UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	**FRANK CIPRIOTTI** **DOROTHY CIPRIOTTI**	**:**	**Chapter 13**
	Debtor(s)	**:**	**Bky. No. 05-15898ELF**

MEMORANDUM

I.

On March 10, 2005, the Debtors filed the above chapter 13 bankruptcy case. The case was dismissed by order entered January 31, 2006 ("the 2005 Case Dismissal Order"). The 2005 Case Dismissal Order states, in pertinent part:

> upon consideration of the United States Trustee's Motion to Dismiss Case with Prejudice, and upon agreement of the Debtors and the interested parties, it is ORDERED that the above-captioned matter be and is hereby DISMISSED with a bar against the Debtor to filing a new bankruptcy petition without prior judicial approval, and; IT IS FURTHER ORDERED that the Bankruptcy Clerk is ordered that he/she shall not accept any further petitions from Debtor without prior Court approval.

On June 15, 2006, the Debtors filed an expedited motion requesting leave to file a new bankruptcy case ("the Motion"). I granted the Debtors' request for an expedited hearing and conducted an evidentiary hearing on June 22, 2006. Attending the hearing, and opposing the Debtors' request for leave to file a new bankruptcy case, were counsel for: (1) Llanerch Shopping Center L.P. ("the Landlord"), (2) the U.S. Trustee and (3) the Chapter 13 Trustee. At the hearing, I heard testimony from Debtor Frank J. Cippriotti and the Debtors' business broker, Eric

Laquer.

For the reasons set forth below, the Motion will be denied.

II.

This bankruptcy case was the Debtors fourth bankruptcy filing since June 2001. The Debtors were represented by counsel in all of their cases. The prior cases are summarized below:

Chapter	**Case No.**	**Date of Filing**	Outcome
13	01-18740	6/13/01	8/2/01 dismissed for failure to file schedules and other documents
13	01-34927	10/23/01	9/24/02 dismissed on motion of chapter 13 trustee
13	04-14387	3/31/04	3/9/05 dismissed on motion of the chapter 13 trustee for failure to make plan payments

The present case, filed one day after the entry of the dismissal order in the 2004 chapter 13 case, involved a small business and was both complicated and hotly contested. The dockets reflect the following filings in the case, inter alia: (1) a Motion for Relief from Stay by the Landlord; (2) a Motion to Dismiss Case With Prejudice filed by the U.S. Trustee; (3) a Motion to Dismiss Case With Prejudice filed by the Chapter 13 Trustee; (4) a Motion to Assume Lease filed by the Debtors; (5) Objections to Confirmation of the Debtors' Chapter 13 Plan filed by the Landlord and by Albert Campagna ("Campagna"); (5) five Chapter 13 Plans (the original plan and four amended plans), filed by the Debtors; (6) a Motion to Avoid Lien filed by the Debtors;

(7) Objections to several Proofs of Claim, filed by the Debtors.[1]

At the outset of the case, the Debtors were attempting to maintain their ownership and operation of a beauty salon and spa business. The business is operated through a closely held corporation controlled by the Debtors called Hair and Tonic, Inc. ("H&T"). H&T operates in a shopping center. The business premises are subject to a lease between the Debtors personally and the Landlord. As of the commencement of the bankruptcy case, it appears that the two biggest threats to the Debtors' ownership and control of H&T arose from a substantial delinquency in rent payments due to the Landlord and a dispute with Campagna with respect to ownership and control of H&T's assets.[2]

It also appears that the same two issues dominated the proceedings in the prior chapter 13 bankruptcy case filed by the Debtors in March 2004 and dismissed in March 2005.[3] Thus,

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[1] The court may take judicial notice of the docket and the content of the bankruptcy schedules and other documents filed in the case for the purpose of ascertaining the timing and status of events in case and facts not reasonably in dispute. See Fed. R. Evid. 201; In re Scholl, 1998 WL 546607, at *1 n. 1 (Bankr. E.D. Pa. Aug. 26, 1998). See also In re Indian Palm Associates, 61 F.3d 197, 205 (3d Cir. 1995)

[2] From the testimony, I was not entirely sure whether the Debtors originally brought Campagna into the business as a "partner" conditioned upon the contribution of some capital or whether the Debtors' original intent was to sell the business to Campagna. In any event, there appeared to be no disagreement among the parties that in prior rulings, the court determined that Campagna has some type of ownership interest in the assets of H&T. Consequently, his consent would be necessary in connection with any sale of the business assets. The Debtors expressed confidence that Campagna would cooperate in the sale of the business in return for some portion of the sale proceeds. In light of an agreement reached with Campagna in connection with a proposed sale to Mr. Na Le which, as explained in the text infra, was never consummated, the Debtors' optimism appears justified.

[3] While the expedited treatment requested by the Debtors and required in the matter before me preclude me from studying the prior bankruptcy cases of the Debtors in minute detail, I base this observation on a comparison of the dockets and the various chapter 13 plans filed by the Debtors in the 2004 and 2005 chapter 13 bankruptcy cases.

starting in March 2004, through the vehicle of two separate chapter 13 bankruptcy filings, the Debtors attempted to resolve their financial difficulties and retain their business. In October 2005, in their Fourth Amended Plan in the present case, the Debtors proposed, for the first time, to sell the assets of H&T. The Fourth Amended Chapter 13 Plan was filed on October 6, 2005.

As stated earlier, on January 31, 2006, the court entered the 2005 Case Dismissal Order, which barred any future bankruptcy filings by the Debtors without prior court approval.[4] The 2005 Dismissal Order was the 154th docket entry in the case.

Some time in February 2006, following dismissal of this case, the Debtors entered into a forbearance agreement with the Landlord ("the Forbearance Agreement"). The Forbearance Agreement included provisions: (1) liquidating the amount of delinquent rent as $55,387.87; (2) authorizing the Landlord to confess judgment for $55,387.87 and to issue a writ of possession on the judgment; (3) obligating the Landlord to forbear from evicting the Debtors from the business premises **prior to May 2, 2006**, provided that the Debtors pay monthly rent of $6,771.83; and (4) obligating the Landlord to consent to assignment of the real estate lease conditioned on payment of the confessed judgment for unpaid rent and the payment of certain additional sums to Campagna.

After entering into the Forbearance Agreement, the Debtors paid, albeit late at times, all of the monthly payments that fell due. The Debtors also continued their efforts to market H&T for sale. The Debtors had employed a business broker in the fall of 2005, originally listing the business for sale for $300,000. However, it appears that the Debtors were prepared to accept

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[4] Prior to February 14, 2006, this case was on the docket of my predecessor in office, the Honorable Kevin J. Carey.

substantially less than $300,000 in order to effect a prompt sale. After the broker was hired, between 20-25 persons or entities expressed some interest in the business. Two letters of intent to purchase were signed by prospective purchasers in 2005. However, neither interested party entered into a binding purchase agreement.

In April 2006, an individual named Na Le signed a letter of intent to purchase the business. The letter of intent was followed by substantial negotiations involving the Debtors, the Landlord, Campagna and Mr. Le. At Mr. Le's insistence, the purchase price of $260,000 was reduced to $195,000. Nevertheless, the Debtors, the Landlord and Campagna all were prepared to consummate the sale transaction and seemed to have reached a meeting of the minds on the distribution of the sale proceeds (which would have been only $100,000 at closing, with the balance of the sale price paid over time). Further, it appears that when the sale to Mr. Le was imminent, the Landlord extended the forbearance period under the Forbearance Agreement beyond May 2, 2006. Unfortunately for the parties, Mr. Le pulled out of the transaction in mid-May 2006, one day before he was scheduled to sign the purchase agreement and lease assignment documents.

After the sale to Mr. Le fell through, the Landlord proceeded to exercise its remedies under the Forbearance Agreement. An eviction and personal property execution proceedings were both scheduled for June 27, 2006. This triggered the filing of the Motion in this case, in which the Debtors have requested leave to file a new bankruptcy case.

After the Debtors filed their motion – in fact, one day before the June 22, 2006 hearing – a new prospective purchaser submitted a letter of intent. The new prospective purchaser is Harvey R. Allen. Subject, of course, to a number of conditions, including a due diligence

examination of the books and records of H&T, Mr. Allen has offered to pay $255,000 for the business. The proposal provides for $95,000 to be paid at closing and $160,000 to be financed by the Debtors over 3 years at 5% interest with monthly payments of $4,795.34. If Mr. Allen wishes to proceed to a purchase of the business, the Debtors' business broker estimates that a closing could take place in approximately 4 weeks.

As of the date of the court hearing, Mr. Allen was made aware that the Debtors have some problems with the Landlord and that there are some "partnership" issues. However, he is not aware of the scheduled eviction or the potential bankruptcy filing. As with the other prospective purchasers who submitted letters of intent, at this stage in the sale process, Mr. Allen is under no obligation to proceed further in the transaction.

As a hair salon and spa, H&T's business is seasonal. The weakest months are in the winter. The strongest months are in the period March through June. Debtor Frank Cipriotti testified that he maintains the books and records of H&T. He candidly acknowledged that he is not a bookkeeper or an accountant. However, he estimated that the gross monthly revenue is approximately $45,000 on the average. Of that amount, approximately $22,000 is paid to the hair stylists who work there.[5] The rent is almost $7,000/month. After other expenses are considered, Mr. Cipriotti estimated that H&T generates, on the average, positive cash flow of approximately $7,000/month.[6] He testified that the business has been growing in the past year or

[5] I infer from the testimony that the hair stylists are treated as independent contractors and paid a percentage of the revenue they generate and that they are not treated as employees with wages from which income taxes are withheld.

[6] Without suggesting that Mr. Cipriotti was not trying to testify truthfully, I lack some confidence in the accuracy of the financial data he provided.

so, with the number of salon "chairs" increasing from 8 to 20. He expressed optimism that the revenue will increase substantially in the very near future because he expects H&T to be named as the second best spa in the region in a local magazine, "Philadelphia Magazine."[7]

The record does not reflect, with any precision, what the terms would be of the Debtors' chapter 13 plan if they were granted leave to file. The H&T sale proceeds would be earmarked for payment to the Landlord, Campagna and the Debtors' business broker. It is not clear that money paid at the H&T sale closing would be sufficient to fully satisfy those three claims. It is clear that no sale proceeds at the closing would be received by the Debtors. No projections of future income or expenses were submitted by the Debtors with respect to their personal finances. Mrs. Cipriotti is a hairdresser and may be able to move to another salon, if necessary, with her "book of business." The same may be true of Mr. Cipriotti, although he did not expressly so testify. However, it is not clear what the amount of the Debtors' future income would be after a sale of H&T. If the letter of intent from Mr. Allen were to serve as the basis for a sale, the Debtors would have an entitlement to a stream of income of almost $4,800/month. But that income is dependent on the continued success of the business and Mr. Allen's cooperation. I cannot ascertain how much of that income might be supplemented by employment income generated by the Debtors. Based on the priority claims filed in this case, it seems that for the Debtors to propose a confirmable plan, they will need to fund the plan with approximately $50,000-$60,000, not counting any amounts that might need to be paid to the Landlord or Campagna if the sale proceeds at closing do not fully satisfy their claims.

[7] Mr. Cipriotti did not explain how he and his wife would benefit from the good publicity if the business is going to be sold. Presumably, he expects that the good publicity will make the business attractive for a sale at or near his asking price.

III.

The 2005 Case Dismissal Order does not, on its face, spell out what standards I should apply in evaluating the Debtors' request for leave to file a new bankruptcy case. The Order says only that the Debtors must obtain leave of court in order to file. The obvious question, then, is what standards should be employed.

In my view, the 2005 Case Dismissal Order imposes what is essentially a procedural burden on the Debtors. Absent the requirement of pre-filing authorization, the Debtors would have simply filed a new bankruptcy case and then may have had to defend against a motion to dismiss the case for cause, see 11 U.S.C. §1307(c); In re Guevara, 2004 WL 2495410 (Bankr. E.D. Pa. October 21, 2004), which is likely to have been filed by any one of a number of interested parties.[8] Instead, as a result of the 2005 Case Dismissal Order, the Debtors must demonstrate the validity of the case they propose to file before it is filed, rather than after it has been filed. Thus, the Order shifts to the Debtors the burden of going forward. However, the issue on the merits is the same. Thus, in a sense, I must decide whether a putative case, as yet unfiled, should be dismissed.

Accordingly, I find guidance for my decision in In re Legree, 285 B.R. 615 (Bankr. E.D. Pa. 2002), a decision by Judge Carey, the judge who entered the 2005 Case Dismissal Order in this case. In Legree, Judge Carey pointed out that requests for dismissal of a case involving multiple prior filings are analyzed as a question of the debtor's "good faith." As such, the

[8] If a case were filed without the need for prior court approval, an issue that would likely come before the court early in the case is the continued applicability of the automatic stay. See 11 U.S.C. §362(c).

propriety of the filing is evaluated based on the "totality of the circumstances."[9] Further,

> [c]ase law in this jurisdiction suggests three other relevant factors to consider in determining the good faith of a debtor with a history of serial filings: (1) Was there a material change in the debtor's circumstances since the previous filing that warrants a fresh start? (2) Can the debtor show a confirmable and feasible chapter 13 plan?; and (3) Does the debtor's history of past filings reflect an intent to abuse the bankruptcy process through a strategy of successive filings without any real reorganization effort

285 B.R. at 619 (citations omitted).

The Debtors seek leave to file another bankruptcy case because they believe that they can sell the business, if given some more time, use the proceeds to pay the Landlord and Campagna, and then provide for other creditors through a stream of chapter 13 plan payments derived from their future income. Further, they point out, with some justification, that denial of the Motion is likely to preclude the potential for any significant recovery by the Landlord and Campagna – if an eviction takes place, H&T's operations will necessarily terminate and all of the value of the business will be dissipated.

In the abstract, and divorced from the long and contentious history of this case, the

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[9] In In re LeGree, 285 B.R. at 619, the court stated:

> A non-exhaustive list of factors to consider when multiple filings are involved includes the following:
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> > (1) the length of time between the prior cases and the present one;
> > (2) whether the successive cases were filed to obtain favorable treatment afforded by the automatic stay;
> > (3) the effort made to comply with prior case plans;
> > (4) the fact that Congress intended the debtor to achieve its goals in a single case; and
> > (5) any other facts the court finds relevant relating to the debtor's purposes in making successive filings.

Debtors' argument is plausible. However, there are several other factors I must consider, including: (1) another bankruptcy filing would be the Debtors' fifth bankruptcy case in five years; (2) the Debtors have been attempting to sell the business since October 2005 and, while they have another prospective buyer whose interest may well be bona fide, they are no further along in the sale process than they were 8 months ago; (3) there are still many steps that would have to be taken, including the negotiation with the Landlord of an appropriate lease extension as part of the sale of the business, compelling the conclusion that a sale of the business in the immediate future is far from certain; (4) the Debtors employed the bankruptcy process for about one and one-half years before shifting gears in October 2005 and opting for a sale of the business as the means of accomplishing their financial rehabilitation; (5) outside of the bankruptcy process, following the dismissal of this case, the Debtors entered into the Forbearance Agreement, which seems to have been designed to give the Debtors one more short, **final** period of time to consummate a sale; (6) in reliance on the Forbearance Agreement and the Debtors efforts to sell the business to Mr. Le, the Landlord incurred additional transaction expenses and has now made the business judgment that the potential benefits of further delay in order to consummate a sale of the business are outweighed by the continuing uncertainty whether a sale will ever be consummated;[10] (7) the agreed order dismissing this case was "with prejudice," which suggests that it was the court's intention that the Debtors bear some additional burden in

[10] The Landlord may be making an error in business judgment by refusing to wait for some additional, limited period of time to see if the latest prospective purchaser will close on a sale. However, given the length of time that has already passed and the psychology underlying the Landlord's willingness to enter into the Forbearance Agreement in February 2006 (in order to give the Debtors "one last chance"), the Landlord's decision to press for eviction is nevertheless understandable

justifying still another bankruptcy filing; and (8) the Debtors have not come forward with specific details regarding the material aspects of the proposed new bankruptcy case, i.e., their projected income and expenses and the proposed treatment of each creditor in their chapter 13 plan.

I find this case to be a relatively close call on the merits because I do not believe that the Debtors are seeking to abuse the bankruptcy system for the sole purpose of delaying a creditor from exercising its remedies without any reorganizational purpose. This is not a case of a debtor filing a bankruptcy case solely to trigger the automatic stay and in order to simply delay the inevitable completion of a creditor's collection remedy – without an intent to bring the bankruptcy case to a successful conclusion. There is a potential rehabilitative benefit to the Debtors that might be achieved if I permitted them to file and if they can effect a sale of H&T. In addition, the Debtors' proposed course of action holds out the potential for significant benefit to their major creditor (the Landlord) who has appeared in opposition to their request. In other words, I do not believe that the Debtors are subjectively acting in bad faith or purposely attempting to manipulate the Bankruptcy Code for improper purposes.

However, in bankruptcy jurisprudence, the concept of a "good faith" filing is a term of art that involves consideration of more than a debtor's subjective state of mind. Despite what might be the best of intentions on the part of the Debtors, in light of the history of this case, I must consider more than their state of mind and the potential benefit to them before permitting still another bankruptcy filing. The bankruptcy process involves a balancing of rights. Thus, a relevant consideration is whether it is fair to continue to delay the Landlord exercising its rights under nonbankruptcy law. In balancing the rights of the parties, I must consider the length of

time the Landlord has been stayed from exercising its rights, the amount of time the Debtors already have had to resolve their dispute with the Landlord (which precedes their decision in October 2005 to sell their business), whether there has been a material change of circumstances since the entry of the 2005 Dismissal Order and how probable it is that the Debtors can promptly sell H&T to satisfy their obligation to the Landlord.

Based on my consideration of the evidence, I find that the Debtors have not met their burden on the first and the second factors identified in Legree: (1) a showing of a material change in the debtor's circumstances since the previous filing and (2) a showing that there is a reasonable probability that the Debtors can propose a confirmable and feasible chapter 13 plan.

Although a sale of the business appears possible at some time in the future on some terms and such a sale could provide some benefit to the Landlord and Campagna, I am not convinced that there is a sufficient likelihood of a prompt sale of the business so as to justify a continued restraint on the exercise of the Landlord's remedies. Given the amount of time that has passed since the Debtor first started marketing the business for sale and the past sale efforts, which were not concluded successfully, the Debtors' position has not changed materially since this case was dismissed in January 2006. As the objectors point out, the Debtors were trying to sell their business in January 2006 and are still trying to sell the business today. There are simply too many contingencies and problems that could arise in the sale process to permit the conclusion that a prompt sale is probable. Nor have the Debtors presented, in a sufficiently detailed manner, the information needed for the court to conclude that there is a reasonable probability that they

can propose and implement a confirmable and feasible chapter 13 plan.[11]

Any one of a number of different facts might have affected the outcome: fewer prior cases; less contentious and less lengthy litigation in the prior cases; the absence of the post-dismissal Forbearance Agreement designed to give the Debtors a final deadline for concluding a sale; a present sale process that had advanced further than the issuance of a letter of intent one day before the court hearing; a more well developed roadmap of the case the Debtors propose to file. However, I must decide this case on the facts presented at the hearing. Thus, although the Debtors have come forward with a reorganization theory that may have been satisfactory earlier in the process, at this stage, in my view, they have fallen a bit short of satisfying their burden for permitting the filing of another bankruptcy case.

For these reasons, the Motion will be denied. An appropriate order will be issued.

Date: June 23, 2006

/s/ Eric L. Frank
ERIC L. FRANK
U.S. BANKRUPTCY JUDGE

[11] If a debtor seeks to overcome the effect of a "bar order" issued in connection with the dismissal of a prior case in order to file a new chapter 13 case, it behooves the debtor to make as detailed a presentation as possible regarding the debtor's current financial condition and the proposed plan. This is because the court's evaluation of the "feasibility" of the proposed plan is at a heightened level after the entry of a "bar order" – at least in comparison to the standard the court might employ in considering a motion to dismiss a chapter 13 case for lack of feasibility when there is no history of serial filings or a prior "bar order."

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IN RE:	**FRANK CIPRIOTTI** **DOROTHY CIPRIOTTI**	**:**	**Chapter 13**
	Debtor(s)	**:**	**Bky. No. 05-15898ELF**

O R D E R

AND NOW, for the reasons set forth in the accompanying Memorandum,

It is hereby **ORDERED** that the Debtors' Motion Requesting Leave to File a New Bankruptcy Case is **DENIED**.

Date: June 23, 2006

/s/ Eric L. Frank
ERIC L. FRANK
U.S. BANKRUPTCY JUDGE