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**SINGLE ASSET REAL ESTATE AND DEVELOPMENT
PROJECTS:
THE *KARA HOMES* MISTAKE**

MARSHALL E. TRACHT

The Kara Homes decision held that various affiliates of Kara Homes, Inc., each of which owned a separate real estate project, were “single asset real estate” (“SARE”) cases under the Bankruptcy Code’s definition. According to the author of this article, the designation as single asset real estate substantially increased the difficulty faced by the debtors in maintaining their reorganization efforts, and has given lenders and their counsel a significant amount of comfort. However, the definition runs against the actual wording of the Bankruptcy Code, the intent underlying the SARE provisions, and the political winds. It should, and may well, be reversed in subsequent cases.

In the real estate downturn of the late 1980s and early 1990s, bankruptcy posed a serious threat to commercial mortgage lenders, often hobbling their ability to effectively enforce their rights to the mortgaged property. This time around, however, changes in the law¹ and in the structuring of transactions² have significantly curtailed the problems lenders face in foreclosing on many properties and the changed framework is entitled to a great deal of praise. However, in a 2007 case, *In re Kara Homes*, the court misinterpreted the definition of “single asset real estate,” taking these protections a step too far by holding the separate project subsidiaries of a development

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company to be single asset real estate companies. Unfortunately, a number of other courts have followed *Kara Homes*, and this faulty interpretation threatens to become settled law, imposing an inappropriate and undue burden on many troubled development and construction projects.³

In *Kara Homes*,⁴ the bankruptcy court held that various affiliates of Kara Homes, Inc., each of which owned a separate real estate project, were “single asset real estate” (“SARE”) cases under the Bankruptcy Code’s definition. As discussed herein, the designation as SARE substantially increased the difficulty faced by the debtors in maintaining their reorganization efforts. Lenders and their counsel have taken a significant amount of comfort from the decision (and following cases) — but it runs against the actual wording of the Code, the intent underlying the SARE provisions, and the political winds. It should, and may well, be reversed in subsequent cases.

THE KARA HOMES CASE

Kara Homes, Inc. is a residential developer in New Jersey, doing both single family and condominium projects. It establishes separate entities (collectively, “the Affiliates”) to hold, develop and sell the real estate for each project, apparently using workers employed by Kara Homes and detailed out to the Affiliates as needed. In late 2006, Kara Homes and the Affiliates all filed for Chapter 11 protection. Given their interrelationships, the bankruptcy court ordered that the cases be jointly administered, but did not order substantive consolidation. On the bankruptcy petitions, the Affiliates were identified as single asset real estate entities.

Shortly thereafter, the Affiliates filed complaints against the construction lenders on the various projects, seeking declaratory judgment that they were not actually single asset real estate entities. On cross motions for summary judgment, however, the court held that they were SARE entities, as defined in the Bankruptcy Code, and thus were subject to the special lender protections in Section 363(d)(3) of the Code.

The debtors argued that they did not fall under the SARE definition because each Affiliate was actively engaged in a substantial business beyond operating the real property. Each had to acquire appropriate land, obtain site approvals, design homes or condominiums for the property, arrange for the

construction, and build common spaces, amenities and roadways.⁵

The court rejected this argument, relying in large part on the test enunciated in *In re Philmont Dev. Co.*⁶ *Philmont* set out a four part test for determining whether a debtor fell within the SARE definition:

Section 101(51B) enumerates four criteria which must exist before a bankruptcy case falls within the scope of Section 101(51B). First, real property constituting a single property or project, other than residential real property with fewer than 4 residential units, falls within the scope of Section 101(51B). Second, that real property must generate substantially all of the income of the debtor. Third, the debtor must not be involved in any substantial business other than the operation of its real property and the activities incidental thereto. Fourth, the debtor's aggregate non-contingent liquidated secured debt must be less than \$4,000,000.⁷

Following this formulation, the *Kara* decision noted that each Affiliate owned a single property or project. Second, the court reasoned, the real property generated substantially all of each Affiliate's income because their only source of income would be sale of the completed residences. The "true point of contention," the court wrote, was whether the debtors' were engaged in any substantial business other than the "operation of its real property and activities incidental thereto."⁸ (The fourth *Philmont* requirement, having secured debt less than \$4 million, was removed from the definition of SARE by Congress in 2005.)

