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Dismissal
698-61386-fra7
Unpublished

In re Amos and Peggy Valdez

3/29/99

FRA

Debtors filed a Chapter 13 petition which listed the IRS and the Oregon Department of Revenue (ODR) as their only creditors. Both creditors filed proofs of claim which were objected to by the Debtors. Mr. Michael Redden was employed with the court's permission as Debtors' counsel with respect to the tax dispute. The ODR, joined by the IRS, filed a motion seeking dismissal under Code § 1307(c) on the grounds that the Debtors unlawfully concealed and disposed of assets of the estate. The court dismissed the case on the grounds advanced by the ODR and IRS. In addition the court found that the Debtors' principal motivation in filing the bankruptcy petition was not reorganization, but the use of the bankruptcy court to litigate their tax disputes. This constituted additional good cause for dismissal.

The Debtors did not appeal the dismissal order. Thirteen days later, however, Mr. Redden filed an involuntary petition under Code § 303. Answers, prepared by the petitioning creditor, Mr. Redden, were filed by the Debtors which admitted the material allegations of the petition. Proofs of claim were filed by the IRS, ODR, and the petitioning creditor. The Debtors and the petitioning creditor filed objections to the claims of the ODR and the IRS and the taxing authorities filed motions to dismiss.

The court granted the motions to dismiss, stating that the case was commenced for two reasons: to assist in the claim of a single creditor (the petitioning creditor)*, and to circumvent the court's order in the prior case. Neither purpose, the court held, provides an appropriate basis for relief.

*An order for involuntary relief may only be entered if the debtor is not paying his debts as they become due, with the exception of debts subject to a bona fide dispute. The debts to the ODR and IRS are subject to a bona fide dispute. All other debts of the Debtors are being paid as they become due, with the exception of the petitioning creditor. The Court cited authority for the rule that one-creditor cases are disfavored with certain exceptions not present here.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 698-61386-fra7
AMOS A. VALDEZ and)
PEGGY VALDEZ,)
) MEMORANDUM OPINION

) Debtors.)

This matter came on for hearing on March 11, 1999 on the motions of the United States and the State of Oregon for an order dismissing the above-captioned case.

The Court heard and considered the evidence, testimony and argument of the parties, announced its findings of fact and conclusions of law from the bench, and directed that the case be dismissed. On further consideration the Court has determined that a written memorandum setting out its findings of fact and conclusions of law in more detail would be appropriate. The Court therefore issues this memorandum opinion in lieu of its findings and conclusions announced from the bench.

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1 I. FACTS

2 On October 11, 1996 Amos A. Valdez and Peggy Valdez filed a
3 joint petition for relief under Chapter 13 of the Bankruptcy Code in
4 this Court, under Case No. 696-65158-fra13. The only creditors in
5 the case were the United States, by and through the Internal Revenue
6 Service (hereinafter "IRS"), and the State of Oregon, by and through
7 the Oregon Department of Revenue (hereinafter "ODR"). The IRS and
8 ODR each filed proofs of claim, each of which was objected to by the
9 Debtors. Mr. Michael Redden, the petitioning creditor in this case,
10 was employed with the Court's permission to act as Debtors' counsel
11 with respect to the tax dispute. As it happens, Mr. Redden became
12 the principal counsel for Debtors in all the proceedings that
13 followed in the first case.

14 The ODR, joined by the IRS, filed a motion seeking dismissal
15 of the first case under 11 U.S.C. § 1307(c). The specific grounds
16 advanced were that the Debtors had unlawfully concealed and disposed
17 of assets of the estate. In addition, each of the taxing agencies
18 filed motions for partial summary judgment seeking determination of
19 certain aspects of the tax dispute between the agencies and the
20 Debtors.

21 This Court determined that the case should be dismissed on
22 the grounds raised by the ODR and IRS. In addition, the Court found
23 that the Debtors' principal motivation in filing their bankruptcy
24 was not reorganization of their debt, but use of the Bankruptcy
25 Court as a form in which to litigate their disputes with the taxing
26 agencies. The Court further held that, since the Bankruptcy Court

1 was established to deal with insolvency and the reorganization of
2 debt, and not to serve as an alternative form for tax litigation,
3 good cause existed for the dismissal.

4 The Debtors did not appeal the order of dismissal. On March
5 13, 1998, thirteen days after the first case was dismissed, Mr.
6 Redden filed an involuntary petition under 11 U.S.C. § 303.

7 The Debtors filed answers to the petition which admitted the
8 material allegations of the petition. It was revealed at the
9 hearing in this case that the answers were prepared by the
10 petitioning creditor.¹ Later on, the petitioning creditor gave the
11 Debtors further assistance by preparing their bankruptcy schedules.
12 The draft answer was accompanied by a letter advising the Debtors
13 that the petitioning creditor was not acting as "their" attorney,
14 and advising them to seek independent legal counsel.

15 The Debtors did not seek any independent advice, but simply
16 signed the answers and caused them to be filed with the Court.

17 In due course an order for relief was entered. Proofs of
18 claim were filed by the IRS and ODR, and by the petitioning
19 creditor. No other claims have been filed, and no other creditors
20 are included in the schedules.

21 The Debtors and the petitioning creditor filed objections to
22 the taxing authorities claims. Thereafter both the ODR and IRS
23 moved to dismiss the case. The Trustee has objected to dismissal,
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25 ¹ The petitioning creditor's attorney of record is an
26 associate in his law firm. For the purposes of this opinion I draw
no distinction between the petitioning creditor and his associate.

1 on the grounds that he has made certain expenditures which he should
2 be permitted to refund from the liquidation of estate assets.

3 II. CAUSE FOR DISMISSAL

4 A case under Chapter 7 of the Bankruptcy Code may be
5 dismissed for cause. 11 U.S.C. § 707. Cause exists because the
6 involuntary petition, and the Debtors' acquiescence, were intended
7 to establish relief under the Bankruptcy Code for improper purposes,
8 and by improper means. The bankruptcy was commenced and continued
9 for two reasons: to assist in the collection of a claim of a single
10 creditor, and to circumvent the Court's order in the prior case.
11 Neither purpose provides an appropriate basis for relief.

12 A. *Petitioning Creditor is Not Entitled to Relief*

13 To begin with a procedural observation: it might be said that
14 the entry of the order for relief under Code § 303(h) precludes
15 consideration of whether the petition was well founded. However,
16 non-petitioning creditors and other interested parties are not
17 ordinarily given notice of commencement of involuntary cases. There
18 is nothing in the record here that reflects that the taxing
19 authorities had notice of the commencement of the case. Moreover,
20 Code § 303(d) suggests that creditors have no standing to answer or
21 controvert a petition under Code § 303. 15 *Collier on Bankruptcy*,
22 ¶303.10[2][b]. A motion to dismiss a case under Code § 707 is an
23 appropriate means for a creditor to challenge a case commenced by
24 way of an involuntary petition.

25 An order for relief may be entered in an involuntary case
26 only if the debtor is generally not paying his or her debts as they

1 become due unless the debts are a subject of a bona fide dispute, or
2 for reasons not pertinent here. The evidence is clear that the
3 Debtors were paying their undisputed obligations as they became due,
4 with the exception of the petitioning creditors. It is undeniable
5 that the debts owed to the IRS and ODR were disputed, in light of
6 their objections filed in both bankruptcies. The petitioning
7 creditor's evidence at the hearing eloquently demonstrated that the
8 dispute was, whatever its ultimate merits, bona fide.

9 The petitioning creditor's acknowledged purpose in filing the
10 petition was the pursuit of his own claim. One-creditor cases are
11 disfavored, and an involuntary petition for the purpose of
12 collecting a single debt will not be approved unless the creditor
13 has been the victim of a fraud, trick or artifice on the part of the
14 debtor or is absolutely bereft of any adequate remedy under non-
15 bankruptcy law. 7H Land & Cattle Company, 6 B.R. 29 (Bankr. D. Nev.
16 1980). The petitioning creditor here claims that he has no remedy
17 available because a federal tax lien against the Debtors has
18 encumbered all of the Debtors' assets, rendering them unable to pay
19 the petitioning creditor. This does not entitle the petitioning
20 creditor to relief under Code § 303 for two reasons. First, the
21 rule articulated in 7H Land & Cattle Co. contemplates legal, as
22 opposed to factual, impossibility of collection. The petitioning
23 creditor here has ample legal remedies. They may be impaired by the
24 fact that the Debtors' assets are subject to superior liens:
25 however, that is frequently the case, and a single creditor is not
26 entitled to involuntary relief simply because other creditors are

1 better situated. Second, the commencement of the bankruptcy case
2 does not change the petitioning creditor's position, since the
3 federal tax lien is still in place. The petitioning creditor argues
4 that only the Bankruptcy Court can reduce or remove the lien by
5 determining that the claimed tax is not owed. However, as noted in
6 the prior case, there are remedies in other courts, and this Court
7 is not an appropriate forum purely because the Debtors failed to
8 avail themselves of others in a timely manner. The single creditor
9 rule in involuntary cases arises from the notion that failure to pay
10 a particular creditor does not lead to the conclusion that the
11 debtor is generally not paying his debts as they become due. The
12 facts of this case do not satisfy this test.

13 B. *The Petition and Answers Thereto Were Collusive*

14 The petitioning creditor commenced the case only days after
15 the previous case was dismissed. Acting through his associate, he
16 prepared responses for the Debtors' signature which, as noted above,
17 incorrectly admitted to the material allegations of the petition.
18 Viewed together, the involuntary petition and the Debtors' answers
19 were collusive. In order to reach this conclusion it is not
20 necessary for the Court to find that the parties explicitly
21 discussed their plans, or agreed in advance on this device for
22 reinstating bankruptcy proceedings. The petitioning creditor, who
23 had served as the Debtors' lawyer in the previous case, filed a
24 petition to put the Debtors back into bankruptcy, and gave the
25 Debtors a form of answer which clearly advanced the process. The
26 lengthy cover letters insisting that the petitioning creditor is

1 pursuing his own interest, and that the Debtors should seek
2 independent counsel, make no difference. After all, what real
3 incentive did the Debtors have to seek independent advice when the
4 action against them sought the very relief they sought in the
5 recently dismissed case?

6 The Debtors had previously been dismissed from this Court,
7 for the reasons described above. There was no material change in
8 their circumstances when the involuntary petition was filed.
9 Further bankruptcy proceedings for these Debtors are every bit as
10 inappropriate now as it was when the first case was dismissed. The
11 involuntary petition and subsequent acquiescence of the Debtors were
12 intended by the Debtors, if not the Debtors and petitioning
13 creditor, to circumvent the Court's previous order. This
14 constitutes grounds for dismissal under § 707.

15 *C. The Trustee's Objection*

16 The Trustee has objected to a dismissal, for the reason that
17 he has expended considerable efforts to date in liquidating the
18 estate, including the employment of counsel for the purpose of
19 recovering certain property held in trust by the Debtors.²

20 The Trustee argues that the taxing authorities should be
21 estopped from seeking dismissal of the case at this late stage.
22 However, as the IRS points out, there was no reason to seek
23 dismissal until the Debtors and petitioning creditor lodged their

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25 ² The property held by the trust is described in the Debtors'
26 schedules as the Debtors' property. Apparently the adversary
proceeding was initiated to clear title in order to allow the
Trustee to liquidate the property.

1 objections to the government's claims. The Court accepts this
2 reasoning, and finds that the motions to dismiss were not untimely.

3 In addition, it must be pointed out that the Trustee was on
4 notice of the unusual circumstances of this case at least as of the
5 time of the first meeting of creditors. Having been aware of
6 circumstances justifying dismissal of the case, the Trustee cannot
7 reasonably object to motions for dismissal by parties prejudiced by
8 the proceeding.

9 At the conclusion of the hearing the Court indicated that the
10 Trustee should have an opportunity to seek reimbursement from
11 secured parties benefitting from his activities. Accordingly, the
12 order dismissing the case should provide such an opportunity.

13 III. CONCLUSION

14 The petitioning creditor cannot maintain an involuntary
15 petition for the purpose of collecting his particular debt, where
16 other undisputed debts are generally being paid. The Debtors are
17 not entitled to continuance of this case, in light of the dismissal
18 of their previous case. Given the unusual circumstances of this
19 case, ample grounds exist for its dismissal.

20 An order will be entered terminating the automatic stay, and
21 provisionally dismissing the case, subject to proceedings by the
22 Trustee respecting any claim he may have for expenses incurred in
23 the preservation of collateral for the benefit of secured creditors.
24 Any such claim should be made within the next two weeks.

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The foregoing constitutes the Court's findings of fact and conclusions of law, which will not be separately stated.

FRANK R. ALLEY, III
Bankruptcy Judge