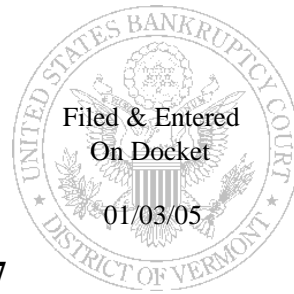


**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**



In re:

**GERARD M. & KATHLEEN D.
COSTELLO,
Debtors.**

**Case # 03-11517
Chapter 7**

**ORDER DENYING EMERGENCY MOTION RE: OPERATION OF DEACON'S DEN
AND APPROVING TERMS OF REVISED ORDER APPOINTING RECEIVER**

WHEREAS, on December 30, 2004, Middlebury Equity Partners, LLC ("MEP") and the Chapter 7 Trustee, John Canney, Esq. ("the Movants") filed a Motion seeking the following:

- 1) for the appointment of an examiner under 11 U.S.C. §§ 1104 (a) and/or 105 to operate and investigate the Deacon's Den tavern and Fennessey's restaurant in accordance with a Stipulation and Agreed-Upon Receiver Agreement between MEP and the Trustee;
- 2) requiring the Debtors to cooperate with the Trustee in the administration of the estate and the operation of businesses in which the estate claims any interest; and
- 3) declaring that the Trustee has the sole authority to represent the Debtors in matters concerning assets of the bankruptcy estate;

WHEREAS a 90 minute emergency hearing was held, by telephone, on December 31, 2004 at which Robert O'Neill, Esq. and Norman Williams, Esq. appeared on behalf of Middlebury Equity Partners, John Canney, Esq., appeared in his capacity as chapter 7 trustee, *pro se*, Christopher Reis, Esq. appeared on behalf of Gerard and Kathleen Costello, Jennifer Emens-Butler, Esq. appeared on behalf of Brattleboro Savings Bank and Kevin Purcell, Esq. appeared on behalf of the U.S. Trustee;

Based upon the facts and circumstances of this case, the full record in this case, and the representations made at the hearing, THE COURT FINDS that

- (I) it does not have jurisdiction over the motion and order to appoint a receiver filed in the state court foreclosure action,
- (ii) its jurisdiction over the subject property is limited to the estate's interest in the property,
- (iii) the estate's interest is determined by the extent to which the value of the property exceeds the valid liens against the property,
- (iv) if the MEP liens are found to be invalid that the estate has a substantial interest in the property,

- (v) since this is a chapter 7 case § 1104 is not applicable,
- (vi) both the Trustee and Office of the U.S. Trustee oppose entry of an order under § 721 authorizing the trustee to operate the Deacon's Den,
- (vii) no evidence or argument was presented to warrant entry of an order directing the Debtors to cooperate with the Trustee in the administration of the estate and operation of businesses in which the estate claims an interest;
- (ix) the Trustee needs more time to investigate and reach a determination with respect to the question of what role the Debtors have concerning assets of the bankruptcy estate; and
- (x) the Trustee has an interest in ensuring that the receiver appointed in the state court action conducts the business of the Deacon's Den in a way that protects the contingent interest of the estate, and this Court's jurisdiction over this motion is limited to verifying that the agreement reached between the parties, to modify the state court order appointing a receiver, does not impede administration of the chapter 7 estate or put the estate's contingent interest at risk

Based upon the unique circumstances of this case, the overlapping jurisdiction of the state court and this court as to the subject asset, the unusual procedural posture that the stay has been lifted as to the subject asset but an adversary proceeding is pending to determine the validity of the MEP lien against the subject asset, the parties' unanimous acknowledgment that time was of the essence because of the potential income to be earned over New Year's weekend, the unavailability of the state court judge and the limited nature of the request ultimately articulated at the emergency hearing,

IT IS HEREBY ORDERED Movants' request for appointment of an examiner under 11 U.S.C. § 1104 is DENIED because the case is in chapter 7 and such relief is statutorily unavailable;.


IT IS FURTHER ORDERED Movants' request for an Order requiring the Debtors to cooperate with the Trustee in the administration of the estate and the operation of businesses in which the estate claims any interest is DENIED because (1) the Movants did not present any specific legal grounds or factual argument on this issue, and (2) the impetus for this request appears to have been the Debtors' alleged refusal to agree to the immediate appointment of a competent receiver who would operate Deacon's Den in a way that protected the interests of all parties, and during the hearing the Debtors did consent to a revised Order Appointing Receiver, on terms that the Trustee and MEP found acceptable.

IT IS FURTHER ORDERED that the Movants' request for an Order declaring that the Trustee has the sole authority to represent the Debtors in matters concerning assets of the bankruptcy estate is DENIED as premature since the Trustee indicated he is not yet prepared to articulate his position on this issue; and

IT IS FURTHER ORDERED that, pursuant to 11 U.S.C. § 105, this Court approves the revised Order Appointing Receiver, on the consensual terms announced at the conclusion of the hearing, namely revising the prior order to name Mr. Alonzo Page as the receiver, to set the receiver's fee at \$2,200 per week for the week of December 31, 2004 through January 6, 2005, to limit the term of the order to one week, and to provide that the terms of said receiver's appointment thereafter shall be determined by the state court, as being in the best interest of the estate.

SO ORDERED.

Rutland, Vermont
January 3, 2005



Colleen A. Brown
United States Bankruptcy Judge