

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
BOWMAN FAMILY PARTNERSHIP, LTD.,) CASE NO. BK99-82394
)
DEBTOR.) CH. 11

MEMORANDUM

Hearing was held on Motion to Dismiss or in the Alternative to Change Venue. Appearances: John O'Brien and Richard Myers for Lenz Farms and William Needler for the Debtor. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A).

Background

The Debtor company, Bowman Family Partnership, Ltd., ("Debtor"), a Colorado limited partnership, filed a petition under Chapter 11 on October 22, 1999. The apparent basis for filing in the District of Nebraska is that the address of Michael Bowman, an officer of the general partner, Bowman Holding Co. is in Ogallala, Nebraska. There are four other Bowman entities that have some relationship to this case whom are also debtors in Chapter 11 bankruptcy cases in this district. They are: (1) Michael and Debra Bowman, (2) John and Debbie Bowman, (3) Bowman Storage, L.L.C. and (4) Jack and Barbara Bowman.

The ownership/structure of the Debtor is as follows:

1. Jack Bowman (limited partner)	27.23%
2. Barbara Bowman (limited partner)	27.23%
3. Jeraldine Baird (limited partner)	15.10%
4. Michael Bowman (limited partner)	8.28%
5. Debra Bowman (limited partner)	8.28%
6. Etienne LaGabrielle (limited partner)	6.44%
7. R2D2 (limited partner)	6.44%
8. Bowman Holding Co. (general partner)	1.01%

The uncontroverted facts are:

1. The Debtor is a limited partnership registered to do

business in the state of Colorado but not in the state of Nebraska.

2. The Debtor has been registered in Colorado since April 17, 1995.
3. All of the limited partners of the Debtor live in Colorado with the exception of Michael and Debra Bowman, who live in Nebraska, and Etienne LaGabrielle, a French citizen.
4. All of the creditors of the Debtor are in Colorado, with the exception of Etienne LaGabrielle.
5. The land owned by the Debtor is located in Colorado.

Position of the Parties

The creditor that filed this Motion to Dismiss or in the Alternative to Change Venue is Lenz Farms ("Lenz"). This motion was filed on December 6, 1999, forty-five days after the Debtor filed its bankruptcy petition. Lenz argues, in essence, that the only tie the Debtor has to the District of Nebraska is Michael and Debra Bowman who have an address in Ogallala, Nebraska. Lenz argues that the principal place of business of the Debtor is in Wray, Colorado, and not Ogallala, Nebraska; that the Debtor is only registered to do business in Colorado; that the major asset of the Debtor is in Colorado; and that all of the creditors are in Colorado and France.

The Debtor responded with a Resistance and Objection to Lenz's motion. The Debtor argues that the motion is untimely, without cause and improperly framed. The Debtor asserts that the general partner of the Debtor is Bowman Holding Co. and the vice president of said company is Michael Bowman who is a resident of Ogallala, Nebraska. The Debtor relies upon 28 U.S.C. § 1408(2) which deems venue proper in a district if there is an affiliate, general partner or partnership with a pending title 11 case in the same district. Additionally, the Debtor is asserting that its principal asset is not land but rather ownership in Caribou Land & Cattle Company ("CLCC"), a Colorado entity.

Issues

A. Is the District of Nebraska the proper venue for this Chapter 11 case?

B. If the District of Nebraska is not the proper venue, should the case be dismissed or transferred to Colorado?

Decision

- A. The District of Nebraska is not the proper venue.
- B. The case should be dismissed.

Discussion

A. Timeliness of the Motion

The Debtor has resisted the Motion to Dismiss or in the Alternative to Change Venue by asserting that the motion is untimely. However, the Bankruptcy Appellate Panel for the Eighth Circuit has stated that "what constitutes timely filing of motion to transfer or dismiss a case is not governed by statutory or rule definition; whether a motion to change venue has been timely filed depends on the facts and circumstances presented in a particular case." Bryan v. Land (In re Land), 215 B.R. 398, 403 (8th Cir. BAP 1997). Another bankruptcy court facing this issue, in the case of In re Deabel, Inc., 193 B.R. 739 (Bankr. E.D. Pa. 1996), stated that "if either party has submitted itself to the jurisdiction of the court by litigating a matter of substance, or if substantial developments have transpired in the case in general, irrespective of the moving party's participation in the same, waiver of an objection to venue could be found." In other words, a filed motion is untimely if the moving party has made steps to adjudicate the case in that venue or a significant amount of the case has transpired before the court.

Apparently, there are no statutes or "bright-line" rules concerning timeliness. However, in an attempt to create a bright-line rule, the bankruptcy court in the Eastern District of Pennsylvania has adopted a sixty-day rule in which to file motions to change venue. See: In re First Summit Development Corp., 1989 WL 118552, slip op. at *1 (Bankr. E.D. Pa. 1989); In re Boca Raton Sanctuary Associates, 105 B.R. 273, 275 n. 2 (Bankr. E.D. Pa. 1989); In re 1606 New Hampshire Ave. Associates, 85 BR. 298, 305 (Bankr. E.D. Pa. 1988). With no binding rule in this district, what must be determined by the facts and circumstances of this case is how far the parties have proceeded in the case and to what extent the moving party has participated in litigation that would be considered a

waiver of the various issues.

There is nothing from the facts to indicate that Lenz's motion is untimely. It was filed forty-five days after the Debtor filed its petition and before any significant litigation took place in this case.

B. Venue

The applicable bankruptcy venue statute, 28 U.S.C. § 1408, states:

Except as provided in section 1410 of this title, a case under title 11 may be commenced in the district court for the district -

(1) in which the domicile, residence, principal place of business in the U.S., or principal assets in the U.S., of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer period of such one-hundred-eighty-day period than the domicile, residence, or principal place of business, in the U.S., or principal assets in the U.S., of such person were located in any other district; or

(2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership.

Subsection (1) of 28 U.S.C. § 1402 provides four separate criteria to find proper venue: (a) it is proper where the debtor is domiciled; (b) it is proper where the debtor resided; (c) it is proper where the debtor maintained his principal place of business; and (d) it is proper where the principal asset of the debtor is located. Satisfying any one of the criteria will render venue proper. In re Blumeyer, 224 BR. 218, 220 (Bankr. M.D. Fla. 1998); In re Mitchell, 206 BR. 204, 207 (Bankr. C.D. Calif. 1997).

Debtor had not been domiciled in Nebraska for 180 days prior to filing. Since the Debtor claims to be a "farmer," it is logical that the principal place of business is the state where its land, presumably used to farm, is located. That state is Colorado. The location of the principal assets of

the Debtor is Colorado. That is where the land is located. Even if Debtor's "principal asset" is actually an interest in CLCC, it is not clear from the record that the certificates representing such interest are, or ever were, located in Nebraska. There is no question that CLCC actually operates and holds assets in Colorado.

The Debtor also alleges that venue is proper under subsection (2) of Section 1408 because a general partner has filed for bankruptcy in Nebraska. However, the general partner of this Debtor is a Colorado corporation that is not in bankruptcy in Nebraska, Bowman Holding Co. Michael Bowman, a debtor in a Chapter 11 case pending in Nebraska, is an officer of Bowman Holding Co., the general partner in Bowman Family Partnership, Ltd. However, Mr. Bowman's status as an officer of the general partner does not bring this debtor under the provisions of 28 U.S.C. § 1408(2) because Bowman Holding Co., the actual general partner, is not a debtor in this district. Venue in Nebraska is not proper.

C. Change of Venue or Dismissal

The change of venue statute, 28 U.S.C. § 1412, states that "A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties."

Since venue is not proper in Nebraska, the Debtor has not requested a transfer of venue, and the movant has requested dismissal in preference to a transfer of venue, it appears that a transfer would not be "in the interest of justice or for the convenience of the parties." A transfer shall not be ordered. Instead, this case shall be dismissed pursuant to Fed. R. Bankr. P. 1014(a)(2).

Separate journal entry to be filed.

DATED: April 7, 2000

BY THE COURT:

/s/Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

09 MYERS, RICHARD
75 NEEDLER, WILLIAM

Copies mailed by the Court to:

John O'Brien, 1600 Broadway, Suite 1360, Denver, CO
80202

United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)	
)	
BOWMAN FAMILY)	
PARTNERSHIP, LTD.,)	CASE NO. BK99-82394
)	A
<u>DEBTOR(S)</u>)	
)	CH. 11
)	Filing No.
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	DATE: April 7, 2000
<u>Defendant(s)</u>)	HEARING DATE:

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion to Dismiss or in the Alternative to Change Venue.

APPEARANCES

John O'Brien and Richard Myers, Attorneys for Lenz Farms
William Needler, Attorney for Debtor

IT IS ORDERED:

Venue is not proper in this district. Case is dismissed pursuant to Fed. R. Bankr. P. 1014(a)(2). See Memorandum entered this date.

BY THE COURT:

/s/Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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75 NEEDLER, WILLIAM

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