UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

SNOW ROAD FARM HOLDINGS, LLC,	Case No. DK 12-04947
	Chapter 11
Debtor.	Hon. Scott W. Dales

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ORDER REGARDING MOTION
FOR SINGLE ASSET REAL ESTATE DETERMINATION

PRESENT: HONORABLE SCOTT W. DALES
United States Bankruptcy Judge

On October 3, 2012, the court held a hearing in Grand Rapids, Michigan to consider the motion of creditor BMO Harris Bank N.A. (the "Bank") for an order declaring that the only asset of Chapter 11 Debtor Snow Road Farm Holdings, LLC (the "Debtor") is "single asset real estate" ("SARE") within the meaning of 11 U.S.C. § 101(51B). The Debtor opposed the Motion. The court considered the parties' written submissions and after hearing oral argument, announced its intention to deny the Motion.

Although the parties did not furnish the court with a record other than their briefs, an internet advertisement, and typical loan documents, they apparently agree that the Debtor, in fact, owns a single asset consisting of real estate commonly known as 2834 East Snow Road, Berrien Springs, Michigan (the "Property"). The Property is improved with a single (and substantial) cottage that, before the petition date, the Debtor's members used for recreational purposes, essentially as a second residence. In order to generate income from the Property after hopes of further development had faded, the Debtor occasionally rented it out. The parties

apparently agree, too, that the Debtor conducts no business other than its ill-fated effort to develop the parcel as a "vacation home," according to the Construction Loan Agreement attached to the Debtor's response, and the occasional rental.

The issue for decision is whether the Property qualifies as SARE, a term the Bankruptcy Code defines as follows:

> The term "single asset real estate" means real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto.

11 U.S.C. § 101(51B). The definition depends to some extent on a debtor's use of the property, but also on the nature of the property. In other sections of the Bankruptcy Code, Congress has used the term "residence" or "principal residence" to differentiate property according to its specific use,[1] but the SARE definition section leads the court to consider the nature of the property rather than, necessarily, its owner's use. Congress evidently intended to exclude small residential projects from the operation of the statute.

In general and as a practical matter, the court will not regard a case as a SARE case unless the debtor identifies itself in that manner on the petition or a creditor successfully seeks such a determination, presumably with an eye towards gaining an advantage under 11 U.S.C. § 362(d)(3). Accordingly, the court determined that the Bank, as the party seeking to take the Debtor's case out of the usual category, has the burden of proof on the issue.

As noted above, the "proofs" on the motion were sparse, as the parties did not request a formal evidentiary hearing. First, the Construction Loan Agreement identifies the project as one

[1] *See, e.g.,* 11 U.S.C. §§ 522(d)(1) & 1322(b)(2).

involving a "vacation home," similarly fortifying the court's impression of the Property as residential in nature. Although the marketing information shows that the Debtor is offering the Property as a vacation rental, the statements of Debtor's counsel during the hearing, not contradicted by the Bank, suggest that several individuals or families banded together and pooled their resources (and those of the Bank) to build a vacation home. They built the structure primarily for personal use among the members, with the hope of subdividing the Property and presumably improving it with the construction of similar properties —a plan that never came to fruition. Counsel reported, again without contradiction, that the rental activity was incidental and sporadic.

For what it is worth, the photograph of the Property included in the advertisement makes it appear residential in nature, as opposed to, commercial or industrial. Certainly, the Debtor does not argue that the Property is being used, or was ever used, as anyone's principal residence; instead, counsel argued that the Debtor's members intended simply to have a vacation home and then perhaps to develop it further.

The Bank's arguments regarding the policy undergirding the SARE definition and its use in Section 362(d)(3) are compelling and were capably presented during the hearing, as were the Debtor's arguments about the residential character of the Property. Without any particularly persuasive authority treating comparable properties as SARE, the parties' competing arguments are in equipoise. The decision, therefore, depends upon the locus of the burden of proof. As noted above, the Bank must bear this burden and, although the question is close, the court is not persuaded that the Property qualifies as SARE given that it consists of a single unit of real estate that appears to be residential in nature.

As the court intimated during the hearing, the SARE definition is designed for the limited of purpose of combating the delays associated with a hopeless reorganization charade. As Judge Perlman noted:

> … in enacting §§ 101(51B) and 362(d)(3), providing for extraordinary expedition in single asset real estate cases, Congress was motivated by a desire to accord relief in a particular familiar bankruptcy situation. That situation is where the owner of an encumbered building is attempting to avert loss of his building to his major lender who is grossly undersecured, and where there is no real hope that the owner can come forth with a viable confirmable Chapter 11 plan. The present situation, in any case, has not been shown to fit within that scenario.

In re Kkemko, Inc., 181 B.R. 47, 51 (Bankr. S.D. Ohio 1995) (marina reorganization is not an SARE case).

Today's decision does not portend a willingness to tolerate delay and futility, and given the court's experience with the parties' counsel, the court does not anticipate either problem in this case. If, however, the Bank is dissatisfied with the pace or prospect for reorganization, it has numerous levers it can pull without relying on the short-circuit of 11 U.S.C. §§ 101(51B) and 362(d)(3).

NOW, THEREFORE, IT IS HEREBY ORDERED that the Motion (DN 36) is DENIED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon A. Todd Almassian, Esq., Perry G. Pastula, Esq., Michael T. Benz, Esq., and the United States Trustee.

END OF ORDER

IT IS SO ORDERED.

Dated October 5, 2012

Scott W. Dales
United States Bankruptcy Judge