The court's conclusion was that the Affiliates fall within this third prong as well:

The Affiliated Debtors are in the business of constructing and selling single family homes on the parcels of real estate owned by the Affiliated Debtors. In order to build and sell homes, it is often necessary to acquire the land on which to build the homes, and plan the community in which they lie; likewise, it is necessary to market those homes for sale and maintain the properties. All of the activities identified by the Debtors as reflective of "business operations" are merely incidental to the Affiliated Debtors efforts to sell these homes or condominium units and do not

constitute substantial business.... Thus, the Court finds that the Affiliated Debtors fall within the definition of “single asset real estate” debtors and, as such, 11 USC § 362(d)(3) applies.⁹

The *Kara* court misapplied the test in *Philmont*, which did not deal with entities that were developing real property. There were two different classes of debtors in *Philmont*. Philmont Development owned partnership interests in three other partnerships, as well as two undeveloped building lots. The court found that Philmont Development was not SARE because its “purpose is not the operation of real property nor is rental income its direct source of income.”¹⁰ The limited partnerships in which Philmont Development had ownership interests were SARE, however, because the partnerships each owned and managed a series of semi-detached housing. The court determined that while the semi-detached housing might not have been “single property,” it fell within the category of a “single project” for each partnership. Notably, none of the partnerships in *Philmont* were involved in planning, developing, or building any of the properties. Philmont Development would develop the project, which the partnership would then purchase and manage.

THE BANKRUPTCY CODE’S SARE PROVISIONS

Congress originally adopted the added lender protections for SARE bankruptcy cases in 1994, at the urging of lenders who felt that, in the real estate downturn of the late 1980s, many borrowers with no real prospect for reorganization had filed for bankruptcy simply to delay foreclosure and hope for an upturn in the market. The arguments for limiting bankruptcy access for single asset real estate entities were well summarized in the Bankruptcy Review Commission’s 1997 Single Asset Proposals:

SARE cases often serve few recognized goals of Chapter 11. First, confirmation of a plan provides minimal benefit to unsecured creditors. Unsecured trade debt is typically paid after the property is foreclosed, either by the purchaser, who wants to maintain the same services to the property, or by the general partners of the debtor, who remain liable for partnership debts. Second, the bankruptcy does not serve the purpose

of eliminating the destructive race among unsecured creditors. There is typically only one significant asset, the real property, and that is generally fully encumbered by the first mortgage. Third, the debtor often has no equity in the property to preserve. In such cases, the debtor is not trying to preserve a present economic interest, but rather is attempting to retain the property in the hope that its value will increase in the future. Fourth, loss of jobs and going-concern value are generally not at stake in single-asset real estate cases. In the usual case, if a debtor loses the property to a new owner, the new owner operates the property in the same general manner as the debtor, thus preserving the same number of jobs and economic activity in the community.¹¹

The definition of single asset debtors is provided in Section 101(51B) of the Bankruptcy Code:

[t]he 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.

The actual protection for lenders in SARE cases is contained in 11 U.S.C. § 362(d)(3), under which a single asset real estate debtor must, within 90 days of the bankruptcy filing (extendable by the court), either file a plan of reorganization that has a reasonable prospect of confirmation or begin making interest payments to the mortgagee calculated at the nondefault rate of interest.¹²

The mechanics of the rule fit the underlying problem well. Many single asset debtors have no real prospect of reorganization. However, the Chapter 11 creates a delay that may hurt the creditor while allowing the debtor to speculate on an improvement in the real estate market (encouraging as much delay as possible). The proceeding may also allow the debtor to apply rents that have been pledged to the lender as additional security, toward its bankruptcy costs so that, in essence, the lender is paying for the debtor's op-

position to its attempt to enforce its mortgage. Section 362(d)(3) requires that, within 90 days, the debtor must either prove that it has a feasible reorganization plan in prospect or else protect the lender from the harm of delay by paying interest on the debt.

The short deadline makes sense because the reorganization plan for a SARE debtor is a relatively simple affair: with no significant creditors other than the mortgagee and no operations to restructure, there are no complex business questions to resolve or difficult multiparty negotiations to work through. A SARE plan generally amounts to either speculation that future financing or a sale may appear or cramdown of the mortgage debt. Either of these plans is fairly straightforward, so there is much less need than in other cases for a lengthy period in which to develop, negotiate, draft, and propose a reorganization plan.

If the plan is not filed before the deadline, the debtor must begin paying interest to the mortgagee. In most cases, the real estate will not be generating sufficient income to cover its expenses and pay the interest — otherwise the debtor would not have defaulted in the first place. Thus, Section 362(d)(3) basically ensures that if a reorganization plan is not promptly proposed, the entire net operating income from the property will be paid to the lender. Further, the debtor's equity holders will most likely have to contribute capital simply in order to make the interest payments, providing another important disincentive to filing merely to delay foreclosure or to maintain a hopeless case.

THE STATUTORY LANGUAGE AND CONGRESSIONAL INTENT

Whether the SARE provisions apply to development projects is a matter of statutory interpretation. Unfortunately, the Code's definition of single asset real estate is ambiguous. Section 101(51B) defines SARE as "real property ...which generates substantially all of the gross income of a debtor...and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental."

A critical phrase that sheds light on the scope of this provision is "the business of operating the real estate." In *Kara Homes*, the court concluded that the Affiliates were SARE entities because all of their income would come from selling the properties, once developed; but selling real estate is not the

same as “operating” it. One talks about “operating” existing real estate, like a shopping center or office building, but the process of developing or constructing a new project is not typically referred to as “operating the real estate,” nor is selling the developed real estate considered “operating” it. One would certainly not confuse “operating” a farm, a factory, or a car with building and selling it. Thus, the process of development or construction is a “substantial business” other than “operating the real estate.”

The legislative history, sparse though it is, supports this reading. The phrase “real property on which no business is being conducted by the debtor other than the business of operating the real property and activities incidental thereto” dates from a Senate draft of the relief from stay provisions of Section 362(d) for the 1978 Bankruptcy Code.¹³ The language was omitted before passage, only to reappear in the 1994 amendments. However, as was explained when the language was first introduced, the phrase was intended to:

reach the single asset apartment type cases which involve primarily tax shelter investments and for which the bankruptcy laws have provided a too-facile method to relay [sic] conditions, but not the operating shopping center or hotel cases where attempts at reorganization should be permitted.¹⁴

Thus, it was not seen as an all encompassing definition, but one that would capture passive investment vehicles.¹⁵ This emerges, as well, in Section 363(d) (3), which provides that the rents from the property may be used to make payments to the creditor to avoid the lifting of the stay — development projects generally have no rents.

Many courts have commented that in passing the SARE amendments in 1994, Congress was aware of the meaning of the phrase “single asset real estate” from prior case law, and thus the statutory definition should be read with those prior cases in mind.¹⁶ Prior to the SARE amendments, a principal attack on single asset real estate cases was an assertion that the case was filed in “bad faith,” and that there was thus “cause” for the judge to dismiss the case.¹⁷ While the bad faith argument was unsatisfactory to lenders, because it depends on the specific facts and circumstances of every case and because

the standards are vague and inconsistently applied, over time it became a useful tool for sorting out those single asset cases that legitimately belonged in Chapter 11 and those that were abusing the bankruptcy process.

A review of the single asset “bad faith” case law from 1993 and earlier discloses scores of cases of which the drafters of the 1994 amendments would have been aware, very few of which appear to have involved ongoing construction or development — and those few support the view that these types of projects are not the inherently abusive situations that Congress was seeking to address.¹⁸

ACTIVE VERSUS PASSIVE ACTIVITIES

For example, in *One Fourth Street*,¹⁹ the debtor had purchased a 10 story office building and borrowed funds to renovate it. Although the renovations were finished, leasing was slower than expected and the debtor defaulted, subsequently filing for bankruptcy. The court refused to dismiss the case as a bad faith filing, distinguishing the renovation situation from a typical single asset case:

[T]he Debtor operates a business in the conventional sense of the word. The business, which is an ongoing concern, consists of the ownership, lease and management of the office building owned by the Debtor. The building project was undertaken as a rehabilitation and development project. The loan from Florida Federal involved an acquisition and development objective. Neither the Debtor nor Florida Federal anticipated any cash throwoff for the first four to five years of the project. Unfortunately for all parties involved, the Debtor’s timetable for profitability was adversely affected by a softening office rental market. However, the Debtor has made significant progress in leasing up its space despite market conditions.²⁰

The court recognized the inherent difference between renovating and re-leasing a building and simply owning and managing the property. The former is an ongoing active business, justifying an opportunity to reorganize, while the latter is essentially a passive investment.²¹

