

ENTERED
FEB 25 2002
K.R.W.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
2002 FEB 22 PM 2:25
U.S. BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:

Greenbriar Properties,

Debtor.

C/A No. 01-13811-W

ORDER

Chapter 11

THIS MATTER is before the Court for emergency hearing upon the Motion to Dismiss Case or, in the Alternative, to Transfer Venue filed by Beal Bank, S.S.B. on February 8, 2002. The Motion to Dismiss asserts that this case must be dismissed because this Court lacks subject matter jurisdiction because jurisdiction exclusively lies with the United States Bankruptcy Court for the Western District of New York.

On February 23, 1994, Greenbriar Properties ("Debtor") filed a Chapter 11 case in New York, Case No. 94-20351 (JCN). An Order Confirming Plan (the "Confirmation Order") was entered on May 19, 1995, and, in the Confirmation Order, the Court retains jurisdiction over a number of matters associated with Debtor's performance under the confirmed Plan. On June 26, 1997, the New York Bankruptcy Court entered an Order Closing Case Subject to Restoration to the Calendar for Certain Purposes (the "Closing Order"). Subsequent to the entry of the Closing Order, Debtor defaulted under the confirmed Plan, and Beal Bank initiated foreclosure proceedings in the state court of New York. The relief requested in the foreclosure proceeding included the appointment of a receiver to collect the rents from the apartments owned by Debtor.

Based upon a review of the orders from the New York bankruptcy case presented by Beal Bank, it is apparent that the confirmed Plan was substantially consummated and that the New York bankruptcy case was administratively closed despite that Court's declining to enter a final

decree at that time.

The Closing Order allows any party to request restoration of the case to the calendar until July 2003, which is the date when the last act contemplated by the confirmed Plan is to be performed. Neither Debtor nor Beal Bank has requested the restoration of the case in the New York Bankruptcy Court as offered by the Closing Order. Instead, Beal Bank chose to initiate foreclosure to enforce the terms of the confirmed Plan in the state court of New York.

It appears that the confirmed Plan in the New York case has been substantially consummated pursuant to 11 U.S.C. §1101(2)¹ and therefore is not subject to modification by Debtor. There is no per se prohibition to Debtor's refile of another Chapter 11 case after the first case has been substantially consummated. See In re Elmwood Dev. Co., 964 F.2d 508, 511 (5th Cir. 1992) (noting that the mere fact that a debtor previously petitioned for bankruptcy relief does not render a subsequent Chapter 11 petition invalid); In re Delray Associates Ltd. P'ship, 212 B.R. 511, 515 (Bankr. D. Md. 1997) (adopting the reasoning of Elwood and concluding that a second Chapter 11 case can be filed if the filing is for a legitimate purpose, including liquidation after a prior confirmed plan failed or if the second case results because of an unanticipated change of circumstances); In re Mableton-Booper Associates, 127 B.R. 941, 943-44 (Bankr. N.D. Ga. 1991) (examining a debtor's change of circumstances to determine whether a second filing was appropriate after the plan under the debtor's first bankruptcy case had been substantially consummated).

Neither the retention of jurisdiction provisions of the confirmed Plan nor the language of the Closing Order provides the New York Bankruptcy Court with exclusive subject matter

¹ Further references to the Bankruptcy Code shall be by section number only.

jurisdiction, particularly under the circumstances where neither Debtor nor Beal Bank has asked for the case to be restored and where Beal Bank chose the state court as its forum for enforcing the confirmed Plan.

The Court further notes that Beal Bank did not assert in its Motion to Dismiss a lack of good faith as cause for the dismissal of this case pursuant to §1112.

For the reasons stated, Beal Bank's Motion to Dismiss for Lack of Subject Matter Jurisdiction is denied. The Motion to Change Venue has been continued for hearing until March 26, 2002 at 10:30 a.m. in the J. Bratton Davis United States Bankruptcy Courthouse, 1100 Laurel Street, Columbia, South Carolina.

AND IT IS SO ORDERED.

Columbia, South Carolina,
2/22, 2002.


UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

BLC

FEB 25 2002

Shady

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

KAREN R. WEATHERS

Deputy Clerk