UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

In Re:	)	
	)	**JUDGE RICHARD L. SPEER**
Archbold Elevator, Inc.	)	
	)	Case No. 11-34894
Debtor(s)	)	
	)	

DECISION AND ORDER

This cause comes before the Court after a Hearing on the Emergency Motion of Farmers & Merchants States Bank to Dismiss Case and/or Abstain or in the Alternative, for Relief from the Automatic Stay, or in the Alternative, for Appointment of a Chapter 11 Trustee. (Doc. No. 28). Also heard at this time was the Motion of 'The Andersons,' a creditor, seeking substantially the same forms of relief. The Debtor, Archbold Elevator, Inc., has objected to said Motions. At the conclusion of the Hearing, based upon the arguments raised by the Parties, and the evidence presented, the Court found that this case should be Dismissed. The following memorializes this Decision.

BACKGROUND

On September 9, 2011, the Debtor, Archbold Elevator, Inc., filed a petition in this Court for relief under Chapter 11 of the United States Bankruptcy Code. On the same day, three business entities related to the Debtor also filed a petition for Chapter 11 relief: (1) Kainos Operations, Ltd.; (2) O-MI-O, Inc.; and (3) Henry Pig, Inc. Pursuant to an order entered by the Court, these cases were ordered to be jointly administered with the bankruptcy case filed by Archbold Elevator. William Fricke is a principal in all of these businesses.

The Debtors' assets and business operations primarily concern hog operations and a grain elevator. The primary movant in this case, Farmers & Merchants States Bank ("the Bank"), is the holder of nine promissory notes executed by the Debtors. As of September 7, 2011, the total balance

owed on the Notes was $5,440,942.36, plus per diem interest of $2,438.76. These notes are secured by liens held by the Bank on substantially all of the Debtors' assets. The other Movant in this case, 'The Andersons,' holds claims against the Debtors in the amount of $5,930,886.71. (Ex. 3a).

Prior to the commencement of the bankruptcy cases now before the Court, a state-court receiver had been appointed, at the request of the Bank, to manage the business operations of the Debtors. The receiver was appointed on April 12, 2011. In seeking the appointment of a state-court receiver, the Bank based its request, in part, on this fact: On April 11, 2011, the Ohio Department of Agriculture indefinitely suspended the Debtors' agricultural commodity handler license due to the apparent misappropriation of hundreds of thousands of bushels of corn and soybeans and the apparent insolvency of Debtors. (Doc. No. 28, Ex. 2). In appointing the receiver, the state court found that the Debtors were in default under the terms of their notes with the Bank. (Doc. No. 28, Ex. 3).

After his appointment, the receiver undertook steps to rehabilitate the Debtors' business, with the ultimate goal of the receiver being a sale of the Debtors' assets and business operations. The steps undertaken by the receiver included, but are not limited to:

> entering into a lease with the company 'The Andersons' for the lease of the Debtors' grain elevator, utilizing 'The Andersons' feed handler's license, which allowed for the Debtors' grain elevator to be reopened
>
> entering into a contract with a third party to slowly liquidate the Debtors' hog herd, thereby generating revenue and lowering operating expenses.
>
> successfully soliciting bids for the sale of Debtors' grain elevator, feed mill and truck terminal.

Since the filing of the Debtors' bankruptcy case, the Court has permitted the Receiver to remain in possession and continue with the operation of the Debtors' business operations. (Doc. No. 61).

DISCUSSION

Law

In the instant matter, the Farmers & Merchants States Bank and 'The Andersons' brought their respective Motions requesting four alternative forms of relief: (1) dismissal or (2) abstention of the case pursuant to 11 U.S.C. § 305; (3) relief from the automatic stay; or (4) the Appointment of a Chapter 11 Trustee. For the reasons set forth below, the Court finds that the four consolidated cases before the Court should be dismissed pursuant to § 305 and § 1112(b).

Section 305 provides in relevant part as follows:

> (a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if–
>
> > (1) the interests of creditors and the debtor would be better served by such dismissal or suspension[.]

"The decision to dismiss or suspend under § 305(a) is discretionary and must be made on a case-by-case basis." *In re Fortran Printing, Inc.*, 297 B.R. 89, 94 (Bankr. N.D.Ohio 2003). Dismissal or abstention under § 305(a) is considered "an extraordinary remedy that should be used sparingly and not as a substitute for a motion to dismiss under other sections of the Bankruptcy Code." *In re L&M Video Productions, Inc.*, Not Reported in B.R., 2007 WL 1847387 *6 (Bankr. N.D.Ohio 2007).

The party seeking abstention bears the burden of proof. *Id*. To sustain this burden, § 305(a) specifies that a party must show that not only is dismissal or abstention in the best interest of creditors, but that abstention is also in the best interest of the debtor. In making this determination, a number of factors may be considered, including: (1) economy and efficiency of administration; (2) whether another forum is available to protect the interests of both parties or there is already a

pending proceeding in state court; (3) whether federal proceedings are necessary to reach a just and equitable solution; (4) whether there is an alternative means of achieving an equitable distribution of assets; (5) whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case; (6) whether a non-federal insolvency has proceeded so far in those proceedings that it would be costly and time consuming to start afresh with the federal bankruptcy process; and (7) the purpose for which bankruptcy jurisdiction has been sought. *In re Fortran*, 297 B.R. 89, 94-94, *citing In re Ceiling Fan Distrib., Inc.*, 37 B.R. 701, 703 (Bankr. M.D.La. 1983).

On the matter of dismissal and abstention under § 305, the following constitutes this Court's findings of fact and conclusions of law in accordance with Bankruptcy Rules 7052 and 9014(c).

Findings of Fact

Between the time the Receiver was appointed and the Debtors' bankruptcy cases were filed, a period of approximately five months, the Receiver was able to enter into agreements to sell a significant portion of the Debtors' assets. Time is of the essence to consummate such sales, particularly the sale of the Debtors' hog operations to Indiana Packers Corporation. The value of such Agreements is reasonable and fair. On September 12, 2011, three days before the Debtors filed for bankruptcy relief, the Receiver was set to announce the winning bid on the Debtors' grain elevator, feed mill and truck terminal.

The Receiver stabilized Debtors' business operations and financial condition. Since the appointment of the Receiver, there has been a significant improvement in the Debtors' business operations. The efforts of the receiver, however, are unlikely to yield any benefit to the Debtors' unsecured creditors.

The State of Ohio and 'The Andersons' conducted an audit of the Debtors' business operations and determined that significant amounts of grain were missing. As the result of the audit conducted by the State of Ohio, the Debtors lost their feed license. This loss prevents the Debtors from operating their grain elevator operation and has the potential to impair their ability to feed the roughly 96,000 hogs that were a part of Debtors' hog operation.

'The Andersons,' as a condition to the use of its Feed License in the operation of the Debtors' grain elevator, requires that Mr. Fricke not be permitted to participate in any way with the grain elevator portion of the business.

Mr. Fricke is under investigation by the Ohio Department of Agriculture and the Ohio Attorney General's office for possible criminal conduct related to those actions which caused the suspension of the feed license. The concerns, in this regard, stem from, among other things, (a) hundreds of thousands of bushels of grain that went "missing; (b) the provision of false financial statements on behalf of Debtors; and (c) the discovery of a significant number of undelivered checks that were represented as "paid" in Debtors' financial records but were never conveyed to Debtors' creditors. (Ex. No. 1).

During the time Mr. Fricke operated the business operations of the Debtors, he often disregarded the corporate form by engaging in certain irregular business practices, including:

Multiple employees were receiving wages in cash on which no taxes were withheld.

Mr. Fricke was paying himself a salary of $200,000 per year, while the Debtors were insolvent or near insolvency.

Although at times they did not perform any real services, Mr. Fricke had family members on the Debtors' payroll.

Mr. Fricke had the Debtors lease a Mercedes-Benz automobile for his personal benefit.

Mr. Fricke commingled personal and corporate assets. For example, Mr. Fricke caused the Debtors to pay for personal cell phone usage for him and his family.

The Debtors' business operations presently generate an overall positive cash flow. The Debtors have proposed to use this positive cash flow to formulate a Chapter 11 plan of reorganization that would yield a benefit to unsecured creditors. Such a plan, however, would be dependent on a number of contingencies to be successful such as a 'sale lease-back' of the elevator. Moreover, even if successful, any potential plan of reorganization that pays any meaningful dividend to unsecured creditors is likely to take a significant amount of time.

Conclusions of Law

Pursuant to 11 U.S.C. § 102(1), sufficient notice has been afforded to all Parties on the matters raised at the Hearing.

For purposes of 11 U.S.C. § 305(a), the interests of the Creditors and the Debtors would be better served by the dismissal of the Debtors' bankruptcy case.

For purposes of 11 U.S.C. § 1112(b), cause exists to dismiss the Debtors' bankruptcy case.

Basis of Court's Decision to Dismiss

In determining whether to dismiss or abstain under § 305, a court is to consider the economy and efficiency of the administration of the estate. On this consideration, the Court is faced with these parameters. First, given the past deficiencies of Mr. Fricke in managing the Debtors' business operations, placing him in possession at this point in time is not a viable option. Second, the alternative form of relief put forth by the Movants, that of appointing a Chapter 11 trustee, would likely place a significant financial burden on the bankruptcy estate, while unlikely yielding any benefit to the Debtors' unsecured creditors.

Accordingly, when considering the administration of the estate, it seems neither economical nor efficient to have this case proceed. Moreover, this would be true even if it were later determined, pursuant to 11 U.S.C. § 1105, that the Mr. Fricke should be placed in possession of the Debtors' business operations. As stated, even if the Debtors were able to successfully formulate a plan of reorganization – a highly speculative scenario – it is even more speculative that the Debtors' unsecured creditors would receive any meaningful distribution. As pointed out by the Bank, the Debtors' present financial projections show that it would take the Debtors 25 years to pay just their secured debt, leaving very little room to pay unsecured debt.

Based on these considerations, it also cannot be ignored that the dismissal of this case will not deprive any of the interested parties of their rights. A very competent state-court receiver has been appointed to manage the Debtors' business operations. Thus, consistent with many of those considerations in favor of dismissal, *supra*, under § 305, these conclusions follow:

> (1) there is pending in another forum a proceeding sufficient to protect the interest of the parties;
>
> (2) this federal proceeding is not necessary to reach a just and equitable solution;
>
> (3) in either this forum or the state-court forum, the unsecured creditors are unlikely to receive any meaningful distribution, and the priority order

> concerning the distribution of assets in the state-court receivership would likely mirror the ultimate order of distribution in this case were it to proceed; and
>
> (4) and the state court receivership provides a less expensive arrangement when the potentially high costs of bankruptcy administration are weighed against the Debtors' chance of successfully making a meaningful distribution to unsecured creditors.

Finally, consistent with the last of the listed considerations regarding dismissal under § 305, the four bankruptcy cases before the Court were only brought after the non-federal insolvency proceeding had been in progress for a period of five months and only after the proceeding had significantly proceeded toward its ultimate conclusion. Particularly, it is noted that the cases before the Court were only brought when the sale of many of the Debtors' assets became imminent. As a result, the costs of starting afresh with the bankruptcy process show that it would be more beneficial to all concerned of allowing the state-court receivership to proceed.

Finally, even disregarding the application of § 305, those matters outlined in this Court's findings of fact – particularly, the prepetition management issues of Mr. Fricke, together with the potentially high costs associated with the appointment of a Chapter 11 trustee – make it unlikely that the Debtors will be able to effectuate a viable plan of reorganization, thereby warranting dismissal under 11 U.S.C. § 1112(b)(1). In relevant part, this provision provides:

> . . . on request of a party in interest, and after notice and a hearing, the court shall . . . dismiss a case under this chapter . . . for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

See In re HBA East, Inc., 87 B.R. 248, 262 (Bankr. E.D. N.Y. 1988) (absence of realistic probability of successful reorganization is grounds for dismissal); *In re Spectee Group, Inc.*,185 B.R. 146, 155-56 (Bankr. S.D.N.Y 1995) (cause existed to dismiss case for a lack of good faith where petition filed

for sole purpose of frustrating and delaying its secured creditor's efforts to enforce its legitimate rights); *In re Monsour Medical Center, Inc.*, 154 B.R. 201, 208-09 (Bankr. W.D.Pa.1993) (Chapter 11 petition filed in bad faith, giving rise to cause for dismissal, when bankruptcy was filed in attempt to reverse setbacks it had suffered in state court receivership).

Accordingly, for all these reasons, the Court finds that Dismissal is appropriate. It is therefore

ORDERED that, effective September 26, 2011, at 5:38 p.m. these four bankruptcy cases are hereby Dismissed: (1) *In re: Archbold Elevator, Inc.*, Case No. 11-34894; (2) *In re: Kainos Operations, Ltd.*, 11-34895; (3) *In re: O-MI-O, Inc.*, Case No. 11-34898; and (4) *In re: Henry Pig, Inc.*, Case No. 11-34896.

Dated: September 27, 2011

Richard L. Speer
United States
Bankruptcy Judge