UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

In Re:	)	Case No. 90-10119
	)	Chapter 11
ROBIN HOOD, INC., a/k/a - d/b/a Sherwood Forest, Sherwood Forest Mini Storage and Sherwood Forest Utility,	)	
Debtor.	)	

ORDER APPOINTING TRUSTEE

This matter is before the court on the Motion of Brevard Federal Savings and Loan Association (hereafter "Brevard Federal") for the Appointment of a Trustee Pursuant to 11 U.S.C. § 1104 (hereafter "the Motion"). Brevard Federal is one of the debtor's secured creditors, and other secured creditors support the Motion. The court has concluded that a Trustee should be appointed, and by this Order appoints Dennie R. Martin as Trustee for the debtor.

Background

Members of the Dehon family own and control the debtor, whose day-to-day activities in recent years have been conducted by Arthur Dehon, Jr. Over the past thirty-odd years the debtor principally has been involved in the development and sale of building lots in a residential development known as Sherwood Forest.

The principal assets of the debtor are undeveloped tracts of real estate in Transylvania County, North Carolina. The debtor owns approximately 525 acres in Sherwood Forest which could be

developed into about 130 residential building lots, some of which currently have road access and utilities. The debtor also owns a nearby 607-acre tract of undeveloped land with one-half mile state road frontage and another 97-acre tract of undeveloped land. Additionally, the debtor owns some other lots, condominiums, and cluster homes. These assets may have a value of approximately $4 million.

The debtor has secured debts totalling over $1.3 million and unsecured debts of over $200,000. Among the secured creditors, Brevard Federal has a secured debt of $1.06 million, C.K. Federal has a secured debt of $246,475, and NCNB has a secured debt of $57,536.

Historically, the debtor has conducted its own marketing efforts directed principally at the sale of single family residential building lots. Recently, the debtor built a small number of condominium units for sale as part of its marketing efforts. Over the course of thirty-three years, the debtor has sold about three hundred lots, or an average of nine lot sales per year, and twenty-four condominiums. In 1988 the debtor conducted an intense marketing effort with the assistance of an outside organization, which resulted in the sale of thirty-seven lots. Because of high marketing costs, however, this program was not deemed successful and was terminated. In 1989 and 1990 the debtor failed to sell any lots.

In February 1990, the debtor filed its Chapter 11 bankruptcy petition. Upon the filing of bankruptcy, the debtor retained a

local independent real estate agency, Coldwell Banker Melton Company (hereafter "the Melton Company"), to market its lots. Two lots have been sold since that time. Since filing for bankruptcy, the debtor has transferred the "amenities" of the Sherwood Forest development -- several tennis courts, five lakes, a swimming pool, a par 3 golf course, and the "green areas" -- to the Homeowner's Association.

By all accounts, the Transylvania County real estate market has been depressed for several years. But, other nearby developments have had considerably more sales activity and sales success than the debtor. Notwithstanding the poor market conditions in 1989 and 1990, Dehon sold his own home and acreage for approximately $250,000, transferred a lot to his mother, and engaged in several other transactions which creditors have questioned.

After an initial hearing on Brevard Federal's Motion, the court entered an Order of January 9, 1991, in which it appointed Dennie R. Martin as Trustee, but limited (1) his powers to investigating the debtor's operations, formulating a plan for future operations, and making recommendations to the court and (2) his term to approximately sixty days, at which time a further hearing on the issue was scheduled. The court conducted subsequent hearings on Brevard Federal's Motion during which the court heard the Trustee's report (hereafter "the Trustee's Report") and the evidence of the debtor in opposition to the Motion and the Trustee's Report.

DISCUSSION

Section 1104(a) of the Bankruptcy Code provides for the appointment of a trustee:

> (1) for cause, including fraud, dishonesty, incompetence or gross mismanagement of the affairs of the debtor by current management... or similar cause...; or
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> (2) if such appointment is in the interests of creditors, any equity security holders, and other interest of the estate...

11 U.S.C. § 1104(a). These two standards may require similar showings. See 4 Collier on Bankruptcy ¶ 1104.01[d] at p. 1104-26. Under either standard the appointment of a Trustee is an extraordinary remedy requiring proof by clear and convincing evidence. In re Ionosphere Clubs, Inc., 113 Bankr. 164, 167 (Bankr. S.D.N.Y. 1990); In re PMH Corp., 116 Bankr. 644, 646 (Bankr. N.D. Ind. 1989). Mindful of the appropriate standards, the court has concluded that the evidence in this case clearly and convincingly requires the appointment of a Trustee in the interests of creditors, equity owners, and other interests of the estate for principally three reasons.

1. *The only prospect for successful reorganization of this debtor requires appointment of a Trustee.*

The Trustee's Report, which the court finds credible, notes several management deficiencies of the debtor which may be categorized as inflexibility and stagnation. Despite substantial changes in its market over the recent years, the debtor has continued to operate to the brink of bankruptcy as it had for

over thirty years. The debtor's product consisting of the sale of building lots, its high prices, and its internal and exclusive marketing efforts have not changed in years. In addition, the Sherwood Forest infrastructure and amenities have not been maintained in comparison to its competition.[1] These findings and conclusions are supported by the fact that other nearby developments have enjoyed significantly greater sales success than the debtor, despite the poor recent and current market conditions and problems within their own developments.

The debtor's stagnation and inflexibility may be demonstrated best by the fact that the debtor virtually has failed to adapt its efforts to the changing market conditions or work out its situation except upon feeling the heat of its creditors' breath. The debtor operated internally and exclusively as its own marketing agent from its inception prior to 1960 until its bankruptcy in 1990.[2] After filing for bankruptcy, the debtor retained the Melton Company to conduct its marketing efforts. Although Melton Co. has considerable autonomy and the debtor has not countermanded any of its efforts, the retention of an outside marketing agent has brought about little actual change in pricing, product design, or marketing efforts for which little cash has been or is now available. The debtor claimed to have previ-

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[1] The court bases this finding upon the conclusions of the Trustee, the Trustee's Report, and all of the evidence before the court.

[2] The 1988 marketing program was operated as in internal effort even though it was handled by an independent contractor.

ously thought of and considered most of the points raised and changes suggested in the Trustee's Report, but the court can find no action by the debtor or other support in the record to justify its claim. All but Adam are subject to such contentions, and the court finds them baseless here.

A most important factor considered by the court is the fact that lot sales alone (the debtor's traditional business) are not sufficient to reorganize this debtor and to allow the debtor to repay its large and largely secured debts. Consequently, a "business as usual" approach, even if accelerated and successful, will not result in the reorganization of this debtor. Substantial changes to the nature of the debtor's secured debts is required to preserve this debtor, Sherwood Forest (which by all accounts is a real asset to its community), and the debtor's other assets. But, for the reasons stated above, below, and in the Trustee's Report, there is little, if any, workable relationship between the debtor's current management and the secured creditors. Virtually all of the secured creditors have filed motions for relief from the automatic stay. While their efforts to realize on their own collateral may be forestalled for some period because of the value of the debtor's land and the debtor's purported equity in it, that situation cannot last forever. The evidence clearly reveals that the debtor's best efforts cannot produce enough income to satisfy its debt. Consequently, without the secured creditors' cooperation, this debtor cannot be reorganized absent a miracle. The debtor's current relationship with

its secured creditors, however, cannot produce the necessary cooperation. The Trustee's efforts may not be successful, but the court is convinced that the debtor's efforts cannot be successful. For this reason, appointment of a Trustee is in the best interests of all parties.[3]

2. *The debtor's own actions support appointment of a Trustee.*

The court is reluctant to, and does not, characterize the debtor's actions as rising to the level of "fraud, dishonesty, incompetence or gross mismanagement," but they are sufficiently close to that level to support the appointment of a Trustee. See 11 U.S.C. § 1104(a)(1). The virtual absence of sales in recent years bespeaks serious "management" problems. The debtor's failure to respond to these conditions until it felt the pressure of its creditors compounds those problems. The problems are compounded further by the questioned transfers by Mr. Dehon, the debtor's principal manager, to his mother, to himself, and for his personal benefit. All of these questioned transactions were

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[3] The court has taken due cognizance of the conjunction "and" in § 11104(a)(2). All of the significant secured creditors have supported the motion for appointment of a Trustee. However, the Homeowner's Association most recently, if not always, has sided with the debtor and a number of unsecured creditors supported the debtor's position apparently for reasons that are only in their short-term self interest. While these expressions of support for the debtor are not insignificant, they do not offer a solution to ultimate failure of reorganization, loss of the debtor's assets to foreclosure, and ultimate diminution or eradication of their own interests. Consequently, the court rejects the support offered to the debtor by the Homeowner's Association and some unsecured creditors as not truly being in their own interest.

"explained" and not shown to be actually fraudulent. When considered in the context of the debtor's poor sales performance, they nevertheless serve reasonably to destroy any credibility and relationship between the debtor and its secured creditors. Finally, the debtor's situation and problems are further exacerbated by the fact that the debtor's principal, Mr. Dehon, is spending one-half of his time in Florida pursuing other interests. While the court is reluctant to fasten the rubric of section 1104(a)(1) to this debtor, such a finding is not without support.

3. *The debtor's insiders' interest is inconsistent with reorganization.*

The debtor was formed over thirty years ago and always has been owned and controlled by the Dehon family. The Dehons have accumulated some valuable tracts of land in Transylvania County and have overseen the partial development of Sherwood Forest into a pleasing residential development. For all its aesthetic accomplishments, however, the debtor has not been financially successful and has significant debts it cannot pay, either presently or on any realistic projected basis. The understandable ties to this land by the Dehon family act as a deterrent to reorganization and, in essence, a conflict of interest with the interests of the estate. These ties, too, support the appointment of a Trustee.

The appointment of a Trustee for a debtor is an extreme remedy and one to be exercised only with great caution. In re General Oil Distributors, Inc., 42 Bankr. 402, 408 (Bankr. E.D.N.Y. 1984); In re Ford, 36 Bankr. 501, 504 (Bankr. W.D. Ky. 1983). It certainly should not be based upon a popularity contest or the howl of creditors alone. In this case, the court is convinced that the appointment of a Trustee is necessary for the benefit of all interests in the estate because it poses the only realistic prospect for reorganization of this debtor.

The court initially appointed Dennie R. Martin as Trustee with limited duties at the suggestion of Brevard Federal, the moving creditor. After reviewing the Trustee's Report submitted by Mr. Martin, observing Mr. Martin's efforts, the court is satisfied that he is the appropriate person to appoint as Trustee in this case.

For all of the above reasons, the court finds and concludes that the requirements of 11 U.S.C. § 1104(a) have been demonstrated clearly and convincingly. Consequently, the court ORDERS that:

1. The Motion of Brevard Federal Savings and Loan Association for the Appointment of a Trustee Pursuant to 11 U.S.C. § 1104 is hereby granted;

2. The appointment of a Trustee for this debtor is appropriate and required;

3. The court appoints as Trustee Dennie R. Martin; and

4. The Trustee shall have all powers and duties specified in Title 11 of the United States Code for Chapter 11 Trustees.

This the 12th day of April, 1991.

George R. Hodges
United States Bankruptcy Judge