

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In re:)
)
GIUSEPPE TRIPODI and)
CONCETTA TRIPODI,)
)
Debtors.)

CHAPTER 11
CASE NO. 04-30793
Re: DOC. I.D. NO. 180

**BRIEF MEMORANDUM OF DECISION ON DEBTORS' MOTION
TO EXTEND PLAN EXCLUSIVITY PERIOD**

This Brief Memorandum addresses the question of whether the Debtors are entitled to a further extension of the exclusive right to file a Plan of Reorganization in this Chapter 11 case. For the reasons stated herein, the Court concludes that the Debtors have not met their burden of proof under Section 1121(d) of the Bankruptcy Code, and accordingly, subject only to a two-business-day extension, the exclusivity period afforded the Debtors shall expire without further extension.

On February 23, 2004, Giuseppe Tripodi, M.D. and Concetta Tripodi (heretofore and hereafter, the "Debtors"), commenced this bankruptcy case through the voluntary filing of a petition under Chapter 11 of the Bankruptcy Code. On June 18, 2004, the Debtors filed a request for an extension of the exclusive period in which to file a Plan of Reorganization and solicit acceptances thereof, which request was granted by Order dated August 4, 2004. That Order extended the Debtors exclusive period in which to file a Plan of Reorganization to October 21, 2004 and to solicit acceptances thereof to December 20, 2004. On October 7, 2004, the Debtors filed a request seeking to further extend the exclusive period which request was granted by order dated November 17, 2004. That order

granted to the Debtors an extension of the exclusive period in which to file a Plan of Reorganization to February 18, 2005, and to solicit acceptances thereof to April 19, 2005. On February 4, 2005, the Debtors' filed an Amended Motion of Debtors for Order Pursuant to Section 1121(d) of the Bankruptcy Code Further Extending Debtor's Exclusive Period in Which to File a Plan of Reorganization and Solicit Acceptances Thereof (hereafter, the "Motion"),¹ Doc. I. D. No. 180, seeking, *inter alia*, a further extension of 30 days within which they would enjoy the exclusive right to file a Plan of Reorganization in this Chapter 11 case. A hearing was held on the Motion on February 16, 2005 (hereafter, the "Hearing"), at which the principal creditors objected. At the Hearing counsel for the Debtors modified the Motion by reducing its request to an extension of ten days from February 18 to February 28, 2005. The Debtor presented no evidence at the Hearing; relying, instead, on the files, records, and history of the case, certain facts and circumstances judicially known to the Court,² and a pending motion for the appointment of a trustee (hereafter, the "Trustee Motion").

Section 1121(b) accords a debtor the exclusive right to file a Chapter 11 plan during the 120 days following the order for relief. Under Section 1121(d) the court, for "cause", may increase the 120-day period of Section 1121(b). In this matter the burden of

¹ The Motion amended a similar Motion, Doc. I. D. 176, filed February 3, 2005, seeking, *inter alia*, a 120-day extension of time.

² Six lawsuits by and between the Debtors, and former professional associates, were ultimately consolidated and assigned to the state court complex litigation docket and tried before the Honorable Carl J. Schuman, Judge of the Superior Court for the State of Connecticut between July 6 and July 17, 2003. In August, 2003, Judge Schuman issued a decision (hereafter, the "Superior Court Decision") concluding, *inter alia*, that the Debtors misappropriated funds from their professional associates, and that such misappropriation constituted (i) a breach of fiduciary duty, and (ii) statutory theft under Connecticut statutes. A Judgment awarding significant monetary damages entered against the Debtors. The Superior Court Decision and related Judgment were appealed (hereafter, the "Appeal") to the Appellate Court of the State of Connecticut (hereafter, the "Appellate Court"). In October 2004, the parties argued the appeal to the Appellate Court, and on February 2, 2005, the Appellate Court affirmed the Superior Court Decision (hereafter, the "Appellate Court Ruling").

establishing the requisite cause of Section 1121(d) is on the Movant-Debtors.

Factors considered by courts in determining whether cause exists for extending exclusivity include:

1. the size and complexity of the case,
2. the necessity of sufficient time to negotiate and prepare adequate information,
3. the existence of good faith progress toward reorganization,
4. whether the debtor is paying its debts when due,
5. whether the debtor has demonstrated reasonable prospects for filing a viable plan,
6. whether the debtor has made progress negotiating with creditors,
7. the length of time the case has been pending,
8. whether the debtor is seeking an extension to pressure creditors, and
9. whether unresolved contingencies exist.

E.g., In re Service Merchandise Co., Inc., 256 B. R. 744, 7512 (Bankr. M. D. Tenn. 2000).

The Debtors confess their case is not “unusually large or complex”, Motion at ¶ 19, observe they have been “focused on prosecuting [and awaiting the results of] . . . an appeal . . . as well as, awaiting resolution of [the Trustee Motion]”, Id., and argue the balance of the remaining relevant Service Merchandise factors tilt in their favor. While cast against the background of moderately prolonged and complicated state court litigation, the instant bankruptcy case, and the requisite plan formulation therein, appear simple and straightforward. Indeed, it now appears to the Court that in light of the Debtors’ assets, a Plan could readily have been formulated and proposed during the pendency of the Appeal.

Moreover, for the past five months the Debtors have been simply "awaiting" the Appellate Court Ruling. In that interim period, the Debtors have had ample opportunity to prepare for any contingency.

Nor does the pendency of the Trustee Motion provide the requisite cause. A decision against trustee appointment would not effect exclusivity. If anything, the prospect of a trustee appointment should have served to motivate the Debtors to have a viable Plan in progress since such an appointment would terminate exclusivity. See Section 1121(c)(1) (any party in interest may file a plan if "a trustee has been appointed").

As the Debtors noted in the Motion:

It has been observed that "[e]xclusivity is intended to promote the environment in which the debtor's business may be rehabilitated and a consensual plan may be negotiated." K Gross and P Redmond, In Defense of Debtor's Exclusivity: Assessing Four of the 1994 Amendments to the Bankruptcy Code, 69 American Bankruptcy L. J. 287, 308 n. 29 (1995). [And] [g]iven the primary goal of achieving a consensual reorganization, "it is not surprising that Congress would have elected to preclude competing plans in the formative period of the Chapter 11 case." In re Lehigh Valley Professional Sports Club, Inc., No 00-11296DWS, 2000 WL 290187, at *3 (Bankr. E.D. Pa. 2000).

Motion at ¶ 17. This is a simple case that has been pending for more than a year providing ample time to negotiate and prepare adequate information. During that time there has been no progress negotiating with creditors and, in light of the Appellate Court ruling affirming the Superior Court Decision, and the positions and continuing acrimony between the Debtors and their principal creditors, a consensual plan is nowhere on the horizon. Continued exclusivity under the circumstances of this case is no longer warranted.

For these reasons the Motion shall be DENIED, subject to a two-day extension through and including Wednesday, February 23, 2005.³ A separate Order shall enter simultaneously herewith.

BY THE COURT

DATED: February 18, 2005



Albert S. Dabrowski
Chief United States Bankruptcy Judge

2/18/2005
5:25 pm

³ The Court is sensitive to the issuance of this ruling after the 4:00 PM closure of the Clerk's office on February 18, 2005 - the last day of the exclusivity period. Had the Court issued this Memorandum and Order on Wednesday, February 16, 2005, the Debtors would have enjoyed the advantage of two business days to be the exclusive proponent of a Plan. So as not to penalize the Debtors for this Court's delay in ruling on the instant matter, the Order shall extend exclusivity two business days.