UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

Colony Brokerage Company of Baltimore-Washington, Inc., **CASE NO. 95-20112**

Debtor. **DECISION & ORDER**

BACKGROUND

On October 7, 1994, Brill Industries, Inc., d/b/a J.P. Mead Cash 'N Carry ("Brill Industries") filed a petition initiating a Chapter 11 case. On October 24, 1994, Chemical Bank ("Chemical"), which held a security interest in all of the assets of Brill Industries to secure an obligation of in excess of $760,000 (the "Chemical Indebtedness"), filed a motion for relief from the automatic stay and for the corporation to account for cash collateral in which Chemical had an interest. The motion was heard on an expedited basis and resulted in an order being entered on November 2, 1994 approving a stipulation granting Chemical relief from the automatic stay. Thereafter on December 20, 1994 an Order was entered dismissing the case.

On October 25, 1994, John J. Brill and Lynda A. Brill (the "Brills") filed a petition initiating a Chapter 7 case. The schedules filed with the Court indicated that John J. Brill was an officer and director of Brill Industries and was a guarantor of the Chemical Indebtedness. A Section 341 Meeting of Creditors was conducted on December 9, 1994 at which one of the attorneys for Chemical attended. Thereafter on December 16, 1994, a Trustee's Report of No Assets was filed; on February 21, 1995 an Order was entered granting Chemical relief from the automatic stay to allow it to foreclose on a $100,000 collateral security mortgage on the Brills' residence; on February 9, 1995 an Order was entered discharging the Brills; and on May 11, 1995 the case was closed.

On December 21, 1994, John C. Brill ("John Brill"), the son of John J. and Lynda Brill, and

Antoinette O. Brill filed a petition initiating a Chapter 7 case (the "John Brill Case"). The schedules and statements filed with the Court indicated that John Brill was (a) the owner of ten shares of Colony Brokerage Company of Baltimore-Washington, Inc., a Maryland Corporation, ("Colony Brokerage"); (b) liable for various state and local taxes in an amount in excess of $118,000; (c) the owner of three hundred shares of Brill Industries, of which he was the President, and (d) was a guarantor of the Chemical Indebtedness.

A Section 341 Meeting of Creditors was conducted on January 27, 1995 in the John Brill Case at which one of the attorneys for Chemical attended. Thereafter: (a) on February 10, 1995 a Trustee's Report of No Assets was filed; (b) on March 29, 1995 an Order was entered discharging the Debtors; and (c) on May 12, 1995, the John Brill Case was closed. Chemical did not file a claim in the Case.

On January 19, 1995, a voluntary petition (the "Petition") was filed on behalf of Colony Brokerage, which initiated a Chapter 11 case. The Petition, which was executed by John Brill as the sole shareholder of Colony Brokerage, indicated that the corporation's domicile, residence or business assets were in this district for the preceding one hundred eighty days and it listed the street address of the Debtor as 20 Trottersfield Run, Pittsford, New York, 14534, John Brill's then current residence.

On January 20, 1995, the Court issued a deficiency order which indicated that a corporate resolution had not been filed with the Petition and that if the resolution was not filed within fifteen days from the date of the filing of the Petition, the Court reserved the right to enter an appropriate order, including an order of dismissal or conversion.

On January 27, 1995, John Brill, as Vice President and Secretary of Colony Brokerage, under penalty of perjury, signed a declaration (the "Declaration") to a Statement Regarding Corporate

Resolution (the "Resolution Statement") which were both filed with the Court on January 31, 1995. The Resolution Statement indicated that on January 19, 1995 a resolution was adopted by the Board of Directors of Colony Brokerage which authorized: (a) the filing of a voluntary Chapter 11 petition; and (b) John Brill to act, in his capacity as Vice President and Secretary, to execute and deliver all necessary documents, perform any and all necessary acts and employ an attorney.

Schedule A to the Petition indicated that Colony Brokerage had total assets of $160,553 and total liabilities of $207,711. The Petition also indicated that the assets were a promissory note from H.S.H., Inc. ("HSH") and payments previously made by HSH on the note (the "HSH Note") to Martin Shifrin ("Shifrin"). The schedules and statements filed on January 19, 1995 indicated that: (1) Colony Brokerage had no secured creditors but it did have unpaid taxes due to the State of Maryland and the Internal Revenue Service of in excess of $28,000; (2) the corporation's major creditor was Colony Promotions, Inc. for a $100,000 business loan; (3) Chemical was owed an obligation which was in dispute and in connection with the obligation Chemical held an assignment of "part of" the HSH Note (the "Assignment") to secure the corporation's guaranty of the Chemical Indebtedness, which Assignment was perfected by the filing of a financing statement on October 21, 1994; (4) the value of the HSH Note was between an undisputed amount of $155,878 and a disputed amount of $330,878; and (5) John Brill was the Executive Vice President and sole shareholder, owning the ten issued and outstanding shares of the stock of the corporation, and that Shifrin was the President. The directors of the corporation were not separately listed on the Statement of Affairs.

On February 10, 1995, Colony Brokerage filed an Amendment to its Schedules which indicated that a claim by Taneytown Bank & Trust Company ("Taneytown Bank") in the amount of $25,098.45 was secured by a security interest in the corporation's accounts receivable, contract rights and general intangibles.

The minute report of the Section 341 Meeting of Creditors conducted on February 14, 1995, at which two attorneys for Chemical attended, indicated that: (1) John Brill was the acting officer of the corporation; (2) the amount of the HSH receivable was in dispute; (3) the status of Shifrin as a shareholder was in dispute; (4) John Brill had assigned "his interest" in the HSH receivable to Chemical, which might be voidable. The minute report of an adjourned Section 341 Meeting of Creditors conducted on March 14, 1995 indicated that Shifrin, whose status as a shareholder was still uncertain, would be moving to change venue and that Colony Brokerage would be moving to require the turnover of any and all pre- and post-petition payments which had been received by Shifrin on the HSH Note.

On March 30, 1995, Chemical filed a motion, initially returnable on April 27, 1995, to dismiss the Colony Brokerage Chapter 11 case as void *ab initio* and for bad faith, in part on the grounds that the case was commenced without authority from the Board of Directors and without authority from the shareholders (the "Chemical Motion to Dismiss"). In its various pleadings filed in connection with the Motion to Dismiss, Chemical, in asserting that the lack of proper authorization to file the Chapter 11 petition constituted cause for dismissal under Section 1112(b), indicated that:

(1) John Brill was not the sole shareholder of Colony Brokerage, but that Shifrin was also a shareholder (perhaps a 50% shareholder). In this regard, attached as Exhibit B to the Motion was a copy of the April 28, 1992 Asset Purchase Agreement between HSH, as Buyer, Colony Brokerage, as Seller, and Shifrin and John Brill, as Stockholders. Chemical asserted that no further written documents had been executed or could be produced which would indicate that, between April 28, 1992 and the filing of the Colony Brokerage petition on January 19, 1995, Shifrin had ceased being a shareholder of Colony Brokerage.

(2) Even if John Brill were the sole shareholder of Colony Brokerage, on January 19, 1995 he had not taken the necessary steps to remove or replace the existing Board of Directors of the corporation which included: (a) John Brill; (b) John J. Brill; (c) Shifrin; and (d) Robert Winnie.

(3) Prior to January 19, 1995 the Board of Directors of Colony Brokerage had not in fact authorized the filing of the petition nor had it authorized the filing of such a petition prior to or on January 27, 1995 when the Declaration was executed by John Brill.

(4) At all times prior to January 31, 1995, John Brill knew that he was not the undisputed sole shareholder of Colony Brokerage; the Board of Directors had not been removed or replaced; and the Board of Directors had not authorized the filing of a bankruptcy petition on behalf of Colony Brokerage.

In its various pleadings filed in connection with the Motion to Dismiss, Chemical in asserting that the case should be dismissed under Section 1112(b) for cause because the petition had been filed in bad faith, indicated that:

(1) John Brill at all times prior to January 31, 1995 when the Resolution Statement was filed with the Court, knew that the filing of the petition had not been properly authorized;

(2) At the time the HSH Note had been assigned to Chemical, John Brill had represented to Chemical that he was the majority shareholder and President of Colony Brokerage and authorized by the Board of Directors to grant Chemical a security interest in its assets, which was in fact not true.

(3) One of John Brill's primary motivations in filing the knowingly unauthorized petition on January 19, 1995 was to be in a position to avoid, as preferential, the Chemical perfected security interest in the HSH Note which, according to Chemical, he had executed and delivered without proper corporate authority.

(4) A further motivation of John Brill in filing the knowingly unauthorized petition was to have a judicial forum which might allow him to more quickly and easily than a Maryland or New York State court would prevent Shifrin from continuing to obtain the HSH Note payments.

(5) John Brill had filed the petition in United States Bankruptcy Court for the Western District of New York, an arguably improper venue, to discourage by economic leverage the more active involvement of various interested parties, including Shifrin.

(6) Any corporate resolution given by John Brill to Taneytown Bank, in connection with the loan obtained from it which was to be secured by a security interest in the corporation's receivables, contract rights and general intangibles, was not authorized by the Board of Directors or the shareholders of Colony Brokerage.

In opposition to the Chemical Motion to Dismiss, an Affirmation by the bankruptcy attorney for Colony Brokerage was filed with the Court on April 24, 1995. Attached to the Affirmation was

an Informal Action of Directors in Lieu of Meeting (the "Ratification"), wherein the Board of Directors of Colony Brokerage, effective as of January 19, 1995, adopted the resolutions authorizing the filing of a bankruptcy petition in the form of language set forth in the Resolution Statement. The Ratification was executed by the various members of the Board of Directors in counterparts between April 12, 1995 and April 17, 1995.

Although set out as additional evidence of a bad faith filing, Chemical in its Motion to Dismiss also asserted that there was no necessary economic purpose for the filing of the Petition, since Colony Brokerage had no remaining business except to collect the proceeds of the HSH Note. Chemical further asserted that Colony Brokerage had no prospects for a reorganization, and that nothing could be achieved in Bankruptcy Court which could not be achieved in an appropriate state court, including the resolution of the issues of the correct amount due on the HSH Note, the avoidability, in whole or in part, of the Chemical interest in the HSH Note, and the nature and extent of the various rights, remedies and relationships among John Brill and Shifrin. In this regard, a review of the various pleadings in the Colony Brokerage Chapter 11 case indicated that the only unsecured creditors scheduled were: (1) Chemical; (2) Colony Promotions, Inc., an entity controlled by insiders; (3) Len Kohlenstein, Esq., the prior attorney for Colony Brokerage and for Shifrin; (4) Charles and Helen Olsick, the parents of Antoinette O. Brill, who loaned the company the proceeds of a home equity loan which was personally guaranteed by John Brill and Shifrin; (5) Shifrin; (6) Glenn Terrell, Esq., the former accountant for Colony Brokerage; and (7) MBNA America, with a filed proof of claim for $2,565.76 for credit card purchases which indicated the account apparently to be in the name of John Brill. Chemical asserted that these related and interrelated parties did not and do not require a bankruptcy proceeding to wind down the corporation's affairs or to resolve the various rights and remedies among these interested parties.

DISCUSSION

Chemical has requested that the Court exercise its broad discretion under Section 1112(b) to find cause within the meaning and intent of that subsection to dismiss the Colony Brokerage Chapter 11 case which it also asserts would be in the better interests of creditors and the estate than conversion. The Court agrees that the case should be dismissed because: (1) the case was filed by John Brill with knowledge that it was not properly authorized, notwithstanding any subsequent ratification; (2) the filing by John Brill was in bad faith; and (3) on all of the facts and circumstances presented, the continuation of Colony Brokerage in bankruptcy, whether in a Chapter 11 or a Chapter 7 case, is unnecessary and would not be in the best interests of the Bankruptcy System.

