

**FILED**

Samuel L. Kay, Clerk  
United States Bankruptcy Court  
Augusta, Georgia  
By jpayton at 5:16 pm, Jun 17, 2011

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Dublin Division

IN RE:	)	Chapter 11 Case
	)	Number <u>11-30021</u>
WILLIAM M. FOSTER, JR.	)	
	)	
Debtor	)	
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WILMINGTON PLANTATION OWNERS'	)	
ASSOCIATION AND JEFFREY H.	)	
SHEFFER, PATRICIA STEWART, THE	)	
DELTA GROUP, INC., RICHARD D.	)	
GRINER, H.B. MARTIN, K.W. MARTIN	)	
MICHAEL S. O'NEAL AND DONNA H.	)	
O'NEAL	)	
	)	
Movants	)	
	)	
v.	)	
	)	
WILLIAM M. FOSTER, JR.	)	
	)	
Respondent	)	
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ORDER

Before the Court is a motion to dismiss filed by the Wilmington Plantation Owners' Association ("WPOA") which has been joined by Jeffrey H. Sheffer, Patricia Stewart, The Delta Group, Inc., Richard D. Griner, H.B. Martin, K.W. Martin, Michael S. O'Neal, and Donna H. O'Neal (collectively, "Homeowners") in support

of the motion to dismiss.<sup>1</sup> William M. Foster, Jr. ("Debtor") and Wilmington Plantation LLC ("Wilmington Plantation"), an unsecured creditor, oppose the motion to dismiss as do two secured creditors, Empire Financial and Wells Fargo. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (O). The Court has jurisdiction pursuant to 28 U.S.C. §1334. For the following reasons, the motion is granted.

**FINDINGS OF FACT**

Debtor operates many businesses in his individual name. He leases real property to nursing homes, leases apartments, leases a golf course/country club, and developed a condominium and related project on the site of the old Oglethorpe Hotel ("Condominium Project") in Savannah. This bankruptcy filing has been precipitated by disputes involving the Condominium Project. There is a long six year litigation history between Debtor, WPOA, the Homeowners, Wilmington Plantation and other individual unit owners. More than ten lawsuits have been filed in connection with the Condominium Project with many of them being consolidated and some being dismissed. Basically, all the suits can be divided into three broad categories. First, there is a dispute with the WPOA, the

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<sup>1</sup> Timothy M. Kean and Marie Goulet also joined in WPOA's motion to dismiss; however, they failed to appear at the hearing in prosecution of the their motion. Dckt. No. 107.

Homeowners, and individual unit owners dealing with the exterior of the condominiums and common areas. Next, there is the dispute with Wilmington Plantation dealing with real estate title issues. Third, there is a dispute with the Homeowners and the individual unit owners dealing with damage to the interiors of the condominium units.

WPOA, the Homeowners, Wilmington Plantation, and the individual unit owners, as well as, Debtor are purported parties to a consent order entered on September 19, 2006 in Superior Court of Chatham County, CV05-0251-KA ("September Consent Order") which amends a prior consent order entered in June, 2005. Pursuant to the June 2005 Consent Order, Debtor conveyed a lien on Condominium Unit 900 ("the penthouse") to the Homeowners to secure his obligation to make certain repairs to the Condominium Project. Pursuant to the September Consent Order, once Debtor deposits the full amount of repairs into the registry of the court, the Homeowners' lien on the penthouse will be released. According to Debtor's statement of financial affairs Debtor has deposited approximately \$1,010,800.00 into the registry of the Superior Court of Chatham County pursuant to the September Consent Order. Statement of Financial Affairs, Dckt. No. 47, item no. 6.

The September Consent Order has governed the relationship of Debtor, WPOA, and the Homeowners for the last several years.

Pursuant to the September Consent Order, Debtor agreed to pay for certain repairs to the Condominium Project as specified by an agreed-upon engineer. Then, the work specified by the engineer was to be performed by a general contractor selected by Debtor. Consent Order, ¶5, Dckt. No. 91, Ex. A. Pursuant to the September Consent Order, and after much litigation, an engineering firm was selected and specified many of the needed repairs. In accordance with the September Consent Order, Debtor selected the general contractor to perform the work. According to WPOA, the general contractor's contract has a base price of \$3.3 million with a possible total as high as approximately \$5 million, depending on what damage is found once construction begins. Debtor argues there is no ceiling on the repair costs and Debtor's liability keeps escalating due to change orders. There is no doubt that the passage of time is allowing the Condominium Project to deteriorate further. According to Debtor, his liability has increased from approximately \$641,000.00 in 2005 to over \$5 million in 2010 and continues to grow. Debtor filed his chapter 11 bankruptcy petition on January 19, 2011, just before WPOA formally executed the contract with the general contractor.

Debtor's bankruptcy schedules reflect he has approximately \$50,642,905.53 in total assets and \$27,662,614.35 in liabilities. Summary of Schedules, Dckt. No. 42. However, this liability figure is misleadingly low because Debtor's schedules properly reflect as

"unknown" the unliquidated, disputed claims of the Homeowners, WPOA, Wilmington Plantation, and other individual condominium unit owners.

Debtor also argues his potential liabilities exceed his assets. Debtor has approximately \$50 million in assets and approximately \$52 million in potential liabilities. To date, the claims register reflects \$24,441,663.16 in unsecured claims, \$27,140,370.54 in secured claims and \$520,234.34 as priority claims for a total of \$52,102,268.04 in total amount claimed. As discussed infra many of the claims are duplicative and unliquidated and disputed claims. Approximately \$23.9 million of the unsecured claims are the unliquidated, disputed claims involving the Condominium Project. Wilmington Plantation has filed the largest unliquidated, unsecured claim in the amount of \$21,138,884.00 and opposes the motion to dismiss. Claim No. 15. The non-governmental bar date was May 18, 2011; however, an extension has been given to WPOA and the Homeowners; and several individual condominium unit owners also have requested an extension to file their claims. WPOA's claim is anticipated to be approximately \$5,000,000.00. Debtor acknowledges many of the claims are duplicative and WPOA and Debtor both contend Wilmington Plantation's \$21 million is barred by the global settlement contained in the September Consent Order.

Debtor earns approximately \$639,672.00 a month and expends around \$543,178.00 a month leaving a net monthly income of

\$96,494.00. Schedules I and J, Dckt. No. 46. Debtor is self-employed and his income except for his social security benefits, consists entirely of income from operations on his real property.

Id. Debtor leases his real property to several nursing homes, leases apartment complexes and leases a country club which generate substantial rental income. His schedules reflect more than \$13 million dollars in equity in his real and personal property.

WPOA and the Homeowners argue Debtor filed his bankruptcy petition solely as a litigation tactic to frustrate and delay their efforts to repair the Condominium Project. As evidence of bad faith, they aver: Debtor was experiencing no financial distress prior to filing; Debtor filed the bankruptcy petition just before the WPOA could formally execute the contract; after years of litigation and after exhausting many appeals in state court the repairs were about to begin; they contend there is no legitimate purpose in the filing as Debtor has stated the bankruptcy was filed because the bankruptcy court offers a perfect venue for claims resolution regarding the Condominium Project. WPOA and the Homeowners aver this is not a reorganization but an attempt to recommence the litigation that has been ongoing for 6 years.

As further evidence of bad faith, WPOA and the Homeowners point to purported deficiencies in Debtor's schedules. WPOA and the Homeowners argue Debtor failed to disclose over \$500,000.00 held in

his Regions Bank Business Money Market Account. Debtor avers this money is security deposits which he holds for others; however, WPOA points out that item no. 14 on Debtor's Statement of Financial Affairs does not disclose any property being held for another. Statement of Financial Affairs, Dckt. No. 47. In further response, Debtor states his schedule B clearly states, "Debtor's Interest is listed" indicating that other entities or persons may have an interest in the account. Schedule B, Dckt. No. 43., Debtor contends this omission from the Statement of Financial Affairs at most is a technical error and not grounds for dismissal.

