UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

RESERVE CAPITAL CORP. CASE NO. 03-60071

Debtor

IN RE:

HAWKINS DEVELOPMENT LLC CASE NO. 03-60072

Debtor

IN RE:

JAMES W. & LORI JO HAWKINS CASE NO. 03-60073

Debtor

IN RE:

HAWKINS FAMILY, LLC CASE NO. 03-60074

Debtor

IN RE:

HAWKINS MANUFACTURED HOUSING, INC. CASE NO. 03-60075

Debtor

IN RE:

FOREST VIEW, LLC CASE NO. 03-60076

Debtor

IN RE:

WOODED ESTATES, LLC CASE NO. 03-60077

Debtor

IN RE:

TIOGA PARK, LCC CASE NO. 03-60078

Debtor

APPEARANCES:

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

MEMORANDUM-DECISION AND ORDER

Paul A. Levine, the Chapter 11 Trustee of the Jointly Administered Debtors ("Trustee") filed and served a motion on November 19, 2004, pursuant to Federal Rule of Bankruptcy Procedure ("Fed.R.Bankr.P.") 9019 ("Rule 9019 motion") seeking to compromise certain claims of the Trustee in these Jointly Administered bankruptcy cases as more specifically identified in the motion. The motion was originally noticed to be heard at this Court's motion term to be held on January 27, 2005, at Binghamton, New York. On November 24, 2004, the Trustee filed and served an Amended Notice of Motion which re-scheduled the motion for the December 16, 2004, motion term of the Court also held in Binghamton. Certain related motions, which are identified below, were also heard in conjunction with the Trustee's Rule 9019 motion. After hearing oral argument on December 16th, the Court adjourned the Trustee's Rule 9019 motion to its original return date of January 27th and heard further oral argument at that time.[1] The Rule 9019 motion

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[1] The primary reason for adjourning the Trustee's Rule 9019 motion was to permit the Court to consider a motion filed by the "debtors and equity security holders" on December 6, 2004, which asserted that the appointment of the Trustee in the Jointly Administered Case of Tioga Park, LLC was void as being contrary to Code § 1104(a) since the Trustee's appointment post-dated the confirmation of Tioga Park's Plan of Reorganization, which was confirmed by an Order of this Court dated June 1, 2004 ("Removal Motion"). At the hearing held on January 27, 2005, this Court concluded that the Removal Motion should be denied in reliance on the decision of the U.S. Second Circuit Court of Appeals in *Silverman v. Fracar, S.A. (In re American Preferred Prescription, Inc.),* 255 F.3d 87 (2d Cir. 2001), because movants failed to appeal the Order Approving the Trustee's Appointment and had sought his removal some three months post-appointment. Also on the Court's docket at the January 27, 2005 motion day were two additional motions. The first of these motions sought to compel the plan proponents in the case of Tioga Park, LLC to comply with the terms of a certain Consulting Agreement "which would inure to the benefit of the individual debtor, James Hawkins, equity security holder and party to the agreement." "Compliance Motion") (*See* Compliance Motion at ¶ 1). That motion had originally been made returnable before the Court on December 16, 2004. The second of these motions sought to disallow the claims of Asolare II, LLC and BSB Bank and Trust, ("Disallowance Motion"). This latter motion, apparently filed by the jointly administered Debtors, first appeared

was opposed by the jointly administered Debtors and by Kirkpatrick & Lockhart, LLP ("K&L"), an unsecured creditor.

JURISDICTIONAL STATEMENT

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

FACTUAL DISCUSSION

As indicated, before the Court could consider the Trustee's Rule 9019 motion, it was required to address the Removal Motion in the case of Tioga Park, LLC. While, if granted, the Removal Motion would not adversely affect the Trustee's status in the remaining jointly administered cases, the Rule 9019 motion clearly implicated claims emanating from Tioga Park, LLC, and, thus, the need to initially address the Removal Motion. In this regard, the debtors and equity security holders argued that the plain language of § 1104(a) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code") prohibits the appointment of a trustee in a Chapter 11 case post-confirmation and, therefore, the Court's Order of September 14, 2004, directing the appointment of a trustee and the subsequent approval of the appointment of the Trustee on September 17, 2004, was a "mistake" to the extent that it was entered in all of the jointly administered cases,

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on the Court's motion calendar on August 26, 2004, and had been adjourned a number of times. It pre-dated the appointment of the Trustee.

including Tioga Park, LLC, which at that time had a confirmed plan. (*See* Removal Motion, dated November 12, 2004, but not filed and served until December 6, 2004 at ¶ 5).

