UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

In Re: Case No. 17-40185-KKS

CAMPBELLTON-GRACEVILLE HOSPITAL CORPORATION, Chapter 11

Debtor.
_____/

EMPOWER H.I.S.' OBJECTION TO SECOND AMENDED JOINT DISCLOSURE STATEMENT IN CONNECTION WITH CHAPTER 11 PLAN OF LIQUIDATION OF CAMPBELLTON-GRACEVILLE HOSPITAL CORPORATION, FILED BY THE DEBTOR AND THE OFFICIAL COMMITTEE OF UNSECURE CREDITORS (Doc. 811) AND SECOND AMENDED JOINT CHAPTER 11 PLAN OF LIQUIDATION PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE, FILED BY THE DEBTOR AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS (Doc. 812)

COMES NOW EMPOWER SYSTEMS H.I.S., LLC ("Movant"), and hereby objects to (1) the *Second Amended Joint Disclosure Statement in Connection with Chapter 11 Plan of Liquidation of Campbellton-Graceville Hospital Corporation, Filed by the Debtor and the Official Committee of Unsecure Creditors* (Doc. 811) ("Disclosure Statement"), and (2) the *Second Amended Joint Chapter 11 Plan of Liquidation Pursuant to Chapter 11 of The Bankruptcy Code, Filed by the Debtor and the Official Committee of Unsecured Creditors* (Doc. 812) ("the Joint Plan"), and in support states:

CGH's Ineligibility to Be a Debtor in Bankruptcy and Lack of Authority to File

The Debtor Campbellton-Graceville Hospital Corporation ("CGH" or "Debtor") is not eligible to be a Chapter 11 debtor. The facts establishing debtor as a governmental unit, as defined under 11 U.S.C. § 101(27)[1], are unassailable. Because CGH is a government unit, it is not a "person" within the meaning of §§ 101 and 109 and is therefore ineligible to file under Chapter 11. Moreover, it has no legislative authority to file under Chapter 9.

[1] Unless indicated otherwise, all ensuing "§" designations used herein shall refer to provisions of Title 11 of the United States Code (i.e., the Bankruptcy Code).
[2] See https://www.guidestar.org/profile/59- 6139709.

The Debtor is a political subdivision of the State of Florida. *See McClenney v. Campbellton-Graceville Hospital*, 1999 WL 334772 (N.D.Fla. 1999) (holding that Debtor is a political subdivision of the State of Florida). Debtor was legislatively created as public entity for the benefit of the citizens and residents of the Campbellton-Graceville Hospital District. *See Campbellton-Graceville Hospital Corporation v. All of the Electors and Taxpayers of the Campbellton-Graceville Hospital District, et al.*, 490 So.2d 1320; Fl. Laws 1961, Ch. 61-2290, § 1 et seq. Its trustees are appointed by the Governor of the State of Florida, upon the nomination of the board of commissioners. Fl. Laws 1961, Ch. 61-2290 § 6; Articles of Incorporation, Art. § IV ("Board of Trustees are appointed by the Governor of the State of Florida"). The trustees serve without compensation. Id. § 8.

The Debtor's property is exempt from taxation. Id. § 13. It possesses sovereign immunity from the tortious actions, including negligence, of its officers, agents or employees. Id. § 6; *see also*, *Eldred v. North Broward Hospital Dist.*, 498 So. 2d 911 (Fla. 1986); *Fla. Stat.* § 768.28. By and through the board of commissioners of Jackson County, the Debtor receives tax revenues equal to five (5) mills. Id. §§ 4 and 5; see also *Emergency Motion to Sell* (Doc. No. 143, ¶ 17). The enacting legislation classifies the Debtor as a "public, non-profit corporation." Fl. Laws Ch. 61-2290, § 2. It is not required to file annual reports, e.g. Form 990, required of non-profit corporations because it is classified by the IRS as an arm of a state or local government.[2]

Moreover, both Federal and State courts have previously concluded CGH is a government unit. *See e.g., McClenney,* 1999 WL 334772, at *1. For example, in 1986 CGH tried to lease its hospital facility, but the circuit court instead denied that CGH had any authority to enter into the lease:

[2] See https://www.guidestar.org/profile/59- 6139709.

> [T]he [Circuit] court concluded that "notwithstanding the apparent, emergency need ... Campbellton-Graceville is not authorized under special or general law to enter into or to enforce the subject lease.

Campbellton-Graceville Hosp. Corp. v. All of Electors & Taxpayers of Campbellton-Graceville Hosp. Dist., 490 So. 2d 1320, 1321 (Fla. 1st DCA 1986) (internal brackets omitted). The First DCA, upholding the circuit court's decision, first reasoned that CGH was a political subdivision:

> Campbellton-Graceville Hospital Corporation is a nonprofit entity created in 1961 by a special act of the Florida Legislature.

Id.

Even though CGH is a non-profit corporation, and although the trustees have been given "the same general powers usually given to directors of a private corporation," the statutory charter should be treated as if it were the corporate enabling documents—like bylaws—which constitute an express limit on the powers of the trustees:

> [C]orporate powers are generally restricted by corporate charter or bylaw, and the special act creating the Campbellton-Graceville Hospital Corporation expressly limits the corporate purpose and authority to "erecting, building, equipping, maintaining, and operating" the hospital.

Id. at 1321. The filing of bankruptcy is not any of "erecting, building, equipping, maintaining, [or] operating" the hospital and would have to be said to be a power "incidental" to "operating" the hospital.

Furthermore, CGH sought Court approval to sell certain of its assets, including its real property, to a third party. In order to overcome what CGH refers to as "conditions precedent," the

> "Debtor and [buyer] worked diligently to have the law that may prohibit the conveyance of the real property clarified to clearly permit such conveyance." (Disclosure Statement p. 24.)

The existing law was appended with new and specifically crafted provisions allowing the contemplated sale to go forward. (See CS/CS/HB 1449.)

The Debtor's decision to undertake this task—of changing the law of Florida to facilitate an uncertain sale—proves that CGH is a creature of government. If CGH were not a government unit, this effort would have been unnecessary. Instead, in order to facilitate the possible disposition of its assets, the Debtor took the unusual step of lobbying the Florida legislature to actually change the law governing CGH's operation. The fact that CGH would go to such lengths should put to rest any dispute that CGH is not a government unit.

Section 109 (d) of the Code establishes who may be a debtor under Chapter 11 and states "a person that may be a debtor under chapter 7 of this title...may be a debtor under chapter 11 of this title. (Emphasis added). Person as defined under Section 101(41) "includes individual, partnership, and corporation."

The term "person" does not include a "government unit" like the debtor in this case. 11 U.S.C. §§ 101(41) and (27) (definitions of "person" and "government unit"). Because CGH is not a "person" under § 101(41), it may not be a debtor in a Chapter 11 proceeding. Rather, CGH is a government unit that does not have legislative authority to file bankruptcy.

Under § 101(27), the term "government unit" means "United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government." 11 U.S.C. § 101(27). The term "municipality" includes political subdivisions of a state. 11 U.S.C. § 101(40). Therefore, the agencies and instrumentalities of a state or a state's political subdivisions constitute governmental units.

The Bankruptcy Court in *Las Vegas Monorail* set forth three factors that affect whether an entity is considered a municipality: (1) the extent to which the entity possesses traditional

government powers or attributes; (2) the extent of the control over the entity possessed by the city, state, or county; and, (3) the state's classification of the entity. *See In re Las Vegas Monorail Co.*, 429 B.R. 770, 788–89 (Bankr. D. Nev. 2010); *see also In re: Hospital Authority of Charlton County*, 2012 WL 2905796, at 6-8 (Bankr. S.D. Ga. 2012) (applying test to hold that debtor hospital authority was a governmental unit) (upheld by District Court in Case 5:12-cv-00084-LGW Dkt 8 06/17/2013).

The first factor looks at attributes which tend to establish that an entity is governmental in nature: that it is a creature of specific legislative enactment, that it has sovereign immunity, that is may exercise the right of eminent domain, that it is tax exempt, that it has the power to tax, and that it receives tax revenues. *See In re: Hospital Authority of Charlton County*, 2012 WL 2905796 at 6; *see also Crosby v. Hosp. Auth. Of Valdosta and Lowndes Cnty.*, 93 F.3d 1515, 1525. Here, the Debtor is a creature of specific legislative enactment. It is exempt from paying taxes. It is authorized to receive tax revenues, which it has done while in bankruptcy. It has sovereign immunity. The Debtor is also subject to control by both the State and County Commission.

The second factor examines "whether the authority or agency is subject to control by public authority, state or municipal." *See In re: Hospital Authority of Charlton County*, 2012 WL 2905796 at 7 (citing *In re: Green Cnty. Hosp.*, 59 B.R. 388, 389 (S.D. Miss. 1986). A board of supervisors appointed by a public authority demonstrates that the government possesses some amount of control over the entity. *Id.*; *See also Westport Transit Dist.*, 165 B.R. 93, 95-96; *In re: Barnwell Cnty Hosp*. 2012 WL 1890260, at *7 (Bankr. D. S.C. 2012). Governmental control also exists when a public authority has powers related to the dissolution of an entity or the disposition of assets. *Id.* In *Green Cnty. Hosp.*, the court held that a county hospital was subject to control by a public authority; even the hospital controlled its day-to-day operations. 59 B.R. at 390; *see also Hosp. Auth. of Charlton County* at 8.

Here, according to the enacting legislation, the Debtor is governed by a board of trustees appointed by the Governor of the State of Florida. Fl. Laws Ch. 61-2290, § 6. Furthermore, the state legislature and the IRS classify the Debtor as a public entity. Moreover, the First DCA has noted that CGH has only such authority as is explicitly conferred by the statute that created it:

> As a statutorily-created public entity the Campbellton-Graceville Hospital Corporation is possessed of only such authority as is thereby conferred.

Campbellton-Graceville Hosp. Corp. v. All of Electors & Taxpayers of Campbellton-Graceville Hosp. Dist., 490 So. 2d 1320, 1321 (Fla. 1st DCA 1986).

The third factor "considers the state's own classification or description of the entity." *In re: Hosp. Auth. of Charlton Cnty.*, *8. Here, the Debtor is a "public, non-profit corporation" "for the purpose of erecting, building, equipping, maintaining, and operating at Graceville, within said Campbellton-Graceville Hospital District, a public hospital, primarily and chiefly for the benefit of the citizens and residents of said hospital district." Fl. Laws 1961, Ch. 61-2290, § 2. The IRS also classifies the Debtor as an arm of a state or local government.

After applying the three factors, it is clear that CGH is a governmental unit. First, it possesses a number of traditional governmental attributes, including being a creature of legislative enactment, exemption from taxation, the ability to receive tax revenues, and sovereign immunity. Second, it is subject to control by the state because the Governor appoints the board of trustees and the state and county must authorize a sale of its real property. The enacting legislation made it clear that it was a public corporation for public purposes – the IRS even classifies it as an arm of a state or local government.

Finally, and perhaps most important, the Northern District of Florida has already ruled that the Debtor is a political subdivision of the State of Florida. *McClenney v. Campbellton Graceville Hosp.*, 5:98CV125SPM, 1999 WL 334772, at *1 (N.D. Fla. Feb. 25, 1999). As such, the

Debtor clearly satisfies the definition of a government unit and is therefore ineligible to be a debtor under Chapter 11 of the Bankruptcy Code. Eligibility is a threshold issue that the Court should determine before considering the Disclosure Statement and Joint Plan.

CGH has filed a Chapter 11 case for which it is not eligible and for which it had no authority to file without enabling legislation. While one can be sympathetic to CGH's aims, its methods fail. The First DCA considered—and rejected—the "expediency argument" and stressed that CGH would have to go get a legislative amendment to the enabling statute to provide authority even to enter a lease, much less turn the entire hospital over to a liquidating trustee in bankruptcy for liquidation:

> While financial constraints may impel the Campbellton-Graceville Hospital Corporation to seek a private lease agreement, the agreement in question may not be legally consummated without legislative amendment to the special act which defines the Campbellton-Graceville Hospital Corporation's authority.

Id. Significantly, the DCA found that any doubt about the existence of implied authority should be resolved against the exercise of the implied power, which would necessarily include filing bankruptcy:

> Although authority may be implied as a necessary incident of powers expressly granted, doubt as to the existence of a power should be resolved against its exercise.

Id.

While CGH may now have authority to sell its real property[3], it remains a government entity. Ultimately, CGH's attempt to use Chapter 11—for which it is not eligible as a non-person

[3] In addition to the recently adopted enabling legislation, the Order approving the sale states: "Should this case be dismissed or these proceedings otherwise be terminated, such dismissal or termination shall have no impact on this Order or its enforcement, and this Order shall remain in full force and effect and shall survive and continue to be binding notwithstanding such dismissal or termination." (Doc. 708, ¶ 6.)

under the Code—must fail due to the lack of any amendment to the enabling legislation.[4] The Debtor is not eligible to be in a Chapter 11 under the plain meaning of the Bankruptcy Code. Eligibility is an absolute bar of this Debtor's legal right to be in a bankruptcy proceeding under Chapter 11.

CGH's Joint Plan Cannot Be Confirmed

It is also axiomatic that if the trustees lack authority to file the case without either (1) the approval of the legislative or executive branches, or (2) via an amendment to the enabling legislation as the First DCA suggested, then it is similarly improbable that they have the authority to turn over the hospital's assets to a liquidating trustee—at least those assets that remain following the sale of CGH's hospital facility.

The question of whether the Bankruptcy Court can divest the state of its assets and turn them over to a privately appointed "Liquidating Trustee"—raises profound Constitutional questions about whether the assets of a political subdivision of the State of Florida can be "liquidated" by order of the Bankruptcy Court without initial legislative permission from the state. We know this cannot happen because the Debtor had to get legislative permission to sell its hospital facilities—and only then to a specific corporation and no other party. It has no authority to dispose of its remaining assets to as yet unnamed third parties.

CGH May Not, As It Proposes, Litigate the Claims of Creditors

The Joint Plan is designed to transform CGH into a litigation mechanism. It will of course no longer operate as a hospital. In settling with two entities, CGH seeks to facilitate lengthy, extensive, and far reaching litigation against third parties. And while the Debtor may prosecute its own causes of action after confirmation, that is not the thrust of the Joint Plan. The

[4] Although this was the analysis of the First DCA—a state court—the analysis remains the same under federal law, which depends on the same State law under the *Eerie* doctrine.

general unsecured Class 3 claims amount to $118,465,785.27 and "consist primarily of third party payors alleging overpaid insurance claims not properly reimbursed by Debtor."

In order to solicit votes, the Debtor proposes that each unsecured Class 3 creditor assign its causes of action to the Debtor, under which scenario the assigning creditor may "increase the allowed amount" of its unsecured claim by up to 50% of the amount recovered. Without assignment, that allowed amount sinks to a "Pro-Rata Distribution from the Liquidating Trust." No example of how this works in practice is provided in the Disclosure Statement, but the message is clear: creditors will fair better if they assign their claims to the Liquidating Trust. The only limitation on these claims is that they be "related" to the Debtor, though that term is undefined. Nonetheless, it can be surmised that these are claims against third parties, for how could the Debtor take assignment of and litigate a claim against itself?

CGH's Joint Plan thus proposes to transfer the claims of non-debtor third-parties against other unrelated third-parties to CGH for prosecution in the Bankruptcy Court. Generally speaking, the Bankruptcy Court would lack jurisdiction as to such claims and potential defendants. But the Joint Plan contemplates generating standing and jurisdiction by the mechanism of assigning these otherwise non-prosecutable claims to CGH for prosecution on behalf of the assigning parties. The law does not allow this.

In *Kipperman v. Onex Corp.*, 411 B.R. 805 (N.D. Ga. 1998), the bankruptcy court considered and rejected a strategy similar to what CGH proposes to do in its Joint Plan, citing the U.S. Supreme Court for the proposition that creditors may not assign their claims to a litigation trust:

> The court believes that this understanding of the Litigation Trust is consistent with the general law relating to the standing of litigation trustees. Litigation trustees do not have standing to directly pursue claims on behalf of creditors and creditors may not assign their claims to a litigation trust. *See Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416 (1972).

Id. at footnote 21 (emphasis added). Similarly, in *Mukamal v. Bakes*, 383 B.R. 798 (S.D. Fla. 2007), the Southern District of Florida considered the same issue and reached the same conclusion as did the *Kipperman* court.

First, the Southern District reasoned that, lacking an "absolute" or "automatic" assignment of claims in the plan, such assigned claims were not property of the bankruptcy estate and the liquidating trustee lacked standing to pursue them:

> … although the definition of 'Causes of Action' contemplates the possibility of assignment of creditors' claims to the Litigation Trust, no automatic assignment of such claims arises from this definition or elsewhere in the plan of reorganization"). Because such third party claims were not directly assigned, they are not property of the bankruptcy estate, and, thus, Plaintiff lacks standing to pursue them.

Id. at 811 (internal cites omitted).

The Southern District then considered what the outcome would have been if the claims had been "directly assigned," and found that the trustee would probably still lack standing:

> The issue, however, is whether the *Caplin* rule applies if there is an "unconditional assignment of creditor claims." Even as to this issue, there is authority that the rule stated in *Caplin* holds true even in cases where a creditor has assigned all claims to a trustee or trust. *See In re Bennett Funding Group, Inc.*, 336 F.3d 94 (2d Cir.2003) (explaining that the assignment of creditors' claims did not confer standing on the trustee); *Williams v. California 1st Bank,* 859 F.2d 664, 666 (9th Cir. 1988) ("Although we are mindful that, unlike *Caplin,* the creditors here assigned their claims to the Trustee, we do not think the mere fact of assignment in order to allow the Trustee to pursue the claims for the creditors sufficiently distinguishes this case to allow of a different result. Evaluating the Trustee's claim in light of the three concerns that informed the Court's holding in *Caplin* reveals substantially the same problems exist")[.]

Id. (emphasis added). The Southern District described the Supreme Court's reasoning in *Caplin*, affirming *Caplin's* holding that trustees may not act as collections agents for third parties:

> [The Supreme] Court concluded that there was no provision in the bankruptcy laws allowing a trustee to assume the responsibility of suing on behalf of creditors of the estate. The Court held that a trustee is not authorized to "collect money not owed to the estate."

Id. at footnote 10.

The *Mukamal* court then joined the reasoning of the Eighth Circuit who found it "extremely noteworthy" that Congress had had an opportunity to overrule *Caplin* but did not do so—and then also, like the Eighth Circuit, ratified the inability of a liquidating trustee to pursue assigned claims:

> We agree with the Eighth Circuit that Congress' express decision not to overrule *Caplin* is "extremely noteworthy." *Ozark Equip. Co.*, 816 F.2d at 1228. We also share that court's certitude that "Congress' message is clear—no trustee, whether a reorganization trustee as in *Caplin* or a liquidation trustee, has power under the Code to assert general causes of action, such as an alter ego claim, on behalf of the bankrupt estate's creditors." *Id.*

Id. at 813 (internal brackets and ellipses omitted). No trustee has that power. Yet that is exactly what the Joint Plan proposes to do here. Because the Joint Plan is barred by applicable law, it should not be confirmed.

WHEREFORE, Empower H.I.S. respectfully requests that this Court reject the Joint Plan and order all such further relief as the Court deems necessary and just.

Dated this 19th day of October 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this day, by electronic transmission through the Court's CM/ECF system upon all parties on the following CM/ECF Service List:

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