UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:

Robert Simpson **Chapter 12**
and Tay Simpson, **Case # 17-10442**
Debtors.

DECISION AND ORDER
DECLARING PREPETITION WAIVER TO BE ENFORCEABLE

Wells Fargo Leasing, Inc. ("Wells Fargo") filed a motion for relief from stay in this case (doc. # 11) (the "Motion"), seeking authority to pursue its state law rights against the Debtors. Wells Fargo's threshold argument is that, prior to filing this bankruptcy case, Mr. and Mrs. Simpson waived their right to oppose a relief from stay motion by Wells Fargo in the event they subsequently sought relief under the Bankruptcy Code. The Debtors oppose the Motion and specifically assert the waiver in question is unenforceable. On January 19, 2018, the Court held an evidentiary hearing on the Motion, the Debtors' opposition to the Motion, and a motion for relief from stay filed by Vermont Agricultural Credit Corporation ("VACC") (doc. # 14).[1] Before turning to the merits of Wells Fargo's waiver argument, the evidence in the record, or the Court's analysis, a brief recitation of the procedural history is necessary to put this contested matter in context.

The following facts are in the record and generally undisputed. The Debtors have operated a farm, primarily in Braintree, Vermont, since 1972, and until 2012, it was a dairy farming business. In 2012, the Debtors were experiencing financial difficulties, were engaged in litigation with Wells Fargo, and filed a chapter 12 bankruptcy case on June 27th of that year (case # 12-10564) (the "2012 bankruptcy case"). In that bankruptcy case, the Debtors vigorously litigated various issues with secured creditors Wells Fargo, VACC, Peoples United Bank ("Peoples"), and the USDA Farm Services Agency (the "FSA").

[1] Although VACC was not a party to the agreement containing the waiver in question, VACC's position is if the Court finds the waiver enforceable and grants relief from stay to Wells Fargo, VACC should also be granted relief from stay since its liens encumber much of the same property, and it asserts the same "lack of equity" arguments, as Wells Fargo.

On August 20, 2012, this Court entered an Order (doc. # 52) determining, among other things, that (i) Wells Fargo's leases of certain property to the Debtors were true leases, (ii) Wells Fargo therefore owned the milking parlor, barn, connecting corridor, and holding area buildings, and the related milking equipment, which were the subject of the dispute between the Debtors and Wells Fargo (see doc. # 19), (iii) the Debtors were required to assume or reject the leases and commence making adequate protection payments, and (iv) Wells Fargo was entitled to relief from stay.

Shortly thereafter, on August 29, 2012, the Debtors filed a motion to dismiss their case (doc. # 56); the Court entered an Order granting dismissal (doc. # 58) the next day. Soon after that, the Debtors sold their herd and paid the proceeds of that sale to Peoples. After the 2012 bankruptcy case was dismissed, the Debtors and Wells Fargo continued robust litigation of their disputes in state court and, ultimately, with the assistance of two mediators, the Debtors and Wells Fargo reached a global settlement agreement (the "Agreement"). Two terms of the Agreement are particularly germane to this contested matter. First, the Agreement authorized the Debtors to satisfy the Wells Fargo debt on a discounted basis, with the magnitude of the discount diminishing over time:

> **1.** **Payment**: The parties stipulate that Simpson owes Wells Fargo a total amount of $1,500,000 on all claims asserted by Wells Fargo in the Civil Action. If Simpson does not otherwise Default under this Agreement as set forth in ¶ 5 below, Simpson may satisfy Wells Fargo at a reduced amount in accordance with the following schedule relieving Simpson of any further financial obligation to Wells Fargo:
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> | | |
> |---|---|
> | November 1, 2016 – May 1, 2017 | $750,000 |
> | May 2, 2017 – August 2, 2017 | $800,000 |
> | August 3, 2017 – November 3, 2017 | $900,000 |
> | November 6, 2017 – April 6, 2018 | $1,100,000 |

Doc. # 11, ex. G, p. 1. Second, the agreement included a waiver by the Debtors of their right to oppose a Wells Fargo relief from stay motion in any subsequently filed bankruptcy case:

> **5.** **Default**. Any of the following events shall be deemed a Default under this Agreement automatically eliminating the above payment schedule and allowing Wells Fargo to immediately release from escrow and file the Judgement.
>
> A. Failure to pay within 18 months of November 1, 2016 per Paragraph 1.
>
> B. Filing of a voluntary or involuntary bankruptcy by Robert Simpson or Tay Simpson, individually or jointly, under any Chapter of the Bankruptcy Code. **As a material inducement for Wells Fargo to enter this Agreement**, **the Simpsons agree that they will not contest a motion filed by Wells Fargo requesting relief from automatic stay, as set forth in 11 U.S.C. § 362, to allow Wells Fargo to enforce its rights hereunder and pursuant to the Judgement**.

