

**UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**

**IN RE:**

**MICHAEL E. MCDUFFIE,**

**CASE NO. 04-53411-NPO**

**DEBTOR.**

**CHAPTER 11**

**MEMORANDUM OPINION AND ORDER  
GRANTING UNITED STATES TRUSTEE'S MOTION TO DISMISS**

On June 25, 2007, there came on for hearing (the "June 25 Hearing") the Motion to Convert or, Alternatively to Dismiss (Dk. No. 11-221) (the "UST Motion") filed by the United States Trustee for Region 5 (the "UST"), the Response thereto (Dk. No. 11-231) (the "Response") filed by Countrywide Home Loans, Inc. ("Countrywide"), the Joinder in the U.S. Trustee's Motion to Convert or, Alternatively to Dismiss (Dk. No. 11-244) (the "Joinder") filed by the Internal Revenue Service (the "IRS"), and the objection (Dk. No. 11-236) filed by Michael E. McDuffie (the "Debtor"), *pro se*, in the above-styled chapter 11 proceeding (the "Chapter 11"). At the June 25 Hearing, Christopher J. Steiskal appeared for the UST, William H. Leech appeared for Countrywide, and Crockett Lindsey appeared for the IRS. The Debtor did not appear. The Court, being fully advised in the premises and having considered the pleadings and arguments by and on behalf of the parties to this proceeding, finds that the UST Motion should be granted, and that this Chapter 11 should be dismissed with prejudice for the reasons set forth below.<sup>1</sup>

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<sup>1</sup> The following constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, which is made applicable to contested matters by Federal Rule of Bankruptcy Procedure 9014.

## Jurisdiction

This Court has jurisdiction over the subject matter of and the parties to this proceeding. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(A). Notice of the UST Motion was proper under the circumstances.<sup>2</sup>

## Facts

### **The Chapter 13 Case**

On March 23, 2001, the Debtor filed a voluntary petition pursuant to chapter 13<sup>3</sup> of the Bankruptcy Code<sup>4</sup> (Dk. No. 13-1) (the “Chapter 13”). Although the Debtor commenced the Chapter 13 with the assistance of counsel, he subsequently terminated his attorney and hired new counsel (Dk. No. 13-47). The second attorney eventually withdrew from representing the Debtor (Dk. No.

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<sup>2</sup> The UST Motion originally was set for hearing on April 5, 2007 (Dk. Nos. 11-222, 223). On the morning of April 5, 2007, the Debtor notified the Clerk of the Bankruptcy Court in Gulfport, Mississippi, that he would be unable to appear because of pain stemming from a back injury he purportedly had sustained on March 1, 2007. Consequently, the UST Motion, along with various other matters, were reset for hearing on May 29, 2007 (Dk. Nos. 11-233, 234, 235, 237, 238, 246). Subsequently, on May 16, 2007, the Debtor filed a Motion for Continuance (Dk. No. 11-254) (the “Second Continuance”) requesting that all pending matters be reset based on his inability to attend the hearings, again based on his alleged back injury. After conducting a telephonic hearing on May 23, 2007, the Court granted the Second Continuance, and reset all pending matters for June 25, 2007, subject to certain limitations on future continuances (Dk. No. 11-265). On June 21, 2007, the Debtor filed yet a third Motion for Continuance (Dk. No. 11-280), which was denied for the reasons set forth in the Order Denying Debtor’s Motions for Continuance issued contemporaneously herewith.

<sup>3</sup> Case No. 01-51611-NPO, United States Bankruptcy Court for the Southern District of Mississippi.

<sup>4</sup> Hereinafter, all code sections refer to the United States Bankruptcy Code located at Title 11 of the United States Code unless otherwise noted.

13-64), and the Debtor thereafter appeared *pro se*<sup>5</sup> in the Chapter 13. The plan was confirmed on July 11, 2001 (Dk. No. 13-13). However, on July 1, 2004, the Chapter 13 was dismissed for non-payment, and the Debtor was prohibited from filing another chapter 13 case for 180 days (Dk. No. 13-69). The Debtor appealed, *pro se*, the dismissal of his Chapter 13 (Dk. 13-75) (the “Chapter 13 Appeal”). The Chapter 13 Appeal was dismissed for failure of the Debtor to file a notice of appeal within the time prescribed by the Federal Rules of Bankruptcy Procedure (Dk. No. 13-92).

### **The Chapter 11 Case**

On July 27, 2004, just twenty-six (26) days after the dismissal of his Chapter 13, the Debtor filed a voluntary petition pursuant to chapter 11 of the Bankruptcy Code (Dk. No. 11-1) (the “Chapter 11”). The Debtor has appeared *pro se* throughout the Chapter 11.

Even though all of the Debtor’s scheduled debts were identified as disputed, contingent, or unliquidated, only five (5) creditors filed proofs of claims in the Chapter 11.<sup>6</sup> Delta Funding

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<sup>5</sup> After the UST Motion was filed, the Debtor filed a motion to reopen his Chapter 13 (Dk. No. 11-249) (the “First Motion to Reopen”). However, the Debtor failed to remit the appropriate filing fee for the First Motion to Reopen and failed to file the First Motion to Reopen in the Chapter 13, instead improperly filing it in the Chapter 11 (Dk. No. 11-249). A Notice of Deficiency (Dk. No. 11-250) was issued by the Clerk of the Bankruptcy Court on May 8, 2007, requiring the Debtor to correct the deficiencies within ten (10) days. On May 24, 2007, this Court entered an Order dismissing the First Motion to Reopen for failure to correct the deficiencies within the required time (Dk. No. 11-264). Thereafter, the Debtor began the process anew by filing a second Motion to Reopen Chapter 13 Case (Case No. 01-51611, Dk. No. 13-95) (the “Second Motion to Reopen”), with the proper filing fee and in the Chapter 13. For the reasons set forth in the Order Denying Debtor’s Second Motion to Reopen Chapter 13 Case entered contemporaneously in the Chapter 13, the Second Motion to Reopen is denied.

<sup>6</sup> *See* Federal Rule of Bankruptcy Procedure 3003 which provides that “[a]ny creditor . . . whose claim . . . is . . . scheduled as disputed, contingent, or unliquidated shall file a proof of claim . . . within the time prescribed by subdivision (c)(3) of this rule; . . .”

Corporation (“Delta”),<sup>7</sup> holder of the mortgage on the Debtor’s residence, filed a proof of claim in the amount of \$97,275.47, which includes an arrearage amount of \$17,990.10 (Proof of Claim No. 5). The IRS filed a unsecured priority and nonpriority claim in the total amount of \$4,421.72 (Proof of Claim No 3). Three (3) unsecured creditors filed claims, as follows: Bell South Telecommunications Inc., in the amount of \$1,758.43 (Proof of Claim No. 4); Nordan Smith Welding Supply, in the amount of \$1,374.88 (Proof of Claim No. 1); and Sabel Steel, in the amount of \$633.20 (Proof of Claim No. 2).<sup>8</sup>

On October 27, 2004, Delta/Countrywide filed a Motion for Order Granting Relief from Automatic Stay (Dk. No. 11-17) (the “Motion to Lift”), alleging lack of adequate protection and seeking relief from the automatic stay to foreclose upon the Debtor’s residence. The Debtor filed a Response to Relief from Automatic Stay, Motion to Remove, Abandonment or Adequate Protection (Dk. No. 11-21), denying that Delta/Countrywide holds a security interest in the Debtor’s residence and disputing the arrearage amount asserted by Delta/Countrywide.

On February 9, 2005, the Debtor filed a Disclosure Statement (Dk. No. 11-40) to which Delta/Countrywide filed an Objection to Disclosure Statement (Dk. No. 11-62).<sup>9</sup> The Debtor also

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<sup>7</sup> Countrywide is the service provider for Delta. Delta and Countrywide have filed numerous documents in this Chapter 11, some in both entities’ names, some in only one entity’s name. Consequently, the Court will refer to them as Delta/Countrywide for purposes of this Memorandum Opinion and Order.

<sup>8</sup> The Court notes that Sabel Steel filed a notice indicating that the Debtor paid the Sable Steel claim in full on June 20, 2007 (Dk. No. 11-287). Such an act “violate[s] one of the principal tenets of Chapter 11: that prepetition general unsecured claims should be satisfied on an equal basis pursuant to a plan.” In re CoServ. L.L.C., 273 B.R. 487, 493 (Bankr. N.D. Tex. 2002).

<sup>9</sup> The UST also filed an Objection to the Disclosure Statement (Dk. No. 11-63), which subsequently was withdrawn (Dk. No. 11-71).

filed his Chapter 11 plan, proposing to pay Delta/Countrywide \$46,000 at 5% interest and to pay his remaining creditors in full (Dk. No. 11-40).

Nine (9) days after filing the disclosure statement and plan, the Debtor filed a Motion to Withdraw Reference (Dk. No. 11-47), seeking to remove his bankruptcy case from the jurisdiction of this Court to the United States District Court for the Southern District of Mississippi for alleged violations of various constitutional amendments. An Order denying the Debtor's Motion to Withdraw Reference was entered on April 18, 2005 (Dk. No. 11-64).

The Debtor thereafter filed two (2) separate adversary proceedings against Delta/Countrywide. Adversary proceeding number 05-05133 was filed on July 19, 2005, and adversary proceeding number 05-05183 was filed on December 19, 2005 (collectively, the "Adversary Proceedings"). In essence, the Adversary Proceedings allege that Delta/Countrywide committed fraud and seek injunctive relief and damages (Adv. Dks. Nos. 1).

Following the filing of the Adversary Proceedings, the parties engaged in what ultimately proved to be fruitless discovery efforts. Consequently, this Court held a status conference on August 10, 2006, at which time the discovery disputes purportedly were resolved pursuant to the parties' agreement (Dk. No. 11-192). The Court also outlined a procedural path leading toward plan confirmation and resolution of the Adversary Proceedings. At the status conference, the Debtor agreed to provide responses to Delta/Countrywide's discovery requests, and an Order was entered to that effect (Dk. No. 11-192). The Debtor, however, did not provide the discovery responses. Instead, he filed objections to the Motions to Compel Discovery filed by Countrywide/Delta (Dk. Nos. 11-197, 198, attached Exhibit "B"). Moreover, the Debtor appealed the Order which had memorialized the parties' agreement regarding the discovery disputes (Dk. No. 11-194) (the "Discovery Appeal"). The Discovery Appeal was denied on February 21, 2007, as a result the

Debtor's failure to establish grounds for the District Court to grant an appeal from the interlocutory order of this Court (Dk. No. 11-219).

Thus, nearly three (3) years have passed since the Debtor's Chapter 11 was filed. The Motion to Lift has been pending two (2) years and eight (8) months. The disclosure statement has not been approved, and the proposed Chapter 11 plan has not been confirmed. The Adversary Proceedings have not moved forward appreciably in the over eighteen (18) months<sup>10</sup> they have been pending or in the ten (10) months since the status conference was held.<sup>11</sup>

### Discussion

The UST alleges that pursuant to § 1112(b), several grounds exist to convert the Chapter 11 to a chapter 7 case, or alternatively, to dismiss the Chapter 11. Section 1112(b) provides that the Court may convert or dismiss a chapter 11 case, whichever is in the best interests of creditors and the estate, for 'cause'<sup>12</sup> including - -

- (1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;
- (2) inability to effectuate a plan;
- (3) unreasonable delay by the debtor that is prejudicial to creditors; and
- ....
- (10) nonpayment of any fees or charges required under chapter 123 of title 28 [28 USC §§1911 et seq.].

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<sup>10</sup> The Adversary Proceedings were filed, respectively, twenty-three (23) months and eighteen (18) months ago.

<sup>11</sup> The Court expresses no opinion on the merits of the Adversary Proceedings. Due to the constant procedural delays which have occurred, the Court has not had an opportunity to consider the substantive issues raised by the parties.

<sup>12</sup> This Chapter 11 was commenced prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Although several specific provisions of BAPCPA were effective immediately upon enactment or at other specified times, § 1501 of BAPCPA provided that the majority of the amendments became effective in cases commenced after October 16, 2005. Under the law prior to BAPCPA, which is applicable to this case, § 1112(b) provided that 'cause' included the above-referenced subsections.

11 U.S.C. § 1112(b)(1), (2), (3), (10).<sup>13</sup> The UST maintains that these reasons, as well as the Debtor's failure to file timely monthly operating reports required under the Bankruptcy Code,<sup>14</sup> provide ample cause to convert or dismiss this Chapter 11. The IRS also asserts in its Joinder that the Debtor has failed to file his federal tax returns or pay federal taxes for the tax years 2004, 2005, and 2006.

The Court finds that the UST has demonstrated cause for dismissing this Chapter 11. According to the UST, the Debtor is delinquent in payment of the quarterly fees required by § 1112(b)(10), and the Debtor is at least three (3) months delinquent in the filing of his monthly operating reports. The UST has established the absence of a reasonable likelihood of rehabilitation pursuant to § 1112(b)(1) in that the monthly operating reports filed by the Debtor in January and February 2007 reflect that he has earned no net income. In his more recent pleadings, the Debtor claims that he is injured and currently unable to work. Consequently, the Debtor does not have sufficient income for an effective reorganization or the ability to effectuate a chapter 11 plan pursuant to § 1112(b)(2).

Moreover, the Court observes that the Debtor has been in bankruptcy for the last six (6) years, except for a twenty-six (26) day window between his Chapter 13 and Chapter 11 filings. His initial Chapter 13 was dismissed for non-payment, which included a 180-day bar against chapter 13 filings. Because he was prohibited only from filing another chapter 13 case, the Debtor filed this Chapter 11. Now the Chapter 11 is approaching its three (3) year anniversary with literally no

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<sup>13</sup> Although § 1112(b) identifies sixteen (16) instances where "cause" exists, the list is not exclusive. *See* § 102(3).

<sup>14</sup> In response to the UST Motion, the Debtor filed five (5) past-due monthly operating reports for the months of August, September, and October 2006, as well as January and February 2007. However, as of the June 25 Hearing, the Debtor again is delinquent in filing monthly operating reports for March, April, and May 2007.

progress having been made toward resolving the Debtor's dispute with his mortgage company<sup>15</sup> or otherwise rehabilitating his financial situation via a confirmed plan.<sup>16</sup> Such surely constitutes an unreasonable delay that is prejudicial to creditors pursuant to § 1112(b)(3).<sup>17</sup>

Additionally, in this Court's opinion, the Debtor has not acted in good faith. The Supreme Court of the United States recently reiterated the long-standing proposition that the "principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" Marrama v. Citizens Bank of Massachusetts, 127 S.Ct. 1105, 1107 (2007) (quoting Grogan v. Garner, 498 U.S. 279, 286-87, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991)). In this case, the Debtor's dilatory tactics belie his professed desire to achieve a fresh start by bringing the Chapter 11 to a conclusion. For example, the Debtor's failure to honor his agreement with respect to providing discovery responses, in and of itself led to a five (5) month delay in any forward progress in the

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<sup>15</sup> At the June 25 Hearing, the UST characterized this Chapter 11 as a two-party dispute and not a viable chapter 11 case.

<sup>16</sup> The Court observes that Hurricane Katrina, which struck the Gulf Coast in August 2005, possibly could have affected the Debtor's ability to advance his chapter 11. However, construing the timeline of the case in the Debtor's favor by crediting him with a full one (1) year recovery period following Katrina, he nonetheless had thirteen (13) months between July 27, 2004, the date of filing, and August 2005, as well as over ten (10) months since the August 2006 status conference to move his Chapter 11 forward. Yet, in that time period of nearly two (2) years, the Debtor nevertheless failed to achieve any progress toward confirmation of his Chapter 11 plan. Moreover, even assuming Hurricane Katrina contributed in some manner to the delays which have plagued this Chapter 11, the Debtor's lack of good faith is nonetheless evident as set forth herein.

<sup>17</sup> The IRS presented evidence at the June 25 Hearing that the Debtor had failed to file personal federal tax returns for 2004, 2005, and 2006. *See* IRS Exh. 1, Declaration of Maxie Henry. While not a listed cause for dismissal under § 1112(b) prior to BAPCPA, the Court nevertheless considers the Debtor's failure to file tax returns as yet another ground supporting dismissal and as yet another indication of the Debtor's lack of good faith in prosecuting this Chapter 11. Additionally, the Court observes that under BAPCPA, § 1112(b)(I) now lists as a cause of dismissal a debtor's "failure timely to file tax returns due after the date of the order for relief."



Chapter 11 or the Adversary Proceedings.

Furthermore, the Debtor is extraordinarily litigious. The vast<sup>18</sup> number of pleadings he has filed are replete with “legalese” but often lack a good faith basis in fact or law. For example, the Debtor argued that Delta/Countrywide’s refusal to produce documents which were outside the scope of discovery violated the Debtor’s Fourteenth Amendment rights (Dk. No. 11-86). The Debtor also asserted that Countrywide willfully violated 18 U.S.C. § 3571, a criminal procedure statute (Dk. No. 11-119). In fact, the sheer number of documents filed by the Debtor has created unreasonable demands for Delta/Countrywide, this Court, and the District Court, each of which has been required to expend an enormous amount of time and resources responding to meritless arguments advanced by the Debtor.

Of course, the Court is cognizant that the Debtor is acting *pro se*. However, while courts generally grant *pro se* parties some leniency, “the right of self-representation does not exempt a party from compliance with relevant rules of procedural and substantive law.” Birl v. Estelle, 660 F.2d 592, 593 (5<sup>th</sup> Cir. 1981) (citing Faretta v. California, 422 U.S. 806, 834 n. 46 (1975)). And, importantly, special consideration is not available to a *pro se* debtor acting in bad faith. See Salter v. IRS (In re Salter), 251 B.R. 689 (S.D. Miss.), aff’d without opinion, 234 F.3d 28 (5th Cir. 2000) (failure of *pro se* appellant to file a brief was a “dilatory tactic”).

Based on the foregoing, the Court is persuaded that the UST Motion should be granted. The Debtor has failed to pay quarterly fees, to file monthly operating reports, or to generate income to effectively reorganize or otherwise effectuate his Chapter 11 plan within the past three (3) years, all of which mandate that the Chapter 11 be dismissed pursuant to § 1112 and the best interests of

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<sup>18</sup> As of the date of the June 25 Hearing, the Chapter 13, Chapter 11, and the two Adversary Proceedings dockets reflect a total number of 571 entries.

creditors and the estate. Additionally, the Debtor has availed himself of the protection of the bankruptcy system for over six (6) years, filed an excessive number of pleadings, presented arguments without a good faith basis in fact or law, and transparently attempted to delay the foreclosure of his residence by Delta/Countrywide, all of which evidence his lack of good faith and further support dismissal. The Court thus concludes that the Chapter 11 should be dismissed with prejudice.<sup>19</sup>

The Court further finds that the Debtor should be barred from filing a bankruptcy case in any United States Court for a period of two (2) years from the date of entry of this Memorandum Opinion and Order based on his abuse of the bankruptcy process. *See Casse v. Key Bank Nat' Assoc. (In re Casse)*, 198 F.3d 327 (2d Cir. 1999) (court is permitted, under 11 U.S.C. § 105, to enjoin future filings for period of time longer than 180 days).

IT IS, THEREFORE, ORDERED that the UST Motion is granted, and that this Chapter 11 is dismissed with prejudice. All other relief requested in the UST Motion is denied.

IT IS FURTHER ORDERED that the Debtor is prohibited from filing any bankruptcy proceeding in any United States Court for a period of two (2) years from the date of the entry of this Memorandum Opinion and Order.

IT IS FURTHER ORDERED that the Adversary Proceedings are dismissed without prejudice.

IT IS FURTHER ORDERED that the balance of the pleadings set for the June 25 Hearing (Dk. Nos. 11-265, 266, 267, 273, 277, 278, 279) are dismissed without prejudice as moot.

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<sup>19</sup> Although Countrywide, in its Response, requested that the case be converted to a chapter 7 case, the Court finds that the Debtor's actions constitute abuse such that, under the circumstances, dismissal is more appropriate than conversion.

IT IS FURTHER ORDERED that all required monthly operating reports shall be filed and all fees due the UST and the Clerk of the Bankruptcy Court shall be paid no later than thirty (30) days from the date of this Memorandum Opinion and Order.

SO ORDERED,