

UNITED STATES BANKRUPTCY COURT EASTERN DISTRICT of NORTH CAROLINA
GREENVILLE
MONDAY, DECEMBER 22, 2014

At issue was MidSouth's plan for structured bankruptcy within Chapter 11. Under the plan, MidSouth would pay the FH-POA a total of \$5000, in quarterly payments over a period of five years. In exchange, MidSouth asked that the court strip *all usage restrictions* (covenants) on the properties it owns (the amenities). MidSouth asked that it be empowered to make “rational business decisions” about what to do with the property.

Each “class” of creditors had the right to accept, or reject the plan. Class 1, Wells Fargo, the primary creditor, voted in favor of the plan, and agreed to amortize the debt of more than \$3 million over a period of 20 years. Class 2, Grady Shumate would cancel his deed of trust in exchange for \$5000 over five years, as would Class 3, Jack Shaw. Class 5, the Fairfield Harbour Property Owners, however, voted 1312 to 9 to reject the MidSouth plan.

Briefly, MidSouth claimed that when it lost the right to collect amenities fees, it lost the ability to maintain the amenities. It also claimed that a boycott and the ill will of the community made profitability no longer possible. MidSouth requested relief from the obligation to maintain the amenities as recreation areas and relief from the covenants that restrict its use of the properties.

Our attorney protested that the FH covenants “run with the land” and can not be stripped by the court of their intended recreational use. To do so would strip property owners of their rights and easements to the land. “Does the court have the right to excuse zoning or environmental restrictions?” he asked. If so, where does it end? Binding and enforceable incidents of ownership can't be changed. He also warned that without restrictions, the debtor (MidSouth) may choose to close everything using its “business judgment” when an increase in the cost of a round of golf, or an increase in the number of rounds played, doesn't solve its financial difficulties.

The MidSouth attorney pointed out that, provided the court approved the MidSouth plan, its present plan to spend \$122,000 on a new irrigation pump clearly demonstrates its intention to continue to maintain its property. Both Shaws insist they have no plans to develop any part of the Shoreline course, but were silent about guarantees.

Under questioning, Jack Shaw admitted he had invested in the purchase on the advice of acquaintances, and had not done due diligence before investing. He and son Donny admitted that neither had any experience in golf course management, nor were they involved in the day to day operation, and, though the Harbour Pointe golf course was expected to turn a profit in 2015, their total investment was not profitable. Yet, they insisted that their proposed plan would succeed with Jack Shaw and son Donny serving as unsalaried managers. To support the plan, Jack Shaw was willing to inject another \$1.8 million over the next five years, above the \$475 thousand he has paid since the declaration of bankruptcy, and the loan he has guaranteed to Wells Fargo. That, Shaw stated, proves that he is not abandoning his responsibilities here. In his closing statement, Kyle Nutt, the POA's other attorney, stated that for the past five years, the cost to maintain the amenities was \$4.2 million. Jack Shaw's proposal to commit \$1.8 million for the next five years, therefore, was unrealistic.

If the court did not approve his plan, Shaw said, MidSouth would have no alternative but to go into Chapter 7 bankruptcy. In that case, his opening bid for the property would be \$200 thousand. If the POA wanted to purchase the amenities, Shaw said, it could bid as well. If the POA wanted to save the

amenities, he said, it could not be done without POA assistance, or voluntary payment of amenities fees by property owners.

NOTE: As we know, the courts have affirmed that the POA is not allowed to purchase the amenities using POA dues. However, if the amenities were purchased by an entity such as an LLC, and the POA were then *deeded* the amenities, unencumbered, and free of debt, we, as a community, could begin to recover our community, and our property values.

Donnie Shaw, was asked by the judge what price he would be willing to take for the property. His answer was \$4.9 million – for property appraised at approximately \$3 million.

The judge commented *hypothetically*, that one possible solution to the impasse might be to combine some funding from MidSouth, and some funding from the property owners, perhaps \$300 per property owner in recreation fees. Of course, many factors need to be considered before any plan can be presented to the court.

At the end of this very long day, the judge denied MidSouth's plan for reorganization, and denied the POA request for dismissal. He directed the two sides to come together and return with a viable plan by mid-February. He reminded both sides that Fairfield Harbour was once the “jewel of Eastern North Carolina” and that, both MidSouth and the Property Owners Association need to work together to preserve their property values. If the two parties can't agree on a plan, he emphasized, neither will have anything of value in the end.

AN INVITATION:

Clearly, we Harbourites have a challenge before us. The amenities – the marinas, the tennis courts, the Shoreline property and the Harbour Pointe golf course are the heart and soul of our community. If we allow these amenities to continue to deteriorate, or lose them altogether, we'll lose much of our property values. The Wainwright Decision has affirmed that we can't purchase the amenities using POA dues, and MidSouth claims it can't restore the amenities with the slender profits from the Harbour Pointe Golf Course.

However, if the amenities were purchased, and the POA were *deeded* the amenities, unencumbered, and free of debt, we, as a community, could begin to recover our community, and our property values.

We know what we need to do, but, right now, we don't know how to do it. Do you?

We need new ideas, “*outside the box*” ideas, if we are to survive. Got any? Thoughts? Suggestions? We need your creative input for a viable plan. Your POA Board welcomes any constructive suggestions while they work to comply with this directive. Let's give this problem some very serious thought, folks. February is just around the corner!

Your FACTS Reporter