

Involuntary petition
Corporations
BR 9001(5) (A)
ORS 60.301 et seq.

In re Westin Capital Markets, Inc.

USDC Civil Case No. 93-6242-HO, Bankruptcy Case No. 692-62389-H7

5/23/94 D. Ct. (J. Hogan) aff'g PSH unpublished

Creditors of alleged corporate debtor filed involuntary petition in order to pursue alleged preference to relative of alleged debtor's vice-president made while fraud charges were pending against debtor's president/sole director. VP filed answer to involuntary petition. Petitioning creditors filed motion to strike answer on the grounds that VP lacked standing. Bankruptcy Court (J. Higdon) granted motion to strike on grounds that VP lacked requisite formal consent of corporate directors to file answer, particularly in light of fact that sole director had consented to default in answering petition from jail. On appeal, District Court (J. Hogan) affirmed.

E94-8(6)

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED

MAY 23 1994

TERENCE H. DUNN, CLERK

BY _____ DEPUTY

Entered

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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WESTIN CAPITAL MARKETS INC.,

Appellant,

v.

Civil No. 93-6242-HO

92-62389

HAROLD MARKUSON, et al

Appellee.

JUDGMENT

The bankruptcy court's order granting appellee-creditors' motion to strike and motion for default is affirmed. This action is dismissed.

Dated: April 25, 1994.

Donald M. Cinnamond, Clerk

by *Lea Force*

Lea Force, Deputy

JUDGMENT

DOCUMENT NO: _____

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FILED

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In Re)	
WESTIN CAPITAL MARKETS, INC.,)	Civil No. ⁹³⁻⁶²⁴² 92-6342-HO
Debtor.)	ORDER
_____)	

This is an appeal from a bankruptcy court order granting a motion to strike an answer to a petition for the involuntary bankruptcy of Westin Capital Markets, Inc. (Westin) and from the entry of default against Westin (Appellant's Excerpt of Record #19). The issue is whether appellant, Mr. Davidson, had the authority to file the answer on behalf of Westin.

On May 29, 1992, petitioning creditors Harold Markuson, Donna Markuson and Jeffrey Schultz (Appellees) filed an involuntary petition for bankruptcy against Westin, the corporate debtor, to recover an allegedly preferential transfer of \$150,000 to appellant, a former employee. Appellant filed an answer on behalf of Westin objecting to the petition. Appellees moved to strike the answer on the ground

that appellant lacked authority to act on behalf of Westin. On March 22, 1993, the bankruptcy judge entered a letter opinion, finding that appellant lacked such authority. On March 24, 1993, the bankruptcy judge issued an order striking the answer and entering default against appellant. Appellant appeals pursuant to 28 U.S.C. § 158(a).¹

STANDARD OF REVIEW

This appeal involves questions of fact, which I review for clear error, and questions of law, which I review *de novo*. United States v. McConney, 728 F.2d 1195 (9th Cir. 1984).

DISCUSSION

An initial procedural issue must be decided regarding the timeliness of appellees' motion to strike appellant's answer. Appellant's Brief, pp. 11-12. Federal Rule of Civil Procedure 12(f)² requires that a party move to strike a pleading within 20 days when the rules do not permit a responsive pleading. The court, on its own initiative, may move to strike a pleading at any time, *Id.*, and may consider a party's motion to strike at any time on the ground that the court is considering the matter of its own accord. See, e.g., Federal Deposit Ins. co. v. British-American Corp., 744 F. Supp. 116, 117 (E.D.N.C. 1990). The authority of an individual to

¹ Appellees argue in their motion to dismiss appeal (#61) that this court lacks jurisdiction because the appeal was not timely filed. That motion was denied January 27, 1994 (#1). Appellees are collaterally estopped from re-asserting this argument.

² F.R.B.P. 7012(b) makes Fed. R. Civ. P. applicable to adversarial bankruptcy proceedings.

represent a debtor in bankruptcy is an issue which a court is bound to consider regardless of whether a motion is filed to that effect. When the issue to be decided by the motion to strike is as integral to the proceeding as it is here, it can be presumed that the bankruptcy court considered the motion of its own accord. The bankruptcy court need not make particularized findings in this regard. I find that the motion to strike was timely considered by the bankruptcy court.

The Bankruptcy Code allows a "debtor" to file an answer to a petition for its involuntary bankruptcy. 11 U.S.C. § 303(d). Appellant argues that he had authority to act on behalf of Westin, pursuant to one of three sources of authority: the authority inherent in his position as a Westin Vice President and director, the authority implied by the behavior of Westin's President and Board of Directors, or the authority designated by the bankruptcy court. Appellant's Brief, pp. 5-8.

Appellant contends that as Vice President of Westin, he had the inherent duty to assume the President's powers during the President's absence. *Id.* at 5-6. Even if this is true under Westin's articles of incorporation, the President was not absent when the answer was filed. In fact, the President filed an affidavit consenting to the involuntary bankruptcy and stating that appellant had no authority to represent the corporation. Appellee's Brief, p. 7. Even if the President

had been absent, the articles of incorporation made the President's powers subject to close supervision by the board of directors. Opinion Letter of Bankruptcy court, Appellant's Excerpt of Record #57, Exhibit 19, p. 3. I find that appellant did not have authority as Vice President acting in the stead of the President to file an answer on behalf of Westin.

Even assuming, as the bankruptcy judge did, that appellant was a Vice President and director of Westin, the plain language of state law defeats any argument that he had the implied power from his officer/director status to file an answer. A corporation has the general power to defend itself. ORS § 60.077(2)(a). Further, ORS § 60.301 provides:

(2) All corporate powers shall be exercised by or under the authority of . . . the board of directors, subject to any limitation set forth in the articles of incorporation. . . .

A corporation may act only through a meeting of the board of directors or through action "taken by all members of the board." ORS § 60.341.

The bankruptcy judge made the following findings of fact:

[N]o meeting is shown to have taken place. . . . There has been no showing that the Board members as a group authorized such action, formally or informally. Under ORS 60.351 and Article III, sections 6 and 7 of the Bylaws, Mr. Davidson, as a director, could not act unilaterally on behalf of the corporation.

Appellant's Excerpt of Record, #57, Exhibit 19, p. 4.

Appellant contends that "[s]ince [the President's] abandonment of the corporation, he had allowed Davidson to manage the affairs of the corporation." Appellant's Brief, p. 6. As noted above, the President expressly states that appellant lacked authority to act on behalf of Westin. The plain language of state law and the factual findings of the bankruptcy judge leave no room for an implication that appellant had the authority to file an answer on Westin's behalf.

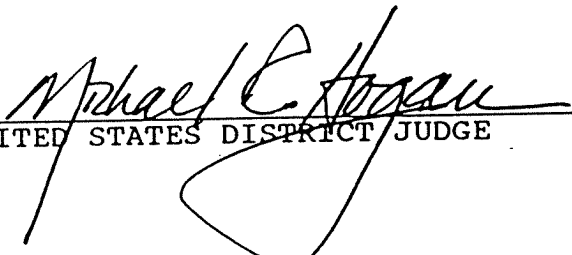
Appellant also contends that the bankruptcy court designated him to answer on behalf of Westin. Appellant's Brief, pp. 7-8. F.R.B.P. 9001(5)(A) provides that the bankruptcy court can designate an officer or member of the board of directors to act on behalf of the debtor. The bankruptcy judge designated appellant, "a principal of the debtor . . . [who] may possess corporate records," to perform the duties of the debtor Westin pursuant to the order for relief, Appellee's Except of Record, #60, Exhibit 9. In the order for relief, the bankruptcy judge designated Mr. Davison to perform the particular duties imposed by section 521 of the Bankruptcy Code and section 1007 of the Rules of Bankruptcy Procedure. *Id.*, Exhibit 9. Section 521 requires debtors to file a list of creditors, to state the debtor's intent with respect to property secured by consumer debt, to cooperate with the trustee, and to attend hearings related to discharge under section 524(d). Section 1007 also requires debtors to

file a creditor list. 11 U.S.C. § 1007. The bankruptcy judge, therefore, charged Mr. Davidson with limited duties. In her findings prior to the order, the bankruptcy judge found that "[t]his court has not appointed Mr. Davidson to act on behalf of the corporation in this case pursuant to Bankruptcy Rule 9001(5). . . ." *Id.*, Exhibit 8, p. 3. Nothing in the record suggests that the court authorized appellant to file an answer.

I find that the bankruptcy judge did not err in finding that the appellant lacked authority to file an answer on behalf of Westin.³

The bankruptcy court's order granting appellee-creditors' motion to strike and motion for default is AFFIRMED.

DATED this day 20th of April, 1994.


UNITED STATES DISTRICT JUDGE

³ Because I find appellant had no power to file an answer on Westin's behalf, I need not consider whether appellant had a conflict of interest rendering him ineligible to act on Westin's behalf, Appellant's Brief, pp. 7-8. Also moot are the questions whether the petition itself was proper, whether the bankruptcy judge erred in denying appellant's motion to dismiss, and whether Westin's President had a conflict of interest preventing him from consenting to the order for relief. Appellant's Brief, pp. 8-9.