
In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)
)
TAIYO CORPORATION) Chapter 11 Case
)
) Number 93-41092
)
Debtor)

ORDER ON MOTION TO SEAL A PORTION OF THE RECORD

A Motion for Relief from the Automatic Stay or an Alternative Motion to Dismiss was filed by Sheraton Savannah Corporation and Sheraton Franchise Corporation in the above-captioned case and scheduled for hearing on September 22, 1993. At the call of the case the Movant introduced as Exhibit "A" a September 2, 1993, appraisal of the property which is the subject of the Motion for Relief from Stay, that being the real estate and improvements generally known as the Sheraton Savannah Inn and Country Club located on Wilmington Island, Chatham County, Georgia. Admission of the contents of the appraisal was not objected to by any party in interest and was therefore admitted into evidence. Thereafter Sheraton Savannah Corporation moved, pursuant to 11 U.S.C. Section 107, that the contents of Exhibit "A" be sealed. No party in interest expressed any objection to the sealing of this Exhibit. Given the strong presumption in favor of public access to court records, however, it is incumbent upon the court to examine whether the motion should be granted.

11 U.S.C. Section 107 provides, in relevant part:

(a) Except as provided in subsection (b) of this section, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.

(b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may--

(1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or . . .

Section 107(a) makes clear that bankruptcy court records are to be open and available to the public except in very limited and exceptional circumstances. In re Analytical Systems, Inc., 83 B.R. 833, 834 (Bankr. N.D.Ga. 1987). *See also* Wilson v. American Motors Corp., 759 F.2d 1568, 1570 (11th Cir. 1985) ("[I]t is the rights of the public, an absent third party, which are preserved by prohibiting closure of public records, unless unusual circumstances exist.").

Clearly, there are strong public policy reasons favoring the maintenance of records open for public inspection which are reflected in the statute and recognized by numerous courts. Nevertheless there are certain narrow instances under section 107(b)(1) in which the court has discretion to protect entities with respect to commercially sensitive information. In fact, section 107(b)(1) states that "the bankruptcy court shall" offer such

protection to an entity when the following two factors are present:

- (1) there is a request by a party in interest for the court to enter an order protecting such information; and
- (2) the information is either a "trade secret, confidential research, or commercial information."

As previously noted, Sheraton Savannah Corporation and Sheraton Franchise Corporation, both creditors and parties in interest, moved this court to seal the contents of Exhibit "A". In support of the motion to seal this evidence Sheraton Savannah Corporation stated that the property is being actively marketed through joint efforts of the movant and the debtor corporation. Movant further represented to the court that the publication of the contents of the appraisal and the conclusions of the appraiser could have a chilling effect on efforts to successfully market the property. Movant further argued that the contents of the appraisal fall squarely within the meaning of the phrase "commercial information" as found in 11 U.S.C. Section 107(b)(1).

Research has yielded a relatively limited number of cases on this subject. However, the district court within the Southern District of New York has, on more than one occasion recognized that the term "commercial information", as used in section 107(b)(1), need not rise to the level of a trade secret before protection is warranted. *See In re Orion Pictures Corp.*, 1993 Westlaw 330065 (S.D.N.Y. 1993) ("Courts interpreting § 107 have not

required that commercial information rise to the level of a trade secret before protecting such information."); In re Lomas Financial Corp., 1991 Westlaw 21231 (S.D.N.Y. 1991) (holding that "commercial information", as used in § 107(b)(1), includes more than just information that may give a debtor's competitors an unfair advantage).

In Lomas, the district court interpreted "commercial information" as including information related "to the buying and selling of securities on the open market." In re Lomas Financial Corp., 1991 Westlaw 21231 (S.D.N.Y. 1991). Under the Lomas rationale I conclude that the information contained in the appraisal, if placed in the hands of the public generally, could clearly affect the market. Although the relevant market is not a public securities market as in Lomas, the potential effect on the market for debtor's hotel is virtually the same, and Lomas is not distinguishable on that ground. Moreover, the court in Lomas was faced with an objection by a party in interest, the creditors' committee, whereas in the case sub judice, no party in interest objected to the motion when Movant set forth the reasons supporting it in open court. In the absence of such an objection and because sealing of this commercial information is in the interest of Debtor and creditors, I find, pursuant to the provisions of 11 U.S.C. Section 107(b)(1) and Bankruptcy Rule 9018, that the contents of the appraisal shall remain under seal.

It is clear, however, that the discretion to make a determination regarding the sealing of exhibits filed in bankruptcy proceedings should be limited in scope and restricted to the minimal amount of restriction on public access which is necessary to serve

the statutory end of protecting commercial information. "[F]or the Court to enter a protective order, limitation of access must not only be an appropriate responsive remedy, but also, there can be no less drastic alternative available." In re Nunn, 49 B.R. 963, 964 (Bankr. E.D.Va. 1985) (*citing* Associated Press v. U.S. Dist. Court for the Cent. Dist. of California, 705 F.2d 1143, 1146 (9th Cir. 1982)).

In this case the decision whether to grant the Motion for Relief from Stay or Dismissal has been submitted to the court and is being held under advisement pending the submission of proposed orders by counsel for both parties. In that context I find that it is appropriate to seal the contents of the Exhibit only until such time as the court renders a decision. That order, of course, will of necessity be based on the entire record, including the Exhibit which by this order will remain under seal for some period of time. However, once a decision is entered of record there is no further basis for sealing the Exhibit for the reason that it will have been incorporated into the findings of fact and conclusions of this court. At that point whatever effect there may be on the market for this property will come as a result of the entry of the court's order and not the opinion of the expert which rendered the appraisal of the property. Because there will no longer exist the same interest to protect as there is presently and because of the overriding right to public access of official court records and documents, the contents of Exhibit "A" will be unsealed at the time this court enters its order on the Motion for Relief or to Dismiss.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of September, 1993.