

ORDERED.

Dated: December 17, 2020



Karen S. Jennemann  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION  
[www.flmb.uscourts.gov](http://www.flmb.uscourts.gov)

In re	)	
	)	
Greater Blessed Assurance Apostolic	)	Case No. 6:20-bk-00148-KSJ
Temple, Inc.	)	Chapter 11
	)	
Debtor.	)	
	)	
	)	

**ORDER DENYING DEBTOR’S NOTICE OF ELECTION TO PROCEED UNDER SUBCHAPTER V OF CHAPTER 11**

This case came before the Court,<sup>1</sup> to consider Notice of Election to Proceed under Subchapter V, *nunc pro tunc*, with Supporting Memorandum (the “Notice”),<sup>2</sup> filed by Debtor, Greater Blessed Assurance Apostolic Temple, Inc. (“Debtor”) and objections by the United States Trustee (“UST”) and Creditor, Third World Missions, Inc. (“Third World”) to the Notice.<sup>3</sup> Consistent with the findings of fact and conclusions of law stated orally, rendered on December 14, 2020, and recorded in open

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<sup>1</sup> The hearing occurred on December 14, 2020.

<sup>2</sup> Doc Nos. 188 and 202.

<sup>3</sup> The UST’s objection is Doc. No. 195. Third World’s objection is Doc. No. 192.

court under Federal Rule of Bankruptcy Procedure 7052, the Court makes the following ruling, as supplemented by this written order, and retains jurisdiction to further supplement these written findings of fact and conclusions of law as needed to explain the oral ruling.<sup>4</sup>

The Small Business Reorganization Act (“SBRA”), enacted in August 2019, became effective on February 19, 2020.<sup>5</sup> It is commonly called Subchapter V because all of its provisions are contained in Subchapter V of Chapter 11 of the Bankruptcy Code.<sup>6</sup> The new law was enacted to help small businesses reorganize by streamlining the cumbersome and often expensive process of a typical Chapter 11 reorganization case.<sup>7</sup> The statutory hope is that by encouraging small business reorganizations more creditors will receive greater distributions and more small businesses will survive and prosper.

Many of the new procedures allow for a quick confirmation of a plan of reorganization. No disclosure statement is required.<sup>8</sup> An impaired accepting class is not vital.<sup>9</sup> Strict timelines require parties to quickly move the case forward. And, by abrogating the “absolute priority rule”<sup>10</sup> as to *unsecured* creditors, debtors may confirm a plan without creditor support and still retain property, even though unsecured creditors are not paid in full.<sup>11</sup> The treatment of secured creditors, however, generally

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<sup>4</sup> *In re Mosley*, 494 F.3d 1320, 1328 (11th Cir. 2007).

<sup>5</sup> Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (2019).

<sup>6</sup> 11 U.S.C. §§1181 – 1195.

<sup>7</sup> *In re Ventura*, 615 B.R. 1, 12 (Bankr. E.D. N.Y. 2020).

<sup>8</sup> See 11 U.S.C. § 1181(b).

<sup>9</sup> See 11 U.S.C. § 1191(b).

<sup>10</sup> 11 U.S.C. § 1129(b)(2)(B).

<sup>11</sup> 11 U.S.C. § 1191(b),(c).

remain unaltered under Subchapter V,<sup>12</sup> along with many other Section 1129 requirements such as proposing a plan in good faith and feasibility.<sup>13</sup>

This case involves a tenacious two-party dispute between the Debtor and Third World. Debtor has modified its loan with Third World at least twice but has not made regular payments on its debt since 2009. Debtor hotly contested Third World's foreclosure action in state court, and an appeal remains pending. When state court rulings were unfavorable to the Debtor, it filed this Chapter 11 case on January 10, 2020.<sup>14</sup>

Debtor, which operates a church and school in Rockledge, Florida, filed this case to "seek protection from foreclosure" of its property initialed by secured creditor, Third World.<sup>15</sup> Throughout this case, Debtor repeatedly has violated this Court's rules or the Bankruptcy Code. Debtor has had two opportunities to confirm a plan but has failed on both attempts.<sup>16</sup> Debtor cannot propose a plan which is feasible and complies with Section 1129.

With confirmation of a plan impossible under a traditional Chapter 11 case, Debtor belatedly seeks to proceed under Subchapter V. Third World and the UST object to the Debtor's late Subchapter V election.

As an initial matter, the Court notes the Debtor's election is procedurally improper. It filed a "Notice" seeking to elect Subchapter V instead of an amended

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<sup>12</sup> 11 U.S.C. § 1191(c)(1). *But see*, 11 U.S.C. § 1190 allowing the debtor to modify certain home mortgage claims.

<sup>13</sup> See 11 U.S.C. § 1191(a),(b).

<sup>14</sup> Doc. No. 1.

<sup>15</sup> Doc No. 15.

<sup>16</sup> Doc. No. 159.

petition. A debtor elects Subchapter V in its bankruptcy petition.<sup>17</sup> And when a Chapter 11 debtor has filed a petition without making an election, the Debtor may amend the petition to elect Subchapter V.<sup>18</sup> A motion or other notice is not required.<sup>19</sup> However, because the Debtor and objecting parties have treated the Notice as a proper way to elect Subchapter V, I will treat the Notice as an amendment to the petition.

Both the UST and Third World object to the Debtor's election to Subchapter V primarily arguing the late request is prejudicial. The SBRA does not provide whether a debtor with a bankruptcy case pending before its effective date—February 19, 2020—may elect to proceed under Subchapter V by later amending its bankruptcy petition. In resolving this issue, bankruptcy courts have considered a variety of factors, which include:

- the extent interested parties have invested in the case before the Subchapter V election;<sup>20</sup>
- whether the bankruptcy court has entered orders creating sufficient vested property interests or post-petition expectations such that

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<sup>17</sup> Interim Federal Rule of Bankruptcy Procedure 1020 (a) provides “DEBTOR DESIGNATION. In a voluntary chapter 11 case, the debtor shall state in the petition whether the debtor is a small business debtor and, if so, whether the debtor elects to have subchapter V of chapter 11 apply... The status of the case as a small business case or a case under subchapter V of chapter 11 shall be in accordance with the debtor’s statement under this subdivision, unless and until the court enters an order finding that the debtor’s statement is incorrect.” *See also In re Seven Stars on the Hudson Corp.* 618 B.R. 333, 342 (Bankr. S.D. Fla. 2020)(debtor elects to proceed under Subchapter V by stating so in the petition).

<sup>18</sup> Fed. R. Bankr. P. 1009(a) allows a debtor to amend a voluntary petition as a matter of course any time before the case is closed. *See also In re Body Transit*, 613 B.R. 400, 407 (Bankr. E.D. Pa. 2020).

<sup>19</sup> *See In re Wetter*, 620 B.R. 243, 253 (Bankr. W.D. Va. 2020) (no motion is required to elect Subchapter V for a debtor already in Chapter 11 since an amended petition is sufficient to make the election); *In re Twin Pines LLC*, 2020 WL 5576957 (Bankr. D. N.M. April 30, 2020)(debtor not required to file a motion to proceed under Subchapter V).

<sup>20</sup> *See Body Transit*, 613 B.R. at 408 (citing *In re Moore Properties of Pers. Cty., LLC* 2020 WL 995544 (Bankr. M.D. N.C. Feb. 28, 2020) ; *In re Easter*, 2020 WL 6009201 (Bankr. N.D. Miss. October 9, 2020) (citing *Body Transit* 613 B.R. at 408).

proceeding under Subchapter V would offend “elementary considerations of fairness” as to those rights or expectations;<sup>21</sup>

- whether the debtor may extend the strict timelines under Subchapter V which usually have passed;<sup>22</sup> and
- whether the debtor amended the petition to elect Subchapter V in bad faith or allowing the amendment would unduly prejudice a party.<sup>23</sup>

These factors generally address whether the debtor’s belated election may occur procedurally or results in impermissible retroactive application of law. They are applied case-by-case and address whether the court should allow the belated election based on the totality of circumstances.

Having considered these factors and totality of circumstances, I find the Debtor waited too long to elect to proceed under Subchapter V. All deadlines have passed. No Subchapter V Trustee was timely appointed, which could have been helpful if the Debtor had acted timely.

And Debtor offers no credible reason for its late change of mind. Debtor filed this case only a month before SBRA’s effective date. It could have elected to proceed

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<sup>21</sup> See *Body Transit*, 613 B.R. at 408 (citing *In re Moore Properties of Pers. Cty., LLC* 2020 WL 995544 (Bankr. M.D. N.C. Feb. 28, 2020); *In re Easter*, 2020 WL 6009201 (Bankr. N.D. Miss. October 9, 2020) (citing *Body Transit* 613 B.R. at 408).

<sup>22</sup> See *In re Seven Stars on the Hudson Corp.* 618 B.R. 333 (Bankr. S.D. Fla. 2020); *In re Trepetin*, 617 B.R. 841 (Bankr. D. Md. 2020); *In re Easter*, 2020 WL 6009201 (Bankr. N.D. Miss. October 9, 2020); *In re Ventura*, 615 B.R. 1, 15 (Bankr. E.D. N.Y. 2020).

<sup>23</sup> See *In re Bonert*, 619 B.R. 248, 253 (Bankr. C.D. Cal. 2020); *Body Transit*, 613 B.R. at 408-09; *In re Easter*, 2020 WL 6009201 (Bankr. N.D. Miss. October 9, 2020) (citing *Body Transit* 613 B.R. at 408).

under Subchapter V early on and complied with all the Subchapter V deadlines.<sup>24</sup> Instead, Debtor proceeded under a traditional Chapter 11 case and failed.

During this case, both the UST and Third World expended considerable time and effort protecting their interests and encouraging the Debtor to comply with its obligations under the Bankruptcy Code. Now, with confirmation of a plan impossible (after two attempts), the Debtor belatedly elects Subchapter V to get another “bite at the apple.” Debtor has established no basis for the delay. The delay in the election and the belated appointment of a Subchapter V Trustee is prejudicial to the creditors, especially Third World, and made solely for further delay.

Debtor now elects Subchapter V in bad faith. Allowing the amendment would unduly prejudice Third World and other creditors. And Debtor offers no valid reason to permit this dilatory and prejudicial conduct.

Accordingly, it is

**ORDERED:**

1. Debtor’s Notice of Election to Proceed under Subchapter V, *nunc pro tunc*, (Doc. No. 188) is **DENIED**.
2. The objections by the United States Trustee (Doc. No. 195) and Creditor, Third World Missions, Inc. (Doc. No. 192) are **SUSTAINED**.
3. Debtor may not proceed under Subchapter V .

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<sup>24</sup> Differing standards have emerged regarding the Debtor’s ability to extend Subchapter V deadlines. See *In re Wetter*, 620 B.R. 243, 252-53 (Bankr. W.D. Va. 2020) (discussing the less stringent standard promulgated under *In re Trepetin*, 617 B.R. 841 (Bankr. D. Md. 2020) with the higher standard articulated under *In re Seven Stars on the Hudson Corp.* 618 B.R. 333 (Bankr. S.D. Fla. 2020). Even under the less stringent standard, the Debtor here is responsible for its inability to comply with the Subchapter V deadlines.

4. Subchapter V Trustee, Jerrett M McConnell, is relieved from any further duties.

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Attorney David Marshall Brown will serve a copy of this Order on interested parties who are non-CM/ECF users and file a proof of service within 3 days of entry of the Order.