UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:	)	
	)	
Emerald Green Pension Fund,	)	Case No. 00-11095C-11G
	)	
Debtor.	)	
	)	

ORDER

This Chapter 11 case came before the court on July 11, 2000, for hearing upon a Motion for Appointment of a Trustee or to Convert Case to Chapter 7 which was filed in this case by the United States Bankruptcy Administrator for the Middle District of North Carolina ("the Bankruptcy Administrator"). Robin R. Palenske appeared as attorney for the Bankruptcy Administrator, Gill P. Beck, Assistant United States Attorney, appeared as attorney for the United States of America, and Barry S. Snyder and Douglas S. Draper appeared as attorneys for the Debtor. Having considered the matters of record in this case and the competent evidence offered by the parties, and having heard the arguments of counsel for the parties, the court finds and concludes as follows:

1. This is a voluntary case which was filed under Chapter 11 of the Bankruptcy Code on May 8, 2000.

2. In the motion which is now before the court, the Bankruptcy Administrator seeks alternatively the appointment of a

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Chapter 11 trustee pursuant to § 1104 of the Bankruptcy Code or the conversion of this case from Chapter 11 to Chapter 7 pursuant to § 1112 of the Bankruptcy Code.

3. Under § 1112(b) the bankruptcy court may dismiss or convert a Chapter 11 case "for cause". Although § 1112(b) lists ten examples of "cause", the list is not exhaustive or exclusive and, therefore, "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." 7 Collier on Bankruptcy ¶ 1112.04[1] (15th ed. rev. 2000). As pointed out in Collier, the legislative history for § 1112(b) states: "The list is not exhaustive. The court will be able to consider other factors as they arise, and to use its equitable powers to reach an appropriate result in individual cases." H. Rep. No. 595, 95th Cong., 1st Sess., at 406 (1977).

4. The failure of a Chapter 11 debtor to comply with requirements under the Bankruptcy Code or Rules may constitute cause for dismissing or converting a Chapter 11 case. See Quarles v. United States Trustee, 194 B.R. 94, 97 (W.D. Va. 1996)(failure to file disclosure statement); In re Tornheim, 181 B.R. 161, 164 (Bankr. S.D.N.Y. 1995)(failure to file monthly reports as required by the United States Trustee); In re Great American Pyramid Joint

Venture, 144 B.R. 780, 790 (Bankr. W.D. Tenn. 1992)(failure to file monthly operating reports). In the present case the Debtor has failed to comply with the requirements of the Bankruptcy Code in several respects.

5. The first of these failures involves the failure of the Debtor to file information required under the Bankruptcy Code. Debtor's filing on May 8, 2000, consisted of a voluntary petition signed by Galen C. Shawver on behalf of the Debtor, Schedule F entitled "Creditors Holding Unsecured Nonpriority Claims" which contained the names, addresses and claim amounts for 54 creditors and a mailing matrix also containing the names and addresses of the creditors listed in Schedule F. The creditors listed in Debtor's Schedule F are the same as the creditors listed in a Schedule F filed by Mr. Shawver in his voluntary Chapter 11 case, which was filed on the same date as this case.

6. The documents filed by the Debtor on May 8, 2000, did not include Schedule A which calls for a list of a debtor's real property, Schedule B which calls for a list of a debtor's personal property, Schedule D which calls for a list of a debtor's secured creditors, Schedule E which calls for a list of creditors holding unsecured priority claims, Schedule G which calls for a list of a debtor's executory contracts and unexpired leases, Schedule H which

calls for a list of a debtor's codebtors nor Debtor's Statement of Financial Affairs.

7. The official file in this case reflects that on June 13, 2000, the Clerks office notified the Debtor in writing that the schedules should have been filed on May 23, 2000. Nevertheless, as of the close of business in the Clerks office at 5:00 p.m. on July 14, 2000, Debtor's Statement of Financial Affairs and the schedules referred to in paragraph six still had not been filed by the Debtor in this case.

8. Section 521(1) of the Bankruptcy Code provides that a debtor "shall" file a list of creditors, a schedule of assets and liabilities and a statement of the debtor's financial affairs. This is a mandatory requirement which may not be ignored by a debtor.

9. The Debtor in this case failed to file, within 15 days after the filing of the petition commencing this case, the information required by § 521(1) in that the Debtor failed to file a list of its assets, failed to file a complete list of its creditors and has failed to file a Statement of Financial Affairs. Such failure on the part of the Debtor has continued for more than sixty days without the court extending the time for filing the information required under § 521(1).

10. Section 343 of the Bankruptcy Code provides that the debtor "shall appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title." The Debtor in this case has failed to comply with this requirement. The § 341 meeting of creditors in this case was scheduled for June 1, 2000. It is undisputed that the Debtor did not appear for the meeting of creditors on June 1, 2000. It likewise is undisputed that the Debtor did not appear at the rescheduled meeting of creditors on July 6, 2000.[1]

11. An issue has been raised as to whether the notice of the § 341 meeting of creditors was received by the Debtor. The official file contains an affidavit of service reflecting that a copy of the notice was mailed to the Debtor in the United States mail by first class mail, postage prepaid, at 613 Rockspring Road, High Point, NC 27262. This is the address listed in the petition which was filed by the Debtor. Moreover, Mr. Shawver testified that this is the correct address for him and for the Debtor. Upon proof that a letter or other mail has been properly addressed,

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[1]When Debtor failed to appear on July 6, 2000, the meeting of creditors was rescheduled for July 12, 2000. During the hearing on July 11, 2000, the Debtor requested that the meeting of creditors be postponed again, which request was granted without prejudice to the motion of the Bankruptcy Administrator.

