

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

LOCAL UNION NO. 281, UNITED  
BROTHERHOOD OF CARPENTERS AND  
JOINERS OF AMERICA, AFL-CIO

CASE NO. 96-63216

Debtor

Chapter 11

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APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

Presently before the Court is a motion filed on behalf of Local Union 281, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (“Debtor”) on February 10, 1997, seeking an extension of the Debtor’s exclusivity period in which to file a plan of reorganization. Also before the Court is a motion filed on February 14, 1997, on shortened notice on behalf of The United Brotherhood of Carpenters and Joiners of America (“UBC”) and the Hudson Valley

District Council of Carpenters (“District Council”) (hereinafter jointly referred to as “UBC/DC”) seeking dismissal of the chapter 11 petition (“Petition”) filed by the Debtor. In the alternative, UBC/DC request relief from the automatic stay in order to convene an internal union hearing to determine whether or not to impose a trusteeship over the Debtor or to permit the District Council to appoint a Business Representative and Organizer to represent the Debtor at the District Council.

Both motions were heard at the Court’s regular motion term in Binghamton, New York, on March 3, 1997. Following oral argument, the Court afforded the parties an opportunity to file memoranda of law. The matter was submitted for decision on April 3, 1997.

### **JURISDICTIONAL STATEMENT**

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1), (b)(2)(A), (G) and (O).

### **FACTS**

The UBC is an international labor union and parent organization of the Debtor. The District Council is an intermediate organization affiliated with UBC. It is alleged that in January 1996 the District Council began the process of converting to a “full service Council” which would serve as the collective bargaining representative for the local unions affiliated with it, including the Debtor. *See* Affirmation of Jeffrey Sklaroff, Esq., dated February 13, 1997, at ¶7.

By letter dated April 9, 1996, Debtor was advised that it would be affiliated with the District Council effective July 1, 1996. *See* Exhibit C of Sklaroff Affirmation. The letter further provided that

If you are having elections this year, you are to proceed with those elections. \* \*  
\* The [District Council] has been restructured to become a Full Service District Council. In the future, there will be no nominations for Business Manager, Business Representative or Organizers in your Local Union. They will be appointed by the Executive Secretary of the [District Council], Charles Vealey (“Vealey”).

*See id.*

In June 1996 the District Council allegedly formulated an operating budget and requested the local unions to make an upfront contribution to the District Council to cover projected expenses. *See* Affidavit of Vealey, sworn to February 12, 1997, at ¶10. Debtor was notified in a letter dated June 21, 1996, that the District Council “requires your local union to participate in the initial funding.” *See* Exhibit 5 of Affidavit of David Lambert (“Lambert”), Business Representative for the Debtor, sworn to February 28, 1997. Included with the letter was a sheet labeled “Hudson Valley District Council of Carpenters Upfront Funding Requirement” which indicated a “Total Upfront Assessment” of \$407,224.00 (“Initial Assessment”). *See id.* According to Vealey, this was a “voluntary upfront contribution” which was later reduced to the sum of \$226,806 (“Revised Assessment”) at a meeting between representatives of the Debtor and the District Council on or about June 27, 1996, and acknowledged in a letter from Vealey dated July 1, 1996.<sup>1</sup> *See* Exhibit C of Vealey Affidavit and Exhibit 7 of Lambert Affidavit.

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<sup>1</sup>Both assessments identify expenses of \$177,090 and an upfront per capita obligation of \$29,115. The Initial Assessment identified “additional funding” of \$201,019. The Revised Assessment does not include that specific category. Instead, it identifies \$20,601 as “expenses over revenues.” According to the letter of July 1, 1996, “expenses over revenues is based on a

On April 4, 1996, the membership of the Debtor approved the reappointment of James Visingard (“Visingard”) as an Organizer. *See* Affidavit of Dennis Cluck (“Cluck”), Recording Secretary for the Debtor, sworn to February 27, 1997. However, in a letter dated July 2, 1996, from Vealey, Visingard was notified that he was no longer to represent the Debtor as Organizer for “Hudson Valley District Council of Carpenters from Local Union #281,” effective at the close of business on Friday, July 5, 1996. *See* Exhibit 2 of Lambert Affidavit and Exhibit E of Vealey Affidavit.. A similar letter, also dated July 2, 1996, was sent to Lambert apprising him that Vealey had decided not to appoint Lambert as “Business Representative of Hudson Valley District Council of Carpenters from Local Union #281” and that he too was to cease representation of the Debtor in an official capacity at the close of business on Friday, July 5, 1996. *See* Exhibit D of Vealey Affidavit. By letter dated July 5, 1996, Cluck received notification that Vealey had appointed Kenneth Smith to be Business Representative, effective July 6, 1996. *See* Exhibit F of Vealey Affidavit.

At a meeting of the members of the Debtor, allegedly held on July 2, 1996, the upfront assessment was discussed. *See* Affidavit of Cluck ¶18. According to Cluck, “[i]t was observed [at the meeting] that the assessment exceeded the total financial assets of [the Debtor], both liquid and nonliquid.” *See id.* Allegedly, at that meeting the membership unanimously passed a motion “to take immediate steps to safeguard all funds and assets’ of [the Debtor] by all appropriate steps, ‘including bankruptcy proceedings.’” *See id.*

On July 5, 1996, the Debtor filed its Petition pursuant to chapter 11 of the Bankruptcy

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dues check-off amount being paid to the District Council of \$.33 per hour on your projected hours,” which were to be forwarded to the District Council on a weekly basis, beginning July 1, 1996. *See* Exhibit 7 of Lambert Affidavit.

Code (11 U.S.C. §§ 101-1330) (“Code”).<sup>2</sup> According to the Petition, Debtor “is a voluntary labor organization in accordance with the National Labor Relations Act and New York General Associations Law in the construction industry . . . Debtor engages in collective bargaining negotiations on behalf of its members in the carpentry trade in the vicinity of Broome, Tioga and Chenango Counties, New York.” *See* Schedule A<sup>3</sup>, accompanying the Petition. According to Schedule A, Debtor’s assets total \$384,124 in personal property, and its liabilities total \$434,755. *See id.* Included in its liabilities is the Initial Assessment of the District Council in the amount of \$407,224, which Debtor has identified as a disputed unsecured claim.

By way of a motion dated August 28, 1996, UBC/DC sought withdrawal of the reference of the Debtor’s case to the district court “on the ground that resolution of the issue in this case requires substantial consideration of both title 11 and other laws affecting interstate commerce.” UBC/DC also requested dismissal of the case for cause pursuant to Code § 1112(b) or in the alternative, relief from the automatic stay pursuant to Code § 362(d). Oral argument was heard on November 4, 1996 by the Hon. Rosemary Pooler, United States District Judge for the Northern District of New York. *See In re Local Union No. 281 United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, 1996 WL 663968 at \*1 (N.D.N.Y. Nov. 14, 1996). Judge Pooler concluded that “[r]esolution of this dispute does not involve substantial and material considerations of non-Code federal statutes” and denied the motion to withdraw the reference. *See id.* at \*3. Judge Pooler commented in *dicta* that if the bankruptcy court were to determine

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<sup>2</sup>Debtor has elected to be considered a “small business” pursuant to Code § 1121(e). *See* Affirmation of Alfred Paniccia, Jr., Esq., dated February 7, 1997, at ¶6.

<sup>3</sup>Schedule A is actually labeled “Exhibit A”.

that the assessment was not a valid debt, “then the bankruptcy petition in all likelihood [would] be dismissed.” *See id.* The District Court also concluded that this Court was capable of balancing the interests of the parties and determining whether to terminate the stay. *See id.* Accordingly, Judge Pooler also denied the alternative relief being sought by UBC/DC. *See id.*

In the interim, the Debtor made application to this Court on or about September 3, 1996, to employ Edward F. Crumb, Esq. (“Crumb”) to represent it in the proceedings before this Court. Opposition was filed on behalf of the UBC/DC and also the U.S. Trustee, alleging that Crumb was not “disinterested” because he represented certain multi-employer benefit funds into which the Debtor makes contributions and which were listed as creditors of the Debtor. A hearing on the application was held on September 9, 1996, and on December 10, 1996, the Court issued its Memorandum-Decision, Findings of Fact, Conclusions of Law and Order denying Debtor’s request on the basis that Crumb did not comply “with the rigors of Code § 327(a) or (c). *See In re Local Union No. 281, United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, Case No. 96-63216, slip op. at 8 (Bankr. N.D.N.Y. Dec. 10, 1996). On December 30, 1996, the Debtor filed an application to employ the law firm of Young & Paniccia to represent it. Debtor’s application was granted by this Court on January 21, 1997, retroactive to December 30, 1996.

## **ARGUMENTS**

### **Dismissal of Debtor’s Petition**

The UBC/DC assert that the Debtor’s Petition was filed in bad faith “to frustrate the ability of the UBC and District Council to exercise well-defined rights of governance and control

granted to them under federal labor law, the UBC Constitution and the By-laws of the District Council.<sup>4</sup> The UBC/DC argue that there is no legitimate financial basis for the filing and that the Debtor is attempting to obstruct the selection and hiring of local union business representatives and organizers and to hinder the convening of an internal union hearing to consider whether to impose a trusteeship on the Debtor. *See* ¶5 of Sklaroff Affirmation. In support of their position, the UBC/DC direct the Court's attention to the Debtor's failure to file a plan within the exclusivity period set forth in Code § 1121 and its untimely motion presently before this Court to extend the exclusivity period.

Debtor contends that the decision to file the Petition was made by the membership on July 2, 1996, in response to the assessment imposed by the District Council. Debtor argues that filing could not have been for the purpose of frustrating the District Council's efforts to terminate Visingard and Lambert and to appoint Smith since the letters notifying the Debtor of those actions were apparently written after the vote to authorize the filing of bankruptcy had been taken by the membership and were received sometime after the Petition had actually been filed. The Debtor also asserts that the facts do not support the argument made by the UBC/DC that the filing of the Petition was intended to interfere with the authority to convene an internal meeting to consider the imposition of a trusteeship over the Debtor. Debtor directs the Court's attention to a letter dated July 22, 1996, from Douglas J. McCarron ("McCarron"), General President of the UBC, in which McCarron indicates that in response to the Debtor's filing of its Petition he had

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<sup>4</sup>The Bylaws were enacted by the District Council in March 1996, subject to the approval of the First General Vice President of the UBC, Douglas J. Banes ("Banes"). Banes approved the Bylaws on or about July 29, 1996, and made them retroactive to March 1996. *See* Exhibit B of Vealey Affidavit.

determined “that a hearing should be conducted to determine whether supervision over Local Union 281 is necessary to protect the rights of the members and correct any financial irregularities.” (emphasis added). *See* Exhibit E of Motion of Sklaroff Affidavit.

#### Extension of Exclusivity Period

Pursuant to Code § 1121(e)(1) only the Debtor could file a plan within the first one hundred days following the filing of the Petition. Debtor contends that “circumstances for which the Debtor should not be held accountable caused the Debtor to not file a plan within said 100 day period.” *See* ¶9 of Debtor’s Motion. Debtor cites to the motion filed on August 28, 1996, by UBC/DC seeking to withdraw the reference of the case to the district court, which required Crumb’s involvement on behalf of the Debtor.<sup>5</sup> Debtor alleges that prior to the appointment of Young & Paniccia, Crumb “was occupied with other matters in this Chapter 11 proceeding which prevented him from devoting time and attention to preparation of a plan of reorganization for the Debtor.” *See* ¶21 of Debtor’s Motion. In addition, the Debtor directs the Court’s attention to the delay in the approval of the appointment of counsel to the Debtor, which did not become effective until December 30, 1996.

UBC/DC oppose the motion, noting that the 100-day period expired on October 23, 1996, some 3 ½ months before the present motion by the Debtor. UBC/DC assert that Debtor’s motion should have been made prior to October 23, 1996, and that the circumstances cited by the Debtor do not excuse the Debtor from making a timely request for an extension within the 100-day period.

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<sup>5</sup>Oral argument was not heard on the motion until November 4, 1996.

## DISCUSSION

Any person that meets the requirements found in Code § 109(d) may file a chapter 11 petition. A “person” includes a “corporation” (*see* 11 U.S.C. § 101(41)), which in turn is defined for purposes of the Code to include an unincorporated company or association (*see* 11 U.S.C. § 101(9)(iv)). The Debtor, as an unincorporated association, was entitled to file a bankruptcy petition pursuant to chapter 11 of the Code. *See generally In re Highway Truck Drivers and Helpers, Teamsters Local No. 107*, 100 B.R. 209 (Bankr. E.D.Pa. 1989).

Having met the minimal eligibility requirements of Code § 109(d), the Debtor’s Petition is still subject to dismissal for “cause” pursuant to Code § 1112(b). “Cause,” although not defined in the Code, has been given maximum flexibility by the courts, allowing dismissal of a chapter 11 case “for any reason cognizable to the equity power and conscience of the court as constituting an abuse of the bankruptcy reorganization process.” *In re HBA East, Inc.*, 87 B.R. 248, 258 (Bankr. E.D.N.Y. 1988). A finding of lack of good faith has consistently been upheld by the courts as constituting cause to dismiss a case. *See In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 985 (Bankr. N.D.N.Y. 1988) (citations omitted); *HBA East* at 258 (citations omitted). As noted by the court in *HBA East*,

Good faith is the gatekeeper of the equity court. Bankruptcy courts are equity courts with powerful tools at their disposal to interfere with or disrupt traditional laws. Were there no good faith limits on the invocation of these powers, they could easily cause injustice and thwart useful social policy.

*See id.* at 263.

A determination of whether the Debtor’s Petition was filed in good faith requires an examination of all the facts and circumstances in the case. *See Copy Crafters Quickprint* at 985.

Consideration must be given to (i) whether the Debtor filed its Petition as a tactic to obtain a litigation advantage; (ii) whether the Debtor's reorganization effort is essentially a two party dispute, (iii) the nature and extent of the Debtor's assets, and (iv) whether there is a reasonable probability that a reorganization plan can be proposed and confirmed. *See HBA East at 259.*

At the time the Debtor filed its Petition, it was not involved in any ongoing litigation as was the case in *Highway Truck Drivers*. Debtor indicates that it filed its Petition in response to the Initial Assessment by the District Council. However, it is clear that as a result of filing its Petition and the imposition of the automatic stay the ability of the District Council to exercise certain rights and control over the Debtor has been frustrated. In fact, if the Court finds that the Petition was not filed in bad faith, then the UBC/DC requests that the automatic stay be modified to allow it to exercise those rights to hold an internal union hearing to determine whether the circumstances warrant the imposition of a trusteeship over the Debtor and to appoint a Business Manager and Organizer.

At the time the Debtor filed its Petition, its assets totaled \$384,124. A review of the Debtor's schedules indicates that for the most part it was current on its obligations at the time it filed its Petition. For example, the Debtor lists claims for dues, accounting services, telephone service, tax service and bank service fees which were incurred in the month prior to the filing of its Petition, namely June 1996. It also lists unsecured priority claims for salaries and employee benefits for various individuals which also arose in June 1996. The only claim of any substance is that of the District Council which is listed by the Debtor as disputed in the amount of \$407,224. It is this dispute and this dispute alone which caused the Debtor to file its Petition.

Debtor's Petition was strategically filed in an attempt to stay the efforts of the District

Council to collect what the District Council describes as a “voluntary upfront contribution” and what the Debtor asserts is a mandatory obligation. The Debtor viewed the obligation as one which would wipe out any assets the Debtor had at the time it filed its Petition. “[B]ankruptcy rehabilitation provisions are intended to benefit only those in genuine distress and are not to be used strategically as an avoidance mechanism to get out of particular obligations viewed by a debtor as having undesirable consequences.” *In re Purpura*, 170 B.R. 202, 207 (Bankr. E.D.N.Y. 1994) (citations omitted).

Whether the Debtor’s concerns as to the intentions of the UBC/DC were valid is not for this Court to address. The Debtor has available to it grievance procedures and administrative remedies for the settlement of any dispute that may arise between it and the District Council. The Court concludes that to allow the Debtor to maintain its status as a debtor under chapter 11 of the Code under these circumstances would be an abuse of the bankruptcy system. The Debtor does not appear to be in genuine financial distress. Based on the Revised Assessment, its assets exceed its liabilities. Furthermore, counsel representing the UBC/DC has stated that the assessment was intended to be a voluntary upfront contribution. As noted above, at the time it filed its Petition the Debtor was current on its other obligations and there was no apparent need to restructure the Debtor’s business finances. All that was necessary is a resolution of the dispute between the Debtor and the District Council, and that is a matter more properly resolved in another forum. Accordingly, the Court concludes that the Debtor’s case should be dismissed for cause.

With respect to the Debtor’s motion seeking an extension of time to file its plan, the Court notes that the Debtor’s request was made on February 10, 1997, approximately three weeks after

the Court approved the appointment of Debtor's counsel and some 220 days after the commencement of the Debtor's case. This is clearly beyond the time contemplated by the statute of 160 days set forth in Code § 1121(e)(2). The Code provides that any request for an extension has to be filed within the periods set forth in Code § 1121(e)(1) and (2) before the Court is authorized to consider whether the Debtor's failure to file its plan was "caused by circumstances for which the Debtor should not be held accountable." *See* Code § 1121(e)(3)(B); *In re Western Steel & Metals, Inc.*, 200 B.R. 873 (Bankr. S.D.Cal. 1996). This Court concludes that it is without authorization to grant the Debtor's request. The Court also concurs with the finding in *Western Steel & Metals* that "the failure to file a plan within the statutory deadline imposed by section 1121(e)(2) constitutes cause under section 1112(b)" and serves as a second basis for the dismissal of the Debtor's case.

Based on the foregoing, it is hereby

ORDERED that the motion of the UBC/DC seeking dismissal of the Debtor's Petition is granted; and it is further

ORDERED that the motion of the Debtor seeking an extension of time to file a plan of reorganization is denied.

Dated at Utica, New York

this 21st day of August 1997

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge