SO ORDERED.

SIGNED this 26th day of July, 2017.

LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

In re	)	
	)	
Boxwood, LLC,	)	Case No. 17-50142
	)	Chapter 11
Debtor.	)	
	)	

ORDER DISMISSING CASE

On July 18, 2017 the case of Boxwood, LLC (the "Debtor") came on for hearing on a Motion by the Bankruptcy Administrator to dismiss the case pursuant to 11 U.S.C. § 1112(b) (Docket No. 63); a Motion *in Limine* by First National Bank of Pennsylvania ("FNB") to preclude the Debtor from testifying about anticipated terms of its plan of reorganization (Docket No. 71); a Motion by FNB for relief from stay (Docket No. 51); and a Motion by the Bankruptcy Administrator for status hearing (Docket No. 4). At the hearing, Brian Hayes and Edwin Ferguson, Jr. appeared for the Debtor, George Sanderson, III and Lauren Golden appeared for FNB, and Robert E. Price, Jr. appeared on behalf of the Bankruptcy Administrator. B. Clay Lindsay, Jr., President and Member of the Debtor, was also present.

The Bankruptcy Administrator set forth grounds for dismissal, including the lack of income in the case since the petition date; the lack of unsecured creditors and the degree to which FNB's secured claims dwarfed all other claims in the case; the pending Motion for Relief by FNB pursuant to 11 U.S.C. § 362(d)(1) and (2); the extraordinary

unlikelihood that a non-consensual plan could be confirmed; and the lack of attempt by the Debtor to sell its real property. FNB joined in the Bankruptcy Administrator's Motion, noting that no plan has been filed even after the exclusivity period ended; no objection to claim has been filed as to any of FNB's secured claims, so they are presumed allowed under 11 U.S.C. § 502(a); no adversary proceedings have been filed to avoid liens held by FNB; no motion for authority to use cash collateral has been filed; and no motions to appoint replacement counsel on behalf of the Debtor in the adversary proceedings currently pending have been filed. The court finds that grounds for dismissal exist pursuant to § 1112(b)(4)(A) and (B).

Section 1112(b)(4)(A) provides that substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation constitutes cause for dismissal. Movants must meet both prongs. *In re Landmark Atl. Hess Farm, LLC*, 448 B.R. 707, 713 (Bankr. D. Md. 2011). *See In re Ashley Oaks Dev. Corp.*, 458 B.R. 280, 285–86 (Bankr. D.S.C. 2011) (finding that the debtor's continual negative cash flow coupled with an inability to generate sufficient funds to meet current obligations and a lack of sufficient capital to operate and service debt constitutes cause under § 1112(b)(4)(A)); *Quarles v. United States Trustee,* 194 B.R. 94, 97 (W.D. Va. 1996) (affirming the bankruptcy court's finding of no likelihood of rehabilitation where the debtor was losing money and the only prospect for rehabilitation through pending litigation was speculative). *Landmark* is particularly instructive:

> Landmark's intention is not to establish or maintain an ongoing business. . . . Landmark's assets . . . are assertedly fully encumbered. It is not expecting to receive any additional assets or funding. Landmark's only feasible reorganization plan would be one of liquidation . . . Landmark has no likelihood of rehabilitation. Rehabilitation means to reestablish a business and Landmark has no business.

448 B.R. at 715. In *Landmark*, the debtor was unable to pay on its debt because it was receiving no income, and the principal, a guarantor on the debt, was using other entities to make payments while listing the payments as accruing debts. *Id*. at 714. The court found that the entire bankruptcy was not an attempt to rehabilitate and reorganize, but rather was an attempt to create an opportunity to reduce the personal liability of the guaranteeing principal. *Id*. at 716. Thus the court could not find a prospect of imminent rehabilitation. *Id*.

Here, the court found in the Order Denying Extension of Exclusivity Period (Docket No. 56) that as of May 2017, the Debtor had not received any rent from Boxwood Tenant, LLC ("Tenant") except for a partial payment in March 2017. At the hearing on July 18, 2017, the Debtor was unwilling to represent that the Debtor received any rent from Tenant in June. *See In re Continental Holdings, Inc.*, 170 B.R. 919, 931 (Bankr. N.D. Ohio 1994) (finding that lacking a reasonably certain source of income precludes a finding of a reasonable likelihood of rehabilitation). Further, while the Debtor had previously presented testimony that Tenant's monthly rent was $7,500.00, the Debtor's lease with Tenant, attached to the Debtor's Response to Motion for Relief From Automatic Stay as Exhibit A (Docket No. 58), shows the monthly rent provision allows for deferral of rent if Tenant lacks sufficient funds. Prior testimony concerning rent due and owing was misleading at best. As the Debtor's sole business activity is the receipt of rents due, and essentially no rents have been received during the pendency of this case, the court cannot find that a viable business exists to reorganize. Thus, with no meaningful income, the unauthorized use of cash collateral, continuing loss to the estate, and no substantial likelihood of rehabilitation, both prongs of § 1112(b)(4)(A) are satisfied.

Section 1112(b)(4)(B) provides for dismissal in instances of gross mismanagement of the estate. Gross mismanagement includes a breach of fiduciary duty to creditors of the estate, "[t]he debtor-in-possession is a fiduciary of the creditors and, as a result, has

an obligation to refrain from acting in a manner which could damage the estate, or hinder a successful reorganization." *In re Marvel Entm't Grp., Inc.*, 140 F.3d 463, 471 (3d Cir. 1998) (quoting *Petit v. New England Mort. Servs.*, 182 B.R. 64, 69 (D. Me. 1995)). *See also Kremen v. Harford Mut. Ins. Co. (In re J.T.R. Corp.)*, 958 F.2d 602, 604–05 (4th Cir. 1992) ("The debtor-in-possession is a fiduciary and owes the same duties as a trustee. The debtor-in-possession does not act in his own interests, but rather in the interests of the creditors."). Here, Mr. Lindsay manages both the Debtor and Tenant, and Mr. Lindsay's conduct in managing both in such a way as to prevent rent due and owing from coming into the estate to the detriment of FNB raises grave concerns regarding the Debtor's fiduciary duty to its creditors. Indeed, the operating agreements for the Debtor and Tenant (Docket No. 58, Exs. B and C) as well as the Master Lease show a structure whereby Tenant is given great leeway in determining how much it wishes to pay each month. Further, the court finds that management for the Debtor has not acted candidly, has failed to follow applicable rules in bankruptcy, has continued to operate without authority to use cash collateral, has filed inaccurate reports, and has otherwise testified or acted in misleading fashions. The Debtor's actions rise to the level of gross mismanagement.

After consideration of the entire record in this case, the Bankruptcy Administrator and FNB have established cause under § 1112(b), including the substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation and the gross mismanagement of the estate. Counsel for the Debtor had "no comment" as to the Motion to Dismiss and the Debtor presented no evidence in response to the motion.[1]

At the hearing, the parties presented the court with a proposed agreement as an alternative to dismissal to, among other things: appoint a Chapter 11 trustee; continue

[1] Given the Debtor's initial agreement to the appointment of a Chapter 11 trustee, it appears that the Debtor does not dispute that cause exists.

the matters for 60 days; provide for 3 adequate protection payments of $9,000.00 each with an automatic lifting of the stay if a payment was missed; and mediate three adversary proceedings between the Debtor, FNB, and other related parties. The parties anticipated that during the 60-day continuance, the proposed trustee would:

- familiarize himself with the case;
- investigate the finances of the Debtor and Tenant;
- evaluate the Debtor's prospects at rehabilitation and work to formulate a plan of reorganization or liquidation;
- familiarize himself with two pending adversary proceedings in this case and one pending adversary proceeding in a related case (BCL One, LLC, Case No. 17-50141) with various claims and counterclaims asserted between FNB, the Debtor, BCL One, LLC, Esby Corporation (another related debtor, Case No. 17-50228), numerous other entities owned and operated by Mr. Lindsay and/or his wife, Connie Lindsay, the Lindsays personally, and another investor; and
- represent the Debtor at the proposed mediation in furtherance of achieving a global settlement resolving all claims amongst the parties.

The parties proposed to compensate the proposed trustee with only the monthly rent of $550.00 the Debtor receives from a long-term cabin rental. FNB stated that its acquiescence to the proposed scheme was an attempt to accommodate a global resolution, but that it did not believe that there was a reasonable plan in prospect, nor did it believe in the feasibility of the Debtor's business. FNB clarified that the only proposed plan it might support was one of liquidation. The Bankruptcy Administrator added that the proposed settlement would initiate the flow of cash payments to FNB.

The appointment of a Chapter 11 trustee is an exception, not the norm. *In re Sharon Steel Corp.*, 871 F.2d 1217, 1225 (3d Cir. 1989) ("It is settled that appointment of a trustee should be the exception, rather than the rule."). In determining whether to appoint a Chapter 11 trustee or dismiss a case for cause, "Section 1112 and Section 1104 read together require the court to make a finding as to what remedy is in the best

interest of the creditors and the estate." *In re Sydnor,* 431 B.R. 584, 600 (Bankr. D. Md. 2010). Numerous cases have held that where there is, in effect, nothing to reorganize, courts favor dismissal. *Landmark*, 448 B.R. at 713 ("The UST recognizes that while such an allegation would ordinarily lead to the request for appointment of a chapter 7 or chapter 11 trustee in the case, he believes that dismissal is the proper remedy given the lack of any real purpose to the case.") (granting dismissal); *In re LG Motors, Inc.*, 422 B.R. 110, 118 (Bankr. N.D. Ill. 2009) ("While a trustee might be able rein in the inappropriate use of the Debtor's assets to pay the personal expenses of Mr. Goldstein, it is unlikely a trustee would be able to make the Debtor profitable."). In *In re Berwick Black Cattle Co.*, the court declared:

> A significant factor favoring dismissal is the utter insolvency of the estates—in a word, they are broke. . . . The only source of funding to pay for a trustee and other continuing expenses of administration, is the chance of recovery from litigation claims at some point in the future, probably easily more than a year in the future, and probably only after substantial costs have been advanced, and with no certainty of success. It is doubtful any independent and qualified person would care to undertake such a gamble by serving as trustee. With no funds on hand to pay administrative expenses or professional fees, and with the only hope of any funding being speculative litigation recoveries, the proposal to appoint a Chapter 11 trustee is simply not feasible. Something more than a wing and a prayer is necessary to justify such an extraordinary appointment.

405 B.R. 907, 914–15 (Bankr. C.D. Ill. 2009), *subsequently dismissed sub nom. In re Ray*, 597 F.3d 871 (7th Cir. 2010). The similarities between *Berwick* and the instant case are apparent. There is no viable ongoing business, essentially no unsecured creditors (such that a Chapter 11 trustee would essentially be acting on behalf of FNB), and therefore no reason to appoint a Chapter 11 trustee to address the gross mismanagement of the Debtor. Also, there are insufficient funds to pay administrative expenses and professional fees. No evidence was offered to support a finding that the appointment of

a Chapter 11 trustee is in the best interest of creditors and the estate, and, as cause exists to dismiss the case pursuant to 11 U.S.C. § 1112(b), there are no circumstances warranting appointment of a Chapter 11 trustee.

Taking judicial notice of the record, given that the Debtor chose not to present any evidence, and considering the lack of any available financial information for June 2017, the court finds that cause exists pursuant to § 1112(b) to dismiss this case.

IT IS THEREFORE ORDERED that this case is hereby dismissed.

[END OF DOCUMENT]

PARTIES TO BE SERVED

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17-50142 C-11

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