SO ORDERED,

Judge Selene D. Maddox

United States Bankruptcy Judge

The Order of the Court is set forth below. The case docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE: JOHN COLEMAN	**CASE NO.: 21-11833-SDM**
DEBTOR	**CHAPTER 11**

ORDER DENYING THE DEBTOR'S MOTION TO DISMISS AND ORDERING THE APPOINTMENT OF AN EXAMINER UNDER 11 U.S.C. § 1104(c)

This cause came before the Court for telephonic hearing on January 6, 2022 on the Debtor's *Motion to Dismiss Case* (the "Motion to Dismiss")(Dkt. #66), the objections and responses filed by the Farm Group (Dkt. #77), the Mississippi Department of Agriculture and Commerce (the "State of Mississippi")(Dkt. #78), and Bank of Commerce and First South Farm Credit (the "Production Lenders")(Dkt. #79), and joinders filed by Farm Groups II and III (Dkt. #s 80, 81, 82), Planters Bank & Trust Company (Dkt. #s 83, 84, 85), and Farm Group I (Dkt. #s 88, 89, 90).

During the telephonic hearing, the Court heard arguments from the Debtor's counsel, Craig Geno ("Geno") and other interested parties who filed responses, joinders, or objections to the Motion to Dismiss. The Court also heard from the Unites States Trustee (the "UST"). No party

presented witness testimony, and the Debtor, John Coleman ("Coleman") did not appear after the Court called him three times on the record.

In support of the Debtor's Motion to Dismiss, Geno argued that Coleman originally filed chapter 11 bankruptcy because of receivership litigation initiated against Coleman by UMB Bank and that, because the litigation had been dismissed in state court, there is "no real reason" to continue in a chapter 11 case. Additionally, Geno argued that the conduct of the Debtor supports dismissal: Coleman failed to file his required monthly operating reports in a timely manner, failed to pay the proper fees due to the United States Trustee, and behaved as a "reluctant or absent witness" in all matters and issues before the Court. Finally, Geno argued that Coleman has "very few assets" to benefit a chapter 11 reorganization and that, while Coleman owns a piece of real property as his former home, the Court has approved the sale of the real property pursuant to a prior Court Order.[1] Upon closing the sale of this property, Geno stated, Coleman is willing to hand over the sale proceeds in the amount of $188,000.00 for the benefit of creditors in the Express Grain Terminals, LLC ("Express Grain") case.[2]

The Court heard several arguments against the Debtor's Motion to Dismiss from the Farm Group, the State of Mississippi, and the Production Lenders. The Farm Group indicated that its objection was filed out of concern that Express Grain would not protect its bankruptcy estate by objecting to the dismissal of Coleman's case. Additionally, while the Farm Group appreciates that Coleman has agreed to pay Express Grain over $188,000.00 in proceeds from the sale of his property, there has been no similar pledge made with regard to attorney's fees paid by Express Grain on Coleman's behalf to his criminal defense attorney, John Colette, in the amount of

[1] See *Agreed Order Granting Motion to Sell Property Free and Clear of Liens* (Dkt. #75).
[2] Case No. 21-11832-SDM.

approximately $50,000.00. The Farm Group argued that Express Grain's payment of attorney's fees on Coleman's behalf should be listed as a debt in Coleman's bankruptcy, thereby increasing the amount owed by Coleman to creditors. The Farm Group went on to state that other disbursements appear to have been made by Express Grain on the eve of its chapter 11 bankruptcy on behalf of Coleman, including payments for life insurance and credit cards, and that such funds should also be paid over to Express Grain as well. Finally, the Farm Group argued that the Motion to Dismiss should be denied because of the existence of claims by Express Grain against Coleman that should be conserved, such as claims for conversion, fraudulent conveyance, and breach of fiduciary duty.

The State of Mississippi presented arguments referencing the pending administrative proceedings regarding the warehouse license[3] of Express Grain. Specifically, the State of Mississippi argued that Coleman was issued a warehouseman license titled "John Coleman Express Grain Terminals," with no conjunctive adverb or punctuation in between the names "John Coleman" and "Express Grain Terminals". This, the State argued, has raised significant concerns about the validity of the license, namely that Express Grain may attempt to argue that the license was issued to Coleman rather than to Express Grain. Because the warehouse license issue impacts both Coleman and Express Grain, the State of Mississippi asked the Court to retain Coleman in the chapter 11 posture or to convert his case to a chapter 7 in order to hear this issue.

Finally, the Production Lenders argued that, as the burden to dismiss a chapter 11 case for cause is on the movant, the Debtor presented insufficient proof to meet his burden of establishing cause by failing to testify at the hearing on January 6, 2022. The Production Lenders, however, stated that, although cause may exist for dismissal because of Coleman's clear failure to satisfy his

[3] See 21-11832-SDM, *Motion For Relief from Stay* (Dkt. #1526).

obligations as a Debtor in chapter 11, it would be improper to allow a debtor to voluntarily invoke the Bankruptcy Code's protections and then subsequently obtain bankruptcy dismissal by intentionally refusing to cooperate with the requirements necessary to comply with the Bankruptcy Code and Federal Rules of Bankruptcy Procedure. The Production Lenders provided examples of Coleman's intentional conduct, such as his failure to appear and cooperate at the § 341 meeting of creditors, the deliberate avoidance of subpoenas, and his unwillingness to testify voluntarily at any hearing before the Court. This, coupled with the allegations made against Coleman of fraud and the conversion of assets, supports the Production Lenders' argument that dismissal under chapter 11 is not in the best interests of the creditors or the estate. Thus, maintaining jurisdiction over Coleman and his assets by converting his case to a chapter 7 proceeding, or through the appointment of a chapter 11 trustee or examiner, keeps him protected from creditors and other parties "racing to the courthouse" for judgment against Coleman outside of this Court.

A motion to dismiss under chapter 11 is governed by 11 U.S.C. § 1112[4] of the Bankruptcy Code. While a debtor does not have the absolute right to voluntarily dismiss his case under § 1112(a), § 1112(b) provides for the conversion or dismissal of a chapter 11 case for "cause" after request by a party in interest. 11 U.S.C. § 1112(b). Under § 1112(b)(1), the Court must convert a chapter 11 case to a chapter 7 case, or dismiss the case entirely, for cause, unless the Court determines that the appointment of a trustee or an examiner under § 1104 is in the best interests of creditors and the estate. 11 U.S.C. § 1112(b)(1). The movant, which in this case is Coleman, bears the initial burden of demonstrating "cause" by a preponderance of the evidence. *In re Miell*, 419 B.R. 357, 366 (Bankr. N.D. Iowa 2009); *In re Corona Care Convalescent Corp.*, 527 B.R. 379,

[4] Unless stated otherwise, all statutory references will be to Title 11 of the United States Code.

382 (Bankr. C.D. Ca. 2015) (citing 7 Resnick and Sommer, *Collier on Bankruptcy*, ¶ 1112.04[4] at 1112-22 (16th ed. 2014)). If "cause" is established, dismissal or conversion of a chapter 11 case under this section is mandated, unless the Court determines that the appointment of a trustee under § 1104(a) or an examiner under § 1104(c) is in the best interests of creditors and the estate, or the statutory exceptions of §§ 1112(b)(2) or 1112(c) apply. *In re Mid-South Business Assocs., LLC*, 555 B.R. 565, 569-70 (Bankr. N.D. Miss. 2016) (internal citations omitted).

Cause is not defined by § 1112, but § 1112 provides a non-exhaustive list of matters establishing "cause." *In re Katon, Inc.*, 2009 WL 982559 at fn. 7 (Bankr. S.D. Miss. 2009); 11 U.S.C. § 1112(b)(4)(A)-(P). As this list is non-exhaustive, the Court may identify other factors establishing "cause" warranting dismissal or conversion from chapter 11, including the debtor's bad faith conduct. *Little Creek Dev. Co. v. Commonwealth Mortgage Corp.*, 779 F.2d 1068, 1072 (5th Cir. 1998).

Even where cause is established to dismiss a chapter 11 case by way of the debtor's bad faith conduct, the Court has the discretion to deny dismissal and appoint an examiner under § 1104(c) if the appointment of an examiner is in the best interests of creditors and the estate. *In re Charles Street African Methodist Episcopal Church*, 499 B.R. 66, 116 (Bankr. D. Mass. 2013). Bankruptcy Code § 1104(c) provides:

> [] if the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan [. . .] the court shall order the appointment of an examiner to conduct such an examination of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor[.]

11 U.S.C. § 1104(c). The relevant subsection of § 1104(c) is § 1104(c)(1), which allows for the appointment of an examiner if such an appointment is "in the best interests of creditors, any equity security holders, and other interests of the estate[.]" 11 U.S.C. § 1104(c)(1). The role of an

examiner is "less drastic" than that of a chapter 11 trustee as it provides for independent third-party input into a chapter 11 case without replacing the debtor in possession. 7 *Collier on Bankruptcy* ¶ 1104.03[1] (16th ed. 2021). The examiner's role is an investigative one, and the court may order the examiner to investigate any aspect of the case or events leading up to the bankruptcy. *Id*. While the scope of an examiner is not outlined by the provisions of § 1104(c), courts have found that the phrase "to conduct such an investigation of the debtor as is appropriate" allows the bankruptcy court to retain broad discretion to direct the examiner's investigation, including its nature, extent, and duration. *In re Revco D.S., Inc.*, 898 F.2d 498, 501 (6th Cir. 1990); see also *In re UAL Corp.*, 307 B.R. 80, 84, 86 (Bankr. N.D. Ill. 2004) ("[T]he court presiding over a large bankruptcy case should have the authority to limit examiner investigations to 'appropriate' subjects, methods, and duration [. . .] it makes the examiner's investigation subject to a court order issued after notice and a hearing at which all parties in interest may participate[.]").

Based on the arguments presented by the Debtor and other parties in interest, the Court finds that the Debtor has met his burden in establishing cause. Specifically, the Court finds that Coleman has engaged in bad faith conduct throughout the pendency of his bankruptcy by continuously and willfully failing to participate in Court proceedings, willfully failing to participate in a § 341 creditors' meeting,[5] and failing to timely file required monthly operating reports or pay fees due to the UST. Although Coleman did not appear at the telephonic hearing held on January 6, 2022 and, therefore, did not testify concerning his conduct during the pendency of his case, the Court is certainly aware of his behavior and is able to ascertain his bad faith conduct

[5] The UST issued a *Notice of Telephonic 341 Meeting of Creditors* on October 7, 2021 (Dkt. #25), which set the § 341 meeting on November 24, 2021. On December 1, 2021, however, the UST filed a Chapter 11 Proceeding Memo (Dkt. #73), stating that approximately six minutes before the § 341 meeting, Coleman filed his Motion to Dismiss and refused to answer any questions.

through the arguments of the parties and the administration of his bankruptcy case. In reaching its decision, the Court also considered all allegations made concerning the prepetition monetary disbursements and transfers made by Express Grain on behalf of Coleman.

Despite finding that cause exists to convert or dismiss this chapter 11 case, the Court recognizes a unique circumstance before it: the Debtor, Coleman, rather than a creditor or other interested party, has sought to dismiss his own case for cause under § 1112(b)(1). While a debtor's bad faith is cause for dismissal or conversion under § 1112(b)(1), the Court will not allow Coleman to subvert the purpose of the Bankruptcy Code by willfully engaging in bad faith conduct to dismiss his own case for cause under § 1112(b)(1). Further supporting this decision is the Debtor's repeated failure to appear before the Court to defend allegations made against him concerning potential fraud and misconduct, which leaves the Court with questions concerning the events that transpired prepetition and any potential misconduct on the part of the Debtor postpetition. Therefore, the Court believes that it is in the best interests of creditors and the estate to allow an examiner to conduct an investigation pursuant to § 1104(c) of the Debtor, his assets, any and all payments made on behalf of the Debtor prepetition, and any other potential transfer of assets by the Debtor or on his behalf. Further, the examiner shall conduct an investigation as is appropriate considering the actions and conduct of the Debtor prepetition and postpetition.

ACCORDINGLY, it is hereby **ORDERED** that the Debtor's *Motion to Dismiss Case* (Dkt. #66) is **DENIED**. It is further **ORDERED** that the office of the United States Trustee shall select an examiner to be appointed by the Court under § 1104(c).

##END OF ORDER##