

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
THE MOUNTAIN WINERY,
Debtors.

Case No. 93-57386-MM
Chapter 11
R.S. No. 950172

**MEMORANDUM OPINION AND
ORDER GRANTING RELIEF FROM
STAY**

INTRODUCTION

Before the Court for consideration is the Motion for Relief From Stay Nunc Pro Tunc filed by the County of Santa Clara to permit the County to make post-petition real property tax assessments. For the reasons set forth as follows, the County's motion is granted on a prospective basis.

FACTUAL BACKGROUND

The Debtor, The Mountain Winery, filed a chapter 11 petition on November 17, 1993. It owns two parcels of real property located at 14831 Pierce Road, Saratoga, Santa Clara County, California and 10000 Monterey Road, Morgan Hill, Santa Clara County, California.

The Debtor operates the Summer Series of concerts at the entertainment amphitheater located at the Mountain Winery property on Pierce Road. The Mountain Winery property consists of 630 acres of foothills, agricultural property and chaparral on which there was formerly an operating winery. Bar-K, Inc. holds a first deed of trust on the Mountain Winery property to secure a note for

1 \$1,150,000.00. San Jose National Bank holds a second deed of trust on the property to secure a note
2 for \$2,451,000.00. The Hugh Stuart Center Trust holds a third deed of trust on the property to
3 secure a note for \$700,000. Ray and Earlyn Collishaw, who are insiders of the Debtor, hold a fourth
4 deed of trust on the property to secure a note for \$8 million.

5 The Monterey Road property is approximately a 22-acre unimproved parcel except for a
6 commercial building and a barn. The appraised value is between \$960,000 and \$1.5 million. The
7 note to San Jose National Bank is cross-collateralized by a first deed of trust on the Monterey Road
8 property.

9 The Court confirmed the Debtor's and the Creditors' Committee's third amended joint plan of
10 reorganization (the "Plan") on January 12, 1995. The liquidating Plan provides that the Debtor shall
11 have until May 15, 1995 to either close escrow on a private sale of the Mountain Winery property or
12 conduct an auction of the Winery property with an undisclosed reserve. The County voted for the
13 Plan and did not object to confirmation of the Plan.

14 The Debtor estimates the value of the Winery property to be \$10 million. On March 15,
15 1995, the Court approved a motion to sell the Winery property to a prospective purchaser for \$6.75
16 million. To date, the Debtor has accepted a deposit and has opened an escrow for sale of the
17 property. Apparently, the terms of the proposed sale are not finalized.

18 The Debtor has incurred a liability to the County of Santa Clara for both pre-petition and
19 post-petition real property taxes. The County's pre-petition tax claim for \$47,568.98 is secured by a
20 first priority lien on the Mountain Winery property. Real property taxes on the Debtor's property for
21 fiscal year 1994-1995 accrued on March 1, 1994, but the automatic stay has precluded post-petition
22 assessment of the taxes. According to the County's records, the Debtor's liability for post-petition
23 real property taxes totals \$66,441.07.

24 With respect to the County's claim, the confirmed Plan provides in pertinent part:

25 Paragraph III.B.1. Description of Claims:

26 Unclassified Claims: Section 1123(a)(1) of the Code provides that certain claims,
27 including administrative expense claims and tax claims by governmental units, are not
classified under the Plan.

28 Class 1 consists of the secured real property tax claims of the County of Santa Clara in

1 the amount of \$97,970.35 (sic) against the Mountain Winery Property.

2 * * *

3 Paragraph III.B.2. Treatment of Claims:

4 a. Unclassified Claims.

5 Administrative Tax Claims.

6 Administrative priority tax claims for taxes accrued after the filing of the Bankruptcy
7 Case shall be paid in Cash in full on the Effective Date unless otherwise agreed by the
8 taxing authorities entitled to payment of such claims.

9 * * *

10 Priority Tax Claims.

11 Allowed tax claims entitled to priority under 11 U.S.C. section 507(a)(7) shall be paid
12 in Cash in full at the close of escrow for sale of the Mountain Winery Assets.

13 b. Classified Claims.

14 Class 1. The County of Santa Clara shall receive the amount of its Allowed
15 Claim in full in cash upon close of an escrow for the sale of the Mountain Winery
16 Assets.

17 Earlier drafts of the plan contemplated the treatment of the County's Class 1 secured tax claim
18 and priority tax claims under § 507(a); however, they did not specifically address the proposed
19 treatment of post-petition administrative tax claims. The Plan further provides:

20 I. INTRODUCTION

21 * * *

22 This Plan provides for the payment of the allowed claims of first, second, and third
23 trust deed holders, administrative claims, unsecured priority tax claims and all non-
24 insider, non-affiliate creditors in full, in cash, through sale.

25 * * *

26 II.J. "Effective Date" shall mean fifteen days after the close of escrow for a sale of
27 the Mountain Winery Assets, or May 15, 1995, whichever occurs first.

28 * * *

IX. PLAN MODIFICATION

Only the Plan proponents may, with Court approval, modify the Plan. Before or after
Confirmation, the Plan may be modified in accordance with the provisions of the
Bankruptcy Code.

1 X. GENERAL PROVISIONS

2 A. Binding Effect of the Plan

3 The provisions of this Plan shall bind the Debtor or any person or entity asserting a
4 claim against the Debtor, whether or not the claims entered arose before or after the
5 Debtor filed this bankruptcy petition, whether or not the claim is impaired under the
6 Plan, and whether or not such person or entity has accepted the Plan.

7 * * *

8 C. Injunction

9 The confirmation order shall provide, and shall operate as, an injunction against the
10 commencement or continuance of any action, to collect, recover, or offset from the
11 Debtor, any claim or interest which is treated in the Plan, except as otherwise
12 permitted by this Plan, or by final order of the Court.

13 * * *

14 D. Vesting of Property of the Estate

15 Except as provided in the confirmation order, and this Plan, on the Effective Date, all
16 of the interest in the property of the Debtor shall be vested in the reorganized Debtor
17 and shall be retained and used by the reorganized Debtor as provided in this Plan, free
18 and clear of all claims, liens, charges, and other interests of persons or entities arising
19 before or after the commencement of this bankruptcy case.

20 The County and the Debtor filed conflicting declarations concerning the Debtor's attempt to
21 obtain the County's ballot while under a time constraint, the Debtor's alleged tagging a copy of the
22 Plan to facilitate the County's review of the portions of the Plan that dealt with the County's claim, the
23 County's belief that its claim was fully secured, and alleged oral assurances by the Debtor's
24 representatives regarding the Plan's treatment of the County's claim.

25 **POSITIONS OF THE PARTIES**

26 In its motion, the County requests nunc pro tunc relief from the stay from the date of the filing
27 of the petition so that it may retroactively assess post-petition real property taxes for fiscal year 1994-
28 1995. The tax assessments would become liens on the Debtor's real property pursuant to Cal. Rev. &
Tax Code § 2187. If granted, the relief requested by the County would elevate its post-petition
administrative tax claim to secured status. Whether the County's claim for post-petition taxes is
secured becomes significant only in the event of a foreclosure on the property. A foreclosing secured

1 creditor would have to pay the post-petition property taxes only if the taxes were secured by the
2 property. If the County's motion is not granted, the County argues, a foreclosing secured creditor
3 would enjoy a windfall at the expense of the County and its taxpayers.

4 In support of its motion for relief from the stay nunc pro tunc, the County cites the
5 amendment to 11 U.S.C. § 362(b)(9) which is contained in the Bankruptcy Reform Act of 1994 and
6 which legislatively overrules the Ninth Circuit holding in In re Glaspy Marine Industries, Inc., 971
7 F.2d 391 (9th Cir. 1992) that an exception to the automatic stay is not applicable to government
8 assessments of property taxes that grant the government a tax lien. Although the County concedes
9 that the amendments in the Bankruptcy Reform Act of 1994 are not applied retroactively, it argues
10 that the policy behind the amendment of the automatic stay exception should be considered in
11 examining whether cause exists under § 362(d)(1). The County argues that the amendment clarifies
12 § 362(b) and is indicative of the legislature's intention that governmental units be allowed to assess
13 taxes post-petition.

14 The Debtor does not oppose the relief requested but asserts that a motion for relief from stay
15 is an improper vehicle to accomplish what is, in effect, a plan modification. The Creditors' Committee
16 withdrew its objection to the County's motion at the hearing. Bar-K, the holder of the first deed of
17 trust on the Mountain Winery property, responds that the property of the estate has vested in the
18 Debtor and that the automatic stay is no longer in effect. It further argues that the treatment of the
19 real property is now controlled pursuant to the provisions of a confirmed Plan and that relief from
20 stay is an impermissible way to amend the Plan, which is binding. Finally, Bar-K argues that unless
21 specifically provided, the amendments in the Bankruptcy Reform Act of 1994 are not retroactive.

22 The County responds that granting the County secured status does not frustrate the
23 reasonable expectation of parties in the case. It also responds that the proposed treatment is not
24 inconsistent with the Plan, which contemplates payment of the County's claim in full.

DISCUSSION

A. APPLICABILITY OF THE AUTOMATIC STAY

28 An initial inquiry is whether the automatic stay remains applicable to these proceedings post-

1 confirmation. Section 362(c)(1) provides that except as otherwise provided in subsections (d), (e),
2 and (f) of § 362, the stay of an act against property of the estate under subsection (a) continues until
3 such property is no longer property of the estate. Section 1141(b) provides that except as otherwise
4 provided in the plan or the order confirming the plan, confirmation vests all of the property of the
5 estate in the debtor. This section of the Bankruptcy Code would control but for paragraph X.D. of
6 the Plan, which provides, "Except as provided in the confirmation order, and this Plan, on the
7 Effective Date, all of the interest in the property of the Debtor shall be vested in the reorganized
8 Debtor. . . ." The Plan provides that the Effective Date is the earlier of fifteen days after the close of
9 escrow on a sale of the Mountain Winery property or May 15, 1995. Until such date, the automatic
10 stay remains in effect.

11 The County's motion requests retroactive relief from the automatic stay. During the post-
12 petition, preconfirmation period when the subject taxes accrued, the stay was unquestionably in
13 effect. However, retroactive relief from the stay is an extraordinary remedy that should be narrowly
14 applied only in limited circumstances. In re Jewett, 146 B.R. 250, 251 (Bankr. 9th Cir. 1992).

15 Having concluded that the automatic stay remains in effect, the Court turns now to the
16 standard for relief from stay for cause.

17 18 **B. STANDARD FOR RELIEF FROM STAY FOR CAUSE**

19 The County requests relief from the automatic stay for cause under § 362(d)(1).¹ The
20 bankruptcy court has broad discretion to grant relief for cause, which must be determined on a case
21 by case basis. In re MacDonald, 755 F.2d 715, 716-17 (9th Cir. 1985). The stay gives the court the
22 opportunity to harmonize the interests of both the debtor and creditors while preserving the debtor's
23 assets for reorganization. Id. at 716.

24 The court's exercise of discretion in resolving a motion for relief from stay for cause must

25 _____
26 ¹ Section 362(d)(1) provides:

27 (d) 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 --

28 (1) for cause, including the lack of adequate protection of an interest in property of such party in
interest.

1 appropriately require a consideration of the policies underlying the Bankruptcy Code as well as the
2 competing interests of the creditor, debtor, and other parties in interest. In re Borbridge, 81 B.R.
3 332, 335 (Bankr. E.D. Pa. (1988)). See also In re FRG, 115 B.R. 72, 74-75 (E.D. Pa. 1990)(In
4 determining cause for relief from stay to enforce a contractual arbitration provision, court must
5 balance purposes of Bankruptcy Code against federal policy favoring arbitration). Relief is
6 appropriate if the balance of hardships tips in favor of the moving creditor. Id. at 74; In re
7 Weatherley, 169 B.R. 555, 562 (Bankr. E.D. Pa. 1994). In the context of determining whether relief
8 from stay is appropriate on the County's motion, the Court must weigh the policy underlying the
9 treatment of post-petition property tax claims in bankruptcy against the policy supporting the finality
10 of the treatment of claims under a confirmed chapter 11 plan.

11 **1. Treatment of Post-petition Tax Claims.**

12 Under California law, assessments of real property taxes become a lien against the property.
13 Cal. Rev. & Tax Code § 2187. The lien attaches as of the first day of March preceding the fiscal year
14 for which the taxes are levied. Cal. Rev. & Tax Code § 2192. Once assessed, the lien for real
15 property taxes for fiscal year 1994-1995 would attach effective March 1994. Id. The real property
16 tax lien would have priority over all other liens on the property regardless of their time of creation.
17 Cal. Rev. & Tax Code § 2191.1.