In response, the Trustee relies on the case of *American Preferred Prescription*, *Inc*. In that case, on somewhat analogous facts, the Second Circuit concluded that an order which appointed a Chapter 11 trustee post-confirmation was a final order for purposes of taking an appeal, and the failure to file such an appeal was fatal to a later effort by a creditor to remove that trustee based upon the language of Code § 1104(a). The creditor also advanced the argument that the bankruptcy court was without subject matter jurisdiction to appoint a trustee post-confirmation, an argument rejected by the Second Circuit. *American Preferred Prescription,* 255 F.3d at 93-95. In this case, the Order directing the appointment of the Trustee and the Order approving that appointment were entered on September 14th and 17th, respectively, and were not appealed. It was not until December 6, 2004, almost three months later, that the movants sought to remove the Trustee by filing and serving the Removal Motion. Thus, the Removal Motion must be denied.

Turning to the Trustee's Rule 9019 motion to compromise claims of the bankruptcy estates, the Court notes that essentially it has five separate components which, if approved, would result in a net payment to the Debtor estates of approximately $362,000. As noted above, opposition to the Rule 9019 motion was filed by the Debtors and K&L. The Trustee has generally described his proposed settlement as being with Asolare II, LLC, a creditor, Southern Tier Acquisitions, LLC, and an entity identified as Tioga Downs Racetrack, LLC. The settlement provides the following:

> A) payment to the Trustee of the sum of $250,000 in settlement of the estates' 55% interest in a $100,000 annual consultant's fee which fee was payable over

5 years;

B) payment to the Trustee of the sum of $60,000 in settlement of the estates' right to a 2% equity interest in Tioga Downs Racetrack, LLC;

C) payment to the Trustee of the sum of $70,000 in settlement of the obligation of Southern Tier Acquisition, LLC and another party, Jeff Gural, to provide James Hawkins, individually with funding that would have permitted Hawkins to repurchase his home, plus the sum of $70,000 to apply toward the payment of priority sales tax claims. Acceptance of this portion of the settlement offer was without prejudice to the right of Southern Tier/Gural to contest any further obligations to Hawkins individually with respect to the repurchase of his home;

D) $18,000 to be paid to Asolare II, LLC in connection with certain adequate protection payments required pursuant to an earlier Order of this Court;

E) an agreement with Asolare II, LLC not to object to the payment to Asolare II of the sum of $2,400,000, representing the proceeds of a recently conducted auction sale of the Debtors' real property so long as the sums set out in paragraphs A, B, and C were received by the Trustee.

In their opposition to the Rule 9019 motion, the Debtors assert a number of grounds. Debtors allege that the Trustee has completely overlooked their assertion that "Asolare II, LLC bald faced lied to the court in its January 7, 2004 transfer of claim filing", in which it asserted that it had purchased relevant debt instruments from BSB Bank, when in fact it had purchased the debt instruments from Asolare Corp. to whom BSB Bank had previously transferred them. Debtors contend that the actions of Asolare II, LLC warrant disallowance of its claim in its entirety. *See* Debtor's Response to Trustee's Report to the Court With Motion To Compromise Claims of the Bankruptcy Estates, dated December 10, 2004.

Debtors also echo the opposition of K&L filed with the Court on December 14, 2004, to the effect that the BSB Bank Mortgage Consolidation and Spreader Agreement ("BSB Mortgage"), dated December 23, 1997, and ultimately assigned to Asolare II, LLC, secured a debt to BSB of no more than $995,356.17. Debtors contend that the debt secured by all of their

former real estate could not possibly have grown to a $3,499,645 figure at the time of foreclosure, as adopted by the Trustee in his Rule 9019 motion. In support of their premise, the Debtors point to the amount of the mortgage tax paid at the time of the recording of the BSB Mortgage as reflecting a principal balance of the former amount. Additionally, the Debtors and K&L both argue that the entry of a judgment of foreclosure and sale on the BSB Mortgage in state court within 90 days of the Debtors' filing should be attacked by the Trustee as an avoidable preference pursuant to Code § 547.

