EOD
10/25/2005

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:	§	
	§	
LBACK DEVELOPMENT, L.P.,	§	Case No. 05-41537
	§	(Chapter 11)
Debtor.	§	
	§	
	§	
IN RE:	§	
	§	
EXOTIC CAR RENTAL OF TEXAS, INC.,	§	Case No. 05-42253
	§	(Chapter 11)
	§	
Debtor.	§	Jointly Administered Under
	§	Case No. 05-41537

ORDER GRANTING MOTION TO DISMISS

On October 4, 2005, the Court heard a motion to dismiss the above-styled cases filed by MLSBF, L.P. ("MLSBF") pursuant to 11 U.S.C. § 1112(b). At the conclusion of the hearing, the Court orally granted MLSBF's motion. The following constitutes the Court's findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, which is made applicable to this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014.

Findings of Fact

1. Prior to the initiation of the above-styled bankruptcy cases, Matthew Lineback owned and operated an automobile sales and service company known as Lineback/Advantage, Inc. ("Lineback/Advantage"). LBack Development, L.P. ("LBack"), which is also controlled by Mr. Lineback, owns certain real estate in Plano, Texas, upon which Lineback/Advantage operated. Additionally, Mr. Lineback formed Exotic Car Rental of Texas, Inc. ("Exotic Car Rental") to offer luxury automobiles for

short-term rental. Exotic Car Rental operated at a separate location in Plano, Texas.

2. In or around January 2005, Lineback/Advantage ceased operations.

3. In or around January 2005, MLSBF filed a collection action in state court against Mr. Lineback, Lineback/Advantage, Exotic Car Rental and LBack Development. Additionally, MLSBF posted the real estate owned by LBack for a non-judicial foreclosure sale on April 5, 2005.

4. On March 31, 2005, LBack filed a petition for relief under Chapter 11 of the Bankruptcy Code.

5. On April 28, 2005, Exotic Car Rental filed a petition for relief under Chapter 11 of the Bankruptcy Code. On May 3, 2005, Exotic Car Rental filed an adversary proceeding against MLSBF seeking, among other things, to recover approximately twenty automobiles it alleged were improperly seized by MLSBF in February 2005.

6. MLSBF filed a Motion to Dismiss, Convert or Appoint a Trustee in each of the above-styled bankruptcy cases on May 20, 2005. The Court heard MLSBF's motions on June 14, 2005. At the conclusion of the hearing, the Court expressed reservations regarding the good faith of Exotic Car Rental and LBack in filing their respective bankruptcy petitions. Nonetheless, the Court denied the motions in order to provide the debtors with an opportunity to demonstrate their alleged good faith by proposing feasible plans of reorganization. The Court ordered, among other things, that LBack and Exotic Car Rental file plans of reorganization and disclosure statements on or before July 29, 2005.

7. On June 17, 2005, the Court entered an order directing the joint

administration of the bankruptcies of LBack and Exotic Car Rental. The Court's order designated the bankruptcy of LBack as the lead case.

8. LBack and Exotic Car Rental filed their respective plans of reorganization and disclosure statements in the bankruptcy of LBack on July 29, 2005. According to their plans, a new business called Willowbend Auto Expo would operate on the real estate owned by LBack and would be managed by Mr. Lineback. The business of Willowbend Auto Expo would include the service and repair of automobiles, the sale of used automobiles, the daily rental of luxury automobiles, and the subleasing of space to individual automobile dealers. LBack's business, in turn, would be funded by monthly rental payments from Willowbend Auto Expo.

9. The disclosure statements filed by LBack and Exotic Car Rental attached a financial plan for Willowbend Auto Expo. All financial projections and assumptions in the financial plan were based on unaudited information provided by Mr. Lineback.

10. Willowbend Auto Expo began operations in August 2005. Willowbend Auto Expo has operated at a loss since opening its doors and is not meeting its financial projections. Willowbend Auto Expo does not have a marketing plan in place.

