FILED
Samuel L. Kay, Clerk
United States Bankruptcy Court
Augusta, Georgia
By mfox at 3:17 pm, Dec 03, 2007

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE: SPORTSMAN'S LINK, INC.	)	CHAPTER 11 CASE
	)	NUMBER 07-10454
Debtor in Possession	)	
	)	
	)	
SPORTSMAN'S LINK, INC.	)	
	)	
Debtor/Movant	)	
	)	
vs.	)	
	)	
USPG PORTFOLIO TWO, LLC	)	
	)	
Creditor/Respondent	)	

MEMORANDUM OPINION AND ORDER ON
DEBTOR'S MOTION TO EXTEND EXCLUSIVITY PERIOD AND
CREDITOR'S CROSS-MOTION TO CONVERT DEBTOR'S CASE TO CHAPTER 7

This matter is before me on the Motion to Extend Exclusivity Period ("Motion") filed by Sportsman's Link, Inc. ("Sportsman's Link") and the cross-motion by USPG Portfolio Two, LLC ("USPG") to convert this chapter 11 case to a case under chapter 7 ("Cross-Motion").[1] After oral argument and consideration

[1] Sportsman's Link also filed an Amended Debtor's Motion to Extend Exclusivity Period (Dkt. # 138) that included a request for extension of the period under 11 U.S.C. § 365(d)(4) for assumption or rejection of an unexpired nonresidential lease. That issue was made moot by my order of October 31, 2007, (Dkt. # 181) denying USPG's motion for possession of premises, in which I concluded that Sportsman's Link had made a timely request to assume the lease.

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of the parties' written motions and responses, I conclude that cause exists under 11 U.S.C. § 1121(d) to extend the exclusivity period during which only the debtor may file and solicit acceptances for a plan. The extension is granted up to and including the date of the confirmation hearing, but in no event beyond November 13, 2008. I further conclude that cause does not exist under 11 U.S.C. § 1112(b) to convert this case to a case under chapter 7.

BACKGROUND

Sportsman's Link is a retailer that operates a hunting and fishing supply store in a 63,000-square-foot facility in a shopping center off Bobby Jones Expressway in Augusta, Georgia. USPG is the landlord for the retail space that Sportsman's Link occupies as tenant under a lease ("Lease").

The Motion and the Cross-Motion are only the latest skirmishes in an ongoing conflict between the parties that began, according to Sportsman's Link, in December 2005, when USPG began to "bully" Sportsman's Link into surrendering its premises so that USPG could move Sam's Wholesale Club from its space in the shopping center to the space occupied by Sportsman's Link.

The location of the leased premises and the significance of the lease are explained in the Background and Discussion sections that follow.

(Disclosure Stmt. 2.) USPG acknowledges that it wants to move Sportsman's Link to a "better space" in the shopping center and also says it offered to pay for the move, but that Sportsman's Link responded with "totally unacceptable demands for USPG to pay the Debtor unwarranted piles of money." (Hr'g Tr. 19:24 - 20:14, Aug. 22, 2007.)[2] Sportsman's Link goes so far as to blame its bankruptcy filing of March 13, 2007, on "the all out war" that the Lease dispute engendered. (Disclosure Stmt. 2.)

The docket in this case indicates that the "war" over the Lease continues unabated, with no sign of a truce. To date, I have determined that the Lease did not terminate pre-petition and that Sportsman's Link is not deemed to have rejected the Lease. (Order Denying USPG Portfolio Two, LLC's Motion for Possession of Premises, October 31, 2007, Dkt. # 181, Notice of Appeal filed Nov. 27, 2007.) Moreover, two other matters related to the Lease are set to be heard in January 2008: (1) Debtor's Motion to Assume Lease and (2) Debtor's Disclosure Statement, with response by USPG. The parties also are litigating an adversary proceeding in which Sportsman's Link alleges that USPG breached its duties under the Lease by failing to repair a leaky roof. See n.2.