The Trustee, in his Reply To Objections To Trustee's Motion dated January 24, 2005, refutes the claim of the Debtors and K&L that he should have attacked the judgment of foreclosure and sale of the BSB Mortgage as a preference, asserting that the judgment "simply determined the amount of the debt and allowed the secured creditor to proceed with a foreclosure sale. Because the underlying property was already encumbered by the mortgages, the entry of the judgment did not constitute a transfer of property or allow the creditor to recover more than it would under a Chapter 7 liquidation, both requirements under Code § 547." *Id*. at ¶ 4. The Trustee further rejects the contention of K&L that the state court judgment of foreclosure and sale did not fix the amount of the debt due and owing on the BSB Mortgage, noting that the amount of that debt was "actually litigated and decided in favor of BSB in an amount far in excess of the amount currently held in escrow." *Id*. at ¶ 8.

In the Trustee's Rule 9019 motion, he addresses, *inter alia*, the transfer of the BSB secured claims involving Asolare Corp. and Asolare II, LLC in light of the Debtors' opposition to the motion grounded upon the assertion that Asolare II, LLC perpetrated a fraud on the Court

and creditors.[2] The Trustee indicates that he has thoroughly investigated the Debtors' contention that the transfer of BSB claims, allegedly directly to Asolare II, LLC, was intended to insulate those claims from an attack by the Debtors against Asolare Corp. for alleged breaches of the so-called Memorandum Agreement of March 5, 2004.[3] The Trustee concludes that Notice of Transfer of Proof of Claim, dated January 7, 2004, in which Asolare II, LLC represented that it had taken its assignment of rights as a secured creditor directly from BSB, and the subsequent Amended Notice of Transfer of Proof of Claim, dated August 27, 2004, in which it was acknowledged that Asolare II, LLC actually received its assignment of the BSB secured claims from Asolare Corp, a related company, which assignment was motivated by tax considerations, do not give rise to any actionable right by the Debtors or the Trustee which would result in the disallowance of the claims of Asolare II, LLC, Asolare Corp and BSB in their entirety, as Debtors allege. The Trustee notes that Fed.R.Bankr.P. 3001(e), which the Debtors allude to in their Disallowance Motion, is intended to protect the holders of claims in a bankruptcy case from unauthorized transfers of those claims to a third party. Here the party sought to be protected by that Rule was BSB, and it has not objected to the ultimate transfer of its secured claims to Asolare II, LLC. The Trustee found no impropriety in the Notice of Transfer of Proof of Claim, dated January 7, 2004, nor the Amended Notice of Transfer of Proof of Claim, dated August 27,

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[2] The Rule 9019 motion, to the extent that it anticipated the opposition of the Debtors, did not result from any "psychic" powers of the Trustee. As the Trustee noted in the Rule 9019 motion at ¶ 39, he was well aware of those arguments, having read the Debtors' Disallowance Motion, dated July 28, 2004, objecting to the claims of Asolare II, LLC and BSB. That motion has been carried on the Court's calendar and is being disposed of in this Memorandum Decision.

[3] In the Disallowance Motion, dated July 28, 2004, the Debtors also allege that Asolare Corp. breached a pre-petition lease regarding the Tioga Park property, which forced the Debtors to file Chapter 11 on January 7, 2003.

2004. The Trustee defends his Rule 9019 motion at ¶ 71 as follows: "The Trustee is not at all willing to risk what will be a substantial dividend to arms length unsecured creditors by chasing arguments that are borderline frivolous and stand to primarily benefit the debtors by, if ever successful, producing a surplus money case through the disallowance of claims."

CONCLUSION

As noted by the Trustee, settlements in bankruptcy cases are viewed with favor by the courts. *See Nellis v. Shugrue*, 165 B.R. 115, 123 (S.D.N.Y. 1994). Whether to approve a settlement rests solely within a court's discretion. *See In re Ashford Hotels, Ltd.,* 226 B.R. 797, 802 (Bankr. S.D.N.Y. 1998); *In re Rimsat, Ltd.*, 224 B.R. 685, 688 (Bankr. N.D. Ind. 1997). In applying that discretion, a court should accept the settlement if it is both equitable and reasonable.

As the United States Supreme Court noted,

> [t]here can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further the judge should form an educated estimate of the complexity, expense and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise.

Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968).

The Bankruptcy Court for the Southern District of New York, in considering whether to

approve a settlement pursuant to Fed.R.Bankr.P 9019, formulated a seven part test indicating that a court must balance the following factors :

> a) the likelihood of success compared to the present and future benefits offered by the settlement; (b) the prospect of complex and protracted litigation if settlement is not approved; (c) the proportion of the class members who do not object or who affirmatively support the proposed settlement; (d) the competency and experience of counsel who support settlement; (e) the relative benefits to be received by individuals or groups within the class; (f) the nature and breadth of the releases to be obtained by officers and directors; and (g) the extent to which the settlement is the product of arms length bargaining.

In re Drexel Burnham Lambert Group, Inc., 134 B.R. 493, 497 (Bankr. S.D.N.Y. 1991) (citations omitted).

Applying the foregoing factors to the instant Rule 9019 motion, the Court reaches the conclusion that the settlement proposed by the Trustee does not "fall[s] below the lowest point in the range of reasonableness." *In re W.T. Grant Co.,* 699 F.2d 599, 608 (2d Cir. 1983). In his Rule 9019 motion the Trustee has provided an analysis as to each of the monetary components and has provided an explanation as to why he believes each amount is reasonable. The Court accepts the Trustee's analysis.[4] Regarding the first factor, the Trustee notes that the two major

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[4] With regard to the Trustee's proposal to accept $60,000 for the 2% equity interest in Tioga Downs Racetrack, LLC, Debtors' counsel pointed out to the Court at oral argument held on January 27, 2005, that pursuant to the Consulting Agreement entered into between James W. Hawkins, identified therein as the "Consultant," Southern Tier Acquisition, LLC, the XYZ Company, a company thereafter formed and Asolare II, LLC, the Consultant had the additional right to purchase "warrants" for the acquisition of an additional 3% of stock in an entity then known as Trackpower, Inc., which warrants were to be furnished by Southern Tier at a price to be agreed upon. Debtors' counsel suggested that the Trustee may have overlooked that option in agreeing to accept the sum of $60,000. In response, the Trustee noted that he did not believe that under the Court's Order of June 1, 2004, confirming the Tioga Park Plan, which Plan was revised by the Court's Order of May 17, 2004, he had the ability to exercise those warrants. Secondly, he did not consider it a prudent exercise of his fiduciary duties to expend estate funds by

arguments raised by the Debtors involve the amounts due to BSB on the mortgages that were foreclosed pre-petition and the legal effect of the Notice of Transfer of Proof of Claim, dated January 4, 2004, and the Amended Notice of Transfer of Proof of Claim, dated August 27, 2004. With regard to the former argument, the Trustee asserts that the Debtors are barred by both collateral estoppel and res judicata, noting that the State Court rejected the very objections the Debtors now wish him to assert in opposition to the claim of Asolare II, LLC, as assignee of the BSB mortgage debt. Additionally, the Trustee points to the Debtors' discontinuance of their Adversary Proceeding in this Court, which sought to limit the amount of the BSB claim, as well as the dismissal of their counterclaims in the state court action, as further evidence of the infirmities of the Debtors' opposition to the settlement. Regarding the latter argument, the Trustee indicates that he can find no evidence that Asolare II, LLC, "was kept under wraps until it filed its Amended Notice of Transfer of Proof of Claim. . . ." The Trustee opines that the requirements of Fed.R.Bankr.P. 3001(e)(2), relied upon by the Debtors, are intended to protect the right of a claim transferor (here BSB) to object to a purported transfer of its claim. He finds no impropriety in regard to either the initial Notice of Transfer or the Amended Notice of Transfer of Proof of Claim. Thus, the Trustee finds no likelihood of success of either objection posed by the Debtors and, therefore, strongly recommends the proposed settlement.

As for the second factor, the Trustee does not offer any opinion on the outcome of potential litigation if the settlement is not approved, except that the litigation outcome factor is somewhat subsumed in the likelihood of success factor already considered. In that vein, and as

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investing in a corporation that was promoting a highly speculative race track. Thus, the Trustee did not attempt to negotiate a monetary settlement involving the so-called 3% option.

previously indicated, the Trustee sums up his position in paragraph 71 of the Rule 9019 motion by stating that " the Trustee is not at all willing to risk what will be a substantial dividend to arms length unsecured creditors by chasing arguments that are borderline frivolous and stand to primarily benefit the debtors by, if ever successful, producing a surplus money case through the disallowance of claims."

The third factor considers the proportion of the "class" accepting or not objecting to the settlement. In the instant case, the Trustee's motion has been supported at oral argument by BSB, Asolare II, LLC, Southern Tier Acquisition and the U.S. Trustee. Written opposition has been interposed by the Debtors and K&L, as previously indicated. No official committee of unsecured creditors has been appointed in this case. BSB, arguably, holds the largest unsecured claim in the case and it clearly supports the Trustee's proposal.[5]

The fourth factor concerns the competency and experience of counsel supporting the settlement. There can be no real dispute as to the competency and experience of the Trustee's counsel, Lemery Greisler LLC. The firm has appeared before this Court in a number of cases and has always displayed a high level of expertise in bankruptcy matters.

The fifth factor concerns the relative benefits to be received by creditors. The Trustee has detailed the components of the settlement that will net the unsecured creditors $362,000. While the Trustee has apparently not calculated what percent dividend that recovery, standing alone,

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[5] The Debtors insist that when BSB executed assignments of its specific secured claims to Asolare II, LLC, it did not reserve to itself the deficiency portion of the assigned claims and, therefore, BSB has no unsecured claim against these bankruptcy estates. This argument would seem to ignore BSB's rights under paragraph 7 of the Master Assignment dated September 24, 2004, executed by Asolare Corp., which is entitled "Preservation of Deficiency"and the subsequent assignment by Asolare Corp of all of its rights and presumably its obligations under the Master Assignment to Asolare II, LLC on October 30, 2004.

will provide, suffice it to say it provides some benefit to unsecured creditors in a case top heavy with secured debt.

The nature and breath of releases to officers and directors as a part of the settlement is the sixth factor to be considered. While this settlement does not implicate the execution of any individual releases, it does propose to pay Asolare II, LLC the sum of $18,000 in full settlement of the various estates' liability for payments pursuant to the Court's prior Order awarding adequate protection. Additionally, the Trustee agrees, as part of the settlement, not to object to Asolare II, LLC receiving the net proceeds of the auction sales of the Debtors' real property, which amounted to approximately $2.4 million dollars. The Court finds no fault with this aspect of the settlement.

Finally, the Court is required to consider the arms length nature of the negotiations that led to the settlement. In the first forty-six paragraphs of his motion, the Trustee details the efforts and investigations he undertook before agreeing to the proposed settlement. No one has disputed those efforts, even the Debtors, though they obviously do not agree with the conclusions reached by the Trustee. The Court has considered the Trustee's submission and believes that following his appointment he thoroughly investigated and evaluated the contentions of all parties after reviewing the documentary evidence and has proposed a settlement that is fair and reasonable.

Based on the foregoing, it is hereby

ORDERED, that pursuant to Fed.R.Bankr.P. 9019, the Trustee is authorized to enter into the settlement as outlined in his motion as being fair and reasonable and in the best interest of the creditors of the estate, and it is further

ORDERED, that the Removal Motion, as well as the Debtors' Disallowance Motion seeking disallowance of the claims of BSB and Asolare II, LLC are denied, while the Hawkins' Compliance Motion seeking to compel compliance with the terms of the Consulting Agreement dated March 5, 2004 as modified by this Court's Order dated May 17, 2004 is denied without prejudice.

Dated at Utica, New York

this 7th day of March 2005

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge