UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

CENTER COURT FITNESS, L.L.C. CASE NO. 98-65130

Debtor

APPEARANCES:

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

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

Presently before the Court is a motion brought on by Order to Show Cause dated April 28, 1999. By that motion Center Court Fitness, L.L.C. (the "Debtor") seeks authorization pursuant to § 363 of the United States Bankruptcy Code, (11 U.S.C. §§ 101-1330) ("Code") to sell an air structure system ("Tennis Bubble") for $70,000 to J.P. McGivney Company of Gig Harbor, Washington ("McGivney"). Opposition to the Debtor's motion was filed on May 5,

1999, on behalf of Chase Manhattan Bank and Venita G. Hottenstein as Co-Trustees of the Will of John H. Garbade ("Chase/Hottenstein"), who hold a mortgage on the real property on which the Debtor operates its athletic facility. L. David Zube, Esq., duly appointed chapter 7 trustee ("Chapter 7 Trustee") in the case of Steven Kersat ("Kersat"), a joint owner of said real property, filed opposition to the Debtor's motion on May 10, 1999. Also opposing the motion is Mary Jane Nugent, Esq. ("Nugent"), a member of the unsecured creditors committee appointed in the case.[1]

The Court heard oral argument on May 11, 1999, and determined that an evidentiary hearing was necessary before any determination could be made. A hearing was held on June 11, 1999, in Utica, New York.[2] In lieu of closing arguments, the Court allowed the parties an opportunity to file memoranda of law. The matter was submitted for decision on June 28, 1999.

JURISDICTIONAL STATEMENT

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

FACTS

The Debtor filed a voluntary petition pursuant to chapter 11 of the Code on August 11,

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[1] It is not clear if Nugent is acting individually or as a representative of the committee.

[2] Per a letter addressed to the Court, dated June 10, 1999, the Chapter 7 Trustee did not appear at the evidentiary hearing, taking the position that his interest as trustee would be adequately represented by the other parties opposing the motion.

1998. According to the "Statement Regarding Authority to Sign and File Petition," executed on August 4, 1998, by Thomas Perchinski ("Perchinski"), the Debtor's president, he was given authorization to file the petition on behalf of the Debtor pursuant to a resolution adopted by the members of the Debtor on August 3, 1998.

The Debtor is a limited liability company operating apparently without a formal operating agreement. According to the Perchinski's testimony, the Debtor operates as an athletic center with facilities for indoor soccer, lacrosse, racquetball, tennis and fitness. The athletic center is located at 1025 Robinson Hill Road in Johnson City, New York ("Real Property"). The Real Property is owned by Perchinski and Kersat[3] and, as noted above, is subject to a mortgage executed on June 30, 1995 ("Mortgage") and held by Chase/Hottenstein. *See* Chase/Hottenstein's Exhibit 1.

Paragraph 5 of the Mortgage provides that

> This Mortgage extends to and shall encumber all buildings, improvements, fixtures, or appurtenances now or hereafter erected or existing upon the Mortgaged Property, including all elevators and all gas, steam, electric, water, cooking, refrigerating, lighting, plumbing, heating, air conditioning, ventilation, and power systems, machines, appliances, fixtures, and appurtenances, even though they be detached or detachable, all of which shall be deemed part of the Mortgaged Property.

See id.

The Tennis Bubble was purchased from Tensar Industries, Inc. ("Tensar") by the Debtor pursuant to Articles of Agreement ("Agreement"), signed on behalf of the Debtor on May 9, 1996. *See* Debtor's Exhibit 3. It encloses two clay courts which were constructed in the summer

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[3] According to the Debtor's 1996 Federal tax return, Perchinski and Kersat each held a 43% interest in profit sharing in the Debtor and each held a 50% ownership of capital in the Debtor. *See* Debtor's Exhibit 8.

of 1996. At that time outside electrical fixtures and drainage were also installed. In addition to the two clay courts, the Debtor also has four hard surface tennis courts located in one of the permanent structures on the Real Property.

The Tennis Bubble was installed at the Debtor's facility in September 1996.[4] The installation involved setting rods around the perimeter of the clay courts into 3-4 feet of concrete, approximately 18 inches wide. The Tennis Bubble is attached to anchors bolted in place every 2-4 feet and is inflated using a large blower. The lighting fixtures inside the Tennis Bubble are bolted to concrete footers, but are not attached to the Tennis Bubble in any way. It was Perchinski's testimony that both the light fixtures and the drainage were installed when the clay courts were constructed to permit outdoor use. Perchinski testified that pursuant to fire and town building codes it is necessary that the Tennis Bubble be deflated at approximately six month intervals. Routine maintenance is also performed on a six month basis.

It was Perchinski's testimony that when the Tennis Bubble was purchased he viewed it as a temporary structure to be depreciated over a short period of time. It was his understanding that a more permanent structure would have required that the Debtor comply with stricter standards of the fire and building codes. When questioned about his representations to prospective investors in the facility concerning the purchase of the Tennis Bubble, Perchinski stated that he had told prospective investors that if it did not work out the Tennis Bubble could be removed and sold.

It was Perchinski's testimony that the cost of disassembling the Tennis Bubble was

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[4] The Debtor also owns a second air structure system in which soccer, lacrosse and field hockey are played on turf.

estimated to be $7,000 to $10,000. He testified that it would take the work of 7-10 men over a period of a day to disassemble and pack up the Tennis Bubble.

With respect to its motion seeking authorization to sell the Tennis Bubble, it is the Debtor's position that the Tennis Bubble's utilization has diminished over the past three years and that expenses incurred in heating and keeping it inflated during the year exceed the income generated from utilization of the two clay courts. According to Perchinski, the decrease in the utilization of the Tennis Bubble can be attributed to (1) a decreased interest in tennis and an increased interest in other sports, including soccer; (2) moisture problems on the court surface as a result of heating the Tennis Bubble which have made the courts uncomfortable to play on during the winter months,[5] and (3) departure of one of the tennis instructors, along with several of his students.[6]

Perchinski prepared summaries of the expenses and income in connection with utilization of the Tennis Bubble between 1997 and 1999. *See* Debtor's Exhibit 4 and 5. The income figures are based on the actual use of the courts at an average cost of $20/hour.[7] The figures used in calculating the expenses are based on certain assumptions and extrapolations concerning the costs associated with operating the various motors/blowers and light fixtures. For example, he based the cost for heating the courts on the number of hours the courts were actually rented and did not factor in the heating costs for the time when the courts were not being utilized. Perchinski also

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[5] The Tennis Bubble is not utilized during the summer months because it is without air conditioning and the temperature inside the Tennis Bubble becomes exceedingly hot and humid.

[6] It was explained that not all players like playing on the clay courts because they provide a much slower surface.

[7] Charges for court time range from $16 to $24 per hour.

explained that he had not included the cost for insurance and maintenance as these were costs incurred with respect to the entire facility and it was difficult to estimate the amount actually attributable to the Tennis Bubble. The income and expenses may be summarized as follows:

INCOME AND EXPENSES ASSOCIATED WITH
OPERATION OF THE TENNIS BUBBLE, February 1997 to May 1999

Time Period	Income	Electrical Expense	Heating Expense	Net Profit/Loss
2/97 - 12/97	$53,055	$11,152	$15,475	$26,428
1/98 - 12/98	33,913	10,218	19,513	$ 4,182
1/99 - 5/99	10,723	4,094	9,996[8]	<$ 3,367>

DISCUSSION

At the conclusion of the evidentiary hearing, the Court identified several issues that needed to be addressed in connection with the Debtor's motion:

1. Whether the Debtor owns the Tennis Bubble or whether it is part of the Real Property and, therefore, not property of the estate;

2. Whether the Tennis Bubble is subject to Chase/Hottenstein's mortgage such that its sale requires the consent of Chase/Hottenstein, and

[8] Annual heating costs were incurred generally over a five month period including January through April and again in December. The heating costs for 1999 occurred between January and April. The apparent decrease in this expense in 1999 is attributable to the decrease in the cost of propane from $.82 in 1997 and $.80 in 1998 to $.53/gallon in 1999. But for this decrease in the cost of heating fuel, the loss would have been greater.

3. Whether it is in the best business judgment of the Debtor to sell the Tennis Bubble.

The Agreement identifies the Debtor as the "Buyer" of the Tennis Bubble, referred to therein as "the structure." *See* Debtor's Exhibit 3. According to the terms of the Agreement, the base purchase price for the Tennis Bubble was $115,000. The Debtor offered as proof of payment to Tensar, otherwise identified in the Agreement as the "Seller," a check for $15,000, dated July 9, 1996.[9] *See id.* There was no evidence offered at the hearing to contradict the Debtor's contention that it is the owner of the Tennis Bubble.

The question which then presents itself is whether, having been installed on the Real Property, it became a fixture. A "fixture" is "[a]n article in the nature of personal property which has been so annexed to the realty that it is regarded as part of the real property." BLACK'S LAW DICTIONARY 574 (5th ed. 1979). As this Court has previously noted in *In re Victory Markets, Inc.*, 202 B.R. 669, 671 (Bankr. N.D.N.Y. 1996), in order for personal property to be considered a fixture and part of the realty, it must "(1) be annexed to the real property or something appurtenant thereto; (2) be applied to the use or purpose for which the realty it is attached to is used; and (3) it must be intended by the parties to be a permanent accession to the realty." *Id.* at 671 (citing *Matter of Metromedia, Inc. v. Tax Commission of the City of New York*, 60 N.Y.2d 85, 90, 468 N.Y.S.2d 457, 455 N.E.2d 1252 (1983)). This Court noted further that whether the removal of the personal property would materially damage the property or the realty and whether it would reduce the value of the premises to a potential tenant may be considered. *See Victory*

[9] The exhibit consists only of a copy of the face of the check. There is no evidence that the check was ever cashed.

Markets, 202 B.R. at 671 (citing *In re H&S Manufacturing Inc.*, 13 B.R. 692, 696 (Bankr. E.D.N.Y. 1981)). Ultimately, it is the intent of the party in installing or annexing the personal property to the realty which is to be given particular weight in any consideration by the Court. *See Victory Markets*, 202 B.R. at 671.

In this case, the Tennis Bubble is clearly anchored to the Real Property. In covering the two clay tennis courts it affords members of the Debtor with additional facilities on which to play tennis during the winter months. This is consistent with the overall use of the Real Property, namely to offer a variety of sports/health/fitness opportunities to its members, including year round tennis. It is noteworthy that even without the Tennis Bubble, the clay courts would still be available for outdoor usage. Indeed, it was Perchinski's testimony that removal of the Tennis Bubble is not likely to materially damage either the Tennis Bubble or the realty.

With respect to whether the Tennis Bubble was intended to be a permanent improvement to the Real Property, Perchinski testified that it was purchased with the idea that if it did not work out, it could always be removed by the Debtor and sold. It was Perchinski's testimony that had the structure been permanent, rather than temporary, the Debtor would have had to adhere to stricter standards of the fire and building codes. Instead, all the Debtor was required to do was to deflate the Tennis Bubble on a regular basis at least every 180 days in order to comply with the fire and building codes.

Perchinski acknowledged that the Debtor did not pay sales tax in connection with the purchase and installation of the Tennis Bubble. Nugent argues that treating the Tennis Bubble

as a capital improvement to the Real Property,[10] exempt from the payment of sales tax, is indicative of the fact that the Debtor considered it to be a permanent fixture when it was purchased. From the Court's perspective this is insufficient to overcome Perchinski's testimony that the Tennis Bubble, annexed to realty which is not owned by the Debtor, was not intended as a permanent addition thereto.

Under these circumstances and based on the evidence presented, particularly the testimony concerning the ease with which the Tennis Bubble could be deflated and removed, as well as the relatively minimal impact removal will have on the Real Property, the Court concludes that the Tennis Bubble is not a fixture. It also follows that it is not an appurtenance as referenced in ¶ 5 of the Mortgage[11] and is not deemed to be part of the "Mortgaged Property" as defined therein.[12] What remains to be determined is whether the sale of the Tennis

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[10] Section 1105(c)(3) of the New York Tax Law ("NYTL") (McKinney 1987 & 1999 Supp.) imposes a sales tax on the installation of tangible personal property not held for sale in the ordinary course of business, except if the property installed will constitute an addition or capital improvement to real property. NYTL § 1101(9) defines capital improvement as an addition or alteration to real property which "(i) [s]ubstantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and (ii) [b]ecomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and (iii) [i]s intended to become a permanent installation.

[11] According to BLACK'S LAW DICTIONARY 94 (5th ed. 1979), an appurtenance is "[a]n article adapted to the use of the property to which it is connected, and which was intended to be a permanent accession to the freehold.".

[12] In reaching this conclusion, the Court also notes that at the time the Mortgage was executed in 1995 the Tennis Bubble had not been installed at the Real Property and there was no testimony to indicate that its installation was contemplated by the parties to the Mortgage at the time of its execution.

Bubble is in the best business judgment of the Debtor.[13] The Second Circuit in *In re Lionel Corp.,* 722 F.2d 1063 (2d Cir. 1983) noted that in considering whether to grant a motion pursuant to Code § 363(b), " a bankruptcy judge must not blindly follow the hue and cry of the most vocal special interest groups; rather, he should consider all salient factors pertaining to the proceeding and, accordingly, act to further the diverse interests of the debtor, creditors and equity holders, alike." *Id.* at 1071. While the court in *Lionel* identified several factors meriting consideration, they were merely to provide guidance in making a determination pursuant to Code § 363. *Id.* The main concern is whether there is a business justification for the sale. It is the Debtor's burden in seeking approval to sell the Tennis Bubble to demonstrate that its sale will aid in the Debtor's reorganization efforts. *Id.*

At the evidentiary hearing, Perchinski presented his analysis of the income generated from the utilization of the clay courts since 1997. He testified that in 1997 the Debtor's gross receipts amounted to approximately $730,000, of which $53,055 or 7% of the total revenues was derived from the use of the clay courts. In 1998 the gross receipts totaled $518,000, of which $33,913 or 6 1/2% of total revenues was attributed to the utilization of the clay courts. Obviously, the income derived from the use of the clay courts is not a substantial portion of the Debtor's income and the impact of removing the Tennis Bubble should be minimal. While its removal will mean that the clay courts will be unavailable for use over the winter months, this

