U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: **24-03245-hb**

ORDER DENYING MOTION TO DISMISS

The relief set forth on the following pages, for a total of 8 pages including this page, is hereby ORDERED.

FILED BY THE COURT
11/14/2024

Entered: 11/14/2024

Chief US Bankruptcy Judge
District of South Carolina

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 24-03245-HB
Perch at Overbrook, LLC,	Chapter 7
Debtor(s).	**ORDER DENYING MOTION TO DISMISS**

THIS MATTER came before the Court for a hearing on November 6, 2024, to consider the Motion to Dismiss Case under 11 U.S.C. § 707(a) (the "Motion to Dismiss") filed by the Acting United States Trustee for Region Four (the "UST")[1] and Debtor Perch at Overbrook, LLC's ("Perch") opposition thereto.[2] The hearing was attended by B. Keith Poston on behalf of the UST and Randy A. Skinner on behalf of Perch. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157, this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), and the Court may enter a final order.

The parties asked the Court to consider the pleadings filed in this case and the attachments thereto. Relevant facts are not in dispute. Shawn Johnson and Lindsay Johnson (collectively, the "Johnsons") were each 50% owners of a company called Birds Fly South Ale Project, LLC ("BFS"), located in Greenville County and operated from September 2016 to October 2023. On March 5, 2024, BFS filed a Chapter 7 petition in this Court to initiate C/A No. 24-00837-hb. On June 6, 2024, the Chapter 7 trustee filed a Report of No Distribution abandoning all assets of that estate. The next day, the Court entered a Final Decree Discharging Trustee and Closing Case.

The Johnsons also equally owned Perch, which operated a restaurant and brewery doing business as "Perch Gastropub" in Greenville County from October 2022 to August 2023. While

[1] ECF Nos. 5 (Motion to Dismiss), 8 (Response to Debtor's Objection to Motion to Dismiss).
[2] ECF Nos. 7 (Objection to Motion to Dismiss), 9 (Reply to Response to Debtor's Objection to Motion to Dismiss).

Perch was in operation, the Johnsons resided in Greenville County. Shortly after Perch ceased operations, the Johnsons relocated to Colorado.

On September 5, 2024, Skinner filed a Chapter 7 petition for Perch, together with schedules and statements, to initiate the above-captioned case.[3] Janet B. Haigler (the "Trustee") was appointed Chapter 7 trustee. On the Voluntary Petition, Perch identified itself as a corporation,[4] listed its principal place of business as Greenville County, and indicated that, after any administrative expenses are paid, it was anticipated that no funds would be available to unsecured creditors. On Schedule A/B (Assets – Real and Personal Property), Perch listed a bank account with a negative balance and did not list any other assets. Perch did not list any creditors on Schedule D (Creditors Who Have Claims Secured by Property). Schedule E/F (Creditors Who Have Unsecured Claims) included two creditors holding non-priority unsecured claims: (1) a former landlord, 1503 Overbrook, LLC, with a claim in the amount of $163,166.72 for "rent"; and (2) BFS with a claim in the amount of $548,275.00 for "back rent". On Part 2, Question 5 of the Statement of Financial Affairs for Non-Individuals Filing for Bankruptcy (the "SOFA"), which instructs to "[l]ist all property of the debtor that was obtained by a creditor within 1 year before filing this case, including property repossessed by a creditor, sold at a foreclosure sale, transferred by a deed in lieu of foreclosure, or returned to the seller", the following appears:

Creditor's name and address	Describe of the Property	Date	Value of property
South State Bank 1951 Eighth Street NW Winter Haven, FL 33881	All business assets belonging to the debtor and Birds Fly South Ale Project, LLC.	01/31/2024	$261,390.73

[3] ECF No. 1.

[4] "A limited liability company is a corporation within the meaning of § 101(9)." *In re Matthews*, 599 B.R. 838, 864 n.59 (Bankr. D. Md. 2019) (citing *In re Longview Aluminum, L.L.C.*, 657 F.3d 507, 509 n.1 (7th Cir. 2011); Fed. R. Bankr. P. 7007.1 Advisory Committee Note (2003 Amendment)).

On September 18, 2024, counsel for the UST emailed Skinner inquiring about the purpose of the Chapter 7 case given the lack of assets and the applicability of § 727(a)(1) (making non-individuals ineligible for a Chapter 7 discharge). On September 24, 2024, Skinner replied that this case was filed to make venue in this District proper for the Johnsons' personal bankruptcy case pursuant to 28 U.S.C. § 1408(2), as the BFS case was filed for that purpose but the Chapter 7 trustee in that case abandoned all assets before the Johnsons were ready to file.

On October 4, 2024, about a month after the petition date, the UST filed his Motion to Dismiss this case under § 707(a) as a bad faith filing, arguing that this case lacks any bankruptcy purpose.

Perch objects, arguing that South State Bank ("South State")—which allegedly had a perfected security interest in the assets of BFS but no security interest in the assets of Perch—"commandeered [Perch's] assets for auction together with the assets of BFS", sold the assets at auction, and commingled the proceeds from the auction of Perch's assets with those from the auction of BFS's assets and applied all proceeds toward BFS's indebtedness to South State. Perch asserts that it filed this case "to address the confiscation of its assets by a non-creditor that otherwise should have been liquidated for its actual creditors" through the avoidance and recovery powers granted Chapter 7 trustees under Chapter 5 of the Bankruptcy Code. Perch alleges that South State's seizure of assets is disclosed on the SOFA, was discussed at the § 341 meeting held on October 18, 2024, and Skinner and the Johnsons provided the Trustee with supporting documentation.

The Johnsons filed a joint Chapter 7 petition in this Court on October 25, 2024, to initiate C/A No. 24-03838-hb, which is pending.

The UST asserts that the real reason the Perch case was filed is reflected in the September 24, 2024, email from Skinner—to make venue in this District proper for the Johnsons' personal bankruptcy case. However, the UST has made no argument that venue in this District is improper for this case. Further, the UST argues that Perch's failure to disclose the potential claim it has against South State on its schedules and statements constitutes further bad faith supporting dismissal.

The Court took the matter under advisement at the November 6, 2024, hearing.

On November 8, 2024, after the hearing on this matter had been held, a continued § 341 meeting was held and the Trustee filed a Report of No Distribution indicating there are no estate assets to administer.

Section 707 provides the Court *may* dismiss a Chapter 7 case after notice and a hearing for cause and provides three non-exclusive examples of "cause." *See* 11 U.S.C. § 707(a). Though not listed in Section 707(a), a debtor's bad faith in filing may constitute cause for dismissal. *Janvey v. Romero*, 883 F.3d 406, 412 (4th Cir. 2018). However, "acknowledging that bad faith may constitute 'cause' under § 707(a) also requires that the remedy of dismissal be reserved for cases of real misconduct." *Id.* The bar for finding bad faith is a high one, and bad faith exists only where the debtor has abused the provisions, purpose, or spirit of bankruptcy law, for example where the debtor has concealed or misrepresented assets and/or sources of income, has excessive expenditures, enjoys a lavish lifestyle, or shows an intention to avoid a large single debt through conduct akin to fraud, misconduct, or gross negligence. *Id.* (citations omitted). "Courts must consider the totality of the circumstances underlying each case to determine whether a debtor has acted in bad faith." Evaluating the factors of any bad faith test "is a discretionary exercise that is best left to bankruptcy judges." *Id.* Factors courts have considered in determining whether a

petition was filed in bad faith for purposes of § 707(a) include: (1) the debtor reduces creditors to a single creditor in the months prior to the filing of the petition; (2) the debtor failed to make lifestyle adjustments or continued living an expansive or lavish lifestyle; (3) the debtor filed the case in response to a judgment pending litigation; (4) the debtor made no efforts to repay his debts; (5) the unfairness of the use of Chapter 7; (6) the debtor has sufficient resources to pay his debts; (7) the debtor is paying debts to insiders; (8) the schedules inflate expenses to disguise financial well-being; (9) the debtor transferred assets; (10) the debtor's over utilization of the protections of the Code to the unconscionable detriment of creditors; (11) the debtor employed a deliberate and persistent plan of evading a single major creditor; (12) the debtor failed to make candid and full disclosure; (13) the debts are modest in relation to assets and income; and (14) there are multiple bankruptcies or other procedural "gymnastics." *In re Del Zotto*, 609 B.R. 581, 587 (Bankr. D.S.C. 2018) (citing *In re Marino*, 388 B.R. 679, 682 (Bankr. E.D.N.C. 2008)). *See also In re Boyd*, 618 B.R. 133, 155 (Bankr. D.S.C. 2020) ("There is no dispute that there is a statutory duty to disclose prepetition assets, including causes of action that are contingent or unliquidated, at the commencement of every bankruptcy case and that the duty, if not performed, continues even after the filing of the initial schedules and statements."). The moving party "bears the burden of demonstrating the Debtor's bad faith as cause for dismissal under Section 707(a)." *In re Cisneros*, No. 21-12338-MCR, 2021 WL 4145407, at *5 (Bankr. D. Md. Aug. 25, 2021) (citing *In re Evatt*, 497 B.R. 483, 487 (Bankr. D.S.C. 2013)).

The UST cites several decisions in Chapter 7 cases in support of his position. However, all involve evidence of bad faith beyond anything present here. *See In re Lots by Murphy, Inc.*, 430 B.R. 431, 438 (Bankr. S.D. Tex. 2010) (dismissing, on motion of the Chapter 7 trustee and the only non-insider creditor whose state court suit was pending on the petition date, a Chapter 7

case of a corporation with no assets after finding that the case served no purpose other than to delay the state court suit); *In re Hydratech Utils., Inc.*, 384 B.R. 612 (Bankr. M.D. Fla. 2008) (dismissing Chapter 7 case of a corporation that had not conducted operations for years, had minimal assets, and whose case prejudiced non-insider creditors); *In re Semco Mfg. Co., Inc.*, 649 B.R. 155 (Bankr. S.D. Tex. 2023) (dismissing Chapter 7 case of a corporation that had never operated, had no administrable assets, filed on the eve of jury selection in state court case involving only non-insider creditor, failed to timely file its schedules and creditor matrix, and where the original and amended petitions were not signed by an authorized representative of the debtor).

Considering relevant factors and authorities, as applied to these facts, the UST has not carried his burden to demonstrate bad faith warranting dismissal of this case. The SOFA includes information sufficient to raise an inquiry about any potential claim against South State as an asset, and relevant facts were disclosed to the Trustee. There is no evidence Perch intended to mislead any party regarding any potential claim, which may have been available only to the Trustee pursuant to the powers granted her under Chapter 5 of the Code. Further, to the extent Debtor filed this case to make venue in this District proper for the Johnsons' personal bankruptcy case, that motivation does not convince the Court that there was any impermissible use of the bankruptcy process in this case.[5]

The UST also cites the Chapter 13 case of *In re Blackmon*, 628 B.R. 804 (Bankr. D.S.C. 2021), asserting that the "twin pillars" of bankruptcy are not present here, warranting dismissal.[6]

[5] Nothing herein shall be construed as a determination that is binding in any matter raised in C/A No. 24-03838-hb.

[6] In that case, the debtor—who had filed a Chapter 13 petition—failed to list several vehicles (1969 Buick Electra, 2005 Chevrolet 3500, 1979 Chevrolet Corvette, 1980 Chevrolet Corvette, 2012 Ford F-250) on his schedules and only added them after the Chapter 7 trustee for his mother's case discovered the vehicles months later in a warehouse used by the family. A skid steer was also discovered in the warehouse, which the debtor had failed to surrender to a creditor. The Chapter 13 trustee filed a motion to convert the case to Chapter 7 under § 1307(c), which provides that a Chapter 13 case may be converted to Chapter 7 or dismissed—whichever is in the best interests of creditors and the estate—for cause. *See* 11 U.S.C. § 1307(c).

In discussing whether conversion or dismissal was appropriate for that Chapter 13 case under 1307(c),[7] the Court noted:

> In determining whether conversion or dismissal is appropriate, "the test turns on whether or not the [conversion or] dismissal is in the best interests of the debtor and the creditors of the estate, with particular emphasis on whether the [conversion or] dismissal would be prejudicial to creditors." *In re Zimmer*, 623 B.R. 151, 162 (Bankr. W.D. Pa. 2020) (quotations and citations omitted). "[D]ismissal of the bankruptcy case is the appropriate remedy when neither of the 'twin pillars' of bankruptcy are present...(1) a discharge for the honest but unfortunate debtor, and (2) when assets are available for the satisfaction of valid claims against the estate." *Id.* (emphasis in original) (citations omitted). "'[T]he second pillar [is present] even if the [debtor's] assets are such that claims can only be paid a very small percentage on the dollar. The key is that at least some portion of claims, however small, be paid through liquidation of assets.'" *Id.* (quoting *In re Lots by Murphy, Inc.*, 430 B.R. 431, 436 (Bankr. S.D. Tex. 2010)).

Blackmon, 628 B.R. at 810 (quoting *In re Zimmer*, 623 B.R. 151, 162 (Bankr. W.D. Pa. 2020)).[8] The Court declines to apply this discussion regarding whether dismissal or conversion of a Chapter 13 case is appropriate under § 1307(c) to mandate dismissal of a Chapter 7 case under § 707(a). The Bankruptcy Code provides that a corporation may be a Chapter 7 debtor. It further provides that a corporation may not receive a discharge in Chapter 7. The Code does not include a requirement that a debtor have assets to file a Chapter 7 case. In fact, most Chapter 7 cases are no asset cases and in some of those cases even non-corporate debtors do not receive a discharge.

IT IS, THEREFORE, ORDERED the Motion to Dismiss Case under 11 U.S.C. § 707(a) is denied.

[7] Only an individual can file a Chapter 13 case. 11 U.S.C. § 109(e).

[8] *Zimmer* discussed many other considerations relevant to a decision on a motion to dismiss a Chapter 7 case that were applicable to the complicated and peculiar facts of that case, and the decision emphasized that there is no absolute right of a party-in-interest to obtain dismissal of a Chapter 7 bankruptcy case, and the Code provides that the Court "may" dismiss. *Zimmer*, 623 B.R. at 161.