Doc. # 11, ex. G, p. 2–3 (emphasis added).

The Debtors and VACC also continued litigation of their dispute after the 2012 bankruptcy case was dismissed. VACC obtained a judgment of foreclosure and replevin order from the state court on November 9, 2016 (doc. # 11, ex. I). On September 1, 2017, VACC issued a notice of sale, of the real and personal property securing its debt, for October 13, 2017 (doc. # 11, ex. J). On September 21, 2017, the state court issued a writ of possession to VACC. The sale did not occur, however, because the Debtors filed the instant chapter 12 bankruptcy case on October 9, 2017 – less than one week prior to VACC's scheduled sale.[2]

At the evidentiary hearing held on the Wells Fargo and VACC relief from stay motions, on January 19, 2018, Wells Fargo, VACC, and the Debtors introduced both the testimony of witnesses and substantial documentary evidence. Wells Fargo called three witnesses: representative Jeffrey Crabtree, Yankee Farm Credit appraiser Robert Guay, and VACC consultant Peter Fitzgerald. All three of these witnesses were well prepared, cogent, professional, credible, and persuasive. The Debtors called Mr. Simpson as their principal witness. He testified clearly, directly, credibly, and passionately about why he believed allowing this reorganization case to proceed was in the best interest of all parties – including VACC and Wells Fargo – and justified denial of the creditors' pleas for enforcement of the waiver and relief from stay. The Debtors also presented the testimony of Justin Poulin, who unequivocally affirmed that he remained interested in purchasing some of the Debtors' property. At the conclusion of that hearing, the Court took the two relief from stay motions under advisement.

Wells Fargo sets forth several grounds for relief from stay in its Motion, but its primary argument is the Debtors waived their right to oppose a relief from stay motion filed by Wells Fargo in the Agreement. As the enforceability of that prepetition waiver is the threshold question at this time, the Court enters this order to address it.

In connection with this waiver argument, both Wells Fargo and the Debtors rely on In re Frye, 323 BR 396 (Bankr. D. Vt, 2005), which presented a very similar fact pattern and raised the same waiver argument upon which Wells Fargo relies here. In Frye, the debtor was a farmer who (i) filed a bankruptcy reorganization case after significant litigation with a mortgagee, (ii) engaged in further litigation with that creditor in the bankruptcy case, (iii) entered into a forbearance settlement agreement with the mortgagee

[2] Peoples also filed a motion for relief from stay in this case, evidencing their continuing dispute with the Debtors, as well as a motion for abstention, based on the status of its lawsuit in state court. On December 8, 2017, this Court entered Orders (doc. ## 25, 26) – with the Debtors' consent – granting both of Peoples motions so it could continue the proceedings in state court for the purpose of fixing the amount of Peoples' claim against the Debtors. (Peoples filed a proof of claim in this case asserting a secured claim in the amount of $86,601.95, see claim # 4-1.) The FSA also continued its litigation against the Debtors in the instant case which resulted in a stipulation, which this Court approved on January 4, 2018 (doc. # 30), authorizing the FSA to offset the Debtors' claim for government payments against the Debtors' prepetition liability to the FSA. (FSA filed a proof of claim asserting a secured claim in the amount of $499,032.33, see claim # 5-1.)

in which the debtors waived their right to the protections of the automatic stay as against mortgage foreclosure in any future bankruptcy filing, (iv) voluntarily dismissed the bankruptcy case, (v) filed a subsequent bankruptcy reorganization case after a default under the agreement, (vi) contested the mortgagee's right to relief from stay in that case, and (vii) challenged the enforceability of the prepetition waiver in the second bankruptcy case. Id. Although the Fryes filed chapter 13 cases and the Simpsons filed chapter 12 cases, the Debtors have presented no case law or convincing argument that this difference is legally dispositive, and Court does not find it to be a significant consideration when assessing the enforceability of a prepetition waiver.

In an earlier Frye decision, this Court held that prepetition waivers are not supported by public policy, declared such waivers are neither *per se* enforceable nor self-executing, cautioned they should be considered on a case-by-case basis, see In re Frye, 320 B.R. 786, 790 (Bankr. D. Vt. 2005), and articulated 10 factors a court must consider when determining whether to enforce a prepetition waiver:

(1) sophistication of the party making the waiver;
(2) consideration for the waiver, including creditor's risk and period of time covered by waiver;
(3) effect of enforcement on other parties, including unsecured creditors and junior lienholders;
(4) feasibility of debtor's plan;
(5) whether there is evidence that waiver was obtained by coercion, fraud or mutual mistake of material facts;
(6) whether enforcement will further legitimate public policy of encouraging out-of-court restructurings and settlements;
(7) whether there appears to be a likelihood of reorganization;
(8) extent to which the creditor would be prejudiced if waiver were not enforced;
(9) proximity in time between date of waiver and date of debtor's bankruptcy filing and whether there was any compelling change in debtor's circumstances in interim; and
(10) whether debtor has equity in property and creditor is otherwise entitled to relief from stay.