18 However, the automatic stay of 11 U.S.C. § 362(a) precludes the post-petition assessment of
19 real property taxes and the automatic attachment of a lien. See In re Glaspy Marine Industries, Inc.,
20 971 F.2d 391 (9th Cir. 1992). In Glaspy Marine, Snohomish County moved the court for payment of
21 delinquent property taxes from the sales proceeds from the sale of the debtor's boat manufacturing
22 facility in Washington. Among the County's arguments in that case was that the automatic stay
23 violated federal law subjecting federal authorities to state and federal taxes because, but for the
24 automatic stay, it would have an enforceable lien against the debtor's property. The Ninth Circuit
25 held:

26 Nothing in the two statutes suggests, however, that post-petition property taxes
27 should receive a *first* priority position. In bankruptcy, taxes are deemed an
28 administrative expense, and are entitled to payment before several classes of claims.
See 11 U.S.C. §§ 501(b)(1)(B) and 507(a)(1). Congress has chosen to give secured
claims priority in bankruptcy over taxes, including property taxes. Excess proceeds

1 from an asset sale remain subject to overdue property taxes.

2 Id. at 394.

3 Snohomish County further argued that the assessment of property taxes is excepted from the
4 automatic stay. The Ninth Circuit also rejected that argument.

5 Congress designed the automatic stay to protect the relative position of all creditors.
6 *See In Re Stringer*, 847 F.2d 549, 551 (9th Cir. 1988). Both public and private
7 creditors are subject to the stay. We interpret statutory exceptions, including section
8 546(b), narrowly to further the purpose of the automatic stay. *See id.* at 552. That
9 purpose -- to ensure that all creditors are treated fairly and equally -- would be
10 severely undermined by a superpriority lien granted each year when counties assess
11 property taxes. Snohomish County's request for an automatic first priority tax lien is
12 irreconcilable with the purpose of section 362. Further, granting the county's request
13 for an automatic first priority tax lien would circumvent Congress' decision to give
14 secured creditors priority over taxes assessed in bankruptcy. *See* §§ 503(b)(1),
15 507(a)(1).

16 Glaspys Marine, 971 F.2d at 394-95. The Ninth Circuit concluded that the automatic stay applies to
17 the assessment of property taxes.

18 Section 362(b), as amended in 1994, legislatively overruled Glaspys Marine, providing:

19 (b) The filing of a petition under . . . this title . . . does not operate as a stay --

20 (9) under subsection (a), of --

21 (D) the making of an assessment for any tax and
22 issuance of a notice and demand for payment of such an
23 assessment (but any tax lien that would otherwise attach
24 to property of the estate by reason of such an
25 assessment shall not take effect unless such tax is a debt
26 of the debtor that will not be discharged in the case and
27 such property or its proceeds are transferred out of the
28 estate to, or otherwise revested in, the debtor).

* * *

(18) under subsection (a) of the creation or perfection of a
statutory lien for an ad valorem property tax imposed by
the District of Columbia, or a political subdivision of a
State, if such tax comes due after the filing of the
petition.

29 The County argues that the amendment is indicative of legislative intent with respect to the
30 treatment of governmental assessments of post-petition taxes. It further argues that this clear
31 declaration of policy constitutes sufficient cause for relief from the automatic stay. The legislative
32 history to the amendments to § 362(b) provides:

1 Local governments rely on real property taxes to constitute one of their principal
2 sources of revenue. These taxes are, in turn, typically secured by statutory liens.
3 **Both the property owner and any mortgage holder recognize that their interest**
4 **in real property is subject to the local governments's right to collect such**
5 **property taxes. However, several circuit courts have held that the automatic**
6 **stay prevents local governments from attaching a statutory lien to property taxes**
7 **accruing subsequent to a bankruptcy filing. See, e.g., In re Paar Meadows, 880**
8 **F.2d 1540 (2d Cir. 1989), cert. denied, 110 S.Ct. 869 (1990); Marakoff v. City of**
9 **Lockport, 916 F.2d 890 (3d Cir. 1990). These decisions create a windfall for**
10 **secured lenders, who would otherwise be subordinated to such tax liens, and**
11 **significantly impair the revenue collecting capability of local governments.** This
12 section overrules these cases and allow local governments to utilize their statutory
13 property tax liens in order to secure the payment of property taxes. (emphasis added)

14 The amendment was not made retroactive, although Congress explicitly made other
15 amendments retroactive.² Courts are to apply the law in effect at the time the bankruptcy case is
16 filed. In matters of statutory construction, courts are to construe newly enacted statutes that affect
17 substantive rights prospectively unless Congress clearly legislates that the statute should be applied
18 retroactively. Bowen v. Georgetown University Hospital, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d
19 493 (1988); Bennett v. New Jersey, 470 U.S. 632, 105 S.Ct. 1555, 84 L.Ed.2d 572 (1985). Thus,
20 the amendment will not be applied retroactively, although the Court will consider the policy behind
21 the amendment.

2. Binding Effect of Confirmed Plan.

22 The Plan was confirmed on January 12, 1995. Under section 1141(a), a confirmed chapter 11
23 plan is binding on the debtor, any entity issuing securities under the plan, any entity acquiring
24 property under the plan, and any creditor, equity security holder, or general partner in the debtor,
25 whether or not the claim or interest of such creditor, equity security holder, or general partner is
26 impaired under the plan and whether or not such creditor, equity security holder, or general partner
27 has accepted the plan.³ A confirmed reorganization plan is treated as a final judgment on the merits
28 by the district court and is given res judicata effect. Stoll v. Gottlieb, 305 U.S. 165, 170-71, 59 S.Ct.

² Section 702 of the Bankruptcy Reform Act provides that except as provided, the provisions shall take effect on the date of enactment, which was October 22, 1994.

³ In re Eubanks, 977 F.2d 166, 170-71 (5th Cir. 1992) (confirmed plan bars debtor's and wife's lender liability claims against banks); In re Heritage Hotel Partnership I, 160 B.R. 374, 377 (Bankr. 9th Cir. 1993)(confirmed plan is res judicata on debtor's prepetition lender liability claims); In re Blanton Smith Corp., 81 B.R. 440, 442-43 (M.D. Tenn. 1987)(order confirming plan is binding and precludes reconsideration upon conversion of provisions granting security interests even if based on an error of law).

1 134, 137, 83 L.Ed. 104 (1938); 5 *Collier on Bankruptcy* ¶ 1141.01[1] (15th ed. 1994). Like a final
2 judgment, a confirmed plan is binding on all parties, and issues that could and should have been raised
3 relating to the plan are barred by res judicata. Heritage Hotel Partnership I, 160 B.R. at 377.
4 Creditors cannot collaterally attack a plan after confirmation. Id. 160 B.R. at 377.

5 Section 1141 serves and promotes a policy of finality. In re De Laurentiis Entertainment
6 Group, 963 F.2d 1269, 1277 (9th Cir. 1992). There is a great need for finality in a reorganized
7 debtor's affairs following confirmation. In re Depew, 115 B.R. 965, 972 (Bankr. N.D. Ind.
8 1989)(default under confirmed plan). The Bankruptcy Court in Depew explained:

9 This need [for finality] is fulfilled by § 1141(a), which binds both debtors and creditors
10 to the terms of a confirmed plan. The reason for doing so "is the basic principle that
11 business rehabilitation is the goal and that economic rehabilitation may be achieved
12 only when there exists a certainty for future business planning." In re Emergency
13 Beacon Corp., 48 B.R. 356, 360 (S.D.N.Y. 1985).

14 * * *

15 Such "uncertainty . . . would render meaningless the whole purpose of a Chapter [11]
16 proceeding." In re Newport Harbor Associates, 589 F.2d 20, 23 n.6 (1st Cir. 1978).
17 As Learned Hand noted; "Unless [the debtor] can assure [new creditors] as to the
18 amount of his actual liabilities without a contingent addition of the old debts, he will
19 start with a handicap in a race which he has already lost." Vogel v. Mohawk Elec.
20 Sales Co., 126 F.2d 759, 761 (2d Cir. 1942).

21 Depew, 115 B.R. at 972-73. "[T]he debtor and creditors naturally look to the plan of reorganization
22 as the final decree of the rights of the parties." In re Henderberg, 108 B.R. 407, 411 (Bankr.
23 N.D.N.Y. 1989)(quoting In re Arctic Enterprises, Inc., 68 B.R. 71, 80 (D. Minn. 1986)).

24 3. Securing Payment of Post-Petition Property Taxes 25 Outweighs Policy of Finality of Confirmation

26 The policy favoring assured collection of local taxes conflicts with the policy of finality where
27 a plan that provides alternative treatment of tax claims is already confirmed. However, the policy of
28 finality of confirmed plans is effectuated to assist *the debtor* as it emerges from bankruptcy. In this
case, it is particularly significant that granting the County's motion would have no impact on The
Mountain Winery, which had provided in its liquidating plan for the payment of property taxes upon
the sale of the property. The party affected by granting the relief sought is a secured creditor, and
Bar-K is affected only in the event it must proceed to foreclosure. As a secured creditor, Bar-K
reasonably anticipates the payment of local property taxes. The policy of finality of a confirmed plan

