THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 05-19361
	)	
ARTHUR BOYD, JR.,	)	Involuntary Chapter 7
	)	
Alleged Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**

Larry Jones, Beverage Management Systems, Inc., Chester Wilson, Lamar Frost, and Deborah Calloway filed an involuntary chapter 7 petition against the alleged debtor Arthur Boyd, Jr. Mr. Boyd answered, opposed the relief requested, and asserted a counterclaim. (Docket 1, 6). For the reasons stated below, the petitioners proved their case and an order for relief will be entered against Arthur Boyd.

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).

THE EVIDENTIARY HEARING

The court held an evidentiary hearing on August 2, 2005. Petitioning creditors Larry Jones, Chester Wilson, Lamar Frost, and Deborah Calloway testified, as did Arthur Boyd.

11 U.S.C. § 303

Bankruptcy cases may be initiated in one of two ways: either the debtor files a case voluntarily or creditors file an involuntary petition naming the alleged debtor. *See* 11 U.S.C.

§§ 301, 302, 303(a). In an involuntary situation, a bankruptcy petition may be filed against an alleged debtor by three or more creditors whose claims aggregate at least $12,300.00 and whose claims are not contingent as to liability or subject to a bona fide dispute. *See* 11 U.S.C. §§ 303(b)(1) and (2). A claim is subject to a bona fide dispute if "'there is either a genuine issue of material fact that bears upon the debtor's liability, or a meritorious contention as to the application of law to undisputed facts . . .'." *Booher Enters. v. Eastown Auto Co. (In re Eastown Auto Co.*), 215 B.R. 960, 965 (6th Cir. BAP 1998) (quoting *In re Lough*, 57 B.R. 993, 997 (Bankr. E.D. Mich. 1986)). The generally accepted test in the Sixth Circuit for determining whether a claim is contingent as to liability is this:

> When all the events have occurred which allow a court to adjudicate a claim and determine whether or not payment should be made, there is no contingency concerning the claim itself, unless it is apparent, to a legal certainty, that the petitioning creditor would be unable to obtain a judgment against the debtor upon adjudication of its claim.

In re Taylor & Assocs., L.P., 193 B.R. 465, 475 (Bankr. E.D. Tenn. 1996) (quoting and adopting the analysis in *In re Longhorn 1979-II Drilling Program*, 32 B.R. 923, 927 (Bankr. W.D. Okla. 1983) (internal quotations omitted)). The petitioning creditors must also show that the alleged debtor is not paying his debts as they become due, unless they are the subject of a bona fide dispute. 11 U.S.C. § 303(h)(1).

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. If so, the petitioning creditors must prove by a preponderance of the evidence that relief is appropriate. *In re Eastown Auto Co.*, 215 B.R. at 968.

THE POSITIONS OF THE PARTIES

The petitioning creditors contend that their debts are not contingent as to liability or subject to a bona fide dispute. Mr. Boyd denies this, asserting that (1) the Beverage Management debt is based on a judgment that is dormant; (2) the Jones debt is based on a judgment, but he has moved for relief from that judgment; (3) if given the opportunity, he could resolve the disputes with petitioning creditors Wilson, Frost, and Calloway outside of bankruptcy proceedings; and (4) he has a pending state court lawsuit against Mr. Jones and others alleging fraud in various activities.

FACTS AND DISCUSSION

I. The Nature of the Debts

Larry Jones

Mr. Jones holds a state court judgment against Mr. Boyd for $1.4 million, no part of which has been paid. The judgment is final and is not on appeal. Mr. Boyd filed a motion to reconsider or to vacate that judgment which the trial court denied. He apparently filed at least two other similar motions, at least one of which is pending. The debt has been reduced to a judgment, so it is not contingent and it is not the subject of a bona fide dispute because the judgment is final, regardless of any additional pending motions to vacate. Mr. Jones is a qualified creditor.

Mr. Boyd contends that he has a pending state court lawsuit against Mr. Jones. The existence of that suit does not, however, change the nature of the judgment debt and does not serve as a defense to the allegation that Mr. Jones holds a judgment that is not contingent or the subject of a bona fide dispute.

Beverage Management Systems, Inc.