Id., at 791; accord LSREF2 Baron, LLC v. Alexander SRP Apts., LLC (In re Alexander SRP Apts., LLC), 2012 Bankr. LEXIS 2466 (Bankr. S.D. Ga. Apr. 21, 2012); In re 4848, LLC, 490 B.R. 343 (Bankr. E.D. Wash. 2013); In re BGM Pasadena, LLC, 2016 U.S. Dist. LEXIS 72825 (Bankr. C.D. Cal. June 2, 2016). The Court also determined in that case that once the debtor's prepetition waiver of protections for the automatic stay has been established, the burden is on the party opposing enforcement of the waiver, i.e., the debtor, to demonstrate that it should not be enforced, citing Sally S. Neely, Pre–Petition Waivers of the Automatic Stay: Are they Enforceable?, SHO54 ALI–ABA 99 (2003) and In re B.O.S.S. Partners I, 37 B.R. 348, 351 (Bankr.M.D.Fla.1984). Id. See also Gregory G. Hesse and Jesse T. Moore, Prepetition Waivers of the Automatic Stay: Lender Satisfaction Not Guaranteed, 22 J. Bankr. L. & Prac. 4 Art. 1 (2013) and

Alexander SRP Apts., 2012 Bankr. LEXIS 2466 at *15. The Debtors do not dispute they signed the settlement agreement with Wells Fargo or that it contained a waiver of their right to contest relief from stay.

Thus, in this case, the salient question is whether the Debtors met their burden of proof with respect to the ten Frye factors, as is necessary to deny Wells Fargo's request for enforcement of the waiver. At the evidentiary hearing, which was three and half hours in duration, Mr. Simpson testified for one hour, and much of his testimony centered on the history of his farming operations and disputes with the various secured creditors. Very little of his testimony focused squarely on the ten Frye factors. In particular, Mr. Simpson did not testify at all about whether he felt he lacked the sophistication necessary to enter into the waiver agreement (factor # 1), or whether he believed Well Fargo obtained the waiver through coercion, fraud or mutual mistake of material facts (factor # 5). With regard to the tenth factor, whether he and his wife have equity in their property and Wells Fargo is otherwise entitled to relief from stay, Mr. Simpson opined that if their debt to Wells Fargo was only $900,000 (as it would have been, as of the petition date, if there had not been a default), and if the contract of sale they had at the time they filed this case was effective (which subsequently fell through), then the Debtors would have equity in the subject property. However, the facts of the case do not support either of the two premises upon which he relied. Therefore, the Court finds the Debtor's testimony on this point to be unconvincing. Moreover, the Debtors' failure to address the first and fifth factors leaves the Court to conclude they weigh in favor of Wells Fargo. This is particularly so since experienced counsel represented Mr. and Mrs. Simpson in the negotiations with Wells Fargo at the time the settlement agreement was executed, and while Mr. Simpson testified he had not understood that a foreclosure by another creditor would trigger the default provisions, he did not testify he did not know about or understand the waiver provision of the Agreement.

The Debtors did argue, and Mr. Simpson did describe, his perspective on the detrimental effect enforcement of the prepetition waiver would have on other parties, including unsecured creditors and junior lienholders (factor # 3); put forward his proposal to sell significant portions of his land, and restructure his operations, to ensure the feasibility of his plan (factor # 4); and his strong belief that he and his wife would be able to effectuate an effective reorganization (factor # 7). However, the record with regard to these three critical factors is scant. Neither Mr. Simpson in his testimony, nor his attorney in her memorandum of law, presented any specific data or projections showing either that the Debtors had satisfied all regulatory and Vermont Land Trust requirements to sell the lands in question, or that the Debtors had contracts in place for the custom work or land leases to generate regular income sufficient to make the payments proposed in their chapter 12 plan. Mr. Simpson's descriptions of the efforts, hopes, and expectations he had with respect to the funding of the plan were inadequate to establish the feasibility or reorganization factors.

Some of the Frye factors, especially the second, sixth, eighth, ninth, and tenth, are more legal than factual in nature so the Court looks to the Debtors' memorandum of law (doc. # 39) to assess whether the Debtors' arguments prevail on those points.[3] The second factor questions whether Wells Fargo gave the Debtors sufficient consideration for the waiver and opens for scrutiny the period of time covered by waiver. The Debtors' legal argument on this point is only that "the Debtors received no consideration for the waiver" and posits that it was "a mandated term by Wells Fargo that harmed the Debtors by restricting their bankruptcy rights." Id. at p. 16. This argument fails as the record – and in particular the plain language of the Agreement – detail significant consideration the Debtors received in exchange for the waiver, including forbearance in the foreclosure action and the opportunity to satisfy the Wells Fargo debt at a deep discount.

Turning to the sixth factor, how denying enforcement of the Debtors' prepetition waiver furthers the legitimate public policy of encouraging out-of-court restructurings and settlements, the Debtors merely cite In re Cheeks, 176 B.R. 817, 818 (Bankr. D. S.C., 1994), and posit that the most appropriate forum for resolving the issues between Wells Fargo and the Debtors "in this complex and large reorganization effort" is the Bankruptcy Court, id., p. 16–17. This is unconvincing. The Debtors had the opportunity to try to reorganize in the 2012 case, and although there has been a compelling change in their circumstances since that case was dismissed, they have failed to set forth any basis for a determination that allowing them to be relieved of the promise they made in the Agreement will foster the strong public policy in favor of out of court settlements.

With regard to the ninth factor, the memorandum of law indicates that the time between the execution of the waiver and the filing of the instant bankruptcy case was "just shy of one year" and that "the Debtors have created a feasible transition plan for their farm by eliminating the dairy operation and implementing new uses [for the property] which . . . [constitutes] a compelling change of circumstance," id. at p. 17. The Court finds Mr. Simpson's testimony and the record in this case corroborate this assertion and thus the Debtors prevail on the ninth factor.

Finally, there are the related factors of prejudice to Wells Fargo and whether the Debtor has equity in the subject property or is otherwise entitled to relief from stay (the eighth and tenth factors). The Debtors' brief asserts Wells Fargo would not be prejudiced if the Court declined to enforce the waiver

[3] The Debtors' memorandum of law recites and examines each of the Frye factors, though the thrust of argument appears to be that prepetition waivers in chapter 12 are unenforceable *per se* and that no relief from stay should be granted without a "complete evidentiary hearing analyzing the criteria for such [a] motion" (see doc. # 39, p. 11).The Court held "a complete evidentiary hearing" on January 19th at which the Debtors had an opportunity to present evidence on both the criteria for relief from stay set out in § 362(d) and the particular issue of whether the prepetition waiver is enforceable. It is the record from that hearing upon which the Court relies in deciding both issues.

(factor # 8) because Wells Fargo is adequately protected by the equity in the property, id. This argument fails because it is premised on flawed rationale, as to both the value of the property and the amount due to Wells Fargo. The Debtors were unsuccessful in casting any doubt on the either the methodology or conclusions of the thorough and professional appraisal Wells Fargo presented. It valued the Debtors' property at $2.3 million. By contrast, the Debtors' competing, higher estimate of value is unpersuasive both because the Debtor failed to present detailed information to support it and because it includes property which is subject to the Wells Fargo leases – contrary to this Court's order in the 2012 case (doc. # 52 in case # 12-10564). The Debtors' computation of equity also hinges on a Wells Fargo debt of $900,000 – contrary to the Agreement and Wells Fargo proof of claim that *prima facie* establish the amount the Debtors owed Wells Fargo at the time this case was filed is in excess of $1.5 million. Taken together, these facts and findings demonstrate Wells Fargo met its burden of proof under § 362(g)(1) and is entitled to relief from stay due to the lack of equity in the property, and also defeat the Debtors' arguments with respect to the tenth factor. Since the only argument the Debtors offer with respect to the lack of prejudice depends upon there being equity in the property, they have failed to meet their burden with respect to the eighth factor as well.

Based upon this analysis of the facts proven at the January 19th hearing, the record in this case, the controlling law, and the ten Frye factors, the Court finds the Debtors executed a valid prepetition waiver of their right to contest the Wells Fargo motion for relief from stay filed in this case and have failed to meet their burden on proof to preclude Wells Fargo from enforcing that waiver.

The foregoing constitutes the Court's findings of fact and conclusions of law pertinent to the Wells Fargo motion for relief from stay, generally, the Wells Fargo request for enforcement of the Debtors' prepetition waiver, in particular, the VACC motion for relief from stay, and the Debtors' opposition to both creditors' motions, all of which were addressed at the January 19, 2018 hearing.

Accordingly, IT IS HEREBY ORDERED the Debtors' prepetition waiver in favor of Wells Fargo, set forth in the Agreement, is enforceable.[4]

SO ORDERED.

Colleen A. Brown

January 25, 2018
Burlington, Vermont

Colleen A. Brown
United States Bankruptcy Judge

[4] The Court will enter a separate order granting Wells Fargo Leasing, Inc.'s motion for relief from stay, based upon the findings and conclusions set forth in this order.