UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF VIRGINIA
Lynchburg Division

In re OAKWOOD COUNTRY CLUB, INCORPORATED,	)	Case No. 10-60246-LYN
Debtor,	)	

MEMORANDUM AND ORDER

This matter comes before the court on the objection of the United States trustee to the disclosure statement of Oakwood Country Club, Inc. ("the Debtor").

Jurisdiction

This court has jurisdiction over these matters. 28 U.S.C. §§ 1334(a) & 157(a). This is a core proceeding. 28 U.S.C. § 157(b)(2)(A)&(N). Accordingly, this court may render a final order. This memorandum shall constitute the court's findings of fact and conclusions of law as directed by Fed.R.Civ.P. 52 which is made applicable in this contested matter by Fed. R. Bankr. P. 9014(c) and 7052.

Facts

The Debtor is a social club that was founded in 1914. The Debtor owned real property consisting of approximately 85 acres of land and improvements thereon ("the Real Property"). The land may be divided into two parcels. The first parcel consists of approximately 77 acres on which is a nine-hole golf course ("the Golf Property"). The second parcel consists of approximately eight acres of land ("the Clubhouse Property") with improvements consisting, among other things, of a clubhouse, swimming pool and tennis courts.

The Debtor sold substantially all of its assets at an auction conducted by the Court. The

Debtor filed a Disclosure Statement Regarding Plan of Liquidation of Oakwood Country Club, Inc. ("the Disclosure Statement") and a Plan of Liquidation of Oakwood Country Club, Incorporated ('the Plan"). The United States trustee objects to the approval of the disclosure statement. The Debtor will not continue operations after this case is closed.

Discussion

The United States trustee objects to the approval of the Disclosure Statement on the grounds that the Plan is not confirmable on its face. Allowing a facially non-confirmable plan to accompany a disclosure statement is both inadequate disclosure and a misrepresentation. In re Dakota Rail, 104 B.R.138, 143 (Bankr. D. Minn. 1989) (citing In re Pecht, 57 B.R. 137, 139 (Bankr. E.D. Va. 1986). Accordingly, it is proper to consider whether the Plan is confirmable on its face when considering whether to approve the Disclosure Statement.

The Plan provides for the treatment of following classes of creditors: (1) Administrative Expenses; (2) Secured Claims; (3) Class 1 – Other Priority Claims: (4) Class 2 – General Unsecured Claims: (5) Class 3 – Bondholder Claims; and (6) Class 4 – Equity Interest Holders.

Under the Plan Class 1 will receive a pro rata distribution. Class 2 may receive a pro rata distribution under the Plan, but the Debtor anticipates that any distribution to Class 2 will constitute a dividend of less than 5%. Class 3 and Class 4 will not receive a distribution under the Plan. The Debtor classifies Classes 1 – 4 as "Unimpaired. Deemed to have accepted the Plan. Not entitled to Vote." The United States trustee argues that the Plan cannot be confirmed because Classes 1 - 4 are impaired and that they have a right to vote to accept or reject the Plan. The Debtor argues that Classes 1 - 4 are not impaired because they will have the right to sue the Debtor after the case is closed by virtue of the fact that the Debtor will not receive a discharge.

A bankruptcy court may confirm a Chapter 11 plan only if the plan meets certain requirements. One requirement is that, if a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider. 11 U.S.C. § 1129(a)(10).

Section 1124(1) of the Bankruptcy Code provides, in relevant part, that "a class of claims or interest is impaired under a plan unless, with respect to each claim or interest of such class, the plan . . . leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest . . ."[1] The language of Section 1124(1) is very broad. Any alteration of a creditor's rights constitutes impairment.

> . . . Th[e] language [of Section 1124(1)] is very broad. E.g., Schwarzmann v. First Union Nat'l Bank (In re Schwarmann), No. 95-2512, 1996 AESOP. LEXIS 31262 at *9 (4th Cir. Dec. 6, 1996) (unpub.) ("It is 'well established' that § 1124 defines impairment in very broad terms.") (citation omitted); Windsor on the River Assocs., 7 F.3d at 130 ("By this [§ 1124(1)] standard, any alteration of a creditor's rights, no matter how minor, constitutes 'impairment'").

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[1] Section 1124 provides that

Except as provided in section 1123(a)(4) of this title, a class of claims or interest is impaired under a plan unless, with respect to each claim or interest of such class, the plan

(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest; or

(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default –

(A) cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title or of a kind that section 365(b)(2) expressly does not require to be cured;

(B) reinstates the maturity of such claim or interest as such maturity existed before such default;

(C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law;

(D) if such claim or such interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a nonresidential real property lease subject to section 365(b)(1)(A), compensates the holder of such claim or such interest (other than the debtor or an insider) for any actual pecuniary loss incurred by such holder as a result of such failure; and

(E) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.

In re Estate of LaRosa, 2009 WL 1172843 (Bankr. N.D.W.Va. 2009). Also see L & J Anaheim Assocs. v. Kawasaki Leasing Int'l Inc. (In re Anaheim Assocs.), 995 F.2d 940, 942-43 (9th Cir.1993) (Congress intended to define impairment broadly, and, generally, any alteration of a creditor's legal rights constitutes impairment).

It is concluded that the Classes 1 - 4 are impaired if there has been any alteration of the creditor's rights under the plan. As noted above, the Debtor argues that the creditor's claims are not impaired because the Debtor will not receive a discharge which means that the creditor's in Classes 1- 4 may bring an action against the Debtor after the case is closed. The problem with the argument is that the Debtor will cease to exist as a legal entity after the case is closed. It is axiomatic that a plaintiff cannot bring a cause of action against an entity that does not exist. Consequently, any action brought to collect on a contract or judgment underlying a creditor's claim will be dismissed upon the filing of the complaint. Because none of the creditors in classes 1- 4 will be left with a viable cause of action against the Debtor, it necessarily follows that their contractual and legal rights are impaired under the plan. The bottom line is that the termination of the Debtor effectively terminates the collection rights of the creditors in the same manner as an order of discharge.

A variation on the definition of impairment leads to the same conclusion. One Court paraphrased Section 1124(1) stating that a claim is impaired under a plan if the obligation of the debtor is not in default.

> Section 1124 of the Code defines impairment negatively, specifying two ways in which a claim is unimpaired. The first [is] . . . when the obligation of the debtor is not in default.

In re Mirant Corp., 2005 WL 6440372, *7, n. 13 (Bankr. N.D.Tex. 2005). The Debtor is in

default on its obligations to the members of Classes 1 - 4. Those creditors' claims are also impaired under this definition.

Classes 1- 4 are impaired. The Plan does not provide that the creditors in those classes will be allowed to vote whether to accept or reject the Plan. The Plan cannot be confirmed as filed. Consequently, the Disclosure Statement cannot be approved.

ORDER

The Debtor's Disclosure Statement is not approved because the Debtors' Plan is not confirmable on its face.

So ORDERED.

Upon entry of this memorandum the Clerk shall forward a copy to the Richard C. Maxwell, Esq., and Margaret K. Garber, Esq., of the United States trustee's office.

Entered on this 22nd day of November, 2010.

William E. Anderson
United States Bankruptcy Judge