

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 13-17204
)
MINNIE M. BOWERS SMITH and) Chapter 11
JAMES SMITH,)
) Chief Judge Pat E. Morgenstern-Clarren
Debtors.)
) **MEMORANDUM OF OPINION**

When the debtors Minnie Bowers Smith, M.D. and James Smith filed their chapter 11 case, Dr. Bowers¹ declared gross monthly income of \$16,460.00.² One year later, the debtors proposed a plan offering to pay \$5,252.00 a month to their creditors.³ About one year after that, and following the untimely death of James Smith, Dr. Bowers proposed an amended plan that called for her to pay \$7,090.00 a month.⁴ She also filed a disclosure statement.

If Dr. Bowers had set aside the proposed plan payments from the filing date, she would have had about \$126,310.00⁵ in reserve by October 2015. As it was, she had no reserve and just over \$5,000.00 in cash for her regular expenses.⁶

¹ This is the debtor's preferred name. Deposition of Minnie Bowers Smith (Dep.) at 3.

² Docket 16.

³ Docket 56.

⁴ Docket 161, 167.

⁵ This number is calculated based on 20 payments of \$5,252.00 for the period of November 2013 through June 2015 and 3 payments of \$7,090.00 for the period after she filed the amended plan in July of 2015.

⁶ Docket 176.

The court held a hearing on the disclosure statement⁷ as well as a continued hearing on the United States trustee's motion to dismiss the case for lack of feasibility based on the debtor's failure to set aside money for the plan on a regular basis. The debtor argues in opposition that no purpose would be served by dismissing the case rather than giving her a chance to perform under a confirmed plan. For the reasons stated below, the UST's motion is granted.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 2012-7 entered by the United States District Court for the Northern District of Ohio on April 4, 2012. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O), and it is within the court's constitutional authority as analyzed by the United States Supreme Court in *Stern v. Marshall*, 131 S.Ct. 2594 (2011) and its progeny.

11 U.S.C. § 1112(b)(1)

A chapter 11 case can be dismissed for cause, on motion of a party in interest, after notice and a hearing. 11 U.S.C. § 1112(b)(1). Cause "includes" a number of circumstances. 11 U.S.C. § 1112(b)(4). The circumstances listed are not exclusive. *In re Creekside Senior Apartments, L.P.*, 489 B.R. 51, 60 (B.A.P. 6th Cir. 2013); *see* 11 U.S.C. § 102(3) (stating that the words "includes" or "including" are not limiting). The court must examine each case with a focus on the debtor before it. The party seeking dismissal must prove its case by a preponderance of the evidence. 489 B.R. at 60.

Cause exists under § 1112(b)(4)(A) where there is a "substantial or continuing loss to or diminution of the estate *and* the absence of a reasonable likelihood of rehabilitation[.]" 11

⁷ Docket 168.

U.S.C. § 1112(b)(4)(A) (emphasis added). Both requirements must be satisfied. The first requirement is met by showing that “the debtor continues to incur losses or maintains a negative cash-flow position after the entry of the order for relief” or that the debtor’s assets have declined in value since the case was commenced.” 489 B.R. at 61 (quoting *In re Westgate Props., Ltd.*, 432 B.R. 720, 723 (Bankr. N.D. Ohio 2010)); *see also In re Miller*, 496 B.R. 469, 479 (Bankr. E.D. Tenn 2013) (collecting cases). If an individual debtor fails “to place . . . financial resources on the table during the pendency of [the] case,” choosing instead to use all disposable income to fund daily living expenses, that supports a finding of continuing loss to or diminution of estate assets. *In re Wahlie*, 417 B.R. 8, 11 (Bankr. N.D. Ohio 2009).

The second requirement considers whether the debtor’s rehabilitation is reasonably likely, which is a different and more demanding standard than reorganization. 489 B.R. at 61. “Rehabilitation, in this context, means to put back in good condition; re-establish on a firm, sound basis.” *In re The V Companies*, 274 B.R. 721, 725 (Bankr. N.D. Ohio 2002) (internal quotation marks and citation omitted). Rehabilitation is reasonably likely if it appears that the debtor’s deteriorating financial situation can be corrected. “If ‘the debtor, or some other party, will be able to stem the debtor’s losses and place the debtor’s enterprise on a solid financial footing within a reasonable amount of time,’ then the debtor may have a reasonable likelihood of rehabilitation.” 489 B.R. at 61 (quoting *In re Costa Bonita Beach Resort, Inc.*, 479 B.R. 14, 42 (Bankr. D. P.R. 2012)).⁸

⁸ The “special circumstances” provision of § 1112(b)(2), does not apply based on the determination that dismissal is appropriate under § 1112(b)(4)(A). 11 U.S.C. § 1112(b)(2); *see In re Creekside Senior Apartments, L.P.*, 489 B.R. 51, 63 (B.A.P. 6th Cir. 2013) (noting that the § 1112(b)(2) exception by its terms “does not apply if the cause for dismissal or conversion is a ‘substantial or continuing loss to or diminution of the estate,’ as set forth in § 1112(b)(4)(A)”).

THE POSITIONS OF THE PARTIES

Counsel for the UST and the debtor agree that the debtor has not budgeted her money or made an attempt to create a reserve fund.⁹ The UST argues that the past predicts the future. Based on the debtor's conduct over the last three years, he contends it is unlikely that the debtor will be able to make drastic changes to her budget to fund the plan, thus showing the plan is not feasible. The debtor argues that if she has to "survive on less money," she will do so¹⁰ and that no party will be served by dismissal.

FACTS¹¹ AND DISCUSSION

Dr. Bowers, a psychiatrist employed by the Cleveland Clinic, earned \$197,268.00 in 2014.¹² That, combined with her husband's pension, resulted in a family income of about \$222,500.00.¹³ Since 2011, she has rented a condominium on a month-to-month basis, paying \$1,650.00 a month plus utilities.¹⁴ There is no written lease. She is responsible for certain repairs.

⁹ Deposition (Dep.) at 85 (Docket 182).

¹⁰ Dep. at 88.

¹¹ Both counsel agreed at the continued hearing that an evidentiary hearing was not necessary, the facts being undisputed.

¹² Dep. at 18. Dr. Bowers was her family's sole wage earner; Mr. Smith received a small monthly pension (\$560.00) until his death in 2015. In light of this, and for ease of the reader, this opinion will refer just to Dr. Bowers as the debtor.

¹³ Dep. at 19.

¹⁴ Dep. at 6. The debtor may also pay water and sewer charges. (Docket 181, Check nos. 1121, 1064).

This case got off to a rocky start when, shortly after the filing and unbeknownst to her counsel, the debtor took \$32,500.00 of the cash surrender value of an insurance policy¹⁵ and used it to pay rent as well as to repay two of her sisters for money they loaned to tide her over before the filing.¹⁶ She did so despite her counsel's instruction to call him before taking any unusual moves. This was perhaps the first, but not the last, time that the debtor acted independently of advice given by her attorney, as discussed below.

The pattern continued with the debtor spending excessive amounts of money over the next two years.¹⁷ These fall into three basic categories: travel for the debtor and her sisters, improvements to the rented condominium, and repairs to her late mother's house.

For example:

December 2013

\$6,000.00 Rent and condominium-related expenses¹⁸
\$1,500.00 Food for a family of two
\$3,000.00 Holiday travel, including two of the debtor's sisters, as
"sort of reimbursing them for that period of time when they were
supporting" the debtor.¹⁹

¹⁵ Operating Report for period ended November 2013, at Cash Statement. (Docket 112).

¹⁶ Dep. at 12-13, 14.

¹⁷ It is difficult to fully understand the debtor's operating statements because of the format used. The UST accepted some responsibility for this, stating that the UST's suggested format for individual chapter 11s is not ideal. (Dep. at 37). Nevertheless, it is the debtor's obligation to provide the relevant information.

¹⁸ Docket 113.

¹⁹ Dep. at 39-40.

February 2014²⁰

\$696.00 Cell phone, cable/land phone, and satellite radio

March 2014²¹

\$550.00 new kitchen sink

April 2014²²

\$800.00 Travel/Airlines

May 2014²³

\$992.00 Vacation/travel for a trip to Tennessee for a graduation²⁴

\$430.00 Other Travel Costs²⁵

June 2014²⁶

\$586.00 Cell phone/Cable/Television

\$1,750.00 Home maintenance/carpeting

\$3,700.00 Travel (to New York for a graduation, perhaps also paying for her sisters)²⁷

July 2014

\$2,001.00 Carpeting installation and home goods

\$674.00 Wedding gift/Entertainment

²⁰ Docket 114.

²¹ Docket 115.

²² Docket 116.

²³ Docket 117.

²⁴ Dep. at 47.

²⁵ All of the travel expenses are for personal rather than business travel. The debtor's employer pays for cabs when she travels from one Cleveland office to another. Until October or November 2014 she paid for her own cab when traveling to and from work, but those expenses are included under automobile expenses. Dep. at 26-28. The debtor only identified one trip that she thought might have been to a medical conference, but her testimony was vague and inconclusive. Dep. at 54.

²⁶ Docket 128.

²⁷ Dep. at 47-48.

\$3,796.00 Vacation/Travel (two week trip to Martha's Vineyard)²⁸

August 2014

\$2,275.00 Travel Expenses/Vacation for a trip to New York.²⁹

September 2014³⁰

\$850.00 Kitchen cabinet installation

\$2,846.00 Travel/rental car/plane tickets/lodging

\$500.00 Kitchen floor installation

\$3,650.00 Travel airlines/rental car

September 17-October 16, 2014³¹

\$500.00 Kitchen Floor Installation

\$3,650.00 Travel/Airlines/Rental Car

November 19-December 16, 2014³²

\$1,800.00 Airline Travel vacation

\$1,900.00 Additional

December 2014³³

\$ 400.00 Home maintenance/cabinets/sink

\$135.00 Travel/vacation

\$1,134.00 Telephone/Internet

January 2015³⁴

\$372.00 Cable/cell phone

\$1,203.15 Personal Items

²⁸ Dep. at 51.

²⁹ Dep. at 47.

³⁰ Docket 120.

³¹ Docket 175, pages 1-3.

³² Docket 175, pages 4-7.

³³ Docket 123.

³⁴ Docket 124.

February 2015³⁵

\$452.00 Cable/cell phone

\$592.00 Personal Items³⁶

March 2015³⁷

\$583.68 Cable/cell phone

April 2015³⁸

\$2,090.00 Personal Items

\$669.81 Cable/cell phone

June 2015³⁹

\$3,519.00 Personal Items

\$490.00 Cable/cell phone

\$2,207.00 Home repairs

July 2015⁴⁰

\$1,095.28 Personal Items

\$1,156.02 Cable/Cell/Utilities

\$1,100.00 Home Repairs

August 2015⁴¹

\$1,483.46 Personal Items

\$4,000.00 Rent/Lodging

\$1,221.75 Cable/cell/Utilities

\$295.40 Vacation Expenses

³⁵ Docket 125.

³⁶ The debtor could not say with certainty what expenses fall within this category, but thought it could include clothing, clothing care, vitamins, and gifts. Dep. at 61. The same month, however, includes separate amounts for food, clothes and laundry/dry cleaning. *Id.*

³⁷ Docket 126.

³⁸ Docket 127.

³⁹ Docket 160.

⁴⁰ Docket 165.

⁴¹ Docket 176, pages 1-3.

September 2015⁴²

\$2,494.32 Personal Items

\$707.67 In-Suite Maintenance/Home Specific Items

Some additional facts warrant mentioning. During this same time period:

- (1) the debtor withdrew about \$15,000.00 in cash;⁴³
- (2) she incurred \$538.90 in bank overdraft charges, most recently in August 2015;
- (3) she spent about \$13,000.00 at Sam's Club and Costco;⁴⁴
- (4) Some expenses (notably cable/cell) reflect payments for more than one month

because the debtor failed to make timely payments;⁴⁵ and

(5) Some expenses relate to a home owned by her late mother, whose 2010 estate is in probate. These include house repairs (roof, boiler and the like) and about \$5,700.00 in insurance premiums.⁴⁶

The debtor provided this explanation for her conduct: "I would take responsibility for not understanding how every cent should be spent once you file bankruptcy. So I think my

⁴² Docket 176, page 4.

⁴³ Docket 181. Check nos. 1005, 1136, 1159, 1172, 1160, 1170, 1365, 1378, 1381, 1402, 1386, 1407, 1393, 1428, 1257, 1260, 1275, 1276, 1285, 1272, 1332, 1311, 1428, 1463, 1468, 1498, 1515, 1527, 1491, 1544. (These checks are listed in the same order they were produced in the exhibit).

⁴⁴ Docket 181. Check nos. 1040, 1014, 1015, 1039, 1008, 1009, 1041, 1048, 1055, 1076, 1077, 1099, 1109, 1135, 1123, 1168, 1386, 1354, 1411, 1429, 1420, 1171, 1207, 1211, 1217, 1235, 1236, 1286, 1271, 1234, 1309, 1293, 1294, 1314, 1315, 1344, 1348, 1450, 1467, 1470, 1521, 1545. (These checks are listed in the same order they were produced in the exhibit).

⁴⁵ Dep. at 59.

⁴⁶ Dep. at 52. Check nos. 1051, 1056, 1114, 1103, 1126, 1131, 1412, 1436, 1165, 1129, 1221, 1223, 1224, 1245, 1304, 1337, 1363, 1464, 1481, 1520. (These checks are listed in the same order they were produced in the exhibit). Dep. at 70-75.

understanding was, since I have the income now, get these things done so that when I start the plan, I might not be able to do these things in the future . . . And it's not because Mr. Henderson didn't stress over and over again about the need to be conservative in spending. But my thought was to get these things I needed to get done because I knew the money wouldn't be there."⁴⁷

Additionally, "it is only very recently, recently meaning in the last six months, that I've understood that from when we filed in October or November of 2013 up until now [September 15, 2015] the expectation would be that there would be money sitting in the bank gathering interest, I guess, that would not have been spent, that would have been part of the plan."⁴⁸

Plainly, cause exists to dismiss this case. This is a high-earning debtor who allocated her income to everything except the proposed plan, thus diminishing the estate. The estate, which should have had a substantial reserve, has little more than it did two years ago.

As to the second element of cause, the debtor's rehabilitation is not reasonably likely. The court does not believe that an intelligent, highly educated debtor failed to understand what her experienced bankruptcy counsel was advising about spending. Even assuming she did not understand her obligations until six months ago, it is telling that *even then* she did not begin to set aside any money for her creditors.

The debtor lives an extravagant lifestyle and has not made any showing in the last two years that she can drastically change her spending pattern. Debtor's counsel describes the debtor as "principled" and the UST's counsel describes her as "sincere;" the court does not have reason

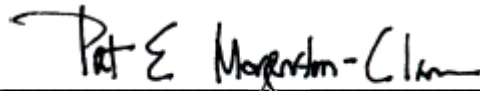
⁴⁷ Dep. at 43-44. The debtor did not explain the thinking behind making improvements to a condominium owned by third parties that she leased on a month-to-month basis.

⁴⁸ Dep. at 45.

to doubt either characterization. That is not, however, the point. The point is that the debtor had ample opportunity over the last two years to demonstrate that she could and would reduce her expenses to honor her plan payment obligations if her plan was confirmed, and she did not. The UST, therefore, proved that it is highly unlikely under the circumstances that the debtor can be rehabilitated, and thus cause exists to dismiss her case.

CONCLUSION

The UST proved that cause exists to dismiss the case, no party having suggested that conversion or appointment of a trustee would be in the best interests of the estate. The case will, therefore, be dismissed by separate order.

A handwritten signature in black ink, reading "Pat E. Morgenstern-Clarren". The signature is written in a cursive, flowing style. The "P" is large and loops around the "at". The "E" is a simple horizontal stroke. "Morgenstern-Clarren" is written in a similar cursive style, with the "M" being particularly prominent.

Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge

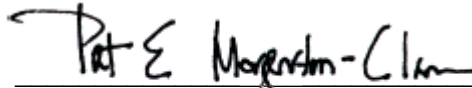
UNITED STATES BANKRUPTCY COURT
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In re:) Case No. 13-17204
)
MINNIE M. BOWERS SMITH and) Chapter 11
JAMES SMITH,)
Debtors.) Chief Judge Pat E. Morgenstern-Clarren
) **ORDER DISMISSING CASE**

For the reasons stated in the memorandum of opinion entered this same date, the United States trustee's motion is granted and this case is dismissed. (Docket 71, 172).

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge