

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

J. POLLICHEMI BUILDER, INC.

CASE NO. 94-60495

Debtor

APPEARANCES:

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court has before it a motion by the Official Committee of Unsecured Creditors ("Chapter 11 Creditors' Committee") appointed in the now converted Chapter 11 case, requesting this Court to reconsider its Order of July 26, 1994, sua sponte converting this case from one filed involuntarily pursuant to Chapter 11 of the United States Bankruptcy Code (11 U.S.C.

§§101-1330) ("Code") to one pursuant to Chapter 7 of the Code.¹

The motion was heard before this Court at Syracuse, New York on August 2, 1994.

JURISDICTIONAL STATEMENT

This Court has core jurisdiction of this contested matter pursuant to 28 U.S.C. §§1334(b) and 157(a), (b)(1), (b)(2)(A) and (O).

FACTS

This case was initially filed as an involuntary Chapter 11 on March 1, 1994. The Debtor did not contest the involuntary petition. As of the date of the filing, the Debtor had effectively ceased operating its custom residential home building business in the greater Syracuse, New York area.

On June 20, 1994, this Court issued an Order Directing Status Conference in the Chapter 11 case, pursuant to Code §105 and Rules 9014 and 7016 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."). Also on June 20, 1994, a Notice of Status Conference was served on all creditors by ordinary mail by the Clerk of this Court. The June 20th Order, as well as the Notice of Status Conference, advised all interested parties that "the Court may, for cause shown, sua sponte, order that the case be dismissed

¹ The Creditors' Committee was appointed by the United States Trustee ("UST") on March 8, 1994.

or converted to Chapter 7" at the status conference. There is no dispute that all of the members of the Chapter 11 Creditors' Committee are listed upon the mailing matrix filed with the Clerk of this Court and presumably received the Notice.

At the Status Conference held on July 20, 1994, the Debtor appeared by its attorneys, Grass, Balanoff & Whitelaw, P.C., Mary Lannon Fangio, Esq. of counsel. Also appearing were the United States Trustee by Kevin Purcell, Esq., the Internal Revenue Service by William F. Larkin, Esq., Assistant United States Attorney; Key Bank by Hiscock & Barclay, Esqs., Laura Harris, Esq.; of counsel; Goodfellow Development Corp. by William Carrigan, Esq. and Pooley Dry Wall by Craig Nichols, Esq. The Chapter 11 Creditors' Committee, though represented by counsel, did not appear at the Status Conference.

At the conclusion of the Status Conference on July 20, 1994, the Court went on the record in open court, and pursuant to Code §1112(b), sua sponte converted the involuntary Chapter 11 case to one pursuant to Chapter 7.

ARGUMENTS

The Chapter 11 Creditors' Committee now asks this Court to reconsider its Order of Conversion.² The Chapter 11 Creditors'

² Since the Order of Conversion was dated July 26, 1994, and this motion was filed by the Chapter 11 Creditors' Committee on July 27, 1994, arguably the Committee had no official existence on the date it filed the motion. See In re Kel-Wood Lumber Products co., 88 B.R. 93, 94 (Bankr. E.D.Va. 1988). ("[C]onversion to Chapter 7 and the ensuing termination of the committee appointed under 11 U.S.C. §1102 ...").

Committee asserts several grounds for reconsideration in its motion papers, but the only three urged by it at the argument of the motion were that it is in a better position than a Chapter 7 trustee to pursue potential claims against the Debtor's former principal, who allegedly transferred in excess of \$800,000 of the Debtor's property to himself, that the existence of a Chapter 7 trustee will add an unnecessary layer of administrative expense to the estate, and finally that a status conference is not the procedural or functional equivalent of "after notice and a hearing" required by Code §1112(b) in order to effect the conversion of a Chapter 11 case.

Only the UST appeared in opposition to the motion and asserted that Code §705 provides for the appointment of a creditors committee in a Chapter 7 case. The UST also expressed concern that in light of the allegations being made by the Chapter 11 Creditors' Committee against the Debtor's former principal, it would not be advisable to return control of the Debtor's remaining assets to that individual.

DISCUSSION

While the initial disclosures regarding the status of the case were made informally in Chambers, the Debtor did file a Status Report dated July 15, 1994, which generally indicated that the Debtor had ceased operations in January 1994, and that the Debtor initially contemplated filing a liquidating plan.