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[13] While both Chase/Hottenstein and Nugent have suggested that the members of the Debtor have not authorized the sale of the Tennis Bubble and that there is no operating agreement as required by New York Limited Liability Law ("NYLLL") § 417 (McKinney 1999), the Court was not presented with any evidence of the articles of organization and there was no testimony concerning the past practices of the Debtor and its members with respect to the sale and purchase of its assets to allow the Court to address these arguments.

loss of income should be expected to be offset in part by the availability of the courts for outdoor use during the warmer months. Currently, the courts are not utilized in the summer because the indoor temperature is generally twenty degrees warmer than the outside temperature due to the fact that the Tennis Bubble is not air conditioned. Removal of the Tennis Bubble will also reduce the Debtor's heating costs and a portion of the costs for electricity, as well. Finally, the Court notes that there was apparent consensus that the clay courts have a limited appeal given the fact that the playing surface is much slower than that found on hard courts. Thus, the impact that removal of the Tennis Bubble will have on the Debtor's membership appears minimal.

The parties opposing the Debtor's motion offered no testimony to dispute Perchinski's analysis of income and expenses associated with the Tennis Bubble. There was the suggestion that the decrease in court usage over the past year or so was due in part to the Debtor's refusal to make the courts available at times. Based on the limited testimony presented, however, it is not possible for the Court to reach any conclusions concerning the frequency of such occurrences and what impact they may have had on the Debtor's income, for example, whether players requesting to play on the clay courts had been able to play on the hard courts instead or had elected to play elsewhere. Nugent criticizes Perchinski for his failure to present the Court with information concerning the possibility of recovering the cost of converting the clay courts to other uses. Perchinski testified that he had researched resurfacing the courts and had found that it would cost between $25,000 to $60,000, depending on the type of materials used. Nugent failed to present any evidence of her own to counter Perchinski's testimony concerning the cost of resurfacing the courts and the fact that the Debtor could not afford to invest such monies at a time when it was attempting to reorganize. No projections concerning the potential income to

be generated if the Tennis Bubble was utilized to house facilities other than the clay tennis courts were presented. Nor was there any information provided with respect to the demand for and usage of the other dome or air structure system located on the Real Property.

Nugent also questions Perchinski's efforts to market the Tennis Bubble, suggesting that 2-3 months of advertising in three magazines was not sufficient and questioning the timing of the advertisements However, Nugent offered no testimony to backup these arguments.

Perchinski testified that he advertised in three nationwide publications over a ninety day period between February and May of 1998. The Tennis Bubble was originally purchased from Tensar at a price of $115,000. Following consultation with Tensar, Perchinski listed the Tennis Bubble at a minimum selling price of $70,000. According to Perchinski, the Debtor received four calls and two bids of $50,000 and $70,000 in response to the advertisements. It is the latter bid from McGivney for which the Debtor now seeks Court approval.

The Court has reviewed the testimony and the evidence presented. While the Court understands that the members of the Debtor may wish to maintain the facilities as they exist or expand the facilities to other uses, this Debtor's main focus must be on reorganization, which may entail some cost cutting measures. The Court finds Perchinski's analysis of income and expenses persuasive. Expenses are increasing and income is decreasing with respect to the Tennis Bubble. The Debtor can ill afford to experiment with alternative uses for the clay courts given the expense associated with resurfacing them. It is also difficult to justify spending additional monies to correct the heating and cooling problems which exist in the Tennis Bubble given the limited demand for the courts. Furthermore, removal of the Tennis Bubble will not prevent the clay courts from being utilized in the warmer months, as was the case prior to its

installation.

The Court concludes that the sale of the Tennis Bubble for the price offered is in the best business judgment of the Debtor. It will allow the Debtor to reduce its expenses in connection with a portion of its facility which is not generating sufficient income to justify its continued use. According to Perchinski, the proceeds of the sale, less the cost of $7,000 - $10,000 to dissemble the unit, will be utilized in connection with the Debtor's reorganization efforts.[14]

Based on the foregoing, it is hereby

ORDERED that the Debtor's motion seeking to sell the Tennis Bubble to McGivney for $70,000 pursuant to Code § 363 is granted.

Dated at Utica, New York

this 23rd day of July 1999

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

[14] The Debtor's original motion indicated that the proceeds would be used to reduce the amount owed on the Mortgage. Apparently in response to opposition based on the fact that the Real Property is not owned by the Debtor and that the Debtor is not obligated on the Mortgage, at the evidentiary hearing Perchinski clarified the Debtor's intention that the proceeds be used in connection with its reorganization and not to reduce the debt on the Mortgage.