

ENTERED ON DOCKET
4/28/04

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	CASE NO. 03-93397
	:	
PHDC, LLC,	:	
	:	
Debtor.	:	CHAPTER 11
_____	:	.
	:	
CRESCIVE LANDSCAPE MANAGEMENT, INC.,	:	
	:	
Movant,	:	CONTESTED MATTER
	:	
v.	:	
	:	
PHDC, LLC,	:	
	:	JUDGE BIHARY
Respondent.	:	

ORDER

This Chapter 11 case is before the Court on the motion to appoint a trustee filed by Crescive Landscape Management, Inc. ("Crescive") on February 5, 2004. The motion is brought under 11 U.S.C. § 1104(a), and this is a core proceeding under 28 U.S.C. § 157(b)(A).

The Court scheduled a hearing on the motion for March 3, 2004, at which Benjamin Abney appeared on behalf of the debtor, Gregory Ellis appeared on behalf of the movant Crescive, John Thornburgh appeared on behalf of creditors and lotholders Juliann and Kevin Gallagher, Mark Kelly appeared on behalf of secured creditors Skram, LLC and Gongga Pooh Jar-Jar, LLC, Joel Larkin appeared on behalf of creditor

Dickinson Pipeline, Inc., and Tom Dworschak appeared on behalf of the United States Trustee. The hearing was continued and completed on April 19, 2004. At the continued hearing, debtor was represented by Evan Altman and Scott Riddle who were retained by the debtor and substituted as counsel for Mr. Abney on March 18, 2004.¹ After carefully considering the testimony, the documentary evidence, the record of the case and the argument by counsel, the Court concludes that Crescive's motion to appoint a trustee should be granted.

This Chapter 11 case was filed more than a year ago on March 28, 2003. The debtor, now named PHDC, LLC, is a real estate developer of an exclusive single family gated development known as Rose Court in Atlanta, Georgia. Debtor changed its name from Portfolio Homes Development Co. to PHDC, LLC immediately before filing for bankruptcy. At the present time, four of eleven lots remain unsold. Crescive, the party that filed the instant motion to appoint a trustee, is a landscaping company that performed work in the Rose Court development. Crescive filed a proof of claim in this case for \$23,250.15. While debtor may dispute some portion of the claim, debtor admits that Crescive is a creditor in this case and has standing to bring the motion. This is the second motion to appoint a trustee filed in this case. The first motion was filed by

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On March 18, 2004, Messrs. Altman and Riddle submitted a letter to the Court requesting that the continued hearing on the motion to appoint a trustee set for March 22, 2004 be rescheduled. On March 19, 2004, the Court held a telephone conference with Messrs. Altman, Riddle, Dworschak, and Ellis to discuss the request for continuance. The Court granted the request, and the continued hearing on Crescive's motion to appoint a trustee was rescheduled for April 19, 2004.

McGuire Properties, Inc. on September 11, 2003 and was resolved by the parties prior to the scheduled hearing.

In its motion, Crescive urges the appointment of a trustee for cause under §1104(a)(1) of the Bankruptcy Code. Crescive alleges that debtor has engaged in significant transactions with related entities, many of which have not been fully disclosed. Crescive contends that debtor's plan of reorganization would allow for substantial payments to insiders, but has almost no prospect of payment for general unsecured creditors. Crescive argues that after the petition date, debtor impermissibly spent cash collateral and that Mr. Sissine, debtor's manager, improperly solicited unsophisticated small creditors in violation of 11 U.S.C. § 1125. Crescive contends that current management is incompetent and dishonest and that the affairs of the debtor have been grossly mismanaged. Finally, Crescive argues that the appointment of a trustee will not harm the estate, because debtor's assets consist of only four (4) lots of real estate which a trustee can market and sell for a fair value. Debtor opposes the appointment of a trustee, arguing primarily that its manager Mr. Sissine is in a unique position to realize the maximum value for the lots and that trade creditors have no hope of getting paid unless he remains in control of the development.

The appointment of a trustee in a Chapter 11 case is governed by 11 U.S.C. § 1104 which provides in relevant part:

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United

States trustee, and after notice and a hearing, the court shall order the appointment of a trustee--

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

11 U.S.C. § 1104(a) (2004).

Whether a trustee should be appointed for cause under § 1104(a) is fact sensitive and must be analyzed on a case-by-case basis. *In re: Sharon Steel Corp.* 871 F.2d 1217,1226 (3d Cir. 1989). The appointment of a trustee is an extraordinary remedy and therefore should be the exception rather than the rule. *Id.*, at 1225. However, once a court, in its discretion, determines that the movant has met its burden of proving that cause exists under § 1104(a)(1), the court must order that a trustee be appointed. *See In re: Sharon Steel Corp.* 871 F.2d 1217,1226 (3d Cir. 1989); *Official Committee of Asbestos Claimants v. G-I Holdings, Inc. (In re: G-I Holdings, Inc.)*, 295 B.R. 502, 507 (D.N.J. 2003).

In the pleadings filed, the parties did not address the movant's burden of proof in a motion to appoint a Chapter 11 trustee. While there is no reported case from the Eleventh Circuit Court of Appeals on this point, the Third Circuit has held that the moving party must establish that the appointment of a trustee is warranted by clear and

convincing evidence. *In re: Marvel Entertainment Group, Inc.*, 140 F.3d 463, 471 (3d Cir. 1998) (citing *In re: Sharon Steel Corp.*, 871 F.2d 1217, 1226 (3d Cir. 1989)). There is also authority holding that in light of the Supreme Court's decision in *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654 (1991), the applicable burden of proof under § 1104(a) is preponderance of the evidence. *In re: Altman*, 230 B.R. 6, 16-17 (Bankr. D. Conn. 1999), *vacated in part on other grounds by* 254 B.R. 509 (D.Conn. 2000); *see also* 4 NORTON BANKRUPTCY LAW AND PRACTICE 2D § 79:4 n.37 (1995). However, because Crescive has established cause by clear and convincing evidence, the Court need not decide whether the lesser standard applies.

Whether "cause" exists under § 1104(a) is not limited to fraud, dishonesty, incompetence or gross mismanagement. *In re: Marvel Entertainment Group, Inc.*, 140 F.3d 463, 472 (3d Cir. 1998); *In re: Intercat, Inc.*, 247 B.R. 911, 920-21 (Bankr. S.D. Ga. 2000); 7 COLLIER ON BANKRUPTCY ¶ 1104.02[3][c][i] (15th ed. 2003). Judge Davis in *Intercat* listed additional factors affecting a court's decision to appoint a trustee as including:

- 1) Materiality of the misconduct;
- 2) Evenhandedness or lack of same in dealings with insiders or affiliated entities *vis-a-vis* other creditors or customers;
- 3) The existence of pre-petition voidable preferences or fraudulent transfers;
- 4) Unwillingness or inability of management to pursue estate causes of action;
- 5) Conflicts of interest on the part of management interfering with its ability to fulfill fiduciary duties to the debtor;
- 6) Self-dealing by management or waste or squandering of corporate assets.

Intercat, 247 B.R., at 920-21. The appointment of a trustee under § 1104(a)(1) is appropriate where the debtor has diverted funds or failed to explain the diversion of funds. *In re: PRS Ins. Group, Inc.* 274 B.R. 381 (Bankr. D. Del. 2001). A history of transactions between the debtor and related companies can also serve as cause for the appointment of a trustee under § 1104(a)(1), as can debtor's failure to keep adequate records and to make prompt and complete reports. *In re: Oklahoma Refining Co.*, 838 F.2d 1133, 1136 (10th Cir. 1988).

Courts may also appoint a trustee under § 1104(a)(2) when it is in the best interest of creditors. Under § 1104(a)(2), the Court tries to determine whether the benefits to the estate will outweigh the costs involved in appointing a trustee. *In re: SunCruz Casinos, LLC*, 298 B.R. 821, 829 (Bankr. S.D. Fla. 2003); 7 COLLIER ON BANKRUPTCY ¶ 1104.02[3][d][ii] (15th ed. 2003).

The debtor is one of several companies managed by James O. Sissine and owned by Mr. Sissine or family members. The debtor is the developer of Rose Court and is owned by a related entity called Portfolio Homes International, LLC (90%), Mr. Sissine's wife Rosemary (9%), and Mr. Sissine (1%). Portfolio Homes, International, LLC is referred to by Mr. Sissine as the "management company," and according to debtor's exhibit 101, it is owned by wife Rosemary (69%), Mr. Sissine's daughter (1%), and a Swiss entity called Stratcom Partners (30%). Under cross examination at the March 3, 2004 hearing, Mr. Sissine testified that in the year before PHDC, LLC filed bankruptcy, it paid Portfolio Homes International, LLC some \$350,000.00, and in

response to the Court's question, Mr. Sissine testified that Portfolio Homes International, LLC paid his wife a salary of between \$200,000.00 and \$250,000.00 in 2002. Not surprisingly, since Mr. Sissine manages both entities, debtor PHDC, LLC has taken no action to recover any amount from Portfolio Homes International, LLC as a preference under 11 U.S.C. § 547. In fact, after PHDC, LLC filed this bankruptcy case, it made payments to Portfolio Homes International, LLC in June, July and August of 2003 out of cash collateral without creditor consent or Court approval as required in 11 U.S.C. § 363 (c)(2). The June payment of \$27,315.00 to this related entity was not properly disclosed on the June monthly report filed by the debtor on July 17, 2003. The evidence also revealed that Portfolio Homes International, LLC, is behind on its payroll taxes by some \$130,000.00 and that the Internal Revenue Service has filed a tax lien against it. In summary, the debtor PHDC, LLC, managed by Mr. Sissine, transferred funds both before and after bankruptcy to a related company also managed by Mr. Sissine, while debtor failed to pay trade creditors and workmen such as Crescive. The related company in turn paid Mr. Sissine's wife a salary, while it failed to pay withholding taxes.

Debtor's expenditure of cash collateral without Court approval has been the subject of previous orders in this case. *See* September 2, 2003 Order and April 12, 2004 Order. However, it is still useful to recite facts relating to that matter as they pertain to the motion to appoint a trustee. On June 25, 2003, some three months after debtor filed this case, debtor entered into a residential lot sales contract with Drs. David

and Judy Finkelman (the "Finkelmans") pursuant to which the Finkelmans tendered a cashier's check for \$72,500.00 in earnest money to Mr. Sissine as manager for the debtor. This money was cash collateral within the meaning of 11 U.S.C. § 363(a). At the August 27, 2003 hearing on the motion to approve the sale, Mr. Sissine testified that the debtor had already spent \$47,959.00 of earnest money without Court approval. McGuire Properties, Inc. objected strenuously to debtor's spending of cash collateral in violation of § 363(c)(2) of the Bankruptcy Code, and on September 2, 2003, the Court entered an Order presented by McGuire Properties, Inc. which, among other things, required Mr. Sissine to repay the \$47,959.00 to the estate and to insure that the debtor-in-possession was holding and had accounted for all of the \$72,500.00 received as earnest money. Mr. Sissine did not repay the debtor, and on February 13, 2004 the United States Trustee filed a motion for an order to show cause why Mr. Sissine should not be held in contempt for failure to comply with the Court's September 2, 2003 Order. On March 1, 2004, Mr. Sissine filed a *pro se* motion to reconsider the September 2, 2003 Order, and on March 25, 2004, the Court held a hearing on the matter. At that hearing, Mr. Sissine identified a check register for the debtor-in-possession account which showed that much of the cash collateral which was spent went directly from the debtor's checking account to Portfolio Homes International, LLC, including a \$27,315.00 wire transfer on June 26, 2003, and another \$10,000.00 of cash collateral was wire transferred on June 26, 2003 to an account at SunTrust "for Ben Abney check - Transfer to cover overdraft." Debtor's June, 2003 operating report filed on July 17, 2003 did not properly disclose the

\$27,315.00 transfer to Portfolio Homes International, LLC, nor did it properly disclose the \$10,000.00 transfer related to debtor's attorney's fees.²

Another company managed by Mr. Sissine and related to this debtor is Portfolio Homes, Inc. This entity, owned 100% by Mr. Sissine's wife, built the homes in Rose Court and held the exclusive right to build homes in the development. On March 13, 2003, just prior to the filing of this case, Mr. Sissine formed a new company which he referred to as a "clean corporation," Portfolio Homes Atlanta, LLC. He then filed an agreement in the real estate records between the debtor and Portfolio Homes Atlanta, LLC, granting the exclusive right to build homes in Rose Court to Portfolio Homes Atlanta, LLC. Mr. Sissine testified that he does not think he told the attorney who drafted the agreement, David Weissman, that he planned to file bankruptcy for PHDC, LLC. Mr. Sissine also testified that Portfolio Homes, Inc. owes his management company, Portfolio Homes International, LLC, some \$750,000.00.

The evidence presented also showed that Portfolio Homes, Inc., ran out of money when building homes for several of the lot purchasers in Rose Court. In at least two cases, Portfolio Homes, Inc. borrowed money from lot purchasers to finish their homes and had the debtor PHCD, LLC guaranty the loans and grant a security interest in debtor's property. Mr. Sissine and/or Portfolio Homes, Inc. are involved in litigation

² On April 27, 2004, as this Order is being completed, the docket reflects that debtor filed an amended operating report for June of 2003 reflecting these June 26, 2003 wire transfers.

with two other sets of lotholders; there is litigation with the Byers pending in Cobb County and an arbitration pending with the Gallaghers.

Mr. Sissine has not dealt evenhandedly with insiders and related entities vis-a-vis unsecured creditors. Two weeks before filing this Chapter 11 case, Mr. Sissine recorded seven deeds to secure debt against debtor's property, including one in favor of his brother, Anthony Sissine, one in favor of the James O. Sissine, Jr. QTIP Trust ("QTIP Trust"), and one in favor of the James O. Sissine, Jr. Family Trust ("Family Trust"). Relatively early in the administration of this case, creditor McGuire Properties, Inc. raised a strenuous objection to relatives and family trusts of Mr. Sissine having any superior rights by virtue of these pre-bankruptcy recordings by Mr. Sissine. But it was not until almost a year after the case was filed that Mr. Sissine's brother and family trusts waived their claims as secured creditors. *See* Consent to Waiver and Surrender of Claim of Security Interest filed by Anthony Sissine on March 1, 2004; and Consents to Waiver and Surrender of Security Interest filed by Mark Maloof on behalf of the Family Trust and QTIP Trust on March 9, 2004.

Several trade creditors who testified found Mr. Sissine to have been less than honest with them when paying them for work performed. Michael Brand, the president of movant Crescive, testified that Crescive was not paid for landscaping work on a certain home, the Domanico residence, and that Mr. Sissine told him that Crescive could not be paid until the sale to the Domanicos had closed because the debtor needed that sale to obtain cash. Mr. Brand testified that he later learned that the Domanico sale

had closed prior to his conversation with Mr. Sissine. He then filed a lien on the home, after which Mr. Sissine contacted him and asked that the lien be released in exchange for a \$10,000.00 check and a guaranty that Crescive would be paid \$2,500.00 per week until the balance of the debt owed to Crescive was paid. Mr. Brand identified a copy of an e-mail exchange between himself and Mr. Sissine corroborating this understanding of the proposed payment arrangement. Mr. Brand testified that he agreed to this arrangement, Mr. Sissine executed a guaranty on October 28, 2002, and Mr. Brand released the lien. But Mr. Sissine never paid Crescive as promised, and Crescive sued Mr. Sissine and Portfolio Homes, Inc. in the State Court of Fulton County. In its answer to Crescive's complaint, Portfolio Homes, Inc. and Mr. Sissine contended the guaranty only pertained to future work. Mr. Sissine's testimony at the March 3, 2004 hearing in bankruptcy court in support of this contention was not credible, and the State Court has entered a judgment in favor of Crescive.

Two creditors called as witnesses by the debtor also expressed the view that Mr. Sissine was less than totally honest with them regarding payment. Debtor called Tony Roberts, owner of a dump truck hauling and pipeline construction business, to testify. Mr. Roberts testified that his company was owed between \$11,000.00 and \$13,000.00 for work correcting fire hydrant installations and other work on Rose Court's water system. When debtor's counsel asked if Mr. Sissine has always been honest with him, he answered "No, not always." Charles Thom of Southland Services, Inc. also was called to testify on debtor's behalf. When asked if Mr. Sissine had been honest with

him, Mr. Thom testified that Mr. Sissine “kind of pushed the issue” regarding promises to pay.

Mr. Sissine’s difficult personal financial condition is also relevant to the motion to appoint a trustee. At the March 3, 2004 hearing, Mr. Sissine testified that his family was six (6) mortgage payments behind on their primary residence and that the monthly mortgage payments are \$5,000.00 a month. They are also in substantial arrears on a second home with mortgage payments of \$9,000.00 a month. Mr. Sissine testified that both homes are titled in his wife’s name, and she filed her own Chapter 11 petition in this Court on April 5, 2004, Case No. 04-65718.

The debtor is not the only entity managed by Mr. Sissine that is currently in a bankruptcy proceeding. Portfolio Homes, Inc., owned 100% by Mrs. Sissine, is the subject of an involuntary Chapter 7 case, Case No. 03-77195, that was filed in this Court in December, 2003. The debtor has contested the involuntary petition, and the matter is set for a hearing before Judge Mullins in June of 2004. At the April 19, 2004 hearing, it was revealed that another related company called PH of Savannah, LLC (owned 99% by Rosemary Sissine and 1% by Mr. Sissine) filed a voluntary Chapter 11 case in this Court on April 4, 2004, Case No. 04-65629.

Crescive’s counsel also pointed out an inconsistency in Mr. Sissine’s positions regarding the solvency of Portfolio Homes, Inc. In the Portfolio Homes, Inc. involuntary bankruptcy case, Portfolio Homes, Inc. takes the position that it is solvent or paying its debts other than those subject to a bona fide dispute. However, in the

proposed disclosure statement filed in the PHDC, LLC case, the debtor PHDC, LLC states that Portfolio Homes, Inc. is insolvent. Mr. Sissine manages both entities, and his attempt to explain this inconsistency was unsatisfactory.

Debtor argues that Mr. Sissine might have made mistakes, but that it is in the best interest of trade creditors and other unsecured creditors not to appoint a trustee, but to allow Mr. Sissine to sell the remaining lots. Debtor's plan would pay trade creditors after the secured claims of Skram Acquisitions, LLC and Gongga Pooh Jar-Jar, LLC, meaning that trade creditors will not be paid until the last lot is sold which is not projected until December 1, 2005. The plan proposed by the debtor essentially asks the trade creditors to wait for payment, if at all, for some eighteen (18) months, and then to be paid only if all four remaining lots are sold on a schedule and at prices agreed to by the debtor and Skram Acquisitions, Inc. In the meantime, the debtor's plan gives Mr. Sissine the right to market the remaining lots in such a way that the lot purchasers must use Mr. Sissine's building company to build their homes. He plans to build luxury homes priced at between \$1.5 and \$2.5 million, and he testified that there will be a 17% profit on the sale of the homes.³ Thus, debtor's plan allows Mr. Sissine to make profits in connection with Rose Court, while the small contractors who worked on the

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Mr. Sissine testified that his building company should realize 17% profits on the sale of these homes. He later refined the percentage by attributing 5% to overhead and supervision and 12% to profit.

development must wait another year and a half to be paid, if at all. Crescive and the Gallaghers strongly oppose any Court approval of this outcome.

Crescive has met its burden of proof and presented clear and convincing evidence of cause within the meaning of § 1104(a)(1) to appoint a trustee in this case. If a trustee is not appointed, then Mr. Sissine will remain in control of the debtor and there will be no examination of possible pre-petition voidable preferences to Portfolio Homes International, LLC. Mr. Sissine is the manager of the management company which has received monies from the debtor before and after the bankruptcy, all while trade creditors remained unpaid. The debtor's June, 2003 operating report filed in July of 2003 was inaccurate and misleading, and debtor spent cash collateral in violation of § 363(c)(2) of the Bankruptcy Code. Mr. Sissine's inconsistent positions on the solvency of Portfolio Homes, Inc. as well as the testimony of creditors give the Court concern about management's trustworthiness. Furthermore, Mr. Sissine's conduct in favoring insiders and relatives over trade creditors immediately before filing this case argues strongly in favor of the appointment of a trustee. Mr. Sissine's own financial condition and the recent bankruptcy filings by his wife and another entity that he manages, PH of Savannah, LLC, along with the manner in which he managed Portfolio Homes International, LLC, by paying his wife a salary without paying payroll taxes, provide further support for the conclusion that a trustee should be appointed. In summary, there is clear and convincing evidence of incompetence, preferential treatment of insiders, and

serious mismanagement, all of which constitute cause under § 1104(a)(1) to appoint a trustee.

The debtor's only argument against appointing a trustee is that Mr. Sissine could sell the lots for a greater amount than could a trustee and that this is the only hope trade creditors have to be paid. Mr. Sissine's track record of making good on promises to trade creditors, and the entire record of this case do not support the conclusion that there is much likelihood that these creditors will get paid under debtor's plan. The moving creditor, Crescive, argues convincingly that it is far more likely that it and other trade creditors will never get paid under debtor's plan, and the Court has not been persuaded otherwise by the debtor. Debtor's evidence that a trustee could only sell each lot for \$541,000.00, while Mr. Sissine could sell the lots for between \$735,000.00 and \$765,000.00 was not persuasive or credible. The Court cannot conclude that Mr. Sissine would do a significantly better job than any trustee in selling these lots and generating funds to pay creditors, and a trustee would review the transactions between the debtor and related entities and be in a position to try to recover funds, if possible, for the estate.

Finally, debtor introduced a number of forms which debtor's first counsel prepared entitled "Objection to Motion for the Appointment of a Trustee." Mr. Sissine apparently approached a number of creditors and had them sign this one-sentence document in which they simply stated that they believe the appointment of a trustee was not in the best interest of creditors. These creditors included Mr. Sissine's brother, an employee of one of Mr. Sissine's companies, and attorneys and accountants with small

claims, some of whom prepared or are parties in the documents that Mr. Sissine filed immediately before bankruptcy providing advantages to his family trusts or to his newly formed building company. Only one of the creditors who signed this form testified at either of the two days of hearings in opposition to Crescive's motion to appoint a trustee. This was Charles Thom with a \$1,575.81 claim. The only other creditor called by debtor's counsel to testify was Tony Roberts of Roberts Hauling Company. When debtor's counsel asked Mr. Roberts if he had an opinion as to whether a trustee should be appointed, he said he did not, but that he had an attorney who could speak for him. His attorney, while present, did not articulate any position in favor of the debtor. While the Court accepts as true the fact that Mr. Sissine obtained a number of signatures on a form, the Court cannot draw the conclusion from these signatures that it is in the best interests of creditors to permit Mr. Sissine to remain in charge of the debtor's affairs.

In accordance with the above reasoning, Crescive's motion to appoint a trustee is GRANTED pursuant to 11 U.S.C. § 1104(a)(1).

IT IS SO ORDERED, this 28th day of April, 2004.


JOYCE BIHARY
UNITED STATES BANKRUPTCY JUDGE

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Date: April 28, 2004