The motion to dismiss a bad faith filing was granted in *In re Rad Proper-*

ties,²² where the debtor had been trying to develop single family lots for sale. It filed for bankruptcy on the eve of foreclosure, having been unable to complete development even after full funding of the development loan. It had also been largely unsuccessful in selling the lots it had completed. The court held that the filing was in bad faith for a combination of reasons. First, there was no development operation to rehabilitate, because the development company consisted solely of one person.²³ Second, the debtor filed the day before summary judgment would have been entered against it in a state foreclosure action, “strong evidence,” the court said, that the debtor filed “merely to delay or frustrate the legitimate efforts of its secured creditors.”²⁴ Third, the debtor had no realistic chance of reorganizing successfully.²⁵ Not surprisingly, the finding that there was no hope for reorganization and that the filing was merely to delay and frustrate the mortgagees led to a “bad faith” dismissal.²⁶

We could expect the same result today in a construction or development case where the loan had been fully funded and the project was incomplete and unsalvageable. It does not follow, of course, that Congress intended the debtor to be subject to the requirements of Section 363(d)(3).

The courts have generally recognized the distinction between active and passive holdings in determining SARE status. In the recent Fifth Circuit decision in *In re Scotia*, the court quoted with approval the following language from a district court case:

In order to be single asset real estate, the revenues received by the owner must be passive in nature; the owner must not be conducting any active business, other than merely operating the real property and activities incidental thereto. Under the prior jurisprudence, those passive types of activities are the mere receipt of rent and truly incidental activities such as arranging for maintenance or perhaps some marketing activity, or... mowing the grass and waiting for the market to turn.²⁷

A debtor engaged in developing a property is not engaged in “the mere receipt of rent and truly incidental activities.” The single asset paradigm just does not fit.

Bankruptcy experts who have considered single asset real estate cases have typically ignored projects under development or in construction because they

do not generally raise the same concerns as passive investment vehicles. Consider, for example, this description of the “paradigm of the single asset case”

1. The debtor is an investment vehicle, usually a partnership, but occasionally a corporation, that was formed for the purpose of holding the single asset as an investment, rather than to operate an ongoing business. As such, the demise of the debtor will not mean that a business fails and that employees lose their jobs, but rather that the particular owners of the partnership or corporation will lose their equity as creditors take over the asset.
2. The asset owned by the debtor is almost always real estate. The real estate is generally income producing, given the obvious and generally insurmountable difficulties of reorganizing a nonincome-producing asset.
3. The immediate cause of the filing of the case is usually a default in one or more secured obligations. Unsecured obligations, typically trade debt arising from the operation of the single asset, are much less significant and generally are a small fraction of the debtor’s total obligations. The case usually centers around a dispute with one or more secured creditors, because unsecured creditors (and in some cases, junior secured creditors) have little or no hope of recovering on their claims absent a successful reorganization.
4. The debtor’s default in its secured obligations is generally the result of a recession or other cause that leads to a reduction in occupancy and rentals, leaving the debtor with too little cash flow to service its secured debt.²⁸

Similarly, the Bankruptcy Review Commission (as prominent a gathering of bankruptcy experts as you will find) spent 66 pages on the issues raised by single asset real estate and proposals for further reforms to the SARE provisions. It gave examples of difficult situations and whether they should fit under the definition;²⁹ but the report does not contain even one word about development projects or properties under construction, and every SARE is about a completed and operating asset (office building, factory, strip shopping center, regional shopping mall).

Kara seems to draw a line between real estate businesses and companies that use real estate in some other line of business. However, the distinction

in the Code is actually between companies that do nothing but “operate real estate,” and active businesses,³⁰ the same distinction drawn in *One Fourth Street*. The value of the former is largely inherent in the asset, and little or no value is lost through foreclosure, so the costs and delay of Chapter 11 serve no purpose. An active development or construction project, however, requires Chapter 11 to preserve going concern value for the benefit of all creditors and other stakeholders.

Note that the requirements of Section 362(d)(3) do not make sense in the development or construction context. The SARE amendments have addressed lender complaints about unjustified bankruptcy cases. However, Congress did not bar SARE entities from filing for bankruptcy. It provided that a lender would be entitled to relief from the automatic stay, to proceed with state foreclosure, if a SARE debtor did not promptly either file a realistic plan or commence interest payments. This was a critical victory for lenders, which otherwise might spend months or years without receiving payments on the debt despite the fact that the debtor was collecting rents from the property — and which might even see the rents used to finance the bankruptcy case and reorganization efforts it opposes.³¹

This protection, which prevents diversion of the rents, makes sense for operating properties. However, if applied to development projects, the payment requirement is an instant death knell for the bankruptcy case. The debtor would find itself required to make interest payments despite the fact that the project does not yet have any income — a requirement that will be impossible for almost any development project to meet. This is recognized in the very structure of most development and construction loans, which do not require any loan payments until the project is finished or provide for the lender to fund the payments to itself through an interest reserve set up from the construction loan funds. It would be odd for the bankruptcy requirement for a debtor seeking to reorganize to impose harsher payment terms than the loan documents themselves.

THE POLICY ARGUMENTS

The fundamental objection to single asset Chapter 11 filings is that there is no bankruptcy justification for the proceeding — the case does not involve

preserving or enhancing going concern value, or preserving jobs, or maximizing the recovery for creditors. Rather, it is a simple battle between the owner and the mortgage lender for rights to an asset of fixed value. Whoever owns the property, space will be leased, rent will be collected, and expenses will be paid. There is little if any value in the *management* of the asset (a service that is easily purchased, in any case); the value is in the *ownership* of the asset. This is true if the property is a shopping center, office building, apartment complex, warehouse, or even undeveloped land. In such a circumstance, there is no justification for delaying the lender's right to foreclose or for incurring the costs of a bankruptcy proceeding.

The same cannot, however, be said of a real estate development project. In a development project or building construction the developer may bring critical skills and personal, professional and contractual relationships to the project. Loss of the developer is likely to mean delays, cost overruns, and the loss of real economic value as a new manager takes over a complex process of interrelated activities. This loss of economic value means that there is likely to be less available to pay creditors, as well as a greater potential liability for any guarantors. These are the precisely the types of losses that bankruptcy is designed to prevent.

Moreover, many development projects are not simple two party disputes, as true single asset cases usually are. A development project may involve contracts with numerous parties to provide takeout financing, architectural services and construction management, construction materials and labor, leasing and brokerage services. It may include obligations to the local government for infrastructure development. It will often involve the rights of tenants who have signed leases for the space once it is developed or buyers who have signed purchase agreements. Failure of the development may mean large losses not just for the developer and lender, but also for numerous suppliers and contractors whose rights may need to be protected through a reorganization proceeding.³²

In many cases, a development or construction loan made to the debtor will have been guaranteed by the individual(s) or development company behind the project. This means that the resolution of the single asset case is inseparable from the reorganization of the developer itself. We see precisely this reasoning in the recent ruling in *General Growth Properties*.³³ General

Growth is one of the nation's largest real estate firms, developing and operating major shopping centers around the United States. The bankruptcy proceeding included 388 related entities that had filed, many of which had been established to own and operate a specific project. While the case did not discuss whether these entities were SARE, the court denied creditors' motions to dismiss the filings by solvent subsidiaries as "bad faith" by looking to the interests of the corporate group as a whole.³⁴

A similar analysis in *Kara Homes* would have recognized that Kara Homes (the developer) and the Affiliates are part of a business operation that must be considered as a whole. While the lenders wanted to count on a "bankruptcy remote" structure to insulate themselves from the cost and delay of a reorganization proceeding, removing the individual projects causes the piecemeal dismemberment of an operating business enterprise. Neither the Affiliates nor Kara Homes would likely be worth as much without the others. And in all probability, the lenders advanced their funds in reliance on Kara Homes' reputation and overall financial strength, in addition to the specific collateral, expecting that Kara Homes would ensure the successful development and the ultimate sales or refinancings that would pay them back.

Considering the interest of the overall enterprise, rather than looking at each debtor in isolation, is consistent with other examinations of the SARE provisions and their purposes. The Bankruptcy Review Commission, for example, stated that

[w]hether the debtor uses real property in an active business should be viewed in terms of economic substance rather than the form of ownership. Thus, where a debtor conducting an active business holds title to the real property used in that business through a separate entity, the entity holding the real property should not be considered a SARE debtor.³⁵

While the authors of the Commission report do not appear to have been thinking about a development company (as noted previously, the report seemed to assume, *sub silentio*, that all SARE cases involve already completed properties), the reasoning applies precisely to a case like *Kara Homes*.

CONCLUSION

The *Kara Homes* decision is troubling because it places form above substance, allowing creditors to dismember an ongoing real estate development business in a piecemeal fashion — exactly what bankruptcy is designed to prevent. This is not what Congress intended when it provided extra protections for mortgagees whose debtors were solely engaged in “operating the real estate.” We can see that not only from the language, but from the very nature of the relief provided — relief that makes sense for debtors holding operating properties, but not for debtors whose properties are under construction or development.

Recognizing that development projects do not fall within the definition of SARE does not leave the lender without protections. It can seek to have the case dismissed as having been filed in bad faith, or to have the automatic stay lifted under Section 362(d)(2) because the debtor lacks equity and has no reasonable prospect for reorganization, if those things are true. If they are not true, it is still entitled to adequate protection of its security interests and to a powerful role in the reorganization process. On the other side, however, if the debtor does have the prospect of successfully reorganizing the project by obtaining financing and completing development or construction, for the benefit all the involved parties, it will have its opportunity to do so without the unduly short deadline or unrealistic payment obligations imposed by Section 362(d)(3).

NOTES

¹ Primarily the passage of the single asset real estate provisions of the Bankruptcy Code, 11 U.S.C. §§ 101(51B), 362(d)(3), discussed below.

² There are two primary changes in structuring that have had a significant impact. The first is the move to using “bankruptcy remote” entities to hold the real estate. See generally Michael D. Fielding, *Preventing Voluntary and Involuntary Bankruptcy Petitions by Limited Liability Companies*, 18 Bankr. Dev. J. 51 (2001); *Matter of Global Ship Systems, LLC*, 392 B.R. 193 (Bankr. S.D. Ga. 2007) (involuntary case dismissed as having been filed in bad faith in part because petition was an attempt to avoid LLC provisions designed to allow creditor to block a bankruptcy filing); but see *In re General Growth Properties*, 409 B.R. 43 (Bankr. S.D.N.Y. 2009) (declining

to dismiss cases as bad faith filings despite the fact that, on the eve of filing for bankruptcy, debtor LLCs replaced “independent managers” which, under the Operating Agreements, were required to “consider only the interests of the Company, including its respective creditors” in voting on any proposal to file for bankruptcy). The second is the widespread adoption of nonrecourse carveouts and springing guaranties. See generally John C. Murray, *Exploding and Springing Guaranties*, in MODERN REAL ESTATE TRANSACTIONS 2009 (SR001 ALI-ABA 1321) (2009); Marshall E. Tracht, *Will Exploding Guaranties Bomb?*, 117 Bank. L.J. 129 (2000).

³ Courts following *Kara Homes* include: *In re MTM Realty Trust*, 2009 WL 612147 (Bankr. D.N.H. 2009); *In re Vargas Realty Enterp. Inc.*, 2009 WL 292958 (Bankr.S.D.N.Y. 2009); *In re Web MTN, LLC*, 207 WL 2746894 (Bankr. E.D. Tenn. 2007); *In re ACA Real Estate LLC*, 2008 WL 4899024 (Bankr.M.D.N.C. 2008); *In re Triumph Inv. Group, Inc.*, 2009 WL 2916986 (Bankr.E.D.Pa. 2009).

⁴ *In re Kara Homes, Inc.*, 363 B.R. 399 (Bankr. D.N.J. 2007).

⁵ *Id.* at 402-03.

⁶ *In re Philmont Dev. Co.*, 181 B.R. 220 (Bankr. E.D. Pa. 1995).

⁷ *Id.* at 223.

⁸ 363 B.R. at 405.

⁹ *Id.* at 406.

¹⁰ 181 B.R. at 223 fn 1.

¹¹ See National Bankruptcy Review Comm’n, National Bankruptcy Review Commission Report, Ch. 2: Business Bankruptcy, Single Asset Proposals (Oct. 20, 1997) at 673 (“BRC Report”).

¹² Section 362(d)(3) reads:

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—

* * *

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that—

(i) may, in the debtor’s sole discretion, notwithstanding section 363 (c)(2), be made from rents or other income generated before, on, or after the date

of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate;....

¹³ For a discussion of the legislative history, see H. Miles Cohn, *Good Faith and the Single-Asset Debtor*, 62 Am. Bankr. L.J. 131 (1988).

¹⁴ *Id.* at 138, citing S.REP. NO. 989, 95th Cong., 2d Sess. 53 (1978).

