

In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:)	
)	
TOTAL TRANSPORTATION)	Chapter 7 Case
SERVICES, INC.))	Number <u>97-20328</u>
)	
<i>Debtor</i>)	
)	
)	
TOTAL TRANSPORTATION)	
SERVICES, INC.))	
)	
<i>Movant</i>)	
)	
)	
v.)	
)	
LAKELAND MOTOR FREIGHT,)	
INC, et al.))	
)	
<i>Defendants</i>)	

ORDER

On March 18, 1997, the above-captioned involuntary Chapter 7 petition was filed against Total Transportation Services, Inc. (hereinafter "Debtor") by the following creditors: Lakeland Motor Freight, Inc., Hub Trucking Inc., J-Mar Trucking Inc., Trucks for You, Inc., and S.G.T. 2000, Inc. On April 11, 1997, Debtor responded

contesting the petition and, in the alternative, requesting a conversion to Chapter 11 if the Court granted petitioner's involuntary petition. A hearing was held on May 15, 1997. At the hearing, Debtor declined to contest further the filing of the petition and instead sought conversion of its case to one under Chapter 11 pursuant to 11 U.S.C. Section 706(a). Without deciding whether Debtor held an absolute right to convert its bankruptcy to Chapter 11, this Court held a preliminary hearing to consider evidence both in support of and in opposition to Debtor's Motion.¹ The relevant facts are as follows.

Debtor operates a national trucking brokerage company which acts as a conduit between shippers and trucking companies. Debtor owes approximately \$400,000.00 and holds accounts receivable in the approximate amount of \$150,000.00.² Debtor is owned solely by Mr. Olin Wooten who also owns 100% of Olin Wooten Transport Co., Inc., a regional trucking concern. Debtor leases its employees and business premises from Olin Wooten Transport Co., Inc. The objecting parties contend that Olin Wooten Transport Inc., is the alter-ego of Debtor and that Debtor has fraudulently concealed assets; whereas, Debtor asserts that the companies are completely separate entities and that its business practices represent the industry norm.

¹ In essence, the hearing was held pursuant to 11 U.S.C. 1112(b) to determine whether Debtor's Chapter 11 should be reconverted immediately as a result of Debtor's allegedly fraudulent activities.

² Mr. Olin Wooten, Debtor's president, testified that much of this debt is owed by trucking companies which have filed for bankruptcy.

The evidence revealed further that Debtor ceased operating in December 1996 and has not operated since; however, Debtor also presented evidence supporting a preliminary finding that Debtor has the financial backing to resume operations and start-up quickly in an industry which requires little capital investment.³ Debtor's checks, issued to both employees and clients, were from the account of Total Transportation, Inc., although the name of Olin Wooten Transport Co., Inc., was identified below the signature line. Debtor's president, Olin Wooten, testified that this apparent commingling was instead an error committed by the printer of the checks and that the funds of the two companies had not been commingled. At the time of filing, Debtor owed Olin Wooten Transport Co., Inc., approximately \$80,000.00.

At the conclusion of the hearing, the matter was taken under advisement to review the applicable authorities and to permit the parties an opportunity to brief the issue. After review, I now hold that pursuant to 11 U.S.C. Section 706(a) Debtor may convert its case to Chapter 11 and that the motion to reconvert pursuant to 11 U.S.C. Section 1112(b) by the objecting creditors will not be entertained without the necessary notice and hearing to consider Section 1112(b)'s enumerated factors.⁴ See In re Mead, 28 B.R. 1000, 1002-03 (E.D.Pa. 1983) (holding that despite evidence of poor accounting

³ Mr. Olin Wooten testified that he intended to infuse no more than \$100,000.00 into the business and that it would not take much more than \$20,000.00 to begin operating.

⁴ It is undisputed that Debtor has satisfied the other requirements of Section 706(a) and the only issue presented is whether this Court may immediately entertain a motion to reconvert pursuant to Section 1112(b).

practices court could not issue motion to reconvert without notice to the parties and an opportunity to be heard).

Although this Court perceives of circumstances where a debtor should not be permitted to use Section 706(a) in order to continue fraudulent practices or gross mismanagement absent a likelihood of reorganization, in the absence of clear and convincing evidence to support such an objection, I hold that Debtor should be permitted to exercise its one-time right to convert pursuant to 11 U.S.C. Section 706(a) and that any reasonable inferences should be decided in favor of the Debtor. *See In re Starkey*, 179 B.R. 687, 694 (Bankr.N.D.Okl. 1995) (stating that the "[c]ourt will grant conversion under § 706(a) readily - but not so readily as to allow and condone abuse"). Considering the facts of this case, the evidence presented by the objecting creditors supports only a circumstantial suggestion that Debtor may have engaged in fraudulent acts which at this time does warrant the denial of Debtor's motion pursuant to Section 706(a). Additionally, Debtor proffered evidence in support of its ability to reorganize that sufficiently satisfied any burden which it may have had to demonstrate a likelihood of reorganization during this preliminary hearing. Therefore, Debtor's Motion to convert from Chapter 7 to Chapter 11 is hereby granted.⁵

⁵ This Order is only a preliminary finding denying relief pursuant to 11 U.S.C. 1112(b) without the requisite hearing and notice. The above objecting creditors shall not be prejudiced from subsequently bringing a motion to convert which will be heard, if necessary, in the normal course or on an expedited basis as the circumstances may warrant.

O R D E R

Pursuant to the foregoing, IT IS THE ORDER OF THIS COURT that Debtor's Chapter 7 case 97-20328 be converted to one under Chapter 11. The Clerk will issue an order for relief under Chapter 11, together with all other appropriate notices.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of May, 1997.