11. On August 12, 2005, MLSBF filed a Renewed Motion to Dismiss, Convert or Appoint a Trustee.

12. On October 3, 2005, LBack and Exotic Car Rental filed amended plans of reorganization.

13. Instead of paying creditors from the theoretical profits to be generated by Willowbend Auto Expo, the amended plan filed by Exotic Car Rental proposes to siphon Exotic Car Rental's assets to Mr. Lineback at a highly favorable price. The amended

plan would create a liquidating trust, which would sell Exotic Car Rental's assets to Mr. Lineback or his designee at liquidation value. The purchase price would be payable by Mr. Lineback in 72 equal monthly installments at 5% interest.

14. The debtors intended that the amended plan filed by LBack would be funded by Ms. Peggy Anderson, who is Mr. Lineback's grandmother.

15. Ms. Anderson, however, has not entered into any written commitment to fund LBack's amended plan. She testified at the hearing on MLSBF's motion that she would be looking to her daughter, Mr. Lineback's aunt, to provide the funds. Like Ms. Anderson, Mr. Lineback's aunt has not entered into a written commitment to fund LBack's plan.

16. Mr. Lineback is a defendant in a number of state court lawsuits. At the hearing on MLSBF's motion to dismiss, he could not recall how many lawsuits in which he is a defendant.

17. There was no evidence that Peggy Anderson, her daughter, or Mr. Lineback had the financial ability to fund LBack's amended plan of reorganization.

18. Exotic Car Rental has not marketed its assets for sale and does not propose to do so in its amended plan.

19. The debtors filed their plans of reorganization, as amended, for purposes of delay.

20. If appropriate, these findings of fact shall be considered conclusions of law.

Conclusions of Law

21. This court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157

and 1334. This is a core proceeding. 28 U.S.C. § 157(b).

22. Section 1112(b) of the Bankruptcy Code states as follows:

> (b) Except as provided in subsection (c) of this section, on request of a party in interest or the United States trustee or bankruptcy administrator, and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, 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;
> (4) failure to propose a plan under section 1121 of this title within any time fixed by the court;
> (5) denial of confirmation of every proposed plan and denial of a request made for additional time for filing another plan or a modification of a plan;
> (6) revocation of an order of confirmation under section 1144 of this title, and denial of confirmation of another plan or a modified plan under section 1129 of this title;
> (7) inability to effectuate substantial consummation of a confirmed plan;
> (8) material default by the debtor with respect to a confirmed plan;
> (9) termination of a plan by reason of the occurrence of a condition specified in the plan; or
> (10) nonpayment of any fees or charges required under chapter 123 of title 28.

11 U.S.C. § 1112(b).

23. The enumeration of factors in §1112(b) is intended only to be illustrative. *See, e.g., In re SB Properties, Inc.,* 185 B.R. 206, 208 (Bankr. E.D. Pa. 1995).

24. Dismissal "for cause" has been interpreted to include lack of good faith in filing a bankruptcy petition. *See, e.g., In re Humble Place Joint Venture,* 936 F.2d 814, 817 (5th Cir. 1991); *see also, e.g., In re SGL Carbon Corp.,* 200 F.3d 154 (3rd Cir. 1999). Dismissal or conversion of a Chapter 11 case for lack of good faith is a decision charged

to the bankruptcy court's discretion. *See, e.g., In the Matter of Koerner,* 800 F.2d 1358, 1367 (5th Cir. 1986).

25. There is no precise test for determining whether a Chapter 11 petition has been filed in good faith. In making this determination, courts may consider any factors which evidence intent to abuse the judicial process and the purposes of the Bankruptcy Code. *See, e.g., MacElvain v. I.R.S.,* 180 B.R. 670 (M.D. Ala. 1995). The Fifth Circuit has stated that "[d]etermining whether the debtor's filing for relief is in good faith depends largely upon the bankruptcy court's on-the-spot evaluation of the debtor's financial condition, motives, and the local financial realities." *In the Matter of Little Creek Dev. Co.,* 779 F.2d 1068, 1072 (5th Cir. 1986).

26. Findings of lack of good faith in proceedings based on §1112(b) have been predicated on certain recurring but non-exclusive patterns. Several, but not all, of the following conditions usually exist:

> (1) The debtor has one asset, such as a tract of undeveloped or developed real property.
> (2) The secured creditors' liens encumber this tract.
> (3) There are generally no employees except for the principals, little or no cash flow, and no available sources of income to sustain a plan of reorganization or to make adequate protection payments.
> (4) Typically, there are only a few, if any, unsecured creditors whose claims are relatively small.
> (5) The property has usually been posted for foreclosure because of arrearages on the debt and the debtor has been unsuccessful in defending actions against the foreclosure in state court.
> (6) Alternatively, the debtor and one creditor may have proceeded to a stand-still in state court litigation, and the debtor has lost or has been required to post a bond which it cannot afford.
> (7) Bankruptcy offers the only possibility of forestalling loss of the property.
> (8) There are sometimes allegations of wrongdoing by the debtor or its principals.
> (9) The "new debtor syndrome," in which a one-asset entity has been created or revitalized on the eve of foreclosure to isolate the insolvent property and its creditors, exemplifies, although it does not uniquely categorize, bad faith cases.

Id. at 1072-73. Additionally, courts consider whether the whether the debtor is seeking to use the bankruptcy provisions to create and organize a new business rather than to reorganize or rehabilitate an existing enterprise. *See, e.g., In re Natural Land Corp.*, 825 F.2d 296, 298 (11th Cir.1987); *In re Washtenaw Huron Inv. Corp. No. 8*, 150 B.R. 31 (Bankr. E.D. Mich. 1993), *aff'd*, 160 B.R. 74 (E.D. Mich. 1993).

27. Here, LBack filed for bankruptcy on the eve of MLSBF's attempt to foreclose upon LBack's primary asset. LBack's amended plan depends upon funding to be provided by Mr. Lineback's grandmother. Ms. Anderson, however, is not legally committed to provide such financing. In fact, Ms. Anderson testified that funding would come from her daughter who, in turn, has not made any legally binding commitment to fund LBack's plan.

28. The amended plan submitted by Exotic Car Rental is equally inadequate. Exotic Car Rental proposes to pay its creditors by selling its assets to Mr. Lineback (an insider) at liquidation value in exchange for a promissory note from Mr. Lineback. Exotic Car Rental, however, does not propose to market its assets to other potential purchasers at a better price and has not established whether Mr. Lineback would be capable of repaying the promissory note – indeed, the evidence at the hearing on MLFSB's motion to dismiss strongly suggests to the contrary.

29. To the extent that the debtors intend for Willowbend Auto Expo to "succeed" to Exotic Car Rental's business, the debtors are improperly seeking to use bankruptcy to create a new business rather than to rehabilitate their pre-bankruptcy businesses.

30. Given the foregoing facts and circumstances, the Court is of the opinion and so concludes that the Chapter 11 cases of LBack and Exotic Car Rental were filed in bad faith and should be dismissed. The Court further concludes that grounds for dismissal exist under §1112(b)(1), (2) and (4) in that there is a continuing loss or diminution of the debtors' estates and no reasonable likelihood of rehabilitation, the debtors are unable to effectuate plans of reorganization, and LBack and Exotic Car Rental have failed to propose feasible plans within the time fixed by this Court.

31. If appropriate, these conclusions of law shall be findings of fact.

IT IS THEREFORE ORDERED that the above-styled bankruptcy cases filed by LBack and Exotic Car Rental shall be, and are hereby, DISMISSED.

Signed on 11/24/05

Brenda T. Rhoades

HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE