

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Northern Division

In re:)	
)	
LAKE REGION DEVELOPMENT, INC.,)	Bankr. Case No. 93-10192
)	
Employer's Tax ID No. 46-0354648)	Chapter 11
)	
)	MEMORANDUM OF DECISION RE:
Debtor.)	RTC'S MOTION TO DISMISS
)	

The matter before the Court is the Amended Motion to Dismiss filed by Resolution Trust Corporation, the joinder in that Motion filed by American Centennial Insurance Company, and Debtor's resistance thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum and accompanying Order shall constitute findings and conclusions under F.R.Bankr.P. 7052.

I.

Lake Region Development, Inc.'s sole stockholder is Janelle Marx. Lake Region is the sole shareholder of Marshall Manor, Inc. Marshall Manor operates a nursing home in Britton, South Dakota. Marshall Manor has sold the nursing home to Lake Region on a contract for deed and it leases the property back from Lake Region.

Lake Region filed a Chapter 11 petition with the United States Bankruptcy Court for the District of South Dakota [Bankr. No. 91-10111] on June 10, 1991, while a foreclosure action by Resolution Trust Corporation (RTC) was pending before the United States District Court for the District of South Dakota [Case No. 89-CV-1047]. On March 2, 1992, this Court ordered Lake

Region's Chapter 11 case to be jointly administered with Marshall Manor's Chapter 11 case [Bankr. No. 91-10112].

Lake Region and Marshall Manor filed disclosure statements and plans of reorganization on December 11, 1991. Several objections were filed, confirmation was never obtained, and the cases did not move forward. The Court conducted a status conference on December 17, 1992. The Court ordered Lake Region and Marshall Manor to file amended plans and disclosure statements by December 21, 1992 if they decided not to pursue a sale of assets under 11 U.S.C. § 363. RTC filed a Motion to Dismiss both cases on December 29, 1992 because Lake Region and Marshall Manor had not met the Court's December 21, 1992 deadline. Lake Region and Marshall Manor filed amended plans on January 19, 1993 -- one day before the scheduled hearing on RTC's Motion to Dismiss -- but they did not serve or notice the plans for hearing.

Lake Region's financial status as set forth in its January 19, 1993 disclosure statement and plan may be summarized as follows:

1. priority creditors - none;
2. secured creditors - RTC for \$856,915.93; Marshall Manor for \$360,822.00; American Centennial Insurance Company (American Centennial) for \$209,148.31; and George Schott for \$26,700.00;
3. unsecured creditors - administrative expenses of \$15,000.00, including United States Trustee fees of \$500.00; and City National Bank for \$29,110.00;
4. insider claims - Financial Services, Inc., for an \$80,000.00 purchase money security interest in a condominium in Florida;

5. real property - the nursing home with a liquidation value of \$1,400,000.00 and the Florida condominium with a liquidation value of \$89,900.00;

6. personal property - various, with a liquidation value of \$83,057.00 plus accounts receivables of \$17,209.00.

After discussions with counsel at the January 20, 1993 hearing on RTC's Motion to Dismiss, the Court continued the hearing for one month to give interested parties time to review Lake Region's and Marshall Manor's amended plans and disclosure statements.

RTC presented evidence in support of its Motion to Dismiss at the continued hearing on February 16, 1993. Lake Region and Marshall Manor presented little evidence in resistance. The Court ordered the parties to submit proposed findings and conclusions.

The Court conducted a telephonic status conference on the proposed findings and conclusions on March 18, 1993. At that conference, counsel for Lake Region and Marshall Manor informed the Court that he had additional evidence to present in dispute of RTC's claim and he argued resolution of RTC's claim would affect the feasibility of Lake Region's and Marshall Manor's plans. By Order entered March 18, 1993, the Court gave Lake Region and Marshall Manor until March 23, 1993 to file an objection to RTC's proofs of claim and stated the cases would be dismissed without further hearing or notice if the deadline was missed. Lake Region and Marshall Manor missed the deadline and the Court dismissed both cases on March 31, 1993.

Lake Region and Marshall Manor appealed the dismissal order

but the dismissal order was not stayed. The United States District Court for the District of South Dakota affirmed the Bankruptcy Court's dismissal by Order entered November 8, 1993.

On November 15, 1993, the day before another hearing in RTC's foreclosure action was scheduled in the United States District Court, Lake Region (hereafter Debtor) and Marshall Manor each filed a second Chapter 11 petition. Debtor filed its schedules on December 3, 1993. These schedules may be summarized as follows:

1. priority creditors - none;
2. secured creditors - RTC for \$1,040,108.29 (fully secured and disputed [Marshall Manor is a co-debtor]); American Centennial for \$267,644.77 (fully secured and disputed [Janelle Marx is a guarantor]); and George Schott for \$36,496.00 (fully secured);
3. unsecured claims - none;
4. real property - a contract for deed valued at \$1,400,000.00; and
5. personal property - a checking account holding \$21,334.62; Marshall Manor stock of unknown value; and a claim against Harold L. Jackson for \$4,325.00.

Debtor stated its assets totaled \$1,425,659.62 and its liabilities totaled \$1,344,249.06.

RTC moved to dismiss both cases on November 15, 1993 and requested hearings on shortened notice. American Centennial joined RTC's dismissal motions on December 10, 1993. Debtor and Marshall Manor filed resistances on December 13, 1993.

On December 15, 1993, Lake Region and Marshall Manor appealed the District Court's affirmance of this Court's dismissal of the earlier Chapter 11 cases. That appeal is pending before the United

States Court of Appeals for the Eighth Circuit.

The evidentiary hearing on RTC's Motions to Dismiss was held December 16, 1993.¹ Appearances included Curt R. Ewinger for Debtor and Marshall Manor, Roger W. Damgaard for RTC, Bruce J. Gering for the United States Trustee, Lee A. Magnuson for American Centennial, and Danny R. Smeins for Janelle Marx. At the conclusion of the hearing, the Court ordered the parties to file proposed findings and conclusions. Upon receipt, the matter was taken under advisement.

II.

There is no per se rule against successive filings except as provided under the Bankruptcy Code.² *Schuldies v. United States (In re Schuldies)*, 122 B.R. 100, 101 (D.S.D. 1990). Instead, a petition and a proposed plan of reorganization each must be filed in good faith. *Id.* at 102. "The bankruptcy court must be concerned whether or not there was a strategy behind the subsequent filings to frustrate statutory requirements and abuse the bankruptcy process." *Id.* (citing *In re Chisum*, 847 F.2d 597, 600

¹ At the beginning of the December 16, 1993 hearing, the Court advised counsel that Debtor's good faith in filing the second petition would be at issue, not whether F.R.Civ.P. 41(b) prohibited a refiling because the first case was dismissed with prejudice, as originally argued by RTC.

² Some successive filings of bankruptcy petitions are specifically prohibited by 11 U.S.C. § 109. Section 109 does not apply in this case, including § 109(g) because that subsection does not apply to non farm corporations.

(9th Cir. 1988)). See also *In re Henke*, 127 B.R. 255 (Bankr. D. Mont. 1991); *In re Miller*, 122 B.R. 360 (Bankr. N.D. Iowa 1990).

Good faith is a factual determination. *Schuldies*, 122 B.R. at 102. Factors to consider include whether a final decree was entered in the previous case, the length of time between the discharge of one case and the filing of another, whether the filing was made to obtain the benefits of the automatic stay, the debtor's effort to comply with any previously confirmed plan, recognition that Congress intended a debtor to achieve the goals of bankruptcy through the filing of a single case, and other "relevant" facts. *Id.* at 102-103. "The court should examine the 'totality' of the circumstances surrounding the filing." *Id.* at 103 (citing *In re Metz*, 820 F.2d 1495 (9th Cir. 1987)). See also *Euerle Farms, Inc. v. State Bank in Eden Valley (In re Euerle Farms, Inc.)*, 861 F.2d 1089, 1091-92 (8th Cir. 1988) (a "multiplicity of factors" may be considered in the aggregate to meet the cause requirement for dismissal; the filing of a bankruptcy petition without the intent or ability to reorganize properly renders a petition subject to dismissal).

This Court, following *First National Bank v. Kerr (In re Kerr)*, 908 F.2d 400, 404 (8th Cir. 1990), has previously concluded that bad faith warranting dismissal of a reorganization case may include concealment, evasion, or direct violations of the Bankruptcy Code or a court order that clearly establishes an improper motive. *In re Coones Ranch, Inc.*, 138 B.R. 251, 258 (Bankr. D.S.D. 1991). Violations of the Code or an order include

self-dealing and asset manipulation without court approval. *Id.*

III.

Upon consideration of the statutes and case law discussed above, this Court concludes that Debtor's second Chapter 11 petition was not filed in good faith and must be dismissed. While bona fide changes in circumstance may justify a successive chance to reorganize, *Schuldies*, 122 B.R. at 101, Debtor has not shown any changes in its financial status nor any new problems since the first case was dismissed that would justify another attempt at a Chapter 11 reorganization. Several facts support this conclusion.

First, Debtor and Marshall Manor's financial picture has not changed appreciably since the first cases were dismissed a year ago. City National Bank's claim against Debtor was resolved before the first Chapter 11 was dismissed. While Debtor paid George Schott \$2,254.00 on November 15, 1993, that creditor is now owed \$10,000.00 more than when Debtor filed its last plan in January, 1993. Most important, Debtor and Marshall Manor still have their same main creditors, RTC and American Centennial, and Debtor has done little this past year to settle those claims through litigation or settlement. For several years, Debtor has been able to force RTC and American Centennial to finance its business dealings at a cost only of making some adequate protection payments during the earlier case. Debtor ultimately must address RTC's and American Centennial's claims. However, a second Chapter 11 plan is not the appropriate avenue when Debtor did not wisely use its first

reorganization opportunity.

Debtor's employment of new counsel is not a sufficient change in circumstance to warrant a second chance to reorganize. While the conduct of Debtor's counsel in the first case contributed greatly to the dismissal, Debtor's plan to employ a second attorney as co-counsel in this case was merely game playing. This case is not overly complicated; one attorney can handle it. Co-counsel was added as window dressing in an attempt to alleviate the Court's concern that the prior attorney would continue to represent Debtor, a tactic that speaks little of Debtor's good faith effort.³

Second, Debtor's and Marshall Manor's principals and other insiders removed substantial sums from the corporations between November 1992 and November 1993. Debtor's schedules show these payments from Debtor totaled at least \$99,400.00, including \$19,000.00 in salary, a dividend of \$22,000.00, and director fees of \$1,200.00 to Janelle Marx. Debtor also paid Jason Marx \$1,200.00 in director fees and it paid \$56,000.00 to Financial Services, Inc., a corporation held solely by Jason Marx, that was a creditor in the Lake Region's earlier case. These payments indicate Debtor and its insiders had little interest in paying claims against the corporations but instead wanted to maximize the

³ The Court denied Debtor's employment of Attorney Danny R. Smeins, who represented Debtor in the first case, because *inter alia* Mr. Smeins is not disinterested and he has represented adverse interests. See *In re Lake Region Development, Inc.*, Bankr. No. 93-10192, bench decision (Bankr. D.S.D. Dec. 16, 1993) (findings and conclusions re: Debtor's application to employ Curt R. Ewinger and denying Debtor's application to employ Danny R. Smeins).

insiders' profits while the corporations were outside the Bankruptcy Court's jurisdiction. As counsel for RTC aptly stated, Christmas came early and often for the Marx family in 1993 while they ignored the large claims against the corporations. The insiders' dissipation of assets while large claims remain unpaid establishes a poor history of trustworthiness. These questionable post-dismissal withdrawals, coupled with the lack of progress in the prior cases,⁴ give the Court and creditors little reason to believe that Debtor will fulfill timely its fiduciary duties in a second Chapter 11 case.

Third, Debtor's assets are essentially unchanged since the dismissal of the prior Chapter 11 cases. Although Debtor and Marshall Manor recently sold an option to purchase the nursing home to Prairie Hills Health Care, Debtor's argument that this sale must be consummated under the Bankruptcy Court's jurisdiction is not tenable.

Fourth, Debtor does not now have, nor did it have in its prior case, any unsecured claim holders that may benefit from a reorganization. The nursing home continues to meet its operating expenses and tax obligations and both Marshall Manor and Debtor have funds available to pay creditors. It is clear that RTC's foreclosure action precipitated both the first and second filings. *See Resolution Trust v. Lake Region Development, Inc., et al.*, Case

⁴ A litany of Debtor's poor performance in the prior case need not be repeated here. *See Lake Region Development, Inc., v. Resolution Trust Corporation*, Civ. 93-1014, slip op. (D.S.D. Nov. 8, 1993).

No. 89-CV-1047 (D.S.D., commenced November 13, 1989). Debtor's filing of a bankruptcy petition on the eve of RTC's foreclosure alone is not indicative of bad faith. However, this is the second time Debtor has filed on the eve of foreclosure and RTC's and American Centennial's claims are little closer to being resolved than when Debtor first filed a Chapter 11 petition three years ago. Accordingly, this Court can only conclude that Debtor's second petition is just another stall tactic and that Debtor has never intended to resolve RTC's and American Centennial's claims within a reasonable time. If that were true, Debtor could have filed a plan with its second petition or shortly thereafter, since it has had almost a year since the dismissal of the last case to negotiate plan treatment with its two major creditors. Instead, Debtor's counsel stated a new plan and disclosure statement would not be ready until February 1994. Further, Debtor and Marshall Manor made adequate protection payments to RTC and American Centennial during the prior cases. Although Debtor and Marshall Manor had sufficient income during 1993 to make some good faith payments toward RTC's and American Centennial's claims, payments stopped when the first Chapter 11 cases were dismissed.⁵

Fifth, Debtor's second petition is inconsistent with its appeal to the Court of Appeals in the first Chapter 11 case. See

⁵ During his testimony, Danny R. Smeins, Debtor's first bankruptcy attorney, intimated that Debtor had continued to make payments to RTC and American Centennial after the first cases were dismissed. Wayne Jarrett, the nursing home's business manager, intimated payments had not continued. Debtor's present schedules do not state that any such payments were made.

Coones Ranch, 138 B.R. at 259. RTC and other creditors must respond to Debtor's appeal of the first case's dismissal while they are also addressing Debtor's second Chapter 11 filing. Debtor's prolonged, circuitous effort to avoid paying R.T.C. and American Centennial has been a waste of Debtor's and the creditors' time and money.

Finally, Debtor has argued in both cases that the state of South Dakota has short-changed the nursing home on its Medicaid reimbursement rate. While the nursing home did receive one increase in its rate after the March 31, 1993 dismissal, Debtor still claims the nursing home is owed more. Debtor and Marshall Manor's efforts to resolve that problem have not been shown to the Court. Debtor and Marshall Manor did not provide the status of any litigation against the state. Debtor and Marshall Manor have not told the Court how more time and another Chapter 11 case will resolve the reimbursement rate problem. Further, the nursing home has operated successfully for the past few years;⁶ there is no indication that any reorganization is dependent on a higher reimbursement rate. The feasibility of a plan of reorganization has never been Debtor's and Marshall Manor's stumbling block. Instead, their problem is that they lack the intent to address

⁶ The positive aspect of this case is that the nursing home has continued in operation with minimal problems. Management has adequately addressed some labor problems, necessary improvements have been made, and the state has continued the home's license. The Court trusts good management of the nursing home will continue although Marshall Manor and Debtor are no longer under its jurisdiction.

properly the claims of RTC and American Centennial. *See Euerle Farms*, 861 F.2d at 1092. But for dilatory tactics, Debtor may have gotten a Chapter 11 plan confirmed in 1991.

An order will be entered dismissing the case.

Dated this ____ day of January, 1994.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Northern Division

In re:)	
)	
LAKE REGION DEVELOPMENT, INC.,)	Bankr. Case No. 93-10192
)	
Employer's Tax ID No. 46-0354648)	Chapter 11
)	
Debtor.)	ORDER DISMISSING CASE
)	
)	

In recognition of and compliance with the Memorandum of
Decision Re: RTC'S Motion to Dismiss entered this day,

IT IS HEREBY ORDERED that this case is DISMISSED.

So ordered this ____ day of January, 1994.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)