UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ONONDAGA PLAZA
MAINTENANCE CO., INC. CASE NO. 96-62930

Debtor Chapter 11

APPEARANCES:

JOHN G. STONE, ESQ.
Assistant Corporation Counsel
Attorney for City of Syracuse
300 City Hall
Syracuse, New York 13202

STEPHEN LANCE CIMINO, ESQ.
Attorney for Debtor
Suite 300
307 South Clinton Street
Syracuse, New York 13202-1250

GUY VAN BAALEN, ESQ.
Assistant U.S. Trustee
10 Broad Street
Utica, New York 13501

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 filed on February 10, 1998 by the City of Syracuse ("City") seeking to dismiss, or in the alternative, to convert to chapter 7, a chapter 11 petition filed by the Onondaga Plaza Maintenance Corporation ("Debtor"). The motion initially appeared on the Court's calendar for March 3, 1998, and was, thereafter, consensually adjourned to March 17 and later to April 21, 1998. The matter was submitted for decision on May 22, 1998

following the submission of memoranda of law.

JURISDICTIONAL STATEMENT

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

FACTS

The Debtor in the present action owns a single asset, a seven-story, ninety year old commercial building located at 306-12 South Salina Street in Syracuse, New York ("Real Property"). The Debtor's only listed creditor is the City of Syracuse, which is owed unpaid real property taxes in an amount exceeding $200,000 and which has moved to dismiss the voluntary petition filed by Debtor on June 19, 1996 pursuant to chapter 11 of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code").

Debtor acquired the Real Property in 1995. At the time of the sale, Debtor's predecessor in interest was deeply in arrears on its real property taxes, which had not been paid since the 1991 assessment year. Debtor has not cured this delinquency, nor has it paid its real property taxes for any year since it acquired ownership. Including interest and penalties, the City now claims a total tax deficiency of $236,361.35, subject to a refund credit of $3,027.94 from the property's 1991 tax payment. Under applicable state law, this deficiency operates as a lien on the property. N.Y. Real Property Tax Law §902 (McKinney 1989).

The present action is just one episode in a long series of litigation between Debtor and the City related to Debtor's property tax liability. To date, Debtor has twice unsuccessfully challenged the amount of its tax assessment in state court, while a third challenge was brought before this Court pursuant to §505 of the Code and rejected by an Order dated February 19, 1997. The exact value of the Real Property remains a bitterly contested issue before the Court: the City asserts a valuation of $700,000, the amount fixed by the New York Supreme Court in the most recent round of state court tax assessment litigation on the matter. Debtor, however, argues the Court should reexamine the issue, and proposes a valuation of less than $100,000.

On March 13, 1998, Debtor filed a Second Amended Plan of Reorganization ("Plan"). In relevant part, the Plan lists two classes of creditors: the City and Donald J. Kirnan ("Kirnan"), Debtor's sole equity holder. The City's tax lien is proposed to be satisfied over twenty years at a purported interest rate of 4%,[1] while future tax payments (including those for 1997/98) are based on a projected assessment value of $150,000. The Plan further designates the City as "temporarily impaired" on its claim for the 1997/98 tax liability only; Kirnan is to retain his equity and remain unimpaired.

The City bases its motion to dismiss or convert primarily on Code §1112(b)(2) (inability to effectuate a plan), as well as the implied requirement of good faith.[2] In response, Debtor

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[1] As the City correctly notes, the purported interest rate is inconsistent with the payment schedule appended to the Plan. Debtor divides the outstanding principal into four segments, each of which are paid off over consecutive five-year periods at 4% interest. However, interest for each segment is deferred until every preceding segment has been paid off, resulting in an actual interest rate much lower than 4%.

[2] The City's other asserted grounds for dismissing Debtor's petition include § 1112(b)(1) (absence of a reasonable likelihood of rehabilitation), § 1129(d) (unconfirmability of plans where the petitioner's principal purpose is tax avoidance), as well as Article 1, § 8 of the New York

argues that the Plan as currently formulated is confirmable, that the Plan was filed in good faith, and that Debtor can meet the repayment schedule outlined in the Plan.

DISCUSSION

A. Debtor's Ability to Effectuate a Plan

In relevant part, Code §1112 provides that

> (b) Except as provided in subsection (c) of this section, on request of a party in interest or the United States trustee or bankruptcy administrator, and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including . . . (2) inability to effectuate a plan . . .

