

best interests of creditors and the estate for the case to remain under chapter 11. Because I find that unusual circumstances are present in this case, the Motion to Dismiss is denied.

FACTS

On October 12, 2006, the Debtor and Georgia Heritage entered into a sales contract ("Sales Contract") under which Georgia Heritage was to sell a 188-unit apartment complex in Augusta, Georgia, to the Debtor for \$4,400,000. (Dkt. No. 35 at 11.) The original closing date was to occur between January 16, 2007, and March 1, 2007. (Id.) The Sales Contract was subsequently modified eight different times by eight separate addenda. The eighth and final addendum to the Sales Contract provided that the sale was to close by November 15, 2008. (Id. at 21.)

On November 14, 2008, one day before the amended closing date of the Sales Contract, the Debtor filed a voluntary small business chapter 11 petition. (See Dkt. No. 1.) The Sales Contract was the only asset listed in the Debtor's schedules (see Dkt. Nos. 11, 18), with a stated value of \$325,000.00 (Dkt. No. 18 at 2). Only five creditors are listed in the Debtor's schedules, with all five holding unsecured nonpriority claims totaling \$312,018.11. (See Dkt. No. 19 at 1-2.)¹

¹ Georgia Heritage was originally listed as an unsecured creditor in the Debtor's schedules (Dkt. No. 1 at 9), but was removed as a creditor by a later amendment to those schedules (see Dkt. No. 19). Georgia Heritage is, however,

On March 10, 2009, the Debtor filed a complaint initiating an adversary proceeding, naming Georgia Heritage as a defendant. (See Dkt. No. 35.) The complaint sought, among other things, specific performance of the Sales Contract. (Id. at 9.) That adversary proceeding remains pending.

On January 14, 2010, I issued a Notice of Hearing to Show Cause why the case should not be dismissed for the Debtor's failure to file a chapter 11 plan and disclosure statement within the time required by the Bankruptcy Code. (See Dkt. No. 58.) On February 12, 2010, before the scheduled hearing date and 455 days after the petition was filed, the Debtor filed its chapter 11 plan and disclosure statement. (See Dkt. Nos. 63, 64.)² The Notice of Hearing to Show Cause was vacated.

The Debtor's chapter 11 plan proposes primarily to assume the Sales Contract. The plan states that assumption of the Sales Contract will enable it to pay all creditors in full except for one (Dkt. No. 69 at 1), which is described as a related entity (id. at 3). In addition, Georgia Heritage is to be paid \$200,000 "over and above the [Sales Contract] price." (Id.)

In the alternative, if the Sales Contract cannot be assumed, the plan calls for the distribution of \$175,000 to pay

a party in interest by virtue of its status as a party to the Sales Contract that the Debtor seeks to assume, and Georgia Heritage characterizes itself as such.

² The Debtor's plan was later amended to correct a typographical error and the omission of an effective date. (See Dkt. No. 69.)

administrative and unsecured claims. (Id.) Funds totaling that amount had been held by a third party under the Sales Contract, but have since been deposited into the registry of the Court. (See Dkt. No. 84.) Absent assumption of the Sales Contract, the plan proposes to pay nothing to Georgia Heritage. (Dkt. No. 69 at 3.) All five creditors voted to accept the proposed plan (see Dkt. Nos. 71, 75, 76, 77, 79), while Georgia Heritage cast the only vote to reject it (see Dkt. No. 78).

On February 22, 2010, Georgia Heritage objected to confirmation of the Debtor's plan. (See Dkt. No. 68.) As part of its objection, Georgia Heritage argued that the plan should not be confirmed because it was not filed before the deadline specified by the Bankruptcy Code. (See id. at 1.) I construe that portion of the objection as a motion to dismiss the case, and that motion is now before me.

CONCLUSIONS OF LAW

I. Relevant Bankruptcy Code Provisions

Certain provisions of Chapter 11 of the Bankruptcy Code apply only to "small business cases." A small business case is defined as any case under chapter 11 in which the debtor is a "small business debtor." 11 U.S.C. § 101(51C). The definition of a small business debtor includes persons engaged in "commercial or business activities" with debts of not more than

\$2,190,000³ as of the date of the petition. 11 U.S.C. § 101(51D). Any chapter 11 debtor that falls within that definition must comply with the applicable provisions for small business cases.⁴

The chapter 11 plan and disclosure statement in a small business case must be filed within 300 days of the order for relief. 11 U.S.C. § 1121(e)(2). Like various other provisions of the Bankruptcy Code, however, § 1121(e)(2) does not provide the consequence for the failure of the debtor to meet that deadline.⁵

³ On April 1, 2010, that amount increased to \$2,343,300 pursuant to 11 U.S.C. § 104(a).

⁴ Before the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, chapter 11 debtors that qualified as small businesses were not required to proceed as small business debtors, though they could elect such treatment. See 11 U.S.C. § 1121(e) (2004) (stating that the timeframes in a small business case apply where "the debtor is a small business and elects to be considered a small business").

⁵ For example, § 704(b)(1)(A) provides that the United States Trustee "shall" file a statement within 10 days of the first meeting of creditors stating whether the case raises the presumption of abuse. See 11 U.S.C. § 704(b)(1)(A). Because that section does not provide the consequence, however, courts have split over whether the failure to file the required statement bars the U.S. Trustee from filing a motion to dismiss under § 704(b)(2). Compare Reed v. Anderson (In re Reed), 422 B.R. 214, 222-23 (C.D. Cal. 2009) (failure to file § 704(b)(1)(A) statement bars a motion to dismiss under

§ 704(b)(2)) with In re Cadwallder, No. 06-36424, 2007 WL 1864154, at *9 (Bankr. S.D. Tex. June 28, 2007) (failure to file § 704(b)(1)(A) statement does not bar a motion to dismiss under § 704(b)(2)).

Likewise, § 521(a)(1) requires a debtor to file bankruptcy schedules, a statement of financial affairs, as well as other documents, see 11 U.S.C. § 521(a)(1), and Federal Rule of Bankruptcy Procedure ("F.R.B.P.") 1007(c) sets the deadline for filing the required documents as 14 days after the petition date. F.R.B.P. 1007(c). There is no specified consequence, however, for the debtor's failure to meet that deadline. See In re Cadwallder, 2007 WL 1864154, at *6 (noting that there is no specified consequence "if the debtor files the documents on the 16th day").

A debtor's failure to file a chapter 11 plan and disclosure statement by the § 1121(e)(2) deadline could result in either conversion or dismissal of the case for cause under 11 U.S.C. § 1112(b).⁶ Before the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), conversion or dismissal under § 1112(b) was left to the discretion of the court. See 11 U.S.C. § 1112(b) (2004) (stating that courts "may" convert or dismiss a case for cause). BAPCPA, however, amended § 1112(b) to make conversion or dismissal for cause mandatory, see 11 U.S.C. § 1112(b)(1) (2010) (stating that courts "shall" convert or dismiss a case for cause), subject however to exceptions.

Cause under § 1112(b)(1) is defined by a non-exhaustive list set forth in § 1112(b)(4), which includes the "failure to file a

Finally, before BAPCPA, § 521(2) required a debtor to file a statement of intention as to all debts secured by property of the estate and act on that intention within the specified time periods without providing the consequence for the failure to do so. See 11 U.S.C. § 521(2)(A-B) (2004). In determining whether the denial of discharge could be a consequence for the failure to meet those deadlines, I held that such relief was not available given the provision's lack of an enforcement mechanism. See Sears, Roebuck & Co. v. Demello (In re Demello), Nos. 95-10587, 95-01060A, 1996 WL 33402697, at *2-3 (Bankr. S.D. Ga. Feb. 12, 1996). Post-BAPCPA, § 362(h), which was added by Congress as part of the BAPCPA amendments, provides the consequence for a debtor's failure to comply with § 521(a)(2) (formerly § 521(2)): termination of the automatic stay as against the specified property, 11 U.S.C. § 362(h)(1) (2010).

⁶ 11 U.S.C. § 1112(b)(1) states in pertinent part:

[O]n 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 or dismissal 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 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, if the movant establishes cause.

disclosure statement, or to file or confirm a plan, within the time fixed by this title." 11 U.S.C. § 1112(b)(4)(J). The burden of establishing cause is on the moving party. 11 U.S.C. § 1112(b)(1).

Once cause is established, conversion or dismissal is mandatory unless one of two exceptions applies. First, the court need not convert or dismiss a case if the court specifically identifies "unusual circumstances . . . that establish that the requested conversion or dismissal is not in the best interests of creditors and the estate." Id. The term unusual circumstances is not defined in the Bankruptcy Code, but it "contemplates conditions that are not common in chapter 11 cases," In re Pittsfield Weaving Co., 393 B.R. 271, 274 (Bankr. D.N.H. 2008).

Second, in the absence of such unusual circumstances, the debtor or another party in interest may avoid conversion or dismissal by establishing that

- there is a reasonable likelihood that a plan will be confirmed within the timeframes established in sections 1121(e) and 1129(e) and
- the grounds for granting such relief include an act or omission of the debtor for which there exists a reasonable justification for the act or omission and that will be cured within a reasonable period of time fixed by the court.

11 U.S.C. § 1112(b)(2)(A-B).

II. Georgia Heritage Has Established Cause to Dismiss the Case

Georgia Heritage correctly points out that the Debtor failed to file a chapter 11 plan and disclosure statement before the 300-day deadline of § 1121(e)(2). The Debtor's chapter 11 petition was filed on November 14, 2008, giving the Debtor until September 10, 2009 to file its chapter 11 plan and disclosure statement. It was not until after I issued a Notice of Hearing to Show Cause why the case should not be dismissed that the Debtor finally filed both documents on February 12, 2010. Because the Debtor failed to comply with the § 1121(e)(2) deadline, and because that failure constitutes cause under § 1112(b)(4)(J), the case must be dismissed unless one of the two exceptions to § 1112(b)(1) applies.

III. Dismissal Would Not Be in the Best Interests of Creditors and the Estate Due to the Unusual Circumstances of this Case

This case is unique because the Debtor's estate includes only one asset: the Sales Contract. There are only five unsecured creditors, and all five have voted to accept the Debtor's proposed chapter 11 plan. In addition, each creditor's debt was incurred to further the closing of the Sales Contract. Counsel for the Debtor stated at hearing that the only way by which all creditors could be paid is if the plan is confirmed and the case remains under chapter 11, allowing the Debtor to pursue

assumption of the Sales Contract or, in the alternative, distribution of the funds currently held in the registry of the Court.⁷ I also find that, because the parties have already submitted briefs and presented evidence in both the case and the related adversary proceeding on the dispositive issues, dismissal of this case would result in the waste of the judicial resources since the outstanding issues can be finally adjudicated in this Court. Based on these facts, I conclude that this case presents unusual circumstances that establish that it is in the best interests of creditors and the estate that this case remain a case under chapter 11.⁸

ORDER

Although the Debtor's failure to file a chapter 11 plan and disclosure statement before the 300-day deadline of § 1121(e)(2)

⁷ I note that although the Debtor's chapter 11 plan proposes to pay all creditors (except the related entity) in full from the \$175,000 currently held in the registry of the Court if the Sales Contract cannot be assumed, the Debtor and Georgia Heritage dispute whether those funds are property of the estate that is available to pay creditors' claims.

⁸ In its Motion to Dismiss, Georgia Heritage cites three cases for the proposition that a small business debtor's failure to file a chapter 11 plan by the 300-day deadline of § 1121(e)(2) is fatal. See Dkt. No. 68 at 1. Unlike the present case, however, none of the three cited cases involved the issue of whether the debtor's failure to file a chapter 11 plan before the 300-day deadline warranted dismissal. See Bertram Commc'ns LLC v. Netwurx, Inc., No. 09-CV-1037, 2009 WL 3809800, at *1-2 (E.D. Wis. 2009) (considering a post-deadline amendment to a timely-filed chapter 11 plan); In re Fla. Coastal Airlines, Inc., 361 B.R. 286, 289 (Bankr. S.D. Fla. 2007) (considering the debtor's post-deadline amendment to a timely-filed chapter 11 plan and a post-deadline plan filed by a creditor); In re Barnes, 308 B.R. 77, 78 (Bankr. D. Colo. 2004) (considering a motion to extend the 300-day deadline of § 1121(e)(2)). Accordingly, because none of those cases address the application of § 1112(b)(1), they are not relevant to the disposition of the present case.

constitutes cause for dismissal under § 1112(b)(1), the unusual circumstances present in this case establish that dismissal would not be in the best interests of creditors or the estate. Therefore, the Motion to Dismiss is **ORDERED DENIED**.



JOHN S. DALIS
United States Bankruptcy Judge

Dated at Brunswick, Georgia,
this 12th day of April, 2010.