IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In Re:	)	
	)	
Spencer C. Young Investments/	)	Case No. 08-81852
The Courtyard of Chapel Hill, LLC,	)	
	)	
Debtor.	)	
	)	

ORDER DISMISSING *PRO SE* CORPORATE DEBTOR'S CASE

This case came on before the undersigned United States Bankruptcy Judge on February 3, 2009 in Durham, North Carolina. Robyn Whitman appeared on behalf of the Bankruptcy Administrator, James B. Angell appeared on behalf of himself, and Terri L. Gardner appeared on behalf of Wachovia Bank, National Association. No one appeared on behalf of Spencer C. Young Investments/The Courtyard of Chapel Hill, LLC. After careful consideration of the evidence, the Court makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure:

I. Facts

On December 1, 2008, Spencer C. Young filed a voluntary petition (the "Petition") under chapter 11 of the Bankruptcy Code on behalf of Spencer C. Young Investments/The Courtyard of Chapel Hill, LLC (the "Debtor"). The Debtor did not file schedules with the Petition, and the Office of the Clerk sent the Debtor a Notice of Filings Due, setting a deadline of December 16, 2008 for those documents. On that same date, the Court entered a chapter 11 operating order (the "Operating Order") ordering the Debtor, among other things, to close its prepetition books, records, and bank accounts, open new debtor-in-possession books, records, and bank accounts by

December 6, 2008 and file monthly reports. This order was served on Mr. Young, as the representative of the Debtor. The Operating Order expressly provides that the "failure to comply with this Order may result in dismissal of this case."

Mr. Young signed the Petition as the manager of the Debtor. The initial meeting of creditors was scheduled for January 7, 2009. By an order of the Court, Mr. Young, was designated by the Court to perform on behalf of the Debtor all acts required to be performed by the Debtor pursuant to the Bankruptcy Code, Bankruptcy Rules and Orders of the Court.

The Debtor is a business entity and not a natural person. Mr. Young is not a duly licensed attorney. On December 1, 2008, the Bankruptcy Clerks Office of the Middle District of North Carolina provided notice by a memo (the "Memo") to Mr. Young, as the filer of the Petition, and the Bankruptcy Administrator that the Petition was filed *pro se*. The Memo informed Mr. Young that failure of the Debtor to obtain counsel in the case within 10 days of the date of the Memo will result in the filing of a motion to dismiss the case pursuant to Federal and North Carolina law, which both prohibit corporations to appear in federal court without licensed counsel. The Bankruptcy Administrator filed a Motion to Dismiss Pro Se Corporate Debtor's Case on December 17, 2008 (the "Motion to Dismiss").

On December 29, 2008, Wachovia Bank, National Association ("Wachovia") filed a Motion to Prohibit Use of Cash Collateral (the "Cash Collateral Motion"). Prepetition, Wachovia had conducted a foreclosure sale upon its Deed of Trust and Assignment of Rents, which constitutes a first lien on the Debtor's shopping center on Franklin Street in Chapel Hill, North Carolina known as "The Courtyard" (the "Real Property") and related assets, on November 20, 2008. Wachovia bid the amount of its debt, including principal, interest, and

costs. On or about the final date for upset bids upon the Real Property, the Debtor filed its *pro se* Petition to stop the sale process.

On January 2, 2009, the Bankruptcy Administrator filed a Notice of Continuance of 341 Meeting until February 4, 2009, inasmuch as the Debtor had not obtained counsel and the schedules and statement of financial affairs had not been filed. The Court held the hearing on the Cash Collateral Motion on January 5, 2009. Terri L. Gardner appeared on behalf of Wachovia and Michael D. West as the Bankruptcy Administrator. The Debtor did not appear. The Court granted the Cash Collateral Motion and entered an order on January 7, 2009 (the "Cash Collateral Order"). Among other things, the Cash Collateral Order prohibits the Debtor from using any rents collected from the Real Property and that any rents payable after the entry of the Cash Collateral Order should be directed to David Maynard at Wachovia. Further, the Debtor, by and through Spencer C. Young, was to provide Wachovia, within three business days, with the following: all funds collected from tenants, a copy of all leases between the Debtor and current tenants in the Real Property, a report of all cash in the Debtor's possession or bank accounts as of the filing of the Petition, and a report of all revenues collected and expenses paid since the filing of the Petition. The Debtor failed to comply with the Court's order.

On January 22, 2009, the Bankruptcy Administrator's Motion to Dismiss came on for hearing. At that hearing, Terri L. Gardner appeared on behalf of Wachovia and Robyn Whitman appeared on behalf of the Bankruptcy Administrator. No one appeared on behalf of the Debtor. At the Bankruptcy Administrator's request the Motion to Dismiss was continued until January 28, 2009, as the Bankruptcy Administrator advised the Court that Mr. Young was meeting with prospective counsel.

At the continued hearing on January 28, 2009 for the Motion to Dismiss, Donald Pocock appeared on behalf of Wachovia, Robyn Whitman appeared on behalf of the Bankruptcy Administrator, James B. Angell made a limited appearance on behalf of the Debtor. Mr. Young also appeared. Forty five minutes prior to the hearing, Mr. Angell had filed, on behalf of the Debtor, an application to employ him as counsel. As of the January 28, 2009 hearing, the Debtor had:

(1) failed to file the schedules or statement of financial affairs which were due on December 16, 2008 and resulted in a continuance of the first creditors' meeting;

(2) failed to comply with the Court's Cash Collateral Order entered on January 7, 2009;

(3) failed to close the books and records of the company and set up new books and records, as required by the Operating Order;

(4) failed to set up new bank accounts as required by the Operating Order;

(5) failed to file a monthly report as required by 11 U.S.C. §§ 1106 and 1107, Bankruptcy Rule 2015, and the Operating Order.

In the Application to Employ, the Debtor disclosed that a $45,000 retainer was paid by Spencer C. Young, Investments, Inc. the parent company of the Debtor. Mr. Angell could not confirm at the hearing on January 28, 2009 that the retainer was not paid from cash collateral. Mr. Angell requested that the Court not enter an order employing him as counsel for the Debtor until he could verify the source of the money paid for the retainer. The Debtor did not dispute that it was not in compliance with the Cash Collateral Order, as it had used cash collateral and failed to provide the required reports to Wachovia. The Court informed the Debtor that failure to comply with the Cash Collateral Order is grounds for dismissal.

The Bankruptcy Administrator did not pursue its Motion to Dismiss at this hearing; therefore, the Court continued the Motion to Dismiss until February 11, 2009, on the condition that the Debtor provide to Wachovia all funds collected from tenants, a copy of all leases between the Debtor and current tenants in the Real Property, a report of all cash in the Debtor's possession or bank accounts as of the filing of the Petition, and a report of all revenues collected and expenses paid since the filing of the Petition, as required by the Cash Collateral Order, by the close of business on Friday, January 30, 2009, and that the Debtor not use any further cash collateral. The Court also set a deadline of February 9, 2009 for the Debtor to file its schedules, monthly reports, and statements as to affiliated companies.

On February 3, 2009, this case came on before the Court for a status hearing and Mr. Angell represented to the Court that he was unable to verify the source of funds received for the retainer, that the Debtor had not only violated the Cash Collateral Order, but the directive order of this Court given at the hearing on January 28, 2009. Mr. Angell informed the Court that the Debtor had completed the following pursuant to the Cash Collateral Order: wired approximately $12,000.00 to Wachovia, provided a copy of leases to Wachovia, reported funds collected to Wachovia (including a report of revenues and expenses paid), and reported Debtor-in-Possession bank accounts to Wachovia, however, none of the bank accounts were in the name of the LLC. Mr. Angell also reported that the Debtor had violated the Cash Collateral Order by making a $2,000.00 insurance payment. Mr. Angell requested that he not be employed as counsel.

II. Dismissal of Petition due to Lack of Representation by Legal Counsel

It is improper to file the Petition in a representative capacity for a corporation other than by a licensed member of the bar. As such, a corporation may not appear in federal court *pro se*.

See e.g., *Rowland v. California Men's Colony*, 113 S. Ct. 716, 721 (1993); *Plimpton v. Cooper*, 141 F. Supp. 2d 573, 575 (W.D.N.C. 2001). An individual without a license to practice law cannot act on behalf of a corporate entity in filing a bankruptcy petition. *In re Elshiddi Enters.*, 126 B.R. 785, 788 (Bankr. E.D. Mo. 1991). *See also Dick Tracy Ins. Agency, Inc.*, 204 B.R. 38 (Bankr. W.D. Mo. 1997) (holding corporation must be represented by counsel in bankruptcy proceeding and may not file petition pro se).

The Local Rules of this Court provide: "All partnerships, corporations, and other business entities (other than an individual conducting business as a sole proprietorship) that desire to appear in cases or proceedings before this Bankruptcy Court must be represented by an attorney duly admitted to practice before the Bankruptcy Court..." Local Bankruptcy Rule 9011-2. Lack of representation by legal counsel is grounds alone to dismiss an action brought by a corporation in federal court. *Plimpton*, 141 F. Supp. 2d at 575. *See In re Dick Tracey Ins. Agency, Inc.*, 204 B.R. at 39 (holding that filing a bankruptcy petition on behalf of a corporation by a non-attorney constitutes the unauthorized practice of law, and a petition filed in that manner should be dismissed as null and void); *Elshiddi*, 126 B.R. at 788-89 (showing where local rule prohibits *pro se* filing by a corporation, the petition should be dismissed).

