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

In re:	)	
	)	
Edybul Foods, Inc.,	)	Case No. 02-83997
	)	
Debtor.	)	
	)	

ORDER

This matter came on for hearing before the undersigned bankruptcy judge on the (1) Motion by Summertime Road Development, L.L.C. ("Summertime") to Dismiss the Debtor's Case or, in the alternative, to Change the Venue of the Case; (2) Motion by the Debtor to Extend time to assume or reject lease agreements; (3) Motion by the Bankruptcy Administrator for Status Hearing; and (4) Application by Attorney for Debtor for allowance of Compensation and Reimbursement of Expenses. Appearing before the Court was Christine L. Myatt, counsel for the Debtor, Ocie Murray, counsel for Summertime, and Michael D. West, Bankruptcy Administrator. The Court, after reviewing the file and hearing the evidence, makes the following findings of fact and conclusions of law.

FACTS

The Debtor, Edybul Foods, Inc., owns or leases restaurant properties and provides operating and accounting services to various related limited liability companies including EBF Haymont, LLC, EBF Skibo, LLC, and EBF Southern Pines, LLC (the "Related LLCs"). The Related LLCs operate restaurants in Fayetteville, N.C. and Southern Pines, N.C. under a franchise agreement between the Debtor and Backyard Burger, Inc. The Debtor's assets include a commercial building with a value of approximately $400,000 in Southern Pines, North

Carolina, and two leases, including a lease with Summertime for commercial real property located at 101 Broadfoot Avenue in Fayetteville, N.C. and a ground lease with JF Dunn for property located on Skibo Road in Fayetteville, N.C.

This is the Debtor's second bankruptcy filing. At the time of the first filing, the Debtor was party to a dispute with Summertime. The Debtor listed its address as 822 Marchbanks Place, Hope Mills, North Carolina, which is in the Eastern District of North Carolina. On its schedules, the Debtor listed $403,036.64 in assets and $740,255.23 in liabilities. Prior to filing the first petition on September 9, 2001, Summertime had obtained a judgment in its action for summary ejectment. The Debtor stayed the ejectment by posting a bond, and subsequently filed its first bankruptcy petition on November 21, 2001 in the Eastern District of North Carolina. On December 19, 2001, the Debtor filed a motion to for an extension of time to assume or reject executory contracts, which was granted.

Nonetheless, the Debtor did not file a motion to assume or reject executory contracts during the time period ordered by the court, nor did it file a Plan of Reorganization and Disclosure Statement. Meanwhile, the Debtor attempted to negotiate an agreement with Summertime to settle the lease dispute by purchasing the property. On June 5, 2002, the Bankruptcy Administrator filed a motion to dismiss the case for cause pursuant to § 1122(b). On September 30, 2002, Judge Small dismissed the case, finding that the Debtor failed to file its Plan of Reorganization and Disclosure Statement, which were due May 20, 2002.

In the month following the dismissal of the first case, Edybul failed to make a scheduled payment in the amount of $40,000 and the parties returned to state court. The parties reached an agreement in the state court action and on December 10, 2002 an Order which incorporated the

stipulations and agreement of the parties was entered by the Clerk of Superior Court in Cumberland County. The Order provided that for the limited purpose of winding down its business, Edybul could maintain possession of the premises until 5:00 pm on December 15, 2002. In consideration for Summertime's agreement to let Edybul remain in possession until December 15, Edybul agreed that it would not challenge or appeal the order.

On Sunday December 15, 2002, just hours prior to the deadline to vacate the premises leased from Summertime, the Debtor filed a second voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code in the Middle District of North Carolina. On its petition, the Debtor listed 2009 Morganton Road in Moore County, N.C., as the principal place of business. The Debtor listed 822 Marchbanks Place, Hope Mills, North Carolina as its mailing address, which is where the Debtor maintains its books and records. Since filing, the Debtor has continued to operate the business as a debtor-in-possession. On its bankruptcy schedules, the Debtor lists assets in the amount of $476,728.35 and liabilities in the amount of $962,826.01.

On January 21, 2003, Summertime filed its motion to dismiss or change the venue of the case. On January 31, 2003, the Debtor filed a motion for an extension of time to assume or reject leases. Summertime objected to the extension on the basis that the Debtor had not paid rent post petition and was indebted to Summertime in an amount in excess of $70,000.

