

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
London Division**

IN RE: :
 :
M3 ENERGY RESOURCES, LLC : **Chapter 11**
 : **Case Nos. 11-60480**
Debtor : **Judge Joseph M. Scott**
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ORDER CONVERTING CASE TO CHAPTER 7

This matter came before the Court for hearing on August 12, 2011 and September 9, 2011, on the Court’s sua sponte order for the Debtor to show cause (“Order to Show Cause”) (Doc. 350) as to why this case should not be dismissed or converted or a trustee appointed, whichever is in the best interests of creditors and the estate, pursuant to 11 U.S.C. §§ 105(a) and 1112(b).

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and it is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

FACTS AND PROCEDURAL HISTORY

On March 31, 2011 (“Petition Date”), Debtor, M3 Energy Resources, LLC, filed its voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (“Bankruptcy Code”). Debtor has been operating its business as a debtor and debtor-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code.

With respect to Debtor’s prospects of reorganization, we have previously found that Debtor,

[H]as made it clear from the beginning of the case that [it] does not have an ability to reorganize absent a substantial cash investment and that the best possible outcome in this case is for the Debtor to sell substantially all of its assets. Debtor has been given an opportunity to find a purchaser and has not been successful.

(Order to Show Cause at 1). Debtor has a history of being before the Court on motions for dismissal:

1. On July 21, 2011, the Debtor entered into a settlement agreement on the record with Mitco Enterprises, Inc. ("Mitco") and the Aspen Parties.¹ Among other things, Debtor agreed that if it had not entered into an asset purchase agreement on or before July 31, 2011, that Debtor's Chapter 11 case would be dismissed. Another significant condition of the agreement was that Debtor would continually maintain insurance during the remaining term of its Chapter 11.

2. As a result of Debtor's failure to maintain insurance, multiple emergency motions for relief from stay and/or motions to dismiss were filed between July 25, 2011 and August 3, 2011. As of August 3, 2011, the date of the emergency hearing on the motions, Debtor had failed to meet multiple conditions of the July 21, 2011 agreement, including the provision to maintain insurance and the provision to have entered into an asset purchase agreement.² However, Debtor's counsel again announced, as he had done at multiple hearings in the past, that Debtor had another party interested in purchasing Debtor's assets, and more time was needed for the potential purchaser to perform due diligence and enter into an asset purchase agreement. The Court granted the motions for relief from stay and entered the Order to Show Cause setting it for hearing on August 12, 2011, effectively giving the Debtor until then for the purchasers to enter into an asset purchase agreement.

3. On August 12, 2011, at the hearing on the Order to Show Cause, the Debtor again advised the Court that interested purchasers had been conducting due diligence of the Debtor's assets. Debtor requested until August 31, 2011, for the Debtor and the interested purchasers to enter into a written agreement. Several creditors, including the Aspen Parties, North American Gem (US), Inc. and T&N Electric Motor Exchange, Inc. were in support of Debtor's request. Therefore, the show cause hearing was continued to September 9, 2011. At this hearing,

¹ The Aspen Parties are: Aspen Century, LLC ("Aspen"), Chas Coal, LLC ("Chas"), Equinox Leasing Company, LLC ("Equinox"), Liberty Leasing Company, LLC ("Liberty"), and Redbird Mountain Coal Company, LLC ("Redbird").

² After entering the terms of the settlement agreement on the record, the parties were never able to agree on a written version of their agreement. Therefore, the agreement is not filed in the CM/ECF record but exists on the record through audio recording.

counsel for the Debtor confirmed to the Court that the Debtor had ceased operations and that Debtor is insolvent.

4. As noted above, Debtor requested until August 31, 2011, to enter into an asset purchase agreement. However, as of the date of the continued show cause hearing on September 9, 2011, Debtor still had not entered into an asset purchase agreement with any potential purchaser. However, Debtor's counsel advised the Court that another potential purchaser was conducting due diligence. According to Debtor's counsel that potential purchaser had entered into a letter of intent to purchase Debtor's assets for \$45,000,000. Counsel was ordered to supplement the record with a copy of the letter of intent. Debtor supplemented the record on September 9, 2011, with a copy of a letter of intent from Five Star Investments Limited ("Five Star") dated September 7, 2011 ("Five Star Letter of Intent") (Doc. 385).

The Court took the matter under submission as of September 9, 2011.

LAW AND DISCUSSION

With respect to converting a chapter 11 case to one under chapter 7, 11 U.S.C. § 1112(b) provides:

(b)(1) Except as provided in paragraph (2) . . . , on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

. . .

(4) For purposes of this subsection, the term 'cause' includes--

(A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; . . .

(C) failure to maintain appropriate insurance that poses a risk to the estate or to the public; . . .

(J) failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court.

11 U.S.C. § 1112(b). Further, § 105(a) of the Bankruptcy Code provides:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a).

As noted above, the Debtor has failed to maintain insurance on its assets.

This case has been filed almost six months and a plan and disclosure statement have not been proposed. Debtor has not filed a motion to extend time to file a plan and disclosure statement. Debtor does not expect to file a plan and disclosure statement until a purchaser of its assets is found. This is evident by the Debtor's Report (Doc. 338) stating why Debtor was unable to file a plan and disclosure statement within 120 days from the Petition Date. In the Report Debtor indicates that it has been seeking a purchaser of its assets since the Petition Date and that it has received three signed letters of intent. The Debtor further explains, however, that none of those potential purchasers was acceptable because they "had conditions that were either unacceptable to the Debtor with a closing date too far in the future or terms that were physically impossible for the Debtor to comply [with], such as coal production minimums." (Report at 1). Regardless of the Five Star Letter of Intent, the Debtor has not given the Court and the creditors any reason to expect that a potential sale with Five Star is any more likely to actually occur than a sale with any of the other potential purchasers who entered into letters of intent with the Debtor. If a sale of Debtor's assets does eventually take place, the Chapter 7 Trustee is in as good a position to complete such sale as the Debtor.³

³ Pursuant to 11 U.S.C. § 348(a) on conversion of Debtor's case to one under Chapter 7, the Petition Date will not change. See 11 U.S.C. § 348(a) (conversion of case from one chapter to another "does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief."). Therefore, generally the date of the original filing determines property of the estate with respect to conversion of a Chapter 11 case prior to confirmation of a plan. See ALAN N. RESNICK AND HENRY J. SOMMER, *Collier on Bankruptcy*, ¶ 348.02[1] (16th ed. 2011). Further, "any property produced or acquired by a nonindividual debtor in possession is either proceeds of estate property or property acquired by the estate and, therefore, is itself property of the estate." *Collier on Bankruptcy*, ¶ 348.02[1].

Relief from stay has been granted to several creditors, and the Debtor has ceased operations. Therefore, the Debtor is generating no income.

The Debtor has run out of time.

The Court having held hearings on these matters and having considered the various responses, objections and other pleadings filed in the record with regard to the Show Cause Order, having considered the arguments of counsel, and having reviewed the record and being sufficiently advised, the Court finds that: (a) "cause" exists to convert this case to one under Chapter 7 of the Bankruptcy Code pursuant to multiple subsections of 11 U.S.C. § 1112(b)(4) and § 105(a); (b) there is no likelihood that a plan will be confirmed within the time fixed by the Bankruptcy Code; (c) Debtor has failed to maintain appropriate insurance and such failure poses a risk to the estate; (d) there is a substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; and (e) conversion is in the best interests of the creditors and the estate. Therefore, it is hereby

ORDED AND ADJUDGED as follows:

1. This case is converted to a case under Chapter 7 of the Bankruptcy Code effective as of the date of this Order.

2. Debtor shall fully comply with the requirements of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure regarding conversion in general and Bankruptcy Rule 1019 in particular, including but not limited to:

a. Filing its final report as required by Bankruptcy Rule 1019(5)(A)(ii) within 30 days following the date of this Order;

b. Filing its list of unpaid debts as required by Bankruptcy Rule 1019(5)(A)(i) within 14 days following the date of this Order; and

c. Timely turning over to the Chapter 7 Trustee the records and property of the estate in the possession or control of the Debtor.

3. The Clerk of the Bankruptcy Court shall send a Notice of Conversion (and other related Notices to those entities as required by the Bankruptcy Code and Bankruptcy Rules.

Copies to:

Matthew B. Bunch, Esq.
Elizabeth Lee Thompson, Esq. **(for service and filing of certificate of service)**
Stanton L. Cave, Esq.
Thomas W. Frenz, Esq.
Douglas T. Logsdon, Esq.
David Jorjani, Esq.
Aaron D. Reedy, Esq.
C. Bishop Johnson, Esq.
Patricia Burgess, Esq.
Dean Langdon, Esq.
Rachelle C. Dodson, Esq., for U.S. Trustee

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***The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.***



**Signed By:**  
**Joseph M. Scott, Jr.**  
**Bankruptcy Judge**  
**Dated: Thursday, September 22, 2011**  
**(jms)**