This case was filed over two months ago, and the Debtor has failed, despite due and proper notice, to obtain counsel. The sole reason that the case was not dismissed at the hearing on January 28, 2009 was that it appeared the Debtor had obtained Mr. Angell. As Mr. Angell informed the Court on February 3, 2009, however, the Debtor does not have counsel. The Debtor's failure to obtain counsel constitutes grounds for dismissal.

III. Dismissal by Cause pursuant to 11 U.S.C. §1112(b)(4)

Section 1112(b) provides, in part, that the court shall dismiss a case for cause "after notice and hearing." 11 U.S.C. § 1112(b). The Debtor has repeatedly violated the Cash Collateral Order. This constitutes cause for dismissal pursuant to 11 U.S.C. §§ 1112(b)(4)(D) and (E). The Debtor violated the Operating Order by: (a) not closing its pre-petition books, records, and bank accounts and not opening new post-petition books, records, and bank accounts as of the date of filing, and (b) not filing monthly reports by the deadline as required, which constitutes cause for dismissal pursuant to 11 U.S.C. § 1112(b)(4)(E). The Debtor has not filed any schedules or affiliation statements, which constitutes cause for dismissal pursuant to 11 U.S.C. § 1112(b)(4)(F).

Section 102, entitled "Rules of Construction," provides that "'after notice and a hearing', or a similar phrase– (A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances." 11 U.S.C. § 102(1)(a); *In re C-TC 9th Ave. P'ship*, 113 F.3d 1304, 1312 (2nd Cir. 1997). Furthermore, the court may dismiss a Chapter 11 case *sua sponte* as appropriate and necessary. *In re Finney*, 992 F.2d 43 (4th Cir. 1993); *In re Starmark Clinics, LP*, 388 B.R. 729, 736 (Bankr. S. D. Tex. 2008).

In this case, there has been a pending motion to dismiss for the failure to have counsel since December 17, 2008. Mr. Young has been given repeated extensions of time to obtain counsel and has failed to do so. Additionally, Mr. Young has continued to violate the Cash Collateral Order in direct violation of the directive of this Court. Thus, dismissal is appropriate and sufficient notice has been given.

While it is true that the Bankruptcy Administrator agreed to continue its Motion to Dismiss on January 28, 2009 until February 11, 2009, there is *no* action this Debtor could have

taken, nor argument it could advance, that would make the Court rule differently next week. This Debtor has had the protections afforded by the filing of a bankruptcy petition and has stayed the foreclosure of real property. While taking advantage of the bankruptcy court's protection, this Debtor has repeatedly failed to honor its responsibilities as set forth in the Bankruptcy Code and has disregarded court orders. To require parties to return to court on February 11, 2009 would be punitive and prejudicial to Wachovia and the Bankruptcy Administrator. The Debtor acknowledged that it had failed to comply with the Operating Order. Notice of the possibility of dismissal was given in that order. The Court also expressly advised Mr. Young at the hearing on January 28, 2009 that the Court would dismiss this case for failure to comply with the Cash Collateral Order. This Court therefore finds that notice of the dismissal was appropriate under these facts and circumstances.

IV. The Automatic Stay

Wachovia asked permission to proceed with its foreclosure sale. Completion of the foreclosure sale was stayed under § 362 of the Bankruptcy Code. Pursuant to N.C. Gen. Stat. § 45-21.22(c), when a foreclosure is stayed by a debtor filing a bankruptcy petition after entry of an order by the clerk of superior court allowing a foreclosure sale and before expiration of the 10-day upset bid period, thereafter when the stay is lifted, the trustee or mortgagee shall not be required to comply with the provisions of N.C. Gen. Stat. § 45-21.16, but shall advertise and hold the sale in accordance with the provisions of N.C. Gen. Stat. §§ 45-21.16A, 45-21.17, and 45-21.17A. The lifting of the automatic stay includes an order specifically lifting the stay as well as dissolution of the automatic stay by virtue of dismissal of a bankruptcy case. *See Beneficial Mortgage Co. of N.C., Inc. v. Barrington & Jones Law Firm, P.A.*, 164 N.C. App. 41,

595 S. E. 2d 705 (2004). Therefore, Wachovia may proceed with its foreclosure against the Debtor's Real Property in accordance with the provisions of N.C. Gen. Stat. §§ 45-21.16A, 45-21.17, and 45-21.17A.

V. Conclusion

Based upon the forgoing, it is hereby ORDERED that the Debtor's case is DISMISSED. It is FURTHER ORDERED that the automatic stay is DISSOLVED and Wachovia is permitted to proceed with foreclosure against the Debtor's Real Property in accordance with the provisions of N.C. Gen. Stat. §§ 45-21.16A, 45-21.17, and 45-21.17A.

Catharine R. Carruthers

February 4, 2009

UNITED STATES BANKRUPTCY JUDGE

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