stamped and deposited in an appropriate mail receptacle, it is presumed to have been received by the addressee in the ordinary course of the mails. See Hagner v. United States, 285 U.S. 427, 430, 52 S.Ct. 417, 419, 76 L.Ed. 861, 864 (1932); Federal Deposit Ins. Corp. v. Schaffer, 731 F.2d 1134 (4th Cir. 1984). If the addressee denies receiving the letter the court must determine whether the evidence of non-receipt is sufficient to rebut the presumption that the mail was delivered. This, in essence, involves a credibility determination by the trial court. See Anderson v. United States, 966 F.2d 487 (9th Cir. 1992). This presumption of receipt of mail is operative in the present case. The evidence offered to rebut this presumption consisted of the testimony of Mr. Shawver that the notice was not received, even though he admitted that the address to which the notice was mailed is the correct mailing address for the Debtor. The court has carefully considered and weighed this testimony and, as a matter of credibility determination, has concluded that it is insufficient to rebut the presumption that the notice was received by the Debtor and Mr. Shawver. Accordingly, the court finds that the Debtor received the notice of the meeting of creditors within a day or two after May 12, 2000, the date on which the notice was mailed in the United States mail by first class mail, postage prepaid, addressed

to the Debtor at the Debtor's correct mailing address, 613 Rockspring Road, High Point, NC 27262.

12. The court finds and concludes that the above-described failure of the Debtor to attend the § 341 meeting of creditors and the above-described failure of the Debtor to furnish information as required under § 521(1) constitute sufficient cause for granting relief under § 1112(b) of the Bankruptcy Code.

13. Additional grounds for finding cause for relief under § 1112(b) were disclosed by the evidence in this case. According to the Debtor's evidence, the Debtor's only assets consist of a bank account containing some $2,031,000.00 and several causes of action against various third parties. The Debtor has no employees and has conducted no business of any kind since May of 1998, when the bank account containing the $2,031,000.00 was seized by the United States in a proceeding in the United States District Court for the Middle District of North Carolina seeking civil forfeiture pursuant to 18 U.S.C.A. § 981. Thus, to the extent that Debtor ever had business operations, such business operations have been shut down and dormant for over two years. It is undisputed that the funds in the seized bank account are subject to the claims of investors who invested money with the Debtor. According to Debtor's own Schedule F, which was filed under penalty of perjury

as being correct, the claims of these investors total $3,287,025.00, a sum which far exceeds the funds in the seized account. Despite conflicting evidence offered at the hearing regarding the size of the Debtor's liabilities, it appears from Debtor's Schedule F that even if the Debtor had a business to reorganize, there are no funds and no stream of income available to fund continuing business operations or reorganization. Finally, it must be noted that very serious questions have been raised regarding the honesty and integrity of Debtor's business practices and whether the Debtor should be entrusted with the handling of the funds in the seized account. In that regard, the evidence offered by the Debtor includes a sworn affidavit and deposition from a former employee of the Debtor which describes in detail improper business practices on the part of the Debtor and commingling and improper use of funds received from investors. These questions are a part of litigation against the Debtor which has been underway for several years and which is still ongoing. While it may not be feasible for this court to resolve the complex issues involved in that litigation based upon the brief testimony and the affidavits offered by the parties at the hearing, the evidence was sufficient to satisfy the court that these questions regarding the Debtor are serious enough and have enough substance to be taken into account

in deciding whether the liquidation and administration of Debtor's estate should be handled by an independent Chapter 7 trustee, rather than by the Debtor in a liquidation under Chapter 11. These dire circumstances and the concomitant lack of any reasonable likelihood of reorganization and rehabilitation constitute additional grounds for finding cause to grant relief under § 1112(b).

14. The Bankruptcy Administrator also is entitled to relief under Section 1112(e) of the Bankruptcy Code, which provides as follows:

> (e) Except as provided in subsections (c) and (f) [neither of which is applicable in this case], the court, on request of the United States trustee, 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 if the debtor in a voluntary case fails to file, within fifteen days after the filing of the petition commencing such case or such additional time as the court may allow, the information required by paragraph (1) of section 521, including a list containing the names and addresses of the holders of the twenty largest unsecured claims (or of all unsecured claims if there are fewer than twenty unsecured claims), and the approximate dollar amounts of each of such claims.

15. As a result of the Debtor's continuing failure to file the information required under § 521(1), as set forth above in

paragraphs five through nine, the court has concluded that the Bankruptcy Administrator's motion should be granted pursuant to § 1112(e), as well as § 1112(b).

16. When applicable, § 1112(b) and 1112(e) both provide that the court may convert a Chapter 11 case to a case under Chapter 7 or dismiss the case, "whichever is in the best interest of creditors and the estate. . . ." In the present case, the court is satisfied that it is the best interest of creditors and the estate to convert this case to Chapter 7, rather than dismissing this case. Conversion to Chapter 7 will assure that the funds of a non-operating, insolvent debtor will be collected and distributed to creditors with legitimate claims in the manner most appropriate in such a situation. To dismiss this case would subject the legitimate creditors of the Debtor to unacceptable risks which are avoided by the conversion of this case to Chapter 7.

17. Since the court has concluded that the Bankruptcy Administrator's motion pursuant to § 1112 should be granted and this case converted to one under Chapter 7, the motion for the appointment of a Chapter 11 trustee pursuant to § 1104 will be denied.

Now, therefore, it is ORDERED, ADJUDGED AND DECREED as follows:

(1) The motion to convert this case to one under Chapter 7 of the Bankruptcy Code is granted and this case is hereby converted to one under Chapter 7;

(2) Charles M. Ivey, III is hereby appointed as Chapter 7 Trustee in this case; and

(3) To the extent that the motion seeks the appointment of a Chapter 11 trustee pursuant to § 1104, the motion is denied.

This 17th day of July, 2000.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge