

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)
)
REMARKABLE RENOVATIONS, LLC,) CASE NO. 13-32507 HCD
) CHAPTER 11
)
DEBTOR.)

Appearances:

Donald E. Wertheimer, Esq., counsel for debtor, 1017 East Jefferson Boulevard, South Bend, Indiana 46617;

Paul Edgar Harold, Esq., counsel for creditor John Alexander, LaDue Curran & Kuehn LLC, 200 First Bank Building, 205 West Jefferson Boulevard, South Bend, Indiana 46601; and

Alexander L. Edgar, Esq., Office of the United States Trustee, One Michiana Square, Fifth Floor, 100 East Wayne Street, South Bend, Indiana 46601.

ORDER AND DECISION

At South Bend, Indiana, on September 19, 2013.

Before the court are “Creditor John Alexander’s Verified Motion to Convert This Case into a Chapter 7 and Order the Immediate Sale of 23901 Greenleaf Boulevard” and “Motion for Sanctions Under 28 U.S.C. § 1927 Against Attorney Donald Wertheimer for Filing Multiple Bad-Faith Bankruptcy Petitions.” *See* R. 19, 20. Also before the court are the responses by the debtor, Remarkable Renovations, LLC, entitled “Objection of Remarkable Renovations LLC to Alexander’s Verified Motion to Convert,” and by the debtor’s attorney, entitled “Donald E. Wertheimer’s Objection to Motion for Sanctions.” *See* R. 33, 35. By its Order of September 9, 2013, the court granted the creditor’s “Motion For Expedited Hearing.” *See* R. 22. Hearing on the motions and objections was held on September 17, 2013.

After hearing the arguments and responses of counsel, the court ruled from the bench on each Motion. The court granted the Motion to Convert pursuant to 11 U.S.C. § 1112(b) on the ground that conversion of this case from chapter 11 to chapter 7 was “in the best interests of creditors and the estate.” However, it denied Alexander’s request for immediate sale of the Greenleaf property. It also denied the

Motion for Sanctions, concluding that Wertheimer's conduct, in the totality of the circumstances of this case, was not deserving of sanctions. This Decision elucidates the court's reasoning concerning these decisions.

John Alexander holds a judgment, entered in the St. Joseph Superior Court on August 3, 2010, and domesticated in Elkhart Superior Court on September 27, 2011, against Steven Kollar and the Greenleaf Land Trust in the amount of \$154,785.86. He obtained a decree of foreclosure against 23901 Greenleaf Boulevard in Elkhart, the Land Trust's only asset. Although Kollar then recorded a mortgage on the Greenleaf property in favor of Infinity Holdings, LLC, a company run by Kollar's son, the Elkhart Superior Court declared that mortgage invalid. Before the Elkhart Sheriff's Office could hold a foreclosure sale, however, the Land Trust filed for Chapter 11 bankruptcy. Alexander's motion to lift the stay on the property was successful, but right before the rescheduled foreclosure sale, this chapter 11 bankruptcy case of Remarkable Renovations was filed, with its only asset being the Greenleaf property. The creditor then sought an expedited hearing and requested conversion of the case to a chapter 7 case, the sale of the Greenleaf property by a trustee, and the right of the creditor to credit bid his judgment at the sale. *See* R. 19.

The court found sufficient cause to shorten the notice period and expedite this hearing. *See* Fed. R. Bankr. P. 9006(c); *In re Bartle*, 560 F.3d 724, 729 (7th Cir. 2009). The parties thoroughly presented the relevant facts to the court in their pleadings and briefs. In addition, the court is quite familiar with the several entities that have filed bankruptcy cases in this court under the authorized signature of Steven Kollar and with the representation of counsel Donald E. Wertheimer.¹ For example, on August 28, 2013, this court dismissed the chapter 11 case of *23901 Greenleaf Land Trust*, Case No. 13-31877, on the grounds that the debtor was ineligible to file a chapter 11 case and that the filing was a litigation tactic intended to avoid prior state court rulings. One day earlier, on August 27, 2013, Kollar as Managing Member had filed the instant chapter 11 case on behalf of Remarkable Renovations, LLC.² At the time the petition was filed, the

¹ *See also, e.g., Phoenix Growth Funds, LLC*, Case No. 12-31247.

² The court noted that the schedules filed in the two bankruptcies were virtually identical. For (continued...)

corporate entity had been administratively dissolved for almost three years. The entity was reinstated on September 13, 2013.

At the hearing, the parties fully and competently argued their positions. Being familiar with the parties and fully informed of the underlying factual background and record herein, the court in its discretion ruled on the dismissal motion without further evidentiary hearing. *See In re Bartle*, 560 F.3d at 729.

Alexander's Motion to Convert focused on the debtor's bad faith and abuse of the bankruptcy process. The debtor insisted that its actions were attempts to repay Alexander. The court stated that it was not unusual for a bankruptcy to be filed on the eve of a mortgage foreclosure sale and that such a filing, by itself, was not an indication of bad faith. The court referred the parties to a recent decision, *In re EFL Partners X*, a decision rendered by Bankruptcy Judge Magdeline F. Coleman a few weeks ago.³ It noted numerous similarities between *EFL* and *Remarkable Renovations*. In each case, for example, there was a state court deficiency judgment against the debtor, and it constituted the majority of the debtor's indebtedness. In each, there was a filing for chapter 11 protection shortly before a scheduled sheriff's sale. In *EFL*, the court granted dismissal of the case, based on its bad faith filing. In this case, the creditor requested conversion rather than dismissal.

After a full hearing of the arguments and responses of counsel, the court granted Alexander's Motion to Convert pursuant to 11 U.S.C. § 1112(b). It found that conversion of this case from chapter 11 to chapter 7 was "in the best interests of creditors and the estate." Section § 1112(b) authorizes a court to dismiss or convert a chapter 11 case for "cause," on request of a party in interest, and requires a court to

²(...continued)

example, in each case, the only property listed on Schedule A was the residence of the debtor at 23901 Greenleaf Boulevard, in Elkhart, Indiana. The same secured creditor, Infinity Holding, LLC, and the same unsecured creditors were listed.

³ *In re EFL Partners X*, No. 13-11495-mdc (Bankr. E.D. Pa. Aug. 23, 2013). The case was discussed in the Bankruptcy Law Resource Center, BNA.com, on September 12, 2013.

determine whether to convert or dismiss the case by considering which choice “is in the best interests of creditors and the estate.”

In *EFL*, Judge Coleman stated that “[t]he inquiry that is most relevant to this determination is whether the Chapter 11 filing serves a valid bankruptcy purpose, or, rather, whether it was filed as a litigation tactic.” She listed other factors relevant to making the determination, which included:

- (i) whether the debtor has few or no unsecured creditors;
- (ii) whether there have been previous bankruptcy filings by the debtor or related entities;
- (iii) whether the pre-petition conduct by the debtor has been improper;
- (iv) whether the filing permits the debtor to evade or delay court orders;
- (v) whether there are few debts to non-moving creditors;
- (vi) whether the petition was filed on the eve of foreclosure;
- (vii) whether the foreclosure property is the major asset of the debtor;
- (viii) whether the debtor has an ongoing business or employees;
- (ix) whether there is no possibility of reorganization;
- (x) whether the debtor’s income is insufficient to operate;
- (xi) whether the reorganization essentially involves resolution of a two-party dispute; and
- (xii) whether the debtor filed solely to obtain the protection of the automatic stay.⁴

In its review of the motions and objections before it, and of the record herein, this court found that seven of those factors were clearly true in this case: The debtor Remarkable Renovations has few or no unsecured creditors; there have been previous bankruptcy filings by related entities; this filing permitted the debtor to evade the state court order; there appear to be few if any debts to other non-moving creditors; the petition was filed on the eve of foreclosure; the bankruptcy essentially involves resolution of a two-party dispute between Kollar and Alexander; and the debtor clearly filed solely to obtain the protection of the automatic stay. Moreover, the schedules reflect that the debtor has no ongoing business, no employees, no cash, and no bank accounts. Because no plan of reorganization has been filed, the court was unable to answer whether there is a possibility of reorganizing, but it stated that it was skeptical, in light of the evidence presented by the parties at the hearing and in their briefs. However, the court found that it probably was true that the debtor’s income was insufficient to operate a business. The only elements that the court

⁴ See also *In re Colonial Warehouse, LLC*, 2013 WL 2190162 at *5 (Bankr. D.S.C. May 21, 2013) (listing similar criteria for determining dismissal based on subjective bad faith); *In re 4 C Sol’ns, Inc.*, 289 B.R. 354, 366 (Bankr. C.D. Ill. 2003) (same).

found to be probably but not clearly in favor of conversion were: (iii) whether the debtor's prepetition conduct was improper (although the court thought the sham mortgage found by the state court might qualify); and (vii) whether the foreclosure property was the major property asset, now that amended schedules have been filed with new properties listed (but the court suspected that probably the Greenleaf property still was the largest asset).

The court concluded that those indicators demonstrated that the chapter 11 filing did not serve a valid bankruptcy purpose; it appeared, instead, to be a litigation tactic to avoid payment of the judgment held by Alexander. Having found that cause existed, the court granted the creditor's Motion for conversion, rather than dismissal, on the ground that it was in the best interest of this creditor and the bankruptcy estate to allow liquidation under the supervision of a chapter 7 trustee. However, the court denied the second request in Alexander's Motion to Convert.⁵ In recognition of a chapter 7 trustee's duty and ability to "collect and reduce to money the property of the estate for which such trustee serves," § 704(a)(1), the court declined to order the immediate sale of the Greenleaf property.

Finally, the court denied the Motion for Sanctions against debtor's counsel, brought under 28 U.S.C. § 1927. The creditor had argued that counsel had filed two chapter 11 bankruptcy petitions to avoid a sheriff's sale, both in this case and in the earlier *23901 Greenleaf Land Trust* case, Case No. 13-31877. He insisted that such a purpose was an illegitimate reason for filing, one that constituted bad faith. He pointed out, as well, that Remarkable Renovations had been administratively dissolved and was not eligible for chapter 11 reorganization. Debtor's counsel responded that he had been unaware of the administrative dissolution at the time of the filing and that the corporation now was reinstated. He also offered another residential real estate property for immediate sale, apparently in lieu of the Greenleaf property.

⁵ The creditor's Motion to Convert and Order Sale violated the requirements of Northern District of Indiana Local Bankruptcy Rule B-9013-1(a) because it included more than one request for relief. The court requires motions and other requests to be filed separately.

Section 1927 allows a court, in its discretion, to hold an attorney liable for any excess costs and expenses caused by his “multipl[ying] the proceedings in any case unreasonably and vexatiously.” *See In re CMGT, Inc.*, 458 B.R. 473, 490-91 (Bankr. N.D. Ill. 2011). The Seventh Circuit has held that “[s]anctions against counsel under 28 U.S.C. § 1927 are appropriate when ‘counsel acted recklessly, counsel raised baseless claims despite notice of the frivolous nature of these claims, or counsel otherwise showed indifference to statutes, rules, or court orders.’” *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 799 (7th Cir. 2013) (quoting *Kotsilieris v. Chalmers*, 966 F.2d 1181, 1184-85 (7th Cir. 1992)).

The court found that bankruptcy filings on the eve of foreclosure are made every day and in themselves are not illegitimate tactics. *See, e.g., In re Penny*, 243 B.R. 720, 728 (Bankr. W.D. Ark. 2000) (“Although filing for bankruptcy on the eve of foreclosure is not *per se* bad faith . . . [a] penchant for repeatedly doing so can be considered as evidence of bad faith.”) (quoting *In re Casse*, 219 B.R. 657, 660 (Bankr. E.D.N.Y. 1998), *aff’d*, 198 F.3d 327 (2d Cir. 1999)). It also found that, under Indiana law, an administratively dissolved limited liability company continues its existence, but only in a limited capacity: It may carry on only the activities necessary to wind up and liquidate its business and affairs. *See* Ind. § 23-18-10-3(a); *see also Girl Scouts of S. Ill. v. Vincennes Ind. Girls, Inc.*, 988 N.E.2d 250, 254-55 (Ind. 2013) (citing Ind. Code § 23-17-23-2, same provision for nonprofit corporation); *Matter of Tri-Angle Distributors, Inc.*, 102 B.R. 151, 153 (Bankr. N.D. Ind. 1989) (finding that “Indiana law does not prohibit a dissolved corporation from filing a petition under Chapter 7 of the Bankruptcy Code in order to wind up and liquidate its business and affairs,” citing Indiana Code § 23-1-45-6). Importantly, however, when the entity is reinstated, “the reinstatement relates back to and takes effect as of the effective date of the administrative dissolution, and the limited liability company resumes carrying on business as if the administrative dissolution had never occurred.” Ind. Code § 23-18-10-4(c); *see also Girl Scouts*, 988 N.E.2d at 254 (citing Ind. Code § 23-17-23-3(c), same provision for nonprofit corporation).

The court has determined, therefore, that Remarkable Renovations' administrative dissolution did not forbid its filing of a chapter 11 petition (although it would have been a liquidating chapter 11) and that its reinstatement allowed its continuation under chapter 11 unencumbered by the administrative dissolution. However, it also recognized that counsel's filing of this chapter 11 case (only months after counsel's filing of *23901 Greenleaf Land Trust*, Case No. 13-31877) certainly frustrated the legitimate efforts of Alexander to enforce his rights to his judgment. Nevertheless, it was unwilling to conclude quite yet that this bankruptcy filing was frivolous; that counsel had shown indifference to statutes, rules or court orders; or that counsel's conduct in filing it was reckless, unreasonable or vexatious. At the hearing, the court acknowledged Wertheimer's long years of bankruptcy practice and reviewed his conduct in the totality of the circumstances of this case. It then found that his actions were not deserving of sanctions. *Cf. In re Park Place Assoc.*, 118 B.R. 613, 618 (Bankr. N.D. Ill. 1990) (concluding that dismissal of case on grounds of bad faith "does not in itself compel imposition of sanctions"). However, the court admonished Wertheimer that, if another entity of Kollar were to file another bankruptcy case in order to avoid payment of the judgment held by Alexander, the court would re-evaluate any charges of bad faith brought to the court at that time. Nevertheless, the court concluded that Wertheimer's conduct in filing the two bankruptcy petitions – for *Remarkable Renovations* and *23901 Greenleaf Land Trust* – did not rise to a level sufficient to warrant imposition of sanctions against him pursuant to 28 U.S.C. § 1927.

In summary, therefore, Creditor John Alexander's Verified Motion to Convert is granted. Alexander's Motion to Order the Immediate Sale of 23901 Greenleaf Boulevard is denied. Finally, Alexander's Motion for Sanctions Under 28 U.S.C. § 1927 is denied. The Order of Conversion will be issued by separate order.

/s/ HARRY C. DEES, JR.
HARRY C. DEES, JR., JUDGE
UNITED STATES BANKRUPTCY COURT