

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 ON**  
**MOTION FOR PARTIAL SUMMARY JUDGMENT**  
**AND MOTIONS TO INTERVENE**

At Fort Wayne, Indiana, on November 1, 2006

This case began with an involuntary petition for relief under Chapter 7 of the United States Bankruptcy Code filed by one of the debtor's creditors, Patrick J. Bruggeman. On July 19, 2006, two additional creditors, William Cast and Wayne Shive, filed motions seeking to intervene or "join in the petition" pursuant to § 303(c) of the United States Bankruptcy Code. The debtor objected to those motions, and has filed a motion for partial summary judgment, challenging whether the intervening creditors are qualified to join. By the court's order of August 31, 2006, the motions to intervene are to be disposed of in connection with the court's ruling on the debtor's motion for partial summary judgment and it is the issue of intervention or joinder that is presently before the court.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Bankr. P. Rule 7056(c); Fed. R. Civ. P. Rule 56(c). Thus, summary judgment is essentially an inquiry as to "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that

one party must prevail as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2512 (1986).

Rule 56 requires the moving party to inform the court of the basis of the motion and to identify “those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986). The non-moving party may oppose the motion with any of the evidentiary materials listed in Rule 56(c), but reliance on the pleadings alone is not sufficient to withstand summary judgment. Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir. 1983). In ruling on a summary judgment motion, the court accepts as true the non-moving party’s evidence, draws all inferences in favor of the non-moving party, and does not weigh the evidence and credibility of the witnesses. Anderson, 477 U.S. 242, 106 S.Ct. 2505 (1986).

Pursuant to § 303 of United States Bankruptcy Code, a person may be involuntarily forced into a bankruptcy proceeding by creditors holding the requisite number and amount of claims, if those claims are not contingent as to liability or subject to a bona fide dispute, and the court finds that the debtor is generally not paying its debts as they become due. See, 11 U.S.C. § 303(b), (h). After an involuntary petition has been filed, other unsecured creditors holding claims that are “not contingent . . . may join in the petition with the same effect as if such joining creditor were a petitioning creditor . . . .” 11 U.S.C. § 303(c).

The debtor advances two arguments in opposition to joinder. First, he contends that Cast and Shive do not qualify as creditors for the purposes of § 303(c) because their claims are contingent. He also argues that they are not two separate creditors, but only a single creditor with undivided

interests under a guaranty agreement, thus there are not three petitioning creditors, and the court should set a trial limited to the issue of how many creditors the debtor had as of the date of the petition.

Debtor's argument that Cast and Shive constitute one creditor rather than two is not relevant to the question of whether they may join these proceedings. Section 303(c) places no limit on the number of creditors that may join a petition, whether it be one or two or one or two hundred. The court recognizes that there is a dispute over the number of creditors the debtor has, and therefore the number of petitioning creditors that are necessary. See, 11 U.S.C. § 303(b)(1), (2). Nonetheless, that issue that can be determined in connection with trial of the issues raised by the involuntary petition. So too the issue of whether Cast and Shive count as one petitioning creditor or two.<sup>1</sup> The question presently before the court is simply whether they are qualified to intervene. Whether they are one creditor or two is not relevant to that determination.

The sole issue presented when a creditor seeks to join in an involuntary petition is whether the creditor is a qualified creditor, see, In re Kidwell, 158 B.R. 203, 211 (Bankr. E.D. Cal. 1993), meaning "does it hold an unsecured claim that is not contingent." 11 U.S.C. § 303(c). If so, it "may join in the petition." Id. See also, Kidwell 158 B.R. at 212. The debtor contends that Cast and Shive do not qualify because their claims are contingent. Those claims are based upon a guarantee

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<sup>1</sup>To the extent it matters for purposes of summary judgment, there may be a significant difference between an obligation to a single entity which is then transferred to multiple entities without the participation of the debtor, and an obligation to a single entity which is later transferred to multiple entities with the active participation and encouragement of the debtor. In the first instance, the debtor had no control over the number of its creditors, while in the second the fact that there may be multiple creditors is, at least to some extent, attributable to the debtor's own actions. The present case may present the latter scenario since it seems that Simon gave his guaranty to Cast, Shive and others in order to induce them to purchase a promissory note issued by Fort Wayne Telsat which was then held by NBD Bank. Guaranty ¶A.

and the debtor argues that a condition precedent to his liability under that guarantee has yet to occur: namely, that a written demand for payment needs to be made and no demand has yet been made of Mr. Simon.

The concept of contingency involves the nature or origin of liability and, more precisely, the time or circumstances under which liability arises. Matter of McGovern, 122 B.R. 712, 715 (Bankr. N.D. Ind. 1989). If all of the events that give rise to a debtor's liability have occurred prior to the petition, the claim is not contingent. In re Knight, 55 F.3d 231, 236 (7th Cir. 1995). See also, McGovern, 122 B.R. at 715-16. A contingent claim, on the other hand, is one where liability depends upon some future event that may or may not ever occur. In re Flaherty, 10 B.R. 118, 119 (Bankr. N.D. Ill. 1981). See also, In re Pulliam, 90 B.R. 241, 243 (Bankr. N.D. Tex. 1988); In re Wilson, 9 B.R. 723, 725. (Bankr. S.D. N.Y. 1981).

The debtor's obligation to Cast and Shive is represented by his guaranty of a promissory note issued by Fort Wayne Telsat, Inc. Guaranties are divided into two types – absolute and unconditional or conditional.<sup>2</sup> An absolute guaranty is unconditional; the guarantor is liable immediately upon default of the principal, without notice. Under a conditional guaranty, however, the guarantor is obligated to pay if payment cannot, with reasonable diligence, be obtained from the principal obligor. While both types of guaranty presuppose a default by the principal, McEntire v. Indiana National Bank, 471 N.E.2d 1216, 1225 (Ind. Ct. App. 1984), see also, I.C. 26-1-3-416, the absolute guaranty ceases to be contingent upon the principal obligor's default. Pulliam, 90 B.R. at 243; Flaherty, 10 B.R. at 119; Wilson, 9 B.R. at 725. Any “demand serves solely as a request for

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<sup>2</sup>They are also called a guarantee of payment and a guaranty of collection. See, In re Pulliam, 90 B.R. at 243; In re Wilson, 9 B.R. at 725; I.C. 26-1-3-416.

payment as opposed to the creation of liability.” Wilson, 9 B.R. at 725; Pulliam, 90 B.R. at 243. See also, McEntire, 471 N.E.2d at 1225 (“the unconditional guarantor automatically becomes the primary obligor upon default of his principal and is not entitled to notice thereof.”)

Whether a guaranty is absolute or conditional is determined by the terms of the agreement itself, which is interpreted like any other contract. Noble Roman’s Inc. v. Ward, 760 N.E.2d 1132, 1138 (Ind. App. 2002). In this instance, Simon “absolutely and unconditionally guarantee[d] the full and prompt payment,” Guaranty ¶ 1, of Fort Wayne Telsat’s obligation. Moreover, the agreement specifically provides that the “Guaranty is absolute and unconditional, . . . is not subject to . . . the performance of any condition precedent” and that the “Guarantor waives . . . demand . . . and all other notices of any kind whatsoever . . . .” Guaranty ¶¶4, 5. The only possible contingency under this agreement, the only event that might be necessary to trigger the guarantor’s liability would be Fort Wayne Telsat’s failure to pay when due. Guaranty ¶ 2. Once that occurred, Simon automatically became the primary obligor. McEntire, 471 N.E.2d at 1225.

The debtor does not argue that Fort Wayne Telsat has not defaulted in its performance of the obligation Simon has guaranteed. He argues only that Cast and Shive have made no written demand upon him to honor his guarantee. But such a demand, even if it had not been specifically waived, is not necessary create the guarantor’s liability, that happened automatically upon the principal’s default. McEntire, 471 N.E.2d at 1225. Once that default occurs, a demand upon the guarantor operates only as a request for payment and is not necessary to create either liability or the guarantor’s duty to pay. See, Wilson, 9 B.R. at 725; Pulliam, 90 B.R. at 243. The fallacy of the debtor’s argument concerning the necessity of a demand can easily be seen when one recognizes that it would transform even a demand note, which all agree is not a contingent obligation, see e.g., U.C.C. §§ 3-

104; 3-106, into a contingent one.

The guaranty that Simon gave to Cast and Shive is not contingent. They qualify as creditors for the purposes of § 303(c) and are entitled to join in this proceeding. The amended motions to intervene filed by William Cast and Wayne Shive are therefore GRANTED and the debtor's objections thereto overruled.

SO ORDERED.

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