

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

IN THE MATTER OF:)
)
MORGAN, INC.) CASE NO. 06-40241
)
)
Debtor)

DECISION ON MOTION TO DISMISS

At Fort Wayne, Indiana, on September 20, 2007.

Debtor is a small transportation company which filed a petition for relief under Chapter 11 of the United States Bankruptcy Code on August 10, 2006. The matter is before the court following trial of the issues raised by a motion to dismiss filed on behalf of Farmers State Bank and the debtor's objection thereto.

The bankruptcy reforms of 2005 made significant changes to the consideration of motions to convert or dismiss Chapter 11 cases. Previously, once the movant had established cause for conversion or dismissal, whether or not the court did so was a matter committed to its discretion. That is no longer so. Now, once cause has been established, the court is required to convert or dismiss the case "absent unusual circumstances specifically identified by the court that establish that the requested conversion or dismissal is not in the best interests of creditors and the estate" 11 U.S.C. § 1112(b)(1). In addition to proving the existence of those "unusual circumstances," in order to avoid conversion or dismissal, the party opposing that relief must also establish that there is a reasonable likelihood that a plan can be confirmed, 11 U.S.C. § 1112(b)(2)(A), and, unless the "cause" involves a continuing loss to the bankruptcy estate and the absence of a likelihood of

rehabilitation, where the basis for conversion or dismissal involves some type of failure on the debtor's part – whether an act or an omission – that there was a reasonable justification for such act or omission and that it will be cured within a reasonable time, which is to be fixed by the court. 11 U.S.C. § 1112(b)(2)(B). Congress also required the bankruptcy courts to deal with motions to convert or dismiss expeditiously. Absent the movant's consent, or compelling circumstances which prevent the court from meeting the Congressionally prescribed timetables, the court is to commence the hearing on the motion within thirty (30) days of the date it is filed¹ and to decide it within fifteen (15) days thereafter. 11 U.S.C. § 1112(b)(3).

After BAPCPA, the parties' respective burdens with regard to motions to convert or dismiss can be summarized as follows: The movant has the initial responsibility of proving that cause exists, 11 U.S.C. § 1112(b)(1), and to this end a non-exclusive list of potential causes is laid out at § 1112(b)(4). Once the movant has done so, the court is required to convert or dismiss the case unless the party opposing the motion is able to identify unusual circumstances indicating that conversion or dismissal is not in the best interests of creditors and the estate, 11 U.S.C. § 1112(b)(1), (2), prove that there is a reasonable likelihood a plan can be confirmed in the not too distant future, 11 U.S.C. § 1112(b)(2)(A), prove that there was a reasonable justification for the act or omission that led to the finding of cause, 11 U.S.C. § 1112(b)(2)(B)(i), and, finally, that the consequences of that act or omission can be cured within a reasonable and a specific period of time. 11 U.S.C. § 1112(b)(2)(B)(ii).

There can be little debate that the bank has established cause to convert or dismiss this case.

¹Bankruptcy Rule 2002(a)(4) requires that all creditors and parties in interest receive at least twenty days notice of this hearing.

To begin with, the debtor used approximately \$19,000.00 of cash collateral without any authorization from either the court or the creditor, to the bank's substantial detriment. 11 U.S.C. § 1112(b)(4)(D). The debtor also sold or attempted to sell property of the estate, outside the ordinary course of business, without authorization or notice to creditors. Both of those actions are in clear violation of the express requirements of the Bankruptcy Code, see, 11 U.S.C. § 363(b)(1), (c)(2), and the terms of the order appointing debtor in possession, which reiterates those obligations in order to make certain that a debtor becomes aware of them.

The debtor tries to justify its actions by arguing that the use of cash collateral was necessary in order to repair the buses which also secured the bank's claim. This is no justification at all, see, Lafayette Dial Inc., 92 B.R. 798, 801(Bankr. N.D. Ind. 1988), much less the reasonable one required by the statute. Furthermore, the debtor has not offered any suggestion as to how the unauthorized dissipation of the bank's cash collateral can be cured. As for the unauthorized sale of property, at trial the debtor argued that the vehicles in question were leased, not sold, to a third party and since the debtor had leased those same vehicles to another party prior to the case such a use was within the ordinary course of business; therefore, no specific authorization was necessary before entering into the transaction. See, 11 U.S.C. § 363(c)(1). The argument ignores the terms of the written agreement between the parties. While that agreement is not a model of draftsmanship, it clearly provides for the sale, not the lease, of the vehicles in question. For the debtor's president to testify otherwise suggests that he either does not know or does not care what he is doing with property of the estate and has little interest in observing the obligations which come from filing a petition for relief under Chapter 11. That too would constitute cause to convert or dismiss the case.

The debtor has also failed to prove that there is a reasonable likelihood that the court will be

confirming a proposed plan some time in the near future. The court has recently concluded that the automatic stay has terminated with regard to all of the debtor's operational assets – three trucks and three buses – due to the debtor's default under the agreement for adequate protection with the bank, and the debtor's effort to modify that agreement has been denied. See, Decision dated Sept. 20, 2007. Without those assets the court sees no way by which the debtor would be able to reorganize its financial affairs or to carry on its business.

In view of the debtor's failure to carry the burden placed upon it by paragraphs (b)(2)(A) and (B) of § 1112, the court sees no reason to explore the meaning of the statutory requirement for "unusual circumstances" establishing that conversion or dismissal is not in the best interest of creditors.

The bank's motion will be granted and this case will be dismissed.

/s/ Robert E. Grant
Judge, United States Bankruptcy Court