

UNITED STATES BANKRUPTCY COURT  
**ENTERED**  
FOR THE DISTRICT OF SOUTH CAROLINA  
DEC 29 1995

FILED

95 DEC 29 PM 12:01

U.S. BANKRUPTCY COURT  
DIST. OF SOUTH CAROLINA

IN RE:

**C.H.B.**

C/A No. 93-72769

Long Point Road Limited Partnership,

**JUDGMENT**

Debtor.

Chapter 11

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, this case is converted to Chapter 7 of Title 11 of the United States Code.

  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,  
December 29, 1995.

fdgt. # 95-408

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ORDER

Chapter 11

THIS MATTER comes before the Court upon its sua sponte motion for dismissal or conversion pursuant to 11 U.S.C. § 1112.<sup>1</sup> Based upon the evidence and testimony presented, along with arguments of counsel for the respective parties, the Court makes the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

1. The within voluntary Chapter 11 petition was filed on June 2, 1993.
2. The sole asset of the Debtor partnership consists of an undeveloped 508.9 acre tract of real estate in Charleston, South Carolina, (the "real estate").
3. The Debtor's Chapter 11 Schedule D lists seven (7) secured claims in an unknown amount.
4. The Debtor's Chapter 11 Schedule F lists eleven (11) unsecured non-priority claims totaling \$45,364.89.
5. On July 12, 1993, the Clerk of Court for the United States Bankruptcy Court for the District of South Carolina issued a Notice of Possible Dismissal for the failure of the

<sup>1</sup> Further references to the Bankruptcy Code, 11 U.S.C. § 101, *et. seq.*, shall be by section number only.

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representative of the Debtor to appear at the first meeting of creditors. On August 10, 1993, this Court issued an Order granting the Debtor's motion requesting that the case not be dismissed and scheduled a continued first meeting of creditors.

6. On December 21, 1993, the Debtor filed a Motion for Extension of Debtor's Time to File Plan and Disclosure Statement Pursuant to Local Rule 1112. The one hundred and eighty (180) day deadline to file a Plan and Disclosure Statement had expired on December 2, 1993. The Resolution Trust Corporation, as Receiver for Atlantic Financial Savings, F.A. (the "RTC"), the Debtor's largest secured creditor, filed an objection to the motion. However, the parties were able to resolve the objections and the Court entered a settlement Order on January 26, 1994 which stated in part "[t]he terms of the settlement are that Debtor will file its disclosure statement and plan of reorganization on or before February 23, 1994, unless the Resolution Trust Corporation agrees to a further extension of time to file said documents in writing."
7. On February 22, 1994, the Debtor filed its Disclosure Statement and Plan of Liquidation. The February 22, 1994 Plan of Liquidation and Disclosure Statement were subsequently withdrawn by the Debtor.
8. On November 14, 1994, the Debtor filed an additional Motion for Extension of Debtor's Time to File Plan and Disclosure Statement Pursuant to Local Rule 1112. This request was denied by the Court in an Order of January 13, 1995.
9. On May 4, 1995, the RTC filed its motion for relief from the automatic stay provisions of § 362. In the motion, the RTC alleges that it first filed its Summons and Complaint in a mortgage foreclosure action against the Debtor on February 12, 1993 as the holder of a

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first priority secured claim against the Debtor in the original principal amount of \$7,000,000.00.

10. As of February 17, 1995, the Debt to the RTC was \$7,176,479.09, an increase of approximately \$56,000.00 since the initial filing of the Chapter 11 petition despite the sales of the various parcels of the 508.9 acre tract and distribution of net-proceeds to RTC.
11. After several continuances, the RTC withdrew its motion for Relief for Stay.
12. On June 16, 1995, the Court issued an Order commanding the filing of a Disclosure Statement and Plan of Reorganization by July 14, 1995. On July 14, 1995, the Debtor filed its Disclosure Statement and Plan of Liquidation, which essentially provided for the liquidation sale of the real estate over time.
13. On October 13, 1995 due to the lack of approval of a Disclosure Statement or confirmation of a Plan of Reorganization, the Court sua sponte scheduled a hearing to determine if cause exists for the dismissal or conversion of this bankruptcy case.
14. On October 20, 1995, the Debtor filed an Addendum to the Disclosure Statement which this Court approved by Order of November 8, 1995. The November 8, 1995 Order also set December 1, 1995 as the deadline for filing ballots accepting or rejecting the Plan of Reorganization.
15. On November 29, 1995, Wachovia Bank of South Carolina, N.A. filed its objection to the Plan. On December 1, 1995, the RTC filed its objection to the Plan. Also on December 1, 1995, Maersk, Inc. filed an objection to the Plan. On December 4, 1995, WAMCO VIII, Inc. filed an objection to the Plan.

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16. There is presently no business operations by the Debtor. The Debtor, acting through the services of a real estate broker, seeks to sell the real estate and distribute the proceeds.

### CONCLUSIONS OF LAW

The sua sponte consideration of the conversion or dismissal of a chapter 11 case is not something this Court undertakes without caution or care. While there has historically been a split of authorities as to whether or not the Court possesses the authority to sua sponte dismiss a case under §1112(b), this Court views those decisions which uphold the Bankruptcy Court's authority to dismiss a case on its own initiative as representing the better view. In re SB Properties, Inc., 185 B.R. 206 (Bkrcty.E.D.Pa. 1995). This Court further notes the recent amendments to §105 which indicate Congressional intent to clarify the Bankruptcy Court's authority and responsibility to ensure the proper administration of bankruptcy cases. This Court further believes that because the dismissal or conversion of a Chapter 11 case remains with the discretion of the bankruptcy court ( see In re Superior Siding & Window, Inc., 14 F.3d 240 (4th Cir. 1994)) a bankruptcy court has the authority to dismiss or convert a Chapter 11 case upon its own initiative.

Section 1112(b) provides for conversion or dismissal as follows:

Except as provided in subsection (c) of this section, on request of a party in interest or the United States Trustee or bankruptcy administrator, and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including-- (1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation; (2) inability to effectuate a plan; (3) unreasonable delay by the debtor that is prejudicial to creditors; (4) failure to propose a plan under section 1121 of this title within any time fixed by the court; (5) denial of confirmation

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of every proposed plan and denial of a request made for additional time for filing another plan or a modification of a plan; (6) revocation of an order of confirmation under section 1144 of this title, and denial of confirmation of another plan or a modified plan under section 1129 of this title; (7) inability to effectuate substantial consummation of a confirmed plan; (8) material default by the debtor with respect to a confirmed plan; [or] (9) termination of a plan by reason of the occurrence of a condition specified in the plan; or (10) nonpayment of any fees or charges required under chapter 123 of title 28 [28 U.S.C. § § 1911 *et seq.*]

In In re Superior Siding & Window, Inc., the Fourth Circuit held that if a bankruptcy court first determines that cause exists for dismissal of the Chapter 11 case, the court must then determine whether dismissal or conversion is in the best interests of the creditors. As stated in the Findings of Fact, it is clear to the Court that in this case there is a continuing lack of progress and diminution of the estate and the absence of any likelihood of rehabilitation. It is equally clear that there is an inability to effectuate a plan where even after two and one-half (2 ½ years), there is a failure to propose a Plan that could be confirmed by the Court pursuant to §1129. This Court finds that such is an unreasonable delay that is prejudicial to all creditors. While several primary secured creditors have opposed conversion or dismissal, supporting instead additional time for liquidation of the real estate without a confirmable plan of reorganization, the Court questions the reasonableness of the Debtor's projections for sales. At a hearing in December of 1995, the parties admitted that there appears to be yet another set of delays for an upcoming closing of a real estate contract covering a large portion of the real estate which leave it indefinite, at best. Furthermore, even if sufficient sales occurred to pay the primary first and second mortgage creditor, a priority dispute between the remaining secured creditors is likely before consideration can be given to payment to other creditors. Therefore due to the objections

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to the present Plan of Liquidation (which by all parties admission makes it unconfirmable), the inactivity of general unsecured creditors, and the great delay that has occurred while the Debtor has proceeded in a Chapter 11 case, it appears that cause exists for the dismissal or conversion of this case and that the best interest of creditors would be served by such dismissal or conversion. Additionally, because liquidation of the real estate is the only apparent feasible method of repayment to creditors and is, in fact, the goal of the Debtor and its secured creditors, it would appear that the interests of all creditors would be better served in a Chapter 7 case in which a trustee could oversee the liquidation process and seek to protect the interests of the unsecured creditors as well.

For all of these reasons, it is therefore,

**ORDERED**, that this case be, and the same hereby is, converted to Chapter 7 of Title 11 of the United States Code; and it is further

**ORDERED**, that the above-named Debtor file in the office of the Clerk of this Court, within fifteen (15) days of the entry of the order:

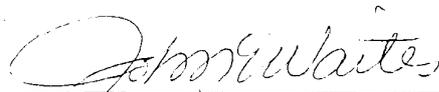
- (1) final statements of profit and loss and cash position through the date of conversion,
- (2) additional schedules (Schedule D - Creditors Holding Secured Claims, Schedule E - Creditors Holding Unsecured Priority Claims, Schedule F - Creditors Holding Unsecured Non-Priority Claims) showing claims against the Debtor arising subsequent to the granting of the Chapter 11 relief,
- (3) a mailing matrix,
- (4) revised schedules (Schedule A - Real Property, Schedule B - Personal Property, Schedule C - Property Claimed As Exempt, Schedule I - Current Income of Individual Debtor, Schedule J - Current Expenditures of Individual Debtor),
- (5) description of any post-petition transactions that should be reflected in a Statement of Affairs filed as of the date of conversion, and it is further

**ORDERED**, that the Debtor shall immediately turn over to the Chapter 7 interim trustee

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all estate property and records which the trustee shall reasonably request. The Debtor shall immediately cease all business operations and take all necessary and appropriate action to insure that estate assets are properly preserved for the Chapter 7 interim trustee. The Debtor shall immediately relinquish control of any operations and estate property to the interim trustee and permit the interim trustee and his agents unlimited reasonable access to estate property. It is expected that counsel for the Debtor shall cooperate fully with the interim trustee, upon the appointment by the United States Trustee of such interim trustee, and take all reasonable action to insure that the Debtor complies with this Order. Failure to comply with this Order may result in the dismissal of the case or other sanctions. Should this case be dismissed for any reason, any fees due to the clerk of court pursuant to 28 U.S.C. §1930 and the appendix thereto, or any fees due to the United States Trustee pursuant to 28 U.S.C. §1930(a)(6), shall be paid within ten (10) days of the entry of the Order of dismissal.

**AND IT IS SO ORDERED.**

  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,  
December 29, 1995.

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