

IN THE UNITED STATES BANKRUPTCY COURT
 FOR THE
 SOUTHERN DISTRICT OF GEORGIA
 Savannah Division

In the matter of:)
 CAP'N SAM'S CRUISES, INC.)
 (Chapter 11 Case 89-40149))
 Debtor)
 CAP'N SAM'S CRUISES, INC.)
 Plaintiff)
 v.)
 COLONIAL OIL INDUSTRIES, INC.,)
 and THE UNITED STATES MARSHAL'S)
 SERVICE BEING AN AGENCY OF THE)
 DEPARTMENT OF JUSTICE OF THE)
 UNITED STATES OF AMERICA)
 Defendants)

Adversary Proceeding
 Number 90-4015

FILED
 at 5 O'clock & 19 min. P.M
 Date 3/12/90
 MARY C. BECTON, CLERK
 United States Bankruptcy Court
 Savannah, Georgia *pcb*

MEMORANDUM AND ORDER

A hearing on the complaint of the Debtor for turnover of certain property of the estate came on for trial on March 9, 1990. After a lengthy evidentiary hearing I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1) The Debtor, Cap'n Sam's Cruises, Inc., is record titleholder in and to three vessels used to transport tourists and sightseers in the Savannah, Chatham County, area. They are the M/V Cap'n Sam, the M/V Waving Girl, and the M/V Goldenrod. In previous proceedings in the United States District Court for the Southern District of Georgia, Defendant, Colonial Oil Industries, Inc. ("Colonial"), instituted judicial foreclosure proceedings. Subsequently Debtor filed its Chapter 11 reorganization case on January 25, 1990, in this Court and the foreclosure matter was referred to this Court by Order of the Honorable B. Avant Edenfield on January 30, 1990. By Order of this Court dated February 2, 1990, I authorized Debtor to take possession of the M/V Cap'n Sam, M/V Waving Girl and M/V Goldenrod for certain enumerated purposes. One of said purposes was to permit the Debtor to begin repairs necessary to put the M/V Cap'n Sam into operation for its use as a tour boat, subject to a full evidentiary hearing on the issue.

The testimony elicited in this matter establishes that Debtor's prior operations were headed by one Samuel Stevens who is

now incarcerated in the federal penitentiary having been convicted of certain criminal activity unrelated to the operations of this Debtor. Sam Stevens was previously the owner of 100% of the stock of the Debtor but at some point transferred all of his stock to his wife, Leola Stevens. At all times until the fall of 1989, Sam Stevens actively managed and served as chief executive officer of the Debtor corporation. Under his supervision and management, the Debtor failed to keep reliable records of its financial transactions or if said records were kept, they cannot be located by the persons presently responsible for managing the day-to-day operations of the Debtor.

2) Daryl Holder now serves as president of the Debtor corporation. Although he has had limited experience in the management of this business endeavor, Mr. Holder appears to be an energetic, intelligent, and hardworking manager of the business. With the experience he has had as assistant manager of the business since April 1989, he appears capable, in conjunction with others, of managing the Debtor's affairs. Leola Stevens has now conveyed a majority of the stock in the Debtor corporation to one Ed Jones who is far more experienced in business management and in analysis and the handling of their financial affairs than Mr. Holder. Mr. Jones is actively involved in assisting Mr. Holder in his duties as president, albeit from afar. Holder and Jones, together with the

established labor force that Debtor has had for a number of years, are capable of doing the work necessary to operate the Debtor corporation if the financial woes of the business can be solved.

3) The Debtor's title in and to the three vessels in issue was not finally terminated by the pre-bankruptcy proceedings in District Court and therefore Debtor retains a property interest in and to the three vessels which it seeks to enforce pursuant to 11 U.S.C. Section 542. It is clear, however, that turnover of property of the estate and the Debtor's right to use property of the estate is subject to the requirement of 11 U.S.C. Section 363(e) that any person with an interest in this property must be assured adequate protection of its interest. In this case the Defendant Colonial holds a preferred ship's mortgage on each of the three vessels and the total indebtedness owed is approximately \$746,000.00.

4) It is undisputed that the value of the three vessels is less than the amount of the debt and thus Colonial is in the posture of an undersecured creditor in this proceeding as contemplated by 11 U.S.C. Section 506. Debtor has offered to make certain adequate protection payments to Colonial in exchange for permission to use the vessels and go back into the business of hauling passengers for hire in its tour operations.

5) Debtor has been in operation in the Savannah area for a large number of years and has considerable repeat business. Many bookings for 1990 cruises have already tentatively been arranged with new and repeat customers. In addition, debtor operates daily one and a half hour harbor tours (one a day in the off season and twice a day during the main season from March to October) for walk-in customers. A substantial portion of Debtor's annual income is derived from the harbor tours. Debtor's business has been a highly visible and integral part of the Savannah waterfront for many years. The business is widely known to local residents and tourists alike and the goodwill enjoyed by the business is an obvious, yet intangible asset.

6) Debtor projects on an annual basis that \$484,000.00 can be derived from harbor tours, based on a projected 65 passengers per day seven days a week during the off season (November to February) and 300 passengers a day seven days a week between April and October. Volume in March during the annual Saint Patrick's Day festivities in Savannah would exceed the April - November average. Debtor also operates dinner cruises, breakfast cruises and anticipates handling other special events which would yield an anticipated annual income of \$980,885.50. Against this, Debtor has projected total expenses of \$665,212.02 or a net income before debt

service and before taxes of approximately \$325,000.00 or \$27,000.00 per month (Exhibit P-1). In contrast to the projections for 1990 put together by Mr. Holder from admittedly poor records, it appears that actual gross income during 1989 was \$580,000.00. From March through October of 1989, gross income was \$540,000.00 (Exhibit P-5). After October, the income figures fell substantially as a result of Mr. Stevens' convictions and the vessels' seizure by Colonial. Nevertheless, the 1989 March through October figures are not supportive of the 1990 projections. For example, harbor tour volume was less than 100 passengers per trip in contrast to the 1990 projection of 150 passengers. However, Mr. Holder believes that the company was being mismanaged and that due to the pending indictment of Mr. Stevens, insufficient attention was given to the business after March, 1989. Therefore, Mr. Holder asserts that those figures are not indicative of the company's true income potential.

7) Indeed, what records the company has been able to produce indicate that gross income for 1987 and 1988 was approximately \$770,000.00 (Exhibit P-6). However, this still falls short of the Debtor's projections which it has formulated for the purposes of this hearing. If Debtor grossed \$770,000.00 annually and expenses were reduced proportionately (from \$655,000 to \$520,000), net income before taxes and debt service would be \$250,000.00 or approximately \$21,000.00 per month.

8) There was considerable expert testimony regarding the extent to which the vessels might depreciate in value if put back into service. The evidence submitted by Colonial was that depreciation would amount to approximately \$42,000.00 per year on the M/V Cap'n Sam and approximately \$20,000.00 per year on the M/V Waving Girl, assuming that no major refitting is performed in the next five years. Debtor does not intend to use the M/V Goldenrod in its continuing operations but instead intends to sell it.

The Debtor's expert testified that depreciation would total only \$20,000.00 per year, assuming proper maintenance. However, to achieve that figure he also estimates that as much as \$250,000.00 in repair and upgrading of the vessels would have to be done first.

9) I conclude that the estimated depreciation testified to by Colonial's experts is the more credible figure. There is no evidence to suggest that Debtor can invest the \$250,000.00 necessary to achieve the condition of the vessel that would yield the figure urged by Debtor. In the absence of such an infusion of capital, depreciation will clearly occur at a much faster rate.

