

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

In the Matter of: : Chapter 11
: :
WESTEK GEORGIA, LLC, :
: :
Debtor : Case No. 03-55298 RFH
: :

BEFORE

ROBERT F. HERSHNER, JR.
CHIEF UNITED STATES BANKRUPTCY JUDGE

COUNSEL:

For Debtor:

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For Gregory W. Phillips,
Robert E. Johnson, and
Alan R. Oglesbee:

Mr. Hubert C. Lovein, Jr.
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For the United States Trustee:

Mr. Mark Roadarmel
Assistant U.S. Trustee
433 Cherry Street, Suite 510
Macon, Georgia 31201-7910

For Flag Bank:

Ms. Molly L. McCollum

3370 Vineville Avenue, Suite 103
Macon, Georgia 31204

For Royal Cord, Inc.:

Mr. Aaron R. Warnke
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309-4530

For Jimmy McKinley,
Upson County Tax Commissioner:

Mr. Truitt A. Mallory
Post Office Box 832
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MEMORANDUM OPINION

Gregory W. Phillips, Robert E. Johnson, and Alan R. Oglesbee, Movants, filed on March 24, 2004, a motion requesting the Court to appoint a Chapter 11 trustee. Westek Georgia, LLC, debtor-in-possession, Debtor, filed on May 5, 2004, a response opposing Movants' motion. The Court held a hearing on May 10, 2004, on Movants' motion. The Court, having considered the evidence presented and the arguments of counsel, now publishes this memorandum opinion.

Movants were the sole shareholders of Westek, Inc. Westek, Inc. was a tire cord manufacturer. Debtor acquired Westek, Inc.'s assets in November of 2002. The assets included a manufacturing facility and equipment. Debtor operated the tire cord business for a number of months. Debtor ceased its operations and leased the manufacturing facility and equipment to Royal Cord, Inc.

Movants and other creditors, on November 12, 2003, filed an involuntary bankruptcy proceeding under Chapter 7 of the Bankruptcy Code against Debtor. Debtor, on January 14, 2004, exercised its right to convert the Chapter 7 case to a Chapter 11 case.¹ Debtor is the debtor-in-possession in the Chapter 11 case. The United States Trustee advises that Debtor is current on its operating reports and quarterly fees.

Movants request that the Court appoint a Chapter 11 trustee. Movants rely on

¹ 11 U.S.C.A. § 706(a) (West Supp. 2003).

section 1104(a)(1) of the Bankruptcy Code² which provides:

§ 1104. Appointment of trustee or examiner

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee—

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

Collier on Bankruptcy states:

[i]—Appointment of Trustee as an Extraordinary Remedy in a Chapter 11 Case.

The appointment of a trustee in a chapter 11 case is an extraordinary remedy. The drafters of the Code recognized that, as a general rule, in the absence of fraud, dishonesty, incompetence, gross mismanagement, or similar grounds, the debtor's management should be given an opportunity to propose a plan of reorganization for the debtor. For this reason, there is a strong presumption that the debtor should be permitted to remain in possession absent a showing of need for the appointment of a trustee or a significant postpetition change in the debtor's management.

7 Collier on Bankruptcy, ¶ 1104.02 [3][b][i] (15th ed. rev. 2003).

Movants have the burden of showing that appointment of a Chapter 11 trustee is necessary. Most courts hold that the showing must be by clear and convincing evidence.

In re Marvel Entertainment Group, Inc., 140 F. 3d 463, 471 (3rd Cir. 1998); In re W.R.

² U.S.C.A. § 1104(a)(1) (West 1993).

Grace & Co., 285 B.R. 148, 157 (Bankr. D. Del. 2002); In re Rivermeadows Assoc. LTD, 185 B.R. 615, 617 (Bankr. D. Wyo. 1995); In re Tahkenitch Tree Farm Partnership, 156 B.R. 525, 527 (Bankr. E.D. La. 1993); In re Royster Co., 145 B.R. 88, 90 (Bankr. M.D. Fla. 1992);

“Absent a showing of need for the appointment of a trustee, there is a strong presumption that the debtor should be permitted to remain in possession.” In re Macon Prestressed Concrete Co., 61 B.R. 432, 439 (Bankr. M.D. Ga. 1986).

The evidence presented at the hearing shows that Adam Runsdorf is the managing member of Debtor. Debtor made a number of prepetition monetary transfers to Mr. Runsdorf and entities related to him. The transfers total about \$1.4 million. Most transfers occurred during the one year period prior to Movants filing the involuntary bankruptcy petition against Debtor.

Mr. Runsdorf had advanced substantial sums to Debtor so that it could meet payroll, purchase materials, and operate its business. The transfers at issue were prepetition repayments of money advanced by Mr. Runsdorf to Debtor. The transfers have been disclosed and the Court finds no effort by Debtor or Mr. Runsdorf to hide the transfers.

Movants argue that Mr. Runsdorf will not scrutinize the transfers to see whether the transfers could be set aside as fraudulent or preferential. Debtor responded that its Chapter 11 plan of reorganization will provide for the scrutiny through an independent attorney or accountant. A creditors’ committee may, with leave of court, be authorized

to bring an avoidance action if a debtor unjustifiably fails to do so. 5 Collier on Bankruptcy, ¶ 547.11[4] (15th ed. rev. 2003). The Court is persuaded that the transfers do not rise to the level of fraud, dishonesty, incompetence, or gross mismanagement which would require the appointment of a Chapter 11 trustee.

Movants also assert that Debtor failed to list on its bankruptcy schedules a Ford Taurus automobile. Debtor responded that the automobile was included in certain personal property valued at \$1.4 million on Schedule B. Debtor notes that the automobile is insured and was included on an amended form sent to the United States Trustee.³ The Court is satisfied with Debtor's response.

The Upson County Tax Commissioner testified that Debtor owes property taxes of \$326,891.29 for 2001, 2002, and 2003. Tax liens have been filed for 2001 and 2002. The Tax Commissioner supports Movants' motion to appoint a Chapter 11 trustee.

The United States Trustee, Royal Cord, Inc., and Flag Bank oppose the appointment of a Chapter 11 trustee.

The Court, from the evidence presented, is not persuaded that Movants have carried their burden of showing that a Chapter 11 trustee should be appointed. The Court is persuaded that Debtor is operating within the requirements of Chapter 11 and should continue as debtor-in-possession.

³ See Amendment to Inventory of Assets, filed March 19, 2004. Docket No. 81.

An order in accordance with this memorandum opinion shall be entered this date.

DATED this 14th day of May, 2004.

ROBERT F. HERSHNER, JR.
Chief Judge
United States Bankruptcy Court