

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH CAROLINA

Case Number: 12-5308-JW

**ORDER DISMISSING CASE**

The relief set forth on the following pages, for a total of 7 pages including this page, is hereby **ORDERED**.

**FILED BY THE COURT  
02/27/2013**



Entered: 02/27/2013

A handwritten signature in cursive script that reads "John E. Waites". The signature is written in black ink and is positioned above a horizontal line.

Chief US Bankruptcy Judge  
District of South Carolina

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH CAROLINA

In re: )  
 )  
Shree Krishna Hospitality, LLC ) Chapter 11  
 ) Case No. 12-5308-JW  
 )  
Debtor. )  
\_\_\_\_\_ )

**ORDER DISMISSING CASE**

This matter comes before the Court on Bank of North Carolina as successor in interest to Beach First National Bank's ("BNC") Motion to Dismiss ("Motion"). This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334 and this matter is a core proceeding. Pursuant to Fed. R. Civ. P. 52, which is made applicable to this matter by Fed. R. Bankr. P. 7052 and 9014(c), and based on the filings of the parties, the evidence presented and arguments made at the hearing, the Court makes the following findings of fact and conclusions of law.<sup>1</sup>

**FINDINGS OF FACT**

The Debtor operates a hotel under a Quality Inn & Suites franchise. On or about July 11, 2005, the Debtor executed a promissory note in favor of BNC in the principal amount of \$1,952,503.79, plus interest (the "Note"). The Note is secured by a mortgage on the Debtor's real property located at 19000 Whythe Boulevard in Hardeeville, South Carolina (the "Real Property"), an Assignment of Leases and Rents from the Real Property, and a Security Agreement in the majority of the Debtor's personal property, including among other things its accounts, equipment, and furniture and fixtures.

<sup>1</sup> To the extent that any of the findings of fact constitute conclusions of law, they are adopted as such, and to the extent that any of the conclusions of law constitute findings of fact, they are so adopted.

The Debtor defaulted in payment of the Note, and after BNC filed a foreclosure and claim and delivery action in the Jasper County Court of Common Pleas, the Debtor filed its voluntary petition for relief under Chapter 11 on August 29, 2012.

Throughout the course of this bankruptcy, the Debtor has been operating under interim cash collateral orders. Further, in various pleadings (including its bankruptcy schedules) and in several hearings, the Debtor has maintained that BNC is an undersecured creditor. On December 12, 2012, this Court held a hearing on the Motion, along with a continued hearing on the Debtor's use of BNC's cash collateral. The Court continued the December 12, 2012 hearing to February 20, 2013, and in doing so, emphasized that it was giving the Debtor breathing space and every chance to formulate a plan of reorganization, and that at the February 20, 2013, it would determine whether the Debtor could indeed file a confirmable plan of reorganization. Specifically, at the December 12 hearing, the Court required the Debtor to address the applicability of the absolute priority rule in light of the Debtor's desire for the current owners to maintain their equity interests in the Debtor. Therefore, and as contained in this Court's *Third Interim Order Authorizing Debtor's Use of Cash Collateral* [Dkt. No. 63, filed Dec. 14, 2012], the Court required the Debtor to file its plan of reorganization and disclosure statement on or before February 4, 2013 to allow it and BNC an opportunity to review the plan. In addition, the Court required the Debtor to deposit all cash collateral received in excess of approved expenses in the Debtor's designated BNC cash collateral account.

The Debtor failed to file its plan and disclosure statement on February 4, 2013. The Court then set a drop dead date and time for the Debtor to file its plan and disclosure statement by 2:00 p.m. on February 8, 2013. The Debtor filed its disclosure statement on February 8, 2013 at 1:59 p.m. and its plan at 2:19 p.m. On February 13, 2013, BNC filed its ballots rejecting the

plan. On February 15, 2012, the Debtor filed its January 2013 Monthly Operating Report ("January MOR") [Dkt No. 77]. In the January MOR, the Debtor revealed that it had a cash profit in the amount of \$7,277.74, but that only \$25.00 had been deposited into BNC's cash collateral account on January 3, 2013.

On February 20, 2013, the Court held a hearing on the Motion and on the Debtor's continued use of BNC's cash collateral.

### **CONCLUSIONS OF LAW**

For a motion under § 1112(b), the movant bears the initial burden to establish cause of dismissal or conversion. Section 1112(b)(1) provides as follows:

Except as provided in paragraph (2) and subsection (c), on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of the creditors and the estate.

Section 1112(b)(2) provides as follows:

The Court may not convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter if the court finds and specifically identifies unusual circumstances establishing that converting or dismissing is not in the best interests of the creditors and the estate, and the debtor or any other party interest establishes that –

- (A) there is reasonable likelihood that a plan will be confirmed within the timeframes established in sections 1121(e) and 1129(e) of this title, or if such sections do not apply, within a reasonable period of time; and
- (B) the grounds for granting such relief include an act or omission of the debtor other than paragraph (4)(A) –
  - (i) for which there exists a reasonable justification for the act or omission; and
  - (ii) that will be cured within a reasonable period of time fixed by the court.

BNC has met its burden of establishing that cause exists for dismissal of this case. While the Debtor was given every chance to file a confirmable plan, the Debtor is simply unable to do so, and indeed was unable even to timely file the plan in accordance with the deadline established in the *Third Interim Order Authorizing Debtor's Use of Cash Collateral*.

First, the Debtor's plan only identified three classes of claims:

- Class 1-Administrative Claims (not impaired)
- Class 2- BNC (impaired)
- Class 3-Unsecured Creditors (not impaired)

Under Bankruptcy Code Section 1129(a)(10), at least one class of claims that is impaired under the plan must accept the plan. However, as BNC is apparently the only impaired class under the Debtor's plan, for the plan to be confirmable, BNC must vote to accept the plan. However, on February 13, 2013, BNC voted to reject the plan, thus eliminating any possibility of the plan being confirmable.

Further, under Bankruptcy Code Section 1126(c), a Chapter 11 plan can be confirmed by the Court if it is accepted by the holders of two-thirds in amount and more than one-half in number of claims in each class voting on the Plan. Thus, a single creditor can block acceptance of a plan if it controls more than one-third of the amount of claims voting in a class. As the unsecured portion of BNC's debt, \$860,875.16, represents 98% of the Class 3 claims of unsecured creditors, BNC holds a "blocking position" with respect to the unsecured claims. By voting in Class 3 to reject the plan, the Debtor has no possibility of confirming its Plan.

Second, although this Court explicitly required the Debtor to address the absolute priority rule in its plan, the Debtor inexplicably chose not to address this. Instead, and despite its prior testimony and representations contained in its schedules, the Debtor chose to treat BNC as a fully secured creditor to seemingly circumvent the absolute priority rule. For the Debtor to totally

disavow its prior testimony and the representations contained in its schedules that BNC was only partially secured would verge on indicating that the plan was not proposed in good faith and would be an independent ground for denying confirmation under Bankruptcy Code Section 1129(a)(3). However, BNC has sufficiently demonstrated that the absolute priority rule acts as a bar to confirmation of the Debtor's plan.

The absolute priority rule provides that if a proposed plan allows “the debtor to retain property, any dissenting [class of] creditors must be paid in full in order for the plan to be ‘crammed down.’” In re Maharaj, 681 F.3d 558, 562 (4th Cir. 2012) (citing Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 202 (1988)). In this case, the Debtor is attempting to retain its property, while also attempting to modify the mortgage and cram down the Note's interest rate. However, the Debtor simply could not offer any plausible explanation for how it could possibly address BNC's unsecured claim of \$860,875.16. Further, even assuming BNC was treated as a fully secured creditor (which, as stated above, would not be accurate), the Debtor's financial performance in this bankruptcy and its testimony indicate that it cannot even address its \$13,656.36 scheduled unsecured debt. As such, the Debtor is simply unable to satisfy the absolute priority rule such that its plan could be confirmed.

Finally, as stated above, while the Court required the Debtor in the *Third Interim Order Authorizing Debtor's Use of Cash Collateral* to deposit all cash collateral received in excess of approved expenses in the Debtor's designated BNC cash collateral account, the Debtor's January MOR demonstrates that it did not comply with this order. Pursuant to 11 U.S.C. § 1112(b)(4)(D), the Debtor's unauthorized use of cash collateral demonstrates an independent ground to dismiss this case. See also In re Madawaska Hardscape Products, Inc., C/A 12-01093-JW at \*24 (Bankr. D.S.C. June 8, 2012) (holding "The use of cash collateral without court

authorization or the creditor's consent can have harsh consequences, including the dismissal of the case.")

While the Debtor's management has done everything they can to stay afloat, they could offer no proof that this estate could break even or confirm a plan of reorganization. Therefore, considering the above, and having heard the positions of the Debtor and BNC, the Court has determined that dismissal of this case is in the best interest of the estate and its creditors.

### **CONCLUSION**

For the foregoing reasons, it is hereby

ORDERED THAT this case be, and hereby is, dismissed with prejudice to bar a refiling under any chapter of the Bankruptcy Code for a period of one year.

AND IT IS FURTHER ORDERED THAT the Debtor shall be prohibited from using BNC's cash collateral.

**AND IT IS SO ORDERED.**