¹⁵ See H. Miles Cohn, *Single Asset Chapter 11 Cases*, 26 Tulsa L.J. 523, 526-27 (1991).

¹⁶ See, e.g., *In re Scotia*, 508 F.3d 221, 223-24 (5th Cir. 2007).

¹⁷ Under Bankruptcy Code Section 1112(b), a bankruptcy case can be dismissed "for cause, including" a list of various specific factors. Courts have generally held that bad faith filing provides "cause" for dismissal.

¹⁸ See, e.g., *In re Carolin Corp.*, 886 F.2d 693 (4th Cir. 1989) (existing 80,000 square foot industrial building); *In re Phoenix Piccadilly, Ltd.*, 849 F.2d 1393, 1395 (11th Cir. 1988) (apartment complex); *In re Natural Land Corp.*, 825 F.2d 296 (11th Cir. 1987) (unimproved pasture land); *In re Little Creek Dev. Co.*, 779 F.2d 1068, (5th Cir. 1986) (undeveloped land); *In re Albany Partners, Ltd.*, 749 F.2d 670, 674 (11th Cir. 1984) (operating hotel); *In re Thirtieth Place, Inc.*, 30 B.R. 503 (9th Cir. B.A.P. 1983) (land intended for development, but no development started); *In re Del Rio Dev., Inc.*, 35 B.R. 127 (9th Cir. B.A.P. 1983); *In re 441 Miami Gardens Drive Partnership*, 154 B.R. 354 (Bankr. S.D. Fla. 1992) (shopping center); *Pleasant Pointe Apartments, Ltd. v. Kentucky Housing Corp.*, 139 B.R. 828 (W.D. Ky. 1992) (completed housing project); *In re Tampa Medical Tower L.P.*, 145 B.R. 99 (Bankr. M.D. Fla. 1992) (office building); *In re Colonial Daytona L. P.*, 144 B.R. 924 (Bankr. M.D. Fla. 1992) (apartment complex); *In re Punta Gorda Assoc.*, 143 B.R. 281 (Bankr. M.D. Fla. 1992) (ground lease under hotel); *In re 441 Miami Gardens Drive Partnership*, 154 B.R. 354 (Bankr. S.D. Fla. 1992) (shopping center); *In re Denver Investment Co.*, 141 B.R. 228 (Bankr. N.D. Fla. 1992) (partial interest in a shopping center); *In re Maricamp Square Associates, Ltd.*, 139 B.R. 554 (Bankr. M.D. Fla. 1992) (shopping center); *In re Club Tower L.P.*, 138 B.R. 307 (Bankr. N.D. Ga. 1991) (high-rise apartment building); *In re Panache Development Company, Inc.*, 123 B.R. 929 (Bankr. S.D. Fla. 1991) (undeveloped ocean front property); *In re The Miracle Church of God in Christ*, 119 B.R. 308 (Bankr. M.D. Fla. 1990) ("a tract of real property"); *Germania Bank v. Lindbergh Plaza Assoc., L.P. (In re Lindbergh Plaza Assoc., L.P.)*, 115 B.R. 202 (Bankr. E.D. Mo. 1990) (shopping center); *Matter of Oakbrook Village, Inc.*, 108 B.R. 838 (Bankr. S.D. Ga. 1989) (apartment complex); *In re Metro, Ltd.*, 108 B.R.