The involuntary petition alleges that Beverage Management Systems, Inc. holds a judgment against Mr. Boyd for $19,104.65. In his answer, Mr. Boyd admits that the judgment exists, but states that it is dormant because it was entered about 10 years ago. Beverage Management does not dispute that the judgment is dormant, but argues that it still retains its character as a debt.

Under Ohio law,[1] a judgment creditor may file a certificate of judgment lien with a county recorder that serves to impose a lien on the judgment debtor's real property located in that county. If, within five years after judgment is entered, a judgment creditor (other than the state) does not execute on the judgment or file a certificate of judgment lien, the judgment becomes dormant. OHIO REV. CODE § 2329.07. A dormant judgment no longer operates as a lien on the judgment debtor's real property, but the judgment continues to exist. *See In re Gretchen*, 184 B.R. 284 (Bankr. S. D. Ohio 1995) (holding that a judgment creditor who had permitted a judgment lien to become dormant could no longer claim status as a secured creditor, but was instead an unsecured creditor). An action to revive a judgment can only be brought within 10 years from the time it became dormant, with exceptions not relevant here. OHIO REV. CODE § 2325.18.

In this case, the Beverage Management judgment seems to be dormant but subject to being revived. The court reaches this conclusion by accepting that the judgment was entered in

[1] The parties did not offer the judgment into evidence. The petitioning creditors argued using the Ohio law of dormancy and Mr. Boyd did not object, so the court will assume for purposes of deciding this issue only that this is an Ohio judgment and Ohio law applies to this issue.

about 1995 which means it would have become dormant no earlier than five years later, or about 2000. Beverage Management would then have until about 2010 in which to revive the judgment. At least one court has held that a dormant judgment may not be enforced, and is "thus without legal effect, unless the judgment is revived . . . . " *In re Stoddard*, 248 B.R. 111, 117 (Bankr. N.D. Ohio 2000). The petitioning creditors did not brief the issue of how a dormant judgment which is subject to revival should be treated under § 303 and the court declines to decide the issue on an uncertain factual record. The creditors did not, therefore, prove that Beverage Management is eligible to be a petitioning creditor.

Chester Wilson

Chester Wilson loaned Mr. Boyd money that as of the hearing date totaled about $134,000.00. Dr. Wilson demanded payment several times, most recently in 2003, but nothing has been repaid. A promissory note that is in default is not contingent as to liability. *See* 2 COLLIER ON BANKRUPTCY ¶ 303.03[2][a] (15th rev. ed. 2005). Similarly, the debt is not the subject of a bona fide dispute. Mr. Boyd suggested that he could work out his differences with Dr. Wilson if given time. That possibility does not change the nature of the debt.

Deborah Calloway

Deborah Calloway loaned Mr. Boyd about $35,000.00, of which he repaid $1,000.00. She has asked to be repaid, to no avail. Her debt is not contingent or the subject of a bona fide dispute.

Lamar Frost

Lamar Frost loaned Mr. Boyd at least $18,000.00. Despite demand, none of it has been repaid. This debt is not contingent or the subject of a bona fide dispute.

The evidence established that four of the five petitioning creditors hold claims aggregating at least $12,300.00 that are not contingent or the subject of a bona fide dispute. As the petitioners were only required to prove that three creditors fall into that category, they met their burden of proof.

II. Generally Paying Debts as They Become Due

The remaining consideration is whether the alleged debtor is generally not paying his debts as they become due. Mr. Boyd testified that he has no income and he admits that petitioning creditors Wilson, Calloway, and Frost have been demanding payment on their debts since at least 2003, which he could not accommodate because he does not have the money. This evidence proves that the alleged debtor is generally not paying his debts as they become due.

CONCLUSION

The petitioning creditors met their burden of proving that relief should be entered against Arthur Boyd under chapter 7 of the bankruptcy code. Separate orders will be entered reflecting this decision and setting Mr. Boyd's motion for relief from stay for hearing.

Date: 4 August 2005

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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

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ARTHUR BOYD, JR.,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**ORDER**

For the reasons stated in the memorandum of opinion filed this same date, an order for relief under chapter 7 of the United States bankruptcy code is entered against Arthur Boyd, Jr.

IT IS SO ORDERED.

Date: 4 August 2005

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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