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MAY 5 2009
C.H.B.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
at _____ O'clock & _____ min _____ M
MAY 5 2009

United States Bankruptcy Court
Columbia, South Carolina (26)

IN RE:

C/A No. 08-05729-JW

Whitney Lake, LLC,

Chapter 11 -

Debtor(s).

AMENDED ORDER GRANTING MOTION TO APPOINT A TRUSTEE

This matter comes before the Court on Southeastern Recapitalization Group, LLC's Motion to Dismiss or, in the Alternative, Appoint a Trustee or to Convert, filed on March 4, 2009, and heard on March 26, 2009. Due to the exigencies in the case, the Court appointed a trustee based on its announced findings and conclusions by previous order filed April 10, 2009. This order states the Court's detailed findings and conclusions supporting the appointment of a trustee pursuant to 11 U.S.C. §§ 1104 and 1112.¹

Findings of Fact

1. On September 18, 2008, Whitney Lake, LLC ("Debtor") filed a petition for relief under Chapter 11 of the United States Bankruptcy Code ("Bankruptcy Code"). Debtor's case is a single asset real estate case under 11 U.S.C. § 101(51B),² and pursuant to §§ 1107 and 1108, Debtor has retained possession of its assets and has been operating as a debtor in possession.

2. Southeastern Recapitalization Group, LLC ("Southeastern") is a South Carolina limited liability company and a creditor in this case.

3. Southeastern filed this motion pursuant to § 1112. This Court has jurisdiction to

¹ To the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are also adopted as such.

² Further reference to the Bankruptcy Code, 11 U.S.C. § 101 et seq., will be by section number only.

consider the motion pursuant to 28 U.S.C. §§ 157 and 1334 and Local Civil Rule 83.IX.01, D.S.C. Consideration of the motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

4. Debtor is an owner and developer of real property known as the "Gardens at Whitney Lake" located off of Murraywood Road on John's Island. Debtor's property is divided into several tracts, referred to as Phase 1b, Phase 1c, Phase 1b infill, and Phase 2.

5. Debtor's majority owner is SEVA Properties, LLC ("SEVA"), which is owned by John D. Lisi. Lisi also owns The Lisi Company ("Lisi Company"), which is the manager, management company, and general contractor for Debtor.

6. Southeastern filed a proof of claim on January 14, 2009, alleging entitlement to \$11,990,065.19 based on three loans made to Debtor. First, Southeastern holds a promissory note, executed by Debtor on September 6, 2006, in the original amount of \$3,990,723, and secured by a mortgage on 53.311 acres in Phase 2. Southeastern also holds a note in the original amount of \$150,000, executed by Debtor on August 10, 2007, and secured by a mortgage covering certain lots on Sailfish Drive. Finally, Southeastern holds a note in the original amount of \$10,000,000, executed by the Lisi Company on December 14, 2006, which is secured by a mortgage on sixty-two town homes in Phase 1b in various stages of completion as well other partially completed lots and unimproved land.³

7. On September 18, 2008, Debtor filed its first Motion to Use Cash Collateral. In the motion, Debtor sought permission to use cash collateral based on a number of projections. Among other things, Debtor projected sales of twenty-four units from October 2008 through February 2009, or between four and six units per month, for total sales revenue during this time of \$4,628,500.

³ The original notes were payable to Regions Bank and subsequently assigned to Southeastern.

8. At the time of the hearing, the Court had approved the sales of only four units since September. Debtor's Monthly Operating Reports ("monthly reports") indicate Debtor has not generated revenue beyond the consensual use of cash collateral.

9. Debtor's monthly reports for October through February further show that Debtor failed to pay all of its bills on time in three months, Debtor failed to pay insurance premiums in every month but February, and Debtor failed to pay all real property taxes. In each month from October through February, Debtor's unpaid bills have totaled between approximately \$60,000 and \$120,000.

10. The balance sheets attached to Debtor's monthly reports reflect that Debtor has become increasingly insolvent. The balance sheet dated October 31, 2008, which is attached to the October monthly report, shows Debtor's liabilities exceeded its assets by \$213,012.11. The February 28, 2009 balance sheet, attached to the February monthly report, states Debtor's liabilities exceeded its assets by \$1,017,667.82.⁴

11. Debtor has not made any post-petition interest or adequate protection payments to Southeastern.

12. Debtor has not secured any post-petition financing. Thus, Debtor's ability to complete the unfinished units is dependent upon the sales of completed units and the ability to use various secured creditors' cash collateral.

Conclusions of Law

Section 1112(b)(1) provides the Court, upon the request of a party in interest, after notice and a hearing, and "absent unusual circumstances specifically identified by the court that establish that the requested conversion or dismissal is not in the best interests of creditors and the

⁴ This amount increases to \$1,148,486.41 in Debtor's March 31, 2009 balance sheet.

estate . . . 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, if the movant establishes cause.”⁵ Section 1112(b)(1) also incorporates § 1104(a)(3), which provides that the Court shall order the appointment of a trustee “if grounds exist to convert or dismiss the case under section 1112, but the court determines that the appointment of a trustee or an examiner is in the best interests of creditors and the estate.”

Section 1112(b) enumerates examples of “cause,” including, among others, “substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation,” “gross mismanagement of the estate,” “failure to maintain appropriate insurance,” and “failure timely to pay taxes.” § 1112(b)(4)(A), (B), (C) & (I).

Initially, the Court finds Southeastern has failed to demonstrate cause on the basis of gross mismanagement. A movant may prove gross mismanagement of a debtor by providing evidence of the debtor’s failure to maintain an effective corporate management team. In re Broad Creek Edgewater, LP, 371 B.R. 752, 759 (Bankr. D.S.C. 2007). The testimony offered by Debtor at the hearing establishes that Debtor’s actions have been aimed at improving and marketing its property, and that Debtor’s reasonable efforts have been hampered by the economic downturn in the local real estate market rather than gross mismanagement.

The Court finds that Southeastern has presented sufficient evidence to establish cause under § 1112(b)(4)(A), which requires a movant to demonstrate both a substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation.

⁵ There is a limited exception in § 1112(b)(2) which provides that subsection (b)(1) shall not apply absent “unusual circumstances,” if the debtor or another party in interest objects and establishes that “(A) there is a 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 under 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.”

Evidence of “[n]egative cash flow and an inability to pay current expenses as they come due” can satisfy the first prong. In re Pinnacle Labs., Inc., 2008 WL 5157981, at *3 (Bankr. D.N.M. June 19, 2008); In re Gateway Access Solutions, Inc., 374 B.R. 556, 564 (Bankr. M.D. Pa. 2007). The monthly reports submitted by Debtor indicate that Debtor is operating with a negative cash flow in a progressively larger amount each month, Debtor has often failed to pay bills on time, and Debtor has unpaid bills between \$60,000 and \$120,000 each month. Furthermore, there is no dispute that Debtor has failed to pay taxes when due, which is sufficient to establish cause. § 1112(b)(4)(I).

The Court also finds that at this time, due largely to the downturn in the real estate market, that there appears to be no reasonable likelihood of Debtor’s rehabilitation. The second prong of § 1112(b)(4)(A) is met where the movant shows “the state of the debtor’s financial affairs are such that it is unable to re-establish itself on a firm or sound base.” In re Schriock Constr., Inc., 167 B.R. 569, 576 (Bankr. D.N.D. 1994); see also In re Avis, 2008 WL 5786807, at *3 (Bankr. E.D. Va. Nov. 13, 2008) (the test for rehabilitation is “the objective likelihood that the debtor’s financial situation can be turned around”). Thus, the “concept of rehabilitation necessarily hinges upon establishing a cash flow from which current obligations can be satisfied.” Schriock, 167 B.R. at 576. Based on the testimony at the hearing and Debtor’s monthly reports, the limited number of unit sales made by Debtor has not generated sufficient cash flow to meet its basic operating expenses and cannot, at this time, be expected to generate the surplus necessary to fund its projected payments under a plan. Furthermore, Debtor has not secured post-petition lending, and its only source of funds is the consensual use of cash collateral. Without sales of housing units, Debtor cannot obtain funds to complete units or pay the estate’s administrative expenses.

Based on the foregoing, the Court concludes that Southeastern has adequately demonstrated cause under § 1112(b)(4)(A) and (I), and the Court must act pursuant to the mandates of the statute. It appears, however, that there is a possibility that Debtor's assets have potential for value and that the appointment of a trustee could improve the prospects for realizing value for the benefit of both secured and unsecured creditors. Accordingly, the Court finds the appointment of a Chapter 11 Trustee is in the best interest of creditors and the estate pursuant to §§ 1112 and 1104.

ORDERED that Southeastern's motion to appoint a trustee is granted.

AND IT IS SO ORDERED.

Columbia, South Carolina
May 5, 2009


UNITED STATES BANKRUPTCY JUDGE