Although there is a "firmly established rule that bankruptcy courts should not precipitously terminate a Chapter 11 case by prematurely converting or dismissing a case," *In re McDermott*, 78 B.R. 646, 651 (Bankr. N.D.N.Y. 1985), courts have uniformly recognized that dismissal under Code § 1112(b) is appropriate in cases where there is no reasonable possibility that debtor will be able to propose a plan that meets the confirmation requirements of Code § 1129. *In re Woodbrook Assoc.*, 19 F.3d 312 (7th Cir. 1994). Upon examination of the Plan and the factual circumstances surrounding Debtor's proposed reorganization, the Court finds that this is indeed such a case.

Code § 1129 provides two alternate mechanisms for the protection of creditor interests.

Constitution. Because all three of these theories involve factual or legal questions that have not yet been fully developed before this Court, and in light of the fact that the City's two principal theories already provide sufficient grounds for granting the motion to dismiss, the Court declines to address these arguments.

According to Code § 1129(a)(9)(C), priority claims that are allowed under Code § 507(a)(8), including certain unsecured governmental claims, are required to be paid within six years from the date of assessment at present value, and this requirement cannot be circumvented by the "cram down" of Code § 1129(b). *See In re Sanders Coal & Trucking, Inc.*, 129 B.R. 516, 519 (Bankr. E.D. Tenn. 1991). This mandatory protection is provided in lieu of the voting power granted to other creditors pursuant to Code § 1126, which applies only to holders of claims allowed under Code § 502. *See Travelers Insurance Co. v. Bryson Properties (In re Bryson Properties)*, 961 F.2d 496, 501 n.8 (4th Cir. 1992).

As a result, the ability of the Debtor to confirm any plan will depend on the characterization of the City's tax deficiency claims under the Code. Although the City seems to argue that Code § 1129(a)(9)(C) applies to its whole claim, this protection is not available for the portion of the City's claim that is secured under state law. *See In re Rotella*, No. 91-00463, 1994 WL 362271 at *7 (Bankr. N.D.N.Y. 1991). By operation of N.Y. Real Property Tax Law §902 (treating property tax deficiencies as liens) and Code § 506 (bifurcating undersecured claims into secured claims up to the value of the collateral and unsecured claims for the remaining balance), the City may thus rely on Code § 1129(a)(9)(C) only for the portion of its claim, if any, that exceeds the value of the Real Property. Conversely, by operation of Code § 502(b)(3), the City enjoys voting rights under Code § 1126 only for the portion of its secured claim that does not exceed the value of the Real Property.

Though the parties do not agree on the exact value of the Real Property, neither has suggested that it is completely worthless. As a result, at least some part of the City's claim will have to be treated in accordance with Code § 1129(a)(8), which states that each class of creditors

must either accept or be unimpaired under the plan.[3] The City has expressed an intention to reject any plan that gives it less than it would receive under foreclosure or liquidation, and given the two-party character of this dispute, the Court finds this statement to be both credible and reasonable. The Debtor's response is that it is possible to devise a plan that would leave the City unimpaired, thus satisfying the second prong of Code §1129(a)(8).

The statutory definition of impairment is contained in Code §1124. The language of this section is broad, encompassing any change that does not "leav[e] unaltered the legal, equitable, and contractual rights" of the holder of an interest. In the present case, any plan that leaves Debtor with possession of the property without immediately and fully satisfying the City's tax lien would alter the City's state law right to immediate payment or foreclosure, bringing the City within the terms of Code § 1124. Debtor seems to argue that the City will not be impaired if it receives the cash-stream equivalent of a lump sum payment. While this point might be relevant in a cram down context, it has no bearing on the threshold inquiry of whether the City is impaired, as the replacement of the right to immediate payment with an interest-bearing right to graduated payment has been held to be an alteration of legal rights even where the former is the indubitable economic equivalent of the latter. *In re Union Meeting Partners*, 160 B.R. 757, 771 (Bankr. E.D. Pa. 1993).

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[3] Although a plan that fails to comply with Code § 1129(a)(8) may under certain circumstances be crammed down under Code § 1129(b)(1), this mechanism is not available to the Debtor in the present case. Under §1129(a)(10), one of the requirements for confirmation is that if any class of creditors is impaired, then at least one non-insider impaired class must consent to the plan. Since the City is the only possible non-insider impaired creditor in this reorganization, any plan by Debtor that violates Code § 1129(a)(8) would by definition also violate Code
§ 1129(a)(10).

Of course, there remains the argument that the Debtor could propose a cash-stream plan that, while leaving the City technically impaired under Code § 1124, would contain terms attractive enough to obtain the City's consent. However, the Court notes that Debtor's most recent Plan, submitted nearly two years after Debtor entered bankruptcy, proposed to repay the City at an interest rate so low as to give the City, in present-value terms, less than half of what it expects to obtain through liquidation. Debtor has yet to show that it is capable of producing a feasible repayment schedule that would be acceptable to the City. Given the feebleness of Debtor's last offer, the Court concludes that it cannot reasonably expect Debtor to be able to do so in the future.

B. Debtor's Good Faith

Although bad faith is not specifically listed among the grounds for dismissal of a petition under Code §1112(b), courts have unanimously held that a minimal requirement of good faith is implicit within the statutory power to dismiss for cause. *In re C-TC 9th Avenue Partnership*, 113 F.3d 1304, 1310 (2d Cir. 1997). An inquiry into good faith is not limited to an evaluation of the Debtor's subjective intentions at the time the petition was filed-- indeed, in most cases, such an exercise would be futile. Instead, courts applying this doctrine have more often than not arrived at the Debtor's state of mind circumstantially, by considering the overall transactional character of the bankruptcy-- in other words, whether the case presents the sort of dispute that can be, or should be, resolved through bankruptcy. *See In re Thirtieth Place*, 30 B.R. 503, 506 (B.A.P. 9th Cir. 1983).

Under the totality-of-the-circumstances test recently adopted by the Second Circuit, the

following objective factors may be considered as proxies for bad faith:

> (1) the debtor has only one asset;
> (2) the debtor has few unsecured creditors whose claims are small in relation to those of the secured creditors;
> (3) the debtor's one asset is the subject of a foreclosure action as a result of arrearages or default on the debt;
> (4) the debtor's financial condition is, in essence, a two party dispute between the debtor and secured creditors which can be resolved in the pending state foreclosure action;
> (5) the timing of the debtor's filing evidences an intent to delay or frustrate the legitimate efforts of the debtor's secured creditors to enforce their rights;
> (6) the debtor has little or no cash flow;
> (7) the debtor can't meet current expenses including the payment of personal property and real estate taxes;
> (8) the debtor has no employees.

C-TC 9th Avenue, 113 F.3d at 1311 (citing *Pleasant Pointe Apartments, Ltd. v. Kentucky Housing Corp.,* 139 B.R. 828 (Bankr. W.D. Ky. 1992)).

Debtor's petition presents one of the strongest cases for dismissal imaginable under the *C-TC/Pleasant Pointe* test. The Debtor is a single-asset entity, whose property interest would be subject to foreclosure if not for the automatic stay of Code § 362. Most significantly, this is a pure two-party problem, and as such, there is absolutely no reason for it to be in bankruptcy court in the first place. There are no junior creditors whose interests must be guarded in this case, and there is no danger that the assets of the Debtor will be broken apart in a socially wasteful manner. Instead, given the City's veto power as the only non-insider creditor under Code § 1129, this Court can only confirm a plan if both sides approve, or if the City can somehow be made non-impaired. The result would be no different if the parties were forced to bargain against a backdrop of state rather than federal law, and, as such, the only practical effect-- indeed, the only possible effect-- of the Debtor's chapter 11 petition has been to impose a two-year delay between the City and its state law rights. And while delay for the sake of delay may often be a useful

litigation tactic, it is not a legitimate use of the bankruptcy laws. As one court has noted,

> These Chapter 11 cases do not represent efforts pitched to a "business reorganization" or to "restructure a business's finances". They are essentially a two-party civil lawsuit brought in the bankruptcy court in the guise of being a reorganization of some sort under Chapter 11. Chapter 11 was never intended to be used as a fist in a two party bout. The Chapter is entitled reorganization and not litigation.

In re HBA East, 87 B.R. 248 (Bankr. E.D.N.Y. 1988).

Accordingly, the Court finds that the Debtor's petition was not filed in good faith.

C. Nature of Relief

Where appropriate, Code §1112(b) requires courts to decide between dismissal of a chapter 11 petition and conversion to chapter 7 by weighing the best interests of creditors and the estate. This is a single-creditor case, which can be resolved just as easily and equitably through a non-bankruptcy tax foreclosure proceeding as through chapter 7. In addition, the City has expressed a preference for dismissal. Accordingly, that is the relief that will be granted.

Based on the foregoing, it is hereby

ORDERED that the City's motion seeking dismissal of the Debtor's chapter 11 petition is granted.

Dated at Utica, New York

this 10th day of September 1998

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge