

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO**

In re:)
)
GARY D. TISCH,) Case No. 17-13428 MER
SSN: xxx-xx-4587)
) Chapter 11
Debtor.)
)

**MOTION TO APPOINT A CHAPTER 11 TRUSTEE OR,
IN THE ALTERNATIVE, TO DISMISS CASE**

Daniel Tisch and Eva Tisch (collectively, the “Creditors”), through counsel, file their Motion to Appoint a Chapter 11 Trustee or, in the alternative, Dismiss Case and state as follows:

INTRODUCTION

Creditors are the brother and sister of Gary Tisch (the “Debtor”). Creditors hold a judgment in the amount of \$1,050,000, plus attorneys’ fees, costs, and interest, against Debtor and his alter ego Liquor Barn, Ltd., for theft and breach of fiduciary duty. Creditors are approximately 90% of the scheduled unsecured claims.

Debtor filed this case within a week of the jury verdict and before a judgment had entered. The sole purpose of this case, in Debtor’s own words, was to prevent Creditors from collecting. When Debtor filed bankruptcy, Creditors held the only debt in default—Debtor was current on all his other debts.

Debtor represented in his schedules that he is solvent by more than \$2,500,000. In a financial statement given to a bank on the same day he filed his schedules, Debtor represented he was solvent by more than \$5,000,000. However, Debtor’s periodic report demonstrates that on paper his businesses make far too little money to pay even the interest owed to Creditors (at least \$80,000 per year). Debtor stated in his status report filed with the Court that he intends to file a plan to pay creditors over sixty months and would begin to liquidate assets only “if necessary.” Debtor has made good on that by doing nothing to begin liquidating property to pay creditors.

Besides a bad faith motive, Debtor has not been transparent during this case. Debtor was not forthcoming on his schedules, which contain known, material misstatements, including the failure to disclose more than \$500,000 paid to him from one of his businesses in 2015. Debtor did not list any income for 2017, but the bank statements of his personal account and the accounts of the businesses he controls shows that Debtor received well more than \$100,000 in 2017 prior to the bankruptcy.

Moreover, Debtor has represented certain values for his assets to the court, and totally different values for the same assets on a financial statement given to one of his creditors the day after Debtor filed his schedules. In the same financial statement, Debtor claimed to own a Mercedes 600SL that Debtor represented in his SOFA was sold to his mother. In fact, Debtor's bank statements show his mother made no payment to Debtor for the car.

Both before and during this case, Debtor has used the money of the businesses he controls as his own. Debtor has also used the business accounts to pay his personal expenses before and during the bankruptcy, including a \$10,000 loan from his girlfriend, credit cards, and an alleged debt to Debtor's mother.

Debtor has also not timely filed monthly operating reports. The single operating report Debtor filed shows that Debtor has continued to pay prepetition unsecured debts, including his mother and credit card companies. Debtor has also paid two attorneys that have not been employed under § 327.

Debtor has ignored other duties as well. More than three months into this case, Debtor has not requested court approval to pay adequate protection to his secured creditors, Debtor has paid attorneys not approved under § 327, has paid prepetition (alleged) debt to his mother and credit card companies.

In short, Debtor filed this case in bad faith and maintains this case in bad faith. Debtor has engaged in fraud and dishonesty. A chapter 11 trustee should be appointed for the benefit of creditors or, in the alternative, this case should be dismissed.

CASE HISTORY

1. Debtor commenced this case by filing a voluntary petition under chapter 7 on April 17, 2017.
2. The meeting of creditors occurred on May 23, 2017.
3. This Court granted relief from stay for Debtor and Creditors to continue the state court litigation. [Docket No. 57].
4. Creditors obtained authority to conduct 2004 examinations of Debtor, Bank of the West, and Mountain View Bank of Commerce. [Docket Nos. 63, 64, and 65].

THE CREDITORS' CLAIM

5. A jury entered a verdict for Creditors and against Debtor for theft in the amount of \$300,000 and breach of fiduciary duty in the amount of \$150,000 on April 17, 2017, the same day this case was filed. The jury also found that Liquor Barn, Ltd., was the alter ego of Debtor. The state court awarded treble damages on the theft claim and entered judgment against Debtor and Liquor Barn, Ltd., for \$1,050,000, plus interest at 8.0% and attorneys' fees and costs. A copy of the judgment is attached as **Exhibit 1**.

6. Debtor has acknowledged the Creditors' claim is nondischargeable [Docket No. 41, at ¶ 4]. Creditors filed a complaint to determine the dischargeability of debt on June 30, 2017. [Docket No. 1 in 17-01265].

7. On July 21, 2017, the state court denied Debtor's motions to amend the judgment and for a new trial under Colo. R. Civ. P. 59 and 60. **Exhibit 2.**

THIS CASE WAS FILED IN BAD FAITH

8. An assessment of alleged bad faith "requires the bankruptcy court's on-the-spot evaluation of the debtor's financial condition, motives, and the local financial realities." *In re Gunnison Ctr. Apartments, LP*, 320 B.R. 391, 399 (Bankr. D. Colo. 2005) (internal citation omitted). Bad faith is often measured by "certain recurring but non-exclusive patterns, and [is] based on a conglomerate of factors rather than on any single event. *Id.*

9. Factors for determining whether a case is filed in bad faith include: (1) the debtor has only one asset; (2) the debtor has only one creditor; (3) the debtor acquired property which was posted for foreclosure and the prior owners had been unsuccessful in defending against the foreclosure; (4) the debtor was revitalized on the eve of foreclosure to acquire the insolvent property; (5) the debtor has no ongoing business or employees; (6) the debtor lacks a reasonable possibility of reorganization; and (7) the Chapter 11 filing stopped the foreclosure. *See, e.g., In re Gunnison Ctr. Apartments, LP*, 320 B.R. 391, 399 (Bankr. D. Colo. 2005); *In re Hyatt*, 479 B.R. 880, 891 (Bankr. D.N.M. 2012)

10. The bad faith in this case centers on a common fact pattern of using bankruptcy as a substitute for a supersedeas bond and to gain advantage in state court litigation in what is nothing more than a two-party dispute. *See, e.g., In re Hyatt*, 479 B.R. 880, 891 (Bankr. D.N.M. 2012). On those points, Debtor candidly disclosed his naked desire: In his Status Report, Debtor states "[t]he foregoing Chapter 11 case was solely filed to protect seizure of Debtor's personal assets as a result of a Judgment" in favor of Creditors. [Docket No. 41, at ¶ 1].

11. The case was filed before a judgment had entered and before the 14-day stay under Colo. R. Civ. P. 62(a) even began to run and Creditors had not taken any action to collect when Debtor filed this case. Debtor testified at his meeting of creditors that the only debt for which he was not current when he filed for bankruptcy was the debt he owes to Creditors. Debtor also testified he did nothing to investigate whether he could obtain a bond to stay execution on Creditors' claim, then later testified he was told he would be unable to get a bond. Debtor has also conceded that Creditors' claim is non-dischargeable. [Docket No. 41, at ¶ 4].

12. Debtor's schedules and reports filed in this case show the only way to pay creditors is by selling assets. On his Schedule J, Debtor represents he has \$4,753.67 in monthly net income [Docket No. 24, 2]. If Creditors' were paid the entire monthly net income over sixty months, the total would be approximately \$285,000, which would not even pay the 8.0% interest accruing on Creditors' judgment against Debtor.

13. Debtor has made no effort to begin selling assets—he has not filed a motion to sell any property and has not even sought to hire a broker to begin marketing property. In fact, Debtor represents in his status report that he intends to propose a plan to “liquidate personal property, if necessary and with Court permission, to make Plan payments which we be amortized over sixty (60) months to pay back the full judgment, if necessary.” [Docket No. 41, at ¶ 1].

14. While Creditors may not be opposed to an orderly liquidation, that process has not started and Debtor has already indicated he will sell assets to pay Creditors’ claim only if forced to do so. In the nearly four (4) months this case has been pending, Debtor has made no outward progress on selling property to pay creditors. Because Creditors are 90% of the scheduled unsecured claims, and their debt is non-dischargeable, it will be very difficult or impossible for Debtor to confirm a plan over Creditors’ objection. Moreover, as demonstrated below, Debtor has made numerous misrepresentations in this case and has shown he cannot perform his fiduciary obligations.

15. Courts hold that when the debtor is solvent, a chapter 11 case is filed in bad faith to hold off a judgment creditor. *In re Hyatt*, 479 B.R. 880, 894 (Bankr. D.N.M. 2012). A conclusion that this case was filed in bad faith is especially warranted here when the Creditors are 90% of the scheduled unsecured claims, their claim is nondischargeable, Debtor’s net income is not sufficient to pay even the interest on Creditors’ claim, and therefore lacks any possibility of reorganizing. and Debtor has indicated his inability to accurately disclose his financial affairs, his inability to timely file monthly reports and his resistance to selling his property to pay Creditors.

DEBTOR’S MISREPRESENTATIONS

The Financial Statement

16. On April 26, 2017, Debtor gave a personal financial statement to Mountain View Bank of Commerce. **Exhibit 3**. On April 26, 2017, Debtor filed his schedules. Debtor represented completely different things to this Court than he did to the bank. A summary is as follows:

Asset	Scheduled Value Filed 4/26	Financial Statement Value Dated 4/25
1999 Sugarbush	1,400,000	1,750,000
9691 W. Coco ¹	250,000	220,000
5783 Asbury ²	300,000	304,000
South Broadway Rentals, LLC	1,548,000	2,400,000
4415 S. Broadway, LLC	1,666,000	1,750,000
Liquor Barn, Ltd.	686,000	1,538,331
1995 Mercedes 600SL ³	Not listed as an asset	15,000

¹ At the meeting of creditors, Debtor testified he did not have a beneficial interest in the property.

² At the meeting of creditors, Mr. Tisch testified he did not have a beneficial interest in the property.

Total	5,850,000	7,977,331
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Compare Docket No. 18, at 1, 2, 5 with **Exhibit 3** (the financial statement).

17. Thus, on April 25th, Debtor represented to a bank that the value of his interests in Liquor Barn and South Broadway Rentals nearly \$2,000,000 higher than he did when identifying the same assets to the Court and his creditors on April 26th. Debtor also represented on April 25 that he owned a Mercedes worth \$15,000, but to the Court and his creditors, Debtor represented he sold the same Mercedes to his mother for \$8,000 prior to the bankruptcy in 2017. [Docket No. 26, at 4 ¶ 18].

18. Creditors obtained bank statements for the only account Debtor disclosed in this case. Debtor received no payments from his mother during 2017 for the alleged sale of his Mercedes to his mother.

Debtor's Income

19. On his statement of financial affairs, Debtor did not list any income for 2017. [Docket No. 26, at 1]. However, in a single month, Debtor received more than \$310,000 from the businesses. **Exhibit 4**, at 4, 5 (Jan. 2017 Bank of The West Acct. No. 8207 Statement).

20. Debtor represented his 2015 income was only \$173,000. [Docket No. 26, at 1]. Debtor's 2015 K-1 for 4415 South Broadway, LLC, shows he received \$526,00 from that entity alone. **Exhibit 5**, at 4 (2015 tax return for 4415 S. Broadway, LLC).

The Residence

21. In his schedules, Debtor identified a 100% ownership interest in 1992 Sugarbush Drive, Evergreen, Colorado (the "Residence") with a scheduled value of \$1,400,000. [Docket No. 18, at 1]. Debtor scheduled three claims secured by the Residence: Bank of the West for \$400,864, Suntrust Mortgage for \$378,621, and Vectra Bank for \$160,000. [Docket No. 20, at 1, 3].

22. The Gary Tisch Revocable Trust is the current owner of the Residence, and has been the owner of the Residence since 2009. **Exhibit 6** (quitclaim deed). There is no deed of trust of record for Vectra Bank on the Residence. The Gary Tisch Revocable Trust granted a deed of trust to Suntrust Mortgage. Moreover, Debtor failed to disclose that Bank of the West has a deed of trust on the Residence securing a line of credit in the amount of \$75,000. **Exhibit 7** (deed of trust). In addition, it appears the \$378,621 deed of trust granted to Bank of the West was granted by Debtor after he transferred the property to his trust. **Exhibit 8** (deed of trust).

The Condos

³ Debtor represented on his statement of financial affairs that the Mercedes was sold to his mother shortly before the bankruptcy.

23. Debtor listed property located at 9691 W. Coco #206, Littleton, Colorado (the “Coco Condo”) as being owned 100% by him, with the current value of his interest in the Coco Condo as \$250,000. [Docket No. 18, at 2]. Debtor listed no claims secured by the Coco Condo. [Docket No. 20].

24. The Coco Condo is actually owned by Sugarbush Investments, LLC. **Exhibit 9** (quitclaim deed). Debtor did not list an ownership interest in Sugarbush Investments, LLC, but testified at the meeting of creditors that he owned that entity. Debtor testified there is a mortgage on the Coco Condo for which he is personally liable, but the Coco Condo was purchased for his nephew, who had credit issues. The nephew pays Debtor each month for the monthly mortgage and that Debtor then pays the mortgage. Debtor testified that the nephew has paid for everything associated with Coco Condo and that Debtor had no beneficial interest in the Coco Condo. Debtor has not disclosed any of these facts in his schedules or amendments thereto and continues to represent that the value of his interest in the Coco Condo is \$250,000. [Docket No. 48, at 2].

25. At the meeting of creditors, Debtor had a similar explanation for 5873 W. Asbury #102, Lakewood, Colorado (the “Asbury Condo”). Debtor listed his interest in the Asbury Condo as jointly owned with his mother, Alix Evensdorf, but valued the Asbury Condo at \$300,000 and his interest in it at \$300,000. [Docket No. 18, at 2]. At the meeting of creditors, Debtor testified his mother has paid for everything associated with the Asbury Condo, including the down payment and monthly mortgage payments. This is again inconsistent with the financial statement he gave the bank only weeks after filing this case. **Exhibit 3** (the financial statement).

The Businesses

26. At the meeting of creditors, Debtor did not know how the \$686,000 value of Liquor Barn in his schedules was determined, but he testified that he believed the actual value was significantly lower than \$686,000. In his periodic report filed on June 5, 2017 [Docket No.55], Debtor estimates the value of Liquor Barn at \$1,163,000. [Docket No. 55, at 4]. Similarly, at the meeting of creditors, Debtor did not know how the value of South Broadway Rentals, LLC, and 4415 South Broadway, LLC, were determined and in his periodic report, Debtor assigns \$1,033,523 as the value of 4415 S. Broadway, LLC, and \$1,231,420 as the value of South Broadway Rentals, LLC. [Docket No. 55, at 18, 30]. This is again inconsistent with the financial statement he gave the bank only weeks after filing this case. **Exhibit 3** (the financial statement).

27. On his schedules, Debtor disclosed that South Broadway Rentals, LLC, owns commercial real estate at 4011 S. Broadway, Englewood, Colorado. [Docket No. 18, at 5; Docket No. 48, at 5]. In fact, South Broadway Rentals, LLC, also owns additional property located at 3901 S. Broadway, Englewood. **Exhibit 10** (deed to 3901 S. Broadway). Debtor listed a debt owed to Mountain View Bank of Commerce in the amount of \$700,000 as secured by his interest in South Broadway Rentals, LLC. [Docket No. 20, at 2]. The public records show that Mountain View Bank of Commerce holds a deed of trust on the property located at 4011 S. Broadway and there is no lien on the property located at 3901 S. Broadway.

28. Debtor testified that the money advanced by Bank of the West on the \$400,000

line of credit secured by the Residence was used for Liquor Barn. However, Debtor testified that 4415 South Broadway, LLC, makes the monthly payment on the \$400,000 line of credit from Bank of the West secured by the Residence.

29. Through discovery in the state court case, Creditors learned Debtor manipulated the accounting for his businesses. Examples include the rent circle, numerous payments by Liquor Barn, 4415 South Broadway, and South Broadway Rentals for Debtor and each in other. A table showing the payments is attached as **Exhibit 11** (table of circular payments). The same thing is shown on **Exhibit 4** (Debtor's January 2017 bank statement). The bulk of the transfers and withdrawals are from and to the businesses. The Debtor has continued the same practices during this bankruptcy case.

30. Neither balance sheets for his entities in the periodic report nor Debtor's schedules identify debt owed among the businesses or by or to Debtor. [Docket No. 55, at 5, 19, and 31]. However, the tax returns for each of those entities shows material due to/due froms. Debtor also did not schedule an alleged debt owed by Liquor Barn to him or from South Broadway Rentals, LLC, to him. [Docket No. 55, at 2 and 23].

31. Bank statements for Liquor Barn show that Debtor has paid Malika Magner, who is Debtor's girlfriend, more than \$10,000 in 2017 (both pre and post-petition).

32. The 2017 prepetition bank statements for Debtor and Liquor Barn show that only Liquor Barn paid Jeffrey Sachs, who represented Debtor and Liquor Barn in the state court case.

The Banks

33. Debtor scheduled two secured claims owed to Mountain View Bank of Commerce \$700,000, the collateral for which Debtor listed as his interest in South Broadway Rentals, LLC, and \$475,000, the collateral for which Debtor listed as his interest in 4415 S. Broadway, LLC.

34. Debtor scheduled two claims owed to Bank of the West. However, Debtor's scheduled information does not match public records. As an example, Debtor scheduled a debt to Bank of the West for \$400,864, secured by the Residence and a \$67,000 debt secured by Debtor's interest in Liquor Barn, Ltd. [Docket No. 20, at 1]. In fact, the \$67,000 debt is secured by the Residence. There is also a debt owed to Bank of the West in the amount of \$67,200.73 secured by the Coco Condo. [Proof of Claim 2-1, at 2, 11].

FAILURE TO FILE MONTHLY REPORTS

35. In the three months this case has been pending, Debtor has filed one operating report. [Docket No. 73]. That operating report shows that Debtor paid Wes Howard on April 17, 2017. [Docket No. 73, at 5]. Debtor did not file an application to employ Mr. Howard until June 23, 2017. [Docket No. 80]. Debtor also paid the prepetition debts owed to several unsecured creditors, including his mother, Alix Evendorff, Discover Card, and Citi [Docket No. 73, at 5].

The amounts are not substantial, but the payments demonstrate that Debtor simply disregards his fiduciary duties.

36. As of the date of this motion, Debtor has not filed an operating report for June.

LEGAL BASIS FOR APPOINTMENT OF A TRUSTEE OR DISMISSAL

37. Debtor's false representations in his schedules about the values of his businesses, his year-to-date income, and the alleged sale of his Mercedes to his mother constitute dishonesty and fraud under 11 U.S.C. § 1104(a)(1). The judgment in favor of creditors and against Debtor for theft and breach of fiduciary duty also constitutes fraud and dishonesty.

38. The appointment of a trustee is also in the best interests of creditors under 11 U.S.C. § 1104(a)(2). Debtor has demonstrated the inability to perform his fiduciary duties by failing to file monthly reports, paying prepetition unsecured debt, using the businesses to conceal payments for his benefit, using the money of the businesses as his own, and failing to keep accurate financials of the businesses.

39. Debtor's bad faith warrants appointment of a trustee or dismissal Under §§ 1104 and 1112, a Court order the appointment of a chapter 11 trustee or dismiss a case "for cause." 11 U.S.C. §§ 1104(a)(1); 1112(b)(1). Cause under both includes bad faith. *See, e.g., In re Ancona*, No. 14-10532 (MKV), 2016 WL 7868696, at *12 (Bankr. S.D.N.Y. Nov. 30, 2016) (appointing trustee for "bad faith"); *In re Gunnison Ctr. Apartments, LP*, 320 B.R. 391, 399 (Bankr. D. Colo. 2005).

40. Debtor's failure to timely file reports constitutes an additional basis for dismissal under 11 U.S.C. § 1112(b)(4)(F).

APPOINTMENT OF A TRUSTEE IS IN THE BEST INTERESTS OF CREDITORS AND THE ESTATE

41. Debtor's financial affairs and those of the businesses are inextricably intertwined. For example, the \$400,000 line of credit secured by Debtor's house was allegedly drawn and paid to Liquor Barn. Debtor testified, however, that the loan is actually paid by one of the other entities.

42. Substantial amounts of money flow in both directions between Debtor and his businesses. **Exhibit 3** (the Financial Statement) and **Exhibit 11** (table of circular payments). It is not clear what consequences would result from financially separating the businesses from Debtor or vice versa.

43. A chapter 11 trustee would be in the best position to operate and manage the businesses to preserve their value for the benefit of the estate, its creditors, and the Debtor. nd liquidate assets

WHEREFORE, Creditors request that the Court enter an order appointing a chapter 11 trustee, or in the alternative, dismissing this case.

Dated: August 2, 2017

Respectfully submitted,

ONSAGER | FLETCHER | JOHNSON, LLC

s/ Andrew D. Johnson

Andrew D. Johnson, #36879
1801 Broadway, Suite 900
Denver, Colorado 80202
Ph: 720-457-7061
Fax: 303-512-1129
ajohnson@OFJlaw.com

Attorneys for Daniel and Eva Tisch