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

**IN RE: CHARLES W. DOWDY** **CASE NO. 11-03329-KMS**

**DEBTOR** **CHAPTER 11**

**MEMORANDUM OPINION AND ORDER**

This matter came before the Court for hearing (the "Hearing") on May 16, 2013, on the Motion to Dismiss filed by the United States Trustee (Dkt. No. 318), the Motion to Dismiss filed by Ole Brook Broadcasting, Inc. (Dkt. No. 319), Responses to the Motions to Dismiss filed by The Peoples Bank, Biloxi Mississippi (Dkt. No. 332), the American Society of Composers, Authors and Publishers, et. al. ("ASCAP") (Dkt. Nos. 337, 338), and the Debtor (Dkt. Nos. 340, 341), a Joinder in the Responses of Debtor and The Peoples Bank in Opposition to the Motions to Dismiss filed by Pike County National Bank (Dkt. No. 344), the Motion for Substantive Consolidation filed by the Debtor (Dkt. No. 321), and Responses to the Motion for Substantive Consolidation filed by the United States Trustee (Dkt. No. 339), Ole Brook Broadcasting, Inc. (Dkt. No. 342) and Pike County National Bank (Dkt. No. 345). Craig M. Geno appeared at the Hearing on behalf of the Debtor, Christopher J. Steiskal appeared on behalf of the United States Trustee ("U.S. Trustee"), John D. Moore appeared on behalf of Ole Brook Broadcasting, Inc., Les W. Smith appeared on behalf of The Peoples Bank, Biloxi Mississippi, Jim F. Spencer, Jr. appeared on behalf of ASCAP and Henry C. Shelton, III appeared on behalf of Pike County National Bank. Having considered the pleadings, the evidence and the testimony presented at the Hearing, the Court finds that the Motions to Dismiss (Dkt. Nos. 318, 319) should be denied and the Motion for Substantive Consolidation (Dkt. No. 321) should be denied as moot.

## FINDINGS OF FACT AND PROCEDURAL BACKGROUND

Debtor Charles W. Dowdy ("Dowdy") is an attorney who practices law in Magnolia, Mississippi. (Dkt. No. 299, at 7). Prior to filing bankruptcy, Dowdy was also the sole shareholder of Southwest Broadcasting, Inc. ("Southwest") and Brookhaven Broadcasting, Inc. ("Brookhaven"). *Id.* Southwest and Brookhaven operated various radio stations in Mississippi and Louisiana. *Id.* On or about February 13, 2006, Dowdy and Brookhaven entered into an asset purchase agreement with Ole Brook Broadcasting, Inc. ("Ole Brook") for the purchase of two radio stations in Mississippi and the Buyers Guide published in Brookhaven, Mississippi. (Claim Dkt. 8-1, Part 7). On or about March 29, 2007, in relation to the asset purchase agreement, Brookhaven and Dowdy executed a promissory note in favor of Ole Brook in the amount of $1,000,000.00. *Id.* at Part 5. Brookhaven also executed a security agreement. *Id.* at Part 6. According to Ole Brook, Dowdy and Brookhaven failed to make the required payments under the note and Ole Brook ultimately obtained a state court judgment against Dowdy and Brookhaven on August 18, 2011 in the amount of $1,194,892.00.[1] The judgment was enrolled in Pike County, Mississippi on August 31, 2011. *Id.* at Part 2.

On September 21, 2011, Dowdy dissolved Southwest and Brookhaven but continued the business operations of both entities in the form of a sole proprietorship. (Hearing Ex. 3). On September 22, 2011, Dowdy filed for protection under Chapter 11 of the Bankruptcy Code. (Dkt. No. 1). In his Schedules, filed on November 2, 2011, Dowdy claimed ownership of the assets of both Southwest and Brookhaven. (Dkt. No. 35). On March 13, 2012, Ole Brook filed an adversary complaint, *Ole Brook Broadcasting, Inc. v. Dowdy (In re Dowdy)*, Adv. No. 12-00028-KMS (Bankr. S.D. Miss. filed March 13, 2012), asserting, among other things, that the

[1] A corrected judgment was entered on August 24, 2011, reflecting that the judgment was against both Dowdy and Brookhaven.

transfer of assets from Brookhaven to Dowdy upon dissolution of the company was a fraudulent transfer. Discovery is ongoing in the adversary proceeding.

On March 7, 2013, Ole Brook, as well as other creditors and the U.S. Trustee, filed an objection to the First Amended Disclosure Statement.[2] (Dkt. Nos. 304, 308, 309, 310). At the hearing on the objections on March 21, 2013, it was brought to the attention of the Court that assets of Southwest and Brookhaven were included in the Schedules filed by Dowdy. No satisfactory explanation for why those assets were included in the Dowdy estate was provided by counsel for Dowdy. Ole Brook asserted that the bankruptcy should be dismissed relying on the case of *In re Chang*, No. 10-51012-NPO (Bankr. S.D. Miss. Aug. 2, 2010), in which the court dismissed the Changs' bankruptcy for lack of good faith where the individual debtors dissolved eight corporate entities and improperly included the corporate assets in their estate in violation of Mississippi law. At the conclusion of the hearing, the Court denied approval of the First Amended Disclosure Statement and required Dowdy to amend his disclosure statement and plan in a way that did not include the assets of Southwest and Brookhaven. (Dkt. No. 316).

On April 19, 2013, both the U.S. Trustee and Ole Brook filed motions to dismiss (the "Motions to Dismiss") each asserting that Dowdy's attempt to combine the financial affairs of Brookhaven and Southwest in his personal bankruptcy created an impermissible "joint petition" in violation of 11 U.S.C. §302. They also asserted that under Mississippi law, dissolution of a corporation does not transfer title to corporate assets to the shareholders. Miss. Code Ann. § 79-4-14.05(b)(1). Citing *Chang* and other cases[3], the U.S. Trustee and Ole Brook argued that the

[2] Ole Brook and other creditors also objected to the original Disclosure Statement filed in this matter. (Dkt. Nos. 261, 263, 265, 267, 268). However, as a result of the objections, the Debtor agreed to amend his Disclosure Statement and the hearing on the objections was continued. (Dkt. No. 283). As a result of the amendment, there was no hearing on the original Disclosure Statement.

[3] *See, e.g., Maples v. Partain (In re Maples)*, 529 F.3d 670, 672 (5th Cir. 2008) (Garza, J. concurring and dissenting) (forfeiture of corporate charter did not transfer assets to debtor shareholders); *In re Adape Tedford Glazier, Inc.*, 410

case should be dismissed for lack of good faith pursuant to 11 U.S.C. § 1112(b). (Dkt. Nos. 318, 319). In his responses to the motions, the Debtor denied that he has acted in bad faith and asserted that the dissolution of the "two corporate entities, pre-petition, was simply to provide for efficiencies of administration, savings with respect to costs and fees and an acknowledgement that assets and affairs had been commingled."[4] (Dkt. Nos. 340, at 6, 341, at 5). The Debtor also maintained that it was the experience of his counsel that such procedures "were not only generally accepted, but expressly approved . . . ." *Id.*[5]

On April 19, 2013, Dowdy filed a motion for substantive consolidation of his case with Brookhaven and Southwest.[6] (Dkt. No. 321). In his motion, Dowdy asserted that he "made the decision that it would be more efficient and in the best interests of the creditors of all three entities if Brookhaven and Southwest were dissolved, and their assets and liabilities transferred

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B.R. 60, 62-63 (Bankr. D. Idaho 2009) ("An LLC member may not treat the assets of the LLC as its own prior to the completion of the winding up process.").

[4] *See also* First Amended Disclosure Statement (Dkt. No. 299, at 8) (Brookhaven and Southwest were dissolved to "avoid filing three separate Voluntary Petitions of Bankruptcy.").

[5] Dowdy also argues that it was clear from the beginning of the case, ostensibly from the filing of the petition, that he claims a "d/b/a" status regarding Southwest and Brookhaven. According to Fed. R. Bankr. P. 1005, the debtor must list all other names used within eight years of filing the petition. *See In re McMahon*, 383 B.R. 473, 475 (Bankr. W.D. Ark. 2008) (d/b/a listings by debtor on petition were trade names of debtor and were required to be listed). However, the listing of a corporate entity as a trade name does not consolidate that entity into the petition. *See Official Creditors' Comm. v. Puyanic (In re Korangy)*, No. 85-A-2277-PM, 1989 WL 34317, at *4 (Bankr. D. Md. Mar. 30, 1989), *aff'd*, 927 F. 2d 596 (4th Cir. 1991) (petition naming debtors as Amile A. Korangy, M.D. and Parvane S. Korangy d/b/a P.A.K. Associates did not place P.A.K. Associates entity in bankruptcy); *Fitzgerald v. Hudson (In re Clem)*, 29 B.R. 3, 4-5 (Bankr. D. Idaho 1982) (court held that individual and spouse were joint debtors and that listing of separate partnership reflected name by which debtors did business but did not operate as petition for relief by partnership); *In re 4-1-1 Florida Georgia, L.P.*, 125 B.R. 565, 566 (Bankr. W.D. Mo. 1991) (petition filed by at least four separate and distinct entities is improper joinder of multiple parties in one petition and must be dismissed); *In re Burch*, No. 11-42042-JDP, 2013 WL 951707, at *3 (Bankr. D. Idaho Mar. 11, 2013) (petition filed as debtors, husband and wife, individually d/b/a D & S Automotive may not be treated as joint filing on behalf of both debtors and D & S Auto); Collier on Bankruptcy ¶ 302.03 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (§ 302 provides that only individuals may file joint petitions and by statutory construction, partnerships, corporations and governmental units may not be considered individuals for purposes of Bankruptcy Code and are not eligible to file joint petitions).

[6] Neither Brookhaven nor Southwest are debtors in bankruptcy. *See Peoples State Bank v. Gen. Elec. Capital Corp. (In re Ark-La-Tex Timber Co.)*, 482 F.3d 319, 327 n.7 (5th Cir. 2007) (substantive consolidation not possible where all entities not in bankruptcy).

to [Dowdy]." *Id*. at 2. He explained that since he filed his petition, the income and assets of Brookhaven and Southwest have been consolidated with his personal income and assets such that it would be cost prohibitive to unravel the transactions. *Id.* at 3. He requests substantive consolidation of the non-debtor entities into his bankruptcy. The U.S. Trustee and Ole Brook objected to the motion.[7] (Dkt. Nos. 339, 342).

In addition to Dowdy, three creditors (ASCAP, The Peoples Bank and Pike County National Bank) filed responses to the Motions to Dismiss generally asserting that dismissal was not in the best interest of the creditors. (Dkt. Nos. 332, 337, 338, 344). These creditors, all secured creditors of Southwest and/or Dowdy but not Brookhaven, assert that they have spent substantial amounts of time negotiating settlements of their claims with Dowdy and raise the timeliness of the Motions to Dismiss as a defense.[8]

At the hearing in this matter, Allistar Watt, manager of the radio stations and Dowdy's son-in-law, testified that on September 20, 2011, Brookhaven and Southwest transferred all of

[7] Pike County National Bank filed a response to the motion asserting that the "procedure followed by Debtor has benefitted the Estate, its creditors, and . . . judicial economy, and has preserved assets for the creditors." (Dkt. No. 345, at 2).

[8] Despite the timing of the motions, this Court is a court of limited jurisdiction. It has jurisdiction over assets of the estate as defined by 11 U.S.C. § 541 and Mississippi law. *See* Collier on Bankruptcy ¶ 541.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) ("Section 541 embodies the essence of the Bankruptcy Code. It creates the bankruptcy estate, which consists of all of the property that will be subject to the jurisdiction of the bankruptcy court."); 28 U.S.C. § 1334(e)(1) (district court in which case under title 11 is pending shall have exclusive jurisdiction over property of debtor and of estate). The parties cannot, by consent or otherwise, confer jurisdiction over assets that, under state law, do not belong to the debtor. *See In re Maples*, 529 F.3d at 672-73 (bankruptcy court exceeded its jurisdiction when it administered assets of individual debtor's corporation); *In re Korangy*, 1989 WL 34317, at *7 (because partnership property was not property of debtors who owned interest in partnership, bankruptcy court lacked subject matter jurisdiction over property); *Nickless v. Aaronson (In re Katz)*, 341 B.R. 123, 128 (Bankr. D. Mass. 2006) (it is axiomatic that mere bankruptcy of partner does not bring partnership assets within jurisdiction of bankruptcy court); *Rodeck v. Olszewski (In re Olszewski)*, 124 B.R. 743, 746-47 (Bankr. S.D. Ohio 1991) (assets of partnership are not administered in bankruptcy cases of the individual partners and court lacked jurisdiction to determine effectiveness of liens on parcels of real estate not part of debtor's bankruptcy estate); *see also McCloy v. Silverthorne (In re McCloy)*, 296 F.3d 370, 373 (5th Cir. 2002) (lack of subject matter jurisdiction may be raised at any time); *In re Young*, 409 B.R. 508, 516 (Bankr. D. Idaho 2009) (delay in filing motion to dismiss does not excuse individual debtor's improper handling of corporate assets under state law); *In re Korangy*, 1989 WL 34317, at *3 ("The fact that this jurisdictional challenge is raised for the first time after extended litigation is of no moment.").

their assets to Dowdy via Bills of Sale and Quitclaim Deeds.[9] (Hearing Exs. 4, 5). Watt testified that as consideration for the transfers, Dowdy agreed to assume all of the debt of Brookhaven and Southwest.[10] In testimony, Dowdy confirmed that he had agreed to assume the debt as consideration for the transfers. Although there are vague references to transfers of these assets and Dowdy's assumption of the debt in pleadings filed in this case, this is the first time that the existence of actual documents and the date of the transfers have been disclosed to the Court.

## CONCLUSIONS OF LAW

Under Mississippi law, it is clear that the mere dissolution of a corporate entity does not effect a transfer of the corporate assets to the shareholders. Miss. Code Ann. § 79-4-14.05 (dissolution does not transfer title to corporation's property). Consequently, an individual debtor may not simply dissolve a corporate entity and include the corporate assets in his bankruptcy. *See In re Burch*, 2013 WL 951707, at *2 (corporation's debts and assets do not automatically revert to officers upon dissolution, construing Idaho law); *Esposito v. Hartley (In re Hartley)*, 458 B.R. 145, 150 (Bankr. S.D.N.Y. 2011), *aff'd* 479 B.R. 635 (S.D.N.Y. 2012) (title to corporate assets remain in corporation until dissolution completed, under New York law); *In re Young*, 409 B.R. at 513, 515 (individual who is owner of corporation brings into estate only his ownership interest and not assets of corporation; dissolution of corporation does not transfer title to corporation's property); *In re Na-Mor, Inc.*, 437 B.R. 482, 485 (Bankr. D. Mass. 2008) (corporation's assets do not immediately pass to shareholders upon dissolution under Massachusetts law); *In re Olszewski*, 124 B.R. at 746-47 ("debtors did not acquire a direct

[9] The Quitclaim Deeds were recorded on September 22, 2011, shortly before the bankruptcy petition was filed.

[10] The Court does not make any finding regarding the sufficiency of the consideration and notes that regardless of the form of transfer, Ole Brook has filed an adversary proceeding seeking to set aside the transfer of the assets of Brookhaven to Dowdy.

interest in the real estate merely because the partnership dissolved; the real estate remains an asset of the partnership pending a winding up of the partnership."). However, according to the evidence presented at the Hearing, the assets of Brookhaven and Southwest were transferred to Dowdy by Bills of Sale and Quitclaim Deeds prior to dissolution. Consequently, these assets were property of Dowdy's estate subject to the liens of the creditors of Southwest and Brookhaven and subject to the creditors' claims and/or causes of action that may arise as a result of the transfer.[11] *See Morris v. Macione*, 546 So. 2d 969, 970-71 (Miss. 1989) (going concern may not avoid creditors by transfer of assets—debt follows the assets); *In re Permian Producers Drilling, Inc.*, 263 B.R. 510, 521 (W.D. Tex. 2000) (lien attaches to assets transferred to shareholders outside of ordinary course of business).

It is not apparent from the Motions to Dismiss or the responses thereto that the movants were aware of actual documents evidencing a transfer of corporate assets to Dowdy, individually, prior to dissolution of the corporations and the filing of his bankruptcy petition. Rather, it appears that the movants were under the impression, as was the Court, that the Debtor's position was that the assets of Southwest and Brookhaven were automatically transferred to Dowdy upon the dissolution of the corporations. However, the trial testimony and documentary evidence regarding the transfer of assets to Dowdy prior to the corporate dissolutions distinguishes this case from *Chang* and other cases cited by Ole Brook and the U.S.

[11] At the hearing, counsel for Dowdy asserted that it is his intention to set aside the judgment lien of Ole Brook as a preference. *See Dowdy v. Ole Brook Broadcasting, Inc. (In re Dowdy)*, Adv. No. 13-00022-KMS (Bankr. S.D. Miss. filed Mar. 19, 2013) (complaint filed by Dowdy to avoid judgment as preferential transfer under § 547). Ole Brook has a lien against both Dowdy and Brookhaven. Pursuant to Mississippi law, Ole Brook's lien against Brookhaven attached to the assets of Brookhaven that were transferred to Dowdy. *See Stanley-Sw. Invs., Inc. v. Colonial Frost Bank (In re Stanley-Sw. Invs., Inc.)*, 96 B.R. 701, 706 (Bankr. W.D. Tex. 1988) (transfers could not be avoided where transfers prior to dissolution of partnership were transfers of partnership property rather than of property of debtor or estate); *Campbell v. Bolen (In re Caudy Custom Builders, Inc.)*, 31 B.R. 6, 8-9 (Bankr. D.S.C. 1983) (trustee may not avoid transfer under § 547(b) where property transferred was not property of debtor but was property of joint venture); 11 U.S.C. § 547(e)(3) ("a transfer is not made until the debtor has acquired rights in the property transferred"); *see generally Farrey v. Sanderfoot*, 500 U.S. 291, 298-99 (1991) (debtor cannot, under § 522, avoid lien on interest acquired after lien attached—to allow debtor to do so "would be to allow judicial lienholders to be defrauded through the conveyance of an encumbered interest to a prospective debtor.").

Trustee. The Court finds, based on the facts presented in this case, that the Chapter 11 filing did not create an impermissible joint filing of Dowdy, individually, with Southwest and Brookhaven. As a result of the transfers, the Dowdy estate includes the assets of Brookhaven and Southwest. Therefore, the Motions to Dismiss should be denied, and the Motion for Substantive Consolidation is moot.

## CONCLUSION

For the reasons stated above, the Motions to Dismiss (Dkt. Nos. 318, 319) are **DENIED**. The Motion for Substantive Consolidation (Dkt. No. 321) is **DENIED AS MOOT**.

**SO ORDERED.**

Katharine M. Samson
United States Bankruptcy Judge
Dated: June 5, 2013