

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

PEREGRINE PARTNERS

CASE NO. 99-60021

Debtor

Chapter 11

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

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

The Court has before it three motions for its consideration in the context of the bankruptcy case of Peregrine Partners (“Debtor”). On April 24, 2000, a motion was filed on behalf of Todd

Welch Construction, RMS Gravel, Inc. and Kirksway Farms, Inc. (“Welch creditors”) seeking dismissal of the Debtor’s case pursuant to §1112(b) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (“Code”) or relief from the automatic stay pursuant to Code § 362(d) in order for the Welch creditors to proceed with a foreclosure action in New York State Supreme Court. On April 28, 2000, a similar motion was filed by Eleanor Foote (“Foote”). On May 2, 2000, Lawrence Fabbroni (“Fabbroni”) also filed a motion pursuant to Code § 362(d) seeking relief from the stay in order to enforce his mechanic’s lien. (Hereinafter, all three entities will be referred to as “the Movants”). On May 3, 2000, opposition to all three motions was filed on behalf of the Debtor.

The motions were heard at a regular motion term of the Court in Binghamton, New York, on May 9, 2000. Following oral argument, the Court held an evidentiary hearing (“Hearing”) on May 30, 2000, in Utica, New York. At the Hearing, the Court heard testimony from several witnesses. Following the Hearing, the parties were provided with an opportunity to file memoranda of law, and the matters were submitted for decision as of June 16, 2000.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of these contested matters pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(A), (G) and (O).

FACTS

On January 4, 1999, a voluntary petition (“Petition”) pursuant to chapter 11 of the Code

was filed on behalf of the Debtor by Rainer Saldsieder (“R. Saldsieder”).¹ According to the Debtor, R. Saldsieder, Richard Varn and Ralph Varn entered into an agreement creating a partnership for the purpose of purchasing and developing real estate in Tompkins County, New York. The Welch creditors provided labor and materials for improvement of a residential subdivision owned by the Debtor and identified as “Peregrine Hollow” (“Subdivision”). *See* Movants’ Exhibit 8. The Debtor in its schedules indicates that the Welch creditors “took one mortgage to replace much smaller mechanics’ liens” filed when the Debtor failed to pay them for their services. At the Hearing, Todd Welch testified on cross-examination that the Welch creditors hold a first mortgage on certain lots in the Subdivision. According to the Debtor’s Statement of Financial Affairs, there was a foreclosure action commenced by the Welch creditors pending in New York State Supreme Court, Tompkins County, when the Petition was filed. *See* Debtor’s Statement of Financial Affairs at ¶4(a). In addition, allegedly there was a tax foreclosure sale scheduled for January 8, 1999. *See id.*

The Debtor also identifies Foote as holding a mortgage of \$125,550 on a number of the lots in the Subdivision. *See id.* Said mortgage was executed on October 24, 1994, and according to Foote’s attorney, Debtor has not made any payments on the note executed contemporaneously with the mortgage. *See* Affidavit of Laurie M. Johnston, sworn to April 21, 2000, and Exhibit “A” attached thereto.

Also listed in the Debtor’s schedules is the claim of Fabbroni based on a mechanic’s lien

¹ By Order dated December 16, 1998, the Hon. Walter J. Relihan, Justice, New York State Supreme Court, extended R. Saldsieder’s sole authority to manage the day-to-day business of the Debtor. *See* Movants’ Exhibit 11. The Order expressly permitted R. Saldsieder “to prepare, file and prosecute a Petition for Bankruptcy . . .” on behalf of the Debtor without consent from the other partners. *See id.*

on certain of the lots in the Subdivision in connection with services provided to the Debtor in his capacity of civil engineer and surveyor.

At the Hearing, the Movants called two witnesses. Christopher Vann (“Vann”), a real estate associate and treasurer of the Ithaca New York Board of Realtors, presented testimony concerning market trends in Tompkins County and the availability of real estate comparable to the lots in the Subdivision. Referring to Movants’ Exhibit 1, Vann testified that as of May 26, 2000, there were 376 developed or improved lots on the market in Tompkins County. For the two year period from May 22, 1998 through May 18, 2000, 252 lots were sold for an average price of \$24,214 after an average of 342 days on the market. *See* Movants’ Exhibit 3. Between 1998 and 2000, lots in the Caroline School District where the Debtor’s Subdivision is located were on the market for approximately 290 days before being sold. *See* Movants’ Exhibit 5. Vann testified that the Debtor’s efforts to market the lots in the Subdivision were disjointed and the “stigma” of bankruptcy would, in his opinion, hinder the Debtor’s marketing efforts as most prospective buyers wanted to close as soon as possible without having to await approval by the Court. He also testified that in this case any buyer of one of the lots in the Subdivision would incur an additional cost of \$5,500 pursuant to an agreement with the Town of Dryden,² which would impact negatively on any efforts to sell the lots. *See* Movants’ Exhibit 10.

Movants also called Todd V. Welch whose company had installed the roads in Phase I of the Subdivision and had also brought water and sewers to it. He estimated that it would cost more

² The “Agreement Establishing Fund for Construction of Snyder Hill Sewer District Meter Pit, Flow Meter and Related Appurtenances,” dated November 7, 1995, provides for the monies to be held in an escrow account as security for the Debtor’s construction of certain improvements, including a meter pit, flow meter and related appurtenances, in the Subdivision. *See* Movants’ Exhibit 10.

than \$550,000 to improve, develop and provide the infrastructure to Phase II of the Subdivision, which currently is undeveloped and without road access. This represents two to three times the original cost of Phase I in 1995-1996. *See* Movants' Exhibit 9.

Heidrun Saldsieder ("H. Saldsieder"), wife of the managing partner, R. Saldsieder, testified that over the past 18 months since the filing of the Debtor's Petition, she has been working with the court-appointed realtor to market the Subdivision. She acknowledged that since 1998 none of the lots without houses on them had been sold. It was her testimony that the Debtor had received offers to purchase Lot 43³ in May 1997, but there had been no sale. Also, there had been two offers on the model home situated on Lot 28 in 1999 which had fallen through.⁴

ARGUMENTS

The Movants contend that the case should be dismissed based on (1) the Debtor's failure to file a plan, (2) the Debtor's failure to sell any of the parcels in the Subdivision, and (3) the Debtor's failure to pay more than \$75,000 in real property taxes on the Subdivision. *See* Movants' Exhibit 7. In the alternative, the Movants argue that the automatic stay should be modified to allow them to pursue their state court remedies. Movants argue that there has been unreasonable delay and their interests are not being adequately protected.

Debtor's counsel responds that "the Debtor realizes that it cannot continue for very much

³ Lot 43 consists of a single family dwelling which is 60% complete and listed by the Debtor for \$140,000. *See* Movants Exhibit 2.

⁴ Lot 28 is listed for sale for \$129,000.

longer without a sale of property and a liquidating Plan. * * * All the Debtor is asking for is a further chance to develop sales prospects . . . * * * Frankly, at this stage there would be little prejudice to the creditors if another selling season does in fact go by, and the court states a deadline by which offers may be put on for court approval and a Plan filed.” See Debtor’s Memorandum of Law, filed June 16, 2000, at 4-5.

DISCUSSION

Reopening the Hearing

On June 16, 2000, a motion was filed on behalf of the Debtor requesting that the Court reopen the Hearing in order to submit evidence of the fact that the Debtor had received an offer for the purchase of Lot 28, otherwise known as 12 or 14 Peregrine Way, for \$125,000. The motion was heard on July 5, 2000, and on July 14, 2000, the Court signed an Order denying the Debtor’s motion without prejudice.

At the hearing on July 5th, the Court indicated that as long as the sale was still pending, it would not consider reopening the proof. However, it also indicated that it would be willing to take judicial notice of the sale of the property if and when it occurred without requiring all parties to return to Court. On November 20, 2000, the Court signed an Order approving the accounting regarding the disbursements of proceeds of the closing on September 15, 2000, on Lot 28. Payments included \$24,391.05 in real property taxes, \$8,750 in real estate commissions, \$8,500 to R. Saldsieder in reimbursement for repairs to the property, \$495.12 to Fabbroni for survey work and \$76,198.12 to the Welch creditors. The Court takes judicial notice of the sale.

Dismissal pursuant to Code 1112(b)

The Court has wide discretion in determining whether to ultimately dismiss a case pursuant to Code § 1112(b). See *In re Dark Horse Tavern*, 189 B.R. 576, 580 (Bankr. N.D.N.Y. 1995); *In re Gucci*, 174 BR. 401, 410 (Bankr. S.D.N.Y. 1994) (citations omitted). Acknowledging that dismissal is a drastic measure, it is important that the Court consider the totality of the circumstances, including “the debtor’s financial condition, motives, and the local financial realities” before making a final determination. See *In re Little Creek Development Co.*, 779 F.2d 1068, 1072 (5th Cir. 1986).

In *Little Creek* the court described a hypothetical scenario for which it concluded that “[r]esort to the protection of bankruptcy is not proper” *Id.* at 1073. That scenario was stated as follows:

The debtor has one asset, such as a tract of undeveloped or developed real property. The secured creditors’ liens encumber this tract. There are generally no employees except for the principals, little or no cash flow, and no available sources of income to sustain a plan of reorganization or to make adequate protection payments pursuant to 11 U.S.C. §§ 361, 362(d)(1), 363(e), or 364(d)(1). Typically, there are only a few, if any, unsecured creditors whose claims are relatively small. The property has actually been posted for foreclosure because of arrearages on the debt and the debtor has been unsuccessful in defending actions against the foreclosure in state court.

Id.

The *Little Creek* court could have been describing the Debtor herein. The Debtor’s principal asset consists of the Subdivision. The various lots comprising the Subdivision are encumbered by, *inter alia*, the liens of the Movants. There are no employees and no income

absent sales of the lots being generated. According to the most recent Operating Report on file with the Court for the month ending October 30, 2000, Debtor's checking account showed a balance of \$61.32. Lot 28 was the only parcel sold during the second "selling season" of the case. A review of the Debtor's schedules of creditors reveals that the majority of creditors assert some type of lien on the Debtor's real property. The proceeds recently received upon the closing on Lot 28 were distributed to various creditors and, as noted above, it appears that the Debtor's funds are severely limited. Since the closing in mid-September, the Debtor has not filed a plan and disclosure statement. There are a minimal number of unsecured creditors who have no interests in the real property. There also were at least two foreclosure actions pending in state court at the time the Debtor filed its Petition, including a tax foreclosure sale scheduled for January 8, 1999.

This case was filed on January 4, 1999. Debtor's counsel indicates that the "the debtor has never indicated that it would be reorganizing rather debtor simply wants an orderly liquidation of the improved real property rather than a foreclosure" See Debtor's Post Hearing Memorandum of Law at 2. There is some question in this Court's mind whether a bankruptcy court is the proper forum for such an approach. Indeed, the Court of Appeals for the Second Circuit in a recent decision noted that

while a debtor may **conclude** Chapter 11 proceedings by liquidating and may even enter them with an intent to liquidate **if necessary**, there is no reason a debtor should be permitted to **enter** these proceedings without a possibility of reorganization.

In re C-TC 9th Avenue Partnership, 113 F.3d 1304, 1309 (2d Cir. 1997) (emphasis added).

For approximately two years there has been an indefinite moratorium preventing the

Movants from enforcing their rights. During that period, the Debtor has been unable to propose, let alone effectuate, a plan. The Debtor has had two selling seasons in which to market the lots in the Subdivision and has been successful in selling only one. There was testimony that the market for such lots as the Debtor's in Tompkins County has decreased in recent years and there are an abundance of comparable lots listed for sale without the "stigma" of bankruptcy. The Debtor's belief that once one lot had been sold, others would follow has not come to fruition. Up until the sale of Lot 28, none of the Movants had received anything in the way of adequate protection payments. Instead, they have experienced delay and frustration in exercising their rights while incurring costs in these proceedings. They also have encountered a decrease in whatever equity might exist in their collateral as a result of the Debtor's failure to pay real property taxes.

The balancing of the facts and equities in this case clearly favor the Movants. The Court sees no reason to prolong this exercise within the context of a chapter 11 case where there is no benefit to the creditors. There continues to be a diminution of the estate and Debtor's counsel acknowledges no intention to reorganize. Accordingly, the Court will grant the Movants' request to dismiss the case. It is, therefore, unnecessary that the Court consider the motion for relief from the automatic stay.

Based on the foregoing, it is hereby

ORDERED that the motions of the Movants to dismiss the Debtor's case pursuant to Code § 1112(b) is granted.⁵

⁵ Dismissal of the case does not necessarily mandate the dismissal of any pending adversary proceedings. *See In re Roma Group, Inc.*, 137 B.R. 148, 150 (Bankr. S.D.N.Y. 1992). Code § 349 "empowers the court to issue orders which may alter the normal effects of dismissal

Dated at Utica, New York

this 13th day of December 2000

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

of the bankruptcy case if cause is shown.” *Id.* Accordingly, the Court’s dismissal of the Debtor’s case is without prejudice to the Debtor filing a motion pursuant to Code § 349 within 30 days of the date of this Order in connection with any adversary proceeding pending herein at the time of dismissal.