UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

WEBSTER CHRYSLER-PLYMOUTH, INC. Case No. 93-20466 K

Debtor

This Chapter 11 case was filed on March 8, 1993. The Debtor's sole asset is real estate which it leased to Chrysler Realty Corp. There is a first mortgage of approximately $1.3 million in favor of Citibank, and a second mortgage in favor of Jim Frederico Wrecking Co. in the approximate amount of $226,000. A third mortgage exists in favor of an insider in the amount of $50,000. After that are numerous tax liens and judgment liens totalling perhaps an additional $2 million. By motions filed on April 5, 1993, the first and second mortgagees ask the Court to dismiss the case, or alternatively, to lift stay to permit foreclosure.

The Debtor characterizes the non-mortgage lienors as "unsecured" creditors and, having filed on the eve of foreclosure, seeks the opportunity to sell the real estate to Chrysler Realty for $1.9 million, to satisfy the first and second mortgages and then to share any balance among the insider third mortgagee and the "unsecured" creditors. The Debtor believes that it would only cost $90,000 to complete such a sale, despite the existence of

unexplained "environmental problems."

The Debtor clearly does not appear to respect the fact that the tax and judgment lienors here are "undersecured" creditors, not "unsecured" creditors.[1] Thus, where there are something on the order of $3.5 million to $4 million in mortgages and other liens on property worth only $1.9 million at most, the Debtor is simply wrong in saying that "there is in fact equity in said property."

The Debtor further seems to ignore the fact that 11 U.S.C. § 363(f)(3) would prevent the sale it contemplates unless (1) all the judgment creditors consented, or (2) the sale were part of a confirmed Plan of Reorganization. In either event, and even assuming that the costs of environmental cleanup, costs of sale, legal fees and other Chapter 11 expenses, etc., do not consume all proceeds over the first and second mortgages, the debtor offers no suggestion as to how it would propose to allocate such proceeds among lienors, the seniormost of which could be expected to insist on priority based on "first-in-time, first-in-right." Thus, the Debtor's assertions that "chaos" would ensue upon dismissal, and that harm would be inflicted on the "majority of creditors," are puzzling. First-in-time, first-in-right will prevail outside

---

[1]This Court's interpretation of *Dewsnupp v. Timm*, 112 S.Ct. 773 (1992) is that 11 U.S.C. § 506(d) may not be read in isolation. The judgment lienors here might hold unsecured "claims," but they are not unsecured creditors.

bankruptcy, and is by no means a chaotic result. Conversely, to use Chapter 11 strictly in an effort to restructure liens on overencumbered real estate may, in some instances, be a questionable use of the federal forum[2] and is the subject of pending legislation.[3]

In sum, then, the Debtor has filed under Chapter 11 with nothing more than an "idea" as to how it might possibly liquidate on more favorable terms than would result from foreclosure. Despite the passage of some considerable period of time, apparently, since the threat of foreclosure emerged, the eleventh hour filing presents a mere notion or concept.

In some cases, that might be sufficient to get past a motion to dismiss or to lift stay so early in the case. But here the Debtor has no intent to reorganize, no employees, no customers, no public interest, no equity, no commitment from a buyer, no consent from judgment creditors, no environmental assessment or remediation plan, no demonstrated efforts toward getting "its ducks in a row" for a conscientious effort under the protection of this Court. Rather it seems that the filing is at best a last ditch effort to salvage something for the insider mortgagee and an effort to yield some value for particular lien claims on which insiders

---

[2]See Cohn, "Good Faith and the Single Asset Debtor." 62 Am.Bankr. L.J. 131 (1988).

[3]See § 202 of S. 540, at 139 Cong. Rec. S2610-02, at S2617.

may have personal liability. (Taxes appear to underlie the major liens.)

There is no reorganization "in prospect" (*In re Timbers of Inwood*, 484 U.S. 365 (1988)) and no cogent reason (in light of the above) to further delay the mortgagees in favor of giving control to the debtor.

Grounds exist for lift of stay and it is so lifted. The motion to dismiss is continued to June 8, 1993, at Batavia, New York at 3:00 p.m., pending investigation of the United States Trustee as to whether dismissal or conversion is in the best interests of creditors and the estate.

Dated: Buffalo, New York
May 6, 1993

U.S.B.J.