

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION**

In re:

Case No. 3:12-bk-4178-PMG

Cherie L. Baker,

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Debtor.

Chapter 11

**ORDER ON IBERIABANK’S MOTION TO DISMISS**

**THIS CASE** came before the Court for a final evidentiary hearing to consider the Motion of IberiaBank to Dismiss this Chapter 11 case pursuant to Section 1112 of the Bankruptcy Code. (Doc. 64).

A Chapter 11 case may be dismissed for “cause” under §1112(b) of the Bankruptcy Code if the Court finds that the petition was filed in bad faith. The issue of a debtor’s bad faith is a fact-intensive inquiry that should be based on the totality of the circumstances.

In this case, the Court has considered the circumstances surrounding the filing and prosecution of the Chapter 11 case, and finds that the Debtor did not intend to abuse the judicial process or the purposes of Chapter 11. The case was not filed in bad faith, and IberiaBank’s Motion to Dismiss should be denied.

**Background**

The Debtor, Cherie L. Baker, is a registered pediatric nurse and licensed real estate broker. She is employed by Managed Access to Child Health, Inc.

Since the 1960's, the Debtor's family owned certain commercial property located on Phillips Highway in Jacksonville, Florida. The Debtor and her brother inherited the Property from their father after he passed away, and the Debtor acquired her brother's interest in the Property in 2007. The Debtor financed the purchase of her brother's interest with a loan from CapitalSouth Bank in the original principal amount of \$2,060,000.00, and the loan was secured by a mortgage on the Property. At the time of the loan, the Property was owned by the Cherie Lowery Baker Revocable Trust.

The CapitalSouth note and mortgage were assigned to IberiaBank in 2009, and a default occurred under the loan documents in August of 2010. On June 9, 2011, IberiaBank filed a foreclosure action in the Circuit Court for Duval County, Florida. On April 17, 2012, a Final Judgment of Foreclosure was entered in favor of IberiaBank in the amount of \$2,205,107.24, and a foreclosure sale was set for June 25, 2012.

On June 19, 2012, the Property was transferred from the Cherie Lowery Baker Revocable Trust to the Debtor individually.

On June 22, 2012, the Debtor filed a petition under Chapter 11 of the Bankruptcy Code. On her schedule of assets filed shortly after the petition, the Debtor listed the following real property: (1) her homestead real property in Ponte Vedra Beach, Florida, with a scheduled value of \$405,023.00, and scheduled mortgages totaling \$486,616.00; (2) approximately 5.4 acres of rental property in Tennessee with a scheduled value of \$181,300.00; (3) a rental condominium located in Jacksonville with a scheduled value of \$71,760.00, and scheduled mortgages totaling \$202,356.23; (4) other residential rental property in Jacksonville with a scheduled value of \$164,834.00, and a scheduled mortgage in the

amount of \$81,957.22; and (5) the Property on Phillips Highway that is subject to IberiaBank's Mortgage.

Additionally, on her schedule of liabilities, the Debtor listed creditors holding general unsecured claims in the total amount of \$62,844.43.

On November 9, 2012, IberiaBank filed the Motion to Dismiss the Debtor's case that is currently under consideration. Generally, IberiaBank contends that the Debtor filed the case to hinder, delay, or defraud IberiaBank in its efforts to enforce its rights against the Property, and also contends that the Debtor has proposed a Chapter 11 Plan that cannot be confirmed. For these reasons, IberiaBank asserts that the case was filed and prosecuted in bad faith, and should be dismissed pursuant to §1112(b) of the Bankruptcy Code.

### **Discussion**

In determining whether a case was filed in bad faith, Courts generally evaluate a series of factors as circumstantial evidence of the debtor's intent in seeking bankruptcy relief. These factors include (1) whether the debtor has only one asset, (2) whether the debtor's unsecured debt is small in relation to the secured debt, (3) whether the debtor has few employees, (4) whether the debtor's asset is subject to foreclosure, (5) whether the debtor's financial problems involve a dispute with secured creditors that can be resolved in state court, and (6) whether the timing of the petition indicates an intent to frustrate the secured creditor's efforts to enforce their rights. In re Phoenix Piccadilly, Ltd., 849 F.2d 1393, 1394-95 (11<sup>th</sup> Cir. 1988).

In this case, IberiaBank contends that the Phillips Highway Property is the Debtor's "one significant asset," that the Debtor has relatively few unsecured creditors and no employees, that the

Debtor's financial problems consist of her dispute with IberiaBank, which has already been reduced to a Final Judgment of Foreclosure in State Court, and that the Debtor improperly transferred the Property from the Trust to herself shortly before the scheduled foreclosure sale in order to frustrate IberiaBank's rights. (Doc. 64, pp. 4-5). Consequently, IberiaBank asserts that the Debtor filed her bankruptcy petition in bad faith, and that the case should be dismissed under the principles outlined in Phoenix Piccadilly.

It is well-established, however, that the Phoenix Piccadilly factors involve a fact-intensive analysis, and that the focus of the inquiry should always be whether the debtor intended to abuse the judicial process and the purposes of the Bankruptcy Code. In re Stafford Rhodes, LLC, 2012 WL 5439041, at 3 (M.D. Ga.). The factors should not be rigidly applied, and the ultimate determination is whether the filing represents an abuse of the judicial system and the purposes of Chapter 11. In re Joyce, Don & Associates, Inc., 2008 WL 343265, at 2-3 (Bankr. M.D. Fla.).

### **Application**

The Court has considered the circumstances surrounding the filing of the petition in this case, and finds that the Debtor did not intend to abuse the judicial process or the purposes of the Bankruptcy Code by seeking Chapter 11 relief. The Court reaches this conclusion for three primary reasons. First, the Phillips Highway Property is family property that is a primary, but not the sole, asset of the Debtor. Second, the Debtor has proposed a Plan of Reorganization that has a reasonable prospect for success within a reasonable time. And third, the transfer of the Property to the Debtor individually was not part of a scheme to defraud her creditors. Consequently, the Court finds that the case was not filed in bad faith, and should not be dismissed.

### **A. The Property**

In the typical or classic single-asset “bad faith” scenario, the debtor is an entity that was newly created or reactivated while a foreclosure action was pending in order to isolate an insolvent property from other debts or assets. See In re 1701 Commerce, LLC, 477 B.R. 652, 658 (Bankr. N.D. Tex. 2012); In re Balboa Street Beach Club, Inc., 319 B.R. 736 (Bankr. S. D. Fla. 2005). The Debtor in this case is unlike the typical bad faith case in a number of respects.

First, the Debtor did not recently acquire the Property as a high-risk venture and immediately attempt to protect the venture by using the bankruptcy laws. On the contrary, the Property had belonged to the Debtor’s family for approximately fifty years when the Debtor and her brother inherited it from their father. The Debtor or her Trust had owned the Property for approximately five years at the time that the bankruptcy petition was filed.

Additionally, the Debtor has other assets and liabilities that are not associated with the Property. The Debtor owns her home in Ponte Vedra Beach, for example, and also has other investment properties. The other investment properties include a rental condominium and a second residential rental property in Jacksonville, both of which are encumbered, and unencumbered real property located in Tennessee. The Debtor’s scheduled secured debt, apart from the debt owed to IberiaBank, totals the approximate sum of \$770,930.23, and her scheduled unsecured debt totals the approximate sum of \$62,844.43.

Finally, the Debtor believes that there is substantial equity in the Property, and that she can preserve the equity for the benefit of all interested parties. According to the Debtor, the value of the

Property exceeds the secured claim of IberiaBank by approximately \$500,000.00, and she has the ability to realize the equity through her long-term familiarity with the Property.

This is not the typical “bad faith” case under the Phoenix Piccadilly factors, and IberiaBank has not shown that the Debtor acted in bad faith when she sought Chapter 11 relief. Instead, it appears to the Court that the Debtor filed the petition for the proper purpose of obtaining financial relief under Chapter 11 of the Bankruptcy Code.

#### **B. The Debtor’s Plan**

In determining whether a case should be dismissed under §1112(b) of the Bankruptcy Code, Courts may also consider whether the debtor has a reasonable likelihood of reorganization. 11 U.S.C. §1112(b)(4)(A). “Dismissal under Section 1112(b)(2) is appropriate when a court determines that it is unreasonable to expect that a plan can be confirmed within a reasonable amount of time.” In re Lezdey, 332 B.R. 217, 222 (Bankr. M.D. Fla. 2005)(citing In re Woodbrook Assoc., 19 F.3d 312, 316-17 (7<sup>th</sup> Cir. 1994)). In this case, the Court cannot determine that the Debtor lacks a reasonable prospect to confirm a plan within a reasonable time.

The Phillips Highway Property is a contiguous location with seven street addresses. At the time that the bankruptcy petition was filed, portions of the Property were leased to Budget Rent a Car Systems, Inc., C.W.S. d/b/a StructureWorks, and Kitchen USA, Inc.

On December 5, 2012, less than six months after the commencement of the case, the Debtor filed a Chapter 11 Plan of Reorganization. (Doc. 70). With respect to IberiaBank’s secured claim, the Plan generally provides for the Debtor to pay IberiaBank the net rents collected on the Property for a period of twelve months. At the end of one year following confirmation of the Plan, the Debtor will make

“monthly payments of principal and interest to IberiaBank based on an amortization of the debt owed on the first anniversary of the Effective Date over 20 years at 4.5% interest.” The Plan further provides that the Debtor will market the Property for sale, either as single Property or divisible parcels, and that IberiaBank shall release its mortgage on the Property according to the release prices set forth in the Plan. (Doc. 70, p. 10).

The Debtor’s Operating Reports for November of 2012 show that the Debtor’s Rent Roll for that month continues to include Avis/Budget, Kitchen USA, and Structureworks as tenants in the property. (Doc. 75). Further, on September 26, 2012, the Court entered an Order approving the Debtor’s engagement of Florida Commercial Real Estate Services, LLC “as Debtor’s real estate broker to assist in the marketing and sale of nine parcels of real property located on Philips Highway between Lenoir Avenue and Mustang Road in Jacksonville, Florida.” (Doc. 53). The Debtor contends that the real estate market has improved sufficiently to justify an opportunity to sell the Property under her Plan.

At the hearing, IberiaBank asserted that a twenty-year repayment term is not commercially reasonable, that the Plan is not feasible, and that it objects to the provision regarding partial releases of its lien.

Although IberiaBank’s objections may present significant confirmation issues, the Court cannot determine at this point in the case that the Debtor’s Plan lacks a reasonable prospect for confirmation within a reasonable time. The Debtor has been remitting the Property’s net rentals to IberiaBank, has undertaken appropriate marketing efforts, and testified that the value of the Property exceeds the amount of IberiaBank’s secured claim. Under these circumstances, the case should not be dismissed as a bad faith filing based on the Debtor’s inability to present a confirmable plan.

### **C. The transfer**

“A number of courts have concluded that the transfer of assets from an entity ineligible for bankruptcy relief to an eligible entity is grounds for dismissal of a reorganization case for lack of ‘good faith’, particularly if the transfer occurred shortly before a foreclosure sale or if there was no legitimate business purpose of the transfer.” In re Lotus Investments, Inc., 16 B.R. 592595 (Bankr. S.D. Fla. 1981)(Citations omitted).

In this case, the Property was owned by the Cherie Lowery Baker Revocable Trust prior to June 19, 2012. On that date, the Property was transferred from the Trust to the Debtor individually. The transfer occurred a week before the Property was scheduled to be sold in connection with IberiaBank’s foreclosure action. The Debtor filed the Chapter 11 petition three days after the transfer.

Despite the sequence and timing of these events, the Court finds that the transfer does not indicate that the Debtor acted in bad faith.

In Federal National Mortgage Association v. Bruckner, 2012 WL 6604577 (E.D. Wisc.), the debtor had caused various limited liability companies to transfer 36 properties to him personally, and filed a Chapter 11 petition shortly thereafter. Fannie Mae was the holder of certain liens on the properties, and filed a motion to dismiss the bankruptcy case. Bruckner, 2012 WL 6604577, at 1-2. The Court first found that it had the discretion to evaluate the totality of the circumstances to determine whether the debtor was attempting to use the provisions of Chapter 11 inappropriately. Id. at 5.

The Court then distinguished the transfer in Bruckner from a case involving “new debtor syndrome,” in which an ineligible entity facing foreclosure transfers property to a new entity in order to file the bankruptcy petition.

[T]his case clearly does not fit within the new debtor syndrome. Although Bruckner transferred properties on the eve of bankruptcy, he did not transfer them to an entity for the purpose of isolating them from other, untroubled assets. Indeed, this case presents almost the exact reverse of the new debtor syndrome: Bruckner transferred troubled assets *away* from single-asset entities to himself personally, thereby subjecting all his assets to the jurisdiction of the bankruptcy court.

Id. at 6(Emphasis in original). The Court concluded that the transfer was not part of a scheme to defraud creditors, and that the debtor's conduct did not constitute bad faith. Id.

In the case currently before the Court, as in Bruckner, the Property was transferred to the Debtor individually, with the result that it became subject to the jurisdiction of the Bankruptcy Court along with all of the Debtor's other assets and liabilities. Under these circumstances, the Court finds that the transfer does not evidence the Debtor's bad faith, and that the case should not be dismissed pursuant to §1112(b) of the Bankruptcy Code.

### **Conclusion**

A Chapter 11 case may be dismissed for "cause" under §1112(b) of the Bankruptcy Code if the Court finds that the petition was filed in bad faith. The issue of a debtor's bad faith is a fact-intensive inquiry that should be based on the totality of the circumstances.

In this case, the Court has considered the circumstances surrounding the filing and prosecution of the Chapter 11 case, and finds that the Debtor did not intend to abuse the judicial process or the purposes of Chapter 11. The case was not filed in bad faith, and IberiaBank's Motion to Dismiss should be denied.

Accordingly:

**IT IS ORDERED** that the Motion of IberiaBank to Dismiss this Chapter 11 Case pursuant to Section 1112(b) of the Bankruptcy Code is denied.

**DATED** this 11 day of January, 2013.

**BY THE COURT**

Paul M. Glenn

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PAUL M. GLENN  
United States Bankruptcy Judge