I. Unauthorized Filing

Although some courts have held that a creditor does not have standing to challenge the filing of a petition on the ground that there is no corporate authorization for the bankruptcy filing, *see In re Professional Success Seminars Int'l, Inc.*, 18 B.R. 75 (Bankr. S.D.Fla. 1982), especially when that creditor would benefit by a dismissal in that a preference or a fraudulent conveyance might be preserved, other courts have allowed creditors to raise the issue of an unauthorized filing, *see In re Consolidated Auto Recyclers, Inc.*, 123 B.R. 130 (Bankr. D.Me. 1991); *In re Verrazzano Towers, Inc.*, 10 B.R. 387 (Bankr. E.D.N.Y. 1981). Even though courts do not favor dismissal motions under such circumstances, *see In re John Hicks Chrysler-Plymouth, Inc.*, 152 B.R. 503 (Bankr. E.D.Tenn. 1992), Section 1112(b) specifically provides that a party in interest may move to convert or dismiss a case. This includes a creditor, even if that creditor may be motivated, in whole or in part, to seek dismissal to preserve an otherwise avoidable transfer. It still remains for the Court

under Section 1112(b) in exercising its discretion to, on a case by case basis, make an informed determination as to whether on all of the facts and circumstances presented, cause exists to order a dismissal of the case.

In this case, it is clear that John Brill filed the petition initiating the Colony Brokerage Chapter 11 case knowing that it had not been properly authorized. Notwithstanding any questions with respect to authorization which he or his attorneys may have had, he also executed and caused to be filed with the Court the Declaration and the Resolution Statement with full knowledge on his part that the Board of Directors had not passed the Resolutions recited in the Statement, including a resolution to file a bankruptcy petition. When viewed along with the other facts and circumstances presented by this case, these actions are so egregious that, although in another and appropriate case the Court might allow an initially unauthorized filing to be cured by a good faith ratification by the necessary board of directors or body of shareholders, the Court believes that it would be inequitable and not in the best interests of the Bankruptcy System to allow the Ratification filed in April, 1995 by the Board of Directors of Colony Brokerage to cure the knowingly unauthorized filing which was made, in this Court's opinion, in bad faith by John Brill.

The knowingly unauthorized filing combined with the bad faith filing of the Declaration and the Resolution Statement materially contributes to the Court's finding, in its sound discretion, that there is cause to dismiss the Colony Brokerage Chapter 11 case.

II. Bad Faith Filing

Although a bad faith filing is not one of the enumerated grounds for dismissal of a Chapter 11 case under Section 1112(b), the law is clear that Section 1112(b) sets forth only a non-exclusive list of factors which can constitute cause. Numerous courts have found, in appropriate

circumstances, that overall bad faith in the filing of a Chapter 11 case can constitute cause for dismissal of the case.[1]

Although in some respects overlapping, there are numerous facts and circumstances presented which support a finding by this Court that the filing of this case and its continued prosecution would be in bad faith, including:

(1) John Brill filed a knowingly unauthorized petition to initiate the Chapter 11 case.

(2) John Brill and his representatives filed with the Court the Declaration and the Resolution Statement knowing that they were false and that the Board of Directors had not in fact authorized the filing of the petition.

(3) John Brill filed the Chapter 11 petition in the United States Bankruptcy Court for the Western District of New York, a questionable venue. Although a Motion to Change Venue was filed on behalf of Shifrin and later withdrawn, there was substantial merit to the Motion which most likely would have resulted in the Court granting it.

(4) The good faith of the initial failure to list Taneytown Bank as a secured creditor is suspect given the subsequent allegations that at the time the secured loan was obtained from Taneytown Bank, the Bank also may have been provided with an improper and unauthorized corporate Resolution.

(5) Filing a petition to be in a position to avoid a preferential or other transfer may not in itself constitute bad faith. However, the facts and circumstances of this case, including: (a) the related bankruptcy cases; (b) John Brill's actions in pledging the

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[1] *See, e.g., In re Purpura*, 170 B.R. 202, 206, 211 (Bankr. E.D.N.Y. 1994) for a recent application of this doctrine, a listing of relevant Courts of Appeals decisions and the succinct conclusion, "A Chapter 11 petition must be filed with the honest intent and genuine desire to utilize the provisions of Chapter 11 for its intended purpose." For a comprehensive discussion of the case law and the judicially developed good faith filing requirement, *see* Lawrence Ponoroff & F. Stephen Knippenberg, *The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy*, 85 NW. U. L. REV. 919, 923 (1991):

> [T]he bankruptcy courts' adaptation of the good faith doctrine presents an excellent example of the law in evolution, . . . [G]ood faith is transformed from a tired cliché, invoked in suspicious response to an array of novel filings, to a useful instrument pressed into service by the courts to bring order and standards to the business of assuring that bankruptcy policy and purposes evolve in a sensible, purposeful way.

HSH Note to Chemical; (c) the obvious shareholder dispute; and (d) the lack of corporate authorization from the Board of Directors, cumulatively constitute an overall bad faith filing in large part made to cure John Brill's possibly fraudulent and unauthorized conduct.

(6) Although the Bankruptcy System and the Bankruptcy Code might provide a more effective and efficient means to deal with what appears to be the two principal problems Colony Brokerage has in winding down its affairs: (a) the resolution of the dispute as to the amounts due on the HSH Note; and (b) the rights and remedies which Chemical may have in the HSH Note, these issues can clearly be resolved and handled by the appropriate state courts. In this Court's opinion, John Brill's election to file a bankruptcy petition was in large part plain and simple forum shopping; his attempt to find a forum where he could cure, to the extent possible, the problems which he had created for himself, the corporation and its various insider parties.

(7) The actions of the Board of Directors, most of whom are insiders, in ratifying the knowingly unauthorized filing after disputing the authorization and venue, presumably occurred because they later became aware that the forum shopping decision by John Brill could inure to their benefit.

These factors and the overall facts and circumstances of this case when viewed together in their totality indicate that there has been a sufficiently bad faith filing in this case to warrant a finding by this Court, in its sound discretion, that there is cause to dismiss the Colony Brokerage Chapter 11 case.

III. Necessity for Bankruptcy Relief

Again, although overlapping with some of the elements of the bad faith filing, Colony Brokerage does not appear to be a corporation which is appropriate for Chapter 11 relief. The corporation has no active business, having sold all of its assets and its business to HSH, and is simply in the process of winding down its affairs, which consists of collecting the HSH Note payments and distributing them to the various creditors and other parties in interest who are basically insiders or who have related-party guaranties. There is no need for a Chapter 11 reorganization here as is contemplated by the Bankruptcy Code. At best, as set forth above, the case is an example of

forum shopping at its worst; an attempt to find a more efficient and effective forum for the collection of the HSH Note and the resolution of some of the rights and remedies of the interested parties in Colony Brokerage, including the possible avoidance of the Chemical Assignment of the HSH Note and the granting of a security interest to Taneytown Bank. There is no reorganization in progress or in prospect in this case. To allow such a case to be filed and remain in Chapter 11, when it appears that all of the interested parties are insiders or interrelated and have various rights and remedies against each other which can be enforced in state court, is not in accordance with the policies of Chapter 11.

The above circumstances and findings also warrant the Court finding, once it has found cause under Section 1112(b), that dismissal rather conversion is in the best interests of all parties and the Bankruptcy System.

CONCLUSION

For the reasons set forth above, the Chemical Motion to Dismiss is granted.

IT IS SO ORDERED.

/s/
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: July 5, 1995