At the hearing on this matter, Alpheus B. Bullock, a partial owner of the Debtor, testified that prior to filing its second bankruptcy petition the Debtor was not experiencing undue pressure from unsecured creditors for payment. Mr. Bullock further testified that the Debtor had no outstanding issues with the Internal Revenue Service or with the landlord for the Skibo Road property. The sole reason the Debtor filed this petition was to obtain an extended period of time

to remain on the Summertime premises and perhaps work something out with the Summertime lease. Finally, just prior to the hearing on the present motion to dismiss, the Debtor closed the restaurant located on the Summertime property and indicated its willingness to reject the lease and release the property. The keys to the premises were returned to Summertime at the hearing.

DISCUSSION

While the Bankruptcy Code does not explicitly require that a case be filed in good faith, § 1112(b) of the Bankruptcy Code permits a court to dismiss a Chapter 11 petition for "cause." Pursuant to § 1112(b), a petition may be dismissed if found to be filed in bad faith. Carolin Corp., 886 F.2d 693 (4th Cir. 1989); see also In re Cedar Shore Resort, Inc., 235 F.3d 375, 379 (8th Cir. 2000); In re SGL Carbon Corp., 200 F.3d 154, 162 (3d Cir.1999); In re Trident Assocs. Ltd. Partnership, 52 F.3d 127, 130-31 (6th Cir. 1995); In re Marsch, 36 F.3d 825, 828 (9th Cir. 1994); In re Phoenix Piccadilly, Ltd., 849 F.2d 1393, 1394 (11th Cir.1988); In re Little Creek Devel. Co., 779 F.2d 1068, 1071-72 (5th Cir.1986). The moving party bears the burden of proving by a preponderance of the evidence that cause exists for dismissal of the debtor's bankruptcy case. Matter of Woodbrook Associates, 19 F.3d 312, 317 (7th Cir.1994); In re V Companies, 274 B.R. 721, 726 (Bankr.N.D.Ohio 2002); In re Lizerac Realty Corp., 188 B.R. 499, 503 (Bankr.S.D.N.Y.1995).

In Carolin, the Fourth Circuit set forth a two-pronged inquiry to determine whether a bankruptcy petition should be dismissed for want of good faith. The court must consider both objective futility and subjective bad faith. The purpose of this inquiry is "to determine whether the purposes of the Code would be furthered by permitting the Chapter 11 petitioner to proceed past filing." Carolin, 886 F.2d at 701. The court should consider the totality of the

circumstances and there is no single factor that will necessarily lead to a finding of bad faith. Id. While the court must make a separate inquiry for each prong, evidence which proves objective futility may also prove subjective bad faith. Id.

The purpose of objective futility inquiry is to ensure that there is embodied in the petition "some relation to the statutory objective of resuscitating a financially troubled [debtor]." In re Coastal Cable TV, Inc., 709 F.2d at 765. Factors to consider include whether there is any going concern value to preserve on the part of the debtor and whether there is any realistic possibility of an effective reorganization or hope of rehabilitation. In re Crown Financial, Ltd., 183 B.R. 719, 722 (Bankr. M.D.N.C. 1995).

In this case, the Debtor has no real hope of reorganization. During its first bankruptcy case, the Debtor had the benefit of ten months of bankruptcy protection and was unable to file any proposed plan of reorganization. The Debtor filed its second bankruptcy petition just two and one half months after the first case was dismissed. Nothing had changed in the interim which would make it more likely that the Debtor could reorganize in the second case. In fact, the circumstances under which the Debtor filed its second petition were essentially the same as those for the first petition. In both instances, the Debtor was facing eviction from its leased premises and was unable or unwilling to make its contractual rent payments when due. In addition, the Debtor's financial condition has remained bleak throughout both filings. The Debtor's monthly reports filed during the first bankruptcy indicate ending cash balances ranging from $4654.59 in December of 2001 to $483.32 in April of 2002. In December of 2002, during the second bankruptcy, the Debtor filed a monthly report indicating an ending cash balance of $250.86. These balances do not include rent payments and indicate a continuing inability to pay rent in the

second bankruptcy. The Debtor owes Summertime an amount in excess of $70,000. The court finds that objective futility has been shown in this case.

The second prong under the Carolin decision is a subjective bad faith inquiry. The purpose of this inquiry is "to determine whether the petitioner's real motivation is to abuse the reorganization process and to cause hardship or to delay creditors by resort to the Chapter 11 device merely for the purpose of invoking the automatic stay, without an intent or ability to reorganize his financial activities." Carolin Corp., 886 F.2d at 702 (citing In re Thirtieth Place, Inc., 30 B.R. 503, 505 (9th Cir. BAP 1983)).

Chapter 11 is not intended to provide a forum for the litigation of a two party dispute and an attempt to do so may be an abuse of the bankruptcy process. "Where a debtor's reorganization effort involves essentially a two-party dispute which can be resolved in state court, and the filing for relief under Chapter 11 is intended to frustrate or delay the legitimate efforts of creditors to enforce their rights against the debtor, dismissal for cause is warranted." In re Crown Financial, Ltd., 183 B.R. at 723. See also In re Ravick., 106 B.R. 834, 844 (Bankr. D.N.J.1989); In re Panache Development Co., Inc., 123 B.R. 929, 932 (Bankr. S.D. Fla.1991). This case involves a classic two party dispute between Summertime and the Debtor. This dispute is properly resolvable, and essentially has already been resolved in state court. Mr. Bullock's own testimony was that the Debtor was not experiencing any pressure from any creditors other than Summertime, and that the sole reason the Debtor filed its bankruptcy petition was to procure an extended period of time to remain on the Summertime property.

Furthermore, the Debtor has clearly employed a series of litigating tactics to delay the

legitimate efforts of Summertime to enforce its rights. Summertime first obtained an order for summary ejectment on September 12, 2001. The Debtor then stayed the state court's ejectment order by posting a bond. On November 21, 2001, the Debtor filed its first Chapter 11 petition. The Debtor remained under the protection of the bankruptcy court for ten months and did not file a plan of reorganization and disclosure statement. After the dismissal of the first case, the Debtor again failed to pay rent. Summertime returned to state court and the state court ultimately entered an order on December 10, 2002 that incorporated stipulations by the parties whereby the Debtor agreed to vacate the premises by December 15, 2002. Pursuant to the state court order, the Debtor had requested and had been allowed additional time to wind down its business prior to vacating the premises. Rather that abide by the state court order, the Debtor continued its operations and filed a second Chapter 11 petition just hours prior to the deadline to vacate the Summertime premises. This series of legal proceedings is evidence of the Debtor's intent to frustrate and delay Summertime's legitimate efforts with no intent to reorganize or cure its lease default. In addition, while the last minute filing in the instant proceeding, standing alone, does not warrant a finding of bad faith, when viewed in the context of the series of events leading up to the bankruptcy filing, it is further evidence of bad faith. See Carolin, 886 F.2d at 703.

Moreover, the venue chosen by the Debtor for its Chapter 11 filing may be evidence of bad faith. This is especially so if the venue chosen is a considerable distance from the debtor's secured and unsecured creditors, state court proceedings, or assets, or it appears that the debtor is attempting to forum shop. See Phoenix Piccadilly, 849 F.2d 1393, 1395 (11th Cir. 1988) (citing In re Pappas,, 7 B.R. 488, 490 (Bankr.D.Mass.1980)). In this instance, the Debtor had a case dismissed in the Eastern District of North Carolina just months prior to filing this case in the

Middle District of North Carolina. The Debtor was also subject to a state court order from Cumberland County, which is also in the Eastern District of North Carolina. There is no clear evidence as to why the Debtor's principal place of business changed during this time period. In this instance, while venue may be technically proper, it appears that the Debtor is attempting to forum shop.

Based upon the totality of the circumstances, the court finds that the Debtor acted in bad faith to gain a tactical advantage over Summertime, not for the purpose of a corporate reorganization. The court finds that objective futility and subjective bad faith on the part of the Debtor have been established, and therefore, cause exists for the dismissal of this case within the meaning of § 1112(b).

For the reasons stated herein, it is ORDERED that the Motion by Summertime to Dismiss the Debtor's Case is granted, and this case shall be and the same hereby is dismissed. It is further ORDERED that the motion by the Debtor to extend time to assume or reject lease agreements, the motion by the Bankruptcy Administrator for status hearing, and the application by attorney for Debtor for allowance of compensation and reimbursement of expenses are denied as moot. It is further ORDERED that the amount of $562.50 be remitted from retainer funds currently held by counsel for the Debtor to Joseph W. Spratt, as compensation for fees and expenses incurred as the court appointed consultant.

This the 8th day of April 2003.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge