UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF WISCONSIN

FILED
NOV 07 1985
CLERK
U.S. BANKRUPTCY COURT

In re: Case Number:

RAPIDS PARTNERS	LF11-83-02113
MID TOWN PARTNERS	LF11-83-02114
HEATHER RIDGE PARTNERS	LF11-83-02115
BUCHNER PLACE PARTNERS	LF11-83-02116
CAMERON PARTNERS	LF11-83-02117
MIDWEST PARTNERS	LF11-84-00492
PHOENIX PARTNERS	LF11-84-00493
KEY PARTNERS	LF11-84-00889
DENTON WEST PARTNERS	LF11-84-01686

Debtors.

MEMORANDUM OPINION AND ORDER

Reorganization proceedings are pending in this court involving the above captioned nine partnerships which are under common management. Each of these partnerships are engaged in real estate management and development. Thomas Markos is the sole remaining general partner involved in each of these partnerships. However, there are numerous limited partners.

The limited partners have filed motions with this court requesting: 1) appointment of a trustee or conversion to Chapter 7 liquidation proceedings; 2) joint administration of these bankruptcy proceedings and appointment of one trustee; 3) appointment of an equity security holders committee with Gerard O'Flaherty as its attorney; and, 4) continuation of adversary hearings until the appointment of a trustee. A hearing on these motions was held on October 29, 1985. Debtors appeared by Attorney Donald J.

Harman and the limited partners by Attorney Gerard O'Flaherty. Dale, Patricia, Arlie and Jeanette Wernecke were represented at the hearing by Attorney James McNeilly.

In support of their motion for appointment of a trustee or conversion, the limited partners point out that none of the debtors have filed the required reports with the court. They allege that the debtors have no reasonable likelihood of rehabilitation and are without operating assets because of state foreclosure proceedings and the appointment of receivers for property previously owned by the debtors. In addition, the limited partners assert that Thomas Markos has not been acting in the best interest of debtors and has not provided the limited partners with information concerning the status of the partnerships during the bankruptcy proceedings.

A brief review of these bankruptcy proceedings and the partnerships involved is necessary in order to address the motions before the court. Each of the debtor partnerships prior to bankruptcy had owned and managed rental properties. These partnerships were operated by Thomas Markos and Reginald Gassen, who was previously a general partner with Markos. In late 1983, five of these partnerships filed reorganization petitions. The remaining four partnerships sought bankruptcy relief in 1984. Each partnership had obtained its rental property through land contract with one or more of the Werneckes. Upon default of these land contracts, state foreclosure actions were commenced. In seven of these bankruptcy proceedings the court has determined

that the rental property is not property of the estate, based on the successful completion of foreclosure actions by the Werneckes. A foreclosure action involving Denton West Partners is presently being prosecuted. The issue of whether Key Partners has lost its interest in rental property through foreclosure is also being litigated in state court. In Key Partners and Denton West Partners the court has issued orders determining that the personal property within the foreclosed apartment buildings, such as furniture and appliances, is property of the estate. The Werneckes retained no security or other interest in this property. The debtors in the other bankruptcy cases have initiated adversary proceedings seeking similar orders.

With the exceptions caused by the pending state court actions involving Key Partners and Denton West Partners, it is accurate to state that the debtors no longer own any real estate through which a rental property business could be operated. The only potential assets of debtors are the personal property items sought in adversary proceedings.

11 U.S.C. § 1104 provides that on request of a party in interest the court shall order the appointment of a trustee for cause or if such appointment is in the interests of creditors. Cause is referred to in sec. 1104 as fraud, dishonesty, incompetence, gross mismanagement of the affairs of the debtor by current management, or similar cause.

It is well recognized that the appointment of a trustee is an extraordinary remedy. See In re Denrose Diamond, 49 B.R. 754,

759 (Bankr.S.D.N.Y. 1985); In re General Oil Distributors, Inc., 42 B.R. 402, 408 (Bankr.E.D.N.Y. 1984). Bearing this in mind, a court shall be circumspect in its use of such power. However, this is not to say that the court should make the requisite showing of cause or the best interests of creditors so difficult as to preclude resort to the protections envisioned by Congress in enacting sec. 1104.