Following the in-Chambers conference, the Court went on

the record and continued the Status Conference. Having concluded that the Debtor was non-operational and that it was having difficulty even in the liquidation of its assets, the Court converted the case to Chapter 7.³ While not specifically articulated on the record, it is clear that conversion was warranted on the basis of Code §1112(b)(2) and (3).

The Chapter 11 Creditors' Committee, which chose not to attend the duly noticed Status Conference and articulate the substantive objections to conversion which they now seek to assert, asks the Court, on this reconsideration motion, to now examine those objections.

Initially, the Court does not believe that a party which has received appropriate notice of a matter before the Court and chooses not to appear, should be afforded the opportunity to avail itself of a motion pursuant to Fed.R.Bankr.P. 9023 or 9024 unless there has been a showing of excusable neglect.

Nevertheless, since the Chapter 11 Creditors' Committee raises procedural objections to the Court's sua sponte Order at a Status Conference, the Court will address those objections.

There is little doubt that a bankruptcy court, acting pursuant to Code §105(a), has the authority to sua sponte dismiss or convert a Chapter 11 case. See In re 266 Washington Associates, 141 B.R. 275, 288 (Bankr. E.D.N.Y.) aff'd sub nomine In re Washington Assoc., 147 B.R. 827 (E.D.N.Y. 1992); see also In re

³ At the argument of this motion on August 2, 1994, Debtor's attorney advised the Court that she was unaware, at the Status Conference, of ongoing efforts by the Chapter 11 Creditors' Committee to market the Debtor's remaining assets.

Greene, 127 B.R. 805, 808 (Bankr. N.D. Ohio 1991) (Congress amended §105(a) specifically to overrule In re Gusan Restaurant Corp., 737 F.2d 274 (2d Cir. 1984) which denied the Gusan court's right to convert a case sua sponte.)⁴

The Chapter 11 Creditors' Committee does not appear to dispute the existence of the Court's authority to dismiss or convert under Code §105, but posits that such authority cannot be exercised within the framework of a status conference which it notes is a procedure that is without any statutory basis.⁵

This Court disagrees. Code §1112(b) requires that before a Chapter 11 case may be dismissed or converted, except on application of the debtor, the Court must afford parties in interest a notice and hearing. Code §102(1)(A) construes "after notice and a hearing" to mean after such notice as is appropriate in the particular circumstances and such opportunity for a hearing as is appropriate in the particular circumstances." Finally, Fed.R.Bankr.P. 2002(a)(5) requires that twenty days notice of a motion to convert or dismiss a Chapter 11 case be provided to all creditors. The Court believes that both the statutory and procedural requirements were met at the July 20, 1994 Status Conference. Five creditors (including the UST) saw fit to attend

⁴ Code §105(a) was amended in 1986 by adding the sentence "No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action ..."

⁵ The Chapter 11 Creditors' Committee notes that pending Senate legislation proposes to amend Code §105 by adding a subdivision that would authorize the holding of status conferences, but that dismissal or conversion of a case is not intended to be the subject of such a status conference. (S.540)

the conference and none of those creditors opposed the Court's sua sponte action, though they clearly were given the opportunity on the record to do so.

Admittedly, none of the members of the Chapter 11 Creditors' Committee were in attendance at the Status Conference, although they had been given notice that the Court might very well convert or dismiss the case. As the UST points out, if they wish to continue their pursuit of the Debtor's former principal, and they intend to actively monitor the progress of the case in a Chapter 7 context, Code §705 provides them such a statutory basis to do so.

This Court is not persuaded that this case should be reconverted to a Chapter 11 posture, once again giving control of the case to a Debtor who admits that it has neither the desire nor the means to either reorganize or liquidate itself.⁶

Accordingly, the Chapter 11 Creditors' Committee motion, upon reconsideration and assuming arguendo that it had the legal capacity to file it, must be denied.

IT IS SO ORDERED.

Dated at Utica, New York

this day of August, 1994

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

⁶ "When a corporation is involved the purpose of Chapter 11 is rehabilitation. Absent a reasonable amount of assets and a feasibly operating business, there is no reason for continuing a corporate debtor in Chapter 11." In re East Coast Airways, Ltd., 146 B.R. 325, 336 (Bankr. E.D.N.Y. 1992) (citations omitted).