

UNITED STATES BANKRUPTCY COURT  
For the Southern District of Iowa

In the Matter of :  
SCOTTISH LINKS, INC. : Case No. 90-2243-W H  
Debtor. : Chapter 11  
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**FINDINGS AND CONCLUSIONS--MOTION TO DISMISS**

Bill D. Campbell's Motion to Dismiss, and the resistance thereto, came on for hearing on October 11, 1990, the parties appearing by their attorneys of record: Peter J. Peters, P.C., for the movant/creditor, Bill D. Campbell; Mark L. Laughlin, Laughlin, Peterson & Lang, Attorneys at Law, for the Debtor-in-Possession; Scott H. Hughes, Attorney at Law, for the First National Bank of Council Bluffs, Successor Trustee for the holders of Scottish Links' mortgage participation notes; and Norman L. Springer, Jr., Robak & Springer, Attorneys at Law, for PACJETS Financial, Ltd., a "lease" creditor of the Debtor-in-Possession. At the conclusion of the hearing, the Court took the matter under advisement.

Bill D. Campbell (herein "Campbell") filed this motion to dismiss upon the basis that he is the owner of 50 percent of the issued shares of Debtor-in-Possession; he is a director of Debtor-in-Possession; he was not given notice of the planned filing of the Chapter 11 petition filed herein; he did not and does not consent to the filing of the petition herein; the acting directors of Scottish Links lacked authority to file the Chapter 11 petition; the filing of the within petition was

without the authority of the shareholders and without notice and authority by the directors of Scottish Links; and, Campbell prays that the Court dismiss the within Chapter 11 petition.

Scottish Links denies the essential allegations of this motion to dismiss and alleges that Campbell is not the owner of any shares of Scottish Links; Campbell is not a director of Debtor corporation; the present directors of Debtor corporation had authority to file the within Chapter 11 petition; McIntosh & Co., Inc., is the owner of 100 percent of the outstanding shares of Debtor corporation; Debtor corporation did have the authority of a majority of the shareholders to file the voluntary petition herein; Campbell filed a foreclosure action in the Iowa District Court and said filing is an election of remedies precluding Campbell's authority over and management of Scottish Links; and, the motion to dismiss should be denied and dismissed.

For the reasons set forth below, Campbell's motion to dismiss will be sustained and this case will be dismissed.

#### **JURISDICTION**

This Court has jurisdiction pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

### FINDINGS OF FACT

1. The Court will first introduce some of the principals involved in this case. Campbell operated and managed a golf course in southwestern Iowa until he sold it in 1983. He had a plan to build and develop a golf course in the Omaha-Council Bluffs metropolitan area and was referred to Stephen M. McIntosh as a possible source of financial backing.

2. The relevant McIntosh family consists of the following members: Melvin McIntosh, deceased 1990. Dorothy R. McIntosh is Melvin's surviving widow and mother of Stephen M. McIntosh and Craig McIntosh.

3. McIntosh & Co., Inc. (herein "McIntosh Co.") is a Nebraska corporation which is a holding corporation of subsidiary corporations. Stephen McIntosh is the president and Dorothy McIntosh is the secretary of said corporation.

4. The McIntosh Co. contends that Scottish Links is a wholly owned subsidiary.

5. McRealty, Inc. (herein "McRealty") is a wholly owned subsidiary of the McIntosh Co. McRealty is the general partner and construction manager for Turnbridge Limited Partnership (herein "Turnbridge"). The limited partners of Turnbridge include McIntosh family members and entities other than McIntosh.

6. MFS, Inc. (herein "MFS") is a wholly owned subsidiary of the McIntosh Co. It previously operated a

restaurant in Omaha and operates the food concession at the golf course.

7. On March 7, 1986, the McIntosh Co. and Campbell entered into a joint venture agreement to form a corporation under the name of Scottish Links, Inc. (Exh. 3). Scottish Links was incorporated for the business of acquiring, constructing, developing, and operating a golf course, and developing the land surrounding it.

8. McIntosh Co. and Campbell each subscribed to 100 shares of common stock for a total of 200 issued shares (Exhs. 1 and 2). Campbell received a 50 percent equity ownership for his labor, concepts, and expertise in the golf course development and management area. McIntosh Co. received a 50 percent equity interest as a financial backer.

9. The Joint Venture Agreement (Exh. 3) provided that the McIntosh Co. would provide a line of credit to Scottish Links to be used for the acquisition of real estate and development of a golf course. This line of credit was to be paid within three years of the agreement, or by March 7, 1989.

These McIntosh Co. loans were to be secured by a first mortgage (Exh. 3, ¶ 4).

10. Scottish Links was to secure a long-term loan to repay its loans to the McIntosh Co. (Exh. 3, ¶ 6). Campbell was not to have any voting rights on his shares of stock until the entire balance of all loans by the McIntosh Co. to

Scottish Links had been repaid in full. If the McIntosh Co. and Campbell had a disagreement regarding the operation of Scottish Links, after the repayment of the loans, an arbitrator was named to resolve the dispute. The arbitrator's decision was conclusive and binding.

11. The Articles of Incorporation of Scottish Links, Inc. were signed on March 25, 1986, and filed on April 15, 1986 (Exh. C).

12. The golf course opened for play on June 1, 1987.

13. A conflict developed between Campbell and McIntosh Co. and the McIntosh Co. attempted to deny Campbell the opportunity to vote his stock in Scottish Links.

14. This conflict resulted in Campbell filing an action in the Iowa District Court, Pottawattamie County, against the McIntosh Co. and Scottish Links, Pottawattamie County No. 58629.

15. On July 27, 1988, a decree (Exh. 4) was filed in said Iowa District Court action. The Decree provided, as relevant herein, that the long-term financing provided for in paragraph 6 of the Joint Venture Agreement was satisfied on January 30, 1987, and Campbell was entitled to vote his stock for any corporate purposes permitted by law.

16. On September 6, 1988, a settlement stipulation was entered into. It was signed by Campbell and his attorney; by McIntosh & Co., Inc., over the signatures of Stephen M.

McIntosh, President, and Dorothy R. McIntosh, Secretary; Stephen M. McIntosh, individually; Melvin McIntosh, individually; Dorothy McIntosh, individually; Craig McIntosh, individually; Turnbridge Limited Partnership, by Stephen M. McIntosh, general partner; McRealty, Inc., over the signature of Stephen M. McIntosh, President, and Dorothy R. McIntosh, Secretary; Scottish Links, Inc. over the signature of Stephen M. McIntosh, President, and Dorothy R. McIntosh, Secretary; and, the signatures of Defendants' attorneys (Exh. 5, including attachments A-1, A-2, A-3).

17. The settlement provided that the McIntosh Co. would purchase Campbell's 100 shares of stock of Scottish Links for the sum of \$216,000.00. This sum was to be paid in future periodic payments from the sale of condominium units being constructed by Turnbridge Limited Partnership. The unpaid balance was to be paid in full on or before December 31, 1981.

18. On September 6, 1988, and in consideration of the agreement with Campbell, Scottish Links, over the signature of Stephen McIntosh, President, and Dorothy R. McIntosh, Secretary, gave a mortgage to Campbell on real estate on 118.47 acres, more or less, on which the golf course was constructed. The McIntosh Co. agreed to subordinate its mortgage from Scottish Links to the Scottish Links mortgage in favor of Campbell.

19. The mortgage provided that in the event of default Campbell had multiple options of declaring due and payable all obligations secured by the mortgage and foreclosing the mortgage in accordance with the law of Iowa, including the right to have a receiver appointed.

20. Campbell agreed to deliver his 100 shares of stock of Scottish Links to an escrow agent who was to retain said stock until Campbell was paid the \$216,000.00 pursuant to the stipulation (Exh. 5, A-1, ¶ 2e). The escrow agent was to deliver the stock to the McIntosh Co. upon payment in full.

21. If Campbell was not paid the \$216,000.00 on or before December 31, 1989, and if Campbell had not acknowledged full payment, the escrow agent was to deliver the stock to Campbell. Nothing was provided for further notice by Campbell.

22. While the stock was in escrow, Campbell was to have no authority over or management of Scottish Links, Inc. or Scottish Links golf course and have no status to vote as a stockholder, director, or officer of Scottish Links so long as the agreed amount was paid on or before December 31, 1989.

23. As part of the agreement, Campbell agreed to resign as director of Scottish Links but if the McIntosh Co. did not complete its payments to Campbell by December 31, 1989, on January 1, 1990, Campbell was to be immediately reelected to the board of directors of Scottish Links, Inc. The issued and

outstanding common voting stock of Scottish Links, Inc. was to remain at 50 percent for McIntosh Co. and 50 percent for Campbell.

24. The agreement further provided that if at any time before December 31, 1989, any of the Defendants, the McIntosh Co., Turnbridge, or Scottish Links, filed a petition in bankruptcy, then the stipulation and agreement would be null and void and Campbell was entitled to the return of the stock from the escrow agent "upon proper showing to said Clerk (the escrow agent) of the pendency of said bankruptcy." (Exh. 5, A-1, ¶ 6). The parties further agreed that any monies paid to Campbell prior to the filing of a bankruptcy petition would not be considered a preference.

25. The Amended Settlement Stipulation (Exh. 5, A-2), dated February 9, 1990, and filed February 16, 1990 in Iowa District Court, acknowledged that Campbell had been paid \$141,000.00, leaving a balance due of \$75,000.00. The balance of \$75,000.00 would draw interest at the rate of 12 percent from January 1, 1990, and this balance was to be paid on or before June 1, 1990.

26. The First Amended Settlement Stipulation of May 31, 1990, acknowledged that the balance of \$75,000.00 had not been paid and extended the date of payment to July 1, 1990. The balance of \$75,000.00 was to continue bearing interest.

27. Campbell commenced an action in the Iowa District

Court, Pottawattamie County, No. 61382, for payment of the promissory note, foreclosure of the mortgage given by Scottish Links to Campbell, payment of costs, and appointment of a receiver. This petition was filed on July 13, 1990.

28. Campbell did not give notice to the escrow agent and the McIntosh Co., or other signatories on the settlement agreement, that he demanded the return of the Scottish Links stock and that the stock was forfeited to him because of a default in the terms of the settlement agreement.

29. Shortly before a scheduled hearing at which the issue of the appointment of a receiver was to be heard, Scottish Links filed the within voluntary Chapter 11 petition on August 28, 1990. This was done without notice to or consent by Campbell.

30. The filing of the Chapter 11 petition was authorized by a special meeting of the Board of Directors of Scottish Links on August 25, 1990 (Exh. 2). Melvin McIntosh, Chairman, Stephen McIntosh, and Craig McIntosh are shown as the directors present and voting approval of the motion. The McIntosh Co. was shown as the sole shareholder of Scottish Links and was represented by Stephen M. McIntosh.

## **DISCUSSION**

### **I. Election of Remedies.**

The Debtor-in-Possession, Scottish Links, contends that

Campbell made an election when he filed the petition to foreclose on the mortgage given by Scottish Links to Campbell, as security for the promissory note given by the McIntosh Co. for the purchase of Scottish Links stock owned by Campbell. Scottish Links further contends that this election precludes him from enforcing his rights with the McIntosh Co. and precludes him from voting as a stockholder, director or officer of Scottish Links.

In order for the defense of election remedies to be available, three elements must be established: (1) the existence of two or more remedies; (2) an inconsistency between them; and, (3) a choice of one of the remedies. Reid v. Hansen, 440 N.W.2d 598, 600 (Iowa 1989); Bollinger v. Kiburz, 270 N.W.2d 603, 605 (Iowa 1978).

This doctrine is a largely obsolete rule which is to be narrowly applied. Feldhahn v. R.K.B. Quality Corp., 356 N.W.2d 226, 229 (Iowa 1984). This doctrine does not preclude distinct and independent grounds of action which arise from the same transaction and which may be concurrently or consecutively pursued to satisfaction. Gray v. Bowers, 332 N.W.2d 323, 324 (Iowa 1983). Gray v. Bowers stands for the proposition that the exercise of the right of forfeiture against the defaulting purchaser extinguishes the liability of the purchaser for the unpaid purchase money. This result is not dependent upon the doctrine of election of remedies, but

instead results from the fact that the contract has been terminated, thereby extinguishing any right to recover the unpaid purchase price. Id., at p. 325.

Campbell had a contract with two entities, the McIntosh Co. and Scottish Links. Under the present state of the record, they are separate and distinct entities.

The first contract was with the McIntosh Co. in the form of a settlement stipulation. The McIntosh Co. agreed to purchase Campbell stock in Scottish Links, and Campbell agreed to place his stock in escrow. As amended, the escrow agreement provided that if Campbell did not acknowledge payment in full on or before a date certain, July 1, 1990, the escrow agent was to deliver the stock to Campbell. This agreement also provided that Campbell was to be automatically reelected to the board of directors of Scottish Links if the payments were not paid as agreed. Further, if Scottish Links filed a petition in bankruptcy, the settlement stipulation was to be null and void.

The second contract was with Scottish Links. Scottish Links mortgaged its golf course to secure the debt of the McIntosh Company. This mortgage provided that in the event of a default on the part of McIntosh Co., Campbell could declare due and payable the obligation secured by the mortgage and foreclose the mortgage in accordance with Iowa law.

Campbell had multiple remedies available to him and he

chose, prior to the filing of the voluntary chapter 11 petition herein, one of the remedies. However, the selected remedy against Scottish Links was not inconsistent with the remedies available against the McIntosh Company. These were distinct and independent remedies against two corporations, notwithstanding the fact that there appears to be a cross-collateralization of assets.

Accordingly, Campbell has rights under the McIntosh agreement which he was not permitted to exercise prior to the filing of the petition herein. These rights include the return of his stock from the escrow agent and right to exercise those rights associated with the ownership of that stock.

## II. Validity of Corporate Action.

Involuntary dismissal of a Chapter 11 case must be for cause. The Bankruptcy Code sets out several circumstances constituting cause for dismissal [11 U.S.C. § 1112(b)], but these specified causes are not exclusive. 11 U.S.C. § 102(3); in re Becker, 38 B.R. 913 (Bankr. D. Minn. 1984).

This court must determine whether this case is within the jurisdiction of this Court which requires a determination of whether Debtor corporation acted upon a valid corporate resolution. The Bankruptcy Code does not establish the internal corporate requirements for the filing of a voluntary

corporate bankruptcy proceeding. Therefore, in determining who has the authority to file a voluntary petition in bankruptcy, the power to file is governed by state law. Matter of Giggles Restaurant, Inc., 103 B.R. 549, 553 (Bankr. D.N.J. 1989).

Iowa Code § 490.801 (1989, as amended) provides that corporate powers shall be exercised by a corporation under the authority of the Board of Directors, subject to any limitations set forth in the articles of incorporation.

The articles of incorporation of Debtor corporation do not provide for any limitation and the By-Laws of Scottish Links (Exh. D) provide that the business and affairs of the corporation shall be managed by the Board of Directors consisting of three directors. (Art. II. Section 1).

The Settlement Stipulation (Exh. 5, Exh. A-1, Paragraphs 2(3) and 3) provides that Campbell automatically became a director when the McIntosh Co. did not make the required \$75,000.00 payment by the extended date of July 1, 1990. The Special Meeting of the Board of Directors of Scottish Links authorizing the filing of the voluntary Chapter 11 petition was held on August 25, 1990, over 50 days after Campbell became a member of the Board of Directors.

Article II, Section 7, of the By-Laws provides for special meetings. Article II, Section 8 provides for the notice of special meetings. Notice of special meetings was

required for each director by mail at least 5 days prior to the meeting.

Campbell neither received notice nor waived notice of this meeting. He was not present at the meeting and has never ratified the actions taken at that meeting.

Accordingly, the petition herein did not originate at a validly held meeting of the Board of Directors and was not voted on by a validly constituted board of directors.

#### **CONCLUSION**

In filing the voluntary Chapter 11 petition, the voting directors of Scottish Links violated the rights of Campbell under his agreement with the McIntosh Co. The corporate resolution which authorized the filing of the Chapter 11 Voluntary Petition on August 28, 1990, is invalid and this Court finds that it has no jurisdiction over this matter. Accordingly, the motion to dismiss is granted and the case is dismissed.

IT IS SO ORDERED, and judgment shall be entered accordingly.

Dated this 29th day of March, 1991.

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RUSSELL J. HILL  
U.S. BANKRUPTCY JUDGE