684 (Bkcty.D.Minn. 1988) (commercial building); *In re Marion Street Partnership*, 108 B.R. 218 (Bankr. D. Minn. 1989) (apartment building); *In re Club Candlewood Assoc., L.P.*, 106 B.R. 752 (Bankr. N.D. Ga. 1989) (50 building apartment complex); *In re Sarasota Plaza Associates Ltd. Partnership*, 102 B.R. 257 (Bankr. M.D.Fla.1989) (office building); *In re Garsal Realty, Inc.*, 98 B.R. 140 (Bankr. N.D.N.Y.,1989) (apartment complex); *In re Park Avenue Partners Limited Partnership*, 95 B.R. 605 (Bankr. E.D. Wis. 1988) (apartment complex); *In re Mill Place Ltd. Partnership*, 94 B.R. 139 (Bkcty. D.Minn.1988) (commercial building); *In re North Redington Beach Assoc.*, 91 B.R. 166, 169 (Bankr. M.D.Fla.1988) (hotel); *In re Oakgrove Village, Ltd.*, 90 B.R. 246, 249 (Bankr. W.D.Tex.1988); *In re Brandywine Associates, Ltd.*, 85 B.R. 626 (Bankr. M.D.Fla.1988) (apartment complex); *In re Anderson Oaks (Phase I) Ltd. Partnership*, 77 B.R. 108, 111 (Bankr. W.D.Tex.1987) (apartment complex); *Matter of Southwest Dev. Corp.*, 76 B.R. 196 (Bankr. M.D.Fla. 1987) (apartment building); *Stage I Land Co. v. HUD*, 71 B.R. 225 (Bankr.D.Minn.1986) (housing project); *In re Sar-Manco, Inc.*, 70 B.R. 132 (Bankr.M.D.Fla.1986) (mobile home park); *In re Jay M. Weisman Irrevocable Childrens Trust of 1981*, 62 B.R. 286 (Bankr.M.D.Fla.1986) (apartment building); *In re Victory Constr. Co.*, 42 B.R. 145, 149 (Bankr.C.D.Cal.1984) (building); *In re Yukon Enterprises, Inc.*, 39 B.R. 919 (Bankr.C.D.Cal.1984) (condominium units); *In re Landmark Capital Co.*, 27 B.R. 273 (Bankr. D.Ariz.1983) (office and hotel complex).

¹⁹ *In re One Fourth Street North, Ltd.*, 105 B.R. 106 (Bankr. M.D.Fla. 1989).

²⁰ 105 B.R. at 108.

²¹ See also *In re I-95 Technology-Industrial Park, L.P.*, 126 B.R. 11 (Bankr. D.R.I. 1991) (refusing to dismiss single asset case where partnership was attempting to develop an industrial park, despite numerous factors that could be considered indicia of bad faith, because of extensive efforts to secure approvals, some of which had been received, and debtor's ongoing plans to develop and market the property).

²² *In re Rad Properties, Inc.*, 84 B.R. 827 (Bankr.M.D.Fla.1988).

²³ *Id.* at 830.

²⁴ *Id.*

²⁵ *Id.* at 830-31.

²⁶ For a similar case, see *In re Campus Housing Developers, Inc.*, 124 B.R. 867 (Bankr. N.D. Fla. 1991) (dismissing development on finding that no further construction financing appeared available, there was no reasonable prospect of reorganization, and filing was "merely to delay RTC from proceeding with the foreclosure sale and realizing on its collateral").

²⁷ 508 F.3d at 221 (quoting *In re Club Golf Partners, L.P.*, 2007 WL 1176010 (E.D. Tex. 2007)).

²⁸ H. Miles Cohn, *Single Asset Chapter 11 Cases*, 26 Tulsa L.J. 523, 527-28 (1991).

²⁹ *Id.* at 668-69.

³⁰ Thus, courts have found that SARE did not encompass companies engaged in harvesting lumber (*In re Scotia Pacific Co., LLC*, 508 F.3d 214 (5th Cir. 2007)), operating a marina (*In re Kkemko, Inc.*, 181 B.R. 47, 49 (Bankr. S.D.Ohio 1995)), or running a golf course (*Commerce Bank and Trust Co. v. Perry Hollow Golf Club, Inc. (In re Perry Hollow Mgmt., Co.)*, 2000 WL 33679447 (Bankr. D.N.H. 2000); *In re CGE Shattuck*, 1999 WL 33457789 (Bankr. D.N.H. 1999); *In re Larry Goodwin Golf, Inc.*, 219 B.R. at 391 (Bankr M.D. N.C. 1997)).

³¹ For a discussion of the battle between lenders and debtors over the use of rents as “cash collateral,” see Lawrence T. Burick, *The Undersecured Creditor’s Adequate Protection Rights in the Single Asset Arena: Did the 1994 Bankruptcy Code Amendments Redress Lender Grievances?*, 100 Com. L. J. 437 (1995).

³² See, e.g., *Matter of East-West Associates*, 106 B.R. 767 (S.D.N.Y.1989) (involuntary bankruptcy filing by mechanics lienors against single asset partnership with unfinished construction project).

³³ *In re General Growth Properties, Inc.*, 409 B.R. 43 (Bankr. S.D.N.Y. 2009).

³⁴ *Id.* at 61-64.

³⁵ BRC Report, *supra* note 11, at 668.