CONCLUSIONS OF LAW

Inasmuch as Debtor still holds title to the vessels, it is entitled to turnover of the property as long as adequate protection is afforded to Colonial. 11 U.S.C. §542; §363(e). Adequate protection is defined in 11 U.S.C. Section 361 which provides in relevant part:

When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by--

- (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;
- (3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

The United States Supreme Court has ruled that an undersecured creditor is not entitled to compensation in the form of interest payments to compensate for its lost opportunity costs, that is the

loss of use of the money which could be reinvested if the property were foreclosed, but rather is entitled only to protection against depreciation of its collateral until the time that the plan is confirmed. This is subject, however, to the requirement that the debtor must be in a position of effecting a successful reorganization within a reasonable period of time. Only after confirmation is the creditor entitled to recover interest on the value of the collateral as of date of confirmation. United States Assoc. of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed. 2d 740 (1988). As applied to the facts in this case I conclude that Debtor is entitled to recover the vessels and put them into use as tour boats. Debtor's sole secured creditor of any magnitude is Colonial with a claim of approximately \$746,000.00. Debtor has unsecured debts of approximately \$249,000.00, but of that amount only \$100,000.00 is undisputed. Debtor projects that the Colonial claim could be amortized in ten years with monthly payments of approximately \$10,400.00.

Without deciding whether a ten year amortization schedule would be approved at the time of confirmation, it is sufficiently reasonable as a basis for analyzing whether the Debtor has a reasonable prospect of effecting a successful reorganization plan. Utilizing the projected secured debt service of \$10,400.00 per month and with net income to service all debt of between

\$21,000.00 and \$27,000.00 per month, I conclude that Debtor has demonstrated a reasonable likelihood of effecting a successful plan. Indeed, Debtor could nearly service the secured debt even if its projected income of \$980,000.00 falls to the 1987 and 1988 levels of \$770,000.00 and its expenses remained at \$665,000.00, an unlikely scenario.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that adequate protection be afforded Colonial as follows:

Periodic Payments. Debtor must make periodic cash payments to compensate Colonial for the depreciation in value of its collateral until confirmation. 11 U.S.C. §361(1). I have concluded that annual depreciation will total \$62,000.00 per year. Debtor's most profitable months are March through October. It is unrealistic to expect that Debtor can make the same payments in the off season that it can in high volume months. Therefore, as adequate protection Debtor will be required to pay Colonial \$7,000.00 per month during March through October and \$1,500.00 per month during November through February. Such payments are due on the first of

each month, except that the March, 1990, payment is pro-rated and reduced to \$3,500.00, payable on or before March 15, 1990.

Insurance. Debtor has produced an insurance policy in form and amounts generally satisfactory to Colonial. However, Debtor is required to:

- a) List Colonial and B&L Management Corporation, d/b/a Stamford Landing, as additional insureds or obtain an endorsement guaranteeing that as loss payees Colonial and B&L will receive the same notice of cancellation as Debtor;
- b) Obtain an endorsement raising protection and indemnity coverage from one million dollars to two million dollars;
- c) Obtain an endorsement to extend coverage from port risk to full navigation.

—Admiralty Jurisdiction. Turnover of the subject vessels to Debtor and its use of same shall be deemed for all purposes as delivery to Debtor as substitute custodian as set forth in this

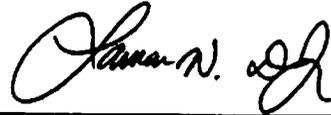
Court's Order of February 2, 1990, and Judge Edenfield's Order of October 20, 1989.

Access to Collateral and Financial Information. Upon written request, Debtor shall provide copies on a timely basis to Colonial of all books and records and financial reports kept or generated in the course of Debtor's operations. Debtor shall allow on-site inspection and verification of its books and records by Colonial or the Office of the United States Trustee not more often than twice a month, at a time to be agreed by the parties, through counsel. Debtor shall provide access to all vessels to Colonial and the United States Trustee for inspection, upon reasonable notice, and so long as operations are not interfered with.

Payments to Insiders. No payment in any amount or for any purpose may be made to any insider as defined by 11 U.S.C. Section 101(3), except the weekly gross salary payable to Daryl Holder of \$370.00 in the absence of specific court order.

So long as all payments and obligations are timely performed, Debtor is hereby authorized to operate its tour boat business utilizing the M/V Cap'n Sam and M/V Waving Girl pending further order of Court. Should Debtor fail to make such payments and fulfill other obligations hereunder, Debtor shall immediately

cease running tours utilizing the M/V Cap'n Sam and M/V Waving Girl. Should Debtor violate the terms of this Order, upon affidavit of default, the Court hereby reserves the right to grant ex parte relief to any party in interest.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 12th day of March, 1990.