

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 00-11090-JMD
Chapter 11

Stephen Camann,

Debtor

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AMENDED MEMORANDUM OPINION

I. INTRODUCTION

On February 8, 2001, the Court held a hearing on motions to deny confirmation or dismiss competing plans filed by the Debtor (Doc. No. 264), Joan Camann (“Joan”) (Doc. No. 263), and Gregory Camann (“Greg”) (Doc. No. 265) (collectively the “Motions to Dismiss”). At the commencement of a hearing held on February 14, 2001, the Court stated that it would be dismissing the Debtor’s case for cause pursuant to 11 U.S.C. § 1112(b). The reasons stated by the Court on the record at the February 14, 2001 hearing and in this memorandum opinion constitute the Court’s findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New

Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

The Court’s findings of fact are based upon a review of the entire record in this proceeding, the pleadings and papers filed by the parties in connection with the Motions to Dismiss, as well as the arguments of counsel at the hearing on February 8, 2001.

A. Divorce Proceedings

The Debtor and Joan separated in 1989 and began divorce proceedings in state court in 1990. On December 15, 1995, the Debtor and Joan executed a proposed final decree in order to resolve their divorce proceeding. On December 22, 1995, Judge William Groff of the Hillsborough County Superior Court approved the recommendation of the marital master and entered a decree of divorce, approving the proposed final decree and incorporating it into a final order (the “Divorce Decree”).

Under the terms of the Divorce Decree the parties divided all of the marital property into the following categories:

1. Life Insurance on the Debtor (Section VII);
2. Primary Residences (Section IX.4);
3. Joan Camann Parcels of Land (Section IX.4);
4. Camco, Inc. (Section IX.5.a);
5. Manchester Realty Co. (Section IX.5.b);
6. Lake Winnepesaukee Property (Section IX.5.c);
7. Hooksett Land (Section IX.5.d);
8. Household Furniture and Furnishings (Section X);
9. Other Personal Property (Section XI); and
10. Personal Motor Vehicles (Section XII).

Under the Divorce Decree, the assets in categories 3, 4, 5, 6 and 7 are referred to as the “Designated Assets.” Pursuant to the Divorce Decree, if the parties had not entered into any other agreement with respect to the Designated Assets as of May 1, 1996, the Debtor was to immediately place the Designated Assets on the market for sale. Although the parties engaged in extensive negotiations regarding the

disposition of the marital assets, particularly the assets of the Debtor's businesses Camco, Inc. ("Camco") and Manchester Realty Company ("Manchester Realty"), during the years following the parties' divorce, they were unable to reach an agreement as to the disposition of the assets. It is undisputed that the parties had not reached any "other agreement" with respect to the Designated Assets by May 1, 1996 and that such assets were not placed on the market for sale as required.

The Divorce Decree also provided that if any of the Designated Assets remained unsold on April 30, 1998, "Joan Camann may move for the appointment of a commissioner effective May 1, 1998 to conduct the sale." See Divorce Decree at Sections IX.5 and IX.6. Joan did not move for the appointment of commissioner on May 1, 1998. Rather, on July 19, 1999, she filed a petition to enforce certain alleged post-Divorce Decree agreements or, in the alternative, to appoint a commissioner under section IX.6 of the Divorce Decree. She also sought the imposition of sanctions against the Debtor. On April 12, 2000, just minutes before the trial on the petition to enforce was scheduled to commence in state court, the Debtor filed a Chapter 11 bankruptcy petition.

B. Bankruptcy Proceedings

The Debtor filed a skeleton Chapter 11 petition on April 12, 2000. Within days of the filing, the Debtor filed a motion seeking to reject an executory contract into which he had allegedly entered with Joan and Greg. After a four day trial, the Court ruled that the parties had not entered into a contract and, therefore, there was no executory contract for the Debtor to reject in bankruptcy. During the course of the case, Joan filed motions seeking orders from the Court compelling the Debtor to transfer to her real property that she alleged was not property of the bankruptcy estate, see Doc. No. 23, and appointing a commissioner to sell non-real estate assets of Manchester Realty, specifically, Manchester Realty's cash and the cash value of the life insurance policy held by Manchester Realty, see Doc. No. 210. The Court denied those motions. See Docs. No. 85 and 232.

At Greg's request, the Court shortened the exclusivity period in this case. See Doc. No. 148. Both the Debtor and Joan proposed plans of reorganization. In accordance with the Court's order dated June 29, 2000, the competing plans have proceeded on parallel tracks. See Doc. No. 148. The Court held a preliminary hearing on confirmation of the competing plans on January 8, 2001. After the January 8th hearing, the Court issued a procedural order setting discovery deadlines and continued hearings on the numerous confirmation issues. See Doc. No. 257.

The Court held a hearing on February 8, 2001 on the legal issues implicated by the competing plans. The parties argued that the competing plans should be dismissed and/or denied pursuant to 11 U.S.C. §§ 1129(a)(3) and/or 1112(b).

III. DISCUSSION

Section 1112(b) of the Bankruptcy Code allows a bankruptcy court to dismiss or convert a case under Chapter 11, whichever is in the best interest of creditors and the estate, for cause. 11 U.S.C. § 1112(b). See also In re Abijoe Realty Corp., 943 F.2d 121, 124-26 (1st Cir. 1991). The Court acting on its own, sua sponte, may dismiss a Chapter 11 case for cause. See In re Harvey Probber, Inc., 44 B.R. 647, 651 (Bankr. D. Mass. 1984) (citing Connell v. Coastal Cable T.V., Inc. (In re Coastal Cable T.V., Inc.), 709 F.2d 762 (1st Cir. 1983)). See also In re Pedro Abich, Inc., 165 B.R. 5, 7-8 (D.P.R. 1994). The Bankruptcy Code does not define the term "cause." Rather, section 1112(b) lists ten examples of cause, which list is not exhaustive. See In re Gonic Realty Trust, 909 F.2d 624, 626 (1st Cir. 1990) ("Although the language of section 1112(b) provides a list of possible circumstances for 'cause,' this is not an exhaustive list, and in fact 'the court is not limited to the enumerated grounds in making its determination of some cause.'" (citations and quotations omitted). "Accordingly, the court may also convert or dismiss a case for reasons that are not specifically enumerated in the section, provided that these reasons are sufficient to demonstrate the existence of cause." Collier on Bankruptcy at ¶ 1112.04[1] (Lawrence P. King, ed., 15th ed. 2000). See also Gonic Realty, 909 F.2d at 626.

Relief under section 1112(b) is discretionary. Id. See also In re Woodbrook Assocs., 19 F.3d 312, 316 (7th Cir. 1994) (“A bankruptcy court has broad discretion under 11 U.S.C. § 1112(b) to dismiss a Chapter 11 case for cause.”). “The court . . . must exercise its sound judgment in reaching a determination and must ascertain that the decision is in the best interest of creditors.” Gonic Realty, 909 F.2d at 626-27. However, “[o]nce cause for relief is shown, the court has broad discretion for dismissing.” Id. at 627.

The issues under section 1112(b) were raised by the parties in their various pleadings scheduled for hearing on February 8, 2001. At the hearing, the issues relating to dismissal and denial of the competing plans were fully discussed and argued by the parties. While Joan made it clear that she was not seeking dismissal of the Debtor’s case based on bad faith under section 1112(b), Greg and the Debtor did address these issues in their papers, which issues had also been raised by the Court at multiple hearings during the course of the Debtor’s case. For these reasons, the Court finds that the parties have had adequate notice of and opportunity to be heard on the issue of dismissal and that their procedural due process rights have been protected.

As stated in open court on February 14, 2001, the Court is dismissing the Debtor’s Chapter 11 case sua sponte for cause under section 1112(b) of the Bankruptcy Code because the Debtor’s case lacks a bankruptcy purpose at this stage of the case. “[T]he general doctrine of good faith is designed to stop abusive chapter 11 cases at any stage of the case.” Collier at ¶ 1112.07[6]b[iii]. Whether a case should be dismissed for lack of good faith turns on the totality of the circumstances in each case. See id. at ¶ 1112.07[2]. The Debtor argues that he filed this case in order to reject an alleged agreement to transfer Camco stock to Greg that the Debtor believed might have resulted in a financially debilitating gift tax liability. However, to the extent that the existence of a contract between the Debtor, Joan, and Greg regarding the sale of stock and the acquisition of assets of Camco and Manchester Realty and the Debtor’s ability to reject such a contract under section 365 of the Bankruptcy Code provided a bankruptcy purpose at the commencement of this proceeding, the contract issue has been resolved for more than eight months. See Doc. No. 124, Order dated June 2, 2000; Doc. No. 132, Memorandum Opinion dated June 6, 2000.

This issue no longer serves as basis for the Court’s continued exercise of jurisdiction over the Debtor and his assets.

This case involves a solvent estate. The Court agrees with Joan that there is no financial crisis necessitating a bankruptcy remedy in this case. See Doc. No. 263 at ¶ 13. No creditor is at risk of receiving less than one hundred percent of its claim, plus interest, where appropriate. See id. (wherein Joan argues that “[t]he matter essentially centers on a ‘two-party’ dispute and does not involve any of Stephen Camann’s general third party creditors – all of whom will be paid in full regardless of the outcome of the bankruptcy proceedings”). In fact, no creditors, except Joan and Greg, have expressed any interest in the Debtor’s bankruptcy case at all. The only legal issues before the Court involve the impact of the Divorce Decree, a five year old final state court order that provides for the distribution of property among the Debtor and Joan, and the existence and curing of any defaults under said decree. See id. (wherein Joan states that the “only disputes in this case involve state law issues”). The interpretation and enforcement of the Divorce Decree has nothing to do with the rehabilitative character of the Bankruptcy Code. See Gonic Realty, 909 F.2d at 627 (citations omitted) (“The purpose of the Bankruptcy Code is essentially to encourage financial restructuring and payments to creditors while preserving jobs and shareholder interests.”).

In addition, the Court notes that a case may be dismissed under section 1112(b)(2) based on the “inability to effectuate a plan.” 11 U.S.C. § 1112(b)(2). The “inability to effectuate a plan” includes the inability to satisfy one or more of the plan confirmation standards listed in 11 U.S.C. § 1129. See Woodbrook Assocs., 19 F.3d at 319-21; Abijoe Realty, 943 F.2d at 128-29. Here, the Court believes that Joan’s claim was impaired within the meaning of section 1124(a)(1) and/or (a)(2) of the Bankruptcy Code. Accordingly, the Debtor would have been unable to satisfy the requirements of 11 U.S.C. § 1129(a)(8), which provides that a plan cannot be confirmed unless the plan proponent obtains the favorable vote of a majority of creditors in each class of impaired claims, and 11 U.S.C. § 1129(a)(10), which requires that at least one class of impaired claims must vote to accept the plan. See Collier at ¶ 1112.04[5][b][iii][A] (“If it becomes reasonably apparent that the debtor cannot obtain the favorable vote of at least one class of

impaired claims with respect to any plan that the debtor might reasonably propose, or that the debtor cannot cram down a dissenting class, there is no point in incurring the cost of the plan process and cause exists to dismiss or convert the case.”). The Court notes further that there were serious good faith issues under 11 U.S.C. § 1129(a)(3) that may also have prevented confirmation of the Debtor’s plan.

Section 1112(b)(3) of the Bankruptcy Code permits the Court to dismiss a Chapter 11 case based on “unreasonable delay by the debtor that is prejudicial to creditors.” 11 U.S.C. § 1112(b)(3). Here, a solvent Debtor has been in bankruptcy for ten months. During this time the Debtor was able to obtain a ruling that there was no enforceable contract for the sale of Camco stock to Greg and enter into a purchase and sale agreement for the assets of Camco and four parcels of real estate. That ruling is now under appeal by Joan and Greg. However, in the eight and one-half months since that ruling, there has been no progress in resolving any of the remaining disputed issues under the Divorce Decree, such as alleged defaults by the Debtor of his obligations under that decree. Rather, the Debtor’s plan envisions that Joan’s rights under the Divorce Decree will be unaffected by the confirmation of his plan and that she may return to the state court to resolve any outstanding items. Joan’s competing plan would have effectuated a division in kind of the marital assets on substantially the same terms as the alleged post-Divorce Decree agreement which this Court ruled on June 6, 2000 was not an enforceable agreement. Neither party has moved toward a consensual resolution of the divorce related disputes but rather both the Debtor and Joan put forth plans that were substantially in accord with their prepetition proposals regarding the division of marital assets. Thus, neither the Debtor nor Joan made any real progress during this case in resolving the divorce related disputes. During this time, third party creditors whose claims are undisputed have been delayed in receiving distributions under a plan. Although the Debtor and Joan may share responsibility for not resolving their disputes under the Divorce Decree and for the resultant delay to creditors, it is the Debtor, not Joan, who has the duty to the Debtor’s other creditors to conclude this proceeding without undue delay. Dismissal of this case will permit the Debtor to pay undisputed third party claims without further delay. Accordingly, section 1112(b)(3) provides an additional ground for dismissing the Debtor’s case.

As noted, Joan's plan of reorganization contemplates a division in kind of the Debtor's business assets as the method for effectuating the division of marital assets ordered by the state court in the Divorce Decree. Although such a method may conform with the Bankruptcy Code, the Debtor has sought dismissal or denial of confirmation of Joan's plan on the basis that her plan is an illegal modification of a final state court property division and that Joan has "consented" to the sale proposed in the Debtor's plan under certain conflict resolution procedures contained in the Divorce Decree.

As in Gonic Realty, the issues before the Court are not bankruptcy issues. Rather, at issue in this case are (i) the manner in which to effectuate the division of marital assets between the Debtor and Joan, (ii) the existence of alleged defaults under the Divorce Decree and remedies available under state law, and (iii) the interpretation of various provisions of the Divorce Decree pertaining to non-business assets. There is no pending reorganization of an enterprise to produce some kind of distribution to third parties. The absence of a proper bankruptcy purpose is cause for dismissal under section 1112(b). See Gonic Realty, 909 F.2d at 627. The use of the federal bankruptcy laws to obtain procedural or substantive advantages in effectuating a final state court decree on the division of marital assets in a solvent estate has nothing to do with the rehabilitative purposes of the Bankruptcy Code.

IV. CONCLUSION

"[B]ankruptcy courts are given a great deal of discretion to say when enough is enough." Woodbrook Assocs., 19 F.3d at 322. For the reasons stated on the record at a hearing held on February 14, 2001 and for the reasons outlined in this amended opinion, the Court finds that there is no bankruptcy purpose being served in this case. There is no reason why the division and distribution of millions of dollars in marital assets under the provisions of the Divorce Decree can not and should not be accomplished under the jurisdiction of the state court that issued such decree. Accordingly, the Court dismisses the Debtor's Chapter 11 case for cause under section 1112(b) of the Bankruptcy Code. The parties are free to return to state court to litigate any and all outstanding issues arising under the Divorce Decree.

The Court previously issued a separate order consistent with this amended opinion.

DATED this 19th day of March, 2001, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge