

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

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In re:

DB ISLAMORADA, LLC,

Debtor-in-Possession.

CASE NO. 07-20537-AJC

Chapter 11

DEBTOR'S MOTION TO DISMISS CASE

DB Islamorada, LLC, debtor and a debtor-in-possession ("**Debtor**"), by and through undersigned counsel, pursuant to 11 U.S.C. § 1112, moves the Court ("**Motion**") for entry of an Order dismissing this Chapter 11 case. In support of this Motion, Debtor states as follows:

I. PRELIMINARY STATEMENT

Like many others, Debtor's business fell victim to the current economic crisis. Prior to the south Florida Real Estate meltdown, Debtor was in the process of developing a condominium hotel in Islamorada, Florida. The harsh economic reality led Debtor to file this case in hopes it could reorganize and resuscitate its dying business. Once those hopes were extinguished, Debtor attempted to sell its assets using Bankruptcy Code § 363. However, the market would not bear a price acceptable to Debtor's secured lenders. Ultimately, Debtor's real and personal property was bought at court ordered auctions by virtue of credit bids by the respective secured creditors. Now, having conveyed all of its assets, Debtor seeks to dismiss this case, passing the baton to the underlying receivership court to oversee the eventual liquidation of Debtor's real property. As there is no viable business to reorganize and no estate to administer, dismissal of this case is proper now.

II. BACKGROUND

A. Pre-petition Business of Debtor

1. Debtor was organized and formed as a limited liability company in the State of Florida on or about August 18, 2003 pre-petition. Debtor was in the business of developing a condominium hotel in Islamorada, Florida (“**Project**”).

B. Bankruptcy Filing

2. On November 29, 2007, (“**Petition Date**”) Debtor filed a voluntary petition under Chapter 11 of Title 11 of the United States Code (“**Bankruptcy Code**”).

3. Debtor is operating its business and managing its assets as a debtor in possession pursuant to Bankruptcy Code §§ 1107 and 1108.

4. Debtor filed its Chapter 11 bankruptcy petition due to insufficient cash flow to complete construction, market and sell units in the Project, which, as of the Petition Date was approximately 75% complete.

5. As of the Petition Date and to date, Debtor has generated no income. Debtor has funded post-petition expenses through post-petition financing from Debtor’s pre-petition secured creditors.

6. As of the Petition Date, Debtor’s secured indebtedness totaled approximately \$25,465,426.76 and its unsecured debt was in the approximate amount of \$1,880,433.33.

B. Receivership Case

7. On December 11, 2007, the Florida Office of Financial Regulation filed a complaint in Miami-Dade Circuit Court styled *Florida Office of Financial Regulation v. Berman Mortgage Corp. et al.*, Case No. 07-43672-CA-09 (“**Receivership Case**”), seeking injunctive relief and the appointment of a receiver against Berman Mortgage Corporation and Dana Berman, individually, Debtor’s principal.

8. On December 11, 2007, the court in the Receivership Case entered an order enjoining numerous individuals and entities, including Mr. Berman, from, *inter alia*, dissipating Debtor's assets ("**Receivership Order**").¹

9. The Receivership Order also appointed Michael I. Goldberg as Receiver ("**Receiver**") of certain receivership assets as defined in the Receivership Order. Accordingly, Mr. Goldberg became the *de facto* Receiver of Debtor.

C. Sale of Debtor's Assets

10. Debtor determined that reorganization was infeasible, and that it was in the best interest of its creditors to sell its assets, which included certain real and personal property.

11. Debtor filed a series of motions concerning the sale of its real and personal property, which were granted by the Court. Various auction sale hearings were set as a result of these motions.

12. Ultimately, Debtor's real and personal property were purchased at auction by virtue of credit bids by Debtor's respective secured creditors.

13. Now that Debtor has disposed of its assets, nothing remains for Debtor to do in this case.

14. Because Debtor's estate is administratively insolvent and possesses no assets, conversion to a Chapter 7 would be impractical and not in the best interest of Debtor's creditors.

III. ANALYSIS AND ARGUMENT

A. Applicable law supports Debtor's decision to dismiss this case.

15. "Chapter 11 is for the debtor with a viable business with assets which need to be preserved." *In re Del Monico*, No. 04 B 28235, 2005 WL 1129774, *4 (Bankr. N.D. Ill. May 13,

¹ While Debtor was not named in the Receivership Case, the language of the Receivership order encompasses Mr. Berman and any potential dissipation of Debtor's assets by him.

2005).

16. Courts may dismiss a Chapter 11 case at any time. *In re Woodbrook Assoc*, 19 F.3d 312, 317 (7th Cir. 1994).

17. An evidentiary hearing is not required on a motion to dismiss under Bankruptcy Code § 1112. *See Singer Furniture Acquisition Corp. v. SSMC INC. N.V.*, 254 B.R. 46, 53 (M.D. Fla. 2000)(holding that the bankruptcy court was not required to conduct an evidentiary hearing prior to dismissing Chapter 11 case).² Further, “[i]n so determining, a court is not required to provide an exhaustive discussion of its reasoning.” *In re Edwards*, No. 95-18405DWS, 1996 WL 407253 at *5 (Bankr. E.D. Penn. June 17, 1996).

18. Bankruptcy courts possess the power to dismiss Chapter 11 cases upon a showing of cause by a party in interest, absent unusual circumstances. *See* 11 U.S.C. § 1112(b)(1).³ Bankruptcy Code § 1112(b) provides a non exhaustive list of factors that demonstrate cause. *See id.* Here, the applicable factor demonstrating cause is: “(A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation.” 11 U.S.C. § 1112(b)(4)(A).

19. Debtor concedes there is no hope of proposing a confirmable plan of reorganization and rehabilitating its business. *In re Gateway Access Solutions, Inc.*, 374 B.R.

² *Accord C-TC 9th Avenue Partnership v. Norton Co. (In re C-TC 9th Avenue Partnership)*, 113 F. 1304, (2d Cir. 1997)(stating “[w]hen the record is sufficiently well developed to allow the bankruptcy court to draw the necessary inferences to dismiss a Chapter 11 case for cause, the bankruptcy court may do so.”); *Han v. Linstrom*, No. 02 CV 213, 2002 WL 31049846, at *4 (N.D. Ill Sep. 12, 2002)(determining that if all the relevant issues have otherwise been addressed in the course of the case, dismissal for cause under 1112(b) does not require a full evidentiary hearing).

³ “[T]he determination of cause under § 1112(b) is ‘subject to judicial discretion under the circumstances of each case.’” *Albany Partners, Ltd. v. Westbrood (In re Albany Partners, Ltd.)*, 749 F.2d 670, 674 (11th Cir. 1984). *See also In re State Street Houses, Inc.*, 305 B.R. 738 (S.D. Fla. 2003)(citing *In re Albany Partners*). However, that discretion was limited by the revisions of 11 U.S.C. § 1112 enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005)(“**BAPCPA**”). *In re Gateway Access Solutions, Inc.*, 374 B.R. 556, 560 (Bankr. M.D. Penn. 2007). “The amendments to § 1112 limit the Court’s discretion to refuse to dismiss or convert a Chapter 11 case upon a finding of cause.” *Id.*

556, 563-64 (Bankr. M.D. Penn. 2007)(finding the absence of a reasonable likelihood of rehabilitation where, *inter alia*, Debtor provided no evidence at the hearing, did not draft a plan, no financial projections, and no future business plans in writing).

20. Debtor has no operations, no cash flow and is unable to pay expenses without incurring additional post-petition debt. Such facts indicate a continuing loss to the estate and the absence of a reasonable likelihood of rehabilitation. *See In re Schriock Constr., Inc.*, 167 B.R. 569, 579 (Bankr. D. N.D. 1994).

21. Moreover, dismissal, rather than conversion, is appropriate and in the best interest of creditors and the estate because there are no assets available for distribution to unsecured creditors in the event of conversion. *See In re Emergystat of Sulligent, Inc.*, No. 07-51394, 2008 WL 597613 at *9 n. 4 (Bankr. E.D. Tenn. Feb. 29, 2008)(agreeing with creditors that dismissal was proper where no evidence that there were any assets available for unsecured creditors upon conversion to Chapter 7); *In re 3 RAM, Inc.* 343 B.R. 113 (Bankr. E.D. Penn. 2006)(finding that dismissal was appropriate where the debtor's only asset was fully encumbered and, thus, there was no estate for a Chapter 7 Trustee to administer); *In re Helmers*, 361 B.R. 190, (Bankr. D. Kan. 2007)(considering factors surrounding whether dismissal or conversion was appropriate and ultimately dismissing case). Here, creditors are better off outside of bankruptcy than in Chapter 7 liquidation.

B. The relative priorities between the various lenders should be preserved upon dismissal.

22. MAMC, Inc., Debtor's principal secured creditor pertaining to Debtor's real property ("MAMC"), is comprised numerous individual lenders. Among those lender's, there is a priority structure.

23. Moreover, certain DIP lenders, Debtor's counsel and the auctioneer have super-

priority positions concerning the real property Debtor conveyed to MAMC, Inc.

24. Should the Court grant the requested relief, Debtor prays that the dismissal order does not operate to merge, extinguish or in any way effect, and in fact serves to preserve, the priority structure among the claim holders that comprise MAMC concerning the real property and the DIP lenders

25. In addition, Debtor requests that the Court's dismissal order preserve the Court ordered first priority indefeasible mortgage on the assets of the Debtor granted to Debtor's counsel, Stearns Weaver Miller Weissler Alhadeff and Sitterson, P.A. for attorneys' fees and costs (D.E. 210) and the first priority lien on real property of the Debtor in the amount of \$8,736.04 granted to Auctioneer, Ameribid, LLC and Louis B. Fisher, III for the balance of his compensation (D.E. 226).

26. By preserving the relative priorities, upon liquidation of the property the Receivership Court will be able to properly allocate the proceeds of the liquidation.

IV. CONCLUSION

27. Debtor had hoped it could reorganize its business via the Chapter 11 process. However, prevailing market conditions quashed that hope. Having disposed of its assets by conveying them to secured creditors through Court ordered auctions, nothing remains for Debtor to accomplish in this case. Debtor submits that this case should be dismissed for cause based upon the continuing loss and diminution of the estate and the absence of a reasonable likelihood of rehabilitation.

WHEREFORE, the Debtor requests entry of an Order: (i) dismissing this case (ii) preserving the creditor priority structure pertaining to Debtor's real property and (iii) granting any other relief this Court deems just and proper under the circumstances.

Dated: June 18, 2009.

Respectfully submitted,

I hereby certify that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualifications to practice in this court set forth in Local Rule 2090-1(A).

/s/ Patricia A. Redmond

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