

570 B.R. 643
United States Bankruptcy Court,
S.D. Alabama, Southern Division.

IN RE: Charles K. BRELAND, Jr., Debtor.

Case No.: 16-2272-JCO

|
Signed April 28, 2017

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Entered 05/01/2017

Synopsis

Background: Creditor moved to dismiss, or in the alternative, appointment of Chapter 11 trustee.

[Holding:] The Bankruptcy Court, Jerry C. Oldshue, Jr., J., held that appointment of Chapter 11 trustee was warranted.

Motion to dismiss denied, and motion to appoint Chapter 11 trustee granted.

West Headnotes (9)

[1] **Bankruptcy** 🔑 Debtor in possession, in general

Debtor in possession is a fiduciary for the bankruptcy estate and assumes virtually all of the rights and responsibilities of a bankruptcy trustee. 11 U.S.C.A. § 1107.

1 Cases that cite this headnote

[2] **Bankruptcy** 🔑 Presumption against appointment

There is a strong presumption in Chapter 11 cases that a debtor in possession should remain in possession absent a showing of the need for a trustee; this presumption is based on the belief that the debtor in possession is the most knowledgeable about, and best able to run, the debtor's business. 11 U.S.C.A. § 1104(a).

[3] **Bankruptcy** 🔑 Proceedings

Because the appointment of a Chapter 11 trustee is an extraordinary remedy, the moving party must show that cause for appointment of a trustee exists by clear and convincing evidence. 11 U.S.C.A. § 1104(a).

[4] **Bankruptcy** 🔑 Necessity or grounds

Decision whether to appoint a Chapter 11 trustee is fact intensive and the determination must be made on a case-by-case basis. 11 U.S.C.A. § 1104(a).

1 Cases that cite this headnote

[5] **Bankruptcy** 🔑 Necessity or grounds

While appointment of a Chapter 11 trustee is mandatory once cause is found, it is within the court's discretion, on a case-by-case basis, to determine whether conduct rises to the level of cause. 11 U.S.C.A. § 1104(a).

1 Cases that cite this headnote

[6] **Bankruptcy** 🔑 Appointment of Trustee or Examiner

Appointment of a Chapter 11 trustee is a power which is critical for the court to exercise in order to preserve the integrity of the bankruptcy process and to insure that the interests of creditors are served.

[7] **Bankruptcy** 🔑 Appointment of Trustee or Examiner

Bankruptcy 🔑 Discretion

Decision whether to appoint a Chapter 11 trustee is vested in the discretion of the bankruptcy court and will be reviewed on an abuse of discretion standard. 11 U.S.C.A. § 1104(a).

[8] **Bankruptcy** 🔑 Necessity or grounds

Inquiry into whether cause exists for appointment of a Chapter 11 trustee is not limited

to the enumerated list of fraud, dishonesty, incompetency or gross mismanagement, but extends to similar cause. [11 U.S.C.A. § 1104\(a\)](#).

1 Cases that cite this headnote

[9] **Bankruptcy** Necessity or grounds

Appointment of Chapter 11 trustee was warranted, where debtor made payments on pre-petition debts as well as payments to lawyers for post-petition work without court approval, debtor engaged and made payments of substantial amounts of money to a “consultant” without court approval, debtor took inconsistent positions regarding his involvement in the ordinary course of his business operations, leading the court to conclude that at least some dishonesty was present, debtor apparently did not maintain or did not have access to important business records relating to many transactions he was questioned about, and debtor failed to comply with court's order as to reporting requirements of related entity. [11 U.S.C.A. § 1104\(a\)](#).

Attorneys and Law Firms

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[Mark Zimlich](#), U.S. Bankruptcy Administrator, [A. Richard Maples, Jr.](#), Mobile, AL, for Trustee.

MEMORANDUM OPINION AND ORDER ON
MOTIONS TO DISMISS, OR IN THE ALTERNATIVE,
APPOINTMENT OF A CHAPTER 11 TRUSTEE

[JERRY C. OLDSHUE, JR.](#), U.S. BANKRUPTCY JUDGE

This matter (hereinafter “*Breland, II*”) is before the Court on Creditor Levada EF Five, LLC’s (“Levada”) Motion to Dismiss or in the Alternative Appointment of a Chapter 11 Trustee (Docs. 22, 65, 173, 184); Creditors Hudgens &

Associates, LLC (“H & A”) and Equity Trust Company as Custodian for the Benefit of David E. Hudgens IRA # 41458’s (together with H & A referred to as “Hudgens Creditors”) Motion to Appoint a Chapter 11 Trustee, (Doc. 190) to which Debtor filed his Omnibus Brief in Opposition thereto (Doc. 122) and the Bankruptcy Administrator’s (hereinafter “BA”) Response thereto. (Doc. 293). Also before the Court is Debtor’s own Motion to Dismiss (Doc. 312), and the BA’s Response in Opposition. (Doc. 332).

Over the course of three days, October 31, November 21 and 22, 2016, the Court heard testimony regarding the above motions from multiple witnesses: Mr. Breland’s CPA, Mark Hieronymous; Creditor William J. Donado; Robert (Bob) Galloway, counsel for Debtor in his previous 2009 Chapter 11 case, and from Mr. Breland himself. At the conclusion of the hearing, the Court requested the parties submit proposed findings of fact and conclusions of law, which they did. (Docs. 282, 289). These matters are now under submission and ripe for adjudication.

*[645](#) For the record, this Court has jurisdiction to hear these matters pursuant to [28 U.S.C. §§ 1334](#) and 157, and the Order of Reference by the District Court dated August 25, 2015. This is a core proceeding pursuant to [28 USC § 157\(b\)\(2\)](#), and this Court has the authority to enter a final order.

In making its findings herein, the Court considered the record before it, the evidence and the testimony presented at the hearings, as well as the arguments of counsel. Having considered all of the above, the Court concludes that Levada’s Motion to Dismiss is due to be and hereby is DENIED. Debtor’s Motion to Dismiss is likewise DENIED. The Hudgens Creditors’ Motion to Appoint a Chapter 11 Trustee is due to be and hereby is GRANTED for the following reasons.

FINDINGS OF FACT

Background

On March 9, 2009, Debtor (or alternately referred to as “Mr. Breland”), filed a Chapter 11 case, Case No. 09–01139 in this Court (*Breland, I*). The Hudgens Creditors were creditors in *Breland, I*, also. On July 8, 2016, Mr. Breland filed the present case, *Breland, II*, along with the companion case of *In re Osprey Utah, LLC*, 16–2270–JCO (hereinafter, “*Osprey*”),

both in this Court. To date, a proposed plan of reorganization has not been filed in either case. The largest creditors in *Breland, II* are the Hudgens Creditors, Levada, and the Internal Revenue Service (“IRS”), which have claims totaling \$9,988,487.25. The only creditors in *Osprey* are William and Linda Donado (the “Donados”), Levada, and Parsons, Kinghorn & Harris, P.C. with claims totaling \$2,647,696.00.

The Hudgens Lawsuit

The claims of the Hudgens Creditors in *Breland, II* arise out of a dispute between the Hudgens Creditors and Mr. Breland regarding the amount allegedly due them under the *Breland, I* Plan of Reorganization. (Doc. 138 at 1–2, ¶¶ 3–8). In *Breland, I*, the Hudgens Creditors filed Claims 23, 24, and 25. Claim 23 was filed by H & A in the amount of \$2,334,987.08; Claim 24 by Equity Trust Company Custodian for the Benefit of David E. Hudgens IRA # 41457 (IRA # 41457) in the amount of \$879,929.55; and Claim 25 by IRA # 41458 in the amount of \$180,498.37. The record of *Breland, I* reflects that Mr. Breland did not object to any of these three claims, and did not list a claim against any of these three creditors as an asset of that Chapter 11 estate. (Doc. 138. at 1, ¶ 3–4). In negotiating his plan of reorganization, Mr. Breland settled the claims of the Hudgens Creditors, and the alleged terms of that settlement were incorporated into the *Breland, I* Plan. Because the interpretation of the terms of this settlement are bitterly disputed between Mr. Breland and the Hudgens Creditors, no finding as to the validity of those issues is made herein, as those issues are not before this Court at this time.

Mr. Breland's plan was confirmed, and, the Hudgens Creditors sought post-confirmation enforcement of that plan from this Court.¹ Mr. Breland successfully contested the enforcement on the grounds that the appropriate forum for enforcing the Plan was state court, and that this Court did not have jurisdiction to do so, and, if it did, that it should abstain from enforcing the Plan.

*646 On March 6, 2014, the Hudgens Creditors filed *Equity Trust Company as Custodian for the Benefit of David E. Hudgens IRA No. 41458 and Hudgens & Associates LLC v. Charles K. Breland*, Case No. CV–2014–900631, in the Circuit Court of Mobile County, Alabama, (the “Hudgens Lawsuit”), seeking to enforce the *Breland, I* Plan which required Mr. Breland to pay the Hudgens Creditors \$1,080,000.00 when distributions were made to other creditors, and to deliver a note and mortgage securing a

reduced claim amount of \$1,500,000. Mr. Breland, claiming defenses to the Hudgens Creditors' claims, denied the allegations of the Complaint and filed a counterclaim and third party complaint against the Hudgens Creditors, and David E. Hudgens individually, claiming, among other things, that the H & A claim filed in *Breland, I* was fraudulent.

On September 17, 2015, the Circuit Court of Mobile County entered an order ruling that the Hudgens Creditors were not entitled to a mortgage on 508 acres in Grand Bay, Alabama, as the Hudgens Creditors had claimed, but granted them a judicial lien against approximately 376 acres of that land. (Doc. 138 at 2, ¶ 9). Prior to that order, on November 20, 2012, Mr. Breland transferred the 508 acres to Gulf Beach Investment of Perdido, LLC, (“Gulf Beach”), and on October 24, 2014, Gulf Beach transferred approximately 400 acres of it to Grand Oaks Plantation, LLC (“Grand Oaks”). On December 18, 2016, the Hudgens Creditors filed an appeal of the portion of the September 17, 2016 Order denying them a mortgage on the entire 508 acres. After obtaining relief from the stay from this Court to proceed with that appeal, the Alabama Supreme Court rendered its February 2, 2017 Opinion that the Mobile County Circuit Court exceeded its discretion in entering [Al. R. Civ. P. 54\(b\)](#) certification on the grounds that the facts of that appeal hinged on facts inextricably intertwined with the facts of the remaining pending claims, and separate adjudications would lead to piecemeal appellate review of the same facts and issues if the Supreme Court were to review the present appeal and then later be presented with an appeal from a judgment adjudicating the pending claims.

On December 15, 2015, the Hudgens Creditors argued a motion for summary judgment for the amounts they claimed were due them under Section 3.2.3 of the *Breland, I* Plan. (Doc. 138 at 3, ¶ 10). On March 24, 2016, the Mobile County Circuit Court granted that motion in favor of the Hudgens Creditors in the amount of \$2,189,342.96, plus costs and interest from December 15, 2015. (*Id.*) On March 17, 2016, Mr. Breland filed a notice of appeal of this judgment and requested the Mobile County Circuit to stay the collection of the judgment while the appeal was pending. (*Id.* at ¶ 11). The stay was denied. Mr. Breland then asked the Alabama Supreme Court to stay the collection of the judgment until the appeal was resolved; that request was also denied. (*Id.*)

The Hudgens Creditors recorded Certificates of Judgment on March 29–30, 2016 in the records of the Judge of Probate of Mobile County, Alabama. On May 18, 2016, the Hudgens

Creditors filed a fraudulent transfer lawsuit against *inter alia*, Mr. Breland and numerous Breland related entities in the Circuit Court of Baldwin County, Alabama.² On November 1, 2016, and on motion of the parties, the case was placed on that court's administrative docket for twelve months.

*647 *The Levada Lawsuit*

Levada has claims in *Breland, II* and *Osprey* which arise out of a contract between Mr. Breland and Levada relating to real property in Utah owned by entities that Mr. Breland owned. (Doc. 138 at 4, ¶ 15). Under the contract, Osprey Utah acquired certain mineral and royalty interests in the property located in Utah (the “Utah Property”) from entities owned by Mr. Breland. The Utah Property was conveyed to Osprey Utah via two deeds (the “Osprey Utah Deeds”). (*Id.*) On April 3, 2014, Mr. Breland and Osprey Utah filed an action against Levada for breach of contract in the United States District Court for the Southern District of Alabama³ (the “Levada Lawsuit”). On February 26, 2015, Levada filed a counterclaim. (*Id.*) Approximately one year later, on February 3, 2016, the jury in the Levada Lawsuit returned a verdict in favor of Levada against Osprey Utah and Mr. Breland in the amount of \$1,420,671.02. On the day of the jury verdict, the district judge entered an order stating that judgment would be entered separately in accordance with the jury verdict after the amount of attorneys' fees was determined. (*Id.*) The District Court calculated the award of attorneys' fees, including statutory pre-judgment interest, and on April 28, 2016, entered a final judgment in the amount of \$2,397,695.94 in favor of Levada and against Mr. Breland and Osprey Utah, jointly and severally. (Doc. 138 at 4, ¶ 17).

On July 6, 2016, Osprey Utah and Mr. Breland filed a notice of appeal of the judgment in the Levada Lawsuit and requested that the District Court stay the execution of the judgment while the case was on appeal. (*Id.* at ¶ 18). The District Court denied the stay; Mr. Breland and Osprey Utah did not post a bond to supersede the judgment. (*Id.*) Two days later, on July 8, 2016, the present Chapter 11 bankruptcy was filed. The failure to post a supersedeas bond and the subsequent filing of the present bankruptcies is an issue of contention between the Debtor and his creditors, and has generated significant motions and multiple settings on that issue.

The Donado Lawsuit

On September 2, 2014, a number of Mr. Breland's entities filed *Utah Reverse Exchange, LLC, et al. v. Linda Donado, et al.*, Case No.:1:14-cv-00408 in the United States District Court for the Southern District of Alabama (the “Donado Lawsuit”) against Linda and William Donado (“the Donados”). (Doc. 138 at 5, ¶ 19). The Donados filed an amended counterclaim, which included Osprey Utah, LLC as a defendant. Part of the case was tried to a jury and part was a bench trial. The case was tried to a jury from February 16–18, 2016. The jury returned a verdict against Osprey Utah, LLC and other defendants on July 18, 2016, in the amount of \$250,000.00. The claims tried by bench trial resulted in a 25% mineral interest to the Utah Property being awarded to the Donados. On March 1, 2017, Mr. Breland and the other of his entities involved in this suit filed an appeal of the final judgment with the Eleventh Circuit Court of Appeals, Case No.: 17–10943. A suggestion of bankruptcy was filed on March 8, 2017, and this appeal was stayed pending stay relief from this Court. A supersedeas bond was not filed in conjunction with the appeal.

Pre-Breland, II Transfers

During the last six months of 2015, Mr. Breland caused a number of new limited liability companies to be formed (the “New Entities”). (BEX 17–22; Doc. 313 at 166–169, *648 176).⁴ When he formed them, Mr. Breland owned the New Entities individually, (*Id.*), but effective January 1, 2016, he transferred ownership of the New Entities and CKB Minneola, LLC,⁵ to Osprey Holdings, LLC. (Doc. 313 at 197–199). Mr. Breland is the 100% owner of Osprey Holdings, LLC. (Doc. 175 at 1).

From February 1–4, 2016, Mr. Breland executed the following six deeds from him, individually, to the New Entities, and executed a deed to his wife (collectively “the Deeds”).

On February 1, 2016, Mr. Breland executed a deed transferring an income-producing commercial property described as Lot 1, Westbrook Commercial Park, Daphne, Alabama, to Osprey Kommerzielle, LLC. That deed was recorded on February 3, 2016. (Doc. 138 at 5 ¶ 22).

On February 1, 2016, Mr. Breland executed a deed transferring a commercial building described as Lot 3, Westbrook Commercial Park, Daphne, Alabama, to Osprey Hund Esser Haus. That deed was recorded on February 3, 2016. (*Id.* at ¶ 23).

On February 4, 2016, Mr. Breland recorded a deed from himself to his wife, Yvonne Breland, transferring his one-half interest in a house and property at Lakewood Club Estates, Point Clear, Alabama in which he and his wife live. Mr. Breland executed this deed on February 1, 2016. (*Id.* at ¶ 28).

On February 4, 2016, Mr. Breland executed and recorded a deed from himself to Osprey Kommerzielle transferring commercial property described as Lot 2, Jubilee Mall Subdivision, Daphne, Alabama. (*Id.* at ¶ 30).

On February 4, 2016, Mr. Breland executed and recorded a deed from himself to Osprey Kommerzielle transferring residential property described as Lot 1, William O'Neal Addition to Daphne, Alabama. (*Id.* at ¶ 31).

On February 4, 2016, Mr. Breland executed and recorded a deed from himself to Osprey Kommerzielle transferring commercial property described as Lot 5, Southside Business Park, Fairhope, Alabama. (*Id.* at ¶ 34).

On February 5, 2016, Mr. Breland recorded a deed from himself to Osprey Punkt Loschen, LLC transferring the Battles Wharf Property. This deed was executed by Mr. Breland on February 1, 2016. On August 8, 2016, Mr. Breland and Osprey Punkt Loschen executed a correction deed to limit the property conveyed to Osprey Punkt Loschen to approximately 10 acres that Mr. Breland had been trying to fill and develop since at least 2008 but had been unable to fill because of opposition from the City of Fairhope. (*Id.* at ¶ 36).

When Mr. Breland executed the Deeds in early February of 2016, the summary judgment motion filed by the Hudgens Creditors for the Money Judgment had already been argued, a jury trial in the Levada Lawsuit was commencing on February 1, 2016 (the day Mr. Breland began executing the Deeds) in which there was a *649 substantial counterclaim against him (MEX 8, 16, 17), and a jury trial was to begin on February 16, 2016, in the Donado Lawsuit, including the Donados' counterclaims, with the jury being selected on February 2, 2016. (MEX 25, 26).

Around noon on February 3, 2016, the jury in the Levada Lawsuit rendered a \$1,420,671.02 verdict against Mr. Breland. (Doc. 138 at 4 ¶ 17; MEX 17. Within hours of the rendition of that jury verdict, Mr. Breland began recording the Deeds. (MEX 28, 47). During his testimony before this Court, Mr. Breland justified those transactions and recordations by characterizing them as being recommended by his CPA, and as being ordinary-course-asset-protection-actions of a real estate developer to protect his properties against potential tort claims that might arise in the course of the operation of his real estate business. However, this Court finds that characterization less than genuine in light of the following facts:

Mr. Breland's own testimony demonstrated that he had owned all six of the properties transferred to the New Entities for many years, some more than fifteen years, without having transferred them out of his individual name. More than four years prior to the transfers, Mr. Breland's accountant, Mr. Hieronymous, testified that he advised Mr. Breland to put the properties into separate LLCs to provide liability protection, yet Mr. Breland did not follow his accountant's instructions. (Doc. 316 at 74–75). In 2012, three years prior to when the transfers were actually made, Mr. Breland was advised again by his attorney and his accountant to make the transfers. (*Id.* at 74–75, 84–85). At this point, a holding company was formed and deeds were prepared to accomplish the transfers, but the transfers were never made. (*Id.*). In fact, Mr. Breland did not execute the deeds until the week the trial commenced in the Levada Lawsuit, and did not record the deeds until after the jury verdict was rendered, despite being repeatedly advised to do so by his attorney and accountant. (MEX 28, 30, 38, 41, 43, 45). Contrary to his accountant's advice that residential and commercial property not be placed in the same LLC, Mr. Breland transferred his office building (parts of which he leases out), Lot 2, Jubilee Mall (a vacant commercial lot), Lot 5 Southside Business Park (a vacant commercial lot), Lot 1, William O'Neal Addition to Daphne (a single family residence that has never been rented out) into to Osprey Kommerzielle, LLC (“Osprey K”). (Doc. 316 at 88–89; MEX 28, 30, 38, 41, 43).

When questioned about his delay in making the recommended transfers, Mr. Breland stated under oath that the reason for the delay was because he was busy getting ready for trial during the three weeks prior to trial. (Doc. 316 at 130–133). No explanation was given as to why he did not execute and deliver the Deeds in the three plus years prior to the trial.

Mr. Breland testified that he transferred his one-half interest in his house to his wife as a result of a settlement agreement with his wife in a divorce proceeding she filed and dismissed in 2012. (DEX 35, 36; Doc. 316 at 227–228). The purported consideration by his wife for the transfer was the withdrawal of her pursuit of obtaining a divorce. (*Id.*) There is no writing evidencing that agreement, and the bona fides of that testimony are drawn into question because the transfer was made on the day after the jury verdict in the Levada Lawsuit, and almost three and one-half years after the divorce proceeding was dismissed.

Notably, this transfer was made to Mr. Breland's wife less than one year prior to the *Breland, II* petition. The transfer also appears to have been made almost simultaneously *650 with the recordation of a mortgage on the house in favor of Eigenkapital, which mortgage Mr. Breland testified was given to secure a proposed loan that ultimately was never made. Mr. Breland continues to reside in the house. (Doc. 316 at 235–250).

First Community Bank Loan

On February 12, 2016, Mr. Breland caused Osprey K and Osprey Hund Esser Haus (“Osprey H”)(another entity he owned until January 1, 2016) to enter into a credit agreement with First Community Bank under which Osprey K and Osprey H were approved to borrow up to \$950,000 (the “Line of Credit”). (MEX 33–35). Mr. Breland guaranteed that debt. (MEX 36).

The security for the Line of Credit was Lots 1 & 3, Westbrook, which Mr. Breland had only days before conveyed to Osprey K and Osprey H, respectively. (MEX 28, 30, 34). Thus, it appears that Mr. Breland encumbered those assets to shield them from execution.

Eigenkapital Karl, LLC

Eigenkapital Karl, LLC (“Eigenkapital”) has been a point of contention throughout this case. The Court notes that Mr. Breland's testimony in general was elusive, but particularly so when Eigenkapital was addressed.

Mr. Breland caused Eigenkapital Karl, LLC to be formed on April 15, 2015 with him as its manager or managing member. (MEX 54). Currently, Wasalan Ltd. (“Wasalan”) is

the manager of Eigenkapital. (Doc. 313 at 42, 44). Even though Mr. Breland, by his own testimony, is the owner of either 99% or 100% of Wasalan and is its President or one of its directors, he could not affirmatively state on the record which position he holds due to alleged lack of knowledge or memory. (*Id.*). Wasalan's address on the Nevada Secretary of State website is the address for Mr. Breland's office post office box. (MEX 55; Doc. 316 at 159). Mr. Breland's office is also the depository of Eigenkapital's business organizational documents. (MEX 55).

Despite not knowing his own position in the structure and administration of Wasalan, Mr. Breland was able to affirmatively state that Wasalan owns 10% of Eigenkapital and that he believes William R. Miller owns 3% of Eigenkapital. Mr. Breland claimed that he did not know who owns the other 87% of Eigenkapital, despite the fact that he was the organizer of Eigenkapital, has a 99–100% ownership interest in the manager of Eigenkapital, has his post office box as the mailing address for Eigenkapital's manager, and his office is the depository for Eigenkapital's business organization records. (Doc. 313 at 44, 57, 62, 67). The Court finds this alleged lack of knowledge to be suspect.

Again, despite not knowing who owns the other 87% of the LLC, Mr. Breland did know that Eigenkapital owns the outstanding balance of a debt owed by Shores of Panama, Inc., in the original principal amount of approximately \$19,000,000 secured by mortgages on property owned by several of his affiliated entities. However, Mr. Breland claimed under oath that he did not know the outstanding balance of that debt. (Doc. 313 at 28–34, 83–84). This mortgage is not reflected on Mr. Breland's 2015.3 Reports, and Wasalan is assigned no value in his schedules.

After being specifically ordered to include Eigenkapital on his 2015.3 reports, despite his close relationship with Eigenkapital, and almost nine months after he filed *Breland, II*, Mr. Breland purports to the Court that he *still* does not know enough about Eigenkapital to provide the information required by Rule 2015.3. (Doc. 257 at 150).

On May 12, 2015, Mr. Breland executed a \$100,000.00 promissory note and a mortgage *651 in favor of Eigenkapital on a house then jointly owned by Mr. Breland and his wife. (MEX 48). That mortgage was not notarized until February 3, 2016, the day the jury verdict was rendered in the Levada Lawsuit. (*Id.*). The mortgage was recorded within two and one-half hours after the jury verdict was

rendered. (*Id.*). After testifying in his 341 meeting that Eigenkapital loaned approximately \$500,000 secured by that mortgage, Mr. Breland now claims that that mortgage was all a mistake—that Eigenkapital never loaned him any money. Yet, as of April 26, 2017, the mortgage continues to encumber the home. (Doc. 316 at 235–240, 246, 252–253).


Mr. Breland's schedules do not show any indebtedness to Eigenkapital even though he testified at his 341 meeting that he owed Eigenkapital \$400,000.00–\$500,000.00. (MEX 72; Doc. 76).

On February 13, 2017, counsel for the IRS filed a Motion to Compel the Debtor to file his 2015.3 Report for Eigenkapital. (Doc. 265). A hearing was held on this Motion and Mr. Breland was given 48 hours to comply with this Court's prior order to file his 2015.3 Report regarding Eigenkapital, or his case would be dismissed without further notice. On March 29, 2017, Mr. Breland complied by filing an affidavit stating again that he lacked knowledge regarding Eigenkapital and that he relied on his in-house CPA, Lori Globetti and outside consultant, William Miller, to prepare the affidavit to the best of their information and belief. (Doc. 292 at 2). The affidavit states that William Miller reached out to several attorneys who might have additional information to provide, but that his efforts resulted nothing. (*Id.*). The affidavit states that neither Eigenkapital nor any of its members were found to have an open checking account, and no other similar transactional documents were available. (*Id.*). The names of those persons or entities contacted were not provided in the affidavit, yet Mr. Breland does state that to his knowledge, the residual interests of Eigenkapital are held by Casper Holdings, LLC and Osprey RDB, LLC. (*Id.* at 3). Mr. Breland swore under the penalty of perjury that he and his staff have not established any checking account or other business account on behalf of Eigenkapital, and, in general, have received very little documentation regarding the entity since its formation. (Doc. 292 at 3–4). Given his relationship with Eigenkapital through Wasalan, Breland's testimony that he cannot obtain information on Eigenkapital is not credible.

Fraudulent Transfer Action

Upon learning of Mr. Breland's February 1–5, 2016 transfers, the Hudgens Creditors, on May 18, 2016, filed a fraudulent transfer lawsuit (the “Fraudulent Transfer Lawsuit”) in the Baldwin County, Alabama Circuit Court⁶ against Mr. Breland, the New Entities, Yvonne Breland, Eigenkapital, and

others seeking to recover Mr. Breland's February transfers. (MEX 14). Most of the defendants in the Fraudulent Transfer Lawsuit are owned directly or indirectly by Mr. Breland and those that are not directly or indirectly owned by him are related to Mr. Breland either as members of his immediate or close family or as entities owned by members of his close family.

Pursuant to  11 U.S.C. § 362, the Fraudulent Transfer Lawsuit was stayed when *Breland, II* was filed. On July 20, 2016, the Hudgens Creditors demanded that Mr. Breland pursue the fraudulent transfer claims that the Hudgens Creditors had asserted in the Fraudulent Transfer Lawsuit. (MEX 15). Mr. Breland refused to *652 pursue those claims, causing the Hudgens Creditors to file a motion for authority with this Court to pursue those claims. (Doc. 98 at 2). The Court is withholding a ruling on that motion pending the outcome of these hearings.

Failures To Disclose or Inaccuracies in Disclosures

Mr. Breland's Schedule of Assets and Liabilities and Statement of Financial Affairs were due on July 22, 2016, but the Court extended that deadline to August 9, 2016. (Docs. 19, 20).

Mr. Breland did not file his Schedule of Assets and Liabilities and Statement of Financial Affairs on August 9, 2016, but, instead, filed an incomplete Schedule of Assets and Liabilities and Statement of Financial Affairs on August 10, 2016. (Docs. 4, 31).

When *Breland, II* was filed, Mr. Breland was, and still is, engaged in litigation with the IRS concerning pre-*Breland, I* tax liabilities. (MEX 6, 51, 52; Doc. 313 at 205–209; Doc. 314 at 178–180). In 2012, Mr. Breland filed two lawsuits in the U.S. Tax Court, Docket No. 21940–12 disputing tax assessments for 2004, 2005, and 2008, and Docket No. 21946–12 disputing tax assessments for 2009. (MEX 6, 51, 52; Doc. 313 at 205–209). Neither of those lawsuits is disclosed in his Statement of Financial Affairs. (MEX 72; Doc. 78). Further, he lists the IRS as a disputed claim in the amount of \$1.00, but, undoubtedly, he has some knowledge regarding the amount of the IRS claim. The IRS has filed a claim in the present case in the amount of \$5,401,448.25. (MEX 72; Doc. 76 at 2; Proof of Claim 2–2 at 2).

Likewise, in both his original and amended Statement of Financial Affairs, Mr. Breland did not disclose the February 2016 conveyances of his real property to the New Entities and to his wife. (Doc. 43 at 8 ¶ 18).

Mr. Breland's initial [Fed. R. Bankr. P. Rule 2015.3](#) Report was due on July 26, 2016, in order for it to be available to creditors before the first setting of Mr. Breland's § 341 creditors' meeting. Even though the § 341 meeting was continued to August 17, 2016, and completed on August 24, 2016, the report was not filed prior to the conclusion of the § 341 meeting.

On September 20, 2016, almost two months after his first 2015.3 report was already due, Mr. Breland filed a motion to, among other things, excuse his failure to file and excuse him from filing the initial July 26, 2016 Report. (Doc 121.) The Court heard the motion, denied that request and required Mr. Breland to file quarterly 2015.3 Reports, including a report up to June 30, 2016, and to include information concerning Eigenkapital in those reports. (Doc 193).

The three 2015.3 Reports Mr. Breland has filed to date do not contain any information relating to Eigenkapital, are so internally inconsistent and so inconsistent with other information filed or testified to by Mr. Breland as to be virtually useless to his creditors and this Court. Additionally, the Reports show numerous transfers of money between his various entities, some of which are at best questionable and at worst fraudulent.

Using the December 31, 2016 Report, but noting that many inconsistencies set out herein are common to all the Reports in the record, the Court found extensive and material errors and inconsistencies:

1. As noted above, as of January 31, 2017, and as late as March 28, 2017, Mr. Breland still claimed to have insufficient information to report on Eigenkapital's assets and liabilities. (Doc. 257 at 150; Doc. 285).

***653** 2. The "Asset Values" for all entities are not updated despite changes in values on the balance sheets.

3. Osprey Holdings, LLC's 2015.3 financial information shows a \$16,000 indebtedness of S. Hickory, Inc. to Osprey Holdings, LLC and a \$40,000 indebtedness of Breland Corporation to Osprey Holdings as liabilities of Osprey Holdings instead of as assets. (Doc. 257 at 9).

4. Florencia Development's financial statements show a \$440,000 "Note Receivable—Gulf Beach Inv Co of Perdido" to Florencia Development, Inc. but Gulf Beach's information shows no indebtedness to Florencia. (Doc. 257 at 54, 138). It also shows an indebtedness of \$5,500 owed by it to Mr. Breland, but Mr. Breland's schedules do not show Florencia as a creditor. (Doc. 257 at 54; Doc. 75).
5. Osprey H's 2015.3 financial information shows a \$26,792 debt to Mr. Breland but Mr. Breland's schedules do not show a corresponding asset. (Doc. 257 at 20; Doc. 74).
6. Osprey P's 2015.3 financial information shows the real property owned by it as having a value of \$1,091,700 but Mr. Breland has repeatedly testified that it has a value of approximately \$300,000. (Doc. 257 at 25–28; Doc. 316 at 180).

The June 30, 2016 2015.3 Report shows:

1. Breland Corporation's 2015.3 financial information says Mr. Breland owes Breland Corporation \$38,953.87 but Mr. Breland's schedules do not show Breland Corporation as a creditor. (Doc. 175 at 5; MEX 72; Doc. 76).
2. Osprey K's 2015.3 financial information shows it owes Mr. Breland \$17,880 but Breland's schedules do not show a corresponding asset. (MEX 72; Doc. 74; Doc. 175 at 17).
3. Osprey H's 2015.3 financial information reduces its value because of a \$545,500 mortgage payoff but does not show any indebtedness secured by that mortgage. (Doc. 175 at 22–23, 26).
4. S. Hickory's 2015.3 financial information shows a \$299,000 vendor's lien indebtedness owed to Gulf Beach but Gulf Beach's 2015.3 information does not show that indebtedness as an asset. (Doc. 175 at 90, 145).
5. Breland testified that Wasalan Ltd. owns a 10% interest in Eigenkapital. (Doc. 313 at 57). On the Entity Value section of Wasalan's 2015.3 financial information, the value of that 10% interest in Eigenkapital is shown as \$240,000.00, but that value is not shown as an asset on Wasalan's balance sheet. (Doc. 175 at 156–157).

6. B & B Orange Beach Development, LLC's financial information does not show a BP claim as an asset, but its September 30, 2016 2015.3 Report shows that B & B Orange Beach collected \$26,762.00 for a BP settlement. (Doc. 175 at 113; Doc. 191 at 111).
7. Grand Oaks Plantation, LLC's 2015.3 financial information shows that it owns 413.67 acres in Grand Bay, Alabama with a value of \$1,117,900.00, but Mr. Breland testified it owned 440 acres with a value of \$4,400,000.00. (Doc. 175, p 139; Doc. 316 at 196).
8. CKB Minneola, LLC's 2015.3 financial information shows a \$100,000 "Increase in Due from S. Hickory Inc" but its balance sheet does not show any indebtedness of S. Hickory *654 as an asset. (Doc. 175 at 151–153). Further, CKB Minneola's 2015.3 financial information shows a \$51,750 "Increase in Due to Charles K. Breland" but CKB Minneola's balance sheet does not show any debt owned by Mr. Breland to CKB Minneola. (*Id.*)
9. Osprey K's 2015.3 Report of financial information shows that it owes Breland \$17,880.00, but Mr. Breland's schedules do not show any debt of Osprey K to him. (Doc. 191 at 16; MEX 72; Doc 74). It also shows a \$1,316.00 "Increase in Due to Charles K. Breland" but the balance sheet shows no increase from the indebtedness to Mr. Breland shown in Osprey K's financial information on its June 30, 2016 2015.3 Report. (Doc. 175, p 17; Doc. 191 at 16, 18). There is also a notation of a \$1,500 "Increase in Due to CKB Minneola LLC" but the balance sheet shows no liability to CKB Minneola. (*Id.*)
10. S. Hickory's 2015.3 financial information shows a \$7,132.00 indebtedness due to it from CKB Minneola but CKB Minneola's information does not show any indebtedness to S Hickory. (Doc 191 at 88, 148).
11. Gulf Beach's 2015.3 Report shows an "Investment in Grand Bay 10, LLC" with a value of \$126,800, (Doc. 191 at 143), that was not shown in Gulf Beach's financial information on the June 30, 2016 2015.3 Report for it. (Doc. 175 at 145). Gulf Beach's September 30, 2016 income statement does not show an expenditure that could be for that investment, its balance sheet does not show any indebtedness used to acquire that interest, its "Entity Value" calculation does not include any value for that investment, its cash flow reconciliation shows a

\$0 "Increase in investment in Grand Bay 10 LLC", and there is no financial information for Grand Bay 10, LLC in the 2015.3 report filed for September 30, 2016. (Doc. 191 at 143–5). This Report also shows an indebtedness of \$10,500 to Breland Corporation that is not included in Mr. Breland Corporation's assets. (Doc. 191 at 5, 143).

These inconsistencies are a mere drop in the bucket of inconsistencies that can be found throughout the 2015.3 Reports and in the record, all of which demonstrate that Mr. Breland is not fully and accurately reporting to the Court the disposition and whereabouts of the assets, liabilities, and income of each of the entities affiliated with him since the filing of the present Chapter 11.

*Unauthorized and Inappropriate
Payments and Actions During Breland, II*

Mr. Breland uses broad categories of income and expenses on his BA–1 reports which prevent his creditors from understanding the discrepancies that exist in those reports. For example, his August 2016 BA–1 Report (Doc. 104) lists expenses in three categories—"cashiers ck to bankruptcy court;" "Utilities, maintenance, recurring expenses;" and "Medical Exp. Donations, Other" for expenses totaling \$62,218.30. The BA–1 Report for September 2016 has three categories—"Utilities, Maintenance;" "Recurring Exp. Consulting;" and "Legal Fees;" for a total of \$67,515.37. The October 2016 BA–1 Report has three categories—"Utilities, Maintenance;" "Recurring Exp. Consulting;" and "Other/Misc/Trustee Fees" for a total of \$32,933.18. It bears noting that Mr. Breland claims to personally have no real *655 property, and virtually no personal property, yet expenses for maintenance and utilities consistently show up in his BA–1 Reports anyway.

Payments Made Without Court Approval

On August 10, 2016, Breland withdrew \$28,862.78 from the *Breland, II* DIP account. (Doc. 105 at 1; MEX 90). Breland testified that he did not remember the reason or purpose for that withdrawal. (Doc. 314 at 117). The accounting records of the U.S. Bankruptcy Court Clerk show that on August 12, 2016, that same amount was deposited with the Clerk for *Breland, I*. See U.S. Bankruptcy Court Clerk Account record in *Breland, I*. Pursuant to this Court's order of September 13, 2016 in *Breland, I*, the Clerk disbursed approximately

\$1,350,000.00 out of the *Breland, I* bankruptcy estate to the United States on account of its *Breland, I* claim. (*Breland, I* Doc. 967). The \$28,862.78 which came from the *Breland, II* DIP account was additional accrued interest paid to the IRS on its *Breland, I* claim. This payment to the IRS from the *Breland, II* estate occurred more than two months after *Breland, II* was filed, and without approval of the Court.

A \$5,800 payment to Gonzalez–Strength & Assoc. for structural engineering services for one of Debtor's companies which Debtor thought was Grand Oaks. Gonzalez–Strength was not listed as a creditor in Debtor's schedules. Mr. Breland could not testify whether it was for pre-petition or post-petition work. Mr. Breland did not request or receive permission to employ or pay it. (Doc. 313 at 215–217).

Unapproved post-petition professional services payments

At the time of the payments described in this subparagraph, no payments to any professionals have been approved by the Court except for a \$50,000 retainer to the McDowell Knight law firm. No consultant has been approved by the Court to provide consulting services to Mr. Breland. Despite that lack of approval, Mr. Breland has paid (i) \$1,870 for post-petition legal services to Stone, Granade, Crosby, a law firm that, as of the date of these hearings, the Court has not been asked to approve, and has not approved, to perform post-petition legal services; (ii) at least \$28,800 to MCA Capital, LLC, MHH, LLC, and Construction Services, LLC; and (iii) payments to Thomas Crowther of \$5,841.40 and \$5,242.25 for post-petition legal work for Osprey Utah.⁷ Mr. Breland could not identify any specific services MCA Capital, LLC, MHH, LLC, and Construction Services, LLC, provided and testified that the invoices he received did not describe when the services were performed. However, it bears noting that each of companies are owned by William R. Miller who is Mr. Breland's "consultant" and who has an office in Mr. Breland's office suite. (Doc. 313 at 199–205, 217–222).

At some time prior to filing the September 30, 2016 Report, Gulf Beach acquired an interest in Grand Bay 10, LLC in the amount of \$126,800.00. (Doc. 191 at 143). This investment is not reflected in the June 30, 2016 2015.3 Report, instead, only an "Increase in Investment in Grand Bay 10 LLC" in the amount of \$1,800.00 is shown. (Doc. 175 at 145–147). The only references to it in the September 30, 2016 2015.3 Report are on the Balance Sheet and Income Statement for Gulf Beach listing an "Increase in Investment in Grand Bay

10 LLC" in the amount of \$0. (Doc 191 at 143–4). There is no indication on the September 30, 2016 2015.3 Report showing *656 the source of the funds for that \$126,800.00 investment.





Post–Briefing Indicia of Lack of Trustworthiness

Since the hearings concluded on these motions, Mr. Breland's creditors have repeatedly been forced to seek help from the Court in getting Mr. Breland to disclose the information required by this Court's orders. Specifically, counsel for the IRS had to file a Motion to Compel Mr. Breland to file adequate 2015.3 Reports for Eigenkapital Karl, LLC. (Doc. 265). Mr. Breland was given 48 hours to file the Report, and did so but with the previously mentioned affidavit that this Court finds deficient. (Doc. 292).

Likewise, on March 30, 2017, the Hudgens Creditors filed a motion requesting judicial review of seemingly unjustified and improperly documented acquisitions and dispositions of various assets by Mr. Breland and his affiliates entities. (Doc. 296). On April 3, 2017, this Court, concerned by Mr. Breland's apparent breach of his fiduciary duties, granted the Motion without a hearing, (Doc. 304), and required Mr. Breland to obtain court approval prior to the acquisition or disposition of any asset of the estate or of any of the affiliates included in the 2015.3 Reporting requirements. Despite having just argued in court on March 28, 2017, that it was in the creditors' best interests for Mr. Breland to remain in bankruptcy, Mr. Breland filed an Expedited Motion to Dismiss on April 6, 2017, a mere three days after this Court's Order was entered, on the grounds that the Court's order imposes an "extreme hardship" causing the "shut down" of the "financial and business operations of Debtor and the Affiliates in the ordinary course." (Doc. 312).

In response to Debtor's Motion to Dismiss, the Bankruptcy Administrator filed an opposition to the dismissal stating that it is apparent that Mr. Breland "does not like to follow the rules and wants to be able to operate freely while in Chapter 11 with little or no oversight by the court or parties in interest." (Doc. 332 at 3). The BA further stated that Mr. Breland voluntarily sought protection under Chapter 11, but has not been willing to submit to the authority of the Court to accomplish the goals of bankruptcy—to reorganize and provide an opportunity for a fresh start for the debtor and the repayment of the creditors.

CONCLUSIONS OF LAW


[1] Upon commencement of a bankruptcy case, all the debtor's property passes to the estate.  11 U.S.C. § 541. “The [Debtor In Possession] is a fiduciary for the bankruptcy estate and assumes virtually all of the rights and responsibilities of a bankruptcy trustee.”  *In re Bame*, 251 B.R. 367, 373 (Bankr. D. Minn. 2000)(citing 11 U.S.C. § 1107;  *Wolf v. Weinstein*, 372 U.S. 633, 649–50, 83 S.Ct. 969, 10 L.Ed.2d 33 (1963);  *Whyte v. Williams*, 152 B.R. 123, 127 (Bankr. N.D. Tex. 1992).

In this case, the Debtor In Possession is an individual. One of the most difficult concepts an individual Chapter 11 debtor has to grasp is that once he files bankruptcy he has a fiduciary duty to his creditors to act in the best interest of the bankruptcy estate. This means he must generally put the interests of his creditors ahead of his own interests. To accomplish his fiduciary responsibility, he must act in a transparent, forthright, and candid manner and work to benefit the bankruptcy estate even if that may be a detriment to him individually.

Mr. Breland has not been transparent, forthright, or candid. He has routinely altered his position with this Court to suit his purposes at the time. Mr. Breland stated multiple times under oath that only he *657 and his small staff are qualified to handle the exceptionally complex nature of his business and that they do so above board and with the utmost transparency. Yet, when this Court ordered him to do so, he sought dismissal of his case based on “extreme hardship.”

Requests to Appoint Chapter 11 Trustee

Section 1104 states that after commencement of a case, but before confirmation of a plan, upon the request of an interested party, and after notice and a hearing, the court shall order the appointment of a trustee for cause including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or if such appointment is in the interests of the creditors, equity security holders and the estate. 11 U.S.C § 1104(a).

[2] [3] [4] [5] [6] “There is a strong presumption in Chapter 11 cases that a debtor in possession should remain in possession absent a showing of the need for a trustee.” *In re Brenda's Rentals, LLC*, 2014 WL 1675881, at *3 (Bankr. N.D. Ala. Apr. 28, 2014). “This presumption is based on the belief that the debtor in possession is the most knowledgeable about, and best able to run, the debtor's business.” *Id.* “Because the appointment of a trustee is such an extraordinary remedy, the moving party must show that cause for appointment of a trustee exists by clear and convincing evidence.” *Id.* The decision whether to appoint a trustee is fact intensive and the determination must be made on a case-by-case basis.” *Id.* “The use of the word, “shall” leaves no discretion in appointment once cause is found.” *Id.* “While appointment is mandatory once cause is found, it is within the court's discretion, on a case-by-case basis, to determine whether conduct rises to the level of cause.” *Id.* “[A]ppointment of a trustee is a power which is critical for the [c]ourt to exercise in order to preserve the integrity of the bankruptcy process and to insure that the interests of creditors are served.”  *In the Matter of Intercat, Inc.*, 247 B.R. 911, 920 (Bankr. S.D. Ga. 2000).

§ 1104(a)(1) Enumerated Factors

[7] [8] “Cases interpreting the scope of the provisions of Section 1104 have been ruled on by a number of appellate courts, although there is no Eleventh Circuit authority in this area.” *Id.* “A review of the appellate decisions reveals common threads.” *Id.* “The decision whether to appoint a trustee is vested in the discretion of the bankruptcy court and will be reviewed on an abuse of discretion standard.” *Id.* “The inquiry into whether ‘cause’ exists for such an appointment is not limited to the enumerated list of fraud, dishonesty, incompetency or gross mismanagement, but extends to ‘similar cause.’ ” *Id.* Factors which other courts in this Circuit have considered include: “(1) materiality of the misconduct; (2) evenhandedness or lack of same in dealings with insiders or affiliated entities vis-a-vis other creditors or customers; (3) the existence of pre-petition voidable preferences or fraudulent transfers; (4) unwillingness or inability of management to pursue estate causes of action; (5) conflicts of interest on the part of management interfering with its ability to fulfill fiduciary duties to the debtor; (6) self-dealings by management or waste or squandering of corporate assets.”

[9] Beginning with the factors enumerated by the Code, the Court finds that clear and convincing evidence has been presented that cause exists to appoint a *658 trustee for the reasons set out below. Though many of the facts relevant to each factor overlap, the Court will make a finding as to each factor separately.

Fraud

This factor weighs in favor of appointment. As demonstrated herein, on the eve of unfavorable jury verdicts being entered against him, Mr. Breland created a network of corporations and LLCs to shield his assets from collection. He transferred substantial assets to insiders using these entities thereby creating a tangled web of potentially fraudulent transfers that impeded his creditors' efforts to collect on their debts against him.

At the hearings on the present pending Motions, Mr. Breland took his oath and swore or affirmed that he would tell the truth regarding the questions asked of him. Yet, on a repeated basis, Mr. Breland either could not or would not answer questions regarding the alleged fraudulent transfers. In doing so, he presented himself as being generally unaware of how, when, why, and to whom certain transactions were made, and passed the buck to his staff regarding the knowledge and maintenance of these dealings. Mr. Breland also encumbered some of these properties with mortgages on the eve of the jury verdict.

Dishonesty

This factor weighs in favor of appointment. Considering this case as a whole, Mr. Breland has taken inconsistent positions regarding his involvement in the ordinary course of his business operations, leading this Court to conclude that at least some dishonesty is present. On one hand, Mr. Breland has been presented as a sophisticated businessman that almost singlehandedly runs an extremely complicated real estate business that only he and his small staff are equipped to do. Then, on the other hand, during his testimony under oath, he stated that he is so disengaged and uninvolved in his corporate business affairs that he was completely unable to answer even basic questions about his business due to his alleged lack of knowledge. This Court finds that Mr. Breland's testimony lacks credibility and finds such inconsistent positions to be disingenuous.

Incompetence or Gross Mismanagement of Debtor's Affairs

This factor weighs in favor of appointment. The fact that Mr. Breland apparently does not maintain or does not have access to important business records relating to many transactions he was questioned about raises critical concern over how he will continue to comply with this Court's reporting orders in a way that provides his creditors with an accurate picture of his income, expenses, and business dealings. Thus, the Court finds that clear and convincing evidence has been presented demonstrating gross mismanagement of his real estate business.

Additionally, the fact that Mr. Breland previously filed bankruptcy in 2009 indicates that he is aware of, but is essentially refusing, to comport with duties of financial reporting and transparency required by the Code.

Therefore, applying all of the enumerated factors in § 1104 to the evidence and testimony presented, the Court finds there is clear and convincing evidence that cause exists to appoint a trustee. However, in the event that it could be found that the factors set out in § 1104(a)(1) do not rise to the level of cause sufficient to support the appointment of a trustee, this Court finds that the § 1104(a)(2) interests of the creditors test merits the appointment of said trustee.

*659 § 1104(a)(2) Interests of the Creditors Test


Subsection (a)(2) applies where a trustee would better serve the interests of creditors and other interested parties. Mr. Breland's systematic siphoning of assets to other companies in common control on the eve of multiple unfavorable jury verdicts, and on the eve of bankruptcy raises grave concerns about his ability to act in the interest of his creditors. Mr. Breland has not volunteered to rescind any of the transactions he orchestrated, nor has he agreed to investigate whether those transactions should be rescinded. In fact, he has refused to do so, and his creditors currently have motions pending before the undersigned for the authority to pursue those investigations by filing various adversary proceedings.

As set forth above, Mr. Breland's failures to disclose and his inaccurate and inconsistent disclosures are so extensive that they can only be the result of fraud, dishonesty, or gross mismanagement. Because such disclosures are essential to the Court's and the creditors' understanding of

Mr. Breland's businesses and the monitoring of his assets, including the assets of the entities closely affiliated with him, the inaccuracies, omissions, and obfuscations alone justify the appointment of a trustee. As evidenced by the conflicting positions he has taken with regard to the state court's jurisdiction to enforce the *Breland, I* Plan as well as the varying values he places on his assets depending on the circumstances, Mr. Breland seems to be willing to say whatever is convenient for his position at the time, regardless of whether his prior statements were made under oath.

A person's opportunity to file bankruptcy is intended to provide a shield that allows a fresh start to the honest, but unfortunate debtor, and to provide fair treatment to all of the debtor's creditors through liquidation or reorganization. It is not intended to provide him with a sword to frustrate and evade his creditors. Mr. Breland's behavior does not comport with the judicious, economic and fair administration of his estate as required by the Bankruptcy Code. Applying § 1104(a)(2), this Court finds by clear and convincing evidence that the interests of the creditors will be better served by the appointment of a trustee.

Additional Factors

“Cases interpreting the scope of the provisions of § 1104 have been ruled on by a number of appellate courts, although there is no Eleventh Circuit authority in this area.”  *In the Matter of Intercat, Inc.*, 247 B.R. 911, 920 (Bankr. S.D. Ga. 2000). The inquiry into whether “cause” exists for such an appointment is not limited to the enumerated list of fraud, dishonesty, incompetency or gross mismanagement, but extends to ‘similar cause’ including the additional factors set out below.

Materiality of the Misconduct

This factor weighs in favor of appointment. As set out herein, Mr. Breland failed to comply with this Court's order as to the reporting requirements of Eigenkapital. On more than one occasion, Mr. Breland's creditors have had to seek judicial intervention to obtain any information involving this entity. Mr. Breland's failure to obey orders of this Court is cause by itself to appoint a trustee.

Additionally, Mr. Breland's bold transfer of so many properties out of the reach of potential judgment creditors on the eve of multiple trials is likewise material in this Court's consideration of his misconduct. The evidence is clear and convincing that nearly every action Mr. Breland has taken since those trials started has been to frustrate his creditors. Therefore, the Court *660 finds that Mr. Breland's actions prior to and during this bankruptcy case are not mere mistakes, misunderstandings or lapses in judgment; instead they demonstrate misconduct so material to the administration of his estate that they warrant the appointment of a trustee.

Evenhandedness or Lack of Same in Dealings with Insiders or Affiliated Entities Vis-a-vis Other Creditors or Customers

This factor weighs in favor of appointment. The numerous transfers between Mr. Breland and the affiliated entities and among the affiliated entities are the result of a lack of evenhandedness and self-dealing. According to his BA-1 and 2015.3 Reports, those transfers include what purport to be loans to insolvent entities and entities with no sources of repayment. If those reports are inaccurate or cannot be trusted, or worse, if they are accurate, they are more evidence of fraud, dishonesty, or mismanagement. In any event, it is the debtor's obligation to present his financial condition in a manner that creditors can understand and it is not the creditors' obligation to ferret out discrepancies, mistakes, omissions, and misrepresentations in the debtor's financial statements. Those transfers additionally demonstrate that Mr. Breland treats insiders and his affiliated entities more favorably than he treats his creditors.

The Existence of Pre-Petition Voidable Preferences or Fraudulent Transfers

This factor weighs in favor of appointment. Mr. Breland made numerous transfers to affiliated persons and entities to which the badges of actual fraud under state law or the Bankruptcy Code could be applied and result in numerous fraudulent transfer judgments. By transferring his real property to entities in the face of potential judgments, he has precluded his creditors from executing on the real property and relegated them to relying on charging orders to collect their debts. The Hudgens Creditors have made a demand upon Mr. Breland to pursue these alleged fraudulent transfer claims. He has refused to do so.

Unwillingness or Inability of Management to Pursue
Estate Causes of Action and Conflicts of Interest
on the Part of Management Interfering with Its
Ability to Fulfill Fiduciary Duties to the Debtor

These two factors are only tentatively applicable at this point. Because Mr. Breland is an individual who is the debtor-in-possession, the conflicts of interest on the part of management factor does not apply directly to him, but he nonetheless owes fiduciary duties to his creditors. The dispute between Mr. Breland and the Hudgens Creditors regarding whether Mr. Breland obligated himself to deliver a promissory note to the Hudgens Creditors under the *Breland, I* Chapter 11 Plan remains to be determined, making this factor less relevant in this analysis. Regardless, the Court notes there is great animosity between Mr. Breland and the Hudgens Creditors on this issue creating concern over whether Mr. Breland would be willing or able to pursue estate causes of action. Additionally, Mr. Breland is the sole owner, or co-owner, of various affiliated entities to which assets were transferred prior to filing bankruptcy creating a conflict between his position as debtor in possession and in his potential position as the defendant in a fraudulent transfer action.

Self-dealings by Management or Waste
or Squandering of Corporate Assets

This Court finds this factor does not weigh in favor of appointing a trustee. To the Court's knowledge, Mr. Breland has *661 not engaged in any waste or squandering of assets or property of the estate.

CONCLUSION

In sum, Mr. Breland's payments on pre-petition debts without Court approval; payments to lawyers for post-petition work without Court approval; engagement and payment of substantial amounts of money to a "consultant" without Court approval; and the failure of his 2015.3 Reports to include Grand Bay 10, LLC or any information regarding Eigenkapital demonstrate substantial callousness toward the bankruptcy process and are a breach of his fiduciary duties under the bankruptcy code.

Therefore, having extensively considered the evidence and testimony presented, the argument of counsel, the motions and pleadings, and record before it, the Court finds the Hudgens Creditors' Motion to Appoint a Chapter 11 Trustee is due to be and hereby is GRANTED on the grounds that cause exists by clear and convincing evidence to appoint a trustee.

Because this Court finds that the facts are such that the appointment of a trustee is warranted, the remaining Motions to Dismiss filed by both Levada and the Debtor are hereby DENIED.

The Bankruptcy Administrator is hereby ORDERED, as soon as is practicable, to nominate a qualified person to serve as the Chapter 11 Trustee in this matter in compliance with [11 U.S.C. § 1104\(d\)](#) and [Fed. R. Bankr. P. 2007.1](#).

All Citations

570 B.R. 643

Footnotes

- 1 The majority of *Breland, I* was presided over by the now retired Bankruptcy Judge Margaret A. Mahoney.
- 2 Case No.: CV-2016-900524
- 3 Case No.: 1:14-cv-00158-CG-C
- 4 "BEX" refers to exhibits submitted by the Debtor In Possession. "MEX" refers to exhibits submitted by Movants Levada and Hudgens Creditors. Doc. 316 is the hearing transcript for the October 31, 2016 hearing, Doc. 313 is the hearing transcript for the November 21, 2016 hearing, and Doc. 314 is the hearing transcript of the November 22, 2016 hearing.
- 5 CKB Minneola, LLC is a Florida limited liability company owned by Mr. Breland. The LLC owns a lease to CVS Pharmacy which generates approximately \$12,000.00 per month in rents. (Doc. 316 at 206).

6 Circuit Civil Case No.: CV-2016-900524.

7 On April 25, 2017, Debtor filed an Application to Employ Thomas N. Crowther as Debtor's Counsel, *nunc pro tunc*. (Doc. 365).

End of Document

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KeyCite Blue Flag – Appeal Notification

Appeal Filed by CHARLES BRELAND, JR. v. USA, 11th Cir., October 30, 2019

610 B.R. 389

United States District Court, S.D.
Alabama, Southern Division.

IN RE: Charles K. BRELAND, Jr.

CASE NO.: 1:17-CR-00312-JB

|
Signed 09/30/2019**Synopsis**

Background: Creditor moved to dismiss, or in the alternative, for appointment of Chapter 11 trustee. The United States Bankruptcy Court for the Southern District of Alabama, No. 1:17-CR-00312, *Jerry C. Oldshue, J.*, 570 B.R. 643, held that appointment of Chapter 11 trustee was warranted. Debtor appealed.

[Holding:] The District Court, *Jeffrey U. Beaverstock, J.*, held that individual Chapter 11 debtor did not have constitutional standing to raise Thirteenth Amendment challenge to bankruptcy court order appointing a Chapter 11 trustee, as allegedly forcing debtor into involuntary servitude.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Convert or Dismiss Case; Motion to Appoint Chapter 11 Trustee or Examiner.

West Headnotes (9)

[1] Bankruptcy 🔑 Conclusions of law; de novo review

District court, operating as an appellate court in bankruptcy matters, reviews questions of constitutional law de novo.

[2] Bankruptcy 🔑 Conclusions of law; de novo review

District court, operating as an appellate court in bankruptcy matters, reviews bankruptcy court's determination of "core" constitutional facts de novo.

[3] Bankruptcy 🔑 Conclusions of law; de novo review**Bankruptcy** 🔑 Discretion

Generally, district court reviews bankruptcy court's denial of motion to alter or amend judgment for abuse of discretion; however, if the ruling on the motion to alter or amend turns on a question of law, district court reviews bankruptcy court's ruling de novo. *Fed. R. Civ. P. 59(e)*.

[4] Bankruptcy 🔑 After-acquired property; proceeds; wages and earnings

Once an individual debtor files for Chapter 11 relief, his or her future earnings and income are included in bankruptcy estate. *11 U.S.C.A. §§ 541, 1115(a)(1)*.

[5] Bankruptcy 🔑 Right of review and persons entitled; parties; waiver or estoppel

Individual Chapter 11 debtor did not have constitutional standing to raise Thirteenth Amendment challenge to bankruptcy court order appointing a Chapter 11 trustee, as allegedly forcing debtor into involuntary servitude and compelling him to work in order to fund distributions by trustee; debtor, who would not have enjoyed free use of his postpetition income even if no trustee were appointed, failed to demonstrate any injury in fact, of kind required for him to have Article III standing to raise his Thirteenth Amendment claims. *U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 13; 11 U.S.C.A. §§ 541, 1115(a)(1)*.

[6] Federal Civil Procedure 🔑 In general; injury or interest

Federal Civil Procedure 🔑 Causation;
redressability

To have standing in constitutional sense, party: (1) must have suffered an injury in fact that is concrete and particularized, and actual or imminent, not conjectural or hypothetical; (2) that injury must be fairly traceable to challenged action of defendant; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *U.S. Const. art. 3, § 2, cl. 1.*

[7] **Bankruptcy** 🔑 After-acquired property;
proceeds; wages and earnings

Even when no Chapter 11 trustee is appointed, the property and earnings that an individual Chapter 11 debtor acquires postpetition become “property of the estate.” *11 U.S.C.A. §§ 541, 1115(a)(1).*

[8] **Bankruptcy** 🔑 Debtor in possession, in
general

Upon the filing of his individual Chapter 11 petition, even in absence of appointment of trustee, debtor was not entitled to do with his postpetition income as he pleased; rather, while he was debtor-in-possession, debtor had duty, as estate fiduciary, to protect and conserve the estate's assets for benefit of creditors.

[9] **Bankruptcy** 🔑 Representation of debtor,
estate, or creditors

Bankruptcy 🔑 Debtor in possession, in
general

Duty to protect and conserve the estate's assets for benefit of creditors is a paramount duty of both a Chapter 11 trustee and Chapter 11 debtor-in-possession.

Attorneys and Law Firms

***390** **Richard M. Gaal**, McDowell Knight Roedder & Sledge, L.L.C., **James Willis Garrett, III**, **Robert M. Galloway**, Galloway, Wettermark, Everest, Rutens & Gaillard, LLP, Mobile, AL, **Algert S. Agricola, Jr.**, Montgomery, AL, for Appellant.

ORDER

JEFFREY U. BEAVERSTOCK, UNITED STATES
DISTRICT JUDGE

This matter is before the Court on Appellant Charles K. Breland, Jr.'s (“Breland” or “Appellant”) Appeal from the Bankruptcy Court for the Southern District of Alabama's Orders dated April 28, 2017, May 3, 2017, and June 21, 2017. Appellant has submitted several briefs in support of his appeal. (Docs. 11, 18, 19, and 26). The remaining interested parties have also filed briefs in opposition. (Doc. 13, 16, 25, and 27). This dispute is ripe for resolution. For the reasons stated herein, the Bankruptcy Court's Orders are **AFFIRMED**.

I. Background

The facts of this case are well-documented in Judge Oldshue's Order in this matter from April 28, 2017.¹ Appellant filed the relevant Chapter 11 petition on July 8, 2016. On July 25, 2016, Appellee Levada EF Five, LLC (“Levada”) filed a Motion to Dismiss Appellant's Chapter 11 case, or in the Alternative, for the Appointment of a Chapter 11 Trustee. On September 22, 2016, Appellees Equity Trust Company, Custodian f/b/o David E. Hudgens and Hudgens & Associates, LLC (“Hudgens Creditors”) filed a motion requesting the Bankruptcy Court appoint a Chapter 11 Trustee over Mr. Breland's case.

On September 30, 2016, Appellant filed an omnibus brief opposing each of the Motions to Dismiss or to Appoint a Trustee. In his brief, Appellant argued that neither dismissal nor appointment of a trustee were in the best interest of creditors or the estate. On October 6, 2016, the Hudgens Creditors filed a response to the Appellant's omnibus brief and asserted that appointing a Chapter 11 Trustee was proper. The Bankruptcy Court then held a motion hearing. On December 19, 2016, Levada filed a post-hearing brief. The Hudgens Creditors did the same on March 14, 2017. Appellant also

filed a post-hearing brief and in it, argued that appointing a trustee implicated the Thirteenth Amendment based on a reading of [*391 11 U.S.C.S. § 1115](#) in conjunction with [11 U.S.C.S. § 1104](#). On March 30, 2017, the Bankruptcy Administrator filed a response to the various motions. The Bankruptcy Administrator argued that cause existed for the appointment of a Trustee and argued that the Thirteenth Amendment does not prohibit the appointment of a Trustee.

On April 6, 2017, Appellant filed an Expedited Motion to Dismiss [his] Petition for Bankruptcy under § 1112(b). In that Motion, Appellant argued that circumstances had changed and that dismissal was in the best interest of creditors and the Estate. Appellant also reiterated his constitutional claim in this motion, arguing “appointment of a Trustee would require Debtor to provide services and his net disposable income in reorganizing thereby forcing the Debtor to work for the trustee and the estate without compensation in a state of involuntary servitude.” (*see* Doc. 11 at 13). The Bankruptcy Administrator filed a response on April 11, 2017, and the Hudgens Creditors filed a response on April 28, 2017. The United States and Levada filed responses on April 28, 2017. In its response, Levada argued that Appellant's Thirteenth Amendment argument was premature because “no plan requiring the payment of post-petition income had been proposed and that appointment of a trustee would not violate the Thirteenth Amendment.” (Doc. 11 at 16).

Appellant then filed another Brief in Support of his Expedited Motion to Dismiss. In it, he again argued that the appointment of a Trustee would be inappropriate and force him into a state of involuntary servitude. The Bankruptcy Court entered an Order and Memorandum Opinion on April 28, 2017. In it, the Bankruptcy Court found cause for the appointment of a Trustee but did not address the Appellant's constitutional argument. (Doc. 3 at 1460 – 1472). The Bankruptcy Court entered an Order appointing a Chapter 11 trustee on May 3, 2017. On May 9, 2017, the Trustee filed an application to employ the Appellant as a consultant.² On May 12, 2017, the Appellant filed his motion to vacate the April 28th Order, which authorized the appointment of a Trustee, again asserting a violation of the Thirteenth Amendment and specifically requested that the Bankruptcy Court address his constitutional claim. The Bankruptcy Administrator filed a response to the Motion to Vacate on May 17, 2017, arguing that the Thirteenth Amendment question was not ripe for resolution. On June 9, 2017, Levada filed its response to the Motion to Vacate and argued, *inter alia*, that the Bankruptcy court implicitly denied Appellant's constitutional argument.

On June 12, 2017, the Trustee filed a response and an amended response to the Motion to Vacate, adopting the other parties' positions. The Hudgens Creditors also filed a Motion in Response on June 12th, arguing the Thirteenth Amendment was not implicated by the appointment of a Trustee.

On June 13, 2017, the Bankruptcy court held a hearing and discussed Appellant's Thirteenth Amendment claim. Appellant argued that the issue was ripe for determination because [11 U.S.C.S. §§ 541](#) and [*392 1115](#), when read together, require all post-petition income and earnings to become property of the Estate. Appellant argued that the issue was ripe because these code provisions required that such property be placed out of his reach and that his subsistence was at the behest of the Trustee. Put another way, Appellant argued that the immediate trigger of [11 U.S.C.S. § 1115](#), which places post-petition income into the Bankruptcy Estate, provided sufficient ripeness because Appellant's injury-in-fact was that he had no control over his post-petition income. Appellant's counsel highlighted testimony that the Appellant could not just simply refuse to work for the trustee because if he did not, his “business would collapse, and the Appellant's 35 – 40 years of sweat building his business would be undone.” Appellant's counsel also noted that the Appellant did not seek conversion to Chapter 7 because “such would not be in the best interest of creditors or the estate.” (Doc. 11 at 18).

The Bankruptcy Court denied Appellant's Motion, finding Appellant's Thirteenth Amendment claim was not ripe for adjudication. (Doc. 3 at 1841 – 18562) (“This Court finds this argument to be premature as no plan of reorganization has been submitted by the Debtor or any other creditor or party in interest.”). Appellant now presents five issues for this Court to consider on appeal:

- (1) Whether the Bankruptcy Court erred in appointing a Chapter 11 trustee under [11 U.S.C. § 1104](#) given that Chapter 11 of the Bankruptcy Code, including [11 U.S.C. §§ 541](#) and [1115](#), includes post-petition income, earnings, and/or wages of an individual debtor, here, Mr. Breland, as property of the estate, thus forcing Appellant into involuntary servitude in violation of the Thirteenth Amendment.
- (2) Whether the Bankruptcy Court erred in appointing a Chapter 11 trustee under [11 U.S.C. § 1104](#), given that the case remained a reorganization case at the time of allowance of the appointment and at the time

of appointment, requiring a Chapter 11 plan to be filed that would, by necessity under [11 U.S.C. § 1129](#) require an individual debtor's projected disposable income, earnings, and/or wages to be included in such a plan, thus further forcing Appellant into involuntary servitude in violation of the Thirteenth Amendment to the Constitution of the United States of America.

- (3) Whether the Bankruptcy Court erred in failing to vacate its Orders related to the appointment of a trustee by holding that Appellant's challenge to the appointment of a Chapter 11 trustee in violation of the Thirteenth Amendment was not ripe for consideration.
- (4) Whether the Bankruptcy Court erred in not dismissing the Chapter 11 case I lieu of appointing a Chapter 11 Trustee in this case, given the prohibitions of the thirteenth Amendment to the Constitution of the United States of America.
- (5) Whether the appointment of a trustee in an individual Chapter 11 case violates the Thirteenth Amendment to the Constitution of the United States of America.

Each issue Appellant raises concerns the Bankruptcy court's appointment of a Trustee, save for the fourth issue, which only focuses on the Bankruptcy court's failure to dismiss his petition outright. However, each claim centers on whether the Bankruptcy court violated the Thirteenth Amendment.

*393 II. Legal Standard

[1] [2] [3] Generally, district courts operate as appellate courts in bankruptcy matters. [In re Sublett](#), 895 F.2d 1381, 1383 – 1384 (11th Cir. 1990). An appellate court reviews questions of constitutional law *de novo*. [Graham v. R.J. Reynolds Tobacco Company](#), 857 F.3d 1169, 1181 (11th Cir. 2017) (citing [Nichols v. Hopper](#), 173 F.3d 820, 822 (11th Cir. 1999)). An appellate court also reviews a lower court's determination of core constitutional facts *de novo*. [FF Cosmetics FL, Inc. v. City of Miami Beach](#), 866 F.3d 1290, 1297-98 (11th Cir. 2017). Generally, an appellate court reviews the denial of a motion to alter or amend a judgment for an abuse of discretion. [Shuford v. Fidelity Nat. Property & Cas. Ins. Co.](#), 508 F.3d 1337, 1341 (11th Cir. 2007). However, if the ruling on a motion to alter or amend a judgment “turns on a question of law,” the appellate court reviews the lower court's ruling *de novo*. [United States EEOC v. St. Joseph's Hospital](#), 842 F.3d 1333, 1343 (11th Cir. 2016).

III. Discussion

a. Appellant does not have constitutional standing to raise his Thirteenth Amendment claims on the basis that the Bankruptcy Court's appointment of a Trustee violated his right to be free of involuntary servitude because Appellant did not have unlimited control of his post-petition property upon the filing his Chapter 11 petition.

[4] Before turning to the question of standing, the Court finds it useful to undertake an analysis of the code provisions at issue. Under [11 U.S.C.S. § 301\(a\)](#), “A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter.” Further, [11 U.S.C.S. §§ 541\(a\)\(1\) and \(7\)](#) provide the following:

[T]he commencement of a case under [section 301](#), [302](#), or [303](#) of this title creates an estate. Such an estate is comprised on all the following property, wherever located and by whomever held:


... all legal or equitable interests of the debtor in property as of the commencement of the case. [...]


Any interest in property that the estate acquires **after** the commencement of the case.



(emphasis added). Among the Legislative Statement accompanying [§ 541](#) is the following:

[Section 541\(a\)\(7\)](#) ... clarifies that **any interest in property that the estate acquires after the commencement of the case is property of the estate**; for example, if the estate enters into a contract, after the commencement of the case, such a contract would be property of the estate. The addition of this provision by the House amendment merely clarifies that [section 541\(a\)](#) is an **all-embracing** definition which includes charges on property, such as liens, held by the debtor on property of

a third party, or beneficial rights and interests that the debtor may have in property of another.

 **11 U.S.C.S. § 541** LEGISLATIVE STATEMENT (emphasis added).³ Further notes within the legislation provide:

***394** When bankruptcy petition is filed, virtually all property of debtor at the time becomes property of the estate; debtor's contingent interest has consistently been found to be property of estate, and in fact, **every conceivable interest of debtor, future**, nonpossessory, contingent, speculative, and derivative, **is within reach of**  **11 U.S.C.S. § 541**.

Id. (citing  *In re Yonikus*, 996 F.2d 866 (7th Cir. 1993)). Likewise, under **11 U.S.C.S. § 1115**, the property of an estate in which the debtor is an individual includes, “earning from services performed by the debtor **after** the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first.” **11 U.S.C.S. § 1115(a)(1)** (emphasis added). Taken together, these provisions and commentary excerpts provide that once a debtor files a petition for bankruptcy, he or she should expect that any after-acquired property will fall into the Bankruptcy Estate. Moreover, the property subject to the estate includes future earnings, as indicated by the breadth of the meaning of “property” within the statutory framework. Thus, the Court draws the following conclusion: after a debtor files for bankruptcy, his future earnings and income are subject to the Bankruptcy Estate by operation of  **11 U.S.C.S. §§ 541 and 1115**.



A bankruptcy court may appoint a Trustee over an estate, under **11 U.S.C.S. § 1104**, *inter alia*:

for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the

debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor ...

U.S.C.S. § 1104(a)(1).

[5] The Court cannot address the merits of Appellant's claims because he does not have constitutional standing. In its Brief in Opposition, the United States (as an intervenor), argues that Appellant lacks constitutional standing to raise his Thirteenth Amendment claims in connection with the appointment of a Trustee in his Chapter 11 bankruptcy because he has not suffered an injury-in-fact. (*see generally*, Doc. 25).⁴ To support this claim, the United States argues that “Mr. Breland has voluntarily chosen to continue to work” and that he is “not being physically or legally compelled to work for the Trustee by any provision of the Bankruptcy Code.” (Doc. 25 at 16). The United States further argues that Appellant has suffered no injury because “[t]he Trustee has only taken the place of Mr. Breland as the fiduciary of the estate” and that “[e]ven without the appointment of the Trustee, Mr. Breland would not have had full control of the estate accounts since he only served as a fiduciary.” (*Id.* at 17; *see also* Doc. 13 at 10). Finally, the United States argues that Appellant has suffered no injury-in-fact because no party has proposed a reorganization plan, and thus, Appellant positing that he will lose all his post-petition income is mere conjecture. (*Id.*; *see also* Doc. 16 at 28 – 30).


Appellant presents three arguments to rebut the charge that he does not have constitutional standing. Specifically, Appellant argues that if he chooses to stop working, his business will fail, which places him in a “psychological bind”; that the United States' argument concerning his former ***395** status as debtor-in-possession fails because after the Trustee was appointed, he lost the ability to convert or dismiss the case pursuant to **11 U.S.C.S. § 1112**; and that even though no plan has been proposed, Appellant still suffered an injury because  **11 U.S.C.S. §§ 1123** and  **1129** require post-petition income to fund a plan as needed and as a benchmark for reorganizational plan approval. (Doc. 26 at 7 – 9). In response, the United States effectively reiterates its previous arguments, but adds:

... the United States does not contend that petitioning for bankruptcy waives all constitutional challenges to the Code. However, Mr. Breland's choice to file for bankruptcy is relevant in determining the cause of the injuries asserted. Mr. Breland's choice to enter bankruptcy triggered the injuries of which he complains because this decision made Code sections 1112, 1115, 1123 and 1129 applicable to his estate ... under [section 1112](#), Mr. Breland has no unequivocal right to dismiss his case absent a showing of "cause"; that was so even prior to the Trustee's appointment, so Mr. Breland's argument is illogical.

(Doc. 27 at 6) (internal citations omitted).


[6] In order to establish constitutional standing, a party must show:



(i) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury [must be] fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

 [Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.](#), 528 U.S. 167, 180-81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). None of the alleged injuries Mr. Breland has described fit these criteria. Mr. Breland first argues that his choice to work or not is "no real choice at all." (Doc. 26 at 7). Here, Mr. Breland asserts that he is "... faced with a decision to forfeit his life's work and let his companies fail, or to toil for the benefit of his creditors" and that "[s]uch a situation placed the Appellant in a state of involuntary servitude in violation of the Thirteenth Amendment." (*Id.*). Mr. Breland further argues


that the work in which he is now engaged is not for his own benefit because "the immediate trigger of [§ 1115](#) placed his post-petition income into the Estate." (*Id.*). Mr. Breland also opines that should he stop working his business would certainly collapse, and that this predicament places him in a "psychological bind." (*Id.*). Mr. Breland's first argument can be broken down into two discrete sub-parts:



- (1) The appointment of a Trustee has left him in a state of involuntary servitude because he must either work or lose his business; and
- (2) He has been injured-in-fact because he is not working for his own benefit by operation of [11 U.S.C. § 1115](#) and the placement of his post-petition income into the Bankruptcy Estate, coupled with "working for the trustee," placed him in a "psychological bind."


Mr. Breland is not being coerced to work, nor does [11 U.S.C. § 1115](#) place him in a state of involuntary servitude. According to the record, the post-petition income Mr. Breland earns is accumulating in his Bankruptcy Estate. However, Mr. Breland is under no obligation to continue to work because the Bankruptcy Code does not require it.⁵ Further, as discussed in more detail below, there is no reorganization plan in place requiring Mr. Breland to *396 continue working "for the benefit of creditors" as he describes. Rather, if such a plan existed, he might have standing to pursue a Thirteenth Amendment claim.  [In re Herberman](#), 122 B.R. 273, 284 (1990) ("... the Thirteenth amendment is not implicated so long as the law in question does not 'compel performance or continuance of a service.' "). Nevertheless, such is not the case and Mr. Breland suffers no actual or imminent injury in this regard.

[7] As to Mr. Breland's contentions that [11 U.S.C. § 1115](#) requires his post-petition income to be placed under the Trustee's control, Mr. Breland is only partially correct. As noted above,  [11 U.S.C. § 541](#) requires that even when no trustee is appointed to a bankruptcy case, the property and earnings a debtor acquires post-petition become property of the estate. Thus, the post-petition income Mr. Breland was to earn while in Chapter 11 bankruptcy was to become property of the estate by operation of  [§ 541](#) alone. The fact that Mr. Breland is in a psychological bind because he cannot move his money around as he pleases is not sufficient for constitutional standing, much less a finding that the Bankruptcy court violated Mr. Breland's Thirteenth Amendment rights.

[8] [9] Mr. Breland's second argument relies on claims that the Bankruptcy Court's appointment of a Trustee over his estate resulted in him being placed in a state of involuntary servitude because “[it] trigger[ed] the coercive effect of § 1115's inclusion of post-petition income” and “[he] lost his ability to convert the case or dismiss it.” (Doc. 26 at 8). This argument is also unpersuasive. On the issue of Mr. Breland's access to his post-petition income, the Court notes again that upon filing his petition for bankruptcy, Mr. Breland was not entitled to do with his post-petition income as he pleased. Rather, as a fiduciary to the bankruptcy estate, Mr. Breland, while a debtor-in-possession, had a duty to protect and conserve the estate's assets for the benefit of creditors. This is a paramount duty of a trustee or a debtor-in-possession.

 *Commodity Futures, Com. v. Weintraub*, 471 U.S. 343, 353, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985); *Tippins Bank & Tr. v. Jarriel (In re Jarriel)*, 518 B.R. 140, 146 (Bankr. S.D.

Ga. 2014);  *In re SunCruz Casinos, LLC*, 298 B.R. 821, 830 (Bankr. S.D. Fla. 2003) (noting the a debtor in possession is depended upon to carry out the fiduciary responsibilities of a trustee and if the debtor in possession defaults in this respect, Section 1104(a)(1) commands that the stewardship of the reorganization effort must be turned over to an independent trustee); *In re Whitehurst*, 198 B.R. 981, 984 (Bankr. N.D. Ala. 1996) (“A debtor in possession is required to act as a fiduciary.”);  *In re Harp*, 166 B.R. 740, 746-47 (Bankr. N.D. Ala. 1993) (“What do these ‘fiduciary responsibilities’ mean to a debtor-in-possession? They imply a special burden on debtors such as the Harps to ensure that the resources that flow through the debtor-in-possession's hands are used to benefit the unsecured creditors and other parties in interest.”). This means that all of Mr. Breland's post-petition income, per


 11 U.S.C.S. § 541, was subject to his Bankruptcy Estate, and as a fiduciary, Mr. Breland could not freely dispose of it.⁶




*397 As noted by the parties, the Trustee has only taken the place of Mr. Breland as the fiduciary of the estate and even if he were to remain the debtor-in-possession, he could not merely do with his post-petition income as he pleased. Thus, he has experienced no injury-in-fact in this regard.

As to Mr. Breland's contention that he suffers an injury because he has “lost the ability to convert or dismiss” his case following the appointment of the Trustee, this too is unpersuasive. Appellant argues that he suffered injury because he now cannot dismiss his petition or convert his case to Chapter 7 without the approval of his trustee, this

being triggered by the Bankruptcy court's appointment under 11 U.S.C.S. § 1104(a)(1). However, much like Appellant's contention regarding access to his post-petition funds, Mr. Breland was not in control of the dismissal of his case from the outset. After filing under Chapter 11, Mr. Breland was subject to the provisions of 11 U.S.C.S. § 1112(b), which only permitted dismissal for “cause” (“the court shall convert a case under this chapter to a case under Chapter 7 or dismiss a case under this chapter ... for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.”) 11 USCS § 1112.

Moreover, the suggestion in Mr. Breland's argument that he would have had cause for dismissal and the Bankruptcy court would have agreed at another point subverts notions of standing as well as ripeness. The Court notes too that Mr. Breland could have originally filed under another chapter, avoiding this matter altogether.⁷ Mr. Breland argues strenuously that opposing parties' arguments concerning the voluntariness of his petition should play no part in this Court's determination of whether he has the standing to assert his Thirteenth Amendment challenges. (*see e.g.* Doc. 26 at 8, 9) (“... the fact that Appellant originally voluntarily filed his bankruptcy petition has no bearing on his ability to assert a Thirteenth Amendment Challenge [*sic*] ... Simply voluntarily filing for bankruptcy relief is not a waiver of the rights provided under the Thirteenth Amendment.”). For

this proposition, Mr. Breland relies heavily on  *In re Clemente*, 409 B.R. 288 (Bankr. D.N.J. 2009) (*see* Doc. 26 at 9). However, Appellant's assertion here misconstrues the opposing parties' argument. The opposing parties are not arguing that Mr. Breland's voluntary petition indicates that he waived a right to be free of involuntary servitude. Rather,

the parties note that, much like the  *Herberman* court, Mr. Breland had several avenues of redress available and each avenue carries specific burdens. (*see e.g.*, Doc. 16 at 26, 27). Moreover, as the Bankruptcy Administrator pointed out in his Brief in Opposition, the  *Clemente* court declined to address whether the debtor was subjected to involuntary servitude in that case; neither did that court extend its analysis to  11 U.S.C.S. § 1129. (Doc. 13 at 17).

Mr. Breland was given the opportunity to act as the debtor-in-possession, to act as the fiduciary over his bankruptcy estate, and unquestionably took actions that gave the Bankruptcy Court cause to remove him from that position. In sum, Mr.

Breland *398 has not suffered an injury-in-fact due to the fact that he cannot now dismiss or convert his case. *See also*, [In re Herberman](#), 122 B.R. 273, 283 (1990) (“It is true that the debtor cannot dismiss his case as of right once the chapter 11 is filed, but that does not render the proceeding itself peonage or involuntary servitude, any more than would the federal government’s levying on wages to collect unpaid taxes constitute impermissible enslavement.”).

Appellant’s final argument that he suffered an injury-in-fact due to the mandates in [11 U.S.C.S. §§ 1123](#) and [1129](#) is meritless. Here, Appellant asserts that he has already suffered an injury-in-fact *prior* to the proposal of a reorganization plan because “[11 U.S.C.S. §§ 1123](#) and 29 both **require** post-petition income to fund a plan as needed and use such income as a benchmark for approval of a plan.” (Doc. 26 at 9) (emphasis added). Because of this, Appellant argues that “a plan that has been objected to will **likely** include [his] **projected** post-petition income for a period of five years” – he would be subjected to a state of involuntary servitude for a time exceeding that which he assumes he has already been subjected to.

In response, the United States and other parties note that the statutory language in the provisions upon which Appellant relies does not compel the use of his post-petition income

to fund a plan. (*see e.g.*, Doc. 13 at 15, 16; Doc. 27 at 5). Instead, there is only a possibility that Appellant’s post-petition income *could* be used in a reorganization plan; there is nothing “concrete” about this possible financial hit Appellant might sustain in the future. Moreover, this Court can find no case (and Appellant provides none) where a court found the use of a debtor’s projected disposable income to repay his creditors constituted a violation of the Thirteenth Amendment, let alone sufficed for an injury to pursue a constitutional claim.

CONCLUSION

Considering the foregoing, the Court finds that Mr. Breland lacks constitutional standing to raise his Thirteenth Amendment claims. Because Appellant cannot clear the first hurdle necessary to show that this matter is justiciable, his requests for relief are denied and the Bankruptcy Court’s orders from April 28, 2017, May 3, 2017, and June 17, 2017 are **affirmed**.⁸



DONE and ORDERED this 30th day of September, 2019.

All Citations

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Footnotes

- 1 For a more complete depiction of the previous proceedings in this matter, the factual background concerning Appellant’s present Chapter 11 case and his previous Chapter 11 case are available at Doc. 3 at 1459 – 1472. The facts, as contained herein, are excerpted from Appellant’s Brief in Support. (Doc. 11). No party in opposition disputed the facts as Appellant presented them in his Brief, nor the legal standards governing the issues Plaintiff presents in this matter. (Doc. 13 at 5; Doc. 16 at 8 – 10; Doc. 25 at 8, 9).
- 2 This Motion was subsequently denied by the Bankruptcy Court in response to several creditors’ objections, noting for the reason of denial, Breland’s conduct warranting the appointment of the Trustee in the first place. Instead, the Bankruptcy Court ordered, on June 21, 2017, that Breland may retain all monies paid to him during the Chapter 11 case prior to the appointment of the trustee, that he may retain all Social Security benefits/payments going forward, and that Breland be paid \$4,200 bi-monthly (\$8,400 per month) for living expenses. (Doc. 3 at 1821).
- 3 Available at: <https://advance.lexis.com/search/?pdfid=1000516&crid=e6fa0321-cb3e-499d-8664-19d03031a9b7&pdsearch=11+U.S.C.S.+541&pdtypeof=search+box+click&pdsearchtype=Search+Box&pdstartin=&pdpsf=&pdqftype=and&pdquerytemplateid=&ecomp=Lf6_9kk&earg=pdsf&prid=211a7427-d64b-4702-bfde-5ec72dd02371>.

- 4 Other interested parties also argue that Appellant lacks constitutional and prudential standing to raise these issues and raise substantially arguments. (see e.g., Doc. 13 at 18 – 21).
- 5 see e.g., Doc. 13 at 9 – 18.
- 6 The Court notes that due to the nature of Appellant's business, some of his post-petition income may not have automatically become the subject of his Bankruptcy Estate under  11 U.S.C.S. § 541(a)(6) – at least to the extent that said income was derived from his services to property held in the estate. (“The commencement of a case under [section 301](#), [302](#), or [303](#) of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held: [...] Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.”).
- 7  *In re Herberman*, 122 B.R. 273, 284 (1990) (“... [the debtor] can choose to file under that chapter in the first place. There is nothing particularly remarkable about the fact that the choice of chapters involves a trade-off of benefits and burdens. There is certainly nothing unconstitutional: A clear distinction exists between peonage and the voluntary performance of labor or rendering of service in payment of a debt.”)
- 8 The Court also affirms the Bankruptcy Court's order refusing to dismiss Appellant's petition outright as articulated in issue four of Appellant's brief because Appellant has suffered no injury-in-fact as a result of that court's refusal to dismiss his petition.

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