U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
1600 ELM STREET, LTD., A Texas Limited Partnership,	§	**Case No. 05-30917-HDH-7**
	§	
	§	
Debtor.	§	

MEMORANDUM OPINION

Came before the Court for consideration, the Amended Motion of Lincoln America to Dismiss Case and/or Involuntary Petition Under 11 U.S.C. §§ 303, 305 and 707 ("Motion to Dismiss"). This memorandum opinion constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 151, and the standing order of reference in this district. This matter is a core proceeding, pursuant to 28 U.S.C. § 157(b)(2)(A).

The Court held a hearing on the Motion to Dismiss on March 1, 2005. In the motion Lincoln American Investments, LLC ("Lincoln") seeks dismissal for cause under 11 U.S.C. § 707 or, alternatively, abstention under § 305.

Lincoln has alleged that there was some sort of collusion between the petitioning creditors and the Debtor in obtaining the order for relief in this case, that the petitioning creditors were not all qualified creditors and that Neptune Downtown Development, LLC, which answered the involuntary and consented to it, is not the true general partner. Thus the case should be dismissed for bad faith.

Alternatively, Lincoln argues that because there is a lawsuit in state court involving many of the parties to this bankruptcy and concerning the sale of the Debtor's real property, this Court should

abstain and allow the matters to run their course in state court.

The § 707 Bad Faith Allegations

Bankruptcy Code § 707 governs the dismissal of Chapter 7 cases. That provision contains two subsections. Section 707(a), applicable to the instant case, provides that a Chapter 7 case may be dismissed only for "cause". Lack of good faith is "cause" for dismissal under § 707(a). *In re Carbaugh*, 299 B.R. 395, 398 (Bankr. N.D. Tex. 2003).

The decision to dismiss Debtor's petition for lack of good faith rests within the discretion of the Court. *In re Atlas Supply Corp.*, 857 F.2d 1061, 1063 (5th Cir.1988). Once the movant has made *a prima facie* showing of the debtor's lack of good faith, the debtor has the burden of proving that its petition was filed in good faith. *In re Tamecki,* 229 F.3d 205, 207 (3rd Cir. 2000) ("Once a party calls into question a petitioner's good faith, the burden shifts to the petitioner to prove his good faith."); *In re Davis, 93* B.R. 501, 504 (Bankr. S.D. Tex. 1987).

On the record made at the hearing on the motion, it does not appear that this case was filed in or is now proceeding in bad faith. The Debtor's witness, Charles Erwin, testified credibly and persuasively, that the general partner did not participate in the filing of the involuntary petition. He apparently met petitioning creditors' lawyer on the date of the hearing. There was no evidence offered that the general partner colluded with the petitioning creditors regarding the instant bankruptcy case.

On the other hand, there was credible evidence offered that the instant Debtor is not paying its debts as they become due, has 12-15 unpaid creditors, has little income, has significant internal disputes among the partners. These are reasons which might cause a bankruptcy case to be filed.

Section 305 Abstention

As an alternative to dismissal, Lincoln asks this Court to abstain from exercising its jurisdiction over these bankruptcy cases pursuant to § 305(a) of the Bankruptcy Code. Section 305(a) provides, in pertinent part,

> (a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if –
> (1) the interests of creditors and the debtor would be better served by such dismissal or suspension.

11 U.S.C. § 305(a)(1). Abstention or dismissal under § 305 is an extraordinary remedy and should only be exercised when the court finds that the interests of both the debtors and the creditors would be better served by abstention. *State Park Building Group, Ltd.*, 316 B.R. 466, 476 (Bankr. N.D. Tex. 2004) (citing *In re Xacur*, 216 B.R. 187, 195 (Bankr. S.D. Tex. 1997) (citing *In re Eastman*, 188 B.R. 621, 624 (9th Cir. BAP 1995)). Lincoln has the burden of proof. *Id.*

Here, if the Court abstains, the matter returns to state court. However, at this time it is unclear from the record when the state court can hear the pending lawsuit. It is clear that the present lawsuit does not involve all of the parties in interest in the bankruptcy case. For example, the petitioning creditors in the instant bankruptcy case are not parties to the proceeding in state court and would get no relief down the street in state court. Thus, it is not in the interests of the petitioning creditors that this Court abstain.

And, it appears that a sale of the property, which would pay all creditors and provide a return to equity will not occur in the state court action. In the instant case, if the Trustee finds a buyer this Court can hear such a motion on 20 days notice. Such sale process and distribution to creditors and equity favor this Court keeping the case, rather than abstaining.

Robert Yaquinto has been appointed the Chapter 7 Trustee in this case. Mr. Yaquinto is a

very respected lawyer and Trustee, who has liquidated many estates. The creditors and equity holders in this case will be well served by having an experienced trustee to seek the highest price for the property. Thus, having an experience Trustee, such as Mr. Yaquinto, overseeing this Debtor's affairs weighs against abstention.

Accordingly, it does not appear that abstention under 305 is in the interests of the creditors and the debtor.

Burden of Proof

As discussed above, the movant bears the initial burden in a motion to dismiss and the ultimate burden of proof in a motion to abstain. Lincoln offered substantial documents into evidence and its able counsel walked the Court through Lincoln's belief as to their meaning. However, Lincoln did not offer a witness who challenged Neptune as the general partner or the validity of the petitioning creditors' claims.

On the other hand, Debtor's witness, Mr. Erwin was credible on the issues raised in the motion. A lawyer for a Mr. James Grannan appeared at the hearing and filed pleadings indicating that Mr. Grannan is the general partner. Mr. Grannan did not appear or testify. At least for now, Neptune is winning on the general partner issue.

Accordingly, the motion will be denied.

SIGNED: 3/7/05

Harlin D. Hale
United States Bankruptcy Judge