

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 SUMMARY JUDGMENT**

At Fort Wayne, Indiana, on April 20, 2007

This case began with an involuntary petition for relief under Chapter 7. The matter is before the court on the debtor’s motion for summary judgment, together with the briefs and other materials submitted in support thereof and in opposition thereto. The motion argues that there are less than three petitioning creditors and, as a result, the case should be dismissed.<sup>1</sup> Whether or not there are the requisite number of petitioning creditors turns on the whether two of the petitioners should be counted as two creditors or only one given the terms of a guaranty that is the basis of the debtor’s obligation to them.

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

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<sup>1</sup>There is also an argument as to the number of the debtor’s creditors and, therefore, the number of petitioning creditors needed to prosecute an involuntary case. See, 11 U.S.C. § 303(b). As to that issue, not only are there genuine issues of material fact, but it is also irrelevant unless the court would conclude that there are less than three qualifying petitioning creditors. So the court does not address that question further.

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, 91 L.Ed.2d 265 (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, 91 L.Ed.2d 202 (1986).

The central issue presented by the motion is whether two of the petitioners can be counted as separate creditors or if they should be counted as a single creditor. The debtor’s obligation to those creditors is based upon a guarantee and determining how to count them requires an interpretation of the parties’ Guaranty Agreement. The debtor argues that the obligation arising out of the guarantee should be treated like a promissory note and, if so, the two petitioners in question constitute a single creditor. The petitioning creditors disagree, arguing that ordinary contract principles should apply in which case those two petitioners constitute two separate creditors.

Since the Guaranty Agreement is the source of the debtor’s obligation to the petitioners in question and its interpretation is central to their proper characterization, the court would have expected a copy of that agreement to have been submitted along with the debtor’s motion. See, N.D.

Ind. L.B.R. B-7056-1. Yet, it was not until the debtor's reply brief that the court was provided with a copy of the document. By then it was too late. The petitioners' response to the motion had already demonstrated that there were genuine issues of material fact associated with the proper characterization of two petitioners and the movant cannot try to change that situation by submitting additional facts in connection with a reply. In summary judgment proceedings, the purpose of a reply brief is to respond to the opponent's legal arguments not to bring forward more facts. Thus, the court should not consider evidence submitted for the first time in a reply brief. Black v. TIC Investment Corp 900 F.2d 112, 116 (7th Cir. 1990). See also, Baird v. Seagate Technology, Inc., 145 F.3d 1159, 1164 (10th Cir.1998).

The petitioners' response to the motion demonstrated that there were genuine issues of material fact. Debtor's motion for summary judgment is therefore DENIED.

SO ORDERED.

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