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NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE VISTA FOODS U.S.A. INC.,
Debtor.

BAP No. WO-96-37

VISTA FOODS U.S.A., INC.,
Appellant,

Bankr. No. 96-12890-BH

v.

OFFICIAL UNSECURED
CREDITORS' COMMITTEE,

ORDER AND JUDGMENT**

Appellee.

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Jack Leebron, Esq. of Oklahoma City, Oklahoma, Attorney for Vista Foods U.S.A., Inc., Appellant.

James Vogt, Esq., of Reynolds, Ridings, Vogt & Morgan, P.L.L.C., Oklahoma City, Oklahoma, Attorney for the Official Unsecured Creditors' Committee, Appellee, and L. Win Holbrook, Chapter 7 Trustee.

Before CLARK, BOULDEN, and ROBINSON, Bankruptcy Judges.

PER CURIAM:

Vista Foods U.S.A., Inc., the Chapter 7 debtor in the above-captioned case (Debtor), appeals an Order of the United States Bankruptcy Court for the

** This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2(a).

Western District of Oklahoma converting its Chapter 11 case to one under Chapter 7 for "cause" pursuant to 11 U.S.C. § 1112(b). Because we conclude the Bankruptcy Court's ruling is fully supported by the record, we hereby affirm the Bankruptcy Court's order.

BACKGROUND

The Debtor is the owner of a meat processing plant. On April 19, 1996, an involuntary petition under Chapter 7 was filed against the Debtor. An Order for Relief was entered on May 20, 1996, and the case was converted to a case under Chapter 11 at the request of the Debtor. In late August of 1996, but before the 120-day period for filing the Debtor's plan of reorganization had expired, the Official Unsecured Creditors' Committee (Committee) filed a Motion to Convert Case to Chapter 7 or Alternatively, to Appoint Trustee (Motion). *See* 11 U.S.C. § 1121(b). The Debtor objected to the Motion. On October 2, 1996, one hundred and thirty-five days after the Order for Relief was entered and after the expiration of the 120-day exclusive period, a hearing on the Motion was held by the Bankruptcy Court. At the time of this hearing, the Debtor had not filed a disclosure statement or plan.

Only Jerry Harper (Harper), an employee of MegaOil U.S.A. Inc. (MegaOil), a creditor of the Debtor,¹ testified at the hearing on the Motion. Harper was "acting" president of the Debtor. He had served in that capacity for the first time approximately two weeks prior to the hearing on the Motion, the Debtor's prior president having resigned. Harper, with twenty-four years experience in the meat industry, had previously served as the Debtor's production manager. He was familiar with the production capacity of the Debtor's 44,000 square foot facility, with its potentially profitable Harris Ham products, and with the customers that he believed would be willing to purchase the Debtor's seasonal holiday ham production. Harper believed that ninety percent of the customers who had purchased the Debtor's hams

¹ MegaOil allegedly perfected a security interest in the Debtor's manufacturing facility within the ninety day preference period.

during the prior holiday season would, as soon as contacted, order again during 1996-97. He testified that in the previous December or January, the Debtor's finances were at a break-even point, although the Debtor was not making a profit. Even though the Debtor's operation had been shut down since February of 1996, Harper expected a good cash flow during the coming November, December, and January, from the sale of Christmas hams alone, that would produce sufficient funds to cover six months of operational costs and could pay back unsecured creditors in two years. Harper was convinced that the Debtor's manufacturing facility was fully operational and he believed that he would be able to convince prior employees to return to the Debtor's employment immediately.

Although Harper gave considerable testimony related to the Debtor's product, its manufacturing process and its customer base, his knowledge of the Debtor's current financial and business affairs was inadequate. Even though he was the Debtor's president, Harper did not know who comprised the Debtor's board of directors. He had little knowledge regarding what had transpired during the bankruptcy proceeding, except that the Debtor's only operation was to process sample test products at its food processing facility. He did not know the contents of the Debtor's monthly financial statements for June and July of 1996 that were both filed August 26, 1996. He had no specific knowledge regarding a sale of a portion of the Debtor's assets that generated \$53,684, whether Bankruptcy Court approval had been obtained, or the disposition of the funds. He could not explain the Debtor's failure to open a Debtor-in-Possession account in a timely manner, and had no knowledge regarding the Debtor's current cash resources. Although Harper valued the Debtor's equipment at \$400,000, he didn't know if it was insured, why the Debtor's manufacturing facility was uninsured from July 1, 1996 to October 1, 1996, or the source of funds to pay a premium for an insurance policy on the Debtor's manufacturing facility that was obtained the day prior to the hearing.

Harper had not yet discussed a plan of reorganization with anyone.

Although he had participated in marketing the Debtor's manufacturing facility, Harper did not know the asking price for the asset or what it was worth shut down as opposed to as a going concern, but had heard that the cost to rebuild the facility was between nine and twelve million dollars. Harper had no knowledge of expenses the Debtor had incurred during the bankruptcy proceeding, but believed that its expenses for electricity, gas, water, telephone, cold storage and the salary of one other person were being paid by his employer, MegaOil. Harper did not know the amount of capital necessary to begin operations, but thought that it would require at least \$100,000, although continued operations would cost considerably more. He had no information regarding current sales, financial projections, and no lines of credit. Harper had communicated with a factoring company, but had no details or commitments for financing to purchase raw materials to begin production.

At the conclusion of the hearing on the Motion, the Bankruptcy Court made the following findings of fact in support of its decision that the Debtor's Chapter 11 case should be converted to chapter 7 under 11 U.S.C. § 1112(b)(1)-(3): (a) the Order for Relief was entered in May 1996, and not much had happened in the case at the time of the conversion hearing in October 1996; (b) not much had happened toward proposing a plan; (c) no plan or disclosure statement had been filed; (d) the Debtor was not in business; (e) there was only one employee; (f) a meat plant was the Debtor's only asset; (g) there was no income and no sales; (h) there was no likelihood of sales in the near future; (i) liquidation would pay unsecured creditors in full; (j) funding for a plan was based on a conversation with an unidentifiable person and was uncertain; (k) the Debtor had virtually no management; and (l) there had been five months of delay. Based on this ruling, the Bankruptcy Court entered an Order Converting Case to Chapter 7. This appeal

followed.²

APPELLATE JURISDICTION

The Bankruptcy Appellate Panel of the Tenth Circuit, with the consent of the parties, has jurisdiction to hear appeals from final judgments, orders and decrees of bankruptcy judges within this circuit. 28 U.S.C. § 158(a), (b)(1), (c)(1). This Court has previously ruled that the Order from which the Debtor appeals is a final order. See In re Vista Foods U.S.A., Inc., 202 B.R. 499 (10th Cir. BAP 1996) (per curiam).

STANDARD OF REVIEW

This Court will not disturb the Bankruptcy Court's findings of fact unless they are clearly erroneous. The Tenth Circuit has held that a factual finding is clearly erroneous when, although there is evidence to support it, upon examination of the entire evidence, the reviewing court is left with the definite and firm conviction that a mistake has been committed. Hall v. Vance, 887 F.2d 1041, 1043 (10th Cir. 1989) (citing Anderson v. City of Bessemer, 470 U.S. 564, 573 (1985)).

Matters of discretion, such as conversion of a case under 11 U.S.C. § 1112(b), are reviewed under an abuse of discretion standard. See Hall, 887 F.2d at 1042-43 (recognizing that conversion of a case under section 1112(b) is a matter of discretion reviewed under an abuse of discretion standard). The United States Court of Appeals for the Tenth Circuit has stated that:

Under the abuse of discretion standard: "a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances. When we apply the 'abuse of discretion' standard, we defer to the trial court's judgment because of its first-

² In its Notice of Appeal, the Debtor listed the Committee, Office of the United States Trustee, Federal Corporation, Mike Bryan Office Supply, and MegaOil U.S.A., Inc. as "parties to the order appealed" Other than the Committee, none of these "parties" have entered an appearance in this appeal. Neither has L. Win Holbrook, the Chapter 7 Trustee, entered an appearance although the attorney for the Committee indicates he also represents the Chapter 7 Trustee. The Committee was the party who filed the Motion. From the record before us, no other party joined the Motion and the Debtor was the only party who objected to the Motion.

hand ability to view the witness or evidence and assess credibility and probative value."

Moothart v. Bell, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting McEwen v. City of Norman, 926 F.2d 1539-1553-54 (10th Cir. 1991) (quoting United States v. Ortiz, 804 F.2d 1161, 1164 n.2 (10th Cir. 1986))).

DISCUSSION

The Bankruptcy Court converted the Debtor's Chapter 11 case to a case under Chapter 7 of the Bankruptcy Code pursuant to 11 U.S.C. § 1112(b)(1), (2) and (3), which provides, in relevant part, that:

(b) . . . on request of a party in interest . . . , and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title . . . 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;
- (3) unreasonable delay by the debtor that is prejudicial to creditors[.]

11 U.S.C. § 1112(b)(1)-(3). "Cause" is not defined in the Bankruptcy Code. While section 1112(b) "enumerates ten grounds upon which a bankruptcy court may convert [a Chapter 11 case] into a case under Chapter 7[.]" the grounds stated are "not exhaustive. . . ." Hall, 887 F.2d at 1044 (citations omitted); see Frieouf v. United States (In re Frieouf), 938 F.2d 1099, 1102 (10th Cir. 1991) ("Section 1112(b) provides a nonexhaustive list of grounds upon which a bankruptcy court may dismiss a Chapter 11 case for 'cause.'"), cert. denied, 502 U.S. 1091 (1992). The Tenth Circuit has recognized that "[t]he bankruptcy court has broad discretion under § 1112(b). . . ." Hall, 887 F.2d at 1044, cited in Small Bus. Admin. v. Preferred Door Co. (In re Preferred Door Co.), 990 F.2d 547, 549 (10th Cir. 1993).

The Debtor argues that the Bankruptcy Court should not have converted its Chapter 11 case to Chapter 7 because the Motion was filed prior to the expiration of the 120-day exclusivity period under section 1121(b). The Debtor has not cited any case law in support of this argument and, in fact, several courts have held that

"[c]reditors need not wait [to seek conversion] until a debtor proposes a plan or until the debtor's exclusive right to file a plan has expired." In re Woodbrook Assocs., 19 F.3d 312, 317 (7th Cir. 1994); see Johnston v. Jem Dev. Co. (In re Johnston), 149 B.R. 158, 162 (9th Cir. BAP 1992); In re Citi-Toledo Partners, 170 B.R. 602, 606 (Bankr. N.D. Ohio 1994). The Debtor's argument is also flawed because it is undisputed that at the time of the hearing on the Motion the Debtor's 120-day exclusive period for filing a plan under section 1121(b) had expired, the Debtor had not filed a plan or requested an extension of the exclusive period under section 1121(d), and the Debtor had not begun to formulate a plan.³

The Debtor also argues that equity prevents the conversion of its case to Chapter 7 because if it had been given additional time it would have obtained financing, generated revenues from the sale of hams during the 1996 Winter holiday season, and proposed a plan. We recognize, as argued by the Debtor, that bankruptcy courts, in exercising their discretion under section 1112(b), must balance the goals of promoting the Chapter 11 reorganization process and protecting the interests of creditors. In re Macon Prestressed Concrete Co., 61 B.R. 432, 436 (Bankr. D. Ga. 1986) (citing Fisher v. City of Huntington Beach (In re The Huntington Ltd.), 654 F.2d 578, 589 (9th Cir. 1981)) (both cases cited in the Debtor's Brief at pages 8-9). While Chapter 11 debtors should be "given a fair opportunity to reorganize," they "should not be permitted to continue in a futile effort to reorganize" at the expense of creditors. Macon Prestressed Concrete, 61 B.R. at 436.

If "cause" for conversion under section 1112(b) is established by the moving party, the debtor must show that, despite such cause, there exists a reasonable prospect of reorganization within a reasonable amount of time. See, e.g.,

³ The Debtor cites two cases in support of his assertion that the moving party has an extremely high burden of proof to show that the Debtor lacked all ability to formulate or realize a plan. However, in both cases relied on by the Debtor, a plan had been filed. See In re Austin Ocala Limited, 150 B.R. 279, 280 (Bankr. M.D. Fla. 1993); In re Sheehan, 58 B.R. 296, 298 (Bankr. D. S. Dakota 1986).

Woodbrook Assocs., 19 F.3d at 317 ("Where a motion to dismiss for cause is opposed, the movant bears the burden of proving by a preponderance of the evidence that cause exists for dismissal of the debtor's bankruptcy case. . . . That [the moving party] bears the burden of persuasion, however, does not eviscerate [the debtor's] obligation to produce evidence in opposition to a well-supported motion."); Hall, 887 F.2d at 1044-45 ("Dismissal under § 1112(b)(2) is appropriate where the debtor's failure to file an acceptable plan after a reasonable time indicates its inability to do so whether the reason for the debtor's inability to file is its poor financial condition, the structure of the claims against it, or some other reason."); In re Tiana Queen Motel, Inc., 749 F.2d 146, 151 (2d Cir. 1984) (test of section 1112(b) is whether debtor can reorganize within a "reasonable" time period), cert. denied, 471 U.S. 1138 (1985); Quarles v. United States Trustee, 194 B.R. 94, 97 (W.D. Va. 1996) (debtor is entitled to a "reasonable" period of time to reorganize and must show a "reasonable" prospect of reorganization); United States v. Jackson (In re Jackson), 190 B.R. 808, 811 (W.D. Va. 1995) (absent mitigating factors a court should convert a Chapter 11 case if there has been "unreasonable" progress in the case); In re Winslow, 123 B.R. 641, 646 (D.Colo.) (debtor must show reorganization possible within a reasonable period of time), aff'd without opinion, 949 F.2d 401 (10th Cir. 1991); see also United States Sav. Ass'n v. Timbers of Inwood Forest Assoc. Ltd., 484 U.S. 365, 375-76 (1988) (debtor must show that reorganization "is in prospect" to demonstrate "necessary to an effective reorganization" under 11 U.S.C. § 362(d)).

The Bankruptcy Court's findings of fact support conversion of the Debtor's Chapter 11 case to one under Chapter 7,⁴ and upon an independent review

⁴ The Debtor has not articulated which, if any, of the Bankruptcy Court's findings of fact are clearly erroneous. The Debtor seems to contest the Bankruptcy Court's findings that the Debtor had virtually no management. The record shows, however, that the Debtor's "acting" president had no experience as the president of a corporation, no understanding of what had transpired during the chapter 11 case, did not have knowledge of fundamental aspects of the Debtor's business structure and finances. Based on the record, therefore, the Bankruptcy Court's finding that the Debtor had virtually no management is not clearly erroneous. Even if this finding

of the record we do not have a "definite and firm conviction" that the Bankruptcy Court made a clear error of judgment or exceeded the bounds of its discretion. Moothart, 21 F.3d at 1504. In fact, our review of the record makes us certain that the Bankruptcy Court acted well within its broad discretion to convert the Debtor's Chapter 11 case to one under Chapter 7 under section 1112(b). See Hall, 887 F.2d at 1044. Indeed, the record supports the Bankruptcy Court's factual finding that this case was "just one of these cases that hasn't gone anywhere and certainly doesn't appear that it will." As such, the Bankruptcy Court did not abuse its discretion in converting the Debtor's Chapter 11 case to a case under Chapter 7 under section 1112(b).

Finally, the Debtor contends that conversion of the case is not in the best interests of creditors, arguing an analysis of the potential return to creditors based on various liquidation scenarios impacted by what may transpire if MegaOil's alleged security interest is or is not avoided.⁵ The trial court correctly held that it had no evidence regarding MegaOil's second mortgage. The facts set forth if the Debtor's argument were not presented as evidence in opposition to the Motion before the Bankruptcy Court. As such, we will not consider this argument. See, e.g., Ashley v. Church (In re Ashley), 903 F.2d 599, 603 n.1 (9th Cir. 1990) (court will not address legal issues raised on appeal if the necessary record is not before it).

CONCLUSION

There exists ample evidence in the record of a continuing loss to the

of fact were clearly erroneous, there exists an abundance of other facts that support the Bankruptcy Court's Order converting the Debtor's Chapter 11 case to one under Chapter 7.

⁵ The Debtor has submitted to the Court a document related to MegaOil's alleged security interest as well as other valuation documents. These documents were not admitted as evidence in the Bankruptcy Court and, therefore, are stricken from the appellate record. See, e.g., Adams v. Royal Indem. Co., 99 F.3d 964, 967 (10th Cir. 1996) (court should strike documents in appendix not presented to trial court); Areo-Medical, Inc. v. United States, 23 F.3d 328, 329 n.2 (10th Cir. 1994) (court should strike documents in appendix not presented to trial court) (citing Daiflon, Inc. v. Allied Chem. Corp., 534 F.2d 221, 226-27 (10th Cir.), cert. denied, 429 U.S. 886 (1976)).

estate and the absence of a reasonable likelihood of rehabilitation, of the Debtor's inability to effectuate a plan of reorganization, and of unreasonable delay that is prejudicial to creditors. The Bankruptcy Court did not abuse its broad discretion in converting the Debtor's Chapter 11 case to a case under Chapter 7 of the Bankruptcy Code under section 1112(b)(1), (2) and (3). Accordingly, we AFFIRM the Bankruptcy Court's Order Converting Case to Chapter 7 of October 2, 1996.

PUBLISH

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE VISTA FOODS U.S.A., INC.,
Debtor.

BAP No. WO-96-37

VISTA FOODS U.S.A., INC.,
Appellant,

Bankr. No. 96-12890

v.

UNSECURED CREDITORS'
COMMITTEE; FEDERAL
CORPORATION; MIKE BRYAN
OFFICE SUPPLY; MEGAOIL U.S.A.
INC.; OFFICE OF THE U.S.
TRUSTEE,

ORDER

November 19, 1996

Appellees.

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before PUSATERI, ROSE, and BOULDEN, Bankruptcy Judges.

PER CURIAM:

Vista Foods U.S.A., Inc., the debtor in the above-captioned case (Debtor), has filed a Motion for Leave to Appeal Under 28 U.S.C. § 158(a) from an Order of the United States Bankruptcy Court for the Western District of Oklahoma

converting the Debtor's chapter 11 case to a case under chapter 7 of the Bankruptcy Code. No response to the Motion has been filed with the Court. The Debtor also filed a Notice of Appeal on the same day.

The Court is vested with jurisdiction to hear appeals from "final judgments, orders, and decrees" of bankruptcy courts pursuant to 28 U.S.C. § 158(a)(1) and (b). *See* Fed. R. Bankr. P. 8001(a). Leave to appeal is necessary only when an appeal is from an interlocutory order or decree of a bankruptcy court. 28 U.S.C. § 158(a)(3); Fed. R. Bankr. P. 8001(b) and 8003.

The United States Court of Appeals for the Tenth Circuit has held that "an order is final if it ends the litigation on the merits and leaves nothing for the court to but execute the judgment." *Adelman v. Fourth Nat'l Bank & Trust Co. (In re Durability, Inc.)*, 893 F.2d 264, 265 (10th Cir. 1990). "[T]he appropriate 'judicial unit' for application of these finality requirements in bankruptcy is not the overall case, but rather the particular adversary proceeding or discrete controversy pursued within the broader framework cast by the petition." 893 F.2d at 266.

The Bankruptcy Court's Order converting the Debtor's chapter 11 case to a case under chapter 7 of the Bankruptcy Code is final and, therefore, leave of Court to appeal is not necessary and the Notice of Appeal is sufficient. Conversion ends the litigation regarding the discrete controversy of whether the case should proceed under chapter 11 or chapter 7. The Bankruptcy Court's Order resolving this controversy cannot be reconsidered later in the case or upon the dismissal or closure of the case. Once the Debtor has been liquidated, there is no possibility of it being reorganized as a going concern. *See, e.g.*, 11 U.S.C. § 363(m) (absent stay pending appeal, reversal or modification of an order authorizing the sale of assets in a bankruptcy case does not affect the validity of the sale to a good faith purchaser).

Accordingly, it is HEREBY ORDERED that the Debtor's Motion for Leave to Appeal Under 28 U.S.C. § 158(a) is DENIED.

For the Panel:

Barbara A. Schermerhorn, Clerk of Court

By:

Deputy Clerk