

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

REPUBLIC REALTY CORP., d/b/a .
REPUBLIC REALTY,

Case No. 88-32-C
Chapter 11

Debtor.

ORDER - MOTION TO DISMISS. MOTION FOR LIFT OF STAY.
AND MOTION FOR ADEQUATE PROTECTION

On March 7, 1988, a hearing was held on the Motion to Dismiss and Motion for Lift of Stay or, alternatively, Motion for Adequate Protection, by Statesman Mortgage Company, formerly known as Hawkeye Bancorporation Mortgage Company (hereinafter "Statesman"). The following attorneys appeared on behalf of their respective clients: William Wheatcraft for Debtor; Linda L. Kniep for Statesman Robert A. Sims for Farmland Industries and Terry L. Gibson for the U.S. Trustee.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (G). The Court, having reviewed the pleadings, evidence, and briefs, now enters its findings and conclusions pursuant to F.R. Bankr. P. 7052.

FINDINGS OF FACT

1. Debtor is in the business of real estate sales and development with offices in Clive, Iowa. Larry A. Wood is president, and Dennis L. Storey is vice president.

2. On its schedule B-1, Debtor lists the real estate located at 139 S.W. 63rd Street, Des Moines, Iowa. This real estate is improved by a mini-warehouse located on the premises.

3. Debtor entered into a real estate contract with Steven B. Bassman in 1985 for the purchase of said real estate. This agreement provided that Debtor would hold title to the real estate, secure financing for the construction of the mini-warehouse, and complete the building of the mini-warehouse. Bassman committed himself to obtaining a "take-out" loan upon completion of the project. Debtor was to be compensated for its role in this transaction by fees arising during the construction process and commissions from the sale of the property.

4. Debtor obtained the construction loan for John D. Ahern who could not obtain financing in his own right. Pursuant to an agreement with Debtor, Ahern was to handle the letting of contracts with subcontractors, and the supervision of construction.

5. Debtor executed and delivered its promissory note to Statesman in August 1985. Statesman agreed to loan or to advance funds for the construction of the mini-warehouse in the total amount of \$650,000.00 As security for the payment of the note, Debtor executed and delivered to Statesman a mortgage on said real estate. Debtor also assigned all

rents to Statesman which were to be applied against its indebtedness to Statesman.

6. Statesman, f/k/a Hawkeye Bancorporation Mortgage Company, commenced an action to foreclose on the mortgage in the Iowa District Court for Polk County with a caption of Hawkeye Bancorporation Mortgage Company. Plaintiff, v. Republic Realty Corporation. et al., Polk County Equity No. CE 025-14668.

7. Judgment was rendered for Statesman on August 6, 1987. The Findings of Fact, Conclusions of Law Order and Decree were attached to Statesman's motion to dismiss and motion to lift stay as Exhibit A.

8. The judgment was in the amount of \$663,352.90 with interest at 14.5% per annum from August 6, 1987, and judgment for costs in the amount of \$45,195.04, with interest at 10% per annum from November 5, 1987. With interest, the cumulative total of the judgment as of the hearing date is \$766,162.87.

9. The foreclosure judgment was entered against the mini-storage warehouse facility located at 139 S.W. 63rd Street, Des Moines, Iowa.

10. In addition to the Statesman's lien, other recorded liens against the property are in excess of \$147,000.00.

11. On its schedule A-3, Debtor lists approximately \$247,000.00 of unsecured claims. Most of these claims are

secured claims and arose because of mechanic's liens, mortgages, equipment lease agreements, and judgments. Larry A. Wood is listed as having a claim against Debtor for \$13,900.00.

12. Debtor filed its pro se voluntary petition under Chapter 11 on January 8, 1988, within one hour prior to the scheduled sheriff's sale of the foreclosed property.

13. The Iowa District Court found that Debtor was not only responsible for misappropriation of construction funds by John Ahern, but also found that Larry Wood, Debtor's principal officer, actively participated in the misconduct. The Court found that from a total of approximately \$614,000.00 in construction funds, Debtor and its agents diverted more than \$241,000.00 to their personal gain rather than to the payment of subcontractors or suppliers of material. The Court concluded that Debtor had mis-appropriated funds and had failed to act in good faith.

14. Debtor does not operate and manage the mini-warehouse and never intended to do so. Debtor had the property constructed pursuant to an agreement for sale. Debtor was not in the construction business and was not engaged in the management and operation of mini-storage facilities. It was primarily a real estate brokerage firm.

15. All of the rents and profits from the premises were assigned to Statesman as part of the security for the construction loan. When construction was sufficiently

complete for units to be rented, Debtor permitted an associate to receive rents until the Iowa District Court ordered otherwise. Subsequently, the State Court appointed a receiver who has been in possession and control of the mini-warehouse and has received the rents since its appointment.

16. Debtor's only asset, other than two desks and four chairs, is the mini-storage facility.

17. Debtor employs no persons other than its principal officers.

18. Debtor has attempted to sell the mini-warehouse for approximately two years. These efforts have netted contingent offers to purchase, the highest of which is \$760,000.00.

19. On schedule B-1 of its petition, Debtor listed the value on the mini-warehouse at \$690,000.00.

20. The income required from the mini-warehouse units to service the principal and interest of the Statesman note is \$8,181.40 per month or approximately \$98,000 per year.

21. The annual vacancy factor has averaged approximately 30% and the actual net income from the property has averaged approximately \$4,000.00 per month.

22. The real estate taxes on the property are currently \$7,500.00 per year based on a partial assessment. These taxes would increase to \$23,000.00 annually commencing in September 1988.

23. The receiver has an account of less than \$77,000.00 in total rents minus necessary expenses. These funds were collected during its management of the property over a period of 1 1/2 years.

24. The appraiser testified that the mini-warehouse, as built, would not produce as much income as the proposed facility as a result of plan modifications during the construction process.

DISCUSSION

Statesman seeks relief in the form of three alternative methods: dismiss pursuant to section 1112(b); lift stay pursuant to section 362(d); or provide adequate protection. Upon review of the pleadings, arguments of counsel, and briefs, the Court concludes Debtor's case should be dismissed on the following grounds.

The first ground for dismissal is Debtor's improperly filed petition. The filing of a Chapter 11 petition by a non-attorney is grounds for dismissal. In re 1433 Corp., 75 B.R. 55, 56 (Bankr. S.D. Fla. 1987). In 1433 Corp., the Court stated that "corporations cannot appear in federal courts through an officer unless that person is authorized to practice law." Id. at 56-57, citing In re Webster, 22 B.R. 11 (Bankr. Vt. 1982) and Bankruptcy Rule 9010(a) and the Advisory Committee Note to the Rule.

In the case at bar, Debtor's Chapter 11 petition was filed on January 8, 1988, by Larry Wood, Debtor's president.

However, Larry Wood is not authorized to practice law. Further, Debtor did not retain an attorney until forced to do so over one month later by the pending motions of Statesman. Therefore, since Debtor's Chapter 11 petition was filed by a non-attorney, Debtor's case should be dismissed.

Assuming arguendo that Debtor's petition was properly filed, the second ground for dismissal is Debtor's lack of good faith in filing its petition. Bankruptcy Code section 1112(b) lists ten non-exclusive "for cause" grounds on which the Court, upon request of a party in interest, can dismiss a case if in the best interests of creditors and the estate. While a lack of "good faith" in filing the petition is not included in the non-exclusive "for cause" list, the Bankruptcy Code imposes on debtors a duty of good faith in filing and maintaining bankruptcy actions. Matter of Little Creek Development Co., 779 F.2d 1068, 1072 (5th Cir. 1986); In re Kinney, 51 B.R. 840, 845 (Bankr. C.D. Cal. 1985). As a result, many courts have found a lack of good faith to constitute "cause" for dismissing the case. See Little Creek, 779 F.2d at 1072; In re Thirtieth Place, Inc., 30 B.R. 503, 505-506 (B.A.P. 9th Cir. 1983); Kinney, 51 B.R. at 845-846; Basin Elec. Power Co-op v. Midwest Processing Co., 47 B.R. 903, 908-10 (D.N.D. 1984), aff'd, 769 F.2d 483 (8th Cir. 1985)

The factors to be considered in determining Debtor's good faith are discussed in Little Creek, supra, where the Court stated:

Determining whether the debtor's filing for relief is in good faith depends largely upon the bankruptcy court's on-the-spot evaluation of the debtor's financial condition, motives, and the local financial realities. Findings of lack of good faith in proceedings based on ... 1112(b) have been predicated on certain recurring but non-exclusive patterns, and they are based on a conglomerate of factors rather than on any single datum. Several, but not all, of the following conditions usually exist. The debtor has one asset, such as a tract of undeveloped or developed real property. The secured creditors' liens encumber this tract. There are generally no employees except for the principals, little or no cash flow, and no available sources of income to sustain a plan of reorganization.... Typically, there are only a few, if any, unsecured creditors whose claims are relatively small. The property has usually been posted for foreclosure because of arrearages on the debt and the debtor has been unsuccessful in defending actions against the foreclosure in state court.... Bankruptcy offers the only possibility of forestalling loss of the property. There are sometimes allegations of wrongdoing by the debtor or its principals....

Little Creek, 779 F.2d at 1072-73 (emphasis added).

Applying the Little Creek factors to the facts in the case at bar, the Court concludes Debtor's lack of good faith in filing its petition is manifest. Debtor's only asset, other than two desks and four chairs, is the mini-storage facility. Statesman's lien, as well as numerous others, encumber the property. Debtor employs no persons other than its principals. Debtor has relatively few unsecured

creditors and most of the claims, in comparison to that of Statesman, are small. Debtor unsuccessfully opposed foreclosure in state court, and filed its pro-se chapter 11 petition within one hour of a sheriff's sale of the premises. Finally, not only does Statesman allege wrongdoing by Debtor, but the state court record through the testimony of Larry Wood and John Ahern establishes beyond doubt Debtor's wrongdoing. Therefore, since Debtor's lack of good faith in filing its petition is manifest, Debtor's case should be dismissed.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes Debtor's pro-se Chapter 11 petition was improperly filed by a non-attorney and thus should be dismissed.

FURTHER, the Court concludes Debtor's lack of good faith in filing its petition is "cause" to dismiss pursuant to 11 U.S.C. §1112(b).

IT IS ACCORDINGLY ORDERED that Statesman's motion to dismiss Debtor's Chapter 11 case is hereby granted.

IT IS FURTHER ORDERED that as a result of this dismissal, Statesman's motions for lifting of stay and for adequate protection are hereby overruled as being moot.

IT IS FURTHER ORDERED that Debtor pay to the United States Trustee the appropriate sum(s) required pursuant to 28 U.S.C. §1930(a)(6) within ten days of the entry of this

Order and simultaneously provide to the United States Trustee an appropriate Affidavit indicating the cash disbursements for the relevant period.

IT IS FURTHER ORDERED that the United States Trustee have judgment against Debtor for the sums due pursuant to 28 U.S.C. §1930(a) (6) upon said dismissal.

Dated this 21st day of July, 1988.

RUSSELL J.HILL
U.S. BANKRUPTCY JUDGE