IT IS SO ORDERED.

Dated: 04:01 PM August 15 2008

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 07-53544
	)	
CHAP. HILL INC.,	)	CHAPTER 7
	)	
DEBTOR(S)	)	JUDGE MARILYN SHEA-STONUM

MEMORANDUM OPINION INTERPRETING ACCORD BETWEEN 11 U.S.C. § 1116(1) REQUIREMENTS AND 521(E)(2)(B) AUTOMATIC DISMISSAL PROVISION

On February 27, 2008, the Court held a hearing ("Hearing") on the following pleadings: (1) "Notice of Debtor's Failure to file Tax Returns Pursuant to 11 U.S.C. § 521(e)(2)" ("Notice")[docket #74] filed by Debtor, Chap. Hill Inc. ("Debtor"); (2) "Response of Trustee to Debtor's Notice of Failure to File Tax Returns" [docket #85] filed by Trustee Richard A. Wilson ("Trustee"); (3) "Objection to Notice of Debtor's Failure to File Tax Returns....." [docket #88] filed by the United States Trustee ("UST"); (4) "Supplemental Notice of Debtor's Failure to File Tax Returns..." ("Supplemental Notice")[docket #89] filed by the Debtor; and (5) "Reply to Supplemental Notice of Debtor's Failure to File Tax Returns" [docket #92] filed by theTrustee.

Appearing at the Hearing were Lenore Kleinman, counsel for the UST, Michael Moran, counsel for the Trustee, and the Trustee. Counsel for the Debtor did not appear. The Hearing was a continuation of matters which the Court had addressed preliminarily during a status conference on January 24, 2008 regarding Debtor's attempt to stop the Trustee's auction for the second time by filing the Notice and Supplemental Notice (collectively the "Notices of Dismissal"). Debtor contended in the Notices of Dismissal that the case must be dismissed pursuant to 11 U.S.C. § 521(e)(2)(B) for failure to file tax returns. The Court rejected that argument and decided that the case would remain pending on the Court's docket.

During the Hearing and after further discussion with counsel, the Court reiterated for the record its earlier ruling that the case was not subject to the § 521(e)(2)(B) automatic dismissal provision. The Court then took the matter under advisement for the limited purpose of establishing in further detail its position regarding § 521(e). This opinion is being entered to eliminate the confusion that might occur in light of the purported Notices of Dismissal.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (G) and (O) over which this Court has jurisdiction pursuant to 28 U.S.C. § 1334(b).

PROCEDURAL BACKGROUND

The Debtor filed its voluntary petition seeking relief under chapter 11 of the Bankruptcy Code on November 2, 2007. On the date that the petition was filed, the Debtor was doing business as Furniture and Mattress Liquidators in Akron, Ohio. On November 2, 2007, the Debtor also filed its statement pursuant to 11 U.S.C. § 1116(1)(B) that it had never prepared a balance sheet, a statement

of operations, a cash flow statement, and that no federal tax returns had ever been filed ("§ 1116(1)(B) Declaration")[docket #4].[1] Attached to the § 1116(1)(B) Declaration was an affidavit signed by the President of the Debtor, Armand Guerrini, attesting to the fact that since the incorporation of Chap. Hill Inc. on June 22, 2005, no federal income tax return had been filed by the company.

On November 28, 2007, this Court entered an order converting the case to chapter 7 ("Conversion Order")[docket #33] on the basis that the case was not filed in good faith and that conversion was in the best interest of creditors of the estate.[2] On November 29, 2007, the UST appointed Richard A. Wilson as the chapter 7 Trustee. Also on November 29, 2007, Debtor filed its Notice of Appeal of the Conversion Order [docket #34] and Motion to Stay Execution of Order Pending Appeal [docket #39]. The Court denied the stay on November 30, 2007 [docket #46].

On January 11, 2008, the Debtor filed with the District Court an Emergency Motion to Stay Execution of all proceedings, including the auction sale of assets scheduled for January 19, 2008. "Trustee's Notice of Intent to Sell" had been filed with the Court on December 21, 2007 [docket

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[1] Among the significant changes made to the bankruptcy law by the Bankruptcy Abuse and Consumer Protection Act ("BAPCPA") is the addition of 11 U.S.C. § 1116. Section 1116 imposes certain duties on a debtor-in-possession in small business cases. Specifically, these duties include requiring the debtor in in possession to "(1) append to the voluntary petition.... not later than 7 days after the date of the order for relief - - (A) its most recent balance sheet, statement of operations, cash-flow statement, and Federal income tax return; or (B) a statement made under penalty of perjury that no balance sheet, statement of operations, or cash-flow statement has been prepared and no Federal tax return has been filed...."

[2] During the conversion hearing, the Court expressed particular concern about Mr. Guerrini's pattern of filing bankruptcy on behalf of entities for which he is the majority or sole shareholder in the context of attempting to negotiate with landlords seeking eviction. The Court also noted that although Debtor failed to file income tax returns prepetition, neither the State of Ohio nor the IRS were listed as potential creditors. The Court further observed that Mr. Guerrini never mentioned a plan of reorganization or how the business would continue to operate.

#55]. The District Court temporarily stayed the auction, but later withdrew that order [docket #75]. The

Debtor filed the Notices of Dismissal on January 21, 2008 and January 29, 2008 respectively, citing Debtor's failure to file tax returns as a alleged basis for automatic dismissal.

On February 8, 2008, the Court overruled Debtor's objections to the auction sale and authorized the trustee to conduct the sale on February 9, 2008 as scheduled [docket #104]. The Debtor filed a purported notice of stay of the Court's order authorizing the sale, but later withdrew the notice of stay as moot [docket #111]. The sale went forward on February 9, 2008 pursuant to the Court's order. According to the Trustee's Report of Auction Sale Results [docket #104], the sale of the inventory and personal property generated the sum of $121,402.20.

DISCUSSION

The Debtor relies on 11 U.S.C. § 521(e)(2)(A) and (B) as the basis for its contention that the case must be dismissed. Section 521(e)(1) is limited to an individual debtor in a case under chapter 7 or 13. However, § 521(e)(2) is not limited to individual debtors. Section 521(e)(2)(A) specifically states that the debtor shall provide:

> (i) ...to the trustee a copy of the Federal income tax return required under applicable law...for the most recent tax year ending immediately before the commencement of the case ***and for which a Federal income tax return was filed***; and
> (ii) at the same time the debtor complies with clause (I), a copy of such return (or if elected under clause (I), such transcript), to any creditor that timely requests such copy.

(Emphasis added.)

Section 521(e)(2)(B) provides that if the debtor fails to comply with the subparagraph (A)(i) and (ii) requirements, "the court shall dismiss the case unless the debtor demonstrates that the failure

to so comply is due to circumstances beyond the control of the debtor." As the plain language indicates, the subparagraph (A) requirement presumes that the Federal income tax return was actually filed. However, as set forth in the § 1116(1)(B) Declaration, this Debtor established that it had never filed any tax returns. Therefore, since the Debtor had never filed a tax return, the automatic dismissal provision of 11 U.S.C. § 521(e)(2)(B) does not apply. Section 521(e)(2) does not require the performance of an impossibility. Accordingly, the Court rejects the illogic of the Debtor's argument that dismissal is mandated.

During the Hearing the Court posed an alternative possibility. In short, what is the result in a case where the tax returns could have been turned over, but were not, due to a debtor's intentional noncompliance or culpable neglect? The Court considers this possibility because it cannot discount the likelihood that the Debtor's § 1116(1)(B) Declaration may be inaccurate, given that the Debtor's counsel was retained on the day prior to the filing. Under the alternative possibility, the Court would not have the benefit of an affidavit attesting to the fact that no tax return had been filed. Instead, the Court would be faced with the chapter 11 debtor who is only interested in the benefits of the automatic stay, but who has no intention of complying with § 1116. Therefore, unlike the Debtor in the instant case, the alternative debtor ***did*** file with taxing authorities the required tax returns but did not append such return(s) to the petition.

Section 1116 does not provide either a remedy or a consequence for a debtor's failure to comply with the requirements set forth in § 1116(1)(A) and (B). On its face, § 1116 does not mandate dismissal of the case. *See In re Franmar, Inc*, 361 B.R. 170 (Bankr. D. Co. 2006). Thus, the analysis turns to the factors listed under 11 U.S.C. § 1112(b)(4) that may establish "cause" for purposes of considering motions to dismiss or convert chapter 11 cases. Here, the Court and counsel

contemplated that the alternative debtor's failure under § 1116(1)(A) would provide cause for conversion of the case to one in chapter 7 pursuant to § 1112(4)(F) (unexcused failure to satisfy timely any filing or reporting requirement) and § 1112(4)(H) (failure timely to provide information reasonably requested by the UST) in order to give the UST opportunity to investigate the business activities of the debtor prior to and after the filing of bankruptcy. Upon conversion of the case to chapter 7, the discussion circles back to the automatic dismissal provision of § 521(e)(2)(B). However, the impact of § 521(e)(2)(B) is different because the tax return was actually prepared and filed as envisioned by subparagraph (A) of § 521(e)(2).

Section 521(e)(2)(B) provides that the Court "shall dismiss" a bankruptcy case if the debtor does not provide to the trustee a copy or transcript of the debtor's most recent prepetition federal income tax return. Likewise, if a creditor requests a copy of such return or transcript and if the debtor fails to provide it at the same time the debtor provides it to the trustee, upon a motion by an appropriate party, must the court dismiss the case? Section 521(e)(2)(B) allows a debtor to oppose a motion to dismiss if the debtor "demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor." Thus, if the debtor opposes the motion, the Court must set and hold a hearing to determine if there are "circumstances beyond the control of the debtor."

Under the alternative facts posed by the Court, a debtor is unlikely to oppose the motion to dismiss because once the case is converted to chapter 7, it no longer desired to be in bankruptcy. Nor would its own neglect constitute evidence of "circumstances beyond the control of the debtor." Therefore, strictly following the plain language of § 521(e)(2)(B), the Court would be required to dismiss the hypothetical case for failure to comply with § 521(e)(2)(A). Consequently, it appears that under BAPCPA, Congress' direction that courts "shall" dismiss bankruptcy cases when tax returns

are not timely provided has given the bad faith debtor who failed to abide by § 521(e) an "escape hatch" from bankruptcy when it no longer suits the debtor's purposes.

Before so interpreting this amendment to the Bankruptcy Code, application of judicial estoppel should be considered. Judicial estoppel prevents a party from taking unfair advantage of the bankruptcy system by asserting inconsistent positions when the benefits of bankruptcy no longer suit its purposes. Relying on principles of judicial estoppel and waiver, Courts have consistently held that debtors may not "thumb their noses" at the bankruptcy system by using their own noncompliance to voluntarily dismiss their cases. *See In Re Withers* (Slip Op.), 2008 WL 202774 (Bankr. N.D. Ohio)(Debtor estopped from demanding dismissal based on failure to obtain credit counseling.) *In Re Mendez*, 367 B.R. 109 (B.A.P. 9th Cir. 2007)(Debtor waived right to dismiss case under 11 U.S.C. § 109(h) for failing to obtain credit counseling by participating in the bankruptcy case); *In Re Hall*, 368 B.R. 595 (Bankr. W.D. Tex. 2007)(Upon determination that the debtor is acting in bad faith in seeking dismissal by reason of his own defalcation, the Court may properly condition dismissal so that debtor is not rewarded for malfeasance); *In Re Fileccia* (Slip Op.), 2007 WL 1695387 (Bankr. M.D. Tenn.)(Debtor had been denied a discharge in an adversary proceeding pursuant to 11 U.S.C. § 727, then filed a motion to dismiss her main bankruptcy case for failure to provide tax returns to the trustee. The Court denied the motion on the basis of debtor's own malfeasance.)

Despite Congress' apparent intentions to permit non-compliance with § 521(e) to trigger dismissal, this Court joins the courts noted above that have faced the same circumstances and declines to empower debtors who lack good faith to manipulate the bankruptcy system in this manner.

C. CONCLUSION

As previously established, Debtor is not entitled to automatic dismissal of its chapter 7 case

under § 521(e)(2)(B). Debtor used chapter 11 and the pretense of proposing a plan of reorganization to gain the protection of the automatic stay in an effort to avoid eviction. As a chapter 11 debtor-in possession, Debtor was not subject to dismissal for noncompliance with the § 1116(A) filing requirement because it provided the necessary statement pursuant to § 1116(1)(B). However, when faced with a motion to convert, Debtor struck an inconsistent position and attempted to use that same omission as grounds for dismissal under another section of the Bankruptcy Code simply because the bankruptcy process no longer suited its needs. This Court will not tolerate Debtor's attempt to manipulate the bankruptcy system in order to advance its own dishonest interests.

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