

SIGNED.



Dated: August 06, 2010

James M. Marlar
JAMES M. MARLAR
Chief Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

In re:) Chapter 11
TEMPE LAND COMPANY, LLC, dba)
CENTERPOINT CONDOMINIUMS,) No. 2:08-bk-17587-JMM
Debtor.) **ORDER**

A motion for stay pending appeal was heard on August 5, 2010 (ECF No. 557). Applying the Ninth Circuit BAP's decision of *In re Wymer*, 5 B.R. 802 (9th Cir. BAP 1980), the court DENIES the motion for stay.

1. Likelihood of Success on the Merits

The binding authority cited by the court for its decision against the Appellant is *Coordinated Financial Planning Corp.*, 65 B.R. 711 (9th Cir. BAP 1986). That case is squarely on point with the relevant facts of this case. As the BAP follows its own precedent, the only way for it to overturn the case would be to grant a motion to convene an *en banc* panel, and then to have the entire panel consider the issue. On the merits, the court agrees with *Coordinated Financial*, and further believes that the cases cited by Appellant, which relate to option contracts, are legally and factually distinguishable from the executory nature of the "right of first refusal" ("ROFR") at issue here.

1 **2. Irreparable Injury to Appellant**

2
3 This element is also meant to cover the equities of a case. Here the Chapter 11 case
4 was immediately known to the Appellant, as counsel acknowledged at oral argument. When
5 conversion to Chapter 7 occurred on September 22, 2009, 11 U.S.C. § 365(d)(1) came into play.
6 Because the Trustee never assumed the Appellant's ROFR, it was, as an executory contract, deemed
7 rejected. *Coordinated Financial*; § 365(d)(1). Appellant took no steps to have its current claim--
8 that a ROFR is not an executory contract--determined by commencing an adversary proceeding.
9 FED. R. BANKR. P. 7001(2). It thus waited too long to assert its rights, and first made the Trustee
10 and Buyer aware of its position at or shortly before the auction sale.

11 Because the Appellant "slept on its rights," and is now attempting to thwart a sale
12 which will put \$875,000 into the Trustee's hands, for payment to creditors, whatever "irreparable
13 injury" it will suffer is due to no one's fault but its own.

14 Appellant can file a claim for money damages, and if that claim is allowed, it can
15 participate in the dividend.

16
17 **3. No Substantial Harm to Appellee**

18
19 To the contrary, the Appellee/Buyer has every reason to close quickly, because of
20 parallel concerns regarding the creditors of another major bankruptcy case, Mortgages, Ltd. That
21 estate has many deserving creditors as well, and its fiduciaries have corresponding obligations. This
22 property is pivotal to part of their overall plan to maximize recoveries for the Mortgages Ltd.
23 creditors.

24 For this estate, and its Trustee, it is statutorily important--and required--to reduce the
25 assets to money as quickly as possible. 11 U.S.C. § 704(a)(1). To now be caught up in the untimely
26 contentions of the Appellant draws the Trustee into a "tar baby"¹ of continued litigation, which just
27

28 ¹ With apologies to Joel Chandler Harris.

1 creates continuing expense for this estate's creditors. Delaying closing of this asset's sale creates
2 a severe prejudice to the estate.²

3
4 **4. Public Interest**

5
6 It is good public policy to quickly liquidate estate assets, and to achieve finality of
7 bankruptcy proceedings, rather than spend countless additional hours, over extended periods of time,
8 in litigation that a prudent and reasonable party with a legal contention should have commenced 9-
9 10 months ago. Only the system suffers when parties too-long delay asserting their known rights.

10
11 **RULING**

12
13 IT IS ORDERED DENYING the motion for stay pending appeal. FED. R. BANKR.
14 P. 8005.

15
16 DATED AND SIGNED ABOVE.

17
18 COPIES to be sent by the Bankruptcy Notification
Center ("BNC") to the following:

19 Michael R. King, Attorney for Centerpoint Holdings
20 Timothy J. Martens, Attorney for Centerpoint Holdings
21 Gregory J. Gnepper, Attorney for Centerpoint Holdings

22 Michael P. Lane, Attorney for Trustee

23 Dale D. Ulrich, Trustee

24 Richard M. Lorenzen, Attorney for ML Manager, LLC

25 D. Lamar Hawkins, Attorney for Debtor

26 Cathy L. Reese, Attorney for ML Manager, LLC

27 Office of the U.S. Trustee

28 ² This buyer, ML Manager, already closed on a \$4,850,000 purchase of
another asset, which auction occurred on the same day as this one.