

SO ORDERED.

SIGNED this 22nd day of January, 2015.




LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA**

In re:)	
)	
Tony Tosh, Jr.)	Case No: B-14-80421
)	Chapter 11
_____)	

ORDER DISMISSING CASE

This matter coming on for hearing before the above signed Bankruptcy Judge on January 15, 2015, on the Motion to Dismiss pursuant to Section 1112 of the Bankruptcy Code filed by the Bankruptcy Administrator, and it appearing to the Court that due notice was given of this hearing, at which Tony Tosh, Jr. (the “Debtor”); Shante Tosh, the Debtor’s wife (“Mrs. Tosh”); Robert Lewis, Jr., attorney for the Debtor; and Robert E. Price, Jr., Assistant Bankruptcy Administrator, appeared;

The Court having considered the entire record in the case, including the monthly reports filed by the Debtor, the testimony and exhibits from the status hearing on November 25, 2014, the testimony and exhibits admitted at this hearing, and the arguments of counsel;

The Court makes the following findings of fact and conclusions of law:

1. The Debtor filed the present voluntary Chapter 11 petition on April 18, 2014.

2. Prior to the present Chapter 11 case, the Debtor filed a voluntary Chapter 11 petition in the Eastern District of North Carolina on May 1, 2012 (Case No. 12-03300-8-RDD). This case was dismissed on April 17, 2014, by consent of the Debtor.

3. The Debtor is employed by Active Construction Services, LLC (“Active Construction”), which is owned by Mrs. Tosh. The Debtor also receives some income from two rental properties he owns.

4. According to testimony by the Debtor and Mrs. Tosh, throughout both of the Debtor’s Chapter 11 cases, Mrs. Tosh has taken charge of completing the Debtor’s monthly operating reports. The Debtor himself has little, if any, firsthand knowledge of his finances. The Debtor filed operating reports for a total of eight (8) months, spanning from April to November 2014. For five (5) of those months, the Debtor subsequently filed amended operating reports; for each of June and July 2014, the Debtor filed a total of three (3) amended reports. Several of such amended operating reports reflected substantially different income, expense, and profit figures from previous iterations of the report.

5. According to the information provided in the monthly operating reports, the Debtor has consistently fallen short of his projected income. In his original Disclosure Statement and Plan of Reorganization, filed on October 15, 2014, the Debtor projected a monthly income of \$15,400.00 to fund the Plan. In his Amended Disclosure Statement and Amended Plan of Reorganization, filed on January 13, 2015 (following the Bankruptcy Administrator’s Motion to Dismiss), the Debtor reduced his projected monthly income to \$13,846.00. According to the most recently-filed versions of the monthly operating reports for each month, the Debtor has shown an income of over \$10,000.00 in only two (2) of the eight (8) months for which he filed

operating reports. He exceeded \$13,846.00 in only one month, August 2014, in which he received a lump-sum payment of approximately \$25,000.00 in past-due rents. He has now abandoned the rental property in question and thus is unlikely to have another similarly large influx in income.

6. The Debtor reported overall losses during four (4) of the eight (8) months in which he filed operating reports. The Debtor's Operating Report Summary, attached as Exhibit E to the Debtor's Amended Disclosure Statement, also shows a loss for December 2014 (the Debtor did not file a Monthly Operating Report for December). The Debtor produced these losses despite apparently not having made mortgage payments on his residence since filing. According to a Motion for Relief from Stay filed by Green Tree Servicing, LLC, the Debtor was also delinquent by nearly a year on the mortgage on one of his rental properties as of October 14, 2014.

7. In light of his inability to consistently produce income in excess of his living expenses, the Debtor is unlikely to be able to make the additional monthly payments to creditors required under his Amended Plan of Reorganization. The Debtor's Amended Disclosure Statement estimated that he would need an additional \$7,265.00 per month to make payments to secured, priority, and unsecured creditors under his Amended Plan. According to his monthly operating reports, the Debtor's profits (income minus expenses) reached that amount only in August 2014, the month in which he received the one-time payment of past-due rents. Thus, rehabilitation of the estate is not reasonably likely to occur.

8. The Debtor's inability to consistently produce a profit and the absence of a reasonable likelihood of rehabilitation support dismissal under Section 1112. A debtor's inflated projections of future income are not sufficient to rebut evidence of substantial diminution of the

estate. The Supreme Court has stated, “However honest in its efforts the debtor may be, and however sincere its motives, the . . . Court is not bound to clog its docket with visionary or impractical schemes for resuscitation.” Collier on Bankruptcy 1112.04[6][a] (16th ed. 2014) (quoting Tenn. Pub. Co. v. Am. Nat. Bank, 299 U.S. 18, 22 (1936)).

9. This case has also featured substantial evidentiary problems. Most notably, there have been serious inconsistencies in the evidence regarding the Debtor’s income from his employment at Active Construction. Mrs. Tosh testified at the status hearing on November 25, 2014, that Active Construction paid the Debtor \$2,500.00 every two weeks, for a total of \$5,000.00 per month. At the hearing on this Motion on January 15, 2015, both the Debtor and Mrs. Tosh testified that the Debtor received a paycheck for \$5,000.00 every two weeks from Active Construction, for a total of \$10,000.00 per month. Mrs. Tosh testified that the Debtor had been receiving that amount for approximately five (5) months. When the Debtor’s counsel pressed Mrs. Tosh on the issue in an effort to rehabilitate her as a witness, Mrs. Tosh stated that she had made a mistake in previously testifying that Active Construction paid the Debtor \$2,500.00 every two weeks, and that the correct number was \$5,000.00. However, none of the bank statements attached to the monthly operating reports corroborate the testimony that the Debtor receives bi-weekly paychecks of \$5,000.00; no bank statement shows regular deposits in an amount even close to \$5,000.00. Further, the income figures included in the Debtor’s Operating Report Summary attached to the Amended Disclosure Statement also conflict with the latest monthly operating reports for June and July.

10. The inconsistencies regarding the Debtor’s income together with the Debtor’s struggles to file accurate Monthly Operating Reports are serious and are grounds for dismissal of the case. “Monthly reports and the financial disclosures contained within them ‘are the life-blood

of the Chapter 11 process’ The reporting requirements provide the primary means for monitoring the debtor’s compliance with the Code’s requirements and they serve as a litmus test for a debtor’s ability to reorganize.” In re Whetten, 473 B.R. 380, 383-84 (Bankr. D. Colo. 2012) (citations omitted). Mrs. Tosh’s testimony that she has received instruction from the Bankruptcy Administrator’s office on how to fill out monthly reports does not solve the problem, especially in light of the continuing inconsistencies regarding the Debtor’s income and Mrs. Tosh’s lack of credibility as a witness. If a debtor struggles to fulfill its basic disclosure duties during the Chapter 11 case when it frequently appears before the court, “how can the creditors have any confidence that the debtor will timely and accurately report its income and make the required distributions under its plan, when the court . . . [is] no longer monitoring the case?” Id. at 384.

11. Certain of the Debtor’s expenses and payment transactions are also problematic and provide evidence of gross mismanagement of the estate. For example, the Monthly Operating Report for the month of September 2014 shows \$8,775.13 spent on “transportation maintenance” (for which the Debtor had budgeted \$700.00). Mrs. Tosh explained in her November 25 testimony that the Debtor initially took his Mercedes to an acquaintance’s home for maintenance and repair. Although the friend did not succeed in fixing the maintenance issues, the Debtor paid him over \$3,000.00. The Debtor then took his vehicle to Mercedes, where he spent several thousands more to complete the maintenance work. According to Mrs. Tosh, the Debtor had problems using his bank card to complete these and some other transactions,¹ and so Mrs. Tosh and Active Construction made payments for him; the Debtor then repaid the sums (without applying for the Court’s permission) by check. Further, several of the Debtor’s bank

¹ The Debtor also had two other major expenses during this month: (1) a \$7,685.00 school tuition payment for the Debtor’s special needs son, and (2) a lump-sum payment to Mercedes, apparently resulting from Mercedes’ failure to cash a series of checks related to the Debtor’s car payment. It was unclear from the testimony exactly which of these transactions corresponded to the checks from the Debtor to Mrs. Tosh.

statements attached to the monthly operating reports show large gaps between check numbers. When asked whether these gaps represented large numbers of outstanding checks, Mrs. Tosh testified that they did not; she explained that she had several checkbooks which she used interchangeably without keeping the checks in order. A Chapter 11 debtor-in-possession owes a fiduciary duty to his creditors to exercise at least basic competence in managing the estate. See In re Marvel Entertainment Group, Inc., 140 F.3d 463, 471 (3d Cir. 1998); In re Korn, 2014 WL 7211293, No. 14-13138 ELF, at *9 (Bankr. E.D. Penn. Dec. 18, 2014) (finding “cause” under Section 1112(b) where the debtor failed to meet his fiduciary obligations as a Chapter 11 debtor-in-possession). The Debtor’s inability to disclose accurate income and expense information together with the Debtor’s spending and financial habits evidence gross mismanagement of the estate.

12. Given the inconsistencies in the monthly operating reports and the various testimonies, the Court has had no credible, accurate, and consistent source of information in this case.

Accordingly, due to the substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation, as well as the gross mismanagement of the estate, and for other cause shown, the Court finds that cause exists for the dismissal of this case pursuant to Section 1112 of the Bankruptcy Code. NOW, THEREFORE, IT IS ORDERED THAT this case is hereby DISMISSED.

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