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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED

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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:) Case No. 04-13227
)
LAURENCE DELEON LOMAZ,) Involuntary Chapter 7
)
Alleged Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**

Huntington National Bank and the Ohio State Department of Taxation request involuntary chapter 7 bankruptcy relief against Laurence Lomaz. (Docket 1).¹ Mr. Lomaz opposes that request. (Docket 7, 16, 44). For the reasons stated below, the court finds that the creditors did not meet their burden of proof and the involuntary petition is dismissed.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2).

FACTS²

On June 5, 2003, Mr. Lomaz filed a chapter 13 case in the United States Bankruptcy Court for the District of Hawaii. (Huntington Exh. E). He listed three creditors in his verified creditor matrix: Huntington National Bank (Huntington), the Ohio State Department of Taxation

¹ The Cheap Escape Company, Inc. joined the petitioning creditors but then withdrew that joinder. (Docket 36, 37, 39).

² The court held an evidentiary hearing on June 2, 2004. Huntington and Ohio presented their case through the testimony of David Kirkley, Huntington vice president of special assets, and Delbert Hanna, a tax enforcement agent for the Ohio Department of Taxation, and exhibits. Mr. Lomaz presented his case through cross-examination.

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(Ohio), and Delores Reed (clerk of courts). *Id.* The Hawaii court dismissed the case on July 9, 2003 with a 180-day bar against refileing. *Id.*

On March 18, 2004, Huntington and Ohio filed this involuntary chapter 7 petition against Laurence Lomaz.

The Debt to Huntington

Huntington made two commercial loans to Pacific Financial Services of America (Pacific Financial): a January 30, 1998 loan in the amount of \$550,000.00 and a February 19, 1999 loan in the amount of \$115,000.00. Pacific Financial gave Huntington a mortgage to secure this debt. Laurence Lomaz guaranteed the two loans, but did not provide any personal security for the debt.

When Pacific Financial failed to pay the loans, Huntington sued and obtained a cognovit judgment against Pacific Financial and Mr. Lomaz. The March 27, 2000 Cuyahoga County Common Pleas Court judgment states:

It is accordingly,

ORDERED that judgment is hereby granted in favor of The Huntington National Bank against Defendants, Pacific Financial Services of America, Inc. and Laurence D. Lomaz, jointly and severally, as follows:

- 1) On the First Note: \$419,668.26, plus interest from March 14, 2000 until judgment at the rate of \$149.37 per diem, plus interest at the rate of 10% per annum from date of judgment;
- 2) On the Second Note: \$117,236.11, plus interest from March 14, 2000 until judgment at the rate of \$32.74 per diem, plus interest at the rate of 10% per annum from the date of judgment;
- 3) All costs and expenses The Huntington National Bank incurs to collect the outstanding amounts.

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(Huntington Exh. A). Mr. Lomaz admits that he owes money under this judgment and believes that it is in the mid-\$300,000.00 range.³

The Debt to Ohio

Delbert Hanna, an Ohio tax enforcement agent, testified that Mr. Lomaz's businesses have a lengthy history of filing late returns and failing to pay taxes on time. Mr. Lomaz, as the responsible party for Fireworks of America LTD, Corp., was personally assessed for that company's unpaid Ohio sales taxes. The assessment became final by operation of law and Ohio filed a judgment lien with respect to it. (Ohio Exh. A). In an effort to collect the debt, Ohio attempted to garnish Mr. Lomaz's personal earnings and obtained the appointment of a state court receiver. (Ohio Exhs. C, D, and E). The assessment remains outstanding, with a balance of \$83,323.22.

Other Debt

Ohio introduced exhibits showing that three state departments (Ohio Bureau of Employment Services, the Ohio Bureau of Workers' Compensation, and the Ohio Department of Jobs and Family Services) filed liens against Mr. Lomaz's real and personal property at various times based on his having done business as Midwest Fireworks. (Ohio Exh. I). There was no evidence as to the current status of those matters.

Huntington also introduced exhibits which indicate that:

- 1) Playboy Enterprises International, Inc. obtained a judgment (jointly and severally) against Mr. Lomaz and Trans Global Telephone Co. in the amount of

³ David Kirkley testified that Huntington received \$170,000.00 in payments leaving a balance due of \$544,602.00. This testimony is given little weight because it was not based on his personal knowledge. It is not, however, necessary to resolve the exact amount due in light of Mr. Lomaz's admission that he owes at least \$300,000.00.

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\$95,644.67 for statutory damages, fees and costs. The judgment was entered on March 7, 2001 and a judgment lien was filed with respect to it on March 28, 2001. (Huntington Exh. F).

2) American Express Travel and Related Services Co. obtained a judgment against Mr. Lomaz in the amount of \$101,045.62 on September 12, 2001. (Huntington Exh. G).

3) Interstate Fire & Security Systems Inc. obtained a default judgment in an action against PFS Fireworks of America, Inc. and Mr. Lomaz in the amount of \$1,299.00 on February 27, 1997. It is unclear whether this judgment is against one or both of the defendants in that action. (Huntington Exh. H).

4) United Broadcasting Co., Inc. obtained a judgment against Mr. Lomaz dba Midwest Fireworks Manufacturing Co. in the amount of \$4,200.00 on September 28, 1993. (Huntington Exh. I).

5) Cassorla Brothers, Inc. obtained a judgment in the amount of \$47,103.02 against Mr. Lomaz and Midwest Fireworks Manufacturing Co. on February 9, 1999. (Huntington Exh. J).

6) Cheap Escape Co. obtained a judgment against Mr. Lomaz and Midwest Fireworks Inc. in the amount of \$13,800.00 and interest on April 24, 2000 and filed a certificate of lien as to that judgment on October 6, 2000. (Huntington Exh. K).

7) A series of federal tax liens were filed against Mr. Lomaz for assessments for tax periods ending on December 31 of 1985, 1986, 1987, 1988, 1989, 1990, and 1992. (Huntington Exh. L-P). The evidence does not address the current status of the liens.

DISCUSSION

I.

Involuntary Chapter 7 Relief

Bankruptcy code § 303(a) provides that creditors may file an involuntary chapter 7 petition. *See* 11 U.S.C. § 303(a). The involuntary debtor may dispute the request for relief. *See* 11 U.S.C. § 303(h); FED. R. BANKR. P. 1011; FED. R. BANKR. P. 1013. The petitioning creditors

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bear the burden of proving by a preponderance of the evidence that relief is appropriate. *See Booher Enters. v. Eastown Auto Co. (In re Eastown Auto Co.)*, 215 B.R. 960, 968 (B.A.P. 6th Cir. 1998).

Mr. Lomaz argues that relief is not appropriate. In his answer and at the hearing, he denies: (1) that the petition can be brought by just two creditors; and (2) that he is generally not paying his debts as they become due.

A. The Required Number of Petitioning Creditors

Section 303(b) delineates the number of creditors needed to bring an involuntary bankruptcy case. *See* 11 U.S.C. § 303(b). “The policy considerations for these requirements are (1) ‘the fear that the involuntary bankruptcy might be used by one or two recalcitrant creditors as a means of harassing an honest debtor’ and (2) ‘the possibility that the threat of an involuntary petition would be used to compel the debtor to make preferential payments to one or more litigious creditors’.” *Subway Equip. Leasing Corp. v. Sims (In re Sims)*, 994 F.2d 210, 217 (5th Cir. 1993) (quoting 2 Collier on Bankruptcy ¶ 303.08 [12][a] (1993)). Under that section, an involuntary case may be commenced:

(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture trustee representing such a holder, if such claims aggregate at least \$11,625 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims; [or]

(2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least \$11,625 of such claims[.]

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11 U.S.C. §§ 303(b)(1) and (2). Stated differently, if an alleged debtor has fewer than 12 eligible creditors, there need be only one petitioning creditor. If an alleged debtor has 12 or more eligible creditors, then three or more petitioning creditors are required. If a debtor's response to an involuntary petition "filed by fewer than three creditors avers the existence of 12 or more creditors, the debtor [is required to] file with the answer a list of all creditors with their addresses, a brief statement of the nature of their claims, and the amounts thereof." FED. R. BANKR. P. 1003(b).⁴

Mr. Lomaz argues that more than 12 creditors hold claims against him which means that the involuntary petition must be brought by at least three creditors. He did not, however, file a list of his creditors with his answer as required by bankruptcy rule 1003(b) and did not provide any proof as to the number of his creditors. The only evidence on this issue establishes that Huntington and Ohio meet the requirements of § 303(b). They both currently hold eligible non-contingent claims which are not subject to bona fide dispute. Mr. Lomaz acknowledges that he owes Huntington at least \$300,000.00 on this unsecured claim; therefore, the aggregate claims of the petitioning creditors exceed the value of any lien on the alleged debtor's property by more than the required \$11,625.00. Based on this evidence, the court concludes that Mr. Lomaz has fewer than 12 eligible creditors. This finding is supported by the creditor matrix filed by Mr.

⁴ There is no controlling law in this circuit as to the appropriate consequence of an involuntary debtor's failure to file the rule 1003(b) list. One approach treats the case as one involving a debtor with fewer than 12 creditors. See 9 Lawrence P. King, *Collier on Bankruptcy* ¶ 1003.03[1] (15th ed. rev. 2004). Another treats the issue as an affirmative defense which fails in the absence of proof to support it. See *In re Coppertone Communication, Inc.*, 96 B.R. 233, 236 (Bankr. W.D. Mo. 1989). It is unclear how these approaches work in light of Sixth Circuit case law which provides that the petitioning creditors bear the burden of establishing each element of § 303(b). See *AZUR-US, Inc. v. DBH Ltd., Inc.*, 234 F.3d 1267 (6th Cir. 2000) (unpublished opinion).

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Lomaz in his chapter 13 case where he only lists three creditors. Because Mr. Lomaz has fewer than 12 eligible creditors, the petitioning creditors in this case satisfy the requirements of § 303(b).⁵

B. Generally Paying Debts as They Become Due

Involuntary bankruptcy relief is not appropriate unless an involuntary debtor is generally not paying his debts as they become due:

(h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if—

(1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute[.]

11 U.S.C. § 303(h)(1). Mr. Lomaz challenges the assertion that he is not generally paying his debts as they become due. This is an issue of fact. *Concrete Pumping Serv., Inc. v. King Constr. Co. (In re Concrete Pumping Serv., Inc.)*, 943 F.2d 627, 630 (6th Cir. 1991).

To determine this issue, “[the] court[] [must] look to ‘the totality of the circumstances existing when the petition is filed.’ . . . The bankruptcy court considers the proportion of the debt being paid – both in terms of the proportion of the creditors being paid and the proportion of debt, in dollar value, being paid.” *Id.* (internal quotation and citation omitted). These four factors are generally considered: (1) the number of unpaid claims; (2) the amount of the unpaid claims; (3) the materiality of the non-payments in the context of the alleged debtor’s overall

⁵ This conclusion moots any issues regarding the effect of Cheap Escape Company’s belated joinder in the involuntary petition, closely followed by its withdrawal.

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financial picture; and (4) the debtor's overall conduct of his financial affairs. *See, for example, In re Brooklyn Res. Recovery, Inc.*, 216 B.R. 470, 481-82 (Bankr. N.Y. 1997); *In re Norris*, 183 B.R. 437, 456 (Bankr. W.D. La. 1995).

The evidence clearly established that Mr. Lomaz is not paying his debts to Huntington and Ohio. What was lacking, however, is evidence regarding Mr. Lomaz's current overall financial condition. No one testified on this issue. The only evidence was the exhibits showing old judgments and liens, the most recent of which is from 2002. The court declines to give much weight to these exhibits because they prove only that judgments were entered, not that judgments are outstanding. Therefore, although the combined amount owed to Huntington and Ohio is substantial, there was no evidence to establish the materiality of that non-payment. And although there was evidence to establish that Mr. Lomaz failed to conduct his financial affairs appropriately in the past, there was no evidence to establish that fact as of the 2004 date of the involuntary filing. For these reasons, there is insufficient evidence from which the court can conclude that the petitioning creditors proved by a preponderance of the evidence that, as of the petition date, Mr. Lomaz is not generally paying his debts as they become due.

CONCLUSION

For the reasons stated, the involuntary petition filed by Huntington and Ohio is dismissed. A separate judgment will be entered in accordance with this Memorandum of Opinion.

Date: 7 July 2004

Pat E. Morgenstern-Clarren
Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:
Mr. Laurence Lomaz
Rebecca Kucera Fischer, Esq.
David Douglass, Esq.
Alexander Jurczenko, Esq.

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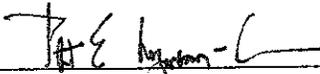
In re:) Case No. 04-13227
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LAURENCE DELEON LOMAZ,) Involuntary Chapter 7
)
Alleged Debtor.) Judge Pat E. Morgenstern-Clarren
)
) JUDGMENT

For the reasons stated in the memorandum of opinion issued this same date, the involuntary chapter 7 petition filed by Huntington National Bank and the Ohio State Department of Taxation against Laurence Lomaz is dismissed. (Docket 1).

IT IS SO ORDERED.

Date:

7 July 2007


Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

Mr. Laurence Lomaz
Rebecca Kucera Fischer, Esq.
David Douglass, Esq.
Alexander Jurczenko, Esq.