

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

TIMOTHY C. TAYLOR  
JULIE L. TAYLOR

CASE NO. 01-66840

Debtors

Chapter 13

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APPEARANCES:

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

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

On February 6, 2002, the Court presided over an evidentiary hearing on Debtors' motion filed pursuant to 11 U.S.C. § 543(b) seeking an order compelling the turnover of certain real property located at 445-447 South Main Street, North Syracuse, New York, known as the Bowling Green Recreation Center ("bowling alley"). Following the conclusion of the hearing, the Court indicated that it would issue a written decision on the motion.

## JURISDICTIONAL STATEMENT

The Court has core jurisdiction over this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a) and (b)(1) and (2)(E) and (O).

## FACTS

On or about July 31, 1998, the Debtors purchased the bowling alley from Dewey F. Antinelli (“Antinelli” or “Objectant”) and financed the purchase price by executing a Note and Mortgage in the face amount of \$400,000 in favor of Antinelli. (*See* Exhibit A attached to Antinelli's Response to Debtors' Motion To Compel Receiver To Turnover Property.)

At some point following the purchase, Debtors entered into an agreement with 445 S. Main Street, Inc. (“the Corporation”), whereby the Corporation would operate the bowling alley. The sole stockholders of the Corporation were the Debtors and Gary M. Vincetore and Jill A.Vincetore (“Vincetores”).

Debtors continued their ownership of the bowling alley until the fall of 2000 when Antinelli commenced a mortgage foreclosure action in the Supreme Court of the State of New York, Onondaga County (“State Court”). On February 26, 2001, the State Court granted Antinelli's motion for the appointment of a receiver and by order dated March 5, 2001, the State Court appointed Jan F. Nastri (“Receiver” or “Nastri”) to act as the receiver. *See* Exhibits A and B attached to Debtors' Motion.

From March 2001 through June 2001, the Debtors remained in possession of the bowling alley pursuant to an agreement with Nastri to pay him the sum of \$4,500 per month. However,

Debtors did not make the payment due for May or June 2001 and on or about June 5, 2001, Nastri removed the Debtors from possession of the bowling alley and took over its operation as Receiver.

On November 20, 2001, the Debtors filed a voluntary petition pursuant to chapter 13 of the Bankruptcy Code (11 U.S.C. §§ 101-1330)(“Code”).<sup>1</sup> Thereafter, on December 8, 2001, the Debtors filed the instant motion. Antinelli filed opposition to the motion on December 20, 2001, and after brief oral argument on December 20, 2001, the Court adjourned the motion to January 15, 2002 for further argument and on the latter date the Court scheduled this evidentiary hearing.

On January 22, 2002, Debtors filed a proposed chapter 13 plan (“Plan”) and scheduled same for a confirmation hearing on February 19, 2002. The Plan provides that Debtors will pay the chapter 13 Trustee \$2,500 per month for a period of 6 months and will then increase their payments to \$6,107.47 for the remaining 54 months of the Plan. The Plan further provides that Antinelli will be paid \$5,278 per month “outside the plan” while the arrears due on his note and mortgage will be paid within the 5 years of the Plan through the chapter 13 Trustee.

In order to fund the Plan, Schedule I of the Debtors' Chapter 13 petition indicates that once returned to the possession of the bowling alley they estimate receiving the total sum of \$13,000 per month, which after deduction of personal expenses to include the regular mortgage payment to Antinelli, they will utilize to fund their plan. At the present time, the bowling alley is being managed by Antinelli pursuant to some arrangement with Nasti.

Among the unsecured debts listed in Debtors' Petition which are directly related to their prior operation of the bowling alley are: \$20,060 to the New York State Lottery for lottery sales

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<sup>1</sup> Debtors previously filed a voluntary petition pursuant to chapter 7 of the Code on March 7, 1996 *See* Objectant's Exhibit 10.

(though Debtor Timothy Taylor testified that he believes this amount is incorrect); \$28,200 to New York State Department of Taxation and Finance for Sales Tax; \$26,669 (total) to Niagara Mohawk Power Corporation on 5 separate accounts that service the bowling alley, listed in the Petition as “disputed”; \$2,500 to Onondaga Beverage Corporation; \$910 to Service Liquor Distributors; \$6,510 to Sysco Food Services; \$920 to T.J. Sheehan Distributors; and \$20,650 to Victor Pulis, which the Debtors also list as “disputed.” In addition, Antinelli testified that he had paid some \$43,000 in past due real estate taxes on the bowling alley since the sale to the Debtors.<sup>2</sup>

At the present time neither the Debtors nor the Corporation have an active liquor license for the bowling alley. The current license is in Nastri's name. Debtor testified that there is a pending liquor license application which is simply awaiting his return to possession of the bowling alley.

## **DISCUSSION**

Code § 543(b) provides that a custodian as defined in Code § 101(11) “shall deliver to the trustee any property of the debtor. . . . that is in such custodian's possession, custody or control on the date that such custodian acquires knowledge of the commencement of the case.”

11 U.S.C. §543(b). As one court has noted, “a custodian with knowledge of a bankruptcy case . . . . has an absolute duty under 11 U.S.C. §543 to refrain from any further action in the administration of property of the debtor's estate and must deliver to the debtor in possession any

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<sup>2</sup> Debtor Timothy Taylor asserted that some of the unsecured debt was listed in Debtors' Petition simply because they guaranteed the debts of the Corporation or were liable for them by law.

property of the estate held by the custodian at the time knowledge of the bankruptcy case was acquired.” *In re Constable Plaza Associates, L.P.*, 125 B.R. 98,103 (Bankr. S.D.N.Y. 1991).

There is but one exception applicable to the mandate of Code § 543(b) and that exception is found in Code § 543(d). That section provides that after a notice and hearing, the court may excuse compliance with subsection (b) “if the interest of creditors. . . . would be better served by permitting the custodian to continue in possession, custody and control of such property.” 11 U.S.C. §543(d).

There can be little argument that Nastri functions in this case as a “custodian” of the Debtors' bowling alley and that as of the date he became aware of the commencement of Debtors' Chapter 13 case he was under an obligation to deliver possession of the bowling alley to the Debtors together with the “proceeds, products, offspring, rents or profits” of the bowling alley then in his possession. (*See* Code § 543(b)(1)).<sup>3</sup> In addition, the custodian is required to “file an accounting of any property of the debtor, or the proceeds, product, offspring, rents or profits of such property, that any time came into the possession, custody or control of such custodian.” *See* Code § 543 (b)(2)

In the instant case there is no evidence that Nastri made any effort to affirmatively comply with Code § 543(b)(1), though it may be argued that the filing of this motion by the Debtors on December 5, 2001, some sixteen days after the filing of their petition was arguably the Receiver's first notice that the Debtors had filed for bankruptcy protection. As to the accounting

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<sup>3</sup> While § 543 speaks in terms of the custodian's obligation to a trustee, it is apparent that a Chapter 13 debtor may step into the shoes of a trustee for purposes of enforcing the requirements of that section. While Code §§ 1303 and 1304 make no specific reference to § 543, as noted in 8 Lawrence P. King, COLLIER ON BANKRUPTCY, ¶ 1303.04 (15<sup>th</sup> ed. 2001), “Section 1303 lists certain powers that a chapter 13 debtor has, exclusive of the Chapter 13 trustee. It is not by any means a complete listing of the chapter 13' debtor's powers.”

requirement, it does appear that Nastri actually prepared a document which might satisfy the statute though there is no indication when it was prepared. *See* Objectant's Exhibit 8.

As indicated, the Debtors filed the instant motion on December 5, 2001, "pursuant to 11 U.S.C. § 423(b)"(sic) compelling Nastri to turn over the property. The motion was made returnable December 20, 2001. When Antinelli failed to file a timely answer to Debtors' motion, the Court adjourned the motion to January 15, 2002 for argument. On January 15, 2002, the Court scheduled an evidentiary hearing for February 6, 2002. Thus, some 2 1/2 months after filing their Chapter 13 petition, Debtors have not regained possession of the bowling alley.

Case law interpreting Code § 543(d), for the most part, places the burden of establishing the exception to Code § 543(b) on the party at whose behest the receiver has been appointed. That burden is said to be met by a preponderance of the evidence. *See In re Lizeric Realty Corp.*, 188 B.R. 499, 506 (Bankr. S.D.N.Y. 1995); *In re Northgate Terrace Apartments Ltd.*, 117 B.R. 328, 333 (Bankr. S.D. Ohio 1990); contra *Matter of Kramer*, 96 B.R. 972, 977 (Bankr. D. Neb. 1989). This Court does not believe that the burden shifts simply because the Debtors, rather than Antinelli, filed the motion. Thus, the Court begins its analysis of the proof provided in this contested matter with the foregoing as its guide.

The Debtor, Timothy Taylor, testifying as Antinelli's initial witness, acknowledged that in 1996 he and his wife, the current co-Debtor Julie Taylor, filed a voluntary petition pursuant to Chapter 7 of the Bankruptcy Code and on July 3, 1996, they received their discharge. *See* Movants' Exhibit 9 and 10. The Debtor, Timothy Taylor, further testified that less than a year later, on April 26, 1996, Julie Taylor won more than a million dollars in the New York State Lottery. (*See* Objectant's Exhibit 11). The Debtor acknowledged that they did not repay any of the creditors listed in their joint Chapter 7 petition with the Lottery proceeds.

On or about July 31, 1998, the Debtors purchased the bowling alley from Antinelli, executing a note and mortgage in the sum of \$400,000 to finance a portion of the purchase price. Some time following the purchase, the Debtors formed the Corporation with the Vincetores to operate the bowling alley.<sup>4</sup> Debtor also asserted that subsequent to their purchase of the bowling alley they made significant improvements, including new scoring equipment, which was financed through M&T Bank in the amount of \$75,000.

Debtor Timothy Taylor acknowledged that he sold the scoring equipment that had been in place at the time of purchase and on which Antinelli held a lien without remitting any of the proceeds to Antinelli. Debtor alleged that he was unaware of Antinelli's lien at the time of the sale.

Debtor identified two New York State sales tax warrants in the amount of \$14,170.22 (Objectant's Exhibit 1) and \$1,476.95 (Objectant's Exhibit 2), respectively,<sup>5</sup> as well as two judgments, M&T Bank versus the Corporation, Jill A. Vincetore and Gary Vincetore dated January 8, 2002, in the sum of \$77,088.75 (Objectant's Exhibit 3) and Sysco Food Services versus the Corporation, dated December 17, 2001 in the sum of \$7,686.60 (Objectant's Exhibit 4).

Debtor Timothy Taylor testified that with regard to employees payroll, the Corporation utilized three systems and that while it was between payroll systems, employees were paid in cash, but that they were required to sign "affidavits" as to how much they were paid. *See* Objectant's Exhibits 15-19. He admitted that when the Receiver took possession in June 2001,

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<sup>4</sup> It is not clear what role the Vincetores played in the operation of the Corporation or the bowling alley, though Debtor Timothy Taylor indicated that at one time Jill Vincetore maintained the bowling alley's books.

<sup>5</sup> The tax warrants were issued against the Corporation "T/A Bowling Green" and related to periods ending 5/31/00, 8/31/00 and 11/30/00.

tax form 941 had not been completed for the employees. Debtor Timothy Taylor also identified the debts listed in his current Chapter 13 petition as being related to the operation of the bowling alley. He disputed only the debts owed to the New York State Lottery, Pulis and Niagara Mohawk Power Corporation.

Debtor Timothy Taylor acknowledged that neither he nor the Corporation had a current liquor license in connection with the operation of the bowling alley, though he asserted that a license application was pending with New York State and would be issued once he regained possession of the bowling alley. He noted that his proposed Chapter 13 plan (Objectant's Exhibit 7) provided for reduced monthly payments during its first six months in recognition of the need to obtain a new liquor license.<sup>6</sup> Debtor Timothy Taylor also testified that in his opinion, the primary cause of the Chapter 13 bankruptcy was his decision to take over a restaurant located within the bowling alley which his wife had attempted to operate. Going forward, Debtor asserted that he had negotiated a lease of the restaurant which would generate a net \$800 per month. On cross/direct examination by Debtors' attorney, he identified spreadsheets relating to the period February through April 2001, which purported to show both actual and projected total monthly income, less cost of goods sold, but did not reflect actual operating expenses. (*See* Debtors' Exhibits B, C & D). Debtor Timothy Taylor also identified a profit and loss statement in the Corporation's name covering the period January 1-May 3, 1999, which reflected a net profit after expenses of \$22,508.80.

Schedule I of the Debtors' joint petition asserts that Debtors will have "projected" combined monthly income of \$13,424.66 with which to fund their Chapter 13 Plan. Upon

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<sup>6</sup> The current liquor license for the premises is apparently issued in Nastri's name.



questioning by the Court, Debtor testified that \$1,000 would be paid to him by the Corporation in the form of wages and \$12,000 would be paid to him by the Corporation pursuant to some type of lease agreement. Debtors' Schedule J itemizes Debtors personal expenses (including the monthly payment to Antinelli on the note and mortgage) and reflects disposable income of \$5,099.65, which is presumably available to fund the Plan.

Antinelli presented the testimony of Kathy Khammar (“Khammar”), Nastri's office manager. She identified a series of documents entitled “Statement of Operations” for each monthly period from March 2001 through December 2001, together with a document entitled “Bowling Green Cash Receipts - Nastri Real Estate Receiver.” (Objectant's Exhibit 8) She also identified a summary of unpaid Niagara Mohawk bills for the period March 30 through May 31, 2001, totaling \$31,138.47 (Objectant's Exhibit 20) and a summary of other bills due between May and June of 2001, totaling approximately \$69,000. (Objectant's Exhibit 21) She testified that these exhibits were a compilation of unpaid bills that Nastri discovered when he took over actual possession of the bowling alley in June 2001.<sup>7</sup>

Finally, Antinelli testified on his own behalf and asserted that pre-petition the Debtors had “bounced” at least two monthly mortgage payments and that he had been required to pay out some \$43,000 in past due real property taxes which would have constituted priming liens on the bowling alley property. He also opined that bowling alleys, in general, were subject to declining revenues.

## CONCLUSION

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<sup>7</sup> Nastri was actually appointed in March, but for March through May the Debtors remained in possession, agreeing to pay Nastri the sum of \$4,500 per month.

Courts considering the application of Code § 543(d) have relied on various factors to determine whether the interests of creditors would be better served by maintaining the pre-petition custodian in place. Those factors may generally be distilled as follows:

- 1) does the debtor have sufficient income to fund a successful reorganization;
- 2) will the debtor use the property in the hands of the receiver for the benefit of creditors;
- 3) whether the debtor has engaged in gross mismanagement or fraudulent behavior;
- 4) whether there are avoidance issues raised with respect to property retained by a receiver because a receiver does not possess avoiding powers; and
- 5) the fact that the automatic stay has “deactivated” the state receivership action.

*See In re Dill*, 163 B.R.221,225 (E.D.N.Y. 1994) citing *Constable Plaza*, 125 B.R. at 103-4.

The first of these factors is, under the facts presented here, perhaps the most difficult to analyze. In performing that analysis, however, the Court agrees with those courts that have held that debtor's plan need not meet the confirmation requirements of Code § 1325 in order to satisfy Code § 543(d).

In the case of *Matter of Kramer*, 96 B.R. 972, *supra*, Bankruptcy Judge Timothy J. Mahoney opined with regard to a Code § 543(d) motion filed in a Chapter 11 case,

It is not the debtors burden to prove at a hearing on a motion for turnover that a plan can be confirmed. If that were the burden, it is unlikely that many Chapter 11 debtors would obtain turnover orders under Section 543. This Court believes that Section 543 turnover requirements are not as detailed or as onerous as the requirements the debtor must comply with in order to obtain confirmation of a plan of reorganization.

*Id.* at 977. As another court observed, “[G]enerally the basic equities would favor a debtor or

debtor in possession. If nothing more, a substantial weight is added to the debtor's burden of attempting to reorganize and promulgate an acceptable plan of reorganization if the debtor cannot have access to all of its assets during its initial breathing spell.” *In re KCC-Fund V, Ltd*, 96 B.R. 237, 239-40 (Bankr. W.D. Mo. 1989).

In the instant case, these Debtors have not been in possession of the bowling alley since June 2001. In June 2001, Nastri expanded his role pursuant to the State Court order to that of more than a receiver of rents when he took over the management of the bowling alley, installing Antinelli, the former owner, as manager. From that point forward, the Debtors presumably had no knowledge of actual operations and could only formulate their Chapter 13 Plan based upon historical income and expenses.

Antinelli's Exhibit 8 is a series of Statements of Operations for the bowling alley covering the period March 2001 through December 2001. Debtors' Exhibits B, C and D purport to reflect gross income, less cost of goods sold for the months of February, March and April of 2001. Unfortunately, Antinelli's Exhibit 8 does not reflect a true picture of the bowling alley's operation until the month of August 2001 when Nastri was able to secure a liquor license. Conversely, Debtors' Exhibit B, C and D appear to omit actual expenses of operation and thus present an incomplete picture of the bowling alley operation.<sup>8</sup>

Antinelli introduced a profit and loss statement for the Corporation covering the four month period January through May 1999, which reflected a gross income of \$146,785 or a

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<sup>8</sup> Debtor explained that in preparing Exhibits B, C and D he did not have access to operational expenses for those months because those records were located with the personal effects of a deceased niece, who had passed away in the fall of 2001. In preparing Schedule I, attached to his Petition, he indicated that he had used Objectant's Exhibit 8 to a large extent to obtain actual expenses.

monthly average gross income of approximately \$30,000 per month. *See* Objectant's Exhibit 12. Nastri's Statement of Operations, which included the months of September, October, November and December 2001, reflect "gross profit" of \$129,887 or approximately \$32,500 per month. *See* Objectant's Exhibit 8. Debtors' Exhibits B, C and D, covering the months of February, March and April of 2001, reflect a significantly higher gross income (less cost of goods) of \$143,897 or a monthly average of approximately \$48,000.

During the four month period (September-December 2001), according to Nastri's Statement of Operations, only the months of September and November would have generated enough money to enable the Debtors to meet the \$13,000 per month necessary to pay personal expenses and fund the Plan, which proposes a 100% dividend to unsecured creditors.

Unfortunately, the Court does not come away from the evidentiary hearing with a clear picture of the Debtors' ability to reorganize; conversely, the Court cannot conclude that the Debtors have insufficient income to fund their Chapter 13 Plan. As indicated, Debtors' proposed Plan asserts a dividend of 100%. At this point, the Court cannot determine that a lesser dividend, requiring a smaller dollar pay out to unsecured creditors, will not satisfy the requirements of Code § 1325(a).<sup>9</sup>

Turning to the second factor, there can be little doubt that the property currently held by the Debtors will be utilized for the benefit of creditors. The bowling alley appears absolutely essential to these Debtors' ability to successfully complete any Chapter 13 plan.

The third factor, much like the first, is less than clear cut. There is little doubt that the

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<sup>9</sup> In reaching this conclusion, the Court recognizes that there are a number of unknown variables, for example what will be the impact of the Debtors' failure to obtain a liquor license and what role does the Corporation, which is not under the jurisdiction of this Court, play in the delivery of income from the bowling alley to the Debtors

bowling alley, while under the Debtors'/Corporation's control from 1998 to the summer of 2001, was financially mismanaged. Debtor Timothy Taylor, in fact, acknowledged that the attempt to operate the in house restaurant was precipitating cause of their insolvency, losing some \$1,500 per week. In addition, Debtors have accumulated large tax and utility arrears pre-petition in the operation of the bowling alley. These facts, however, do not evidence a gross mismanagement of the business. Debtors' uncontroverted testimony was that during their period of ownership they had invested over \$100,000 in improvements to the bowling alley. Antinelli attempted to show that Debtors/Corporation were paying employees in cash without deducting the required payroll taxes, introducing affidavits of purported employees of the bowling alley during the months of March through June of 2001, which attest to the net pay received for a specific number of hours worked during a specific weekly time period. Debtor Tim Taylor asserted the affidavits were utilized when the Corporation was between payroll companies who typically prepared payrolls. Finally, Antinelli portrayed the Debtors as individuals bereft of morality because they failed to pay the creditors that they had discharged in their pre-lottery winning Chapter 7 case. "Absent a bad faith filing lacking any possibility of reorganization the presence of grossly inept management of the property, or fraudulent behavior," the creditor's burden is a difficult one. *Northgate Terrace Apartments, Ltd.*, 117 B.R. at 333. While the Debtors have painted a picture of poor business practices, the Court is not convinced they are guilty of gross mismanagement.

The fourth factor does not appear to have any application here, though a closer look at Objectant's Exhibit 8 might warrant an action to recover preferential payment.

With respect of the fifth factor, the automatic stay remains in place, halting the foreclosure proceedings in State Court for which the Receiver was appointed. Furthermore, the docket of the case indicates that there is no motion pending seeking relief from the automatic

stay.

On balance, the instant contested matter is a close call, but given the factors considered by other courts that have had similar disputes and the statutory mandate of Code § 543(b), the Court must find in favor of the Debtors. To deprive a Chapter 13 debtor of possession of the very asset that must be utilized to fund a Chapter 13 plan is to effectively deny that debtor access to Chapter 13 at all. Thus, proof in support of Code § 543(d), under these circumstances, must present a very strong preponderance in favor of creditor. That burden has not been met and, therefore, it is

ORDERED that Nastri shall turnover physical possession of the bowling alley to the Debtors within ten (10) days of the date of this Order, and, it is further

ORDERED that Nastri shall immediately turn over to the Debtors all funds collected by him from the operation of the bowling alley during the period November 20, 2001 to the date hereof which remain in the receiver's account and shall immediately provide evidence of the transfer of funds to Debtors' counsel and Mark Swimelar, Esq., Chapter 13, Trustee, and, it is finally

ORDERED that Nastri shall, within thirty (30) days of the date of this Order, prepare and serve upon the Debtors and the Chapter 13 Trustee a financial accounting of the operation of the bowling alley during the period November 20, 2001 to the date hereof.

Dated at Utica, New York

this 20th day of February 2002

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge

