

The below described is **SIGNED**.

(ade)

Dated: August 18, 2004



JUDITH A. BOULDEN
U.S. Bankruptcy Judge



IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

In re:

GLOBILL.COM, LLC,
Debtor.

Bankruptcy Number: 04-26754
Chapter 7

**MEMORANDUM DECISION GRANTING MOTION FOR ORDER DISMISSING
OR SUSPENDING CHAPTER 7 CASE**

Before the Court is a Motion for Order Dismissing or Suspending Chapter 7 Case (Motion) filed by O.T.E. Development USA, 9056-0566 Quebec, Inc., Adrian Mathai, and Zubin Mathai (collectively, the “Mathai Brothers”) under 11 U.S.C. § 305(a)(1).¹ The debtor, GloBill.Com, LLC (“GloBill” or the “Debtor”), as well Kenneth Rushton, the chapter 7 trustee (Trustee), have submitted memoranda and exhibits, presented evidence and oral arguments. The Court has therefore considered the facts before it and the arguments presented by counsel, and has conducted an independent review of applicable law.

The parties have vigorously argued in their various briefs filed on this Motion the merits of the question of whether or not the filing of the Debtor’s petition by Daniel Warren (Warren),

¹ All references to the United States Code are to Title 11 unless otherwise noted.

the person allegedly in control of the Debtor at the time of filing, was authorized. However, the true question that must be decided prior to resolving the complex issue of who was authorized to file this petition is whether this Court should abstain from hearing the matter and dismiss the petition under § 305. Based upon all the facts and circumstances, and having considered what is in the best interest of the creditors of the estate and the Debtor, the Court determines that the Motion should be granted and the case dismissed.

I. FACTS

The Mathai Brothers owned and operated SyPRO, LLC (SyPRO), an entity that provided a mechanism for webmasters who operated Internet web sites to charge their customers through credit cards or phone billings for accessing the webmasters' web sites. SyPRO collected the full amount from the customers, deducted a 15% fee, and remitted the balance to the webmasters. To provide this service, SyPRO was required to process the charges through a merchant account, but difficulties arose with their bank in processing the charges. To resolve the merchant account issue, to conceal their affiliation with the merchant account process and upon the advice of Warren as their accountant, the Mathai Brothers agreed to the creation of GloBill, the debtor. Warren, or his related entity Warren Associates, was designated as nominal owner of the Debtor and was to provide accounting and financial services to the Debtor, while the Mathai Brothers were granted an option to gain ownership and control of the Debtor upon certain conditions, and would provide all operational services to the Debtor. Certain assets of SyPRO were transferred to the Debtor and the Debtor continued to provide the same service to the webmasters that SyPRO had provided.

The Mathai Brothers eventually determined that the Debtor should be sold, and that Warren should search for a buyer, for which service he would be paid a fee. No buyer was forthcoming, and the Mathai Brothers came to distrust Warren and what they viewed as his lack of effort to obtain a buyer. They also suspected that Warren was defrauding them, and, to that end, hired a private investigator to pose as a buyer to attempt to obtain financial information about the Debtor from Warren. When they gained information through the private investigator that they believed confirmed their concerns that Warren had fraudulently removed \$2.1 million dollars from the Debtor, they orally exercised their option to regain control of the Debtor and sued Warren in Pennsylvania.

Warren refused to surrender control of the Debtor or its assets, contesting that the Mathai Brothers had exercised their option according to the parties' agreement, and asserting that use of the private investigator was a breach of the parties' implied covenant of good faith and fair dealing. The Mathai Brothers then redirected the Debtor's cash flow stream to a new merchant account through a new entity because they believed that Warren's actions in managing the Debtor would cause the webmasters to transfer their business to the Debtors' competitors. Of some \$450,000 in funds left in the Debtor's accounts, it appears that Warren used \$300,000 for his own purposes, despite a debt of over \$1.6 million owed to webmasters. The Mathai Brothers obtained \$25,000 in additional funds which they paid to webmasters, and the remaining \$150,000 was frozen by the Mathai Brothers (Frozen Funds).

Warren then caused the Debtor and other entities to sue the Mathai Brothers in the United States District Court for the Northern Division of California. The Mathai Brothers transferred

their pending action in Pennsylvania as a counter claim in the California case (California Litigation). The California Litigation has been proceeding to trial for approximately 1½ years.

While the California Litigation was proceeding, the Mathai Brothers attempted to wind up the affairs of the Debtor and to resolve claims asserted by thousands of webmasters that totaled approximately \$1.6 million. They communicated with all the webmasters and gave them the option to be paid cents on the dollar or to be paid their claims in full plus interest from the California Litigation. The agreements with the webmasters contractually obligate the Mathai Brothers, under certain circumstances, to pay the Frozen Funds to the webmasters. The Mathai Brothers paid \$600,000 in webmasters' claims. They also attempted to obtain consent from Warren and his entities to distribute the Frozen Funds to the webmasters, but failed.

Warren caused this chapter 7 case to be filed on April 26, 2004, following the end of discovery and shortly before the commencement of a three week trial in the California Litigation. The schedules list approximately 6,000 webmasters, each with a \$0 claim, because Warren has no current information about the amount owed to them. He has also listed himself with an unsecured claim of approximately \$1.6 million, and has listed various other personal debts as obligations of the Debtor. Warren has also filed a personal chapter 7 case listing the same creditors as those listed in the Debtor's schedules. Prior to filing, Warren liquidated and converted substantial sums into exempt property.

At the hearing on the Motion, Adrian Mathai provided credible testimony that he was committed to distributing the Frozen Funds to the webmasters. Warren testified regarding his relations and transactions with the Debtor and the Mathai Brothers, but was evasive. The Trustee did not present any evidence, and nothing is before the Court as to how this case would be

administered, other than the statutory overlay. None of the 6,000 webmaster creditors who received notice of this proceeding responded.

II. ANALYSIS

Section 305(a)(1) reads “[t]he court . . . may dismiss a case under this title or may suspend all proceedings in a case under this title, at any time if — the interests of creditors and the debtor would be better served by such dismissal or suspension.”² In determining what is in the best interest of creditors and the debtor, courts must look at the individual facts of the case. Prior to the presentation of evidence, the Court focused the parties on four criteria articulated by the Colorado Bankruptcy Court³ that it would consider in this factual determination. First, the motivation of the parties seeking bankruptcy jurisdiction. Second, whether another forum is available to protect the interests of both parties or if there is already a pending proceeding in state court. Third, the economy and efficiency of administration. And finally, the prejudice to the parties.⁴

A. Motivation of the Parties Seeking Bankruptcy Jurisdiction.

The Mathai Brothers presented evidence of the ongoing dispute between them and Warren in the California Litigation centered around ownership and control of the Debtor. Despite questionable authority, Warren filed this chapter 7 petition as managing member of the Debtor shortly before the California Litigation was set for trial. Warren testified that he did not believe he was prepared to take the case to trial, but his attorneys had not filed any type of

² § 305(a)(1).

³ *In re Spade*, 258 B.R. 221, 231 (Bankr. D. Colo. 2001).

⁴ *Id.*

motion to continue the trial date. Warren's personal petition for chapter 7 relief reflects, among other debts, close to \$100,000 owed to two different law firms representing him in the California Litigation. Rather than paying his attorneys and continuing with the litigation, Warren chose to convert his available assets through bankruptcy planning to exempt assets.

Warren asserts he filed this petition, in part, so that the Frozen Funds could be distributed to the Debtor's creditors, including himself.⁵ Almost all of the Debtor's creditors listed in this filing are also listed in Warren's chapter 7 filing. In spite of this alleged motivation to repay creditors from the Frozen Funds, and in light of his failure to agree to distribution of the Frozen Funds to the webmasters prepetition, the Court finds that Warren's primary motivation in filing the instant chapter 7 petition on behalf of the Debtor was to delay the trial in the California Litigation which would determine, among other issues, whether he had ownership and control of the Debtor and thus authority to file bankruptcy on behalf of the Debtor.

The evidence presented by the Mathai Brothers indicates they are committed to distributing the Frozen Funds to the webmasters, and to the winding up of the affairs of the Debtor. Warren argues that the Mathai Brothers' primary motivation in bringing this Motion is to prevent an independent trustee from investigating their improper seizure of a corporate opportunity. Although the motivation of parties objecting to bankruptcy jurisdiction is not strictly one of the tests considered by the Court, the Court finds, based on the evidence presented to this point, that the Mathai Brothers stated motivation of preserving and distributing the Frozen Funds is credible.

⁵ Although at closing argument Warren's counsel asserted Warren's unsecured claim would be subordinated to other unsecured creditors because it probably represented an equity interest, Warren did not so testify.

Although the motivation of the parties alone “may not directly affect the consideration of whether the creditors and the debtor would be better served by the dismissal of this case, the motives of the parties can significantly influence the court’s evaluation of other factors and contribute to the court’s decision to dismiss under § 305.”⁶ Warren’s strategic decision to file for bankruptcy in order to avoid a trial he could not afford is evidence that he did not file in order to commence an orderly and fair distribution of assets to creditors. Under this factor, Warren’s self-interested filing motivation urges this Court to continue to the next steps in examining whether the creditors as a whole will be better served by exercising jurisdiction or by dismissal.

B. Availability of Another Forum.

The very question of ownership and control of the Debtor that the parties are requesting this court to determine is also the central issue in the case pending in the California Litigation – who controls the Debtor: Warren or the Mathai Brothers. Before this case can be administered, ownership and control of the Debtor must be determined. The parties have failed to offer any persuasive reason why this bankruptcy court is better situated to rule on this question. This issue involves an inherently two-party dispute between the Mathai Brothers and Warren. This is not a bankruptcy-centered dispute that would necessitate adjudication in this specialty court.⁷ No party has explained to the Court how the California Litigation, with its non-debtor parties, would be removed to this Court. Certainly, the ninety day deadline in Fed. R. Bankr. P. 9027(2)(A) has

⁶ *Id.* at 232.

⁷ *In re Mazzone*, 183 B.R. 402, 421 (Bankr. E.D. Pa. 1995) (“because a bankruptcy forum is often not the proper forum in which to adjudicate non-bankruptcy issues, litigation of such issues is frequently best left to the state courts and should not be imposed upon this specialty court unless necessary to resolve a bankruptcy-centered dispute”).

passed, and the parties have not argued another time limit is applicable. Further, there is no evidence as to how the Trustee would intend to resolve the control issue, whether to continue with the California Litigation, or file an entirely new cause of action in this Court. It appears, absent any evidence to the contrary, that the most effective way to resolve this question is to allow the California Litigation, where the parties have been through the discovery process and are closer to trying the case, to proceed as best it can, given Warren's personal filing.

C. Economy and Efficiency of Administration.

Allowing this case to continue in a chapter 7 adds additional expenses on top of those necessary to resolve this essentially two-party case, which will likely deplete the remaining assets without distribution to creditors of the Debtor. Administration of a chapter 7 case requires payment of fees and costs by the estate to any specialized bankruptcy or California counsel hired by the Trustee, as well as the Trustee's compensation and expenses for the administration of the estate. The Trustee's attorney joined Warren in arguing that the Debtor should remain under the jurisdiction of the bankruptcy court. However, the Trustee did not testify as to how he plans to proceed to administer the Debtor's estate. Certainly the statutory overlay provides for a convenient forum for the Trustee, may provide a method for prompt turnover of the Frozen Funds, and provides a basis for claims filing and allowance. However, the Trustee has not provided any evidence regarding the pivotal issue of how the control issue will be resolved. It appears, therefore, that the Frozen Funds will be substantially dissipated, if not entirely depleted, before the case can even be administered leaving very little to nothing for the numerous creditors. The complex litigation to determine who controls the Debtor will likely consume the cash assets of the estate, leaving no distribution to creditors including the webmasters.

The Court has already determined that the California District Court is the better forum to resolve this dispute. Allowing the bankruptcy to continue while the California Litigation proceeds would be both inefficient and uneconomical to creditors. This factor also indicates the interests of the creditors and the Debtor would be better served by dismissal.

D. Prejudice to the Parties.

The creditors in this case, apart from the Mathai Brothers' contingent claim and Warren's personal claims, consist of webmasters to whom the Debtor owes between \$1.1 - 1.6 million. The only evidence of how these creditors will be paid is from the Mathai Brothers. Warren has admitted that in the last two years he has not paid one penny to offset the webmaster liability. As explained above, the Trustee failed to testify and no other evidence of how the case will be administered was presented.

The Mathai Brothers have entered into settlement agreements with many of the webmaster creditors in order to resolve their claims against the Debtor outside of bankruptcy. The Mathai Brothers have already paid substantial funds to settle these claims. Significantly, the settlement agreements assign the Mathai Brothers' rights to the Frozen Funds to the webmasters.⁸ This assignment of rights is consistent with Adrian Mathai's testimony that it was always his intent to pay the creditors of the Debtor.

The only prejudice to creditors would be in eliminating the Trustee's ability to review the actions of the Mathai Brothers for their asserted exploitation or conversion of a corporate opportunity. While the Trustee may be a more convenient, skilled, and logical person to review

⁸ Debtor's Ex. A at 3.

those concerns, even Trustees don't work for free. If there are no funds in the estate after determination of the control issue, and if it appears that the claims against the Mathai Brothers are difficult to prove, it is unlikely that those claims will be pursued, even in this forum. Without more, such argument does little to weigh in favor of denying the Motion.

III. CONCLUSION

After considering the motivation of the parties, the availability of another forum, the economy and efficiency of administration, and the prejudice to the parties, the Court finds that the interests of the creditors and the Debtor will be better served by dismissing this case pursuant to § 305. A Dismissal Order shall issue accordingly.

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ORDER SIGNED

SERVICE LIST

Service of the foregoing **MEMORANDUM DECISION GRANTING MOTION FOR ORDER DISMISSING OR SUSPENDING CHAPTER 7 CASE** will be effected through the Bankruptcy Noticing Center to each party listed below.

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