SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: February 18, 2021

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

MISSISSIPPI MATERNAL-FETAL MEDICINE, P.A.,	**CASE NO. 21-00091-NPO**
DEBTOR.	**CHAPTER 11**

ORDER GRANTING MOTION FOR DETERMINATION THAT APPOINTMENT OF PATIENT CARE OMBUDSMAN IS UNNECESSARY AT THIS TIME

This matter came before the Court for telephonic hearing on February 17, 2021 (the "Hearing") on the Motion for Determination that Appointment of Patient Care Ombudsman is Unnecessary (the "Motion") (Dkt. 26) filed by the debtor, Mississippi Maternal-Fetal Medicine, P.A. (the "Debtor"), in the above-referenced bankruptcy case (the "Bankruptcy Case"). No response to the Motion was filed. At the Hearing, J. Walter Newman, IV represented the Debtor, Robert A. Byrd, the trustee appointed in this chapter 11, subchapter V case (the "Subchapter V Trustee'), appeared on his own behalf, and Christopher J. Steiskal, Sr. represented David W. Asbach, Acting U.S. Trustee for Region 5 (the "UST"). In support of the Motion, the Debtor offered two (2) exhibits[1] and the testimony of Dr. Robert W. Naef, III, M.D. ("Dr. Naef") into evidence. The Court granted the Motion from the bench. This Order memorializes and

[1] Citations to exhibits are to the corresponding docket entry in the Bankruptcy Case.

supplements the Court's bench ruling.

Jurisdiction

The Court has jurisdiction over the Bankruptcy Case pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 11 U.S.C. § 157(b)(2)(A). Notice of the Hearing was proper under the circumstances.

Facts

1. The Debtor is an obstetrics and gynecology practice that provides maternal and fetal medicine and specializes in the care of expectant mothers that are considered high-risk. (Dkt. 26 ¶ 4). The Debtor was established in Jackson, Mississippi in 2005. (Dkt. 26 ¶ 3). Dr. Naef serves as the president of the Debtor, and he is the only doctor employed by the Debtor. (Dkt. 26 ¶ 4). Dr. Naef has been board certified with the Mississippi State Board of Medical Licensure since July 1988. (Dkt. 35). Dr. Naef is also certified in General Obstetrics and Gynecology and Maternal-Fetal Medicine with the American Board of Obstetrics and Gynecology. (Dkt. 34, 35). The Debtor operates within the guidelines of the American College of Obstetricians and Gynecologists and the Society of Maternal Fetal Medicine. (Dkt. 26 ¶ 10). The Debtor also employs two (2) office administrators and two (2) sonographers. (Test. of Dr. Naef at 10:07:19-10:07:50 (Feb. 17, 2021)).[2]

2. The Debtor's patients typically are referred to the Debtor by a family practitioner or a general obstetrician. (Test. of Dr. Naef at 10:06:25-10:06:32 (Feb. 17, 2021)). If the patient has previously been a patient of the Debtor, the Debtor will allow the patient to "self-refer," but the patient remains under the care of a general obstetrician. (Test. of Dr. Naef at 10:12:55-10:13:23 (Feb. 17, 2021)). Patients are referred to the Debtor because they are considered high-risk during

[2] The Hearing was not transcribed. Citations are to the timestamp of the audio recording.

either the term of the pregnancy or at the time of delivery. (Test. of Dr. Naef at 10:06:32-10:06:46 (Feb. 17, 2021)). The Debtor provides a management plan for the patient and assists the referring physician with the implementation of the management plan. (Test. of Dr. Naef at 10:06:46-10:07:01 (Feb. 17, 2021)). Most of the Debtor's patients are women of reproductive age that are not disabled or unable to communicate. (Test. of Dr. Naef at 10:12:50-10:13:20 (Feb. 17, 2021)).

3. On January 20, 2021, the Debtor filed a voluntary petition for non-individuals (the "Petition") (Dkt. 1) under subchapter V of chapter 11 of the U.S. Bankruptcy Code. On the Petition, the Debtor classified its business as a "Health Care Business" as defined in 11 U.S.C. § 101(27A).

4. On February 1, 2021, the Debtor filed the Motion arguing that the appointment of a patient care ombudsman ("PCO") pursuant to 11 U.S.C. § 333 is unnecessary. (Dkt. 26 at 6). The Debtor argues that it has an exemplary history of patient care pursuant to the guidelines for the practice of high-risk obstetrics from the American College of Obstetricians and Gynecologists and the Society of Maternal Fetal Medicine and that "[m]ost if not all of the Debtor's patients are of such a physical and/or mental condition that they are able to protect their rights or otherwise act for themselves in most respects." (Dkt. 26 ¶¶ 10, 12). The Debtor also argues that the purpose of the Petition is to restructure its debt and not due to patient care issues. (Dkt. 26 ¶ 14).

5. On February 10, 2021, Strategic Funding Source, Inc. ("Strategic") filed the Motion to Prohibit Use of Cash Collateral (the "Motion on Cash Collateral") (Dkt. 31) asking the Court to prohibit the use of its cash collateral pursuant to 11 U.S.C. § 363(e) or in the alternative to provide for adequate protection as a condition to its use pursuant to 11 U.S.C. § 361. (Dkt. 21 at 5-6). Strategic also requests that "it be granted an allowed superpriority administrative expense claim pursuant to 11 U.S.C. § 507(b)." (Dkt. 31 at 7).

6. Strategic alleges that the Debtor defaulted on its obligations under a Loan Agreement and Security Agreement and Personal Guaranty in the principal amount of $150,000.00. (Dkt. 31 ¶ 4). To secure the payment and performance, the Debtor purportedly granted Strategic "a first priority continuing security interest in and lien upon all or substantially all of the Debtor's personal property, including, without limitation, all cash, equipment, accounts, inventory, chattel paper, instruments, documents and general intangibles, and all products and proceeds of any of the foregoing." (Dkt. 31 ¶ 5). Strategic alleges that on August 29, 2019, it filed a complaint against the Debtor for breach of contract in the Virginia Circuit Court of the County of Chesterfield and obtained a judgment on July 8, 2020 against the Debtor in the amount of $263,041.00, consisting of $152,675.00 of principal, $104,866.00 of interest, and attorney's fees of $5,500.00. (Dkt. 31 ¶ 8). A hearing on the Motion on Cash Collateral is set for March 9, 2021. (Dkt. 33). At this juncture, no written response to the Motion on Cash Collateral has been filed. The deadline to do so expires on March 4, 2021.

7. On February 17, 2021, the Court held the Hearing on the Motion. At the Hearing, Dr. Naef testified about the circumstances that caused the Debtor to file the Petition. First, a new, competing clinic opened in Madison, Mississippi that decreased the number of referrals to the Debtor. (Test. of Dr. Naef at 10:14:00-10:14:28 (Feb. 17, 2021)). Second, the global health pandemic caused by COVID-19[3] caused approximately 20-30% of patients to miss their appointments. (Test. of Dr. Naef at 10:14:30-10:14:45 (Feb. 17, 2021)). Dr. Naef explained that these two reasons caused the Debtor to fall behind on its obligations to Strategic. (Test. of Dr. Naef at 10:14:40-10:15:00 (Feb. 17, 2021)). Strategic then obtained a garnishment that seized all

[3] *See Thing to Know About the COVID-19 Pandemic*, Centers for Disease Control & Prevention (Feb. 17, 2021), https://www.cdc.gov/coronavirus/2019-ncov/your-health/need-to-know.html.

of the Debtor's cash in its accounts. (Test. of Dr. Naef at 10:14:40-10:15:30 (Feb. 17, 2021)). In order to continue operating, the Debtor obtained funding from an alternative lender. (Test. of Dr. Naef at 10:14:40-10:15:30 (Feb. 17, 2021)). The Debtor is using the alternative funding to maintain its normal operations. Both the Subchapter V Trustee and the UST stated at the Hearing that the appointment of a PCO is unnecessary given these facts.

Discussion

Pursuant to 11 U.S.C. § 333, if a debtor is a health care business, the appointment of an ombudsman is mandatory unless the Court finds that one is not necessary for protection of patients under the specific facts of the case. 3 COLLIER ON BANKRUPTCY ¶ 333.02 (16th ed. 2021). A court must appoint a PCO within thirty (30) days after the debtor files a bankruptcy case unless the court, "on motion of the United States trustee or a party in interest filed no later than 21 days after commencement of the case . . . finds that the appointment of a patient care ombudsman is not necessary under the specific circumstances of the case for the protection of patients." FED. R. BANKR. P. 2007.2(a). The party opposing the appointment of a PCO bears the burden of overcoming the mandatory appointment. *In re Smiley Dental Arlington, PLLC*, 503 B.R. 680, 688 (Bankr. N.D. Tex. 2013). The Court must determine whether the appointment of a PCO is necessary to protect patients' interests based on the particular facts of the Bankruptcy Case.

Most courts use the test articulated in *In re Alternate Family Care*, 377 B.R. 754 (Bankr. S.D. Fla. 2007), in determining whether a PCO is necessary. The *Alternate Care* test considers the following list of factors, none of which is determinative: (1) the cause of the bankruptcy, (2) the presence and role of licensing or supervising entities, (3) the debtor's past history of patient care, (4) the ability of patients to protect their rights, (5) the level of dependency of the patients on the facility, (6) the likelihood of tension between the interests of the patients and the debtor, (7)

the potential injury to the patients if the debtor drastically reduced its level of patient care, (8) the presence and sufficiency of internal safeguard to ensure an appropriate level of care, and (9) the impact of the cost of an ombudsman on the likelihood of a successful reorganization. *Id.* at 758. According to one well-respected bankruptcy treatise:

> Facts that warrant a decision not to appoint an ombudsman could include that the facility's patient care is of high quality, that the debtor has adequate financial strength to maintain high-quality patient care, that the facility already has an internal ombudsman program in operation or that the situation at the facility is adequately monitored already by federal, state, local or professional association programs so that the ombudsman would be redundant.

3 COLLIER ON BANKRUPTCY § 333.02[2] (16th ed. 2021). "The weight given to the factors is at the discretion of the reviewing court." *In re Flagship Franchises of Minn. LLC,* 484 B.R. 759, 762 (Bankr. D. Minn. 2013) (citing *In re N. Shore Hematology-Oncology Assocs., P.C.*, 400 B.R. 7 (Bankr. E.D.N.Y. 2008)). Presumably, the protection provided by a PCO is "from the poor medical care because of the disruption caused by the bankruptcy filing, the business's overall financial problems or the transfer of a patient from a closing facility." 3 COLLIER ON BANKRUPTCY § 333.02[2] (16th ed. 2021).

The Court finds that at this time the *Alternate Care* factors weigh against appointing a PCO. The Debtor employs one licensed physician, Dr. Naef, who recertifies annually and abides by the guidelines for the practice of high-risk obstetrics outlined by the American College of Obstetricians and Gynecologists and the Society of Maternal Fetal Medicine. As a physician certified by the Mississippi State Board of Medical Licensure, patients that are not satisfied with their standard of care can contact directly the Mississippi State Board of Medical Licensures. There is no evidence before the Court that the standard of care by Dr. Naef or the Debtor has ever been a problem. The Court also finds that the Debtor's role as an additional, supplemental physician in the care of patients allows additional assurance that patients' rights will be protected

and the standard of care will not suffer. The risk to patient care is lessened further by the Debtor's role in only providing outpatient care instead of a continuity of day-to-day care. *See In re Genesis Hospice Care LLC*, No. 08-15576-NPO 2009 WL 467265, at *2 (Bankr. N.D. Miss. Feb. 24, 2009). For these reasons, the Court finds that a PCO is not necessary at this time to protect patient care and patient's rights.

Finally, the Court notes that the costs of appointment could adversely affect the Debtor's ability to reorganize, and as the Court has found, the filing of the Bankruptcy Case was not precipitated by concerns relating to quality of patient care or to patient privacy matters. *In re N. Shore Hematology-Oncology Assocs., P.C.*, 400 B.R. at 12 (citing *In re William L. Saber, M.D., P.C.*, 369 B.R. 631 (Bankr. D. Colo. 2007)). The Court, however, recognizes that the Debtor's financial future is still unknown and that the Debtor had to file the Bankruptcy Case to continue its operations. The Court, therefore, reserves the right to reconsider these factors and the necessity of a PCO at any time during the Bankruptcy Case. Specifically, the Court will consider whether a PCO is necessary at the conclusion of the hearing on the Motion on Cash Collateral.

Conclusion

The Court has found that the appointment of a PCO is an unnecessary expense that would impair the potential success of the Bankruptcy Case. There is no indication that there is a risk to patient care if a PCO is not appointed at this time. The Court is also convinced that the state licensing board and the continued care by the referring physician provides adequate oversight for the Debtor's practice. Should the Debtor experience any negative trend which indicates the need for the appointment of a PCO in the future, the Court anticipates the filing of an appropriate motion so that the Court might reconsider such an appointment. At present, the Court will consider whether a PCO is necessary at the conclusion of the hearing on the Motion on Cash Collateral. *See*

FED. R. BANKR. P. 2007.2(b) ("[T]he court, on motion of the United States trustee or a party in interest, may order the appointment at a later time if it finds that the appointment has become necessary to protect patients.").

IT IS, THEREFORE, ORDERED that the Motion is hereby granted.

IT IS FURTHER ORDERED that the appointment of a PCO is unnecessary at this time.

IT IS FURTHER ORDERED that the Court will reconsider its decision at the conclusion of the hearing on the Motion on Cash Collateral set for March 9, 2021.

END OF ORDER