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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

DENNIS and GERDE AMOROSO,

No. 04-11303

Debtor(s).

_____ /

Memorandum on Motion to Dismiss

Creditor Travelers Casualty and Surety Company of America has moved for dismissal of this Chapter 11 case or, in the alternative, abstention. While defective service prevents the court from entering a final order denying the motion, the court elects to deal with the issues raised in the hopes of saving the parties time and money.

The motion is based on a mis-reading of those few cases which have dismissed a Chapter 11 for bad faith. Contrary to the arguments of Travelers, it is not necessarily bad faith to file a Chapter 11 on the eve of litigation, nor is it necessarily bad faith to file if a debtor's financial woes are caused primarily by one creditor. Moreover, the motive of Travelers appears to be transparent: a dismissal of the case would perfect its prejudgment attachment and allow Travelers to circumvent bankruptcy laws intended to require equitable distribution of a debtor's estate.

Travelers has spent many pages of legal argument trying to force a square peg into a round hole. This case has little in common with cases which have dismissed a case for bad faith. Bad faith dismissals are only common where the debtor has been newly created or endowed with distressed

1 property on the eve of bankruptcy. See, e.g., *In re Thirtieth Place, Inc.*, 30 B.R. 503 (9th Cir. BAP
2 1983). The primary case upon which Travelers relies, *In re St. Paul Self Storage Ltd. Partnership*,
3 185 B.R. 580 (9th Cir. BAP 1995), stands only for the proposition that a Chapter 11 case can be properly
4 dismissed where the debtor has no business to be disrupted, no other creditors to be prejudiced, and the
5 bankruptcy was filed as a litigation tactic.¹ In this case, the debtors have raised factual issues as to all of
6 the elements which should be considered in bad faith dismissal, mandating at least a costly evidentiary
7 hearing. Even if the court were to find one or two of the elements listed in *St. Paul Self Storage*,
8 dismissal is a matter of discretion which the court is very reluctant to exercise in favor of Travelers
9 because of the inequitable result to other creditors.

10 Travelers' argument for abstention is even more revealing of its true motives. It could at any
11 time either seek relief from the automatic stay to continue its litigation against the debtors in District
12 Court, if that relief is justified, or it could ask the District Court to withdraw the reference and itself sit
13 as a bankruptcy court. Travelers' reason for seeking dismissal seems to have nothing to do with
14 interference with its litigation and everything to do with preserving its status as a secured creditor.

15 In many instances, the filing of a bankruptcy facilitates rather than hinders a creditor with a valid
16 claim. Instead of litigating, a creditor need only file a proof of claim to establish a right to payment. If
17 litigation over the claim is necessary, it can be accomplished in bankruptcy court very expeditiously and
18 without the expense of a jury trial. Moreover, the practical realities of litigation in bankruptcy court
19 prevent a creditor from over-litigating where the maximum possible dividend is far lower than the claim
20 itself. The only real detriment to Travelers of continuing the bankruptcy proceedings seems to be the
21 potential loss of its provisional secured status.²

23 ¹Contrary to Travlers' argument, *St. Paul Self Storage* does not "mandate dismissal." It only
24 holds that dismissal under the facts of that case was not an abuse of discretion.

25 ²If, as Travelers argues, there are no other creditors, then its loss of secured status is of no
26 consequence to it. The very fact that Travelers is so keen to preserve its attachment lien supports the
debtors' argument that there are significant other debts.

1 For all their legal arguments, Travelers' counsel has not grasped the elementary procedure
2 necessary to place a motion properly before the court. A motion to dismiss is a contested matter,
3 governed by FRBP 9014. Rule 9014(b) provides that contested matters are to be served in the same
4 manner as a summons and complaint. The easiest way to serve a summons and complaint on a debtor is
5 by simple first-class mailing to the debtor and debtor's counsel pursuant to FRBP 7004(b)(9).

6 For the foregoing reasons Travelers' motion will be denied, without prejudice to a properly
7 served motion if Travelers wishes to persist in seeking dismissal. Counsel for the debtors shall submit
8 an appropriate form of order.

9
10 Dated: September 20, 2004


Alan Jaroslovsky
U.S. Bankruptcy Judge