

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In the Matter of:)
)
MID ATLANTIC RETAIL GROUP, INC.,) Case No. 07-81745
d/b/a Barry Better Menswear,) Chapter 11
)
Debtor.)
_____)

MEMORANDUM OPINION AND ORDER
DENYING MOTION TO TRANSFER VENUE OR TO DISMISS

This case came before the court on December 19, 2007 for hearing on the Motion to Transfer Venue or to Dismiss (“Motion”) filed by Zeeman Manufacturing Company (“Zeeman Manufacturing”), Harold Zeeman (“Mr. Zeeman”), and Lori Travis (“Ms. Travis”) (collectively referred to as the “Movants”). A. Lee Hogewood, III appeared on behalf of the Movants. Terri L. Gardner and Lisa P. Sumner appeared on behalf of Mid Atlantic Retail Group, Inc. (“Debtor”). Robert Price appeared on behalf of the Bankruptcy Administrator (“BA”).

Movants seek to have the Debtor’s case transferred from this district to the Eastern District of Virginia or, in the alternative, to have this case dismissed. Movants argue that the Middle District of North Carolina is an improper venue, and that the interests of justice and the convenience of the parties favor the transfer of Debtor’s case to Virginia. Debtor argues that venue is proper because Debtor has principal assets located in this district. Debtor also disagrees with the Movants regarding the necessity of a transfer to Virginia. The court agrees with the Debtor and will deny Movants’ Motion for the reasons that follow.

JURISDICTION

The court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157, and 1334, and the General Order of Reference entered by the United States District Court for the Middle District of North Carolina on August 15, 1984.

FACTS

Debtor filed a voluntary bankruptcy proceeding under Chapter 11 of the United States Bankruptcy Code on November 30, 2007 (“Petition Date”) in the Middle District of North Carolina. Debtor is a Virginia corporation that is in the business of selling men’s clothing and accessories, and has done so continuously since its incorporation on January 27, 2005.¹ Debtor’s headquarters are in Richmond, Virginia and its management team works from its headquarters.

In February of 2005, Debtor operated fifteen stores, having purchased them from Zeeman Manufacturing. In 2005 and 2006, the Debtor added a total of fifteen stores, but grew too quickly. Therefore, it began to downsize and operated thirteen stores as of November 1, 2007. Since then four more stores have been closed to reduce overhead and to allow the Debtor to focus on its more profitable locations. The Debtor currently operates nine stores that are located in Winston-Salem and Greensboro, North Carolina; Gainesville, Georgia; Kenner, Baton Rouge, and Gretna, Louisiana; Lightfoot and Woodbridge, Virginia; and San Antonio, Texas.

The most accurate information available about the distribution of Debtor’s assets is a report that reflects the percentage of inventory located in each state where the Debtor operated a

¹Debtor presently and has always been incorporated in Virginia.

retail store (“Inventory Report”).² The Inventory Report shows that 25.2% of the Debtor’s inventory was located in Louisiana, 19.3% was located in North Carolina, 16.3% was located in Virginia, 14.1% was located in Missouri,³ 13.3% was located in Georgia, 4.7% was located in Tennessee,⁴ 3.8% was located in Texas, and 3.4% was located in Pennsylvania.⁵ As shown by the Inventory Report, the majority of Debtor’s personal property assets are not located in any single state, but are spread among the several states in which it operates. The Debtor does not own any real property.

The Movants are the Debtor’s largest creditor, and have an alleged⁶ first lien security interest on fixed assets, inventory, and the proceeds therefrom as set forth in a security agreement dated February 23, 2005 (“Security Agreement”). None of the Movants live or work in Virginia. The remaining creditors of the Debtor are scattered across the country, with most located in either California or New York.

²The Debtor did a physical inventory count in January of 2007 using bar codes with electronic inventory systems. The report referenced above was compiled within 90-120 days of that inventory count and the Debtor believes that this report reflects the most accurate inventory figures of the year 2007.

³Since the report, Debtor has closed the stores in Missouri. Most of the Missouri inventory was moved to Louisiana. Some, however, was moved to Tennessee. The Tennessee store has also closed, and all of the Tennessee inventory was moved to Louisiana.

⁴The Debtor has closed the Tennessee store and moved all of the inventory to Louisiana.

⁵The Debtor has closed the Pennsylvania store and moved the inventory to North Carolina and Virginia.

⁶Debtor filed an adversary proceeding (07-09031) on December 17, 2007 against the Movants asserting that Movants are not perfected based upon the content of the UCC Financing Statement and other filings made by the Movants in Virginia.

DISCUSSION

There are two issues to be resolved with regards to the Motion. The first issue is whether the Middle District of North Carolina, the district where Debtor filed its bankruptcy petition, is a proper venue. Title 28, section 1408 of the United States Code governs proper venue for a bankruptcy case and it provides:

Except as provided in section 1410 of this title, a case under title 11 may be commenced in the district court for the district—

(1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district; or

(2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership.

28 U.S.C. § 1408 (2000). The statute provides that a court must look at the 180 days preceding the commencement of the bankruptcy case and determine the district(s) where venue is proper using any of the four different bases provided in § 1408: the residence of the debtor, the domicile of the debtor, the principal place of business of the debtor, and the location of principal assets of the debtor. Id. It is clear that venue can be proper in several districts as the district where a debtor resides, is domiciled, has its principal place of business, or has principal assets located is not always going to be the same. Id. In this case, none of the parties argue that the Middle District of North Carolina is a proper venue based upon the domicile, residence, or principal place of business of the Debtor. Therefore, if venue is proper in this district, it will be because

the Debtor had principal assets in this district for the majority of the 180 days preceding the Petition Date.

There is a presumption that a debtor's choice of forum is a proper district for venue purposes and the party challenging a debtor's choice must show by a preponderance of the evidence that the venue is improper. See, e.g., In re Farmer, 288 B.R. 31, (Bankr. N.D.N.Y. 2002) (“There is a presumption that the district where the bankruptcy petition is filed is the appropriate district for venue purposes . . . and the burden is on the party disputing venue to establish that position by a preponderance of the evidence.”) (quoting In re Handel, 253 B.R. 308, 310 (1st Cir. BAP 2000)); In re Baltimore Food Systems, Inc., 71 B.R. 795, 798 (Bankr. D.S.C. 1986) (“Movants have the burden of proving that venue is improper in the [district where debtor filed its bankruptcy petition].”). The Movants must, therefore, show by a preponderance of the evidence that the Debtor did not have principal assets located in this district during the majority of the 180 days preceding the Petition Date. According to the Movant, because Debtor's assets are scattered pretty evenly across the various states where the Debtor operates its retail stores, there is no one district where the principal assets of the Debtor are located. In turn, because principal assets of the Debtor are not located in any particular district, Movants argue that no district, including the Middle District of North Carolina, is a proper venue based on the location of principal assets of the Debtor. The court disagrees with the Movants' reading of section 1408.

Section 1408 provides that a district is a proper venue if principal assets of the debtor are located in that district. 11 U.S.C. § 1408 (2000). The court does not believe that the statute requires that assets be concentrated in one district for principal assets to be located in that

district. Instead, the court believes that a debtor's principal assets can be located in several different districts because "[t]he venue statute does not require that only *the* principal asset may support venue; rather, venue may be proper in a district where principal assets are located. Thus, a debtor may have more than one appropriate venue based upon more than one principal asset." In re Ross, 312 B.R. 879, 889 (Bankr. W.D. Tenn. 2004) (emphasis in original). Therefore, in order to determine whether the Middle District of North Carolina is a proper venue, the court must determine if principal assets of the Debtor were located in this district during the relevant time period. The evidence shows that during the majority of the 180 days preceding the Petition Date, the Debtor operated four retail stores in the Middle District of North Carolina.⁷ In addition, the Inventory Report shows that over 19% of the Debtor's assets were located in the Middle District of North Carolina as of January 2007. It is a fair inference that this percentage continued throughout the 180 days, and the court does make that inference. Because the Debtor operated four stores and had 19% of its assets in this district during the relevant time period, the court finds that principal assets were located in the Middle District of North Carolina during the majority of the 180 days preceding the Petition Date and that this district is a proper venue for the Debtor's bankruptcy case.

The second issue to be dealt with by the court is whether a transfer of this case pursuant to 11 U.S.C. § 1412 is appropriate. Section 1412 provides: "A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." 11 U.S.C. § 1412 (2000). The Movants request that this court

⁷The stores in the Middle District of North Carolina were located in Winston-Salem, Greensboro, Burlington, and Durham. The stores in Burlington and Durham were closed shortly before the Petition Date.

transfer this case to the Eastern District of Virginia, where the Debtor is incorporated and where the Debtor's headquarters are located. The Movants bear the burden of proof and must show by a preponderance of the evidence that the interests of justice or the convenience of the parties would be served by a transfer of this case. See, e.g., In re Industrial Pollution Control, 137 B.R. 176, 181 (Bankr. W.D. Pa 1992) ("The burden of proof that a change of venue is warranted is upon [the movant] and must be carried by a preponderance of the evidence."); In re Baltimore Food System, Inc., 71 B.R. 795, 802 (Bankr. D.S.C. 1986) ("The burden of proof with regard to the convenience to the parties and the interest of justice is . . . on the Movants."); In re Custom Builders of Steamboat, Inc., 349 B.R. 39, 43 (Bankr. D. Idaho 2005) ("The party urging a change of venue has the burden of showing by a preponderance of the evidence, that a transfer is warranted."). As discussed in detail below, this court finds that the Movants failed to carry this burden.

Bankruptcy courts have used the following factors in determining whether a transfer of venue is appropriate: (1) the proximity of creditors of every kind to the court; (2) the proximity of the debtor to the court; (3) the proximity of the witnesses necessary to the administration of the estate; (4) the location of the assets; (5) the economic administration of the estate; and (6) the necessity for ancillary administration if a liquidation should occur. In re Commonwealth Oil Refining Co., 596 F.2d 1239, 1247 (5th Cir. 1979). The first factor, and perhaps the most important, is the proximity of creditors to the court. The evidence shows that the Debtor's unsecured creditors are scattered across the country, with most in either New York or California. There are very few unsecured creditors in North Carolina or Virginia. The evidence also shows that none of the Movants live or work in Virginia. Therefore, Virginia is no more convenient for

the Debtor's creditors than North Carolina, and this factor does not favor a transfer of the Debtor's case. The second factor is the proximity of the debtor to the court. The evidence shows that the Debtor is domesticated in North Carolina with principal assets located in North Carolina. The Middle District of North Carolina is also the forum chosen by the Debtor and this is entitled to be given weight by the court in making a decision about transferring a debtor's case. This factor favors retention of this case in this district. The third factor is the proximity of witnesses. Although the Debtor's headquarters are in Virginia, the evidence shows that the Debtor's primary officers spend extensive time traveling to and from Debtor's stores, which are located in several different states. The evidence also indicates that the primary officers spend a significant amount of time in North Carolina and that appearing before this court does not impose a burden upon them. This factor does not suggest that a transfer to Virginia is warranted. The fourth factor is location of assets. The location of the Debtor's assets does not favor a particular district as the evidence shows that the Debtor does not own any real property and its personal property is not concentrated in any one state. This factor does not suggest that a transfer to Virginia is warranted. The fifth factor is administration of the estate. The court does not believe the administration of the estate would be more efficient if this case was transferred to Virginia. This court has the ability to schedule hearings as required, as well as the time and willingness to become familiar with any issues that should arise. Therefore, this factor does not favor a transfer of the Debtor's case to Virginia.⁸ The sixth factor is the necessity of ancillary jurisdiction if

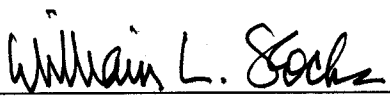
⁸It should be noted that the court also considered that the administration of the estate will require a determination of the status of the Movants' security interest which will require the application of the Uniform Commercial Code ("UCC") as enacted in Virginia. The UCC as enacted in Virginia is virtually identical to the UCC as enacted by North Carolina and will not require application of novel Virginia state law in North Carolina.

liquidation should occur. As the Debtor does not own real property and its personal property is scattered across the various states in which it does business, there is no reason to believe that more ancillary jurisdiction will be required in North Carolina than in Virginia. Therefore, this factor does not favor the transfer of Debtor's case. Because no factor strongly suggests that Virginia would be a more convenient forum, the evidence does not show that the interests of justice or the convenience of the parties would be furthered by a transfer of the Debtor's case from this district to the Eastern District of Virginia and the Movants' Motion should be denied.

For the reasons outlined above, this court finds that the Middle District of North Carolina is a proper venue and that the Movants failed to carry their burden of proof that a transfer of this case to the Eastern District of Virginia is warranted. As a result, the Movant's Motion is denied.

IT IS SO ORDERED.

This 14 day of January, 2008



WILLIAM L. STOCKS
United States Bankruptcy Judge