

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

VINING ENTERPRISES, INC.
Debtor.

Bankruptcy No. 92-42080XM
Chapter 11

ORDER RE: WITHDRAWAL OF MOTION TO DISMISS

Vining Enterprises, Inc. seeks to withdraw its motion to dismiss its case but after the court granted the motion. Pursuant to an order of the court, debtor has given notice to creditors of the effort to withdraw. The motion is resisted. Telephonic hearing was held on February 18, 1994.

Vining Enterprises, Inc. (VINING or DEBTOR) filed its voluntary chapter 11 petition on November 12, 1992. It was essentially a one-asset case. Debtor owned a railroad train which it hoped to operate as a dinner or excursion train. Debtor has never operated the train. In its schedules, debtor valued the train and its related furnishings at two million dollars. It listed secured claims against the train at \$1,210,000.00 and unsecured claims of \$92,865.00.

Walter E. Vining owns 40 per cent of the common stock of the debtor. His son, Randi Vining, owns 50 per cent. Randi's wife, Kathy, owns 10 per cent. Walter is vice president of the corporation; Randi is president. At all times during the course of these chapter 11 proceedings, Walter acted as the corporation's representative to Donald F. Neiman, the debtor's counsel. It was Walter who, on the authority of the board of directors, signed the petition, schedules and the corporate resolution leading to the bankruptcy filing.

Various secured creditors sought and obtained relief from the stay to proceed against the debtor's only tangible property-the train and its furnishings. Most recently, the debtor did not resist the motions, and they were granted. The following creditors obtained relief: Paul's Plumbing; Lake Equipment, Inc.; Pappajohn, Shriver, Eide & Nicholas, P.C.; Richard Stelling and Pleasant View Farms, Inc.; and Schoenauer Musser & Co. According to the representations made at the hearing, these creditors have been granted state court judgments totaling \$1,167,561.00. Their interests in the debtor's property have been foreclosed. The sheriff's sale is scheduled for March 2, 1994. Debtor has moved in state court to set aside the judgments.

After most of the secured creditors had obtained relief, Walter Vining instructed attorney Neiman to move to dismiss the case. The motion was filed November 9, 1993. Debtor alleged in its motion that the secured creditors' claims exceeded the value of the debtor's train and that "the debtor can see no legitimate means for continuation of the estate proceedings in the Bankruptcy Court, as there will be no remaining assets in the debtor's estate for administration."

Notice of the motion was given to all creditors and parties-in-interest. The deadline for objections was set as November 30. No one objected to the dismissal. On December 17, 1993, the court issued its order dismissing the case. Prior to the order, however, Randi Vining decided that the debtor should not dismiss its case. He instructed attorney Neiman to withdraw the motion. He filed a withdrawal on December 20, 1993, three days after the entry of the dismissal order.

Randi Vining told Neiman that he did not consent to the dismissal. He also told Neiman that he did not get notice of the dismissal, although Neiman says he sent it to him. He wants the case to proceed so he can dispute some of the creditors' claims and to file a plan. He believes reorganization can still be accomplished.

Stelling, Pleasant View Farms, Inc., Paul's Plumbing, the Pappajohn law firm, and the U. S. Trustee resist the

withdrawal. They argue (1) that the case cannot be "undismissed"; (2) that the debtor is not capable of reorganizing; and (3) that a continuance of the bankruptcy proceeding would chill bidding by outsiders at the sheriff's sale.

The court will treat the debtor's "Withdrawal of Motion to Dismiss" as a motion to alter the judgment of dismissal. It was timely filed. Under such a Rule 59(c) motion, the court may set aside its order of dismissal. Sanders v. Clemco Industries, 862 F.2d 161, 168 n.13 (8th Cir. 1988).

Debtor has stated no legal basis for the motion to withdraw. Any ground or cause for setting aside the dismissal should be substantial. To the extent one focuses upon the debtor's failure to withdraw the motion in timely fashion, one might consider excusable neglect as a basis for relief. But the motion to dismiss was the voluntary act of the debtor. It has offered no legal argument that the motion was not the legitimate act of the corporation undertaken by an officer with authority to act. It would appear then that there was no neglect at all, but merely a last-minute change of decision.

The only reason given for the withdrawal is that the president of the debtor believes that reorganization can be accomplished and that the corporation should be reorganized or liquidated for the benefit of all creditors. Presumably, the argument is that only secured creditors are benefiting by present circumstances. There is little in the record advanced by the debtor to support this new position. The hope that the debtor can dispute claims is at best remote, as they have been liquidated by the state court in the foreclosure action. As to the potential for reorganization, the debtor has never operated, and it appears likely it will lose its major asset by sheriff's sale. The record does not support the debtor's argued basis for granting its motion. The court concludes that the debtor has failed to show good cause for granting the motion to withdraw. Accordingly,

IT IS ORDERED that debtor's motion to withdraw the motion to dismiss is denied. Judgment shall enter accordingly.

SO ORDERED ON THIS 18th DAY OF FEBRUARY, 1994.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order and a judgment by U. S. mail to: Donald Neiman, Paul Demro, Larry Eide, Eric Lam, Eldon McAfee & Anita Shodeen, Steven Hendricks, Patrick Rourick, William Frye, Murray Klobberdanz, Herman Folkers, James Heiny and USTrustee.