UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

6007 Lake Road LLC,

Debtor.

Case No. 14-21527-PRW
Chapter 11

DECISION AND ORDER
GRANTING MOTION TO DISMISS CHAPTER 11 CASE

PAUL R. WARREN, United States Bankruptcy Judge

The United States Trustee ("UST") has moved to convert or dismiss this Chapter 11 case under 11 U.S.C. § 1112(b) based on the failure of the Debtor, 6007 Lake Road LLC ("Debtor"), to perform the duties required of a Chapter 11 Debtor-in-Possession under 11 U.S.C. §§ 1106(a), 521, 704(a), within the time established by Rule 1007 FRBP (ECF No. 13). The UST indicates that the Debtor has failed to file schedules, failed to provide proof of insurance, failed to provide copies of returns, and failed to retain counsel in connection with this case (*Id.*). The Court finds that the UST has demonstrated cause to convert or dismiss the case under 11 U.S.C. § 1112(b)(4)(B), (b)(4)(C), (b)(4)(E)—and that neither exception under 11 U.S.C. § 1112(b)(1) or (b)(2) applies in this case. The Court finds, in the exercise of its discretion, that dismissal of this Chapter 11 case is in the best interest of creditors and the estate. The motion of the UST is **GRANTED**, under 11 U.S.C. § 1112(b)(1), (b)(4)(B), (b)(4)(C), and (b)(4)(E). The case is **DISMISSED**, under 11 U.S.C. § 1112(b)(1).

I.

FACTS

This single-asset real estate Chapter 11 case was commenced by the filing of a skeletal Petition, without schedules or statements, on December 15, 2014 (ECF No. 1). The Court issued an Order, under Rule 1007(b) FRBP, directing the Debtor to file required statements and schedules within fourteen days (ECF No. 6). At the Debtor's request, the Court extended the deadline to file statements and schedules to January 15, 2015 (ECF Nos. 9, 10). However, the Debtor wholly failed to file the schedules and statements as required by 11 U.S.C. §§ 521, 704(a), and 1106(a) and Rule 1007 FRBP, contrary to the deadline imposed by the Court's Order (ECF No. 11). During the 74 days that this case has been pending, the Debtor also failed to retain legal counsel, failed to provide proof of insurance, and failed to provide copies of tax returns to the UST.

Although not listed on the Debtor's mailing matrix, only the Internal Revenue Service has filed a proof of claim in this case (Claim No. 1). No other claims have been filed. While the Debtor has not filed schedules identifying its creditors, the mailing matrix accompanying the Petition lists only First Niagara Funding ("First Niagara") and the Wayne County Treasurer—the other listed entities or individuals appear to be related insiders.

On January 21, 2015, the UST filed a motion to convert or dismiss the case under 11 U.S.C. § 1112(b) because the Debtor had failed to (1) file schedules and statements, (2) provide proof of insurance, (3) retain legal counsel, (4) provide copies of tax returns and financial statements, and (5) establish a debtor-in-possession account (ECF No. 13). The motion was scheduled to be heard on February 26, 2015 at 9:00 a.m. Two days before the scheduled hearing, prospective counsel to the Debtor, David Ealy, Esq., filed a letter with the Court (ECF No. 17).

The letter indicated that the Debtor had—that day—paid the necessary retainer. By the letter, the Debtor indirectly opposed the motion of the UST and requested an open-ended extension of time to comply with the Court's prior Order (*Id.*). The Debtor did not deny any of the material allegations of the motion (*Id.*). The Court denied the request for adjournment of the UST motion—to the extent the letter could be viewed as requesting an adjournment of the motion—and denied the Debtor's request for additional time to comply with the Court's Order of December 31, 2014 (ECF No. 19).

At the February 26, 2015 hearing on the motion to convert or dismiss, Kathleen Schmitt, Esq. appeared on behalf of the UST, and Mr. Ealy appeared on behalf of the Debtor. No officer appeared on behalf of the Debtor. The UST made a proffer of testimony that would be offered in support of the UST's motion. That proffer offered the facts that the UST would introduce through the testimony of Stephanie Becker ("Ms. Becker"), Bankruptcy Analyst for the Office of the UST. Based on Ms. Becker's qualifications and experience, the Court found her qualified to testify as an expert under Rule 702 of the Federal Rules of Evidence ("FRE"). The Court further found that Ms. Becker's testimony would be admissible under Rules 703 and 704 FRE. The Debtor did not object to the UST's evidentiary proffer. The Court admitted the proffered testimony into evidence, in further support of the UST's motion. Ms. Becker's proffered testimony indicated that she met with Mr. Ealy and the Debtor as part of the initial case intake process. As a result of that meeting and her subsequent monitoring of the case, Ms. Becker would testify to the fact that the Debtor has not provided proof of insurance on the property, has not provided copies of filed tax returns, and has not filed required statements and schedules to date. The UST also advised the Court that on January 22, 2015, a 341 meeting of creditors was

convened, at which Mr. Ealy dutifully appeared but at which the Debtor failed to appear through an officer or director.[1]

Mr. Ealy confirmed at the hearing that First Niagara is a secured lender and that the only other creditors are taxing authorities. The case was filed on the eve of foreclosure by First Niagara to prevent loss of the property. There are no unsecured creditors. Mr. Ealy indicated that the Debtor intended to liquidate the real estate, were this Chapter 11 case permitted to go forward. Mr. Ealy was candid in informing the Court that there are no unusual circumstances that would provide an exception to conversion or dismissal under 11 U.S.C. § 1112(b)(1) or (b)(2).

II.

ANALYSIS

Dismissal or conversion of a Chapter 11 case must be granted, under 11 U.S.C. § 1112(b), if the movant demonstrates "cause," unless the Court finds that the exceptions provided by either 11 U.S.C. § 1112(b)(1) or (b)(2) apply. *In re Spencerport Dev., LLC*, No. 14-21154 (PRW), 2014 Bankr. LEXIS 4909, at *3-4 (Bankr. W.D.N.Y. Dec. 4, 2014). Under the exception created by 11 U.S.C. § 1112(b)(1), the Court may deny a motion to convert or dismiss if it determines that the appointment of a trustee or examiner is in the best interest of the estate and its creditors. *Id.*; 7 Collier ¶ 1112.05[1] (16th ed. rev.). Here, no party in interest has requested the appointment of a Chapter 11 Trustee. The exception created by 11 U.S.C. § 1112(b)(2) applies where the Court finds and specifically identifies "unusual circumstances

[1] The Court commends Mr. Ealy's continued efforts to competently and vigorously represent the Debtor—even before the Debtor paid a retainer and despite the Debtor's failure to participate in its own Chapter 11 case—in keeping with his responsibilities under the Rules of Professional Conduct.

establishing that converting or dismissing the case is not in the best interests of creditors and the estate," coupled with the showing required by 11 U.S.C. § 1112(b)(2)(A) and (B). 11. U.S.C. § 1112(b)(2); *Spencerport*, 2014 Bankr. LEXIS 4909, at *4. Here, neither the Debtor nor any party in interest demonstrated or even suggested the existence of any unusual circumstances. The Court finds that the exceptions under 11 U.S.C. § 1112(b)(1) and (b)(2) do not apply in this case.

The moving party bears the initial burden to establish, by a preponderance of the evidence, the existence of "cause" to convert or dismiss a Chapter 11 case. *Spencerport*, 2014 Bankr. LEXIS 4909, at *4; 7 Collier on Bankruptcy ¶ 1112.04[4] (16th ed. rev.). If the movant establishes cause to convert or dismiss—and the Court finds, as it has in this case, that the exceptions under 11 U.S.C. § 1112(b)(1) and (b)(2) do not apply—the Court *must* convert or dismiss the Chapter 11 case. *Spencerport*, 2014 Bankr. LEXIS 4909, at *4. The Court has wide discretion to determine whether cause exists to convert or dismiss under § 1112(b). *In re MF Global Holdings Ltd.*, 465 B.R. 736, 742 (Bankr. S.D.N.Y. 2012); 7 Collier on Bankruptcy ¶ 1112.05[2] (16th ed. rev.).

Here, the UST asserts that cause exists for dismissal or conversion based on the following: failure to retain legal counsel for the corporate Debtor, Rule 9010 FRBP; gross mismanagement of the estate, 11 U.S.C. § 1112(b)(4)(B); failure to maintain appropriate insurance, creating a risk to the estate or the public, 11 U.S.C. § 1112(b)(4)(C); failure to comply with an order of the Court, 11 U.S.C. § 1112(b)(4)(E); and unexcused failure to timely satisfy any filing or reporting requirement established under the Bankruptcy Code or Rules, 11 U.S.C. § 1112(b)(4)(F). Ms. Becker's proffered testimony confirms that the Debtor has not provided proof of insurance and has not filed schedules of assets and liabilities—constituting cause to

convert or dismiss under 11 U.S.C. § 1112(b)(4)(C) and (b)(4)(F). The Debtor's failure to provide this information contravened the Court's Order of December 30, 2014, requiring that these documents be filed by January 15, 2015—constituting additional cause to convert or dismiss under 11 U.S.C. § 1112(b)(4)(E) (ECF No. 11). The Debtor also has not provided evidence that it created a debtor-in-possession account, which—combined with the Debtor's pattern of inaction in this case and its failure to retain legal counsel—demonstrates gross mismanagement of the estate, constituting cause under 11 U.S.C. § 1112(b)(4)(B). For 74 days, the Debtor has enjoyed the protections of the automatic stay under 11 U.S.C. § 362, without performing any of the statutory duties imposed by the Bankruptcy Code. The Court finds that the UST has demonstrated, by a preponderance of evidence, that cause exists to convert or dismiss the case.

The decision to convert or dismiss depends on which remedy will best serve the interest of creditors and the estate. The Debtor is a single-asset real estate business, as defined by 11 U.S.C. § 101 (ECF No. 1). The preservation and rehabilitation of an operating business is not at issue in this case. Mr. Ealy conceded at the hearing that the only creditors are secured or priority tax creditors—First Niagara, the IRS, and Wayne County. Essentially, the case is a simple two-party dispute. The Debtor's secured creditor—a commercial bank—and the affected taxing authorities certainly have rights and remedies under state law, and they should be permitted to pursue those rights and remedies. There are no unsecured creditors to be protected. The Court finds, in the exercise of its discretion, that dismissal is in the best interest of creditors and the estate. The Debtor's modest real estate asset can be liquidated or refinanced outside of the bankruptcy process. The secured creditors and taxing authorities have been delayed in pursuing their remedies by the automatic stay—to their disadvantage and prejudice—while the Debtor has

done nothing to attend to its Chapter 11 case. Dismissal will allow the taxing authorities and the secured creditors to proceed in state court and effectively put an end to the stalemate caused by the Debtor.

III.

CONCLUSION

The motion of the UST to dismiss or convert is **GRANTED**, pursuant to 11 U.S.C. § 1112(b)(4)(B), (b)(4)(C), (b)(4)(E), and (b)(4)(F). The case is **DISMISSED**, under 11 U.S.C. § 1112(b)(1).

IT IS SO ORDERED.

Dated: February 26, 2015
Rochester, New York

/s/
HON. PAUL R. WARREN
UNITED STATES BANKRUPTCY JUDGE