

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:)
)
JAMES A. SIMON) CASE NO. 06-10150
) CHAPTER 7 INVOLUNTARY
)
)
Alleged Debtor)

**DECISION AND ORDER DENYING
MOTION TO DISMISS OR ABSTAIN**

At Fort Wayne, Indiana, on October 24, 2006

This case began with an involuntary petition for relief under Chapter 7 of the United States Bankruptcy Code, filed by one of the alleged debtor's creditors, Patrick J. Bruggeman. In addition to answering the involuntary petition, the alleged debtor also filed a motion to dismiss this case. The motion argues that the petition was filed by only one creditor, not three or more as required by § 303(b), and, thus, it was filed in bad faith. Alternatively, the movant has asked the court to abstain in favor of allowing the disputes between the parties be heard in state court. It is this motion, along with the petitioner's response thereto, which is presently before the court.

Neither the motion nor the brief filed in support thereof identify the procedural rule upon which the motion is based or articulate the legal standard the court is to apply in passing upon it. See, In re King, 2006 WL 1994679 (Bankr. N.D. Ind. 2006). The court assumes that the movant is proceeding under Rule 12(b) of the Federal Rules of Civil Procedure, and presumably Rule 12(b)(6) – the failure to state a claim upon which relief may be granted – since the motion says nothing about things like jurisdiction, venue or the service of process. A motion to dismiss for the failure to state a claim can only be granted if it is clear that there is no set of facts plaintiff – here, the petitioner – could prove in support of its claim which would entitle it to relief. See, Caldwell v. City of Elwood,

959 F.2d 670, 671-72 (7th Cir. 1992) (citing Mosley v. Klincar, 947 F.2d 1338, 1339 (7th Cir. 1991)). Measured by that standard, the motion fails. The only issue at this stage of the proceedings is whether this petition satisfies the requirements for involuntary relief under the Bankruptcy Code, which it clearly does. An involuntary petition may be filed by a single creditor in appropriate circumstances. See, 11 U.S.C. § 303(b)(2). This petition was filed on the official forms, contains the required allegations as specified by § 303(b) of the Bankruptcy Code, was signed by the petitioning creditor, see, Fed. R. Bankr. P. Rule 1003, Advisory Committee Note (1983); 11 U.S.C. § 303(b)(involuntary case is commenced by filing a petition), and was served in accordance with Rule 4 of the Federal Rules of Civil Procedure. If the facts as alleged are true, the petitioner is entitled to the relief it seeks.

The arguments presented in the motion to dismiss go well beyond the appropriate preliminary inquiry. The movant argues the petitioning creditor knew or should have known that the alleged debtor had more than twenty qualifying creditors, so that the petition was filed in bad faith, and that it is prepared to present evidence to prove it. These things may or may not be true, but they go the merits of the petition, not the sufficiency of the allegations it contains. By repeatedly stating that it is “prepared to present evidence,” the movant seems to be anticipating that some sort of trial will be held on the motion, demonstrating that it is attempting to have the court conduct an inquiry that goes far beyond what is appropriate for what has been filed – a motion to dismiss this case for failure to state a claim upon which relief can be granted. Such motions are disposed of based upon what the plaintiff has alleged, without receiving evidence. On its face, the involuntary petition satisfies the requirements of an involuntary petition, and, consequently, the motion to dismiss is denied.

As to the movant’s request that, pursuant to § 305 of the Bankruptcy Code, the court abstain

from hearing this matter, that motion is addressed to the court's discretion. See, In re Cash Currency Exchange, Inc., 762 F.2d 542, 555-56 (7th Cir. 1985). In essence, the movant appears to be arguing that it is inappropriate for a petitioning creditor to file an involuntary petition if it might be entitled to pursue, or is pursuing, a remedy in state court. Not only does this argument overlook the distinctions between the opportunities which may be available under the Bankruptcy Code and those available under state law, but it is a bit absurd to suggest that a creditor should not use the bankruptcy process when Congress has specifically created the mechanism by which it can do so. "Bankruptcy is both a creditor's remedy and a debtor's right." In re Marchiando, 13 F.3d 1111, 1115 (7th Cir. 2000). The court thinks it is entirely appropriate to initiate involuntary bankruptcy proceedings in order to take advantage of the remedial opportunities bankruptcy offers creditors, whether or not non-bankruptcy law offers something similar. The motion to abstain is also denied.

SO ORDERED.

/s/ Robert E. Grant
Judge, United States Bankruptcy Court