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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
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U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:) Case No. 03-18559
)
MIDWEST FIREWORKS MFG. CO.,) Chapter 11
INC., II,)
) Judge Pat E. Morgenstern-Clarren
Debtor.)
) **MEMORANDUM OF OPINION**

The chapter 11 trustee moves to convert this case to chapter 7 under bankruptcy code §§ 1112(b)(1) and (2). (Docket 116). Creditor Huntington National Bank and Laurence Lomaz (the debtor's sole shareholder) object. (Docket 119, 120). For the reasons stated below, the motion to convert is granted.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered 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).

FACTS¹

I.

Midwest Fireworks Mfg. Co. Inc., II filed its chapter 11 case on June 13, 2003. A related company, Pacific Financial Services of America, was already in a chapter 11 at that time and the

¹ The court held a hearing on the motion on December 2, 2004 to inquire if any party requested an evidentiary hearing. No one did. These facts are drawn from the docket and the filings in this case. The court has also taken judicial notice of the docket in *In re Pacific Financial Services of America*, case no. 03-11098.

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cases were jointly administered with David Simon serving as the chapter 11 trustee (trustee). *See In re Pacific Financial Services of America*, case no. 03-11098. Huntington National Bank proposed a joint plan of reorganization that depended, among other things, on the trustee selling the assets of both corporations. On November 8, 2004, the court granted the trustee's and United States trustee's motion to dismiss the *Pacific* case on the ground that there was not a reasonable likelihood that the plan could be confirmed within a reasonable period of time.² The trustee then moved to convert this case to chapter 7.

II.

Midwest was in the business of manufacturing and selling fireworks at 160 Underridge Road, Conneaut, Ohio (Conneaut property) and 8550 State Route 224, Deerfield, Ohio (Deerfield property). The debtor has not done any business since July 3, 2003, shortly after the trustee accepted his appointment. At that time, the estate had \$159,000.00 in cash. The trustee has paid utility and security costs and repaired the heating, electrical, and sprinkler systems at the Conneaut property, which reduced the cash to about \$130,000.00. The debtor's only other assets are a small amount of inventory and several pieces of equipment, together with whatever interest it may own in certain state licenses.

The licenses at issue, jointly owned by Midwest and Pacific, permit them to manufacture and sell fireworks in Ohio under certain circumstances. Under state law, such licenses run with specific real estate and the license holder cannot move the license to another location. Ohio will

² *See* memorandum of opinion and order entered in *In re Pacific Financial Services of America* (docket 201, 202).

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not issue any additional fireworks licenses until December 2005. Any valid license, therefore, theoretically has an enhanced value in a closed market.

The fireworks licenses owned by Pacific and Midwest are registered to the Conneaut property and/or the Deerfield property. Midwest does not own either property (and neither does Pacific). The Deerfield license has been revoked, the revocation was upheld on appeal, and further appeal is pending. The license that runs with the Conneaut property is the subject of a Notice of Non-Renewal; when the notice hearing goes forward, the trustee anticipates that this license will also be revoked. In the meantime, to have any hope of keeping or reviving any license the trustee must pay a renewal fee of \$2,750.00 per license and represent that he has an interest in the real estate to which it attaches. The trustee does not feel he can do this because the estate does not have an interest in either the Conneaut or Deerfield properties. For all intents and purposes, therefore, the licenses have little or no value to the estate in their present form today.

THE POSITIONS OF THE PARTIES

The trustee argues that cause exists to convert the case because the debtor has not done business for more than a year and the estate is diminishing as the trustee pays to maintain the Conneaut property to protect the remaining inventory. The trustee contends further that there is no hope of rehabilitating this debtor because the proposed plan is not even theoretically feasible now that the *Pacific* case has been dismissed.

Huntington contends in opposition that cause does not exist because the trustee has not proven that the estate is diminishing or that rehabilitation is not possible. On the first point, Huntington argues that the money spent and to be spent by the trustee is not a diminishment of the estate but a cost of preserving it. On the latter point, Huntington states that it has appealed

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the dismissal of the *Pacific* case which may result in a reversal that might revive the proposed plan, thus permitting rehabilitation. Alternatively, if cause does exist, Huntington's position is that conversion would not be in the best interests of the creditors, but neither does it argue in favor of dismissal.

Laurence Lomaz concedes that cause exists to convert or dismiss because reorganization is not feasible. He believes that dismissal is the better remedy but does not provide any reasons in support.

DISCUSSION

On request of a party in interest, and after notice and a hearing, a bankruptcy court may convert or dismiss a case for "cause." 11 U.S.C. § 1112(b). The statutory definition of cause includes the "inability to effectuate a plan." 11 U.S.C. § 1112(b)(2). This test for cause "focuses on whether there is a reasonable likelihood that a plan can be confirmed in a reasonable amount of time." *In re V Companies*, 274 B.R. 721, 724 (Bankr. N.D. Ohio 2002) (citing *In re Woodbrook Assoc.*, 19 F.3d 312, 316 (7th Cir. 1994)). Cause can also be shown by proving "continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation." 11 U.S.C. § 1112(b)(1). The party seeking conversion has the burden of proving cause exists by a preponderance of the evidence. *See In re Woodbrook Assocs.*, 19 F.3d 312, 317 (7th Cir. 1994).

The parties agree that the plan proposed by Huntington when the *Pacific* and *Midwest* cases were being jointly administered is the only plan that will be proposed. As noted above, this court reviewed that plan in detail in the *Pacific* case, found that there was not a reasonable likelihood that the plan could be confirmed in a reasonable amount of time, and for that reason

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granted the trustee and United States trustee's motion to dismiss the *Pacific* case. The proposed plan required both debtors to be in chapter 11 cases so that the trustee could sell their assets collectively. With the *Pacific* case dismissed, there is no reasonable likelihood that a plan can be confirmed in a reasonable period of time in this case, either. While Huntington correctly notes that the *Pacific* dismissal is on appeal, there is no stay pending appeal. The appeal does not undercut the trustee's proof that there is no reasonable likelihood that the plan can be confirmed within a reasonable time. The trustee proved that cause exists under bankruptcy code § 1112(b)(2).

The trustee also proved that cause exists under § 1112(b)(1). There is a fixed pool of money and a determined set of assets in this case; each dollar spent by the trustee is reducing the dollars available to pay administrative costs and dividends to creditors. None of the money being spent by the trustee for utilities and repairs is likely to increase the estate assets. The estate is, therefore, diminishing. And as already discussed, there is no reasonable likelihood of rehabilitation.

After a finding of cause, the court must determine whether the case should be converted or dismissed by asking which path would be in the best interests of the creditors and the estate. *See* 11 U.S.C. § 1112(b). The chapter 11 trustee supports conversion because he has funds on hand that can be applied to administrative expenses and distributed to creditors. If the case were dismissed, these funds would go back to the debtor and the creditors would be forced to pursue state court remedies to collect from it. *See In re Continental Holdings, Inc.*, 170 B.R. 919, 927 (Bankr. N.D. Ohio 1994)(noting that a decision regarding conversion versus dismissal is incomplete unless creditors' interests in bankruptcy are compared with those under state law).

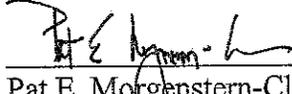
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There is no question but that conversion is in the best interests of creditors and the estate. The case will, therefore, be converted to one under chapter 7.

CONCLUSION

For the reasons set forth above, the trustee's motion to convert is granted. A separate order will be entered reflecting this decision.

Date: 8 June 2004



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

Rebecca Kucera Fischer, Esq.
Morris Laatsch, Esq.
David Douglass, Esq.
Alexander Jurczenko, Esq.
Maria Giannarakis, Esq.
David Simon, Esq.

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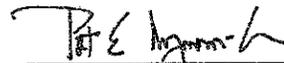
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MIDWEST FIREWORKS MFG. CO.,) Chapter 11
INC., II,)
)
) Judge Pat E. Morgenstern-Clarren
Debtor.)
) **ORDER**

For the reasons stated in the memorandum of opinion entered this same date,
IT IS, THEREFORE, ORDERED, that the chapter 11 trustee's motion to convert this
case is granted and this case is converted to a case under chapter 7 of the United States
bankruptcy code. (Docket 116).

Date: 8 Dec 2004



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

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David Douglass, Esq.
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