Upon consideration of the circumstances of these bankruptcy proceedings, the court concludes that there is both cause for appointment of a trustee and that such appointment would be in the best interests of creditors. The debtors admit that they have not filed the required reports with this court. They contend, though, that since they have no rental property to manage there is no information to report. This is simply not the case. It has been pointed out that a debtor-in-possession or trustee has a fiduciary relationship with all creditors and has the inherent duty to keep them informed. Denrose Diamond, supra. The majority of these bankruptcy proceedings have been pending for nearly two years. Plans of reorganization have either not been proposed or are in no way presently feasible.[1]

At the hearing on these motions, debtors' attorney referred to the pending adversary proceedings and stated that the debtors' new plan would be to sell the personal property obtained through

---

[1] The plan of reorganization in each of the 1983 bankruptcy proceedings calls for the operation and sale of rental property which is not property of the estates.

those adversary proceedings to satisfy their debts. The pendency of these adversary proceedings cannot excuse the debtors' failure to keep creditors informed or make any meaningful progress since the inception of the bankruptcies. A creditor should not be expected to wait interminably for a plan of reorganization or at least informal information concerning the status of a reorganization. The failure to advance toward reorganization or keep creditors informed provides a basis for appointment of a trustee.

Several other factors weigh in favor of appointing a trustee in these proceedings. The first is that Thomas Markos resides in Hawaii. It is legitimately questionable whether these partnerships can be adequately managed by a general partner residing thousands of miles from Wisconsin. This is especially the case given the lack of progress in these cases and the failure to keep creditors informed. Another significant factor is that the limited partners have filed a civil action against Thomas Markos alleging fraud, mismanagement, commingling of funds and diversion of partnership assets for personal use. Additionally, Thomas Markos and at least two of the debtors have been investigated by Wisconsin and Minnesota authorities for violation of state securities laws. Regardless of the final outcome of the limited partners' lawsuit or the state investigations, these activities have certainly engendered more than the normal amount of ill will and distrust among the parties to the bankruptcies. It would be in the best interests of both the estate and creditors to bring in a neutral party to manage the affairs of debtors.

A final factor militating in favor of appointment of a trustee is that these bankruptcy estates no longer include any rental properties, with the possible exception of Key Partners and Denton West Partners. Debtors' attorney has admitted that there is no longer a rental property business to operate. Consequently, the most apparent reason for maintaining a debtor-in-possession no longer exists. An impartial and experienced trustee will be able to more effectively marshal the assets of these estates and ensure that they are managed in the best interests of the creditors and the estates.

Based on the factors discussed above this court shall appoint Attorney Lawrence J. Kaiser as the trustee in these nine partnership bankruptcies. In addition to his other duties under sec. 1106(a), the trustee shall, pursuant to sec. 1106(a)(5), recommend whether these proceedings should be converted to Chapter 7 liquidation proceedings. Because these debtors have been managed by the same general partner they are sufficiently related so as to justify joint administration of the cases and the appointment of a single trustee pursuant to Bankruptcy Rules 1015 and 2009. Joint administration and appointment of a single trustee will be advantageous to both the estates and the creditors as a whole.

The limited partners have requested the appointment of a committee of equity security holders for all partnership debtors except Denton West Partners. The court shall order this appointment and the requested appointment of Attorney Gerard O'Flaherty

to represent the committee. The limited partners' final motion for continuation of adversary proceedings until appointment of a trustee will be granted to the extent that a decision will not be rendered in the adversary proceedings until the trustee has an opportunity to review the actions, and informs the court of his position concerning those actions.

This opinion shall constitute findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052.

ORDER

IT IS ORDERED THAT Attorney Lawrence J. Kaiser is appointed trustee in these nine bankruptcy proceedings which shall be administered jointly. In recognition of the trustee's blanket bond which is hereby approved, the trustee shall be qualified upon filing of a written acceptance of this appointment within five days of the receipt of this order.

IT IS FURTHER ORDERED THAT an equity security holders' committee is appointed in each bankruptcy proceeding, other than Denton West Partners, with Gerard O'Flaherty as its attorney.

IT IS FINALLY ORDERED THAT the trustee, in addition to his other duties, shall recommend whether these proceedings should be

converted to Chapter 7 liquidation proceedings and inform the court of his position concerning pending adversary proceedings in these cases.

Dated: November 7, 1985.

BY THE COURT:

William H. Frawley
U. S. Bankruptcy Judge

cc: Attorney Donald J. Harman
Attorney Gerard O'Flaherty
Attorney James W. McNeilly, Jr.
Attorney Lawrence J. Kaiser ca