

THIS OPINION IS NOT INTENDED
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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
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NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:) Case No. 95-14780
)
ROBERT FINCH,)
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**
)

In re:) Case No. 95-14778 (P_{10m-6})
)
MELVIN FINCH and)
BARBARA FINCH,) Chapter 11
)
Debtors.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**
)

In re:) Case No. 95-14779
)
JOSEPH WILLIAMS and)
ELSIE WILLIAMS,) Chapter 11
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**
)

These cases are before the Court on the Motions of the United States Trustee to Convert or Dismiss (Case No. 95-14780 Docket 68; Case No. 95-14779 Docket 66; Case No. 95-14778 Docket 69) and Motions of Commerce Exchange Bank to Convert (Case No. 95-14780 Docket 69; Case No. 95-14779 Docket 67; Case No. 95-14778 Docket 70). Debtors objected to all motions. (Case No. 95-14780 Docket 72, 73; Case No. 95-14779 Docket 70, 71; Case No. 95-14778 Docket 72, 73). For the reasons stated below, the Motions are granted, the Objections are

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overruled, and the cases are converted to cases under Chapter 7 of the Bankruptcy Code.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).

FACTS

The Court held an evidentiary hearing in these three cases on May 8, 1997. Christopher Sonson, Bankruptcy Analyst for the Office of the United States Trustee, was the only witness. Based on the testimony, exhibits,¹ and the file, the Court finds these facts:

1. Debtors filed these cases under Chapter 11 of the United States Bankruptcy Code on October 27, 1995. While the cases are related, they have not been procedurally consolidated.

2. On April 29, 1996, the Court entered an Agreed Order authorizing the sale of Debtors' real estate located on Leuer Avenue in Cleveland, Ohio (the "Property") to E.Z. Building Component Corp. for \$630,000, with all liens and interests of all parties to be transferred to the fund generated by the sale. (United States Trustee Exhibit, Case No. 95-14780 Ex.5; Case No. 95-14779 Ex.6; Case No. 95-14778 Ex.6).

¹ Debtors filed Motions in Limine to exclude exhibits and witnesses offered by Commerce Exchange Bank. Those Motions were denied at the hearing. After that, all exhibits were admitted into evidence without objection, with the exception of United States Trustee Exhibit 14 in the case of Barbara and Melvin Finch, Exhibit 14 in the case of Joseph and Elsie Williams, and Exhibit 13 in the case of Robert Finch. Debtors' objections to admission of these exhibits, which are compilations of financial information included in the other exhibits, were overruled.

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3. On October 22, 1996, after a lengthy process, the Court approved the Third Amended Disclosure Statement filed by Melvin and Barbara Finch, the Second Amended Disclosure Statement filed by Robert Finch, and the Second Amended Disclosure Statement filed by Joseph and Elsie Williams. (United States Trustee Exhibit, Case No. 95-14780 Ex. 5; Case No. 95-14779 Ex. 6; Case No. 95-14778 Ex. 6). The confirmation hearings were adjourned indefinitely by agreement of the parties to allow this Court to consider the availability of marshaling, an issue raised both in related adversary proceedings and in the proposed Plans of Reorganization. Debtors did not prevail on the issue of marshaling and the Judgments denying its availability are currently being appealed. (Adv. Pro. #96-1165 Docket 52, 54; Adv. Pro. #96-1164 Docket 52, 54; Adv. Pro. #96-1162 Docket 49, 51).

4. All three Disclosure Statements discuss Plans of Reorganization to be funded through two sources: the sale of the Property and post-petition wages of Debtors. The Disclosure Statements contemplate 56-month Plans.

5. Christopher Sonson, C.P.A., testified that he was assigned to these three cases by the Office of the United States Trustee at the time they were filed. His responsibilities include reviewing the monthly operating reports filed by the Debtors, as well as the Disclosure Statements and Plans of Reorganization. Debtors have generally provided all information requested by the United States Trustee's office. Mr. Sonson reviewed and analyzed the information provided by Debtors over the course of more than a year, giving him the opportunity to consider the seasonal aspects of Debtors' business operations.

6. Mr. Sonson analyzed the financial performance of Debtors Melvin and Barbara Finch as follows: they projected their monthly income to be \$6,722 or a total of \$40,333 for the

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period of October 1996 through March 1997. They failed to meet the projected monthly income every month for that period, with their actual income amounting only to \$27,697. These Debtors projected that their excess monthly income over projected expenses would be \$2,181 a month and those monies would fund their Plan. (United States Trustee Ex. 6 Case No. 95-14778, Disclosure Statement, p. 6). For the time period from October 1996 through March 1997, this should have totaled \$13,081. Instead, Debtors had a shortfall of \$11,335. (United States Trustee Ex. 14 Case No. 95-14778).

7. Mr. Sonson analyzed the financial performance of Elsie and Joseph Williams as follows: they projected their monthly income to be \$5,795 or a total of \$34,770 for the period of October 1996 through March 1997. They failed to meet the projected monthly income every month for that period, with their actual income amounting only to \$14,423. These Debtors projected that their excess monthly income over projected expenses would be \$2,146 a month and those monies would fund their Plan. (United States Trustee Ex. 6 Case No. 95-14779, Disclosure Statement, p. 6). For the time period from October 1996 through March 1997, this should have totaled \$12,876. Instead, Debtors had a shortfall of \$12,176. (United States Trustee Ex. 14 Case No. 95-14779).

8. Mr. Sonson also analyzed the financial performance of Debtor Robert Finch. After making appropriate adjustments to account for the fact that Mr. Finch's spouse is not a debtor, Mr. Sonson testified that Mr. Finch projected his monthly income to be approximately \$4,256 a month, or a total of \$25,536 for the period of October 1996 through March 1997. He failed to meet that projection every month for that period, with his actual income totaling only \$11,571. Debtor projected that his monthly income would exceed his expenses by \$2,175 and

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those monies would fund his Plan. For the time period from October 1996 through March 1997, this should have totaled \$13, 050. Instead, Debtor had a shortfall of \$9,495. (United States Trustee Ex. 13 Case No. 95-14780).

9. All three Plans of Reorganization require Debtors to pay administrative expenses at confirmation. These expenses are projected to be: Melvin and Barbara Finch, \$38,200; Elsie and Joseph Williams, \$38,200; and Robert Finch, \$23,500. In contrast, Debtors' March 1997 Operating Reports indicate Melvin and Barbara Finch had \$866 cash on hand; Elsie and Joseph Williams had \$154 cash on hand; and Robert Finch had \$126 cash on hand. (United States Trustee Exhibit, Case No. 95-14780 Ex. 11, 13; Case No. 95-14779 Ex.12, 14; Case No. 95-14778 Ex. 12, 14).

10. Debtors did not present any evidence that the sale of the Property had closed. Debtors submitted into evidence several letters expressing the hope on the part of the authors that the transaction would be able to close at an unstated time and under unidentified conditions. (Debtors' Exhibits Case No. 95-14780 Ex.1-4; Case No. 95-14779 Ex.1-4; Case No. 95-14778 Ex. 1-4). These letters indicate that the intended purchaser has still not obtained financing.

11. Debtors also introduced into evidence checks payable to Melvin Finch, Joseph Williams, and Robert Finch bearing notations that they are for wages paid in April 1997. (Debtors' Exhibits Case No. 95-14780 Ex.6 ; Case No. 95-14779 Ex.6; Case No. 95-14778 Ex. 6). There was no evidence of any corresponding expenses incurred by Debtors for that month. There was, therefore, no evidence of any Debtors' net monthly income for April 1997.

12. Mr. Sonson's testimony was undisputed that Debtors in each of the three cases do not have the present ability to fund the proposed Plans.

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13. On April 10, 1997, the Court held a status conference in open court in the three main bankruptcy cases to give the parties an opportunity to address any issues they deemed relevant following the rulings made on motions for summary judgment in the three related adversary proceedings. Debtors did not request that the Court schedule a hearing on confirmation of the Plans nor did Debtors withdraw their Disclosure Statements or their proposed Plans. Debtors did not ask for leave to file amended plans of reorganization.

DISCUSSION

The United States Trustee and Commerce request relief under 11 U.S.C. § 1112(b)(2) and (3). Those sections provide, in relevant part, for the dismissal or conversion of a Chapter 11 case:

- (b) . . . on request of a party in interest or the United States Trustee . . . , and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including -
 - (2) inability to effectuate a plan; [or]
 - (3) unreasonable delay by the debtor that is prejudicial to creditors.

Movants must prove by a preponderance of the evidence that cause exists for the requested relief.² *In re Woodbrook Assocs.*, 19 F.3d 312, 317 (7th Cir. 1994). Commerce has requested conversion while the United States Trustee takes no position regarding conversion versus dismissal. Debtors oppose the requested relief.

² Although Commerce also requested relief under 11 U.S.C. § 1112(b)(1), it did not present evidence or argument regarding diminution of assets and it is clear that relief is no longer being sought under that section.

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11 U.S.C. § 1112(b)(2)

Inability to effectuate a plan under 11 U.S.C. § 1112(b)(2) tests whether there is a reasonable likelihood that a plan can be confirmed in a reasonable amount of time. *In re Woodbrook Assocs.* Relief under this section is appropriate “where the debtor’s failure to file an acceptable plan after a reasonable time indicates its inability to do so whether the reason for the debtor’s inability to file is its poor financial condition, the structure of the claims against it or some other reason.” *Hall v. Vance*, 887 F.2d 1041, 1044 (10th Cir. 1989). “Creditors . . . need not incur the added time and expense of a confirmation hearing on a plan they believe cannot be effectuated. (Citation omitted). . . . The very purpose of § 1112(b) is to cut short this plan and confirmation process where it is pointless.” *In re Woodbrook Assocs.* at 317. Additionally, “it is recognized that generally ‘bankruptcy courts have substantial discretion to dismiss . . . [where] the debtor files an untenable plan of reorganization’.” *In re Charfoos*, 979 F.2d 390, 395 (6th Cir. 1992) (quoting *Toibb v. Radloff*, 501 U.S. 157, 165 (1991) (discussing bad faith as a basis for dismissing a Chapter 11 case).)

11 U.S.C. § 1112(b)(3)

11 U.S.C. § 1112(b)(3) defines cause to include unreasonable delay that is prejudicial to creditors. “[T]he bankruptcy code does not guarantee that a debtor will emerge unscathed or that his business will be successfully reorganized. Bankruptcy must not become a safe harbor inside which debtors are forever hidden from debts they have incurred and creditors who deserve payment . . . ‘It only provides a breathing period for a debtor to attempt to reorganize’.” *In re Jackson*, 190 B.R. 808, 811 (D.C. W.D. Va. 1995) (quoting *In re Jones*, 115 B.R. 351, 352 (Bankr. N.D. Fla. 1990).) The circumstances that caused or contributed to the debtor’s delay

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must be considered in determining whether an unreasonable amount of time has elapsed. *In re Jackson* at 811; *In re Sphere Holding Corp.*, 162 B.R. 639 (D.C. E.D.N.Y. 1994). This section also requires consideration of whether continuing proceedings will be detrimental to creditors. *In re Koerner*, 800 F.2d 1358 (5th Cir. 1986).

These Chapter 11 cases have been pending for over eighteen months. Debtors do not have an ongoing business to reorganize. They have proposed Plans which provide for the sale of the Property as a portion of Plan funding, with ongoing Plan payments to be made from Debtors' wages. The sale of the Property which was authorized by this Court over a year ago has still not closed and the purchaser has not obtained financing to date. It appears unlikely, therefore, that the sale will be consummated. Debtors have not sought authority to sell the Property to any other buyer. Additionally, the income and expense projections on which those Plans were based have proven to be grossly inaccurate because Debtors' actual wages have lagged substantially behind projected wages and expenses have varied from the projections. In sum, there are no funds available to support the Plan payments. Moreover, the Plans were based on a marshaling scheme determined to be inappropriate by a judgment of this Court.

Debtors have not filed or proposed new Plans although they have had more than ample opportunity to do so. Debtors have not offered any explanation for the delay. Under these circumstances, continuing the reorganization process would almost certainly be non-productive and would result in delay detrimental to creditors. Therefore, under these facts, Debtors in all three cases have been unable to effectuate a plan within the meaning of 11 U.S.C. § 1112(b)(2). Based on the same facts, it is clear that Debtors have delayed unreasonably in their Chapter 11 cases and a continuance of the process is not justified and would prejudice creditors. Relief

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under 11 U.S.C. § 1112(b)(3) is, therefore, also warranted.

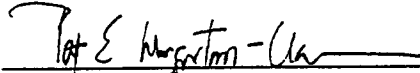
Dismissal or Conversion

The facts in these cases indicate that conversion rather than dismissal is in the best interests of creditors and the estate. There appear to be substantial assets in all three cases which may be liquidated by a Chapter 7 trustee and distributed to creditors. An orderly liquidation of these assets under Chapter 7 is, therefore, preferable to dismissal.

CONCLUSION

The Motion of the United States Trustee for Conversion or Dismissal and the Motion of Commerce Exchange Bank for Conversion are both granted and the Debtor' Objections to them are overruled. Separate judgments will be issued in accordance with this Memorandum of Opinion.³

Date: 19 May 1997



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Ronald Henderson, Esq.
Stephen Hobt, Esq.
Amy Leizman, Esq.

By: Joyce L. Gordon, Secretary

Date: 5/19/97

³ As is the case with prior orders, this Memorandum of Opinion is being filed in each of the three cases.

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In re:) Case No. 95-14779
)
JOSEPH WILLIAMS,) Chapter 11
ELSIE WILLIAMS,)
Debtors.) Judge Pat E. Morgenstern-Clarren
) **JUDGMENT**

For the reasons stated in the Memorandum of Opinion filed this same date,

IT IS, THEREFORE, ORDERED that the Motion of the United States Trustee for Conversion or Dismissal and the Motion of Commerce Exchange Bank for Conversion are granted and the Debtors' Opposition to them is overruled. This case is, therefore, converted to a case under Chapter 7 of the United States Bankruptcy Code.

Date: 19 May 1997

Pat E. Morgenstern-Clarren
Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Ronald E. Henderson, Esq.
Steve Hobt, Esq.
Amy Leizman, Esq.

By: Joyce L. Gordon, Secretary

Date: 5/19/97