Patrick M. Flatley
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

In re:	)	
	)	
PANTHERA ENTERPRISES, LLC,	)	Case No. 19-bk-787
	)	
Debtor.	)	Chapter 11
	)	

ORDER

West Virginia Economic Development Authority ("WVEDA") seeks the dismissal of this case or conversion of it to Chapter 7.[1] WVEDA concedes that it does not rely upon any of the non-exhaustive examples of cause enumerated in § 1112(b)(4). Rather, it contends that Panthera Enterprises, LLC (the "Debtor"), filed its case in bad faith. The Debtor opposes the motion and asserts that it filed its case in good faith, with a legitimate desire to reorganization, and with a reasonable prospect in that regard. A hearing was timely conducted upon the motion on December 16, 2019.

For the reasons stated herein, the court will deny WVEDA's motion.

I. BACKGROUND[2]

The Debtor owns approximately 750 acres in Moorefield District, Hardy County, West Virginia, with an address of 2506 Fish Pond Road, Old Fields, West Virginia ("Real Property"). On August 21, 2013, the WVEDA made a fifteen (15) year term loan to the Debtor in the original principal amount of $5,000,000 ("2013 Loan"). The 2013 Loan financed a portion of the Debtor's cost to acquire 689.40 acres in Moorefield District, Hardy County, West Virginia. The 2013 Loan

[1] WVEDA also seeks relief from the automatic stay. On November 15, 2019, however, the court entered an order holding in abeyance WVEDA's motion in that regard pending the outcome of this dispute.

[2] The court compiled its background almost exclusively from the stipulated facts submitted by the Debtor and WVEDA.

is evidenced by a Promissory Note, pursuant to which the Debtor was to make equal monthly payments of $37,849.50, beginning September 21, 2013, with a final payment of all unpaid principal and accrued and unpaid interest due on August 21, 2028. The 2013 Loan is secured by a Credit Line Deed of Trust and Fixture Filing, granting WVEDA a first lien on the 689.40 acre tract acquired by the Debtor. The 2013 Loan is also secured by a Collateral Assignment of Leases and Rents.

WVEDA made a second loan to the Debtor on July 2, 2014, in the original principal amount of $1,871,505.00. This loan financed the acquisition of an additional 58.09 acre tract, adjacent to the 689.40 acre tract. Together, the 689.40 acre tract and the 58.09 acre tract are referred to as the "Real Property." Proceeds of the 2014 Loan were also used to construct improvements and renovations on the Real Property. The 2014 Loan is evidenced by a Promissory Note, pursuant to which the Debtor was to make equal monthly payments of $13,734.66, for a term of fifteen (15) years, with a final installment of all unpaid principal and accrued and unpaid interest due on July 2, 2029. The 2014 Loan is secured by a Credit Line Deed of Trust and Fixture Filing, granting WVEDA a subordinate lien on the 689.40 acre tract and a first lien on the 58.09 acre tract. It is also secured by a Collateral Assignment of Leases and Rents, and is guaranteed by the Guarantors.

The Real Property is the site of a security operations training facility ("Facility"). It offers tactical training for personnel involved in military and non-military protective services, including government, military and law enforcement personnel. The Facility includes tactical driving tracks, a vehicle obstacle course, shooting ranges, a live fire shoot house, a mobile operations urban training combat town, an FAA approved helicopter landing pad, an armory and explosives vault, multiple classrooms, on-site dining facilities and off-site lodging. Notably, neither the Debtor nor its subsidiaries have employees with which to conduct training. Rather, the Debtor subcontracts with another company to operate and provide training at the Facility.

Prior to June 2018, the Debtor's subsidiary, Panthera Training Center (“PTC”), operated the Facility and conducted training at the Facility. In 2013, the Debtor leased the Real Property to PTC for a fifteen (15) year term, pursuant to the terms of a Commercial Lease. PTC was to pay the Debtor monthly rent of $38,000. Effective June 1, 2018, the Debtor entered into a Subcontract Agreement ("2018 Subcontract") with Panthera Training LLC (“Training”), to operate the Facility and conduct training at the site, replacing PTC. Pursuant to the 2018 Subcontract, Training agreed to perform the services, i.e., specialized tactical training, that the Debtor and its subsidiaries had contracted to provide at the Facility. The 2018 Subcontract has an initial term of June 1, 2018 to May 31, 2023, with two options to extend it through May 31, 2026.

Training is not affiliated with the Debtor. It is a wholly owned subsidiary of Historic Arms Corporation, a company owned by Robert L. Starer and his wife. Training entered into two other agreements with the Debtor effective June 1, 2018: (i) a Commercial Lease Agreement, dated June 1, 2018, pursuant to which Training leased the Debtor's Real Property ("2018 Commercial Lease"); and (ii) an Agreement of assignment, dated June 1, 2018 ("2018 Assignment"). The term of the 2018 Commercial Lease extends through December 31, 2030. It requires monthly base rent payments of $52,000, plus "Additional Rent", calculated per the terms of the Commercial Lease. The monthly base rent payment of $52,000 is paid directly to the WVEDA to be applied to the indebtedness owed the WVEDA by the Debtor.

The Debtor currently has one contract, with a United States federal government agency, to provide specialized training at the Facility. PTC currently has two contracts with a branch of the military to provide specialized training at the Facility. As of the Petition Date, Training was conducting the specialized training that was to be provided under these three contracts by the Debtor and PTC respectively pursuant to a subcontract by and between Training and the Debtor, PTC and Panthera Worldwide LLC. Notably, however, the Debtor conveyed personal property used at the Facility to SMI, LLC, on June 15, 2018.

Based upon certain defaults under the loan agreement existing in June 2018, WVEDA, the Debtor, PTC, and the Guarantors entered into a Forbearance Agreement, effective as of July 6, 2018. Under the Forbearance Agreement, WVEDA agreed to forbear from exercising its rights under the Loan documents, including the Deeds of Trust, for a period of six (6) months. The terms of the Forbearance Agreement state that it matures January 6, 2019, at which time all amounts due and owing under the WVEDA Loan documents would be due and payable, together with attorneys' fees and costs. Per the terms of the Forbearance Agreement, the monthly rent payments to be paid by Panthera Training to the Debtor under the 2018 Commercial Lease would be paid directly to WVEDA, to be applied to the indebtedness due and owing on the WVEDA Loans.

Thereafter, the Debtor failed to pay the 2017 real property taxes due and owing on the Real Property. In November of 2018, the 2017 tax liens for the delinquent taxes were auctioned by the Hardy County Sheriff and certified to the West Virginia State Auditor's Office for disposition. The redemption period expires April 1, 2020. Also, unbeknownst to WVEDA and Training, the Debtor and SMI, LLC, entered into that certain Timber Agreement, dated March 26, 2018.

Ultimately, the Debtor did not pay the indebtedness due under the WVEDA Loans upon maturity of the Forbearance Agreement on January 6, 2019. Despite the Debtor's failure in that regard, WVEDA accepted payments from Training for several months. Thereafter, WVEDA commenced foreclosure, with a foreclosure sale scheduled for September 16, 2019. The Debtor filed its voluntary petition in bankruptcy on September 13, 2019. WVEDA filed its secured claim in this bankruptcy case on October 23, 2019 for $6,477,180.47, which is Claim # 4. Two weeks after the Debtor filed its complaint seeking to oust Training from the Real Property, WVEDA filed its extant motion to convert or dismiss.

II. ANALYSIS

WVEDA contends that cause exists to dismiss or convert the Debtor's case because the Debtor engaged in bad faith by filing its petition for relief under Chapter 11 of the Bankruptcy Code. To support its motion, WVEDA asserts that the Debtor's pre-petition conduct, including multiple defaults under its loan agreement with WVEDA, together with its alleged inability to reorganize, necessitate dismissal or conversion. Specifically, WVEDA states that the Debtor breached their loan agreement by encumbering and ultimately selling certain personal property subject to the loan agreement and selling timber that also served to secure the Debtor's repayment to WVEDA. WVEDA also contends that the Debtor's apparent desire to oust Training, which currently operates the Facility and generates income illustrates the futility of the reorganization effort because the Debtor is otherwise unable to operate the Facility.

The Debtor counters that it did not file its case in bad faith. In that regard, it asserts that it was not motivated by bad faith in seeking the protections afforded by Chapter 11. Additionally, the Debtor contends that it can propose a feasible plan of reorganization. In notes in that regard that, despite the early jousting with Training, it may ultimately propose a plan that includes Training's continued operation at the Facility. Indeed, in the adversary proceeding between the Debtor and Training, the court denied preliminary injunctive relief to both parties dictating their cooperation at least through the end of 2019. The Debtor remains hopeful that it can reach a longer-term resolution with Training. In fact, the Debtor noted at the evidentiary hearing on the motion to dismiss or convert that it, Training, and WVEDA briefly discussed a global resolution that included the Debtor's dismissal of its adversary proceeding against Training. According to the Debtor, however, that discussion did not bear fruit because WVEDA demanded the appointment of a Chapter 11 trustee as part thereof.

It is well-settled in the Fourth Circuit that "the broad language of § 1112(b) 'supports the construction that a debtor's lack of good faith may constitute cause for dismissal of a petition.'" *Carolin Corp. v. Miller*, 886 F.2d 693, 699 (4th Cir. 1989) (quoting *In re Albany Partners, Ltd.*, 749 F.2d 670, 674 (11th Cir. 1984)). To achieve dismissal in that regard, a creditor must show "*both* objective futility and subjective bad faith . . . ." *Carolin*, 749 F.2d at 700 (emphasis in original). "[S]uch a stringent test is necessary to accommodate the various and conflicting interests of debtors, creditors, and the courts that are at stake in deciding whether to deny threshold access to Chapter 11 proceedings for want of good faith in filing." *Id*. at 701. Indeed, "[d]ecisions denying access at the very portals of bankruptcy, before an ongoing proceeding has even begun to develop the total shape of the debtor's situation, are inherently drastic and not lightly to be made." *Id*. at 700.

"The overall aim of the twin-pronged inquiry must of course be to determine whether the purposes of the Code would be furthered by permitting the Chapter 11 petitioner to proceed past filing." *Id*. at 701. In that regard, "a totality of the circumstances inquiry is required." *Id*. "The objective futility inquiry . . . should therefore concentrate on assessing whether there is no going concern to preserve and no hope of rehabilitation, except according to the debtor's terminal euphoria." *Id*. at 701-02 (internal quotation omitted). "The subjective bad faith inquiry is designed to ensure that the [debtor] actually intends to use the provisions of Chapter 11 to reorganize or rehabilitate an existing enterprise, or to preserve going concern values of a viable or existing business." *Id*. at 702 (internal quotation omitted).

Here, the court finds that the totality of the circumstances leads to the denial of WVEDA's motion. Specifically, WVEDA failed in its burden to show either that the Debtor's Chapter 11 case is objectively futile or that the Debtor's Chapter 11 petition was motivated by subjective bad faith. To the contrary, the evidence adduced at trial indicates both a viable going concern to preserve through reorganization and an intent by the Debtor to use the provisions of Chapter 11 to achieve a constructive result.

In that regard, WVEDA relied almost exclusively on the Debtor's complaint against Training to support its contention that the Chapter 11 case is objectively futile. Notably, WVEDA filed its motion just over two weeks after the Debtor filed its complaint against Training.

Moreover, WVEDA argued that the Debtor's prospective ouster of Training from the Facility terminates any ability of the Debtor to reorganize because the Debtor possesses no other means by which it can conduct business at the Facility. For example, the Debtor itself has not conducted training at the Facility for several years and indeed has no employees with which it could service existing or future contracts. According to WVEDA, therefore, the Debtor's anticipated cashflow will cease such that it will be unable to service its debt to WVEDA and otherwise reorganize.

The Debtor countered, however, that it continues to negotiate with Training regarding a potential resolution of their extant dispute. According to the Debtor, its proposed Chapter 11 plan of reorganization may ultimately include the retention of Training as subcontractor to operate at the Facility and generate cashflow for WVEDA and other of the Debtor's creditors.[3] In that regard, one of the Debtor's principals offered uncontroverted testimony that the operation of the Facility formerly generated approximately $7 million in revenue such that part of the Debtor's plan is likely to expand its customer base and revenue. Even if Training remains, additional work for it generally benefits the Debtor through additional rent payable to the Debtor under its commercial lease agreement with Training. Notably, WVEDA has continued to receive the contracted amount of $52,000 per month from Training. The Debtor availed itself of Chapter 11 only a little more than three months ago. Based upon the relative young age of the case, particularly when paired with the Debtor's prospective agreement with Training and the ongoing payment to WVEDA, the court cannot say that this case presents a debtor with no going concern to preserve or hope of rehabilitation. That reasonable prospect of rehabilitation is sufficient alone to deny WVEDA's motion. Nonetheless, the court will also examine the evidence it heard regarding the second prong of the *Carolin* standard.

Regarding its subjective bad faith inquiry, the court finds that WVEDA also fell short of its burden to establish cause to convert or dismiss this case. In that regard, WVEDA relied principally on the nature of the Debtor's defaults under the loan agreement. Specifically, WVEDA contends that the Debtor defaulted based upon its payment default and failure to timely pay its real and personal property taxes, its encumbrance and ultimate sale of personal property at the Facility, and its sale of the timber upon the Real Property. Additionally, WVEDA seemed to suggest that

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[3] The dispute between the Debtor and Training includes whether Training has rights purely as a subcontractor for the Debtor or whether the Debtor previously assigned all of its rights under its contract to Training. That dispute is immaterial for the court's disposition here.

the Debtor has a long history of overpromising and underdelivering when it comes to financial reorganization prebankruptcy.

The Debtor countered and made clear on the record that the personal property remains at the Facility for use by Training; albeit subject to the property being consumed in the regular course of business. Additionally, the timber remains in place upon the Real Property. The Debtor testified in that regard that its actions vis-à-vis the personal property and timber were to appease another of its aggressive creditors, SMI, LLC. It is unclear what the Debtor's agreement is with SMI going forward, but the uncontroverted testimony was that the personal property and timber remain upon the Debtor's Real Property based upon its agreement with SMI. Despite the Debtor's past payment defaults, its performance since June 2018 based upon Training's operation of the Facility has been credible. Moreover, the record shows that WVEDA continued to accept payment and not pursue its rights under the forbearance agreement upon the expiration of the same in January 2019.

Based upon the foregoing, the court finds that the Debtor is like just about every other debtor that seeks relief before it. It is the court's experience that well-managed debtors with appropriate capitalization and cash flow typically do not seek relief in bankruptcy. Rather, those that file generally have experienced some failure of management or operations that left them insolvent. Additionally, the court often sees poor managerial decisions exacerbating the debtors' financial condition—like here, the Debtor's conveyance of its personal property and timber creating issues to be resolved with WVEDA and Training. Moreover, innumerable debtors seek relief with some type of delinquent tax obligation or an impending foreclosure, brought on generally by the lack of cash flow. In short, the Debtor is similar to most debtors that the court sees seeking relief under various chapter of the bankruptcy code. Nothing WVEDA presented leads the court to believe that the Debtor was motivated by any subjective bad faith in filing its case.

III. CONCLUSION

Based upon the foregoing, the court finds that WVEDA failed to meet its burden in showing cause exists to convert or dismiss this case. Specifically, it did not show either that the case is objectively futile or that the Debtor was motivated by subjective bad faith in seeking relief under Chapter 11.

Therefore, the court does hereby

ORDER that WVEDA's motion to convert or dismiss (Doc. No. 52), filed November 2, 2019, be and hereby is DENIED. Based upon the court's disposition, it will set further proceedings on WVEDA's motion for stay relief, which it heretofore held in abeyance.