UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re:	Chapter 11
David A. Mayer,	Case No. 8-15-73216-las
Debtor.	

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MEMORANDUM ORDER GRANTING MOTION OF SHIRLEY MAYER TO DISMISS CHAPTER 11 CASE PURSUANT TO 11 U.S.C. § 1112(b)

I. Introduction

This matter comes before the Court on the motion, dated December 16, 2015 (the "Motion") [Dkt. No. 81], of Shirley Mayer ("Movant") to dismiss the chapter 11 case of David Mayer (the "Debtor") for cause under 11 U.S.C. § 1112(b)(1).[1] Movant contends that cause exists to dismiss this chapter 11 case (i) under § 1112(b)(4)(F) based upon Debtor's unexcused failure to comply with the reporting requirements set forth in Bankruptcy Rule 2015.3, and (ii) under § 1112(b)(4)(P) due to Debtor's failure to pay post-petition domestic support obligations. Movant also reasons that Debtor's case should be dismissed for lack of good faith and Debtor's inability to effectuate a plan.

Debtor filed opposition to the Motion on January 4, 2017 [Dkt. No. 84] and Movant filed a reply on January 6, 2017. [Dkt. No. 85]. The Court heard oral argument from the parties on January 10, 2017.

The Court has carefully reviewed the moving, opposing and reply papers and considered the parties' oral argument. For the reasons discussed below, the Court concludes that Movant has met her burden of proof that cause exists under § 1112(b)(1) to

[1] All statutory references to sections of the United States Bankruptcy Code, 11 U.S.C. § 101 et seq., will hereinafter be referred to as "§ (section number)".

dismiss this chapter 11 case. The Motion, therefore, is granted.[2]

II. Jurisdiction

The Court has jurisdiction over this matter under 28 U.S.C. § 1334 and the Standing Order of Reference entered by the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. § 157(a), dated August 28, 1986, as amended by Order dated December 5, 2012, effective *nunc pro tunc* as of June 23, 2011. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) in which final orders or judgment may be entered by this Court pursuant to 28 U.S.C. § 157(b)(1).

III. Background[3]

A. Pre-Petition Marital Separation Agreement

The Debtor and Movant were married on September 29, 1974. On February 7, 2011, Debtor and Movant entered into a separation agreement (the "Separation Agreement") agreeing to the terms of their marital separation. [Dkt. No. 81-1]. A judgment of divorce was entered by the New York State Supreme Court, Suffolk County (the "Matrimonial Court") on August 30, 2011. [Dkt. No. 81, ¶9]. Pursuant to the terms of the Separation Agreement, Debtor was required to, among other things, pay Movant spousal support totaling twenty-eight percent (28%) of his gross income, from any and all sources, for the remainder of Movant's lifetime, with minimum payments of $75,000.00 per year for 2013, 2014 and 2015. [Dkt. No. 81-1, Article V, pp. 4-5]. The Separation Agreement further provided that the terms of the Separation Agreement "shall be amended or modified only by a written document which is signed and acknowledged by [Debtor and Movant]." [Dkt. No.

[2] At the conclusion of the hearing, for the reasons set forth on the record, the Court granted the Motion. This Memorandum Order memorializes and explains further the bases for the Court's ruling.

[3] Unless otherwise noted, the relevant facts are not in dispute and are taken from the parties' submissions in connection with the Motion.

81-1, Article XIX, p. 21]. The Separation Agreement also provided that "[n]either this Agreement nor any provision shall be amended or modified or deemed amended or modified, except by an Agreement in writing duly subscribed and acknowledged with the same formality as this Agreement." [Dkt. No. 81-1, Article XXII, p. 24].

Debtor alleges that on November 22, 2012, he and Movant orally agreed to modify the terms of the Separation Agreement (the "Alleged Oral Agreement"). According to Debtor, Movant agreed that in lieu of receiving monthly support payments under the Separation Agreement, Debtor would instead pay for their daughter's law school tuition and living expenses. [Dkt. No. 16-2, ¶¶6-8; Dkt. No. 84, ¶6]. Movant denies entering into an oral agreement with Debtor. [Dkt. No. 81, ¶45]. Debtor claims to have paid at least $295,061.00 toward his daughter's law school tuition and related living expenses during 2013, 2014 and 2015. [Dkt. No. 84, ¶9].

On September 13, 2013, Movant filed a motion in the Matrimonial Court seeking to hold Debtor in contempt for willfully failing to comply with the terms of the Separation Agreement. Debtor responded by filing a motion seeking a downward modification of spousal support owed to Movant based upon the parties' Alleged Oral Agreement. No determination has been made by the Matrimonial Court on Debtor's motion for a downward modification of his obligations under the Separation Agreement. [Dkt. No. 84, ¶16].

B. The Chapter 11 Case

On July 29, 2015, Debtor filed this chapter 11 case. [Dkt. No. 1]. In his affidavit filed in accordance with Rule 1007-4 of the Local Bankruptcy Rules of this Court, Debtor stated his reason for filing for relief under chapter 11 – "[m]y current financial problems are due to a decline in my regular income and the results of an onerous divorce settlement." *See* Affidavit ¶8 [Dkt. No. 1]. Debtor is employed by and is the sole owner of David A. Mayer & Associates PLLC. [Dkt. No. 1].

On August 27, 2015, Debtor filed a motion seeking a declaration that no monies were owed to Movant under the Separation Agreement based upon the parties' Alleged Oral Agreement and that he overpaid Movant by the sum of $70,061. [Dkt. No. 16]. On October 28, 2015, Movant filed a priority claim for prepetition unpaid domestic support obligations in the amount of $286,242.15. *See* Claims Register, Claim 6-2. Movant asserts that Debtor has failed to pay post-petition spousal and maintenance support, exclusive of attorneys' fees, of at least $55,202.59. [Dkt. No. 81, ¶31; Exhibit B – Schedule of Arrears].

Debtor's motion was adjourned on consent to allow Debtor and Movant to negotiate a consensual resolution. Having reached an impasse in their negotiations, Movant filed the Motion.

IV. Discussion

A. Legal Standard

Section 1112(b) provides that the court shall convert a chapter 11 case to a case under chapter 7 or dismiss a chapter 11 case, whichever is in the best interests of creditors and the estate, for cause, unless the Court determines that one of the two limited exceptions set forth in §§ 1112(b)(1) and (b)(2) apply. If one or both of the exceptions apply, the Court has discretion whether to dismiss or convert the chapter 11 case. Under § 1112(b)(1), rather than dismiss or convert, the Court may determine that the appointment of a trustee or an examiner is in the best interests of creditors and the estate. 11 U.S.C. § 1112(b)(1). Under § 1112(b)(2), the Court may deny a motion to convert or dismiss if (i) it finds and specifically identifies "unusual circumstances establishing that conversion or dismissal is not in the best interests of creditors and the estate" and (ii) the debtor or any other party in interest establishes that the requirements of §§ 1112(b)(2)(A) and (B) have been met. 11 U.S.C. § 1112(b)(2).

When considering a motion to dismiss under § 1112(b), the Court's analysis begins with an assessment of whether cause exists. The movant bears the burden of demonstrating, by a preponderance of the evidence that cause exists to dismiss or convert a chapter 11 case. *In re Babayoff,* 445 B.R. 64, 76 (Bankr. E.D.N.Y. 2011); *Taub v. Taub (In re Taub),* 427 B.R. 208, 231 (Bankr. E.D.N.Y. 2010). If cause is found to exist, and the Court determines that the limited exceptions do not apply, dismissal or conversion is mandatory—the Court must dismiss or convert the chapter 11 case. Courts have broad discretion to determine whether cause exists to dismiss or convert a chapter 11 case under § 1112(b). *In re MF Global Holdings Ltd.,* 465 B.R. 736, 742 (Bankr. S.D.N.Y. 2012); *In re FRGR Managing Member LLC,* 419 B.R. 576, 580 (Bankr. S.D.N.Y. 2009) (*citing In re Kholyavka,* No. 08–10653DWS, 2008 WL 3887653, at *5 (Bankr. E.D. Pa. Aug. 20, 2008)).

Section 1112(b)(4) provides an "illustrative, not exhaustive" list of sixteen grounds that constitute cause for purposes of § 1112(b)(1).[4] *C–TC 9th Ave. P'ship v. Norton Co. (In re C–TC 9th Ave. P'ship),* 113 F.3d 1304, 1311 (2d Cir. 1997). The list is not exclusive, and the Court is free to consider other factors. *BH S & B Holdings, LLC,* 439 B.R. 342, 346 (Bankr. S.D.N.Y. 2010); *FRGR Managing Member LLC,* 419 B.R. at 580.

B. Analysis

Movant alleges four separate grounds for dismissal under § 1112(b)(1). She asserts that cause exists to dismiss this case due to Debtor's (i) unexcused failure to comply with the reporting requirements set forth in Bankruptcy Rule 2015.3; (ii) failure to pay post-petition domestic support obligations; (iii) inability to effectuate a chapter 11 plan; and (iv) lack of good faith. The Court will address each ground in turn.

[4] Relevant here, for purposes of § 1112(b), "cause" includes the "unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter," 11 U.S.C. § 1112(b)(4)F), and the "failure of the debtor to pay any domestic support obligation that first becomes payable after the date of filing of the petition." 11 U.S.C. § 1112(b)(4)(P).

1. Unexcused Failure to Satisfy Timely Any Filing or Reporting Requirement

For purposes of § 1112(b)(1), cause to convert or dismiss a chapter 11 case includes a debtor's "unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter." 11 U.S.C. § 1112(b)(4)(F). Movant argues that Debtor has failed to comply with his statutory duty to file periodic financial reports as required by Bankruptcy Rule 2015.3.

Bankruptcy Rule 2015.3(a) provides that:

> In a chapter 11 case, the trustee or debtor in possession shall file periodic financial reports of the value, operations and profitability of each entity that is not a publicly traded corporation or a debtor in a case under title 11, and in which the estate holds a substantial or controlling interest. The reports shall be prepared as described by the appropriate Official Form…

Fed. R. Bankr. P. 2015.3(a). An entity in which the estate holds a twenty percent (20%) interest shall be deemed a "substantial or controlling interest." Fed. R. Bankr. P. 2015.3(c). Rule 2015.3 periodic financial reports shall be filed "no later than seven days before the first date set for meeting of the creditors under § 341 of the Code," and "no less frequently than every six months thereafter, until the effective date of a plan or the case is dismissed or converted." Fed. R. Bankr. P. 2015.3(b). Copies of the reports shall be served on the United States Trustee. *Id.* These reporting requirements may not be modified unless cause is demonstrated. Fed. R. Bankr. P. 2015.3(d).

Debtor is the sole owner of David A. Mayer & Associates PLLC, a privately held entity in which the estate holds a one hundred percent (100%) interest. As such, Debtor is required to file the periodic financial reports mandated by Bankruptcy Rule 2015.3(a). Debtor has not filed the required periodic financial reports and he has not requested that this Court vary the reporting requirements established under Rule 2015.3(a).

Rather, he argues that at Movant's request he provided Movant with bank statements for the business, and that she has not requested any additional documents. Providing bank statements to Movant, however, does not fulfill Debtor's statutory duty under Bankruptcy Rule 2015.3(a), and does not justify Debtor's failure to comply with the obligatory reporting requirements. Additionally, the bank statements were only provided to Movant – they were not served on the United States Trustee as required under Bankruptcy Rule 2015.3(b). Thus, the record supports a finding by this Court that cause to convert or dismiss this chapter 11 case exists under § 1112(b)(4)(F). *In re Ancona*, Case No. 14-70532 (MKV), 2016 Bankr. LEXIS 4114, at *35 (Bankr. S.D.N.Y. Nov. 30, 2016) (finding cause after debtor failed to file its Rule 2015.3 periodic financial reports). *See also In re Hoyle,* No. 10-01484-TLM, 2013 WL 210254, at *11 (Bankr. D. Idaho Jan. 17, 2013); *In re Whetten,* 473 B.R. 483 (Bankr. D. Colo. 2012).

2. Failure to Pay Post-Petition Domestic Support Obligations

For purposes of § 1112(b)(1), cause to convert or dismiss a chapter 11 case includes a debtor's failure "to pay any domestic support obligation that first becomes payable after the date of the filing of the petition." 11 U.S.C. § 1112(b)(4)(P). Debtor does contend that his obligations to Movant under the Separation Agreement are not "domestic support obligations" as that term is defined in § 101(14A). Nor does Debtor dispute that he has failed to pay post-petition domestic support obligations owed to Movant. Instead, he insists that the Alleged Oral Agreement modified the terms of the Separation Agreement thereby relieving him of any obligation to make spousal support payments to Movant under the Separation Agreement once he completed paying for their daughter's law school tuition in 2015. The Court disagrees. No judicial determination has been made by this Court or the Matrimonial Court that the Separation Agreement has been modified to reflect the Alleged Oral Agreement. Thus, the record supports a

finding by this Court that cause to convert or dismiss this chapter 11 case exists under § 1112(b)(4)(P).

It is also clear from the record that Debtor did not establish (i) unusual circumstances showing that conversion or dismissal is not in the best interests of creditors and the estate, (ii) a reasonable likelihood that a plan will be confirmed within a reasonable period of time, and (iii) a reasonable justification for his failure to (a) comply with the reporting requirement set forth in Bankruptcy Rule 2015.3 and (b) pay post-petition domestic support obligations. Additionally, no showing has been made that an appointment under § 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate. Thus, neither of the two limited exceptions set forth in §§ 1112(b)(1) and (2) are present here. Further, neither party argued that conversion of this case to a case under chapter 7 is in the best interests of creditors and the estate.[5]

Because the Court finds cause to dismiss this chapter 11 case under §§ 1112(b)(4)(F) and (P), the Court need not address Movant's further argument that this case should be dismissed for lack of good faith and Debtor's inability to effectuate a chapter 11 plan.

[5] The Court notes that the U.S. Trustee supported dismissal, rather than conversion, of this chapter 11 case.

V. Conclusion

For the reasons discussed above, the Motion is granted and Debtor's chapter 11 case is hereby dismissed pursuant to 11 U.S.C. § 1112(b)(1).

SO ORDERED.

Dated: February 3, 2017
Central Islip, New York

Louis A. Scarcella

Louis A. Scarcella
United States Bankruptcy Judge