NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MB 13-021

Bankruptcy Case No. 12-10411-WCH

ADALGISA MERCADO,
Debtor.

ADALGISA MERCADO,
Appellant,

v.

COMBINED INVESTMENTS, LLC,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. William C. Hillman, U.S. Bankruptcy Judge)

Before
Deasy, Cabán, and Finkle,
United States Bankruptcy Appellate Panel Judges.

Carmenelisa Perez-Kudzma, Esq., on brief for Appellant.
James R. Simmons, Esq., on brief for Appellee.

November 20, 2013

Per Curiam.

The debtor, Adalgisa Mercado, appeals from the bankruptcy court's order granting Combined Investments, LLC ("CI") relief from the automatic stay pursuant to § 362(d)(2).[1] After consideration of arguments from the parties and the record on appeal, the Panel has determined that appropriate appellate review is not possible because the bankruptcy court did not sufficiently specify the findings of fact and conclusions of law upon which its ruling is based. Therefore, we **VACATE** and **REMAND** this matter to the bankruptcy court to set forth its explicit findings of fact and conclusions of law, or for such further proceedings as it determines are appropriate.

BACKGROUND

The debtor and her husband jointly own three properties, one of which is the subject of this appeal (the "Property"). The debtor rents the Property to various tenants, generating monthly income of approximately $5,000.00 to $6,000.00. CI is the current holder of a note secured by a mortgage on the Property and an assignment of rents.

In January 2012, the debtor filed a chapter 11 petition. On her Schedule D, the debtor identified CI as a creditor with a debt secured by the Property, which the debtor valued at $205,000.00. CI filed a secured proof of claim in the amount of $452,639.58.

On January 23, 2012, the debtor filed a motion for authority to use cash collateral in which she sought, in part, to use the rents from the Property to pay her operational and personal expenses. CI objected to the debtor's use of rents, arguing that she was failing to pay taxes and

[1] Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific statutory sections shall be to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. § 101, et seq.

utility bills and to insure the Property. Pursuant to an order dated February 8, 2012, the bankruptcy court granted the use of cash collateral through March 31, 2012, and ordered the debtor to pay CI $4,000.00 as adequate protection. On March 21, 2012, the bankruptcy court issued an order granting further use of cash collateral and ordering the debtor to pay adequate protection payments to CI of $1,300.00 per month. Thereafter, the bankruptcy court, over CI's objections, extended the debtor's use of cash collateral numerous times on the same terms.[2]

On October 15, 2012, CI filed a motion for relief or, in the alternative, to convert or dismiss the debtor's case.[3] CI contended, among other arguments, that it was entitled to relief from the stay under § 362(d)(1) for lack of adequate protection because the debtor was not making post-petition mortgage payments, was not paying real estate taxes, water or sewer bills, and had not filed a chapter 11 plan. CI also sought relief from the stay under § 362(d)(2), on the grounds that the debtor had no equity in the Property and it was not necessary for her reorganization. The debtor objected and countered that CI was adequately protected because she was making the court-ordered monthly payments, maintaining the Property, and paying the real estate taxes due on the Property during the pendency of the case. She further argued that the Property was necessary for her reorganization because it generated rental income to utilize for her livelihood and would provide some funds for the plan of reorganization.

[2] Throughout the course of the bankruptcy, CI continually objected to the debtor's use of cash collateral, asserting that the debtor should not have access to the rents from the Property and, in the event the bankruptcy court authorized the use of cash collateral, the amount of cash collateral available to the debtor was excessive considering that CI's interest was not adequately protected under the cash collateral orders.

[3] Although CI's motion included an alternate request for dismissal or conversion of the case, neither the parties nor the bankruptcy court addressed that request at any of the hearings.

Fifteen days later, the debtor filed a disclosure statement and a chapter 11 plan. In the plan, the debtor proposed to cram down CI's lien on the Property to $205,000.00 (debtor's alleged market value of the Property), and to modify the terms of CI's loan agreement by extending the maturity date for a period of thirty years and lowering the annual interest rate to six percent. CI objected to the plan on various grounds, including that the debtor should not be permitted to cram down its lien below the Property's market value or use the rental income from that Property as a source of plan funding or personal support. CI maintained that the debtor's valuation of the Property was "more than one-third less than the reasonable fair market value of the Property."

On October 31, 2012, the bankruptcy court held a preliminary hearing on the motion for relief from stay combined with a hearing on the debtor's motion for continued use of cash collateral. The parties agreed to continue the hearing on the motion for stay relief, and the court ordered the debtor to continue making monthly adequate protection payments of $1,300.00 to CI.

On December 19, 2012, the bankruptcy court held a combined hearing on the motion for relief from stay, motion for continued use of cash collateral, debtor's motion for approval of the disclosure statement accompanying her reorganization plan, and CI's objection to the disclosure statement and plan. At that hearing, the bankruptcy court granted the debtor's motion for approval of the disclosure statement, and authorized the debtor's continued use of cash collateral through the plan confirmation hearing (with the added directive that "excess income from [CI]'s property to be [segregated] and used for that property only"). However, the court declined to rule on CI's motion for relief from the stay until the confirmation hearing.

On February 6, 2013, the bankruptcy court held a combined hearing on the motion for use of cash collateral, the motion for relief from the stay, and the confirmation of the plan. At the hearing, CI argued that the debtor did not have any equity in the Property (stating that the actual market value was approximately $110,000.00 more than the debtor's valuation of $205,000.00). CI also contended that the debtor's reorganization plan was not feasible because it was unclear how the debtor was going to fund the plan.[4] According to CI, it would be "fundamentally unfair to cram down this lien below the . . . current value of this property and then use the proceeds from that property to fund the plan, which also is contingent upon other funding which she really hasn't explained [if] it's ever going to come about." The debtor responded that CI's interest was adequately protected; she had paid to CI post-petition payments totaling $16,075.00 and had paid over $18,000.00 in taxes related to the Property. She also reasserted her position that the Property's current value was $205,000.00. The bankruptcy court, noting that the value of the Property was a "big, up-front issue," determined that it could not approve a plan or consider the stay relief motion without an evidentiary hearing to determine the value of the Property. Therefore, the court scheduled an evidentiary hearing, with the parties to exchange their respective appraisal reports of the Property prior to that hearing. All pending matters were continued to that hearing date.

[4] The previously approved disclosure statement provided that the debtor would receive considerable income from a divorce settlement in the form of alimony or property division. During the course of the bankruptcy proceeding, however, the debtor and her husband either reunited or decided to forestall the divorce proceedings. Thus, CI argued, it was unclear how the debtor was going to fund her plan.

On April 30, 2013, the debtor submitted an appraisal report valuing the Property at $205,000.00. On that same day, CI submitted its appraisal report, valuing the Property in the range of $290,000.00 to $315,000.00.

On May 1, 2013, the bankruptcy court conducted a combined hearing on the motion for use of cash collateral, the motion for relief from the stay, and plan confirmation. The bankruptcy court first considered CI's motion for relief from the stay, and counsel for each party presented their arguments on that motion. Neither party requested to proceed with an evidentiary hearing; they did not request the opportunity to present testimony of their respective appraisers, or any other witnesses, or to present any evidence beyond their respective appraisal reports.[5] CI emphasized that there was no equity in the Property, and the Property was not necessary for an effective reorganization because the rental income derived from the Property should be used to maintain the Property and service CI's secured debt (as opposed to the debtor's proposal to use funds in excess of property maintenance expenses to fund payments to other creditors and for the debtor's living expenses). At the hearing, the debtor conceded that she had no equity in the Property,[6] but argued that it was necessary to her reorganization because of the rental income it produced. In further support of her position, the debtor alleged that she was not causing the Property to decline in value, as she was maintaining it and paying all taxes and utilities in

[5] The bankruptcy court advised the parties at the prior hearing that the court would treat the parties' appraisal reports as direct testimony. Although not germane to the Panel's remand of this matter, CI alleges in its appellate brief that while its appraiser was present at the May 1, 2013 hearing and available for cross-examination, the debtor's appraiser was not present in the courtroom and not similarly available.

[6] Specifically, the debtor stated: "There is no question that the property has lost value and value of the property is less than the actual amount of the debt."

addition to timely paying CI its monthly adequate protection payments. With respect to her divorce proceeding and its impact on the plan funding, she explained that her husband had agreed to convey to her a third of his interest in a business, which would provide her with income to fund the plan. In short, according to the debtor, relief from the stay was not warranted.

After hearing arguments from the parties, the bankruptcy court issued the following bench ruling:

> All right. So we have a piece of property that is, to put it mildly, under water. The first mortgage are [sic] $450,000 and it's worth depending on which appraisal you buy somewhere between 250 [sic] and 315, but in any event, it's way under.
>
> Now, I can't see where the maintaining [of] this property is for the benefit of this debtor or is it necessary for reorganization. The numbers just aren't right. We've got two excellent appraisals. . . .
>
> In any event, there's no equity. I can't agree that it will be worthwhile to allow this debtor to cram down the first mortgage, maintain the property, and hope that it will increase in value.
>
> I think the motion for relief is well taken. The reason we put it down for evidentiary hearing is because I thought there might be something more extraordinary to come in from the appraisals, but it didn't. Motion for relief from stay by Combined Investments is granted.

The bankruptcy court did not issue a written opinion elaborating upon its bench ruling. This appeal followed.[7]

[7] The debtor did not move for a stay pending appeal. However, the debtor's counsel represented at oral argument that CI has not foreclosed on the Property because the debtor's husband filed his own chapter 11 bankruptcy case and CI is currently enjoined from taking action against his interest in the Property by virtue of the automatic stay in that case.

JURISDICTION

Before addressing the merits of an appeal, the Panel must determine that it has jurisdiction over this appeal even if the litigants do not raise the issue. See Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724, 725-26 (B.A.P. 1st Cir. 1998). The Panel has jurisdiction to hear appeals from: (1) final judgments, orders and decrees; or (2) with leave of court, from certain interlocutory orders. 28 U.S.C. § 158(a); Fleet Data Processing Corp. v. Branch (In re Bank of New Eng. Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). "A decision is final if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Id. at 646. An interlocutory order "'only decides some intervening matter pertaining to the cause, and [ ] requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.'" Id. (quoting In re Am. Colonial Broad. Corp., 758 F.2d 794, 801 (1st Cir. 1985)). Generally, an order granting relief from stay is a final, appealable order. See Rodriguez Camacho v. Doral Fin. Corp. (In re Rodriguez Camacho), 361 B.R. 294, 299 (B.A.P. 1st Cir. 2007). Accordingly, the Panel has jurisdiction to hear this appeal.

STANDARD OF REVIEW

Appellate courts apply the clearly erroneous standard to findings of fact and *de novo* review to conclusions of law. See Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 269 (1st Cir. 2010). The Panel reviews orders granting relief from the automatic stay for an abuse of discretion. See Aguiar v. Interbay Funding, LLC (In re Aguiar), 311 B.R. 129, 132 (B.A.P. 1st Cir. 2004) (citing Soares v. Brockton Credit Union (In re Soares), 107 F.3d 969, 973 (1st Cir. 1997)). An abuse "'occurs when a court, in making a discretionary decision, relies upon an improper factor, neglects a factor entitled to substantial weight, or considers the correct mix of factors but makes a clear error of judgment in weighing them.'" Bacardí Int'l Ltd. v. Suárez & Co., 719 F.3d 1, 9 (1st Cir. 2013) (quoting Matamoros v. Starbucks Corp., 699 F.3d 129, 138 (1st Cir. 2012)).

DISCUSSION

Section 362(a)(1) provides that the filing of a bankruptcy petition automatically stays all acts against a debtor and property of the estate, subject to limited exceptions. 11 U.S.C. § 362(a)(1). The automatic stay provides a debtor with one of the fundamental protections under federal bankruptcy law—breathing room from collection efforts, harassment, and foreclosure actions. In re Soares, 107 F.3d at 975 (citations omitted). It comes into being upon the commencement of a bankruptcy case and remains in force with respect to an act against property of the estate until such property is no longer property of the bankruptcy estate. 11 U.S.C. § 362(a) & (c)(1); see also In re Rodriguez Camacho, 361 B.R. at 299.

Section 362(d)(2) of the Bankruptcy Code provides a procedure whereby a creditor can seek to have the automatic stay lifted with respect to its claim 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—
>
> (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)(2).[8] As the moving party, CI had the initial burden of demonstrating the debtor's lack of equity in the Property, and the debtor had the burden of proving that the Property was necessary for an effective reorganization. 11 U.S.C. § 362(g); see also Aja v. Emigrant Funding Corp. (In re Aja), 442 B.R. 857, 862 (B.A.P. 1st Cir. 2011) (citation omitted).

Here, the debtor conceded that she did not have any equity in the Property.[9] Consequently, the burden shifted to the debtor to demonstrate that the Property was necessary to an effective reorganization. See 11 U.S.C. § 362(g); United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 375 (1988).

Section 362(d)(2)(B) presents two separate elements relating to the reorganization component that must be established for stay relief to be granted: first, whether the property is necessary to enable a debtor to reorganize; and second, whether an effective reorganization is in

[8] The parties do not dispute that although CI sought relief from the automatic stay under both § 362(d)(1) and (d)(2), the bankruptcy court granted relief from stay under § 362(d)(2).

[9] In light of the debtor's admission below, the Panel need not address her arguments that the bankruptcy court erred by not holding an evidentiary hearing on the issue of the debtor's equity in the Property and that the court's finding on equity was erroneous.

prospect. See In re Huggins, 357 B.R. 180, 185 (Bankr. D. Mass. 2006). The Supreme Court has articulated the debtor's burden under § 362(d)(2)(B) as follows:

> [I]t is the burden of the *debtor* to establish that the collateral at issue is "necessary to an effective reorganization." See [11 U.S.C.] § 362(g). What this requires is not merely a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization *that is in prospect*. This means, as many lower courts . . . have properly said, that there must be "a reasonable possibility of a successful reorganization within a reasonable time."

Timbers, 484 U.S. at 375-76 (citation omitted). To satisfy its burden, a chapter 11 debtor need not show that its plan of reorganization is confirmable; rather, it must establish that its proposed plan has a realistic chance of being confirmed and is not patently unconfirmable. See In re Currie, Case No. 11-13502-JNF, 2012 WL 907701, at *7 (Bankr. D. Mass. Mar. 16, 2012) (citing In re YL West 87th Holdings I LLC, 423 B.R. 421, 444 (Bankr. S.D.N.Y. 2010); In re Mullock, 404 B.R. 800, 806 (Bankr. E.D. Pa. 2009) (to demonstrate there is a reasonable possibility of successfully reorganizing within a reasonable period of time, a debtor must show only that confirmation of the plan is within the realm of possibility)).

For the bankruptcy court to grant CI relief from the stay, it necessarily found that the debtor had not met her burden of establishing both that the Property is necessary for her reorganization and also that her proposed plan of reorganization had a realistic prospect of being confirmed within a reasonable period of time. In this case, the bankruptcy court did not provide an adequate explanation as to why the Property was not necessary for an effective reorganization. The court did not state whether it considered the debtor's arguments that the

Property was necessary for the success of her reorganization plan because she derived significant rental income from the Property. Nor did the court address whether the debtor's proposed plan had a realistic possibility of being confirmed or whether it was patently unconfirmable. The court's bench decision did not refer to the confirmation hearing (which was scheduled to be heard that same day), the position of the United States Trustee or other creditors, nor did it identify any Bankruptcy Code sections or case law that would make the plan unconfirmable. Rather, the court simply stated that it did not think cramming down this Property would be "worthwhile," without any further elaboration.

The motion for relief from the stay is a contested matter under Fed. R. Bankr. P. 9014 and is subject to Fed. R. Bankr. P. 7052 (incorporating Fed. R. Civ. P. 52(a)), which requires the bankruptcy court to state its findings and conclusions on the record or in an opinion or memorandum of decision filed by the court. See Fed. R. Civ. P. 52(a)(1) ("In an action tried on the facts . . . the court must find the facts specially and state its conclusions of law separately."). These findings must be sufficient to indicate the factual basis for the court's ultimate conclusion. See Groman v. Watman (In re Watman), 301 F.3d 3, 7 (1st Cir. 2002).

We previously stated that this mandate is essential for appropriate appellate review of a bankruptcy court's ruling.

> For the multi-tiered adjudicative system to function smoothly, the trial court must provide an adequate record for appellate review. This record must include specific findings of facts and conclusions of law that provide the proper foundation for the basis of the order under appeal. When the basis for a ruling is not easily ascertainable from the bare record, the better course, rather than surmise as to the bankruptcy court's motives, is to remand for an elaboration of the decision. See Fed. R. Bankr. P. 7052; Fed. R. Civ. P. 52(a).

. . . .

> The Supreme Court has explained that without "statements of the preliminary and basic facts" on which the trial court relied, "their findings are useless for appellate purposes." Dalehite v. United States, 346 U.S. 15, 24 (1953). The findings must be explicit enough to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision. Brandt v. Repco Printers & Lithographics, Inc. (In re Healthco Int'l, Inc.), 132 F.3d 104, 108 (1st Cir. 1997). Effective review should not depend upon the intuition of the appellate judges or their ability to divine the critical facts or the trial court's reasons for its judgment.

Farnsworth v. Morse (In re Farnsworth), BAP No. MW 08-086, 2009 WL 8466786, at *8 (B.A.P. 1st Cir. Nov. 20, 2009).

We need go no further. The bankruptcy court's brief comments without amplification of its findings of facts and legal conclusions in support of its ruling do not provide us with a sufficient basis to ascertain the reasoning for its decision, and, therefore, we cannot conduct a reasoned review. In the absence of explicit findings of fact and conclusions of law, the prudent course is to vacate the order and remand the matter to the bankruptcy court to make specific findings of fact and conclusions of law supporting its decision, or for such further proceedings as it determines are appropriate. See Grossman v. Berman, 241 F.3d 65, 68-69 (1st Cir. 2001).

CONCLUSION

Because the bankruptcy court did not make explicit findings of fact or conclusions of law on the elements of stay relief under § 362(d)(2)(B), we are unable to adequately review the order granting relief from the automatic stay. Therefore, we **VACATE** and **REMAND** this matter to the bankruptcy court to provide explicit findings of fact and conclusions of law, or for such further proceedings as it determines are appropriate.