

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION  
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In re )  
 )  
FLORIDA MEN’S MEDICAL CLINIC, ) Case No. 6:14-bk-08623-KSJ  
LLC, ) Chapter 7  
 )  
Debtor. )

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**ORDER GRANTING KEVIN HORNSBY, M.D.’S MOTION TO DISMISS**

Shannon Schaffer and Dr. Kevin Hornsby are the sole owners of the debtor, Florida Men’s Medical Clinic, LLC. The parties are entangled in an ownership dispute as to which has operating authority and corporate control, resulting in Ms. Schaffer filing a state court law suit on May 5, 2014. On the eve of the hearing before the state court seeking the appointment of a receiver for the Debtor, Ms. Schaffer filed this Chapter 7 bankruptcy case. Dr. Hornsby contends that Ms. Schaffer lacked the authority to file the bankruptcy petition and filed an emergency Motion to Dismiss.<sup>1</sup> The Court agrees that the state court first must resolve this ownership and corporate control dispute before either party can file a bankruptcy case. As such, this Court will abstain from ruling on the issue, will dismiss this case, and discharge the Chapter 7 Trustee, Marie Heinkel.

In his motion to dismiss, Dr. Hornsby chiefly argues that Schaffer does not have the authority to unilaterally file a bankruptcy petition on the Debtor’s behalf.<sup>2</sup> “The question of

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<sup>1</sup> Doc. No. 5. Schaffer filed a response opposing the motion to dismiss. Doc. No. 16. In addition, she seeks a continuance of the emergency hearing. Doc. No. 15. Finding that the Debtor is an operating company that would be irreparably harmed if this Court delayed resolution of Dr. Hornsby’s motion to dismiss, the Court will deny Schaffer’s motion for a continuance.

<sup>2</sup> Doc. No. 5.

whether the filing of the bankruptcy petition was authorized depends upon the applicable state law and the facts of the case.”<sup>3</sup> “[I]t is generally accepted that a bankruptcy case filed on behalf of an entity by one without authority under state law to so act for that entity is improper and must be dismissed.”<sup>4</sup> Accordingly, the Court looks to state law, specifically Florida state limited liability law, to determine whether Schaffer, acting alone, could file a Chapter 7 petition on behalf of the Debtor.

Dr. Hornsby and Schaffer offer two different versions of events. Dr. Hornsby contends that the Debtor currently operates under an operating agreement signed on December 13, 2013. This operating agreement states that Dr. Hornsby owns 51% of the Debtor and Schaffer owns 49% of the Debtor. This operating agreement contains language that effectively requires a vote of the members on all decisions or actions of the members and provides that the Debtor was to be member-managed. No such vote occurred. Moreover, under the operating agreement, Dr. Hornsby is the 51% majority owner, so Schaffer lacked corporate authority to file the bankruptcy petition.

In Schaffer’s state court complaint, she disputes the validity of the operating agreement, contending that her signature on the operating agreement is invalid. She also claims that Schaffer and Dr. Hornsby own equal shares of the Debtor.<sup>5</sup> Although Schaffer agrees no member vote authorizing the bankruptcy filing occurred, she contends she as the sole Managing Member has the independent authority to sign the bankruptcy petition, relying on Florida state law.

Very few limited liability companies operate without operating agreements, so the law interpreting Chapter 608 of the Florida Statutes as a gap-filler is sparse. Section 608.422 of the Florida Statutes states that “[u]nless otherwise provided in its articles of organization or the

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<sup>3</sup> *In re H & W Food Mart, LLC*, 461 B.R. 904, 907 (Bankr. N.D. Ga. 2011).

<sup>4</sup> *Id.* (citing *In re A–Z Electronics, \*907 LLC*, 350 B.R. 886, 891 (Bankr. D. Idaho 2006)).

<sup>5</sup> Hornsby’s Exhibit 1 at ¶ 14.

operating agreement, the limited liability company shall be a member-managed company.”<sup>6</sup> Neither party produced articles of organization for the Debtor to indicate whether the Debtor is member-managed or manager-managed. In a member-managed limited liability company, decisions out of the ordinary course of the debtor’s business or affairs must be submitted to a member vote for the LLC to be bound to that decision.<sup>7</sup> No member vote here took place, and even if it did, Dr. Hornsby’s 50% vote surely would have resulted in a deadlock. If the Debtor is member-managed, Schaffer would not have authority to file the Chapter 7 petition, an action clearly outside the ordinary course of the Debtor’s business of operating an erectile dysfunction medical clinic.

If the Debtor is manager-managed, the decision is a little less clear. Dr. Hornsby currently is listed as the manager of the Debtor. But, the Court realizes Schaffer argues his manager status was ill-gotten. In a manager-managed LLC, “any matter *relating to the business* of the limited liability company may be exclusively decided by the manager.”<sup>8</sup> The decision to file bankruptcy, however, is more than a mere business decision.<sup>9</sup> Chapter 608 requires a vote of the members to dissolve an LLC under its own dissolution statutes.<sup>10</sup> The Court sees no reason why filing to liquidate an LLC under the Bankruptcy Code would require a less stringent standard. Assuming Schaffer is validly the manager, neither she nor Dr. Hornsby would have authority to *unilaterally* push the Debtor into a liquidating bankruptcy case.

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<sup>6</sup> Fla. Stat. § 608.422(1) (2013).

<sup>7</sup> Fla. Stat. § 608.4235(1)(b) (2013).

<sup>8</sup> Fla. Stat. § 608.422(4)(b) (2013).

<sup>9</sup> *Cf. In re Bel-Aire Investments, Inc.*, 97 B.R. 88, 89 (Bankr. M.D. Fla. 1989). In *Bel-Aire*, the one of the corporation’s two directors filed a voluntary petition without the consent of the other director. The court held that “[t]here is no question that the authority to manage the affairs of the corporation does not include the right to file a petition for relief under any of the operating chapters of the Bankruptcy Code.” *Id.* at 89-90. The debtor’s business was ownership and operation of various RV parks, and “obviously [did] not include the business of the Debtor to file for relief under Chapter 11 of the Bankruptcy Code.”

<sup>10</sup> Fla. Stat. § 608.4231(5) (2013).

The Court determines these issues for the limited purpose of determining whether Schaffer has the authority to unilaterally file a bankruptcy petition for the Debtor. She did not have the requisite authority. If Schaffer and Dr. Hornsby ultimately agree that bankruptcy is the best option for the Debtor, or if the state court disagrees with this Court's construction of Chapter 608 and determines that Schaffer has the authority to unilaterally place the Debtor into bankruptcy, the Debtor is free to file a new bankruptcy case.

The Courts primary concern in this case is one of comity. In dismissing the Debtor's Chapter 7 petition at such an early stage in the case, the Court explicitly recognizes that the case was set to be heard on a two-day emergency evidentiary trial on Schaffer's request for a receiver, which if she prevailed, would provide her with the relief she hoped to find in this Court. Because her complaint concerns solely state law issues, the dispute is primarily a two-party dispute over corporate control, the harm that remaining in Chapter 7 would cause to the Debtor, and the fact that an evidentiary hearing was set to be heard on Schaffer's state complaint mere days after she filed this petition, the Court abstains from the matter under 28 U.S.C. § 1334(c)(1).

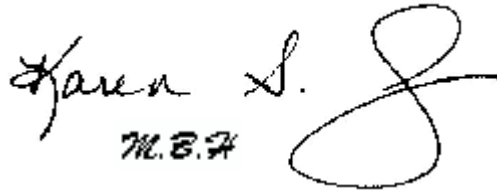
Accordingly, it is

**ORDERED:**

1. Dr. Kevin Hornsby's motion to dismiss case (Doc. No. 5) is granted.
2. This case is dismissed without prejudice.
3. The Court abstains from deciding the state law dispute.

4. The Chapter 7 Trustee is discharged from all further responsibility in connection with this case.

DONE AND ORDERED in Orlando, Florida, August 7, 2014.

Handwritten signature of Karen S. Jennemann, M.B.A. The signature is written in cursive and includes the initials "M.B.A." below the name.

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KAREN S. JENNEMANN  
Chief United States Bankruptcy Judge

Jimmy Parrish is directed to serve a copy of this order on interested parties and file a proof of service within 3 days of entry of the order.