

THIS OPINION IS NOT INTENDED
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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:) Case No. 03-11098
) (jointly administered with
PACIFIC FINANCIAL) Case No. 03-18559
SERVICES OF AMERICA,)
)
Debtor.) Chapter 11
)
) Judge Pat E. Morgenstern-Clarren
)
) MEMORANDUM OF OPINION

The debtor Pacific Financial Services of America and the chapter 11 trustee move to dismiss the Pacific case, only, under bankruptcy code § 1112(b). (Docket 186, 199). The office of the United States trustee, and Laurence Lomaz (Pacific's sole shareholder) support that request. The motion is opposed by creditors Huntington National Bank, the State of Ohio Department of Jobs and Family Services, and Albert Gibel. (Docket 196, 197, 198, 200). For the reasons stated below, the motion to dismiss is granted.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) and (O).

FACTS¹

Pacific Financial Services of America filed its chapter 11 case on September 27, 2002. Midwest Fireworks Manufacturing Co. Inc., II filed its chapter 11 case on June 13, 2003. Neither

¹ No party requested an evidentiary hearing. These facts are drawn from the docket, filings, and the uncontested statements made during the October 28, 2004 hearing on the motion.

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debtor has operated its business since the filings. The cases are being jointly administered.

David Simon serves as the chapter 11 trustee (trustee) in both cases.

Pacific and Midwest jointly own licenses issued by Ohio that permit them to sell fireworks. In Ohio, such licenses run with specific real estate and the license holder cannot move the license to another location. Ohio will not issue any additional fireworks licenses until December 2005. Any valid license, therefore, theoretically has an enhanced value in a closed market.

The fireworks licenses owned by Pacific and Midwest are registered to property located at 160 Underridge Road, Conneaut, Ohio (Conneaut property) and/or at 8550 State Route 224, Deerfield, Ohio (Deerfield property). Pacific does not own either property and neither does Midwest.² Ohio revoked the licenses linked to the Deerfield property, a decision that was affirmed on appeal and is awaiting further appeal. The license that runs with the Conneaut property is the subject of a Notice of Non-Renewal; when the notice hearing goes forward, the trustee anticipates that this license will also be revoked. In the meantime, to have any hope of keeping or reviving these licenses the trustee must pay a renewal fee of \$2,750.00 for each license and represent that he has an interest in the real estate to which they attach. Pacific does not have any funds to pay these fees, although Midwest does.

On February 10, 2004, the trustee moved to dismiss the Pacific case on the ground that the debtor had not conducted business postpetition, had filed the bankruptcy solely to delay a

² Who *does* own these properties is a legal mystery that need not be resolved at this time. Suffice it to say that the Deerfield property seems to have been transferred from Lomaz or a related entity to the Cuyahoga County Common Pleas court to IWARR, Inc. to Albert Gibel. The Conneaut property apparently was transferred at some point to Grand Slam Fireworks, Inc., a Lomaz affiliate. Many people claim fraud in connection with these transfers.

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pending state court foreclosure of the Conneaut property, and was incapable of proposing a plan of reorganization. (Pacific Docket 116). Huntington opposed the motion, arguing that it would propose a plan of reorganization that offered the only hope of recovery for creditors. The trustee withdrew his motion to allow Huntington this opportunity.

On March 18, 2004, Huntington filed a proposed plan of reorganization and disclosure statement in both the Pacific and Midwest cases, together with a motion to approve bidding procedures and auction date for a sale of equity interests in the debtor and other assets (Huntington auction motion). (Pacific Docket 139, 140, 143; Midwest Docket 97, 98, 101). As set out in these documents, Huntington proposes that the trustee enter into a purchase agreement with IWARR, Inc., or such higher bidder as might come forward in an auction (the purchaser).

The plan proposes that the trustee will sell these assets to the purchaser for \$1 million:

- (1) the trustee's interest in the Deerfield property;
- (2) the trustee's interest in the Conneaut property;
- (3) the fireworks licenses that run with the Deerfield and Conneaut properties; and
- (4) the outstanding stock of both debtors.

The proposed purchase agreement requires the trustee to warrant that he has good and marketable title to all of these assets, with limited exceptions. Alternatively, and subject to limitations,

Huntington proposes that the trustee will sell these assets to the purchaser for \$600,000.00:

- (1) the Conneaut property;
- (2) the fireworks licenses that run with that property; and
- (3) the outstanding stock of both debtors.

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Huntington proposes to conduct the sale(s) via auction through procedures set out in the Huntington auction motion.

Huntington acknowledges in the plans that neither debtor has title to the Deerfield or Conneaut property. Both properties are the subject of state court foreclosure actions and Huntington is a party in both actions. Huntington's plan assumes that it would remove those actions to this court, with this court adjudicating the foreclosure complaints, defenses, and counterclaims, and ultimately directing the U.S. Marshal's office to conduct the foreclosure sales. The plan is contingent on the purchaser being the successful bidder at both foreclosure sales, whether the sales are conducted in this court or state court. [Purchase agreement ¶ 7.4]. The real estate titles will then somehow be transferred to the trustee who will sell the Deerfield property, and/or the Conneaut property, and the assets described above, with a warranty of good title, to the purchaser. [Purchase agreement ¶ 4.0].

The plan also assumes that involuntary chapter 7 cases will be filed against Lomaz personally (the sole shareholder of both debtors) and two of his other affiliates, Sky Slam Fireworks, Inc. and Grand Slam Fireworks, Inc. Huntington and Ohio did file an involuntary chapter 7 case against Lomaz individually on March 18, 2004, but that case was dismissed on Lomaz's motion (after an evidentiary hearing) on July 7, 2004. (Case no. 04-13227, docket 45, 46). There was no evidence that any party commenced an involuntary case against Sky Slam Fireworks, Inc. or Grand Slam Fireworks, Inc.

On May 13, 2004, the court held a hearing on the disclosure statement and Huntington's auction motion, together with the IRS objection to the motion. The IRS objected to the bidding procedures because they did not require each bidder to allocate the purchase price between the

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two debtors and among the various assets. This is significant because Pacific has more than one secured creditor. At the hearing, the parties stated that the auction motion and the disclosure statement would be supplemented and then each would be resolved by an agreed order.

No supplements or agreed orders have been filed to date. The major action taken by Huntington since that date is to remove the state court actions to the bankruptcy court.³

THE POSITIONS OF THE PARTIES

The movants argue that Huntington's proposed plan of reorganization is not feasible for several reasons: Huntington has not been able to work out the dispute with the IRS; IWARR, Inc., one of the two entities interested in bidding for the debtors' property, has withdrawn from the process; and two of the fireworks licenses in which the debtors have an interest have been revoked and are unlikely to be reinstated. The third appears headed in the same direction. Additionally, the trustee argues that the Pacific estate has no funds to pay the fee for a renewal application for the licenses and, in any event, he cannot meet the requirement that he represent to the State of Ohio that the estate(s) have an ownership interest in the Deerfield or Conneaut properties.

In opposition, the creditors argue that this is the only forum that can resolve all of the

³ These are the removed actions: (1) *Ashtabula County Treasurer v. Old Republic Insurance Co., et al.*, Ashtabula County Court of Common Pleas, No. 2000 cv 00220 (the Conneaut property); and (2) *Huntington National Bank v. Larry Lomaz*, Portage County Court of Common Pleas, case no. 2001 cv 1007 (the Deerfield property). In the Conneaut property case there are 11 named defendants, including Pacific and Midwest. The pleadings include counterclaims, crossclaims, and third party claims. Huntington, which holds a first security interest in the property, removed that case on July 14, 2004. In the Deerfield property case, the complaint names Lomaz, Pacific, and 17 other defendants. Huntington removed this case on August 11, 2004. At the court's request, the parties briefed the issue of whether those actions should be remanded. That issue is made moot by this decision.

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claims, Huntington is willing to loan the debtors money to pay the application fee, Huntington is moving forward to effectuate its proposed plan of reorganization, and the reason Huntington has not resolved the IRS issue is because it was cost efficient to focus on other issues at this time.

DISCUSSION

Bankruptcy code § 1112(b) states that on request of a party in interest, and after notice and a hearing, the court may dismiss a case for “cause.” 11 U.S.C. § 1112(b).⁴ The statutory definition of cause includes the “inability to effectuate a plan.” 11 U.S.C. § 1112(b)(2). This test for cause “focuses on whether there is a reasonable likelihood that a plan can be confirmed in a reasonable amount of time.” *In re V Companies*, 274 B.R. 721, 724 (Bankr. N.D. Ohio 2002) (citing *In re Woodbrook Assoc.*, 19 F.3d 312, 316 (7th Cir. 1994)). The party seeking dismissal has the burden of proving cause exists by a preponderance of the evidence. *See In re Woodbrook Assocs.*, 19 F.3d 312, 317 (7th Cir. 1994).

The parties agree that the plan proposed by Huntington is the only plan that will be proposed. The plan faces these difficulties:

- (1) it proposes that the trustee sell real estate to which he does not hold title (Deerfield and Conneaut);
- (2) the means by which Huntington expects the trustee to obtain title to the real estate are murky. The plan is contingent on the purchaser being the high bidder at two foreclosure sales and the trustee then agreeing to accept titles from the purchaser for purposes of reconveying them

⁴ Alternatively, § 1112(b) provides for conversion to chapter 7.

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to the purchaser with the fireworks licenses. The trustee has not agreed to this course of action.⁵

(3) the IRS objection that the proposed purchase agreement does not require the purchaser to allocate its bid among the different assets still stands.

(4) the plan proposes that the trustee convey all shares of both reorganized debtor corporations to the purchaser, whereas the proposed sale assets include "all the issued and outstanding stock of the Chapter 11 Debtors." It is unclear how these provisions can be reconciled. Also, Lomaz personally owns the Pacific and Midwest stock and that stock is not part of the chapter 11 estates. The trustee would not under these facts have the present ability to sell the stock unilaterally.

(5) there was no evidence as to what bidder, if any, is still interested in pursuing this transaction.

(6) the plan proposes that the trustee sell the fireworks licenses to the purchaser. Again, the purchase agreement calls for the trustee to warrant good title, although two have been revoked and the third is on the verge of revocation. Although Huntington points out that the state fire marshal is in "open dialogue" with the parties, that has been true for at least several months without resolution; and

(7) the trustee does not believe that the plan is viable.

Huntington has pursued a plan enthusiastically and creatively. Nevertheless, the hard fact remains that the proposed plan is simply not capable of being effectuated based on the difficulties just described. The debtor has not done business since the filing and no party has come forward

⁵ The trustee's reluctance to place the estates in the chain of title may be based in part on the state of the real estate. The Deerfield property, at least, has been described as having environmental clean-up issues.

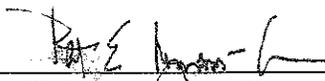
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to show that there is a reasonable likelihood that the debtor can be rehabilitated in any fashion other than through the Huntington plan. Cause exists to convert the case to chapter 7 or to dismiss it. The chapter 11 trustee supports dismissal. No party has argued in favor of conversion and it does not appear that conversion would benefit creditors or the estate because Pacific is not doing business and there are no funds in the estate. The court finds that dismissal is in the best interests of the creditors. The motion to dismiss will, therefore, be granted.⁶

CONCLUSION

For the reasons set forth above, the motion to dismiss is granted. A separate order will be entered reflecting this decision.

Date: 8 November 2004



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

Rebecca Kucera Fischer, Esq.
Morris Laatsch, Esq.
David Douglass, Esq.
Alexander Jurczenko, Esq.
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David Simon, Esq.
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⁶ The Midwest case will continue under the Midwest case name and number, with the clerk's office to docket only under the Midwest number.

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SERVICES OF AMERICA,)
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Debtor.) Chapter 11
)
) Judge Pat E. Morgenstern-Clarren
)
) **ORDER**

For the reasons stated in the memorandum of opinion entered this same date,

IT IS, THEREFORE, ORDERED, that the debtor's and the chapter 11 trustee's motions to dismiss are granted and this case is dismissed. (Docket 186, 199).

Date: 8 Nov 2004



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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