Not For Publication

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

IN RE:	)	CASE NO.	02-30563 (LMW)
INTERIORS OF YESTERDAY, LLC,	)	CHAPTER	7
DEBTOR.	)	DOC. I.D. NOS.	233, 275, 276, 363

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MEMORANDUM OF DECISION RE:
TRUSTEE'S MOTION TO DISMISS CASE

Lorraine Murphy Weil, United States Bankruptcy Judge

The matters before the court are the chapter 7 trustee's (the "Trustee") motion to dismiss this chapter 7 case (Doc. I.D. No. 233, the "Motion")[1], the above-referenced objections thereto and the objections of Jean Hart and Jo Ann Foucher stated orally at the September 21, 2005 hearing. This court has jurisdiction over this core matter under 28 U.S.C. §§ 1334 and 157(b) and that certain Order dated September 21, 1984 of the District Court (Daly, C.J.).[2] This memorandum constitutes the findings of fact and conclusions of law mandated by Rule 7052 of the Federal Rules of Bankruptcy Procedure (made applicable to this contested matter by Rule 9014 of the Federal Rules of Bankruptcy Procedure).

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[1] References to the docket of this chapter 7 case appear in the following form: "Doc. I.D. No. _____." References herein to title 11 and/or the Bankruptcy Code refer to the same as it existed prior to amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

[2] That order referred to the "Bankruptcy Judges for this District" "all cases under Title 11, U.S.C., and all proceedings arising under Title 11, U.S.C., or arising in or related to a case under Title 11, U.S.C. . . . ."

I. **BACKGROUND**[3]

Some of the background to this case is set forth in this court's prior opinion (*In re Interiors of Yesterday, LLC*, 284 B.R. 19 (Bankr. D. Conn. 2002), the "*Prior Opinion*") with regard to dismissal of this case and denial of relief from stay. In the *Prior Opinion*, the court held (among other things): that the mere fact of the initial *pro se* filing of the above-captioned debtor's (the "Debtor") voluntary chapter 7 petition did not require dismissal of this case on the facts presented; and that "cause" otherwise did not exist then for dismissal of this case within the purview of 11 U.S.C. § 707(a).[4] Familiarity with the *Prior Opinion* is assumed.

For some time prior to the commencement of this chapter 7 case, the Debtor operated a shop where antiques, rugs and other decorative items were offered for sale. A substantial portion of the Debtor's inventory (the "Inventory") is claimed to be the goods of third parties (collectively, the "Consignors") placed with the Debtor for sale on consignment. The Debtor's now former landlord ("Mr. Orsini") is the holder of an alleged attachment (the "Attachment") in respect of the Inventory and the Debtor Property (as hereafter defined). Pursuant to the Attachment and prior to the petition date, a state marshal seized the Inventory (including allegedly consigned goods) and the Debtor Property and removed them to a storage facility (known as Little John's Movers, Inc.) ("Little

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[3] All facts stated in section I and elsewhere in this memorandum have been gleaned from the entire record of this chapter 7 trustee. This case has been pending for about five years and, as of the date hereof, has more than 450 docket entries. As a matter of necessity, the case history which follows is simplified.

[4] The Trustee and the United States Trustee (the "UST") objected to the dismissal of this case. (*See Prior Opinion*.)

John's") in Meriden, Connecticut, where those goods have remained ever since, accruing monthly storage charges (the "Storage Charges").[5]

The Debtor's Schedule A - Real Property lists no real property. (*See* Doc. I.D. No. 15 (Schedule A).) The Debtor's original Schedule B - Personal Property lists the following relevant items: $2,200 "[c]ash on hand" seized pursuant to the Attachment; a checking account with a balance of $700 seized pursuant to the Attachment; "[r]ugs, vase [sic], painting [sic], prints, books, antique furniture, decorative furnishings, etc." with a stated value of $10,000.00 and "jewelry" with a stated value of $2,000.00[6], all seized pursuant to the Attachment; an alleged claim (the "Orsini Claim") against Mr. Orsini "for misrepresentation, fraud, breach of contract, unjust enrichment, breach of good faith and fair dealing" with a stated value of $450,000.00; an alleged claim "against Quality Roofing Company for damages to goods during work by Quality Roofing" (the "Quality Roofing Claim") with a stated value of $175,000.00; and the Inventory "moste [sic] of which may belong to [the Consignors]" with a stated value of $500,000.00. (See Doc. I.D. No. 15 (Schedule B).) The referenced seizures all appear to have taken place on or about October 10, 2001. (*See* Doc. I.D. No. 15 (Statement of Financial Affairs, item 4.b); *see also* Tarro Exhibit (as hereafter defined) 5 (police incident report in respect of seizure dated as of such date).) The Debtor's Amended

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[5] All or substantially all of the Inventory and the Debtor Property appears to be at Little John's (*see* Doc. I.D. No. 15 (Schedule B)), and this memorandum will proceed on that assumption. (*But see* Doc. I.D. No. 15 (Statement of Financial Affairs, item 4.b (describing seizure as limited to "90% of furniture - assets of the business . . . plus $2,200 cash in drawer & jewelry").) Houshang Massachi alleges that only twenty-five percent of "his" Inventory is at Little John's. (*See* Doc. I.D. No. 350 (Mr. Massachi's Response to Trustee's Supplement).)

[6] All such tangible property is hereafter collectively referred to as the "Debtor Property." Schedule B also shows two vehicles with no equity in them. (*See* Doc. I.D. No. 16 (Amended Schedule D - Creditors Holding Secured Claims).) Those vehicles appear not to have been seized. (*See* Doc. I.D. No. 15 (Schedule B, item 23).)

Schedule B - Personal Property (Doc. I.D. No. 38) lists an alleged claim (the "Sobol Claim") of "uncertain" value against another former landlord, "Mr. Sobol," for "interfer[ence] with the business operations of the Debtor" (Doc. I.D. No. 38).

The Debtor's Amended Schedule D - Creditors Holding Secured Claims lists the Attachment as a disputed lien in the amount of $110,000.00. (*See* Doc. I.D. No. 16 (Amended Schedule D).)[7] The Debtor's Amended Schedule F - Creditors Holding Unsecured Nonpriority Claims lists (among other claims) undisputed "claims" of twenty Consignors (including Kathleen Tarro, the managing member of the Debtor, the "Manager") (*see* Doc. I.D. No. 16 (Amended Schedule F)) as well as a disputed claim of Mr. Orsini in the amount of $110,000.00.[8]

On March 11, 2004, the Trustee filed that certain Amended Notice of Sale of Property of Estate and Opportunity for Objections Thereto (Doc. I.D. No. 81, the "Sale Notice") which proposed a sale to Mr. Orsini for $7,500.00 ("plus the assumption and payment of all" Storage Charges) of all the Debtor's interest in and to: all tangible property including the Inventory (subject to the Consignors' interest in the same, if any) and the Debtor Property; and all of the Debtor's causes of

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[7] The Attachment is evidenced by a certain Order of Attachment dated October 1, 2001 and entered in a certain civil action (the "Civil Action") pending in the Connecticut Superior Court and captioned *John L. Orsini v. Interiors of Yesterday, LLC*, No. CV-01-0450081S. (*See* Tarro Exhibit 6 (copy of Attachment order).)

[8] For the purposes of this memorandum only the court will assume that those persons listed as Consignors in the Debtor's schedules are in fact consignors. The primary Consignors appear to be the Manager herself (with a "claim" listed in the amount of $70,000.00) and an "Anthony Tarro" (with a "claim" listed in the amount of $185,000.00). (*See id.*) The Debtor, the Manager and the other objecting Consignors (Mr. Massachi, Richard Tarro, Ms. Hart and Ms. Foucher) are referred to collectively below as the "Objectors." Mr. Tarro's standing as a Consignor has been challenged. (*See* 7/25/06 Transcript (as hereafter defined)at 184-86 (remarks of counsel for Mr. Orsini).) Because it makes no difference to the decision, this court assumes, but does not decide, that Mr. Tarro has standing as a Consignor.

action including the Quality Roofing Claim, the Orsini Claim, the Sobol Claim and the alleged cause of action (the "Manager Claim") against the Manager referred to in the *Prior Opinion* (*see Prior Opinion* at 27). The Manager and certain of the other Consignors filed objections to the Sale Notice. (*See* Doc. I.D. Nos. 83, 86, 87, 88, 89 and 90.) At the initial hearing on the Sale Notice, the court indicated that the sale could be approved only after an evidentiary hearing, and the matter was continued for that purpose. Subsequently, Mr. Orsini withdrew from the proposed deal and the Sale Notice became moot. (*See* 9/21/05 Transcript (as hereafter defined) at 75 (testimony of Trustee)); docket entry for September 21, 2005 (marking the relevant items "moot").)

Mr. Orsini then filed a motion for relief from stay to auction off the Inventory. (*See* Doc. I.D. No. 116, the "Stay Relief Motion.") The Trustee, the Manager and certain of the other Consignors filed objections to the Stay Relief Motion. (*See* Doc. I.D. Nos. 119, 121, 126, 127, 128, 131.)[9] In connection with those objections, the Manager sought to have Little John's unpack the Inventory and the Debtor Property for "viewing." (*See* Doc. I.D. No. 165.) That motion was deemed to be a motion for an examination pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure and was granted by order entered on December 27, 2004. (*See* Doc. I.D. No. 179.) Little John's was served with a subpoena pursuant to that order but insisted on compensation for unpacking and then repacking the subject property. Little John's agreed to perform the services necessary to a "viewing" if a $3,000.00 deposit and a guaranty for payment of any additional fees for the services were posted. The Manager posted the deposit and the guaranty and the "viewing"

[9] The Manager and the relevant Consignors objected to the substantive relief requested by Mr. Orsini. The Trustee did not object to that substantive relief. Rather, the Trustee objected only to the asserted amount of the Attachment (*i.e.,* $110,000.00). (*See* Doc. I.D. No. 119.) It is now uncontested that the maximum amount of the Attachment is $38,000.00.

occurred on July 13, 2005.[10] (*See* Doc. I.D. No. 289 ("Memorandum [of] a [V]iewing of [M]erchandise at Little John's [M]overs, Meriden, CT, July 13, 2005 at 1:00 p.m. [filed by the Manager]").) The Manager and two of the other Consignors, Mr. Orsini (through counsel), the Trustee, two appraisers (one for the Consignors and one for Mr. Orsini) and a video tape person (for the Consignors) attended the "viewing." (*See id.*) The Objectors claim that the Inventory and/or the Debtor Property was damaged during the course of the seizure pursuant to the Attachment and/or during storage and some person or persons is/are liable therefor (the "Damage Claim").

The Motion was filed on February 2, 2005.[11] Pursuant to the Motion, the Trustee seeks to dismiss this case for "cause" pursuant to Bankruptcy Code § 707(a) on the grounds, *inter alia*, that administration of this case will not benefit creditors. The Objectors filed the above-referenced objections to the Motion contesting the foregoing (among other things) and Jean Hart and Jo Ann Foucher objected orally at the September 21, 2005 hearing.[12] The UST supported the Motion. (*See* 9/21/05 Transcript at 121:19-22) (remarks of counsel for UST).) An evidentiary hearing on the

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[10] As discussed below, the Trustee had no cash to pay for a "viewing."

[11] The Trustee also filed a Notice of Proposed Abandonment of Property and Opportunity for Objections Thereto (Doc. I.D. No. 235) on the same day with respect to the Inventory at Little John's. On February 25, 2005 the Trustee filed a report of Abandonment of Property of an Asset of this Estate (Doc. I.D. No. 244) with respect to the abandonment notice. Certain of the Objectors filed objections to the abandonment notice and report. By a memorandum and order dated December 6, 2005 (Doc. I.D. No. 360), the court ruled (for technical reasons) that no abandonment had been effectuated by the abandonment notice and ordered that the abandonment report be stricken from the record. (*See id.*)

[12] Jo Ann Foucher also had filed an objection (Doc. I.D. No. 277) to the Motion but that written objection was overruled for failure to prosecute. (*See* Doc. I.D. No. 282.) Ms. Foucher appeared at the September 21, 2005 hearing and orally restated her objection. The written objection of Mr. Massachi supplemented his oral objection stated at the September 21, 2005 hearing. All of the above-referenced written and oral objections to the Motion are referred to hereafter collectively as the "Objections."

Motion and the Objections was held on September 21, 2005. Post-hearing briefing was had. By order dated December 2, 2005, the court scheduled a status conference (the "Status Conference") with respect to these matters on notice to the parties. At the Status Conference, the court reopened these proceedings from the bench to permit the Trustee to develop an additional record. (*See* 12/14/05 Oral Record at 2:03:34 *et seq.*) Pursuant to that bench ruling, a further evidentiary hearing with respect to these matters was held on July 18, 2006 and July 25, 2006 (collectively with the two prior days of evidentiary hearing, the "Hearing").[13] Testimony was taken and further exhibits were introduced into the record.[14] Oral argument (in lieu of post-trial briefing) was had on September 19, 2006. The UST has filed a statement in support of the Motion. (*See* Doc. I.D. No. 454.)

This matter is ripe for decision. For the reasons set forth below, the court concludes that the Motion should be granted and the Objections overruled.

II. ANALYSIS

A. LEGAL STANDARDS

Section 707(a) provides in relevant part as follows: "The court may dismiss a case under this chapter only after notice and a hearing and only for cause . . . ." 11 U.S.C.A. § 707(a) (West 2005).

> Section 707(a) provides three examples of "cause" that would justify dismissal of a chapter 7 case . . . . The examples are merely illustrative, and the court may dismiss

[13] Copies of the Hearing transcripts are in the record as Doc. I.D. No. 345 (9/21/05 hearing), Doc. I.D. No. 455 (7/18/06 hearing) and Doc. I.D. No. 456 (7/25/06 hearing). References herein to those transcripts appear in the following forms: "9/21/05 Transcript at __:__"; "7/18/06 Transcript at __:__"; and "7/25/06 Transcript at __:__" (as the case may be).

[14] References herein to exhibits introduced into the record of the Hearing appear respectively in the following forms: the Trustee's exhibits are referred to as "Trustee Exhibit ___"; the Manager's exhibits are referred to as "Tarro Exhibit __"; and Mr. Orsini's exhibits are referred to as "Orsini Exhibit ___". Exhibits of the parties from other proceedings in this case are so designated.

> the case on other grounds when cause is found to exist . . . . The court has substantial discretion in ruling on a motion to dismiss under section 707(a), and in exercising that discretion must consider any extenuating circumstances, as well as the interests of the various parties.

6 Alan N. Resnick and Henry J. Sommer, *Collier on Bankruptcy* ¶ 707.03[1], at 707-15 to 707-16 (15th ed. rev. 2005) ("*Collier on Bankruptcy*") (footnotes omitted). The burden is on the party alleging "cause" to prove its existence by a preponderance of the evidence. *In re Horan*, 304 B.R. 42, 48 (Bankr. D. Conn. 2004). *See also Dionne v. Simmons (In re Simmons)*, 200 F.3d 738, 743 (11th Cir. 2000).

In this case, the person seeking dismissal is the Trustee who is asserting that administration of this case will not benefit creditors. The court must give some deference to the Trustee's opinion in that regard. That is because when Congress enacted the Bankruptcy Code

> Congress envisioned . . . a system in which the bankruptcy court was not to play a significant role in the actual administration of the estate. Intervention by the court was to be the exception, not the rule.

In re Dalen, 259 B.R. 586, 597 (Bankr. W.D. Mich. 2001). *See also Frostbaum v. Ochs*, 277 B.R. 470 (E.D.N.Y. 2002) (affirming bankruptcy court's deference to trustee's decision to close case); *In re Meyers*, 139 B.R. 858 (Bankr. N.D. Ohio 1992) (deference to trustee's decision not to abandon property); *Rose Marine Inc. v. Marine Contracting Corp. (In re Rose Marine, Inc.)*, No. 88-4038, 1990 WL 10007382, at *2 (Bankr. S.D. Ga. April 27, 1990) (deference to trustee's decision not to pursue litigation). The standard for review of a trustee's decision regarding case administration is the "business judgment" rule. *Frostbaum*, 277 B.R. at 475. "So long as [the] . . . decision was not made arbitrarily, or in bad faith, it . . . [is] appropriate for the Bankruptcy Court to accept . . . [the trustee's] decision . . . ." *Id.*

Two other points should be noted here. First, a chapter 7 trustee is a fiduciary and one of the trustee's duties is to

> collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest . . . .

11 U.S.C.A. § 704(1) (West 2005). However, "[t]he responsibility of the trustee to collect assets and to effectuate the policy of equity of distribution does not per se compel litigation by the trustee at every instance where a potentiality for recovery exists. To the contrary, a trustee has a substantial degree of discretion to sue or not to sue." *In re Rose Marine, Inc.*, 1990 WL 10007382, at *2. Second, Congress gave trustees a financial incentive to accomplish effective administration of the estate by tying a trustee's compensation to the aggregate amount of distributions in the case. *See* 11 U.S.C. § 326(a).[15]

B. APPLICATION OF LAW TO FACTS

Reduced to its essentials, the Objectors argue that, by deciding not to administer this case, the Trustee is breaching his statutory duty to reduce the Debtor's assets to money for the benefit of creditors. As noted above, the correct inquiry is whether the Trustee's decision in that regard is either arbitrary or unreasonable. If it is not, "cause" exists to dismiss this case. Below, the court applies that standard with respect to each material asset of the Debtor.

1. Sale of the Inventory and the Debtor Property

The court has heard opinions of the aggregate value of the Inventory and Debtor Property of anywhere from $35,000.00 (7/18/06 Transcript at 152:25 – 153:1 (testimony of Mr. Barrows))

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[15] The Trustee has put many hours into this case and, if it is dismissed, will receive no compensation therefor. (*See* 9/21/05 Transcript at 118:14-23 (statement of counsel for UST).)

to $150,000.00 (at auction) (Doc. I.D. No. 458 (transcript of 2/7/06 hearing ("2/7/06 Transcript") on Stay Relief Motion) at 72:2-8 (testimony of Mr. Fontaine)).[16] The court makes no determination of value because, for the reasons stated below, the court concludes that the Trustee's determination that he cannot effectively realize upon any such value is neither arbitrary nor in bad faith.

The Objectors argue that the Trustee should sell that property "free and clear," hold the proceeds of sale and then litigate with the Consignors (and Mr. Orsini) as to the respective rights in those proceeds. This the Trustee declines to do because he believes that "it would be almost impossible . . . to sell [the] . . . assets . . . ." (9/21/05 Transcript at 5:13-14 (testimony of Trustee).) Moreover, such sale would be by auction and "who knows what . . . [the estate] would get." (*Id.* at 84:22 (testimony of Trustee).) Finally, the Trustee asserts, those gross proceeds would be reduced by litigation fees and costs, the Storage Charges and other costs. (*See id.* at 84 (Storage Charges); *id.* at 6, 11, 89-90 (litigation costs).) For the reasons stated below, the court concludes that the Trustee's decision not to sell the Inventory and the Debtor Property is neither arbitrary nor in bad faith and the court will not overturn that decision.

a. <u>Sale Difficulties (11 U.S.C. § 363)</u>

The Inventory likely would have value to a disinterested purchaser (if at all) only if the Trustee could give such purchaser clear title (*i.e.,* sell the property "free and clear" of the Attachment and the Consignors' interests). The Objectors argue that the Trustee could use

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[16] Mr. Fontaine's estimate for valuation of the relevant property in a "retail environment" was $200,000.00. (2/7/06 Transcript at 71:1-6 (testimony of Mr. Fontaine).) Mr. Fontaine's valuation was exclusive of the rugs. (*Id.* at 65 (testimony of Mr. Fontaine).) Rugs were valued by the Objectors separately at $7,200.00 as of the time of the "viewing" at Little John's. (*See* 7/25/06 Transcript at 307 (testimony of Mr. Massachi).)

Bankruptcy Code § 363(h) to do so. To understand why the Objectors are wrong, it is necessary to understand the structure of Section 363.

Section 363(b) states the general rule that only "property of the estate" may be sold pursuant thereto. *See* 11 U.S.C. § 363(b). There is only one exception to that rule: Section 363(h) which permits the Trustee to sell both the estate's interest in property "and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety . . . ." 11 U.S.C.A. § 363(h) (West 2005). Courts have held that the scope of Section 363(h) is limited by its plain language. *See, e.g., Geddes v. Livingston (In re Livingston)*, 804 F.2d 1219, 1222-23 (11th Cir. 1986) ("The language of the bankruptcy statute is clear and unambiguous in its listing of the three § 363(h) cotenancies. This plain language forces the conclusion that the three cotenancies are the only three in which the co-owner's interest may be sold without his consent."). *See also* 3 *Collier on Bankruptcy* ¶ 363.08[3], at 363-65 ("Thus, whether section 363(h) applies depends on whether, under applicable nonbankruptcy law, the manner in which the debtor and the co-owner hold property fits within one of those categories."). The Debtor and the Consignors are not co-owners of the Inventory; the Consignors claim that the Inventory is their property and not the Debtor's property. Accordingly, the Inventory cannot be sold pursuant to Bankruptcy Code § 363(h). Nor, as explained below, could the Trustee sell the Inventory pursuant to Bankruptcy Code §§ 363(b) or 363(f) without successful litigation against the Consignors.

It has been suggested that the Trustee could avoid the Consignors' interest in the Inventory pursuant to chapter 5 of the Bankruptcy Code. *See, e.g.,* 11 U.S.C. § 544(a)(1); Conn. Gen. Stat.

§ 42a-9-109(a)(4); *id.* cmt. 6; Conn. Gen. Stat. § 42a-9-317.[17] However, even if the Trustee were to prevail and recover the Inventory pursuant to a bankruptcy avoidance power, the Inventory only then would become property of the estate pursuant to Bankruptcy Code § 541(a)(3) and amenable to sale pursuant to Bankruptcy Code §§ 363(b) or 363(f). *See F.D.I.C. v. Hirsch (In re Colonial Realty Corp.),* 980 F.2d 125, 131 (2d Cir. 1992) ("[T]he inclusion of property recovered by the trustee pursuant to his avoidance powers in a separate definitional subparagraph [of Section 541(a)] clearly reflects the congressional intent that such property is not to be considered property of the estate until it is recovered.") (internal quotation marks omitted). Thus the Trustee cannot sell the Inventory pursuant to Section 363(b) or Section 363(f) prior to successful avoidance of the Consignors' interests in the Inventory.

Nor could the Trustee sell the Inventory pursuant to Bankruptcy Code § 363(f)(4) (sale of property of the estate "free and clear" of disputed liens and other interests) without successful litigation against the Consignors on the theory that the Consignors' interest in the Inventory is subject to "bona fide dispute." That is because a Section 363(f)(4) sale cannot be had when there is an unresolved issue of whether the subject property is "property of the estate;" that issue must be resolved prior to sale.[18] *See In re Claywell,* 341 B.R. 396, 398 (Bankr. D. Conn. 2006) (Krechevsky, J.) ("A bankruptcy court may not allow the sale of property as 'property of the estate' without first determining whether the debtor in fact owned the property." (internal quotation marks omitted)). Moreover, the Trustee might have to commence adversary proceedings (perhaps as many

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[17] It also has been suggested that Article 9 of the Uniform Commercial Code as it existed in Connecticut prior to its 2001 amendment applies here.

[18] That situation is to be distinguished from the situation where the debtor has undisputed title to the property but the trustee challenges the existence of a claimed lien upon it.

as twenty) to determine the "property of the estate" issue because the issue likely may not be amenable to resolution in the context of a Section 363 motion. *Cf. Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1099 (2d Cir. 1993) (stating that a Section 365 assumption motion is an improper vehicle to resolve disputed issue regarding debtor's breach of agreement). *See also Darby v. Zimmerman (In re Popp)*, 323 B.R. 260, 269 n.14 (B.A.P. 9th Cir. 2005) ("[W]e do not decide whether a contested matter brought in the absence of . . . an adversary proceeding can provide 'a sound basis for holding that the [property sought to be sold is] property of the estate.'") (citation omitted and last modification in original). However, regardless of whether the litigation against the Consignors may be brought as adversary proceedings or a contested matter, the Trustee cannot sell the Inventory pursuant to Section 363 without successful litigation against the Consignors.

b. <u>Sale Difficulties (Litigation)</u>

The Trustee believes that the Consignors would not cooperate with a sale of the Inventory outside of a Section 363 sale,[19] and that the above-discussed litigation would be necessary to enable a Section 363 sale of the Inventory. (*Cf.* 9/21/05 Transcript at 9:10 - 11:2) (testimony of Trustee).) The Trustee has declined to bring actions against the Consignors because the estate has no money with which to litigate. The court concludes that the Trustee's reasoning is not unsound.

This court has had about five years to observe the behavior of at least some of the Consignors in this case and the court believes that the Trustee's fears are not unjustified. It has been suggested by certain Consignors that the Consignors might be willing to facilitate a sale of the Inventory and

[19] A sale of the Consignors' interest in the Inventory would require voluntary bills of sale from them.

then litigate over the sale proceeds.[20] Even if the court credits those suggestions on behalf of those Consignors, those suggestions are not binding on the other Consignors and their amenability to such a suggestion is speculative.

The estate has no money with which to fund litigation against the Consignors. (*See, e.g.,* 9/21/05 Transcript at 86:11 (testimony of Trustee).) It has been suggested that the Trustee could use the seized cash and the seized bank account noted in the Debtor's Schedules. However, $2,900.00 does not pay for much litigation. It also has been suggested that the Trustee might fund litigation with proceeds of the sale of the Debtor Property. It is true that the Trustee might sell the Debtor Property "free and clear" of the Attachment pursuant to Bankruptcy Code § 363(f)(4) (sale "free and clear" of lien in "bona fide dispute"). However, the Trustee could not *use* those sale proceeds without first litigating successfully with Mr. Orsini concerning the validity of the Attachment and/or the aggregate value of property subject to the Attachment (*i.e.*, the Trustee must prove that the Attachment either is invalid or is "adequately protected" by seized property other than the Debtor Property). *Cf.* 11 U.S.C. §§ 363(c), 363(e) (protection for cash collateral).

c. <u>Other Concerns</u>

There are other practical reasons supporting the Trustee's decision not to sell the Inventory (and the Debtor Property). First, the financial results of an auction sale are uncertain (moreover, auctioneers do not work for free). Second, Little John's likely would charge an additional fee for unpacking the property. Third, Storage Charges would continue to accrue while litigation is pending

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[20] At the Status Conference, Mr. Massachi's counsel suggested that his client might be willing to buy out Mr. Orsini's lien for $38,000.00 in order to facilitate administration of this case. (*See* 12/14/05 Oral Record at 2:06:00 *et seq.* (remarks of Attorney Novak).) Nothing ever came of that suggestion to the court's knowledge.

and all accrued Storage Charges would have to be paid from sale proceeds.[21] Fourth, fees incurred by the Trustee in the course of litigation would have to be paid before general unsecured claims could be paid. *See* 11 U.S.C. § 726(a) (distribution according to priorities). Those concerns are real.

2. The Attachment

Pointing to certain aspects of the record in the Civil Action, the Objectors argue that the Attachment was vacated in the Civil Action and that the Trustee is required to assert that alleged invalidation in litigation against Mr. Orsini. The Trustee does not agree with the Objectors that the Attachment was vacated. This court will not decide that issue. It is a matter of interpretation of proceedings in the Superior Court which is better left to the Superior Court itself. In any event, avoidance of the Attachment has material value to the estate only to the extent that the Trustee can extract meaningful value from the seized property. As discussed above, the court will not disturb the Trustee's judgment that the foregoing cannot be accomplished effectively.

3. The Orsini Claim, the Damage Claim, the Quality Roofing Claim, the Sobol Claim and the Manager Claim

For the reasons set forth below, the court finds and/or concludes that the Trustee's decision not to litigate the referenced alleged causes of action is neither arbitrary nor in bad faith. Accordingly, that decision will not be overturned by this court.

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[21] There was $12,620.50 in accrued and unpaid Storage Charges as of the July 25, 2006 hearing. (*See* 7/25/06 Transcript at 257 (testimony of Ms. Warro).) That does not include $8,810.30 in Storage Charges that has been paid by Mr. Orsini (*see id.*) who likely would be entitled to recover that amount from the proceeds of a sale of the Inventory (and the Debtor Property). It has been suggested that Little John's might waive Storage Charges (and an unpacking fee) in exchange for a release (or reduction) of the Damage Claim. The probability of that result is speculative at best. (*See* section II.B.3, *infra*.)

a. The Damage Claim

As noted above, the Objectors claim that the Inventory and/or the Debtor Property was damaged during the course of the seizure pursuant to the Attachment and/or during storage and some person or persons (including but not necessarily limited to Mr. Orsini, the seizing sheriff and/or Little John's) is/are liable therefor. However, title to the Damage Claim derives from title to the allegedly damaged property and, accordingly, is infected with the same impediments to realization of value for the estate.[22]

b. The Orsini Claim, the Quality Roofing Claim, the Sobol Claim and the Manager Claim

None of the Objectors suggest that the Manager Claim has any worth.[23] With respect to the other alleged claims, the Trustee would have to rely on the Manager as his chief witness. The Trustee believes that the Manager would not be a credible witness. (*See, e.g.,* 7/18/06 Transcript at 15-17 (testimony of Trustee).) The Trustee also notes that, in arbitration proceedings between Mr. Orsini and the Debtor, the arbitration panel disparaged the Manager's credibility in its decision. (*See* Trustee Exhibit 2 (from 6/17/04 hearing on the Sale Notice) ("[Arbitrators'] Decision and

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[22] None of the parties have discussed the alleged but undefined preference claim asserted by the Debtor against Mr. Orsini referred to in the *Prior Decision*. (*See Prior Decision* at 27.) The existence of the foregoing appears to have been founded on the erroneous belief that Mr. Orsini's obtaining a prepetition confirmation of an arbitration award in the amount of $110,000.00 constituted a preference. (*See* 7/18/06 Transcript at 21-23.) It did not. It is true that a postpetition order of attachment was entered on the referenced supplemental judgment (*see* Orsini Exhibit C), but that order is void. *See City Bank v. Industrial Bank NA (In re Brown),* 178 Fed. Appx. 409, 2006 WL 1210789 (5th Cir. 2006).

[23] Mr. Orsini has asserted the Manager Claim which challenges the Manager's trustworthiness to resume control of the Debtor's management. However, Mr. Orsini, a major claimant in this case, supports the dismissal. On the other hand, the Objectors have never claimed that the Manager is untrustworthy.

Award") ("The arbitrators found testimony of the defendant's principal, Kathleen Tarro, to be prevaricated and without credibility.").) In any event, the court defers to the Trustee's opinion of the Manager's (low) worth as a witness.

4. Balancing of the Equities

The court remains mindful that chapter 7 relief is both "a qualifying debtor's right [and] . . . such debtor's creditors' remedy," (*Prior Decision* at 27).[24] However, here an experienced and competent chapter 7 trustee has decided that this case is not an effective remedy for the Debtor's creditors[25] and the court defers to that decision because the court has concluded that the Trustee's decision in that regard is neither arbitrary nor in bad faith. There may be creative approaches to administering this case in bankruptcy which have not been considered by the Trustee (or this court). However, the law does not require the Trustee to administer the estate by any means theoretically possible. Rather, the court will defer to Trustee's decision not to administer the case if it is sufficiently supported so that a court can determine that such decision is neither arbitrary nor in bad faith. The court agrees with the Trustee that the Debtor and the Consignors can pursue their respective state law rights and remedies (including with respect to the Attachment and the claims discussed in part II.B.3, above) in state court.

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[24] The Debtor cannot claim a right to a chapter 7 discharge because it is an artificial entity not eligible for a chapter 7 discharge. *See* 11 U.S.C. § 727(a)(1).

[25] The Trustee has been a panel trustee in this district from the inception of the Bankruptcy Code and did some trustee work under the prior Bankruptcy Act as well. (9/21/05 Transcript at 91:20 - 92:1 (testimony of Trustee).) He estimates that he has served as trustee in about 15,000 cases. (*Id.* at 92:9-10 (testimony of Trustee).) The UST agrees with the Trustee's assessment of this case. (*See* 9/21/05 Transcript at 115-122 (remarks of counsel for UST); Doc. I.D. No. 454.)

The Objectors argue that dismissal of the case would redound to Mr. Orsini's benefit at their expense. It is true that dismissal of this case will eliminate the automatic stay of further proceedings in the Civil Action. However, the Consignors still can litigate the respective priorities of their interests and Mr. Orsini's lien in state court. It also is true that, if the Attachment has been vacated, Mr. Orsini would be an unsecured creditor in this case. On the other hand, if this case is dismissed (and even if the Attachment has been vacated) Mr. Orsini might yet obtain a lien which may be senior to the Consignors' interests in the Inventory and the Debtor Property. However, weighing that argument against the Trustee's argument (supported by the UST) that this case is not susceptible of effective administration, under all the circumstances set forth above the court finds the Trustee's concerns to be weightier.

Under the foregoing circumstances, the court defers to the Trustee's decision that this case is unadministratable and, accordingly, concludes that "cause" exists to dismiss this case.

III. CONCLUSION

For the reasons set forth above, an order will enter dismissing this case.

Dated: February 2, 2007 BY THE COURT