Debtor also failed to list January 2011 transfers of condominium Units 601 and 602 from Debtor to his limited liability company, Thousand Oaks Properties, LLC ("Thousand Oaks"). These transfers were approximately 15 days prior to filing of the bankruptcy petition. WPOA and the Homeowners also contend Debtor's valuation of his \$500,000.00 interest in Thousand Oaks is an undervaluation since Debtor foreclosed on the property in January 2011 bidding \$1,000,000.00 for the two units only weeks before the filing of the bankruptcy petition.

In response, Debtor avers his schedules show his ownership of Thousand Oaks. These two condominium units are owned by Thousand Oaks, not the Debtor. He avers the omission of the transfers to Thousand Oaks in his statement of financial affairs is a technical

error and not grounds for dismissal.

In August 2006, Debtor transferred two other units, Unit 405 and the penthouse to a newly created limited liability company, EKL Georgia LLC ("EKL") and Debtor took back a promissory note on each unit which were due and payable August 2007. Exs. D and E, Dckt. No. 105. As previously discussed, the penthouse is encumbered by the Homeowner's lien. Debtor is not a member or owner of EKL, but EKL is owned by several of Debtor's children. Debtor's schedules do not reflect Debtor has collected on the note as Debtor's schedule B reflects a \$2.1 million dollar note receivable from EKL secured by the penthouse and Unit 405 which is the original balance of the notes in August 2006. Schedule B, Dckt. No. 43. The Homeowners argue Debtor formed EKL, as a sham, as he has never received any payments from EKL on the \$2,100,000.00 note owed to Debtor. They aver Debtor should have listed his beneficial, equitable interest in the units in his bankruptcy schedules. As evidence of this sham, the WPOA and the Homeowners point to the fact that Debtor purports to not have any ownership interest in EKL; but, a check for \$3,478.69 from his account was prepared on November 11, 2010, to "Chatham County Tax Com" for "Unit 405, 2010-7334." Statement of Financial Affairs, Dckt. No. 47, p. 19. However, this check was subsequently voided. On November 12, 2010, another check was written from Debtor's account for \$36,000.00 to EKL with the

notation on the check stub "for lease on unit 405." Statement of Financial Affairs, Dckt. No. 47, p. 47. Subsequently, a third check in amount of \$36,000.00 was written November 15, 2010, which indicates it was paid to EKL for "membership"; however, this check is voided. Statement of Financial Affairs, Dckt. No. 47, p. 47. Debtor's schedules do not disclose any EKL lease, and WPOA and the Homeowners contend the \$36,000.00 corresponds to the ad valorem taxes due on the units. Schedule G, Dckt. No. 45. Debtor disagrees that EKL was formed as a sham and point out that EKL was properly created and the transfer was subordinated to the Homeowner's lien. This transfer was in 2006, not on the eve of the bankruptcy. Debtor claims he does not have any interest in EKL nor does he own the units and therefore, there was nothing to disclose in his schedules.

Furthermore, Debtor argues he has filed his bankruptcy petition in good faith and for a valid bankruptcy purpose and he contends his potential liability exceeds the value of his assets. As to utilizing the bankruptcy court for claims resolution, Debtor counters that the bankruptcy court is the perfect forum to litigate the claims filed against Debtor and to "bring order to the chaos." Debtor desires to utilize the bankruptcy court's jurisdiction to bring all pending lawsuits and disputes into one forum and then pay the claims through the orderly process of a chapter 11 plan of reorganization. Debtor states he filed bankruptcy because the state

courts have failed to: decisively determine title to the common areas and building pads around the Condominium Project; and he states he does not have sufficient funds on hand to pay for the repairs which continue to escalate daily with no end in sight; and he asserts even the fulfilment of the repairs required by the September Consent Order may not end his liability, as several parties claim the September Consent Order is not binding upon them, including Wilmington Plantation and numerous homeowners. WPOA and the Homeowners dispute this claim and contend the September Consent Order binds all the parties.

WPOA and the Homeowners aver Debtor has plenty of cash to pay for the repairs of the Condominium Project. WPOA contends Debtor nets, after all debts have been paid, approximately \$100,000.00 per month. Debtor's schedules also reflect about \$1.33 million in cash in his bank accounts and he has over a million dollars in the registry of the state court to help pay for the repairs and his statement of financial affairs list several gifts of cash that are regularly made to family members. Debtor's schedules also reflect more than \$13,000,000.00 in equity in his real and personal property.

Two of Debtor's secured creditors appeared at the hearing in support of the bankruptcy and in opposition to the motion to dismiss. These lenders point out that Debtor has substantial loans

maturing at the end of the year, and they argue the secured creditors may decline to renew Debtor's loans if Debtor's bankruptcy case is dismissed because the piecemeal judgments against Debtor would adversely affect their collateral.

**CONCLUSIONS OF LAW**

Pursuant to 11 U.S.C. §1112,<sup>2</sup> a chapter 11 case may be dismissed for "cause" if the petition was not filed in good faith. In re Phoenix Piccadilly, Ltd., 849 F.2d 1393, 1394 (11th Cir. 1988); Albany Partners, Ltd. v. Westbrook (In re Albany Partners, Ltd.), 749 F.2d 670, 674 (11th Cir. 1984). "The prospects of a successful reorganization do not override, as a matter of law, the finding of bad faith." In re Phoenix Piccadilly, Ltd., 849 F.2d at 1394.

There is no particular test for determining whether a debtor has filed a petition in bad faith. Instead, the courts may consider any factors which evidence 'an intent to abuse the

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<sup>2</sup> 11 U.S.C. §1112(b)(1) states in pertinent part:

Except as provided in paragraph (2) and subsection (c), on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

judicial process and the purposes of the reorganization provisions' or, in particular, factors which evidence that the petition was filed 'to delay or frustrate the legitimate efforts of secured creditors to enforce their rights.'

Id. (internal citations omitted). Movants have the burden of proof to establish by a preponderance of the evidence sufficient cause justifying dismissal. In re Bal Harbour Club, Inc., 316 F.3d 1192, 1195 (11th Cir. 2003); In re Vallambrosa Holdings, LLC., 419 B.R. 81, 88 (Bankr. S.D. Ga. 2009). While there is no set test for bad faith, the Eleventh Circuit enumerated several factors for courts to consider when determining whether a case is filed in bad faith:

- (i) whether the debtor has only one asset;
- (ii) whether the debtor has few unsecured creditors whose claims are small in relation to the claims of the secured creditors;
- (iii) whether the debtor has few employees;
- (iv) whether the debtor's single asset is the subject of a foreclosure action as a result of arrearages on the debt;
- (v) whether the debtor's financial problems involve essentially a dispute between the debtor and the secured creditors which can be resolved in the pending state court action; and
- (vi) whether the timing of the Debtor's filing evidences an intent to delay or frustrate the legitimate efforts of the debtor's secured creditors to enforce their rights.

Id. These non-exclusive factors allow the court to examine the totality of the facts and circumstances of each case to determine

whether a case has been filed in bad faith. In re Vallambrosa Holdings, LLC., 419 B.R. at 86.

Although there is no precise test for determining bad faith, courts have recognized factors which show an 'intent to abuse the judicial process and the purposes of the reorganization provisions'. . . . These factors include the timing of the filing of the petition . . . whether the debtor is 'financially distressed,'; whether the petition was filed strictly to circumvent pending litigation, and whether the petition was filed solely to reject an unprofitable contract.

In re Dixie Broad. Inc., 871 F.2d 1023, 1027 (11th Cir. 1989) (internal citations omitted). Addressing each of the factors and considering the totality of the circumstances:

The case sub judice is not a single asset case, rather, Debtor has many assets. He is a very successful businessman who has acquired and developed real property into: apartment complexes, condominiums, leaseholds for nursing homes, and a golf course/country club.

While this is not a single asset case, Debtor's financial problems and his reason for filing bankruptcy basically involve a single asset, the Condominium Project. These disputes involve numerous lawsuits that fall into three basic categories: 1) title to the underlying fee of a portion of the property; 2) construction-related issues regarding the exteriors of the units and common areas; and 3) construction-related issues involving the interiors of

the units. The parties pursuing the various positions are: the Wilmington Plantation, the WPOA, and the Homeowners, respectively. Their respective interests are aligned as to certain issues and diametrically opposed on others. WPOA and the Homeowners contend this is a bad faith bankruptcy filing in an effort to delay the final adjudication of the state court proceeding that has been pending for more than six years. Conversely, Debtor and Wilmington Plantation contend federal court is the appropriate forum to obtain jurisdiction to properly address all the potential claimants.

To date, unsecured creditors have filed claims of approximately \$24 million, more than \$23,000,000.00 of which involves the Condominium Project. In addition, it is expected that the WPOA will file a claim of approximately \$5,000,000.00 for the outstanding repairs to the exteriors and common areas. There also are claims of numerous individual unit owners. The parties acknowledge many of the unsecured claims are duplicative both on their face<sup>3</sup> and by the nature of the repairs. Namely, if the work to the exteriors and common areas is completed, it will reduce the overall claims.

Of the claims filed, Wilmington Plantation's \$21 million dollar claim constitutes the lion's share of the unliquidated,

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<sup>3</sup> For example, Goulet and Kean jointly own one unit, but have each filed claims for \$750,000.00. Claim Nos. 18 and 19.

unsecured claims. Wilmington Plantation filed suit against Debtor in the Middle District of Georgia alleging in part, a breach of warranty, contending Debtor did not own the unencumbered fee conveyed to the Wilmington Plantation because the Declaration of Condominiums executed by Debtor previously conveyed the land to condominium unit owners. At various times, both Debtor and WPOA have contended Wilmington Plantation's claim is barred by the global settlement reached in the September Consent Order. The September Consent Order does address title issues and does contain a global settlement clause, but we have insufficient evidence to address the merits of these allegations. Nevertheless, rather than being small in comparison, if allowed these unsecured claims actually may exceed the claims of secured creditors who have filed claims of approximately \$27 million. However, as this is an individual chapter 11 case, in order for the plan to be confirmed over the objection of an unsecured creditor, the plan must meet 11 U.S.C. §1129(a)(15).<sup>4</sup> Furthermore, in order for the plan to be confirmed

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<sup>4</sup> 11 U.S.C. §1129(a)(15) states in pertinent part:

(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan--

(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less

over the objection of an impaired class the plan arguably must satisfy the absolute priority rule. See In re Steedley 2010 WL 3528599 \*1 (Bankr. S.D. Ga. August 27, 2010) (upon objection from an impaired unsecured claimant, "for a plan to be found 'fair and equitable,' it must, if unsecured claims are not to be paid in full, satisfy the absolute priority rule of 11 U.S.C. §1129(b)(2)(B)(ii)."). This somewhat diminishes the importance of this distinction in the totality of the circumstances analysis.

While Debtor's financial issues generally do not involve his secured creditors, the bad faith inquiry is not limited to cases involving a dispute between a debtor and a secured creditor. See In re Bal Harbour Club, Inc. 316 F.3d at 1192 (a debtor's lack of good faith in corporate governance may cause dismissal); In re SGL Carbon, 200 F.3d 154 (3d Cir. 1999) (unsecured creditors committee moving for dismissal); Furness v. Lilienfield, 35 B.R. 1006 (D. Md. 1983) (RICO claimant moving for dismissal); In re Martin, 51 B.R.

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than the amount of such claim; or

(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

490, 493-94 (Bankr. M.D. Fla. 1985) (governmental entity moving for dismissal due to bad faith).

Representatives of two of Debtor's secured creditors appeared at the hearing and opposed the motion to dismiss. Both noted that Debtor operates numerous significant businesses in his individual name. Unlike the more customary structure where liability exposure is generally limited through the operation of different ventures via separate and distinct businesses, each of Debtor's operations impact the entire business. A judgment against Debtor attaches to all his property, including the properties secured by these creditors' liens. While such a judgment may be subordinate to the secured lender's position it adversely affects the overall equity and strength of the lender's position and generally is an event of default under the terms of the loan documents. Both secured creditors argued the chapter 11 structure provides a statutory framework to help compartmentalize this exposure via the oversight through the operation of the committees,<sup>5</sup> cash collateral orders, the involvement of the U.S. Trustee, and the

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<sup>5</sup> At the hearing, WPOA complained that Debtor's listing their claims as "unknown" prevented them from receiving notice and an opportunity to serve on an unsecured committee. While WPOA did not receive the notice that goes to Debtor's 20 largest unsecured creditors, this did not prevent them from forming and serving on a committee or contacting the United States Trustee about serving on a committee. See 11 U.S.C. §1102. Furthermore, there is no doubt WPOA received timely notice to the bankruptcy filing.

Court.

These secured creditors also argue several of the loans mature within the next 12 months. Both voiced concerns whether the lenders would renew the loans if this case is dismissed and the lawsuits are able to resume. Notwithstanding these concerns, Debtor was current in his obligations as of the petition date. Many of Debtor's secured creditors knew or should have known of the pending litigation as several of the loans have been made or modified during the pendency of the litigation. See Claim Nos. 4, 5, 7, 9, 10, 12, 13, and 25. There is no evidence the lawsuit has adversely affected Debtor's relationship with his secured creditors.

Next, Debtor has only a few employees. Debtor is an individual and to a large degree this is a family run business. His operating reports do not reflect large amount of money being expended on employee salaries.

There has been no evidence suggesting any of Debtor's properties are subject to any threatened foreclosure action. Nevertheless, there is an acknowledgment that the state court proceedings had reached a critical stage after more than six years of litigation. Debtor had selected the general contractor and the WPOA was on the verge of executing the construction contract which would have commenced repairs at the Condominium Project.

The most troublesome aspect of this case is the timing of

the filing of the bankruptcy petition. While, there is no statutory requirement that a debtor be financially destitute or insolvent at the time of filing, bankruptcy reorganizations are "to be resorted to by business entities which are experiencing some type of financial difficulty." In re the Bible Speaks, 65 B.R. 415, 426 (Bankr. D. Mass. 1986); In re Dixie Broad., Inc., 871 F.2d at 1028 (stating "[t]he Bankruptcy Code is not intended to insulate financially secure sellers or buyers from the bargains they strike."); In re Cohoes Indus. Terminal Inc., 931 F.2d 222, 228 (2nd Cir. 1991) (stating "[a]lthough a debtor need not be *in extremis* in order to file such a petition, it must, at least, face such financial difficulty that, if it did not file at that time, it could anticipate the need to file in the future."). Some bankruptcy courts have allowed petitions to be filed in the face of pending litigation that posed a serious threat to the financial stability of the debtor. See In re A.H. Robins Co., 89 B.R. 555, 557 (Bankr. E.D. Va. 1988) (Dalkon shield); In re Johns-Manville, 36 B.R. 727 (Bankr. S.D.N.Y. 1984) (asbestos). The Third Circuit distinguished cases like A.H. Robins Company and In re Johns-Manville noting that in those cases judgments/settlements had already been entered causing financial distress and the potential claimants were unknown and litigation could continue for decades to come. In re SGL Carbon, Corp., 200 F.3d at 164, n. 15, 169. In this case, Debtor

has been able and continues to be able to pay his debts as they become due.

Because there was no financial distress, the issue is whether the petition was filed to gain a tactical advantage in the litigation. Id. Debtor filed this case to bring "order out of chaos" from the state court proceedings. Movants claim these state court proceedings were close to asserting order. The contract with the general contractor was about to be executed and work was to commence. The issue of whether the September Consent Order's global settlement barred Wilmington Plantation's claim was a threshold issue to be addressed for the Middle District of Georgia action to proceed.

Debtor basically wants to use the bankruptcy system to re-work the terms of the September Consent Order entered into in 2006. This is not a proper purpose of the bankruptcy system. See In re Waldron, 785 F.2d 936 (11th Cir. 1986) (financially secure chapter 13 debtor's petition was filed solely to reject an option contract and therefore was filed in bad faith); In re SGL Carbon Corp., 200 F.3d 154 (3d. Cir. 1999) (dismissing case where debtor was financially healthy, making payments as due and filed bankruptcy because they could not expeditiously settle a lawsuit and bankruptcy would increase the pressure to settle); In re Argus Group 1700, Inc., 206 B.R. 757, 765-66 (E.D. Pa. 1997) (finding bad faith where petition

was filed to obtain alternative forum for dispute resolution); In re Martin, 51 B.R. 490 (Bankr. M.D. Fla. 1985) (dismissing case where the debtors' assets were greater than liabilities and the court found was filed to frustrate the efforts of the county government in pursuing a claim in state court against debtors); Furness v. Lilienfield, 35 B.R. 1006 (D. Md. 1983) ("The Bankruptcy provisions are intended to benefit those in genuine financial distress. They are not intended to be used as a mechanism to orchestrate pending litigation.").

At this point, Debtor has no need of reorganization under the Bankruptcy Code, but rather filed to re-litigate. See In re Wally Findlay Galleries (New York) Inc., 36 B.R. 849 (Bankr. S.D.N.Y. 1984) (the fact that the debtor was unable to propose a meaningful plan of reorganization until its litigation with two creditors was resolved evidenced that the debtor sought to use bankruptcy "not to reorganize, but to re-litigate."). At this point, I find this case was not filed for a legitimate bankruptcy purpose but rather the case was filed as a tactical litigation decision and therefore must be dismissed. See In re SGL Carbon Corp., 200 F.3d 154 (3d Cir. 1999) (dismissing case where debtor was financially healthy, making payments as due and filed bankruptcy because they could not expeditiously settle a lawsuit and bankruptcy would increase the pressure to settle); In re Argus Group 1700,

Inc., 206 B.R. 757, 765-66 (E.D. Pa. 1997) (finding bad faith where petition was filed to obtain alternative forum for dispute resolution); In re Martin, 51 B.R. 490 (Bankr. M.D. Fla. 1985) (dismissing case where the debtors' assets were greater than liabilities and the court found was filed to frustrate the efforts of the county government in pursuing a claim in state court against debtors); In re Purpura, 170 B.R. 202 (Bankr. E.D.N.Y. 1994) (dismissing petition filed for the purpose of frustrating the debtor's former wife's attempts to collect on domestic support obligations).

In this case, Debtor was current with all his creditors at the time the petition was filed. At the hearing, Debtor's attorney proffered that Debtor has the ability to pay his debts once a set amount is determined. Tr. p. 55, lines 5-12. This shows a desire to re-litigate the September Consent Order. Debtor has the ability to pay but just does not know how much he needs to pay. After more than six years of vigorous litigation, just prior to the execution of the contract with the general contractor, Debtor filed for bankruptcy.

Debtor argues that while he may be solvent, he lacks liquidity to pay \$5,000,000.00 for the repair work and he notes his liability is not limited to \$5,000,000.00. However, Debtor's schedule B reflects approximately \$1.3 million in cash in various

bank accounts and according to schedule I, Debtor nets around \$96,000.00/month income after expenses. Furthermore, Debtor's statement of financial affairs lists approximately \$1 million as being held in the registry of the court of Chatham County Georgia which according to the Consent Order is to be used to pay the cost of repairs. Debtor's schedules also reflect significant equity in his personal and real properties, this is not a typical "land rich, cash poor" debtor. On the whole, Debtor's business operations continue to be profitable. While Debtor is correct this monthly income would help fund his chapter 11 reorganization, it also highlights the purpose of the bankruptcy filing is to obtain a tactical advantage in the underlying litigation involving the Condominium Project.

There clearly is no requirement that a debtor has to wait until a massive judgment is entered before filing for bankruptcy protection; however, in cases that allow the filing there was evidence of "serious financial and/or managerial difficulties at the time of filing." In re SGL Carbon Corp., 200 F.3d at 164; In re Waldron, 785 F.2d 936, 939 (11th Cir. 1986). As previously discussed, there was no imminent financial distress. The parties acknowledge Debtor's obligation on the repairs ranges from \$3 million to in excess of \$5 million dollars. There is no indication that \$5 million would be immediately due and payable. Furthermore,

at this point, the viability of the \$21 million claim of the Wilmington Plantation is merely speculative and unresolved, as are the other homeowners claims. While debtors are not required to be insolvent or to liquidate, they are required to be under serious financial distress. At this point in the proceedings, Debtor has not reached that threshold. The claims of Wilmington Plantation and many of the homeowners are contingent. No contract has been signed. Debtor has significant cash on hand and available and has not shown an inability to meet his obligations as they come due.

The Piccadilly factors are not exhaustive and while the factors provide a framework, the actual analysis requires more than a check-list approach. In re Vallambrosa Holdings, LLC, 419 B.R. 81, 86 (Bankr. S.D. Ga. 2009). The proper inquiry for bad faith is whether Debtor has a legitimate and proper purpose for filing his chapter 11 case. In re Martin, 51 B.R. at 495. Given the totality of the circumstances, at this time, I find the bankruptcy filing is an attempt to obtain an alternative forum for the resolution of the Condominium Project litigation.

Movants contend other evidence of Debtor's bad faith involve the discrepancies in his bankruptcy schedules. Debtor has failed to disclose the transfer of two condominium units to one of his limited liability companies, Thousand Oaks, less than two weeks before he filed his bankruptcy petition. Debtor lists his value in

Thousand Oaks as worth \$500,000.00 when just a few weeks before filing, he bid \$1,000,000.00 for these two units at a foreclosure sale. Second, Debtor undervalued a bank account by approximately \$500,000.00. When questioned about this money, Debtor responded that it was not his property, rather it was security deposits he holds and therefore is not his money. He further reiterates that he noted "Debtor's Interest is listed" in the bank account on schedule B. However, even if the money was held for another, Debtor acknowledges he failed to properly list this on item 14 of his Statement of Financial Affairs. Lastly, the movants contend Debtor has failed to list his interest in the penthouse unit and unit 405. Debtor states he has no interest in these units as they are owned by EKL; however, movants argue the evidence suggests otherwise. Debtor's schedules show he has never collected on the \$2.1 million dollar note due and owing from EKL which has matured. No foreclosure action is listed in Debtor's statement of financial affairs. Checkstubs attached to the statement of financial affairs appear to indicate Debtor is paying the taxes on these units for EKL. One \$36,000.00 check states it is for "lease of unit 405"; however, Debtor's schedules failed to disclose a lease on Unit 405. While these discrepancies do not control my analysis they are noteworthy.

Debtor states his good faith is shown because he has the means to fund a plan as he has net monthly income of approximately \$96,000.00. He states that the court cannot dismiss because it is in the best interest of the creditors to allow Debtor the chance to get resolution of the claims and to pay the claims through his plan. However, the prospect of reorganization is not enough to overcome bad faith. In re Phoenix Piccadilly, Ltd., 849 F.2d at 1394 ("The prospects of a successful reorganization do not override, as a matter of law, the finding of bad faith."); In re SGL Carbon Corp., 200 F.3d at 159, n. 8 ("In bad faith cases involving the filing of a petition that is an abuse of the bankruptcy process, however, §112(b)'s conversion/dismissal choice is inappropriate. The proponent of an abusive petition does not belong in bankruptcy so it is unnecessary to ask whether dismissal or conversion is in the interest of the creditors."). The filing of a bankruptcy petition in bad faith taints every aspect of the case and Debtor would not be able to satisfy the good faith requirement for confirmation of his plan. See 11 U.S.C. §1129(a)(3) (requiring the plan be proposed in good faith).

For the foregoing reasons, I find Debtor's petition to be filed in bad faith warranting dismissal, and WPOA's motion to dismiss is ORDERED granted.



SUSAN D. BARRETT  
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 17<sup>th</sup> Day of June 2011.