

THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION



In re: ) Case No. 04-24902  
)  
SEBASTIAN RICCO, ) Chapter 11  
)  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
)  
) **MEMORANDUM OF OPINION**

The U.S. trustee filed a motion to convert this chapter 11 case to chapter 7 or, in the alternative, to appoint a chapter 11 trustee.<sup>1</sup> Creditors Farm Credit Services of Mid-America and Sandra Ricco support the motion and the debtor opposes it.<sup>2</sup> For the reasons stated below, the motion 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).

**FACTS**<sup>3</sup>

This is the second chapter 11 bankruptcy case filed by the debtor Sebastian Ricco. He filed his first case on September 18, 2002 in the Akron division of the Northern District of Ohio,<sup>4</sup>

---

<sup>1</sup> Docket 60.

<sup>2</sup> Docket 74, 75, 136.

<sup>3</sup> The court held an evidentiary hearing on April 21, 2005.

<sup>4</sup> Case no. 02-54303.

the Honorable Marilyn Shea-Stonum presiding. About one year later, following three unsuccessful attempts by the debtor to present an adequate disclosure statement and plan, Judge Shea-Stonum dismissed the case with the instruction that: “. . . should the Debtor decide to file another chapter 11 case, he will be required to file an adequate Plan and Disclosure Statement with his petition.”<sup>5</sup>

The debtor filed his second case on November 21, 2004 in the Cleveland division. Although he did not file a plan and disclosure statement with the petition in accordance with Judge Shea-Stonum’s order, this court declined to dismiss his case on that basis at the initial status conference. At the continued status conference, the debtor promised to file the plan and disclosure statement by February 6, 2005. He did not do so. The trustee filed his motion to convert, or for the appointment of a trustee on March 4, 2005 with a hearing date of April 21, 2005. The day of the hearing, the debtor filed a brief in opposition.

The debtor’s operating report for March 2005 shows that he has \$2,742,800.00 in land and buildings, \$1,166,156.21 in secured debt, and \$439,576.97 in unsecured debt.

### **THE POSITIONS OF THE PARTIES**

The United States trustee moves to convert this case to chapter 7 or to appoint a chapter 11 trustee on these grounds:

1. The debtor did not timely file his monthly operating reports;
2. The debtor did not file a disclosure statement;
3. The debtor did not timely file a proposed plan;
4. The debtor’s schedules and operating reports show that the debtor

---

<sup>5</sup> United States trustee exh. 1.

has more than enough assets to pay all of his secured and unsecured creditors in full; and

5. The debtor has not filed an application to retain a professional to sell the debtor's real estate, although the debtor must sell the real estate in order to fund a plan.

In response, the debtor states:

1. He filed the monthly operating reports for December 2004, January 2005, February 2005, and March 2005 on April 19, 2005;
2. He filed a proposed plan on February 16, 2005 and an amended plan on April 21, 2005, and he will be filing another amended plan in the near future;
3. He intends to file an application to employ a real estate professional;
4. He filed a disclosure statement on December 9, 2004;
5. He has filed motions to reinstate the stay for all properties where the stay has been lifted;
6. He intends to pay all creditors in full;
7. He has shown good faith by adding five properties to be sold through the plan; and
8. The motion is "premature as the plan has only been in effect . . . , about a month [and] a half not giving time for the plan to be effective and certainly not an unreasonable delay that is prejudicial to the secured and unsecured creditors."

### **DISCUSSION**

Motions to convert or dismiss are governed by bankruptcy code § 1112(b), which provides in relevant part:

(b) [With exceptions not relevant here], on request of . . . 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 –

\* \* \*

(3) unreasonable delay by the debtor that is prejudicial to creditors[.]

11 U. S.C. § 1112(b)(3). This is not an exclusive list of grounds to convert. *See, for example, Michigan Nat'l Bank v. Charfoos (In re Charfoos)*, 979 F.2d 390, 392 (6th Cir. 1992) (noting that bad faith is additional cause). The decision regarding relief under § 1112(b) is made on a case-by-case basis. *See Laguna Assocs. Ltd. P'ship v. Aetna Cas. & Sur. Co. (In re Laguna Assocs. Ltd. P'ship)*, 30 F.3d 734, 737 (6th Cir. 1994). The movant must prove by a preponderance of the evidence that cause exists to convert or dismiss. *See In re Woodbrook Assocs.*, 19 F.3d 312, 317 (7th Cir. 1994).

The debtor acknowledged at the hearing that he filed both his first case and this case because he was going through a divorce and was “trying to protect the family assets for his children” as against his then-wife’s efforts to obtain some of them. The evidence presented at the hearing, including taking judicial notice of the docket as requested by the United States trustee, shows that the debtor has done very few things required of a chapter 11 debtor and has done some things that a chapter 11 debtor should not do. The debtor did not timely file his operating reports, he did not file a disclosure statement,<sup>6</sup> he did not file the chapter 11 plan when he filed his case as ordered by Judge Shea-Stonum, he did not file within the extension granted by this court, and the plan he ultimately filed is by his own admission defective. He apparently has used the services of a professional in connection with efforts to sell his real property although he has

---

<sup>6</sup> Although the debtor says he filed a disclosure statement on December 9, 2004, there is no such docket entry and the debtor did not offer a copy into evidence.

not filed an application to retain such a person. Similarly, the debtor testified that an accountant has been working on the monthly operating reports, but he has not filed an application to retain an accountant. Although the debtor's schedules show that he has had enough assets to pay his debts in full from the date this case was filed, he only recently filed a plan that proposed to do so. In the meantime, he has been sitting in chapter 11 with enough assets to have paid all his debts in full, not met his responsibilities to provide timely financial information to the United States trustee and his creditors, and claims that he does not really know what is going on.

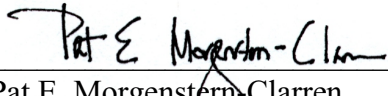
Given the debtor's filing history, the depth and breadth of his business dealings, and his obvious animosity toward at least one of his creditors (his ex-wife), the court does not believe that the debtor is confused about the state of his case or his responsibilities in chapter 11. The debtor has been given a full and fair chance by not one but two bankruptcy courts to avail himself of the legitimate relief afforded by chapter 11 to the honest but unfortunate debtor. He has instead unreasonably delayed, which delay has caused prejudice to creditors who are substantively no closer to receiving payment under a confirmed plan than they were the day the case was filed. The court, therefore, finds that the debtor has unreasonably delayed his prosecution of this case to the prejudice of his creditors.

Section 1112 requires the court to determine whether conversion or dismissal is appropriate. The United States trustee requests conversion; the court finds that to be the better course because a chapter 7 trustee can move promptly to liquidate the debtor's assets for the benefit of his creditors and estate. This case will, therefore, be converted to a case under chapter 7 of the bankruptcy code.

**CONCLUSION**

The motion of the United States trustee to convert the case to one under chapter 7 is granted. A separate order will be entered reflecting this decision.<sup>7</sup>

Date: 4/27/05

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

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

---

<sup>7</sup> The United States trustee's alternative request for the appointment of a chapter 11 trustee is rendered moot by this decision.

THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

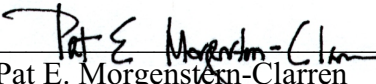


In re: ) Case No. 04-24902  
)  
SEBASTIAN RICCO, ) Chapter 11  
)  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
)  
) **ORDER**

For the reasons stated in the memorandum of opinion entered this same date,

IT IS, THEREFORE, ORDERED that the United States 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 60).

Date: 4/27/05

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

To be served by clerk’s office email and the Bankruptcy Noticing Center