

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 04-12595
)
THE CAPITAL CREATION CO., INC.,) Chapter 11
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**

Creditor Coventry Group, Inc. moves to appoint an examiner on the ground that the debtor and its principal and insiders engaged in activities warranting such an appointment. *See* 11 U.S.C. § 1104(c)(1). The debtor opposes the request.¹ For the reasons stated below, the motion is denied.

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).

FACTS²

The Capital Creation Co., Inc. filed its chapter 11 petition on March 4, 2004. The debtor is an Ohio corporation which was established in 1977 as an insurance brokerage firm. Joshua

¹ Docket 249, 261.

² The court held a hearing on June 16, 2005. Counsel submitted the issue for decision on oral argument and the briefs. These facts are drawn from the case docket and the approved disclosure statement.

Gottlieb is the debtor's sole shareholder. At one time, this was a thriving business which generated commission income through the sale of life insurance policies. After experiencing a significant downturn in its business, however, the company terminated its employees, outsourced its operations, and soon filed this case. The debtor's current revenue stream consists entirely of commissions generated when customers pay premiums on policies they purchased prepetition.

There is no committee of unsecured creditors. Creditors have, however, been active and many, if not most, substantive issues have been contested. On November 24, 2004, the debtor and JG Acquisitions, LLC, an entity owned by Joshua Gottlieb, filed a joint proposed disclosure statement and plan.³ Several parties, including Coventry, objected to the disclosure statement. On January 20, 2005, the court held a hearing to consider the adequacy of the disclosure statement, which hearing was adjourned for an amended disclosure statement to be filed. The amended disclosure statement was approved at a hearing held on February 17, 2005 and the court entered an order reflecting this on February 25, 2005. The order provided that: (1) the confirmation hearing would be held on April 11, 2005; (2) March 30, 2005 was the last date to object to confirmation; and (3) March 30, 2005 was the deadline for voting on the plan.⁴

On April 8, 2005, the confirmation hearing was adjourned at the debtor's request to permit the court to rule on issues related to the claim of Allyne Gottlieb.⁵ That matter has now been decided, the confirmation hearing is now scheduled for June 28, 2005, plan voting has taken

³ Docket 170.

⁴ Docket 187.

⁵ Docket 227, 228.

place, and the debtor has filed a report tabulating plan acceptances and rejections.⁶ A number of parties, including Coventry, have filed objections to confirmation.

DISCUSSION

The positions of the parties

Coventry maintains that an examiner should be appointed because the most significant creditors in this case are entities or individuals related to or controlled by Joshua Gottlieb. It cites these two prepetition transfers which it believes merit examination: (1) the transfer of business opportunities away from the debtor to related entities; and (2) the grant of a security interest to Isabel Lucas (Joshua Gottlieb's mother) for less than reasonably equivalent value thirteen months before the case was filed. The debtor opposes the appointment, arguing that Coventry failed to establish a factual basis for the appointment and that the delay and cost of the appointment at this stage of the case outweigh any potential benefit to the debtor's estate and creditors.

11 U.S.C. § 1104

Bankruptcy code § 1104(c)(1) provides for the discretionary appointment of an examiner:

If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor or by current or former management of the debtor, if –

⁶ Docket 222.

- (1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate[.]

11 U.S.C. § 1104(c)(1).

An examiner “typically investigate[s] the debtor’s business and handle[s] other duties specifically assigned by the bankruptcy court, but do[es] not replace the debtor in possession in handling the day-to-day affairs of the business.” *United States v. Schilling (In re Big Rivers Elec. Corp.)*, 355 F.3d 415, 422 (6th Cir. 2004). “As the title suggests, the basic job of an examiner is to examine, not to act as a protagonist in the proceedings.” *Official Comm. of Asbestos Pers. Injury Claimants v. Sealed Air Corp. (In re W.R. Grace & Co.)*, 285 B.R. 148, 156 (Bankr. D. Del. 2002). A debtor’s sale of assets to a related corporation before the chapter 11 case is filed may warrant investigation by an examiner where there are questions regarding the transaction and the relationships of the parties involved. *See In re Gilman Servs., Inc.*, 46 B.R. 322, 327 (Bankr. D. Mass. 1985).

A request to appoint an examiner must be substantiated with factual support that the appointment is necessary. *See In re Gliatech, Inc.*, 305 B.R. 832, 836 (Bankr. N.D. Ohio 2004) (citing *In re Mechem Fin. of Ohio, Inc.*, 92 B.R. 760, 761 (Bankr. N.D. Ohio 1988)). “[A] creditor group, no matter how dominant, cannot justify the appointment of . . . [an] examiner simply by alleging that it would be in its interests. It must show that the appointment is in the interests of all those with a stake in the estate[.]” *In re Sletteland*, 260 B.R. 657, 672 (Bankr. S.D. N.Y. 2001). When deciding if an appointment will benefit creditors, equity security holders, and other parties in interest, the court must consider the cost, as well as the delay, which will result from the appointment. *See Gliatech*, 305 B.R. at 836 (noting that the cost of an

appointment must be considered); *In re Gilman Servs., Inc.*, 46 B.R. at 328 (Bankr. D. Mass. 1985) (noting that delay caused by the appointment may also be relevant).

Coventry cites two prepetition transactions to support its request: the debtor's transfer of its business opportunities to J.L. Gottlieb Agency, Inc. and the grant of a security interest to Isabel Lucas. Coventry did not, however, support the motion with the requisite evidence. There was no evidence regarding the transfer to Ms. Lucas. And the evidence provided with respect to the transfer of business opportunities is not sufficient to support the appointment of an examiner in this case. Coventry offered evidence in the form of transcripts from depositions⁷ which it suggests show that Joshua Gottlieb's actions on this issue should be carefully scrutinized. Those excerpts are, however, incomplete and inconclusive.⁸

Additionally, considerations of cost and delay weigh against the appointment of an examiner. This is a relatively small case that has been pending for over one year. At this point, a disclosure statement has been approved, voting has been completed, and the hearing to consider confirmation of the joint plan is set for June 28, 2005. The appointment of an examiner would provide minimal benefit to creditors and the estate, and Coventry has not shown that the delay and cost attendant to the appointment are warranted.⁹

⁷ The excerpts are attached to Coventry's motion.


⁸ At the hearing on this matter, Coventry's counsel expressed frustration about the debtor's alleged failure to provide information on these issues. The case docket does not reflect any effort on Coventry's part to compel discovery on these issues and Coventry did not offer any other evidence in support.

⁹ Coventry's counsel suggested that his client would be willing to pay the costs associated with the appointment to avoid burdening the estate. However well-intentioned the offer, the United States trustee correctly pointed out that such payment might compromise the examiner's independence and impartiality.

CONCLUSION

For the reasons stated, Coventry's motion to appoint an examiner is denied. A separate order reflecting this decision will be entered.

Date: 23 June 2005



Pat E. Morgenstem-Clarren
United States Bankruptcy Judge

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

THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

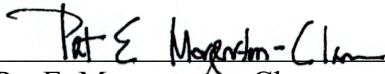


In re:) Case No. 04-12595
)
THE CAPITAL CREATION CO., INC.,) Chapter 11
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **ORDER**

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

IT IS, THEREFORE, ORDERED that the motion of Coventry Group, Inc. to appoint an examiner under 11 U.S.C. § 1104(c)(1) is denied. (Docket 249).

Date: 23 June 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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