FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
January 4, 2008
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE JAY X. VINCENS, Debtor.	BAP No. WY-06-096
JAY X. VINCENS, Appellant, v. CONVENIENCE PLUS PARTNERS, LLC, Appellee.	Bankr. No. 05-22317 Chapter 11 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Wyoming

Before McFEELEY, Chief Judge, MICHAEL, and THURMAN, Bankruptcy Judges.

PER CURIAM

This matter is before the Court on Debtor's appeal of the dismissal of his Chapter 11 bankruptcy case pursuant to 11 U.S.C.§ 1112(b)(3).[1] We AFFIRM.

I. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely-filed appeals from final

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

1 Because Debtor's bankruptcy case was initiated prior to enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, all statutory references herein are to the Bankruptcy Code provisions as they were before the Code was amended.

judgments and orders of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[2] A motion for rehearing that is filed within ten days of entry of the order sought to be appealed extends the deadline for a notice of appeal to ten days after entry of the order disposing of the motion.[3] An order dismissing a debtor's case pursuant to 11 U.S.C. § 1112 is a final order for the purposes of appeal.[4] Therefore, since the Debtor's notice of appeal was timely filed within 10 days of entry of the bankruptcy court's order denying his timely motion for reconsideration, and no district court election has been filed, this Court has jurisdiction over this appeal.

II. STANDARD OF REVIEW

Bankruptcy courts have "broad discretion under § 1112(b)."[5] Therefore, this Court reviews the decision to dismiss a bankruptcy case under that statute for abuse of discretion. We review the bankruptcy court's factual findings in support of its decision for clear error. A factual finding is "clearly erroneous" when "'it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made.'"[6]

III. BACKGROUND

Debtor, Jay X. Vincens, has devoted several years of his life to opposing what he views to be "interstate fraud" committed by Convenience Plus Partners, LLC ("C-Plus"), one of his creditors. Debtor is a "financial investigator" in the

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[2] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002.

[3] Fed. R. Bankr. P. 8015 and 8002(a).

[4] *In re Davis*, 239 B.R. 573, 576 (10th Cir. BAP 1999).

[5] *Hall v. Vance*, 887 F.2d 1041, 1044 (10th Cir. 1989).

[6] *Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990) (quoting *LeMaire ex rel. LeMaire v. United States*, 826 F.2d 949, 953 (10th Cir. 1987)).

business of writing technical reports, and claims to have been involved in a number of fraud investigations around the country. At some point in time, Debtor purchased a business in Lander, Wyoming known as "The Highwayman Truck Stop" from C-Plus, which maintains a secured claim against Debtor. The Highwayman consists of gas pumps that are primarily for use by large trucks and RVs, a small store, repair shop, and a coffee shop. However, at all times during the pendency of Debtor's bankruptcy proceedings, the Highwayman has been closed due to a number of electrical and other code violations, which Debtor contends he "inherited" from C-Plus. Debtor owns the real property on which the truck stop is situated, and a majority interest in "Red Canyon Holdings, LLC," which is or was the intended operator of the truck stop.

Debtor's relationship with C-Plus has been rife with conflict. Debtor contends that any number of misrepresentations were made by C-Plus with respect to the condition of the truck stop, that C-Plus actively impeded his efforts to resurrect the business, and that C-Plus is largely, if not entirely, responsible for closure of the business. Debtor has submitted a number of documents that he contends validate his claims, which C-Plus denies. Indeed, it appears that the main thrust of the Debtor's arguments below is his claims against C-Plus.

IV. DISCUSSION

The Debtor originally filed a voluntary petition for Chapter 13 relief in October 2005. Shortly thereafter, C-Plus moved to convert the Debtor's case to a Chapter 7 proceeding on the ground that the Debtor was without a source of income sufficient to repay his debts. The Debtor responded by filing a motion to convert from Chapter 13 to Chapter 11, which was granted by the bankruptcy court on March 1, 2006. In July 2006, the United States Trustee ("UST") filed a motion to either convert or dismiss the Debtor's case, pursuant to 11 U.S.C. § 1112(b)(1),(2), and (3). As the basis for the motion, the UST asserted that the truck stop remained closed, that no evidence of efforts to reopen the business had

been submitted, that the Debtor had not filed either a disclosure statement or a reorganization plan, and that a successful reorganization did not appear to be feasible. Section 1112(b) allows dismissal of a bankruptcy case:

> . . . for cause, including–
>
> (1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;
> (2) inability to effectuate a plan; [or]
> (3) unreasonable delay by the debtor that is prejudicial to creditors[.]

After a hearing, the bankruptcy court dismissed the Debtor's bankruptcy case pursuant to § 1112(b)(3), stating:

> In sum, the business is non-operational; a plan is not proposed and depends on too many outside forces to be feasible; the Debtor has no income, no refinancing, and no business records; the creditors in this case are not protected by equity or progress; and the Debtor while striving to save the business, cannot realistically proceed under the circumstances. The delay is prejudicial to the creditors.[7]

The Debtor continues to devote his efforts to proving that, but for the malfeasance of others, he would be able to make the truck stop a successful business. Not surprisingly, details of the malfeasance of others provided the bulk of his submissions to the bankruptcy court. However, it is not the province of bankruptcy courts to determine responsibility for a business's demise. Rather, it is the court's responsibility to balance the rights and obligations of the debtor and its creditors, and to determine whether the debtor has proposed a plan that is "feasible."[8] Moreover, "[f]easibility determinations must be firmly rooted in

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[7] *Order on Motion to Convert or Dismiss Case* ("*Order of Dismissal*") at 3, *in* Appendix to Appellant's Brief at 22. The Order of Dismissal refers to its authority "under 11 U.S.C. § 112(b)(3)." *Id.* This is clearly a typographical error, both since the motion was based on § 1112(b), and because there was not, and still is not, a § 112(b)(3).

[8] *In re Inv. Co. of the Sw., Inc.*, 341 B.R. 298, 310-11 (10th Cir. BAP 2006) (feasibility refers to the §1129(a)(11) requirement for confirmation, which requires that any plan must provide a realistic and workable framework for reorganization).

predictions based on objective fact."[9]

We do not doubt that the Debtor has proceeded in this matter in good faith, that he has expended a great deal of time, energy, and effort into the truck stop, that he has faced a number of obstacles in his struggle to transform it into a going concern, or that he believes that he can do so. Nonetheless, since the Debtor seeks Chapter 11 bankruptcy relief, he must comply with the Bankruptcy Code's requirements in order to obtain it. This he has failed to do. Significantly, the Debtor failed to propose a feasible plan based on objective fact, and failed in any other way to move forward in his efforts to "revive" the business. Moreover, it does not appear likely that he would be able to anytime soon. The Debtor's allegations against C-Plus, while possibly appropriate in an objection to its claim, are essentially irrelevant to the obligations under Chapter 11 to proceed with a confirmable plan.[10] His insistence on pursuing those claims prior to making any real effort to objectively describe how the business can be successfully reorganized is simply not an alternative to proposing a plan in a Chapter 11 bankruptcy case. The bankruptcy court's findings with respect to delay are not clearly erroneous.

V. CONCLUSION

The bankruptcy court did not abuse its discretion by dismissing the Debtor's Chapter 11 bankruptcy case pursuant to § 1112(b), and the Order of Dismissal is therefore AFFIRMED.

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[9] *Id.* at 311 (internal quotation marks omitted).

[10] We are mindful of the fact that the Debtor is proceeding *pro se* in this matter, due to the unfortunate death of his attorney. However, neither counsel's death, nor his impaired functioning beforehand, can relieve the Debtor of the obligation to move forward with the reorganization of his business. *See Nat'l City Bank of Pa. v. Allen*, No. 07-cv-00006, 2007 WL 1489815 at *1 (D. Colo. May 18, 2007) (*pro se* status does not alter the requirement to comply with statutes). Simply put, regardless of the Debtor's reasons, no forward progress has been made.