

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Mikell Scarborough, Master In Equity

Case No. 2011-CP-10-8421

Court of Appeals Docket 2015-001182

Bank of New York Mellon, The as Trustee, et al  
Respondent

vs.

Martin H. Seppala, et al  
Appellants

**RECEIVED**

DEC 29 2016

SC Court of Appeals

**APPELLANTS' STATUS UPDATE OF BANKRUPTCY**

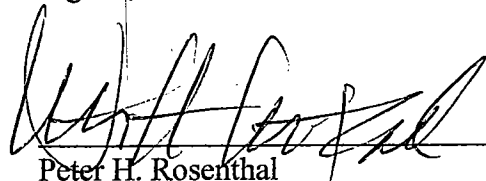
Now come the Appellants, Thomas F. True, Trustee of The Jate IV Trust and The Jate IV Trust, in the above captioned matter, and provides this Status Update pursuant to the Order of the Appeals Court dated August 13, 2015.

The Appellant Jate IV Trust filed for bankruptcy protection under Chapter 11 on July 21, 2015. The Appellant so notified the Appeals Court that in turn issued the said order holding the appeal "in abeyance until the bankruptcy court relinquishes jurisdiction". Further, the Appeals Court order contained a requirement that the Appellant provide this status every 60 days.

The Appellant hereby states that the Chapter 11 bankruptcy has been dismissed thereby lifting the said STAY. (Docket # 15-03834-dd). See Order attached.

Appellant attaches hereto the Order of Dismissal.

Signed,

A handwritten signature in black ink, appearing to read "Peter H. Rosenthal", written over a horizontal line.

Peter H. Rosenthal  
Attorney for Jate IV Trust  
647 Pleasant St.  
Weymouth, MA 02189  
(617) 571-9177

Dated: December 22, 2016  
Weymouth, Massachusetts

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH CAROLINA**

IN RE:

C/A No. 15-3834-DD

JATE IV Trust,

Chapter 11

Debtor.

**ORDER GRANTING MOTION TO  
DISMISS CASE**

This matter is before the Court on a motion to dismiss JATE IV Trust's ("Debtor") chapter 11 bankruptcy case. The motion was filed by Bank of New York Mellon ("BONYM")<sup>1</sup> on August 11, 2016 [Docket No. 76]. Debtor filed a response to the motion to dismiss on September 12, 2016 [Docket No. 95], after the deadline for objections had passed. A hearing was held on December 13, 2016. At the conclusion of the hearing, the Court granted the motion and dismissed Debtor's chapter 11 case. The Court now issues this order.

**FACTS AND PROCEDURAL BACKGROUND**

1. BONYM held a mortgage on real property owned by Debtor and located at 1180 Chersonese Round, Mount Pleasant, SC 29464 (the "Property"). BONYM commenced an action for foreclosure of its mortgage on November 14, 2011. On March 24, 2015, an Order and Judgment of Foreclosure and Sale was filed, granting BONYM summary judgment and ordering that the Property be sold at foreclosure sale.

2. Debtor appealed the state court foreclosure order. While the appeal was pending, Debtor filed its chapter 11 case on July 21, 2015, which stayed the foreclosure sale of the Property<sup>2</sup> and the appeal.

<sup>1</sup> BONYM's full name is The Bank of New York Mellon FKA The Bank of New York as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2005-17, Mortgage Pass-Through Certificates, Series 2005-17, by and through Bayview Loan Servicing, LLC as its servicer and attorney in fact.

<sup>2</sup> BONYM's motion to dismiss indicates that Debtor failed to post a bond in connection with the appeal of the foreclosure order, and therefore the appeal did not stay the foreclosure sale.

3. Debtor's Schedule A, filed August 21, 2015 [Docket No. 14], and Debtor's second disclosure statement filed May 24, 2016 [Docket No. 67] indicate that Debtor's only significant asset is the Property.<sup>3</sup> Debtor's Schedule A filed August 21, 2015 indicates the value of the Property is \$1,450,000.00.

4. Debtor's Schedules D and F indicate that Debtor only has three creditors: BONYM, whose judgment against Debtor is approximately \$998,356.47; David Collins, Esq., who holds a mortgage on the Property of approximately \$100,000.00; and Snee Farms Community Foundation, who holds a judgment against Debtor of approximately \$3,411.91.

5. Debtor's Schedules indicate that the Property is being leased to William L. Tuorto pursuant to a residential lease agreement for the amount of \$2,000.00 per month. Debtor's May 24, 2016 disclosure statement indicates that the lease agreement contains an option to purchase. Debtor's May 24 disclosure statement and plan indicate that Debtor proposes to reject the lease and the option to purchase and to evict Mr. Tuorto from the Property.

6. Debtor filed its initial plan and disclosure statement on January 19, 2016 [Docket No. 40, 41]. A hearing on Debtor's initial disclosure statement was scheduled for March 22, 2016. On March 23, 2016, the Court entered an order denying approval of the initial disclosure statement and giving Debtor sixty (60) days to file another disclosure statement [Docket No. 55].

7. Debtor filed a second plan and disclosure statement on May 24, 2016 [Docket No. 67, 68]. A hearing on the second disclosure statement was initially scheduled for July 12, 2016 and was continued three times.

8. Debtor's monthly operating reports filed during the chapter 11 case indicate that Debtor has no employees. Debtor's most recent monthly operating report, October 2016, indicates

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<sup>3</sup> Debtor's amended Schedule B, filed November 30, 2015 [Docket No. 39], indicates that Debtor also holds a bank account containing \$124.83 and a malpractice claim against two of its former attorneys, which was valued at \$500,000.00.

that since the filing of Debtor's case, with four exceptions, Debtor's only income each month has been \$2,000 in rental income.<sup>4</sup>

9. Debtor's May 24 disclosure statement and plan indicate that the plan will be funded by the sale of the Property.

10. On August 11, 2016, BONYM filed a motion to dismiss Debtor's chapter 11 case, a motion for relief from stay, and a motion to allow claims [Docket No. 76].<sup>5</sup> Debtor did not timely respond to the motion. Debtor filed a response to the motion to dismiss on September 12, 2016 [Docket No. 95] and a motion to file a late objection on September 13, 2016 [Docket No. 96], approximately two weeks after the deadline for objections had passed.

11. A hearing was scheduled on BONYM's motions on September 20, 2016 and was ultimately continued to December 13, 2016, to allow the parties time to have appraisals of the Property conducted.

12. On December 9, 2016, BONYM filed an amended certification of facts in support of its motion for relief from stay [Docket No. 111]. The certification indicated that, pursuant to an October 14, 2016 appraisal, the fair market value of the Property is \$801,900.00.

13. The day before the December 13 hearings, counsel for Debtor and BONYM contacted the Court to indicate that the matters were settled and that a settlement would be announced the following day at the hearing.

14. However, at the start of the December 13 hearing, counsel for Debtor informed the Court and, for the first time, opposing counsel, that he no longer had authority to consent to the

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<sup>4</sup> The October 2016 monthly operating report lists \$4,200.00 in October 2015, \$2,175 in December 2015, \$3,800 in June 2016, and \$2,050 in September 2016. The source of the additional funds is not clear from the monthly operating reports.

<sup>5</sup> All three forms of relief were requested in the pleading filed by BONYM on August 11 [Docket No. 76]. However, to comply with the Court's filing requirements, the pleading was refiled and docketed as a motion for relief from stay and motion to allow claims on August 12, 2016 [Docket No. 83, 86].

previously-agreed upon settlement. Accordingly, the Court held a hearing on BONYM's motion to dismiss.

### CONCLUSIONS OF LAW

BONYM seeks dismissal of Debtor's chapter 11 case pursuant to 11 U.S.C. § 1112(b).

Section 1112(b)(1) states:

Except as provided in paragraph (2) and subsection (c), on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

Section 1112(b)(4) sets forth a nonexclusive list of situations that constitute "cause." Additionally, "[t]he Fourth Circuit has held that a chapter 11 case may be dismissed or converted because it was not filed in good faith." *In re Colonial Warehouse, LLC*, C/A No. 13-00662-dd, 2013 WL 2190162, at \*3 (Bankr. D.S.C. May 21, 2013) (citing *Carolin Corp. v. Miller*, 886 F.2d 693, 698 (4th Cir. 1989)).

To dismiss a case for lack of good faith, the Court should engage in a two prong test, which examines both objective futility and subjective bad faith. *Colonial Warehouse*, 2013 WL 2190162, at \*3 (citing *Carolin Corp.*, 886 F.2d at 700-01). As explained below, the Court finds that both prongs are met in Debtor's case and accordingly, the case must be dismissed.

#### I. Objective Futility

"The objective futility inquiry is designed to insure that there is embodied in the petition "some relation to the statutory objective of resuscitating a financially troubled [debtor.]"" *Colonial Warehouse*, 2013 WL 2190162, at \* 4 (quoting *Carolin Corp. v. Miller*, 886 F.2d at 701) (alteration in *Carolin*). In assessing whether a bankruptcy case is objectively futile, the Court should assess whether there is any going concern to preserve and whether there is any hope of rehabilitation. *Id.* (quoting *Carolin Corp.*, 886 F.2d at 701-02). ""[I]f there is not a potentially

viable business in place worthy of protection and rehabilitation, the Chapter 11 effort has lost its *raison d'être . . .*”” *Id.* (quoting *Carolin Corp.*, 886 F.2d at 698).

Here, Debtor’s bankruptcy case is objectively futile because there is no going concern to preserve and no hope of rehabilitation. Debtor’s only asset of significant value is the Property. Debtor is proposing to sell the Property through its chapter 11 case; however, the amended certification of facts filed by BONYM indicates that the Property is worth less than is owed to BONYM. BONYM’s counsel indicated at the hearing on the motion to dismiss that BONYM is unwilling to accept anything less than payment in full. Additionally, even if Debtor chose to retain the Property, Debtor has no business to reorganize. According to the monthly operating reports filed in Debtor’s case, Debtor’s only income is \$2,000.00 per month in rental income. This amount is not sufficient for Debtor to propose a feasible plan for repayment of its creditors.

Further, Debtor’s second disclosure statement, proposed in May 2016 after the Court denied approval of Debtor’s previous disclosure statement, has still not been approved, despite a hearing on the disclosure statement having been continued by the Court numerous times. Debtor’s chapter 11 case has been pending for approximately 17 months, and little progress has been made toward confirmation of a plan. In sum, because there is no business to preserve and no hope of reorganization, Debtor’s chapter 11 case is objectively futile, and the first prong is met.

## II. Subjective Bad Faith

“The subjective bad faith prong ‘asks whether a Chapter 11 petition is motivated by an honest intent to effectuate reorganization or is instead motivated by some improper purpose.’” *Colonial Warehouse*, 2013 WL 2190162, at \*5 (quoting *In re Premier Auto. Serv., Inc.*, 492 F.3d 274, 280 (4th Cir. 2007)). “‘Subjective bad faith is shown where a petition is filed “to abuse the reorganization process,” or “to cause hardship or to delay creditors by resort to the Chapter 11 device merely for the purpose of invoking the automatic stay.’”” *Id.* (quoting *Premier Auto. Serv.*,

492 F.3d at 280). In determining whether subjective bad faith exists, the Court should consider the following list of non-exclusive factors:

- (1) The debtor has one asset;
- (2) Secured creditors' liens encumber the asset;
- (3) There are generally no employees except for the principals and there is no ongoing business activity;
- (4) The debtor has little or no cash flow and no available sources of income to sustain a plan of reorganization or make adequate protection payments;
- (5) There are few, if any, unsecured creditors whose claims are relatively small;
- (6) There are allegations of wrongdoing by the debtor or its principals;
- (7) The timing of the debtor's filing evidences an intent to delay or frustrate the legitimate efforts of secured creditors to enforce their rights;
- (8) The debtor is afflicted with the "new debtor syndrome" in which a one asset entity is created or revitalized on the eve of foreclosure to isolate the insolvent property and its creditors;
- (9) There is no realistic possibility of reorganization of the debtor's business;
- (10) The reorganization essentially involves a two-party dispute; and
- (11) Bankruptcy offers the only possibility of forestalling loss of the property.

*Id.* (citing *In re Harmony Holdings, LLC*, 393 B.R. 409, 418-19 (Bankr. D.S.C. 2008)).

In Debtor's case, nearly all of these factors are met. Although Debtor does list a bank account containing a nominal sum and a malpractice claim as additional assets on its amended Schedule B, it is apparent that this case is about the Property. Debtor has provided no evidence that it is actively pursuing the malpractice litigation. Debtor's schedules show that the Property is encumbered by three liens. Debtor has no employees. Debtor's schedules and the monthly operating reports filed throughout the case indicate that Debtor's only business activity is the rental of the Property to Mr. Tuorto. Other than a sale of the Property, this is also Debtor's only potential source of income to fund a plan. Debtor's schedules list no unsecured creditors. BONYM alleges in its motion to dismiss, and Debtor does not contest, that the Property was conveyed between various parties in contravention of the loan documents. Additionally, BONYM asserts that Debtor has continually failed to maintain the Property and to pay the real property taxes and maintain insurance on the Property. The timing of Debtor's bankruptcy filing just prior to the foreclosure sale evidences an intent to delay BONYM's legitimate efforts to enforce its rights. There is no

realistic possibility of reorganization. Debtor proposes to sell the Property, but the evidence before the Court indicates that the amount of BONYM's claim exceeds the current value of the Property. Although Debtor has obtained authorization to employ a real estate broker in its chapter 11 case, there is no evidence of any ongoing efforts to sell the Property. Although Debtor does have two other creditors, Debtor's chapter 11 case is essentially a two-party dispute between BONYM and Debtor. Finally, other than Debtor's pending appeal of the state court foreclosure order, Debtor's chapter 11 case offered the only hope of forestalling loss of the Property. Because nearly all factors are met, the subjective bad faith prong is satisfied as well.

**CONCLUSION**

For the reasons set forth above, it appears that Debtor's chapter 11 rehabilitation is objectively futile, and its case was subjectively filed in bad faith. Accordingly, cause exists for dismissal of the case. BONYM's motion is granted. Debtor's chapter 11 case is dismissed.

AND IT IS SO ORDERED.

**FILED BY THE COURT  
12/20/2016**



**Entered: 12/21/2016**

A handwritten signature in black ink, appearing to read "D. R. Duncan", written over a horizontal line.

**David R. Duncan  
Chief US Bankruptcy Judge  
District of South Carolina**

**PROOF OF SERVICE**


Pursuant to Rule 262 of the Rules of Appellate Procedure, I hereby certify that I served a copy of the above document,

**APPELLANTS' STATUS UPDATE OF BANKRUPTCY**

on Respondent by depositing same with this Proof of Service, in the United States Mail, first class postage prepaid, on December 27/2016 and addressed as follows:

Magalie A. Creech, Esquire  
Finkel Law Firm LLC  
P.O. Box 41489  
Charleston, SC 29423

Signed,



Peter H. Rosenthal, Esq.  
647 Pleasant Street  
Weymouth, MA. 02189  
(617)571-9177  
Attorney for Jate IV Trust, Appellant

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ALSO ADMITTED IN SOUTH CAROLINA

Phone: (617) 571-9177  
Fax: (781) 335-2153

December 22, 2016

The Honorable Jenny Abbott Kitchings  
Clerk of Court, South Carolina Court of Appeals  
PO Box 11629  
Columbia, SC 29211

Re: Bank of New York Mellon, The as Trustee, et al vs. Martin H. Seppala, et al  
Appeals Court Docket No. 2015- 001182;

Dear Madam Clerk,

Please note that the Bankruptcy proceeding that stayed the appeals proceeding in the above matter has been dismissed. Therefore, the Appellant encloses the following:

- Appellants' Status Update of Bankruptcy with copy of dismissal order;
- Appellant's Motion for Extension of Time to File Initial Brief;
- Proof of Service;

The Appellants have sent the required proof of service to the Respondent in this matter.

Please docket and file same with the other papers in this matter.

Very truly yours,

  
Peter H. Rosenthal

Attorney for Appellants

PHR:mmm

Attachments

Copy to Magalie Creech, Esq.

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SC Court of Appeals

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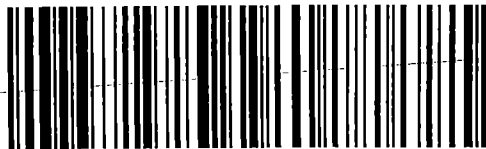
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