay is merited. 108 S.Ct. at 633.

Relief for Cause:

38. "Cause" exists here as an alternative (or cumulative) basis for granting relief from the automatic stay. First, there is a history of post-petition defaults in payment by the Debtor. Second, the history of neglect of the Property has rendered it into marginal condition. And, finally, as a result of deferred

maintenance, the building is deteriorating to the point where it is in jeopardy of serious problems -- including the possibility of losing its occupancy permit.

39. For all of the foregoing reasons, the court concludes that cause exists for granting Carlyle relief from the automatic stay.

Miscellaneous Matters:

40. Carlyle objected to the appearance of counsel for Central National Bank, Texas National Bank and the Imperial Palace Pension Fund all of whom are pledgees of the limited partnership interest of Mr. Starnes who is the sole general partner (and 90% owner) of the Debtor. There is authority for sustaining that objection. See Roslyn Savings Bank v. Comoach Corp., 698 F.2d. 571 (2d Cir. 1983). Nevertheless, the court permitted counsel for these parties to participate fully in the hearing which resulted in this Order, if for no other reason than to avoid rehearing on account of his exclusion. Given the court's ruling here, it would appear that this issue is moot.

It is therefore **ORDERED** that:

1. The stay of 11 U.S.C. § 362 is modified to permit Carlyle to foreclose and sell the Property subject to the court's approval;

2. This court shall retain jurisdiction of this matter in order to approve or disapprove any sale of the Property; and

3. This Order is conditioned upon Carlyle's advertising the Property for sale in the Wall Street Journal for, at minimum,

the number and timing of advertising required by the North Carolina General Statutes (the scope of this and other advertisement of the Property will be a factor that the court will consider in either approving or disapproving any sale of the property by Carlyle).

This decision was announced in court on August 19, 1988, and is entered this the 31st day of August, 1988.

George R. Hodges
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

IN RE:	)	Case No. A-B-88-10261
	)	Chapter 11
ASHEVILLE BUILDING ASSOCIATES, a Texas Limited Partnership,	)	
	)	
Debtor.	)	JUDGMENT ENTERED ON 9-8-88

ORDER DENYING STAY PENDING APPEAL

This matter is before the court on the debtor's motion for a stay of the court's August 31, 1988 Order pending its appeal. That Order granted a secured creditor, Carlyle Real Estate Partnership VIII ("Carlyle") modification of the automatic stay* in order to proceed with a foreclosure and sale of the debtor's sole asset, the Northwestern Bank Building ("the building") in Asheville, North Carolina. The court has concluded that the motion should be denied.

The standard by which a motion for stay of an order pending appeal is to be judged was stated by the Fourth Circuit in Long v. Robinson, 432 F.2d 1977 (4th Cir. 1970):

> Briefly stated, a party seeking a stay must show (1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay.

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* It is worth noting that orders granting relief from the automatic stay are exempt even from the automatic ten-day stay of enforcement of a judgment contained in Fed. R. Civ. Pro. Rule 62(a) subject to the court's authority to impose such a stay. See Bankruptcy Rules 7062 and 8005.

Id. at 979. This standard has been generally accepted by other courts as well, See, Federal Prac. and Proc. § 2904 at 316 and n. 37. Consideration of these factors on the present motion for a stay requires denial of the motion.

(1) Probability of Success on Appeal

It appears that the debtor's probability of success on appeal is not substantial. The primary thrust of the debtor's motion appears to be that the court erred in relying on Carlyle's expert appraiser's testimony about the value of the building. The court heard and observed the testimony of Carlyle's appraiser, including the cross-examination by the debtor, together with the evidence of value offered by the debtor. After considering all of that, the court simply was convinced by Carlyle's appraiser's testimony that his valuation was correct. The court has considered all of that evidence again and remains convinced that the valuation was correct. Further, the court's prior Order considered the best evidence of the value of the building to be the recent offer to purchase the building. Nothing in the debtor's present motion causes the court to doubt the propriety of its August 31, 1988 Order.

(2) Irreparable Injury to the Moving Party

The debtor will not be irreparably injured by denial of the stay because there are several avenues of relief available to the debtor, and because the only possible injury alleged is a monetary one. Of course, the debtor has the right to seek an expedited appeal by the District Court. In addition, the debtor

may protect the building's alleged value by bidding at a foreclosure sale itself or by producing potential bidders at the sale. It also has the protection of the upset bid period and the court's order that any foreclosure sale be subject to review by the court. Finally, until the building is foreclosed and sold by Carlyle, the debtor can sell the building itself (subject to court approval). Moreover, the only injury alleged by the debtor is a purely monetary one which by its nature is not irreparable.

(3) Harm to the Prevailing Party

Staying the court's August 31 Order would be inappropriate in the circumstances of this case. That Order granted relief from the automatic stay. To stay that Order would be to deny Carlyle the very relief to which the court determined it is entitled. Further, the debtor filed its bankruptcy petition on February 22, 1988 -- the very day that Carlyle had scheduled its foreclosure sale. The debtor then had the benefit of the § 362 automatic stay until the August 31 Order modified the stay to permit the foreclosure to proceed. During the six months that the debtor had the benefit of the stay it made no significant effort to develop a plan of reorganization or arrange to sell the building. In fact, the evidence showed no action whatsoever by the debtor in this regard until after Carlyle filed its motion for relief from the stay -- five months after the debtor filed its bankruptcy petition. Further, the debtor has demonstrated no realistic ability to perform in the future any better than it has

in the past. In these circumstances, to stay the August 31 Order would force Carlyle to sit idly by while the amount it was owed -- by an insolvent debtor -- increased by over $50,000.00 per month.

(4) Public Interest

There appears to be no significant public interest in staying the August 31 Order.

Based upon the foregoing considerations, the court concludes that the debtor's motion for stay pending appeal should be denied.

It is therefore **ORDERED** that the debtor's Motion for Stay of Order Pending Appeal is hereby **denied.**

This 9th day of September, 1988.

George R. Hodges
United States Bankruptcy Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

A-B-88-1026-BKR
A-MISC.-956

In re: ASHEVILLE BUILDING ASSOCIATES, a Texas Limited Partnership,

Debtor-Appellant,

vs.

CARLYLE REAL ESTATE LIMITED PARTNERSHIP, VIII,

Appellee.

ORDER

THIS MATTER is before the Court on Asheville Building Associates' Emergency Motion for Stay of Order Pending Appeal, filed September 22, 1988. For the reasons that follow, Asheville Building Associates' motion will be denied.

BACKGROUND

The following facts appear from a stipulation entered into between appellee, Carlyle Real Estate Limited Partnership, VIII ("Carlyle"), and appellant, Asheville Building Associates ("ABA"), filed August 18, 1988:

On November 15, 1985, Carlyle executed a Deed of Trust ("the Carlyle Deed of Trust") with respect to an eighteen story office building known as the Northwestern Bank Building and Parking Garage ("the Property"), which is located in Asheville, North Carolina. On that same day Carlyle also executed a note, with a face amount of three million dollars ($3,000,000.00) ("the Carlyle Note") in favor of Northwestern Bank. Also on that same day, Carlyle sold the Property to ABA subject to both the Carlyle Note and the Carlyle Deed of Trust; ABA executed a Deed of Trust (the "ABA Deed of Trust") and a Note, with a face amount of 6.5 million dollars ($6,500,000.00) (the "ABA Wrap Note") in favor of Carlyle. Since the time of these above-described transactions, Northwestern

Bank has become, by merger, First Union National of North Carolina ("First Union").

Under the terms of the ABA Deed of Trust, all rents and royalties generated by the Property were assigned to Carlyle. On January 27, 1988, Carlyle perfected its interest in such rents and royalties.

The Property is ABA's only asset, and ABA's only business is to own and rent the Property.

During 1987, ABA was periodically in default under its obligations under the ABA Wrap Note, and it was been continuously in default of its obligations under the ABA Wrap Note since November 7, 1987. During 1987, after ABA failed to make payments on the ABA Wrap Note, Carlyle twice began foreclosure proceedings but dismissed both foreclosure actions because ABA brought its payments current. On December 15, 1987, in Superior Court, Buncombe County, North Carolina, Carlyle again initiated foreclosure proceedings against the Property. On January 27, 1987, the Superior Court appointed JMB Property Management Company ("JMB") to be receiver of the Property, and now JMB, as receiver pursuant to a consent decree, is collecting rents and revenues generated by the Property. On February 1, 1988, notice was issued setting a foreclosure sale for February 22, 1988, at noon.

On February 22, 1988, the same date that the foreclosure sale was to take place, ABA filed in the United States Bankruptcy Court for the Southern District of Texas, Houston Division, a petition for relief under chapter 11 of the United States Bankruptcy Code. On April 26, 1988, venue for the chapter 11 bankruptcy proceeding was transferred to this District.

The following additional background facts appear from this Court's review of the entire record designated by appellant, with the exception of transcripts of the bankruptcy court's proceedings; such transcripts have not been ordered or produced, and they, therefore, do not exist.

Since the filing of the chapter 11 petition, ABA has not filed a plan of reorganization, nor has ABA been granted an extension of the exclusivity period set forth in Section 1121(b) of Title 11, United States Code.

The filing of the chapter 11 petition automatically stayed the foreclosure proceedings, pursuant to Section 362 of Title 11, United States Code. On July 11, 1988, Carlyle filed a motion, pursuant to Section 362(d) of Title 11, United States Code, seeking relief from the automatic stay in order to proceed with its foreclosure action. On July 12, 1988, the Honorable George R. Hodges, United States Bankruptcy Judge, entered an order directing ABA to respond to Carlyle's motion for relief from automatic stay; a preliminary hearing on Carlyle's motion was set for July 21, 1988, and a final hearing was set for August 1988.

On July 21, 1988, Judge Hodges conducted a preliminary hearing on Carlyle's motion for relief from the automatic stay. On that day a consent order was entered continuing the preliminary hearing and scheduling the final hearing for August 17, 1988.

On August 17, 18, and 19, 1988, Judge Hodges presided over final hearings on Carlyle's motion for relief from the automatic stay. Attorney Larry K. Hercules, of Dallas, Texas, appeared on behalf of ABA; Ellison T. Starnes, the sole general partner of ABA and owner of ninety percent (90%) of ABA, was also present at the final hearing. Attorney James Gary Rowe, of Asheville, North Carolina, and his associate, Mr. Brondyke, appeared on behalf of Carlyle.

Joseph U. Shorer, of Chicago, Illinois, appeared on behalf of both Carlyle and JMB Property Management Company. In addition, over the objections of Carlyle, Albert L. Sneed, Jr., of Asheville, North Carolina, appeared on behalf of two banks, (1) Central National Bank of Sterling, Illinois, and (2) Texas National Bank, of Houston, Texas, each having security interests in the limited partnership and general partnership of Mr. Starnes; Mr. Sneed also appeared on behalf of the trustees of the Imperial Palace Pension Fund, who are ordinary creditors secured by a pledge of the limited partnership. David G. Gray, of Asheville North Carolina, appeared on behalf J.M. Westfall & Company, an unsecured creditor of ABA.

Several witnesses testified at the final hearing, and numerous exhibits were introduced into evidence. On August 19, 1988, after hearing and considering all of the evidence and the arguments of counsel, Judge Hodges announced his decision. On August 31, 1988, Judge Hodges entered a thirteen (13) page order memorializing his decision, which modified the automatic stay and permitted Carlyle to foreclose and sell the Property, subject to the Bankruptcy Court's final approval; Judge Hodges specifically retained jurisdiction over the matter in order to approve or disapprove any sale of the Property, and he specifically conditioned his order upon Carlyle's advertising the Property for sale in the Wall Street Journal in accordance, at a minimum, with the provisions of the North Carolina General Statutes relating to foreclosure sales.

In his written order of August 31, 1988, Judge Hodges made numerous findings of fact and conclusions of law, which can be summarized, in pertinent part, as follows:

Carlyle is ABA's only secured creditor, and ABA now owes Carlyle approximately seven million, two hundred thirty-seven thousand, nine hundred forty-five dollars ($7,237,945.00). ABA owes its unsecured creditors approximately one hundred twenty thousand dollars ($120,000.00).

Shortly after ABA purchased the Property, ABA began to experience financial difficulties, which caused ABA to defer necessary maintenance, amounting to approximately four hundred thousand dollars ($400,000.00). Since 1985, the Property has deteriorated, and the Property's major problems, which are outlined in Judge Hodges order of August 31, 1988, will continue to cause deterioration if they are not corrected. The building manager for the Property has been unable to obtain maintenance funds from ABA, and many essential service vendors have discontinued their services because they have not been paid. During ABA's ownership, the occupancy rate of the Property has decreased ten percent (10%), from ninety percent (90%) to eighty percent (80%).

A professional appraiser retained by Carlyle, Thomas Steitler, conducted an appraisal of the Property by three accepted valuation methods: (1) cost, (2) market, and (3) income. Mr. Steitler's appraisal resulted in three values: (1) Cost approach, 6.42 million dollars ($6,420,000.00); (2) Market approach, 6.63 million dollars ($6,630,000.00); and (3) Income approach, 6.05 million dollars ($6,050,000.00). Mr. Steitler concluded that the income approach best approximated the value of the Property. ABA did not offer its own appraisal of the Property, but Mr. Starnes did testify, without any relevant support, that the Property is worth nine million dollars ($9,000,000.00).

Carlyle now has a written agreement with a group of people, including some of the largest tenants of the Property, providing for a cash sale of Property for 6.84 million dollars ($6,840,000.00). The agreement, which is contingent

upon relief being obtained from the automatic stay, also provides that ABA's unsecured debts, which amount to approximately one hundred twenty thousand dollars ($120,000.00), will be paid from the proceeds of the sale.

As of August 17, 1988, ABA's only efforts to sell the Property involved inquiries about a plan to auction the Property via satellite to one hundred and fifty thousand potential pre-qualified buyers situated in such exotic locations as Tokyo, Zurich, London, and Frankfurt, as well as somewhat more mundane locations in the United States and Canada. Judge Hodges characterized this proposed plan as an unrealistic, fanciful, "Star Wars" marketing scheme.

Judge Hodges concluded that the circumstances described above warrant relief from the automatic stay because ABA does not have equity in the Property and such Property is not necessary to an effective reorganization, 11 U.S.C.A. § 362(d)(2) (A), (B) (West 1979 & Supp. 1988). In addition, Judge Hodges concluded, as an alternative ground for decision, that the automatic stay should be modified because these circumstances constitute "cause," id. § 362(d)(1).

On September 7, 1988, ABA filed a notice of appeal seeking to appeal Judge Hodges' August 31, 1988 order to this Court. On that same day, pursuant to Rule 8005 of the Federal Bankruptcy Rules, ABA filed a notice in the Bankruptcy Court seeking a stay of Judge Hodges' August 31st order. On September 8, 1988, Judge Hodges entered an order denying ABA's motion for a stay pending appeal. On September 19, 1988, pursuant to Rule 8006 of the Federal Bankruptcy Rules, ABA filed Appellant's Designation of Record and Statement of Issues, in which ABA identified nineteen separate issues it wishes to raise on appeal. This Court has carefully reviewed all nineteen issues identified by ABA and concludes that ABA is essentially seeking to challenge Judge Hodges' evaluation of the evidence regarding the value of the Property and ABA's reorganization efforts.

On September 22, 1988, ABA filed its Emergency Motion for Stay of Order Pending Appeal, which is now pending before this Court. In the Emergency Motion, ABA asserts that cross-examination at the final hearing revealed serious flaws and deficiencies in Carlyle's retained appraiser's report. In addition, ABA asserts in its Emergency Motion that it and its equity security holders will sustain irreparable harm if the foreclosure sale is allowed to take place pending this Court's review of Judge Hodges' August 31, 1988 order. Finally, ABA correctly points out that if Judge Hodges' order of August 31, 1988 is not stayed, and the foreclosure sale takes place, then ABA's appeal to this Court will be moot, see 11 U.S.C.A. § 363(m) (West 1979).

STANDARD OF DECISION

As Judge Hodges noted in his order filed September 8, 1988, the standard of decision this Court must use in determining ABA's Emergency Motion for Stay of Order Pending Appeal was established by the United States Court of Appeals for the Fourth Circuit in Long v. Robinson, 432 F.2d 977 (4th Cir. 1970); accord City of Alexandria v. Helms, 719 F.2d 699 (4th Cir. 1983). The Long court phrased the standard as follows:

> Briefly stated, a party seeking a stay must show (1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay.

Long v. Robinson, 432 F.2d at 979; accord In re Cretella, 47 Bankr. 382 (E.D.N.Y. 1984); In re Tolco Properties, Inc., 6 Bankr. 490 (Bankr. E.D. Va. 1980).

ANALYSIS

I. Likelihood of Success on the Merits of the Appeal

When reviewing Judge Hodges' order dated August 31, 1988, this Court will be required to affirm his findings of fact unless such findings of fact are clearly erroneously. This Court fully realizes that the "whole ball of wax" is now at stake; if ABA loses its stay motion, its appeal will be moot. Therefore, this Court has carefully reviewed the record and concludes that Judge Hodges' findings of fact are not clearly erroneous. Instead, Judge Hodges' findings of fact appear to be entirely correct and substantially supported by the record. Since ABA has essentially challenged only Judge Hodges' factual conclusions, this Court concludes that ABA has no realistic possibility of success on the merits.

II. Irreparable Injury to ABA

ABA will not suffer any irreparable harm if the stay is not granted because there are several remedies available to ABA. As Judge Hodges noted in his order dated September 8, 1988, ABA can seek to protect the Property's alleged value by bidding at the foreclosure sale or by finding and producing potential bidders at the foreclosure sale. The only harm ABA alleges is loss of equity, which is a monetary injury that is, by its nature, not irreparable.

III. Substantial Harm to Other Parties

If this Court stays Judge Hodges' August 31, 1988 order, Carlyle will once again be frustrated in its efforts to sell the Property because the August 31st order allowed Carlyle to proceed with the foreclosure sale despite the automatic stay of Section 362. Carlyle now has a fair and reasonable agreement to sell the Property, and if that agreement comes to fruition Carlyle will benefit, some of the large tenants of the Property will benefit, and ABA's unsecured creditors will benefit. If this Court stays Judge Hodges' August 31st order, Carlyle will be harmed, because it will be forced to absorb, at least, a fifty thousand dollars ($50,000.00) per month loss; the large tenants of the Property will be

harmed because they will lose an opportunity to acquire the premises they occupy; the unsecured creditors will be harmed because it is unlikely that ABA will have anything to satisfy their claims. From February 22, 1988, until August 31, 1988, ABA had an opportunity to develop a plan of reorganization and had an opportunity to arrange for a realistic disposition of the Property. This Court is of the opinion that it is very unlikely ABA could perform any better if the sale of the Property were delayed.

IV. The Public Interest

ABA has not shown in any way how the public interest would be served by staying Judge Hodges's order dated August 31, 1988, and this Court is of the opinion that there is no public interest to be served by such a stay.

CONCLUSIONS

NOW, THEREFORE, IT IS ORDERED that Asheville Building Associates' Emergency Motion for Stay of Order Pending Appeal, filed September 22, 1988, is **DENIED**.

This the 29th day of September, 1988.

ROBERT D. POTTER, CHIEF
UNITED STATES DISTRICT JUDGE