

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of :
 :
T.P.M., INC., : Case No. 88-1592-C H
 : Chapter 11
Debtor. :
- - - - -

JUDGMENT

The issues of this proceeding having been duly considered by the Honorable Russell J. Hill, United States Bankruptcy Judge, and a decision having been reached,

IT IS ORDERED AND ADJUDGED that the SBA's motion to dismiss is granted.

IT IS FURTHER ORDERED that Debtor shall pay to the United States Trustee the appropriate sum required pursuant to 28 U.S.C. §1930(a)(6) within ten (10) days of the entry of this Order and simultaneously provide to the United States Trustee an appropriate affidavit indicating the cash disbursements for the period of July 11, 1988, through the date hereof.

IT IS FURTHER ORDERED that judgment is hereby entered against the Debtor and in favor of the United States Trustee for the sums due and owing pursuant to 28 U.S.C. §1930(a)(6).

Dated this 27th day of February, 1989.

Mary M. Weibel
Clerk of U.S. Bankruptcy Court

By: _____
Deputy Clerk

SEAL OF U.S. BANKRUPTCY COURT

ENTRY OF JUDGMENT

Dated: February 27, 1987

FINDINGS OF FACT

1. Debtor is a South Dakota corporation with its principal place of business at 4141 McDonald, Des Moines, Iowa. Debtor is engaged in the business of tortilla chip manufacturing and commenced business on October 27, 1987.

2. The officers of Debtor are as follows: President-Timothy P. Janusz; Vice President, Secretary -- Susan R. Janusz; and Treasurer -- Timothy P. Janusz.

3. Debtor's board of directors is composed of the following members: Timothy P. Janusz, Susan R. Janusz, and Maurice Webb.

4. debtor filed a Chapter 11 bankruptcy petition on May 13, 1988, in the United States Bankruptcy Court District of Nebraska. On July 11, 1988, venue was transferred to this Court.

5. On November 3, 1987, Debtor entered into a lease with Jacobson. This was a 5-year lease to lease the premises at 4141 McDonald, Des Moines, Iowa. The lease commenced December 1, 1987, and the first month's rental payment in the amount of \$2,500.00 was paid as a deposit.

6. Debtor has never assumed or rejected this lease.

7. At the time of the filing of the Chapter 11 petition, Timothy P. Janusz owned 100% of Debtor's stock.

On August 2, 1988, Timothy P. Janusz entered into an agreement to sell 100% of the shares of Debtor corporation to Foods of America, Ltd. Mr. Janusz, personally, also agreed to sell all the equipment, inventory, receivables, payables, office equipment, and supplies to Foods of America as a stock sale of Debtor corporation. There has been no transfer of the stock.

8. There has been no change in Debtor's board of directors or corporate officers. There was neither notice nor Court approval of the stock sale.

9. On August 19, 1988, SBA moved to dismiss this case. SBA has filed a claim in the amount of \$152,108.41 and is secured by furniture, fixtures, machinery and equipment used by Debtor in its business.

10. On August 31, 1988, Debtor, over the signature of Debtor's attorney, filed a notice that Debtor does not resist SBA's motion to dismiss.

11. Debtor's summary of debts and property states the total secured and priority debt owing as of the date of filing is \$166,301.28. Said summary states the value of all property totals \$182,118.00, which amount includes \$25,000.00 as the value assigned to a trade name formerly used by Debtor.

12. Debtor has not manufactured any tortilla chips or used any of the equipment located in the warehouse space since its filed its bankruptcy petition. There has been no

sales of merchandise since the filing of the petition and there is not an ongoing business.

13. Oil and water has leaked from Debtor's warehouse space which created a nuisance for other tenants of the warehouse. This condition caused an emergency order of September 2, 1988, to permit the lessor to enter the leased premises to inspect cleanup and repair any leakage of oil and water.

14. Debtor has not filed a plan of reorganization.

15. Debtor's monthly reports indicate it ceased operation in August 1988 and has not operated since that date.

DISCUSSION

Bankruptcy Code §112(b) sets out ten non-exclusive "for cause" grounds on which the Court, upon request of a party in interest, may dismiss a case if in the best interests of creditors and the estate, including:

- (2) inability to effectuate a plan;
- (3) unreasonable delay by the debtor that is prejudicial to the creditors. . .

11 U.S.C. 1112(b)(2) and (3). A dismissal for cause rests within the Court's sound discretion. In re Economy Cab & Tool Co., Inc., 44 B.R. 721, 724 (Bankr. D. Minn. 1984). The moving party has the burden of proof of showing "cause" exists. Id.

SBA's first ground for dismissal is §1112(b)(2) -- inability to effectate a plan. Under said section, the

movant must show the debtor lacks all ability to formulate or carry out a plan. Economy Cat, 44 B.R. at 725. If a debtor cannot submit a feasible plan, it does not have the ability to effectuate a plan. Moody v. Security Pacific Business Credit, Inc., 85 B.R. 319, 346 (W.D. Pa. 1988) (citing Clarkson v. Cooke Sales & Service Co., 767 F.2d 417 (8th Cir. 1985)). The Court can dismiss under said section if it determines it is unreasonable to expect that a plan can be confirmed. In re Zahniser, 58 B.R. 520, 537 (Bankr. D. Colo. 1986). The court need not wait until a confirmation hearing in order to determine whether debtor is unable to effectuate a plan. In re Chesmid Park Corp, 45 B.R. 153, 159 (Bankr. E.D. Va. 1984).

In the case at bar, Debtor filed a chapter 11 petition on May 13, 1988. To date, Debtor has failed to file a plan. As indicated by monthly reports for the months August-December, 1988, Debtor is no longer operating and has not operated since August of 1988. Since Debtor has not been operating for over six months, it is unreasonable to expect that a plan could be confirmed because Debtor has no cash flow to fund a plan. Therefore, the Court concludes SBA has met its burden of proof for dismissal under §1112(b)(2).

SBA's second ground for dismissal is §1112(b)(3) -- unreasonable delay by the debtor that is prejudicial to creditors. In determining whether delay has been unreasonable, the Court must look to the totality of the

circumstances. In re Galvin, 49 B.R. 665, 669 (Bankr. D.N.D. 1985). In addition, "[c]ourts will often combine §1112(b)(2) and (3) and hold that the Debtor made an unreasonable delay that is prejudicial to the creditors because the Debtor did not or cannot effectuate a plan within a certain time period." Moody, 85 B.R. at 351 (citations omitted).

In the case at bar, Debtor filed its bankruptcy petition over nine months ago. Since that time, Debtor has failed to file a plan. Given Debtor's lack of operation over the last six months, and corresponding lack of cash flow, any plan Debtor might file would not be feasible due to the lack of cash flow. Consequently, any plan filing would only cause further delay and this the Court refuses to allow. Based upon the totality of the circumstances, the Court finds there has been unreasonable delay by Debtor that is prejudicial to creditors. The Court, therefore, concludes dismissal is warranted under §1112(b)(3).

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes SBA has met its burden of proving "cause" to dismiss exists under both 11 U.S.C. §1112(b) (2) and (3).

FURTHER, the Court concludes dismissal of Debtor's case renders the other pending motions moot.

IT IS ACCORDINGLY ORDERED that SBA's motion to dismiss is granted.

IT IS FURTHER ORDERED that all other pending motions are overruled as being moot.

IT IS FURTHER ORDERED that Debtor shall pay to the United States Trustee the appropriate sum required pursuant to 28 U.S.C. §1930(a)(6) within ten (10) days of the entry of this Order and simultaneously provide to the United States Trustee an appropriate affidavit indicating the cash disbursements for the period of July 11, 1988, through the date hereof.

IT IS FURTHER ORDERED that judgment is hereby entered against the Debtor and in favor of the United States Trustee for the sums due and owing pursuant to 28 U.S.C. §1930(a)(6).

Dated this 27th day of February, 1989.

Russell J. Hill
U.S. Bankruptcy Judge