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IN THE UNITED STATES BANKRUPTCY COURT **FILED**

FOR THE

at 11 O'clock 20 min A.M

SOUTHERN DISTRICT OF GEORGIA
Brunswick Division

Date 11-6-89 ae

MARY C. GECTOM, CLERK
United States Bankruptcy Court
Savannah, Georgia
Chapter 11 Case
Number 89-20468

In the matter of:)
HOLIDAY FUND, INC.)
Debtor)
and)
HOLIDAY BUILDERS, INC.)
Debtor)

Chapter 11 Case
Number 89-20532

ORDER DISMISSING CASES

BACKGROUND

On the morning of September 5, 1989, in an effort to prevent the imminent foreclosure of certain real property which had been advertised for sale for that day by Great Southern Federal Savings and Loan Association ("Great Southern"), Holiday Fund, Inc., ("Holiday Fund") filed a Chapter 11 bankruptcy petition. The filing was made without benefit of counsel; Robert C. Harper subsequently filed a motion to appear as attorney for Holiday Fund, which motion was granted. Thereafter on October 2, 1989, Holiday Builders, Inc.,

("Holiday Builders"), a related corporation, also filed a Chapter 11 bankruptcy case.

On the afternoon of Holiday Fund's bankruptcy filing, Great Southern filed a Motion to Lift Stay, in order to proceed with the foreclosure sale of lots 38 and 39, Glynn Marsh Village, Glynn County, Georgia (the "Great Southern" property). After a telephone conference between and among the court, Great Southern's counsel and John Klinowski, the principal of Holiday Fund, Great Southern did sell the property at public sale at which it was the highest bidder; Great Southern has not recorded a foreclosure deed, awaiting the outcome of its Motion for Relief from Stay.

On October 5, 1989, First Federal Savings and Loan Association ("First Federal"), the other movant before the Court, filed Motions to Lift Stay and/or Dismissal of Case in both the Holiday Fund and Holiday Builders cases. Unaware of the Debtors' bankruptcy filings, First Federal had been advertising for foreclosure certain properties owned by the two Debtors. The hearings on the Motions of both Great Southern and First Federal were scheduled for October 5, 1989, but were continued at the Debtors' request and rescheduled for October 16, 1989, at which time

both Movants and the Debtors presented evidence in a consolidated hearing.

These bankruptcy filings are the second Chapter 11 filing for each Debtor, both of the prior bankruptcies having been filed on August 28, 1987. Thereafter, Holiday Builder's Amended Plan of Reorganization was confirmed by this Court on June 26, 1988, and Holiday Fund's was confirmed on July 5, 1988. Each of the confirmed plans provided for resumption of monthly payments to the secured creditors, with all arrearages owing to First Federal, Great Southern and Georgia Federal Bank by Holiday Fund to be paid in full within twelve months following confirmation. The plans, as amended, also called for the transfer of stock to John Klinowski, the major stockholder and to certain related entities in satisfaction of their debts. The stock transfers were made and monthly payments resumed to most or all of the secured creditors; no payments were made, however, on the arrearages due at the expiration of the twelve month period. The secured creditors, their debts and the assets of Holiday Fund and Holiday Builders are essentially the same in these bankruptcies as in the prior cases.

Mr. Klinowski testified for the Debtors that the objective in filing the Chapter 11 bankruptcies is to liquidate

rather than to reorganize. On cross-examination, however, Mr. Klinowski acknowledged that his overall plan involved the future development of over forty units on the unimproved acreage owned by Holiday Fund. Mr. Klinowski also testified that he was hopeful that another venture in which he is involved will be brought to fruition thereby generating monies to be applied to debts in these bankruptcy cases.

ANALYSIS

Section 1141(a) of the Bankruptcy Code provides that the provisions of a confirmed plan bind the debtor; thus, Holiday Fund and Holiday Builders are bound by the prior plans which were confirmed by this Court. At issue is whether the Debtors may file a second Chapter 11 bankruptcy case when they were unable to perform in accordance with the provisions of their earlier plans.

Section 1127(b) permits the debtor to "modify such plan at any time after confirmation of such plan and before substantial consummation of such plan . . . ". According to 11 U.S.C. Section 1101(2), "substantial consummation" occurs upon

(A) transfer of all or substantially all of the property proposed by the plan to be transferred;

(B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and

(C) commencement of distribution under the plan.

Subsection (A) was satisfied upon the transfer of equity stock in satisfaction of debt and subsection (B) was satisfied when each of the Debtors clearly assumed the business and management of the property of the Debtor. The third requirement was also satisfied as the Debtor did begin monthly installment payments to a number of the secured creditors. A South Dakota District Court held that subsection (C), the commencement of the distribution requirement, was satisfied by debtors before that Court even when payments paid under their plan equalled only four percent of the total payments due. U.S. v. Novak, 86 B.R. 625 (D.S.D. 1988).

In In re Northampton Corporation, 39 B.R. 955 (Bankr. E.D.Pa. 1984), a case factually very similar to the one at bar, a creditor moved to convert or dismiss a Chapter 11 case. The Court found that there was "cause" for conversion where the debtor was attempting to use a Chapter 11 bankruptcy case for the primary

purpose of affecting claims of creditors which were unsuccessfully addressed in its confirmed plan in a prior Chapter 11 case. According to the court, because the prior plan in a case had been substantially consummated, it could not be modified by the subsequent Chapter 11 filing. The court noted that a confirmed plan may be modified before but not after substantial confirmation. The court found that the filing of the Chapter 11 petition "with an eye toward curing defaults arising under a previously confirmed chapter 11 plan" is so akin to modifying the previous plan within the meaning of Section 1127(b) that it deemed the filing of the new petition an attempted modification under that section. Id. at 956.

The Court in In re A.T. of Maine, Inc., 56 B.R. 55 (Bankr. D.Me. 1985), was also faced with a second Chapter 11 filing. Relying heavily on the Northampton case, the court found that the debtor was precluded from filing a new petition as the second filing, would, in essence, affect or modify a substantially consummated plan of reorganization. Judge Goodman approved the rationale of the Northampton decision that to permit the second filing to go forward would be to "allow [the] debtor to continuously circumvent the provisions of a confirmed plan by filing chapter 11 petitions ad infinitum." In re Northampton Corporation, 37 B.R. 110, 112-13 (Bankr. E.D.Pa. 1984).

Generally, however, there is no per se rule against successive bankruptcy filings. In re Garsal Realty, Inc., 98 B.R. 140 (Bankr. N.D.N.Y. 1989). In fact, most courts hold that a bona fide change in circumstances may justify a debtor's multiple bankruptcy filings. Id. at 150-51. In Garsal, a mortgage holder sought modification of the bankruptcy stay in order to continue foreclosure proceedings since this was the debtor's second bankruptcy filing. That court considered both the A.T. of Maine and the Northampton cases and found them inapposite in that those cases involved defaults arising out of previous confirmed plans with identical debts and creditors which the courts perceived as "end-run modifications". Id. at 149. In Garsal the secured creditor who was the movant held debt created by an assignment which had resulted in the consolidation and creation of an entirely new debt so that the second filing was not considered a modification of the prior plan. Id.

The Court in In re Jartran, Inc., 87 B.R. 525 (N.D. Ill. 1988), aff'd _____ F.2d _____, 1989 WL 111541, 58 U.S.L.W. 2190 (7th Cir. 1989), also permitted a second bankruptcy filing. The Court found that the first Chapter 11 had been filed with an eye toward reorganization and that the second filing was made for the purpose

of liquidation in light of the unsuccessful reorganization. Thus, the Court found that the second filing was not an attempt to circumvent the prohibition against amending a plan once it has been substantially consummated.

CONCLUSION

This Court is persuaded that the Movants are entitled to relief as the Debtors' second bankruptcy filings appear to be in the nature of an attempt to cure defaults arising out of their prior plans of reorganization. The facts in the cases before the Court are virtually identical to those in the Northampton case which the Court finds persuasive. While Debtors have argued that their current bankruptcy cases contemplate a liquidation effort, Mr. Klinowski's testimony was to the contrary. It would appear to the Court that the Debtors contemplate only a partial liquidation at most; according to Mr. Klinowski a future development of over 40 units is contemplated by Holiday Fund.

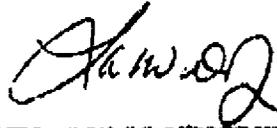
Further, it would appear that the Debtors remain optimistic that monies will be generated from other ventures of Mr. Klinowski, which monies could cure the Debtors' defaults; however, representations have been made to the creditors over a period of

time that these monies would be forthcoming. Unfortunately, this venture has never been consummated and it is inappropriate to permit the current bankruptcy filings to prevent the secured creditors from pursuing their remedies based on the defaults under the confirmed Chapter 11 plans while Mr. Klinowski continues to work on other ventures in the hope that they will generate monies necessary to cure the defaults under the plan.

While the Debtors' prior commitment to cure arrearages within twelve months may have been overly optimistic, 11 U.S.C. Section 1127 does not permit the debtor to extend its time for curing the arrearages through a second bankruptcy filing. The Court notes that while Mr. Klinowski now asserts a desire to sell properties constituting the collateral of the moving creditor in order to satisfy the secured claims. That option was available to the Debtors a number of months ago when it became apparent that they could not meet their obligations under the confirmed plans. This Court concludes that the bankruptcy cases of Holiday Fund and Holiday Builders should be dismissed for the reasons set forth above. Having found that these bankruptcy cases should be dismissed, it is not necessary to broach the question of the equity in the properties.

The Court further concludes that Great Southern' Motion does not fall within the narrow exception the Eleventh Circuit carved out in In re Albany Partners, Ltd., 749 F.2d 670 (11th Cir. 1984) permitting retroactive relief from the bankruptcy stay. The right to file a subsequent Chapter 11 case is a matter of first impression in this District and as such I do not find that the filing of these cases was in bad faith.

Accordingly, IT IS HEREBY ORDERED that the Chapter 11 cases of Holiday Fund, Inc., and Holiday Builders, Inc., are dismissed.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 31st day of October, 1989.