

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH CAROLINA

In re:	)	Chapter 11
	)	
The Cliffs Club & Hospitality Group, Inc.,	)	Case No. 12-01220-jw
<i>et al., d/b/a The Cliffs Golf &amp; Country Club,</i>	)	
	)	Jointly Administered
Debtors.	)	
_____	)	

**MOTION AS TO APPLICATION OF STAY BY GENERAL ELECTRIC CAPITAL CORPORATION AND GENERAL ELECTRIC COMMERCIAL, INC.**

Now comes General Electric Commercial, Inc. (GEC) and General Electric Capital Corporation (GECC), hereafter collectively referred to as “Lessors”, by and through their undersigned counsel, and move the Court for an order pursuant to Fed. Bankr. R. 9014(a) and SC LBR 9013-1 that the automatic stay imposed by 11 U.S.C. § 362(a) does not apply to the golf cart leases of Lessors (Motion). In support of this Motion, Lessors would respectfully show the Court as follows.

**Jurisdiction**

The Court has jurisdiction to hear this proceeding pursuant to 28 U.S.C. §§ 157 and 1334. The Court also has the authority to hear this matter pursuant to a general order of reference entered by the United States District Court for the District of South Carolina. *Stern v. Marshall*, 131 S.Ct. 2594, 180 L. Ed.2d 475 (2011), is inapposite to this Motion because Lessors are just asking the Court to determine the applicability of the automatic stay to their replevin claims.

**Facts**

1. GEC and The Cliffs Communities, Inc. (Lessee) entered into Master Lease Agreement

No. 230463 (**Tab A**), supplemented by Equipment Schedule Nos. 9 (**Tab A-1**), 10 (**Tab A-2**), 11 (**Tab A-3**) and 12 (**Tab A-4**), pursuant to which GEC leased to Lessee one hundred seventy-five (175) golf carts to be used at the Cliffs at Keowee Vineyards, Keowee Springs and Walnut Cove, all of which are in South Carolina except for Walnut Cover which is in North Carolina.

2. GECC and Lessee also entered into Master Lease Agreement No. 8394851 (**Tab B**), supplemented by Lease Schedule Nos. 1 (**Tab B-1**) and 2 (**Tab B-2**), pursuant to which GECC leased to Lessee fifty (50) golf carts to be used at The Cliffs at Keowee Springs. Together, all Master Leases, Equipment Schedules and Lease Schedules shall be referred to collectively herein as the “Leases”.

3. Lessee is in payment default under the terms of Master Lease Agreement No. 230463, for its failure to make the February rental payment and 2010 personal property taxes on Equipment Schedule Nos. 9, 10, 11 and 12.

4. This Motion is made in an abundance of caution prior to the commencement of claim and delivery proceedings in Common Pleas Court, Pickens County, South Carolina and Superior Court, Buncombe County, North Carolina.

**Relief Requested**

**I. Stay Does Not Apply**

11 U.S.C. § 362(a)(1) pertains to the commencement of an action against the debtor. Lessee is not a debtor in this case. Subsection (2) addresses a pre-petition judgment. Lessors do not have a pre-petition judgment. Subsection (6) speaks to a claim against the debtor. Lessors have no claim against any debtor in this case. Lessors are not seeking a setoff which would trigger subsection (7).

Nor are Lessors in or about to be in a proceeding with a debtor before the United States Tax Court which would be within subsection (8) of the automatic stay.

Lessors wish to replevin golf carts in accordance with the terms of their Leases with Lessee which is not a debtor in this case. Thus, Lessors are not seeking to obtain possession of property of or from the estate, or enforcing any lien against property of the estate or of the debtor. The contemplated replevin actions of Lessors fall outside the parameters of 11 U.S.C. § 362(a)(3), (4) and (5).

## **II. No Debtor Has a Legal Interest**

The Leases are between Lessors and The Cliffs Communities, Inc. Neither of the Master Lease Agreements are between Lessors and any of the above captioned Debtors, nor are any of the accompanying Equipment or Lease Schedules. Debtors do not presently have, nor have they ever had, title, the right to title or any contractual rights to the use and possession of the golf carts. Debtors do not have any legal interest in the golf carts.

## **III. No Debtor Has an Equitable Interest**

"Section 541(a) defines 'property of the estate' as 'all legal or equitable interest of the debtor in property as of the commencement of the case.'" *In re Johnson*, 429 B.R. 540, 544 (Bankr. D.S.C. 2010). When a debtor "does not hold legal title" to property, such property "constitutes property of the Estate" only if the debtor "possesses an equitable interest in the [property]." *Id.* A "mere possessory interest in property" is not enough to create an equitable interest and render collateral property of the estate. *Id.* A debtor "should, at the very least, demonstrate some good-faith, colorable claim to or basis for possession of property in order to trigger application of the automatic stay where

the estate's interest arises solely through possession." *Id.*, citing *In re Anderson*, C/A No. 04-01278, slip op. at 5 (Bankr. D.S.C. April 15, 2004) (Limiting the holding in *In re BHB, LLC*, 1997 WL 33344249 (Bankr. D.S.C. 1997)). See also *In re Brittain*, 435 B.R. 318, 323 (Bankr. D.S.C. 2010) ("[P]roperty was subject to the automatic stay because the debtor had actual and exclusive possession along with a sufficient equitable claim for possession.").

Debtors have not claimed an equitable interest in the golf carts under 11 U.S.C. § 541(a)(1). Debtors have not listed the golf carts as personal property under Schedule B. None of the Leases are set forth on Schedule G, nor are the Leases listed on the Schedule of Assumed Contracts referenced in Article VI of the Plan. Debtors have not filed a motion to assume the Leases. Counsel for Lessors has asked counsel for Debtors and local counsel for their purchaser group whether either intends to assume the Leases, and neither has expressed any intention of doing so. Debtors are marching rapidly towards plan confirmation with no apparent desire to retain the golf carts, inasmuch as assumption of the Leases is required prior to confirmation. 11 U.S.C. § 365(d)(2). Debtors' indifference to whether the elderly players on their mountain courses walk or ride is a strong signal that Debtors assert no equitable interest in the golf carts.

#### **IV. Conclusion**

Because Debtors do not have any legal or equitable interest in the golf carts, Lessors are not seeking to obtain possession of property of or from the estate, or enforcing any lien against property of the estate or of the debtor, when Lessors commence their claim and delivery proceedings in Common Pleas Court, Pickens County, South Carolina and Superior Court, Buncombe County, North Carolina. Lessors' replevin actions will not be in violation of 11 U.S.C. § 362(a)(3), (4) and

(5).

**WHEREFORE**, Lessors respectfully request that this Court enter an order pursuant to Fed. Bankr. R. 9014(a) and SC LBR 9013-1 that the automatic stay imposed by 11 U.S.C. § 362(a) does not apply to the golf cart leases of Lessors.

Charlotte, NC

DRISCOLL SHEEDY, P.A.

Date: 06/12/2012

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