[2] This citation refers to the transcript of a hearing on various motions both in this case and in the associated adversary proceeding, Sportsman's Link, Inc., v. U.S. Properties Group, Inc. (In re Sportsman's Link, Inc.), No. 07-01031 (Bankr. S.D. Ga. filed May 30, 2007). The Motion to Extend Exclusivity Period also was set for that date, but was continued until November 13, 2007.

Thus the Lease has been and continues to be the flashpoint for conflict between the parties. More importantly, whether Sportsman's Link may assume the Lease is the as-yet-unresolved question that is the linchpin in this case.

Before I address the merits of the Motion and the Cross-Motion, I note that the Motion as filed requested an extension of the exclusivity period only through October 9, 2007, the date that Sportsman's Link represented was the deadline for it to file a plan of reorganization under agreements with its creditors. (Mot. ¶ 7.) The Motion was not heard, however, until more than a month after that date had passed. Consequently, the Motion was still pending when Sportsman's Link on October 9 filed a Chapter 11 Plan of Reorganization ("Plan") and a Disclosure Statement. For reasons explained below, I grant a further extension of the exclusivity period beyond the initial requested date.

DISCUSSION

I. Extension of the Exlusivity Period under 11 U.S.C. § 1121(d)

Under 11 U.S.C. § 1121, only the debtor may file a plan during the 120-day period following the filing of the bankruptcy petition, and only the debtor may solicit acceptances for a plan

during the 180-day period following the filing of the petition. See § 1121(b)-(c)(3). This period is commonly referred to as the "exclusivity period." Under § 1121(d) as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), the court may for cause extend the 120-day period for up to 18 months after the date the petition and the 180-day period for up to 20 months after the date of the petition.[3]

The question of whether to extend the exclusivity period is within the discretion of the bankruptcy judge, and the determination is fact-specific. In re R.G. Pharmacy, Inc., 374 B.R. 484, 487 (Bankr. D. Conn. 2007). The court should interpret § 1121 "to limit the delay that makes creditors the hostages of Chapter 11 debtors." United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.), 808 F.2d 363, 372 (5th Cir. 1987), aff'd, 484 U.S.

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[3] The applicable subsection provides in relevant part that

> on request of a party in interest . . . and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section.
>
> (2)(A) The 120-day period specified in paragraph (1) may not be extended beyond a date that is 18 months after the date of the order for relief under this chapter.
>
> (B) The 180-day period specified in paragraph (1) may not be extended beyond a date that is 20 months after the date of the order for relief under this chapter.

11 U.S.C. § 1121(d)(1)-(d)(2)(B).

365 (1988). With that perspective in mind, courts have developed the following non-exclusive list of factors relevant to determining whether cause exists to grant an extension:

> 1) the size and complexity of the case;
>
> 2) the necessity of sufficient time to negotiate and prepare adequate information;
>
> 3) the existence of good faith progress toward reorganization;
>
> 4) whether the debtor is paying its debts as they come due;
>
> 5) whether the debtor has demonstrated reasonable prospects for filing a viable plan;
>
> 6) whether the debtor has made progress negotiating with creditors;
>
> 7) the length of time the case has been pending;
>
> 8) whether the debtor is seeking an extension to pressure creditors; and
>
> 9) whether unresolved contingencies exist.

In re Friedman's, Inc., 336 B.R. 884, 888 (Bankr. S.D. Ga. 2005) (citing In re Serv. Merch. Co., 256 B.R. 744, 751 (Bankr. M.D. Tenn. 2000); In re Express One Intern., Inc., 194 B.R. 98, 100 (Bankr. E.D. Tex. 1996); In re McLean Indus. Inc., 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987)).

The bankruptcy court decides which factors are relevant to a particular case and how much weight to give each

factor. Bunch v. Hoffinger Indus., Inc. (In re Hoffinger Indus., Inc.), 292 B.R. 639, 644 (B.A.P. 8th Cir. 2003). Notwithstanding the frequently-cited nine-factor test, the court has "a high degree of flexibility" in designing the appropriate test for each case and "is not required to apply any particular set of factors, or number of factors, in every case." Official Comm. of Unsecured Creditors v. Elder-Beerman Stores Corp. (In re Elder-Beerman Stores Corp.), 1997 WL 1774880, at *4 (S.D. Ohio June 23, 1997). The focus should be on "the unusual circumstances affecting the Debtor's ability to effectuate a Plan." Serv. Merch. Co., 256 B.R. at 751.

Here, USPG in opposing the Motion correctly points out that this case is neither large nor complex. (Resp. ¶ 18.) USPG also cites the Debtor's "bleak operating history" (Supp'l Resp. ¶ 3) and in addition asserts that the Plan already filed by Sportsman's Link "is not likely to be confirmable under 11 U.S.C. § 1129" (Id. ¶ 16).

Addressing these arguments, I conclude that the size and complexity of the case is not relevant in this instance. As to the Debtor's operating history, not only are the Debtor's most recent six months' sales figures consistent with the seasonal nature of the business, but the most-recently-filed Operating

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Report (for October 2007) showed a jump in sales of more than $20,000 as compared to the previous month. Finally, the issue as to whether this particular Plan is confirmable is premature, particularly in light of the Debtor's intention to amend the Plan, as stated at hearing on the Motion on November 13.

Here, the single most important factor in determining cause to extend the exclusivity period is the issue that has dominated this case from the beginning: the unresolved contingency (the final factor on the nine-factor list) of whether Sportsman's Link has timely assumed the Lease. Not only is this issue still "live," its resolution is not imminent. Debtor's pending Motion to Assume Lease cannot be ruled upon before early 2008, the hearing having been continued to January 15 on motion by USPG.

The Lease issue is dispositive of the Motion presently before me for two reasons. First, the question of whether Sportsman's Link should be allowed to assume the Lease is central to the Debtor's survival as a going concern. Second, Sportsman's Link cannot reasonably be expected to put forth a plan of reorganization until the Lease issue has been resolved. I conclude that the critical role of the Lease in the Debtor's reorganization and the fact that this case cannot move forward

until the assumption issue is determined are sufficient to establish cause under § 1121(d).

II. Cross-Motion to Convert

Under § 1112(b)(1) as amended by BAPCPA, the court on request of a party in interest shall convert a case under chapter 11 to a case under chapter 7 if the movant establishes cause.[4] The term "cause" includes any of a non-exclusive list of events (primarily acts and omissions by the debtor) and circumstances that could jeopardize the success of the debtor's reorganization. See § 1112 (b)(4)(A)-(P).

Here, in a response filed before my October 31 ruling that the Debtor was not deemed to have rejected the Lease, USPG asserts as cause for conversion that "the Lease has been deemed rejected." (Resp. ¶ 23.) This argument has been invalidated by my subsequent decision and thus cannot constitute cause for conversion under § 1112.

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[4] The applicable subsection provides in relevant part that

> on request of a party in interest, and after notice and a hearing, absent unusual circumstances specifically identified by the court that establish that the requested conversion . . . is not in the best interests of creditors and the estate, the court shall convert a case under this chapter to a case under chapter 7 . . . if the movant establishes cause.

11 U.S.C. § 1112(b)(1).

ORDER

It is therefore ORDERED that Debtor's Motion to Extend Exclusivity Period is GRANTED. It is

FURTHER ORDERED that the period under 11 U.S.C. § 1121 during which only Sportsman's Link may file and solicit acceptances for a plan of reorganization is extended up to and including the date of the confirmation hearing on the Debtor's Plan and Disclosure Statement, but in no event beyond November 13, 2008. It is

FURTHER ORDERED that USPG's Cross-Motion to Convert Debtor's Case to Chapter 7 is DENIED.

John S. Dalis
United States Bankruptcy Judge

Dated at Brunswick, Georgia,
this 29th day of November, 2007