UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

HOTEL SYRACUSE, INC. — CASE NO. 90-0292l

Debtor — Chapter 11

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

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

Presently before this Court is the motion of the United States Trustee ("UST") seeking an order either converting this case to a case pursuant to Chapter 7 of the Bankruptcy Code (ll U.S.C. §§101-1330) ("Code") or dismissing the case. The UST's motion is grounded upon Code §1112(b). Additionally, the UST sought payment of its quarterly fees pursuant to 28 U.S.C. §1930(a)(6).

The UST's motion first appeared upon the Court's motion calendar on August 20, l99l and was thereafter consensually adjourned to the date of the

hearing on confirmation of the Debtor's proposed plan.[1]

When no hearing on confirmation of any plan proposed by the Debtor occurred, the UST requested that its motion be restored to the Court's motion calendar. In accordance with that request, the motion was added to the motion calendar at Syracuse, New York on June l6, l992 and was considered at that time. Following oral argument, the Court allowed the parties until June 23, l992 for submission of any additional memoranda. Only the Debtor and the City of Syracuse, City of Syracuse Industrial Development Agency ("SIDA") and City of Syracuse Economic Development Corporation ("SEDCO") collectively the "City" filed additional papers.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this motion pursuant to 28 U.S.C. §§1334(b) and 157(a), (b)(l),(2)(A) and (O).

FACTS

The Court need not recite the voluminous facts of this case other than to note that Debtor's voluntary petition pursuant to Chapter ll of the Code was filed on October 26, l990. At the time of filing, Debtor was the owner and operator of a 725-room hotel in downtown Syracuse, New York. Debtor's primary creditors included Manufacturers Hanover Trust Company ("MHTC"), the City and Apple Bank.

To date, no disclosure statement has been approved by this Court and no plan of reorganization or otherwise has been confirmed. The case, over the past two years, has been marked by almost continuous litigation though the parties have seen fit, at times, to engage in "standstills" and "global stipulations", only to have such consensual arrangements later dissolve, leading

[1] On October 24, l99l, Hotel Syracuse ("Debtor") filed an Amended Disclosure Statement and Amended Plan. On October l4, l992, this Court entered an Order denying approval of the Amended Disclosure Statement. No hearing on confirmation of the Amended Plan has ever been held.

to renewed hostilities.

ARGUMENTS

In renewing its motion in June of l992, the UST contends, at oral argument, that throughout the case the Debtor has lacked the ability to show any operational profit from its hotel, that it has filed disclosure statements and plans that are meritless, only to avoid dismissal or conversion, and that it continues to generate a huge administrative debt which will all but wipe out any realistic hope that pre-petition unsecured creditors might have had of getting paid.

The City echoes the assertions of the UST and adds that the Debtor's losses are perhaps far greater when one considers that it has failed to pay current real property taxes and is not paying the debt service on its secured debt.

The Debtor asserts that as of June ll, l992, it experienced a break through in negotiations with MHTC, which holds a $l2.5 million dollar claim against the Debtor, secured by a first mortgage on the hotel. Debtor optimistically reports that MHTC has agreed to reduce its debt to $6 million and subordinate its secured position to new financing in the sum of $8 million. The new financing is to be provided by a group of prominent Syracuse businesspersons, collectively known presently as the "Green Group".

Debtor goes on to reaffirm its belief that with the contemporaneous opening of the newly constructed Syracuse Convention Center only a few blocks away from the Hotel, its profitability will take a dramatic upward turn.

Finally, as it has continually during the case, Debtor accuses the City of engaging in a campaign of negative publicity to drive potential business away from its Hotel.

DISCUSSION

The Court has previously passed upon motions to convert or dismiss Chapter ll cases pursuant to Code §1112(b) and has concluded that, "[i]t is

within the Court's broad discretion to convert or dismiss the case, provided the best interests of the creditors and the estate are served." In re Copy Crafters Quickprint, Inc., 92 B.R. 973, 985 (Bankr. N.D.N.Y. l988). See also In re Sal Caruso Cheese, Inc., l07 B.R. 808, 8l7 (Bankr. N.D.N.Y. l989).

Furthermore, "[c]onversion or dismissal of a Chapter ll case is a drastic measure and the burden is on the movant to prove it is warranted and not premature." Sal Caruso Cheese, Inc., l07 B.R. at 8l7.

The UST's motion, as originally filed in July of l99l, alleged basically two grounds for dismissal or conversion: (a) lack of ability to show a profit and (b) failure to file a plan of reorganization and disclosure statement.[2] Upon restoration of the UST's motion to the calendar approximately one year later, those same grounds are alleged by the UST albeit, that the Debtor has in fact filed an unconfirmed plan and an unapproved disclosure statement in the interim.

Additionally, the UST now asserts that he is fearful that the continuation of the Chapter ll case spawn even greater administrative expenses which, in accordance with Code §§503(b), 507(a)(l) and 1129(a)(9)(A), will have to be paid ahead of pre-petition unsecured creditors in any subsequent plan of reorganization.

Both the UST and the City question the need for any evidentiary hearing on this motion, urging the Court to reach its decision solely on the papers and its familiarity with the events that have occurred since the filing of the Chapter ll case.

Failure to hold an evidentiary hearing prior to granting a motion to convert or dismiss a Chapter ll case does not necessarily constitute a violation of a debtor's right to due process of law, particularly where there has been a prior evidentiary hearing on the motion. See Matter of Sullivan Cent. Plaza I, Ltd., 935 F.2d 723, 727 (5th Cir. l99l).

In the instant case, it is not entirely clear what benefit an evidentiary hearing would provide to the Debtor vis-a-vis the grounds for the

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[2] It is noted that the UST's motion fails to allege which subsections of Code §1112(b) it relies upon, however, it would appear that Code §1112(a)(l), (2) and (3) are applicable.

Code §1112(b) motion since it does not directly refute the contentions of either the UST or the City. Instead the Debtor has, since mid-June of this year, been touting the combination of MHTC's potential subordination of its claim and the infusion of some $8 million dollars of new money as the nucleus of an imminent consensual plan.

The Court is not at all clear on the present status of the Green Group's proposal on MHTC's alleged subordination, and it believes that in light of that fact, an evidentiary hearing is necessary at which the Debtor will be given the opportunity to flesh out what has to date been an optimistic outline of what it hopes will happen in the immediate future.

Coincidentally, an evidentiary hearing has been scheduled to be held before this Court on November 23, l992 on the City's motion to appoint a trustee herein pursuant to Code §1104. The Court, therefore directs the Debtor to be prepared to present at said hearing credible evidence in support of its contention that it will be able to file a plan of reorganization which shall incorporate both the MHTC debt reduction and subordination, as well as the new capital infusion by the Green Group.

IT IS SO ORDERED.

Dated at Utica, New York
this day of November, l992

STEPHEN D. GERLING
U.S. Bankruptcy Judge