UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:
FIRST CONNECTICUT CONSULTING GROUP, INC., *et al.*,
Debtors.

Chapter 11 Case
Misc. Proceeding # 04-101

ORDER
DENYING MOTION FOR SUMMARY DENIAL OF MOTION TO DISMISS

On January 18, 2004, the Debtors,[1] joined by the Committee of Unsecured Creditors in these cases as well as the Committee of Unsecured Creditors in the individual chapter 11 case of James Licata,[2] filed a Motion for Summary Denial of the Contested Motion by Peter and Lorraine Mocco to Dismiss Certain Chapter 11 Petitions (doc. #41)[3] seeking a summary denial of Peter and Lorraine Mocco's[4] Motion to Dismiss. The subject Motion to Dismiss (doc. #3) was originally filed in the United States Bankruptcy Court for the District of Connecticut, Bridgeport Division, on March 19, 2003, and is before this Court pursuant to an Order for Change of Venue to the District of Vermont Pursuant to 28 U.S.C. § 1412 entered in this Court on January 2, 2004. See doc. #1.

This Court has jurisdiction to adjudicate this contested matter pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A).

ISSUES PRESENTED

The Court is treating the Summary Judgment Motion as a motion to validate the chapter 11 filings. The primary questions raised by this motion are whether Licata had authority to file petitions under title 11 on behalf of the subject LLCs, and whether these cases were filed in good faith. See Debtors' Memorandum in Support of Summary Denial of Contested Motion by Peter and Lorraine Mocco to Dismiss Certain Chapter 11 Petitions (doc. #42). Thus, the question presented is whether there are undisputed facts sufficient to deny

[1] The term "Debtors" refers to:
1. First Connecticut Holding Group LLC II;
2. First Connecticut Holding Group LLC III;
3. First Connecticut Holding Group LLC X;
4. First Connecticut Holding Group LLC XI; and
5. First Connecticut Holding Group LLC XIII.

Further, hereinafter, the Debtors will be referred to interchangeably as "Debtors" and "the LLCs".

[2] Hereinafter, referred to as the "Licata".

[3] Hereinafter, referred to as "the Summary Judgment Motion".

[4] Hereinafter, referred to as "the Moccos".

dismissal of these chapter 11 cases, as a matter of law. Under summary judgment principles, the Court is bound to construe all facts, and draw all inference from those facts, in the light most favorable to the non-moving party, here, the Moccos.

The legal standard for dismissal of a chapter 11 petition allocates the burden of proof as follows: The moving party must make a *prima facie* showing of bad faith; and upon such showing, the burden of proof shifts to the debtor to show that the petition was filed in good faith. See RUSSEL, BANKRUPTCY EVIDENCE MANUAL, 2001 Ed., § 301.82(B) (citing 11 U.S.C. § 1112(b); Matter of Namer, 141 B.R. 603 (Bankr. E.D. La. 1992), appeal dismissed 1992 WL 164528 (E.D. La. 1992)). Thus, for purposes of ruling on this motion, the Court starts with the premise that the Moccos have made their *prima facie* showing of bad faith; and then examines the facts and arguments presented to ascertain if the Debtors have presented sufficient, material, undisputed facts to demonstrate that they filed these petitions in good faith. If the Debtors have made such a showing they are entitled to a judgment denying the Motion to Dismiss as a matter of law. However, as is more fully articulated below, the Court has found that there are facts material to the question of the Debtors' good faith in dispute, and therefore, it must deny summary judgment.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper only if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See FED. R. CIV. P. 56(c); FED. R. BANKR. P. 7056. A genuine issue exists only when "the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. See Anderson, 477 U.S. at 247. Factual disputes that are irrelevant or unnecessary are not material. See id. Furthermore, materiality is determined by assessing whether the fact in dispute, if proven, would satisfy a legal element under the theory alleged or otherwise affect the outcome of the case. See id. The court must view all the evidence in the light most favorable to the nonmoving party and draw all inferences in the nonmovant's favor. See Cruden v. Bank of New York, 957 F.2d 961, 975 (2d Cir. 1992). In making its determination, the court's sole function is to determine whether there is any material dispute of fact that requires a trial. See Anderson, 477 U.S. at 249; see also Delaware & Hudson Ry. Co. v. Conrail, 902 F.2d 174, 178 (2d Cir. 1990).

DISCUSSION

Essentially, the Debtors assert four alternative grounds for summary denial of the Motion to Dismiss. First, the Debtors assert that the good faith nature of Licata's filing flows from the fact that his ownership of the LLCs was clearly established under the terms of the confirmed plan in the Moccos' chapter 11 case. Specifically, the Debtors contend that Licata's ownership was a *sine qua non* of the confirmation of the Moccos' Fourth Amended Plan (the "Plan"). Moccos' major secured creditor, First Union, was objecting to confirmation of the Moccos' Plan. In order to overcome that objection, Licata was to take title to LLCs which in turn would be the owners of certain property previously owned by the Moccos, and enter into loan transactions that would result in First Union being paid in full. The Statement of Undisputed Facts makes clear that this refinancing of the First Union obligations through a non-Mocco entity was the consideration for First Union's acceptance of the Plan and, hence, was an essential step for obtaining confirmation of the Plan. The LLCs assert that the entry of the confirmation order constitutes *res judicata* on the question of ownership of the LLCs and the LLCs' assets. The flaw in this argument is that the Debtors fail to acknowledge that the principle of *res judicata* is not absolute. The key defense to this principle is fraud in the inducement. If the bankruptcy court entered the confirmation order in reliance upon information that was not true or upon circumstances created by a party (or parties) with the intention to mislead or deceive the court and other parties, the confirmation order may be subject to revocation and/or *res judicata* may not be applicable. See, e.g., Aegis Realty Corp. v. Langer (In re Aegis Realty Corp.), 301 B.R. 116, 119 (Bankr. S.D.N.Y. 2003) ("[a] judgment of a court having jurisdiction of the parties and of the subject matter operates as res judicata, in the absence of fraud or collusion, even if obtained upon a default.") (quoting Saud v. The Bank of New York, 929 F.2d 916, 919 (2d Cir.1991)). Here, the Court finds that there are significant questions of fact regarding whether there was an intent to defraud the court and if so, by whom, and for what purpose. Moreover, there are also questions of fact about what the parties intended and the creditors understood, by the terms of the Plan relating to the role of Licata *vis a vis* the LLCs; for example, was he to be owner or merely an agent for the Moccos. Accordingly, this Court is not persuaded that there are no material facts in dispute with regard to the *res judicata* argument.

Second, the Debtors argue that the contracts upon which the Moccos rely to prove that they, rather than Licata, had the sole authority to file chapter 11 petitions for the LLCs are void as against public policy. As with the first argument, there are significant questions of fact surrounding the validity and enforceability of the supplemental (a/k/a secret) agreement and the escrow agreement. Hence, no ruling can be made on this argument without resolving several factual disputes, including, the intentions of the parties at the time these

agreements were made; who signed the agreements; what was the purpose of these agreements; whether the agreements resulted in the defrauding of parties and, if so, whom; and whether this Court should rely upon affidavits originally given or the recanting testimony subsequently provided.

Third, the Debtors urge the Court to find that, contrary to Moccos' assertions, Licata's filing of these cases did serve a proper bankruptcy purpose and was not filed solely to address (or exacerbate) a bilateral dispute. The Debtors argue that the filing of these cases is not inconsistent with the goals of the bankruptcy process and many parties' rights will be addressed in these filings, most notably the rights of the creditors in the LLCs' chapter 11 cases and the creditors in Licata's individual chapter 11 case. The Court finds that there are no facts in dispute with regard to this argument. There is no question that other parties beyond Mr. Licata and the Moccos have risks and rights in the balance here. Thus, the Debtors have demonstrated that, based upon the material undisputed facts, a determination could be made, as a matter of law, that they have shown this prong of good faith. However, the Moccos have other bases to support their Motion to Dismiss.

The Debtors' final and most strenuous argument is that Licata owned the LLCs on the dates he caused their chapter 11 cases to be filed; therefore, any argument by the Moccos that Licata lacked authority to file these chapter 11 cases is wholly without merit. If this unequivocal and unfettered ownership interest were proved, and there was no issue as to a lack of good faith, then the Moccos' Motion to Dismiss would have to be denied. Licata claims these rights of ownership and authority under state law as well as under the terms of the Moccos' confirmation order, and insists that nothing set forth in the Motion to Dismiss proves otherwise. In order to prevail on this Summary Judgment Motion, the Debtors must show undisputed facts that, as a matter of law, lead inescapably to the conclusion that Licata owned the LLCs on the dates of the subject chapter 11 filings. Here, several of the facts which are critical to this determination are in dispute. In particular, the Court finds the books and records of the LLCs regarding ownership and transfer of ownership interests to be unclear. The records of the LLCs raise significant factual issues including, but not limited to: whether the transfers recorded were actually made; whether the issuing party had authority to make the transfers; whether valid certificates were issued; what the notation "not issued or delivered" means, when it was made, and by whom; and whether the determinations made by the bankruptcy court in the Moccos' chapter 11 case limited or modified the LLCs' operating agreements regarding transfers of certificates. The Court finds these facts all to be material to the question of who "owned" the LLCs on the date their bankruptcy petitions were filed. See Anderson, 477 U.S. at 249; see also Conrail, 902 F.2d at 178.

Based upon the Motion to Dismiss, the Motion for Summary Denial of the Motion to Dismiss, together with the Debtors' Statement of Material Undisputed Facts (doc. #43) and the exhibits referenced therein, and the Moccos' Opposition together with their Response to "Licata's Statement of Material Undisputed Facts" and Counter-statement of Additional Facts (doc. #58) and the exhibits referred to therein, the Court finds that there is a genuine issue as to several material facts. Therefore, the Court is precluded from granting summary relief to the movant-Debtors. The Court finds that the issue of whether these chapter 11 cases should be dismissed cannot be determined without presentation of further evidence on the questions of whether these cases were filed in good faith and whether Licata had authority to file them. Accordingly,

IT IS HEREBY ORDERED that the Debtors' Motion for Summary Denial of the Contested Motion by Peter and Lorraine Mocco to Dismiss Certain Chapter 11 Petitions is DENIED. Therefore, the evidentiary hearing shall commence on February 2, 2004, at 9:00 AM, at Federal Courthouse in Rutland, Vermont.

SO ORDERED.

January 30, 2004
Rutland, Vermont

Colleen A. Brown
United States Bankruptcy Judge