

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**

In re:**MARIMAC, LLC****Debtor.****Case # 03-10379****Chapter 11***Appearances:*

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For the Debtor

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For the Secured Creditor

Kevin Purcell, Esq.
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For the Office of the
United States Trustee

ORDER

On March 20, 2003, Debtor filed its Chapter 11 Petition, commencing this case. The Debtor ran a marina business in New York State, known as Monty's Bay Marina (hereinafter, the "Marina"). On the same date, Debtor filed, *inter alia*, an Application to Authorize Use of Pre-Petition Credit Card Clearing Account, with Potential Post-Petition Clearing of any Pre-Petition Charges (doc. #2). Soon thereafter, on March 25, 2003, Debtor filed a Motion for Turnover of Estate Property and Compliance with 11 U.S.C. § 543 and Bankruptcy Rule 6002 by Custodian (doc. #5). Secured Creditor James D. Carter filed an Objection to Motion for Turnover (doc. #17). On April 1, 2003, the Court held an emergency hearing on the Motion for Turnover. After hearing arguments, the Court delayed decision on the Motion, adjourning the hearing to today, May 12, 2003. It also issued an Interim Order, directing, *inter alia*, the New York State Receiver* to maintain the Debtor's property and to file monthly reports.

Thereafter, Mr. Carter filed a Motion for Relief from Stay (doc. #28), a Motion to Appoint Trustee or Motion to Convert Case to Chapter 7 or Motion to Dismiss Case (doc. #29) and a Motion to Change Venue or, alternatively, to Dismiss Case (doc. #30). For convenience, these Motions were all scheduled for hearing on May 12, 2003. Likewise, the Court scheduled the Application for Authorization of Pre-Petition Credit Card Clearing Account for a hearing on May 12, 2003.

* In a New York State foreclosure action on the Marina's property, a receiver, John T. Snell, Esq., was appointed to operate the Marina. Mr. Snell, in turn, retained Mr. Carter, the Secured Creditor in this case, to operate the Marina.

The Debtor filed Objections to all of Mr. Carter's Motions. See doc. #36 (objection to Motion to Appoint Trustee), doc. #37 (objection to Motion to Change Venue), and doc. # 38 (objection to Motion for Relief from Stay). Likewise, the Office of the United States Trustee also filed an Objection to Motion for Appointment of Chapter 11 Trustee and a Statement Regarding the Motion to Convert Case to Chapter 7 or to Dismiss (doc. #42).

At the commencement of today's hearing, the Court indicated it would address the five pending motions, namely: (1) the Motion to Change Venue; (2) the Application for Authorize Use of Pre-Petition Credit Card Clearing Account; (3) the Motion for Turnover; (4) the Motion to Appoint a Trustee or Convert/Dismiss Case; and (5) the Motion for Relief from Stay.

As a preliminary matter, the Court found the Debtor had demonstrated, through the testimony presented by principal Roger McCormick at the April 1, 2003 hearing, sufficient connections with Vermont to satisfy the venue criteria of 28 U.S.C. § 1408. The Court further found that the Secured Creditor had not presented persuasive evidence to warrant a change of venue under 28 U.S.C. § 1412. Accordingly, the Court found venue in Vermont was proper, and denied Mr. Carter's Motion to Change Venue.

Next, the Court inquired whether the Application for Authorize Use of Pre-Petition Credit Card Clearing Account was still before the Court for its consideration. The Debtor indicated that if it were returned to possession it would open new debtor-in-possession accounts, and therefore it withdrew its Application to use pre-petition credit card accounts. Thus, it is not necessary for the Court to act upon this Application.

From its review of the papers submitted for the May 12th hearings, the Court found the facts and arguments pertaining to the three remaining Motions to be integrally connected and determined that the evidence on all three motions could be consolidated. Hence, the parties were instructed to introduce their evidence accordingly. Secured Creditor James D. Carter and two of Debtor's principals, Mr. Roger McCormick and Mr. Yves G. Julien, testified to the relevant facts and circumstances of the Debtor's financial circumstances, to its pre- and post-petition operations and to the likelihood of reorganization. Counsel for the Debtor, the Secured Creditor and U.S. Trustee examined and cross-examined each of the witnesses, respectively. Two of the witnesses were called after presentation of their preliminary testimony, as rebuttal witnesses.

Mr. Carter, who is presently running the Marina, testified about the work he has caused to be performed to maintain and improve the property. He also testified about the steps he has taken to market the Marina in anticipation of opening for the 2003 boating season. Mr. McCormick testified that the in-fighting between the principals of the Debtor, which had been the basis of a Vermont state court action and that had made it impossible to operate the Debtor's business effectively, had recently been resolved. Further, Mr. McCormick testified that, if confirmed, the Debtor's chapter 11 plan of reorganization would pay all creditors 100% , with at least 50% of the dividend to unsecured creditors being paid upon confirmation, and with confirmation expected to occur within 60 days. Additionally, Mr. McCormick offered evidence about his past business experience in the construction business which he believes has helped him to operate the Marina, and about his experience in operating the Marina since 2000. Mr. Julien's testimony corroborated Mr. McCormick's testimony that the Marina has been improved since Marimac, LLC has owned it. Mr. Julien also testified that the Marina could double or triple its profitability if the Debtor were allowed to resume operational responsibility. Moreover, Mr. Julien also testified that he is confident relying upon the profitability of the Marina to be the primary source of funds for the buy-out of his interest in the Debtor LLC. Significantly, the Court finds there was a total absence of evidence to support the Secured Creditor's allegation that the value of the Marina has diminished since the Debtor purchased it or that the future management of the Debtor is incapable of accomplishing an effective reorganization if the Debtor.

THUS, UPON CONSIDERATION of the papers submitted and the evidence presented, the COURT FINDS:

1. Regarding the Secured Creditor's Motion to Appoint Trustee or Alternatively to Convert or Dismiss the Case

As the movant, the Secured Creditor bears the burden of proving that the appointment of a chapter 11 trustee is necessary. See 11 U.S.C. § 1104. The Court finds the testimony the principals of the Debtor to be credible with regard to the resolution of their differences and their ability to operate the Mariana cooperatively in the future, if Mr. McCormick buys out the interests of the two remaining principals. The Court concludes that the Secured Creditor has not met his burden of proof for the appointment of a Trustee, in that he has not demonstrated cause to appoint a chapter 11 trustee in this case. See In re Northstar Contracting Corp., 128 B.R.

66 (Bankr. S.D.N.Y. 1991) (appointing a chapter 11 trustee is an extraordinary remedy which will cause additional expense to the estate). Based upon the testimony presented, and the inevitable cost associated with the appointment of a trustee, the Court further finds that the appointment of a Trustee would not be in the interests of any creditors, other than perhaps the Secured Creditor. Therefore, the Motion to Appoint a Trustee is denied.

The motion to convert or dismiss is denied premised upon the Debtor following through with the filing of the plan described at today's hearing. Since the Debtor principal testified that the plan would be confirmed within 60 days, the Court will condition denial of the motion to convert or dismiss upon the Debtor's filing of a plan and disclosure statement by May 30, 2003.

2. Regarding the Secured Creditor's Motion for Relief from Stay

As the movant, the Secured Creditor bears the burden of proving the issue of the Debtor's equity in the property. See 11 U.S.C. § 362(g). Based upon the evidence presented, particularly the testimony presented at today's hearing, the Court finds the Secured Creditor has failed to meet his burden under § 362(d). The credible evidence presented is that the Marina has increased in value since the Debtor purchased it and is likely to continue to increase in value if the Debtor operates it, under the management structure presented today. Moreover, the Debtor presented credible evidence that the Marina is necessary to the Debtor's effective reorganization and that such a reorganization is possible, as is its burden under § 362(g). Therefore, the Secured Creditor's Motion for Relief from Stay is denied.

3. Regarding the Debtor's Motion for Turnover

As the § 543 movant, the Debtor bears the burden of proving it can continue to preserve the Debtor's estate for the benefit of the creditors. Based upon the credible testimony presented today, the Court is persuaded the Debtor is capable of preserving the estate's property. Mr. McCormick has run the Marina in question for several years and Mr. Julien has substantial experience in marketing marina use. Moreover, Mr. McCormick has testified that he is willing to make the necessary capital infusions into the business to ensure its successful reorganization and potential growth. Since the policy of the Bankruptcy Code is to give the Debtor the opportunity to reorganize and presumes that the Debtor is capable thereof until it is proven otherwise, see In re

H & S Transp. Co, Inc., 55 B.R. 786 (Bankr. M.D. Tenn 1982), and finding the evidence in this case supports that presumption, the Court grants the Debtor's Motion for Turnover.


However, the testimony presented today also indicates that the Debtor's insurance expires today. The Debtor must have insurance in order to proceed. Therefore the turnover of the property is contingent upon and will not take effect until, the Debtor produces proof of insurance sufficient to satisfy the criteria of the Office of the U.S. Trustee. If such insurance is not produced by noon on Friday, May 16, 2003 , the case is converted to chapter 7. Likewise if the Debtor fails to file a plan and disclosure statement by May 30, 2003 the case will be converted to chapter 7.

IT IS THEREFORE ORDERED:

- A. the Secured Creditor's Motion to Appoint a Chapter 11 Trustee is denied;
- B. the Secured Creditor's Motion for Relief from Stay is denied;
- C. the Motion to Convert or Dismiss is denied at this time, but will be granted if the Debtor fails to file a plan and disclosure statement by May 30, 2003 ; and
- D. the Debtor's Motion for turnover is granted, subject to production of insurance by noon on May 16, 2003.

SO ORDERED.

May 12, 2003
Rutland, Vermont



Colleen A. Brown
United States Bankruptcy Judge