UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

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| IN THE MATTER OF | ) | |
| | ) | INVOLUNTARY |
| CITY CENTER COMPLEX, LLC, | ) | CASE NO. 10-20820 HCD |
| | ) | CHAPTER 7 |
| | ) | |
| ALLEGED DEBTOR. | ) | |

Appearances:

David J. Beach, Esq., counsel for alleged debtor, Eichhorn & Eichhorn, 200 Russell Street, Post Office Box 6328, Hammond, Indiana 46325;

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Robert E. Stochel, Esq., counsel for Lazzaro Company, Inc., and IB&B, One Professional Center, Suite 306, Crown Point, Indiana 46307; and

David A. Buls, Esq., counsel for C&B Steel Co., Casale, Woodward & Buls, LLP, 9223 Broadway, Suite A, Merrillville, Indiana 46410.

MEMORANDUM OF DECISION

At South Bend, Indiana, on February 28, 2012.

Before the court are two Motions to Dismiss the involuntary petition in bankruptcy filed against the City Center Complex, LLC ("City Center" or "alleged debtor") – the first Motion brought by the alleged debtor itself and the second filed by the petitioning creditors Bloomfield Corporation ("Bloomfield"), Lazzaro Company, Inc. ("Lazzaro"), C&B Steel Company ("C&B"), and IB&B, LLC ("IB&B") (jointly, "creditors"). Also before the court is the alleged debtor's Objection to the Creditors' Motion to Dismiss,

seeking to preserve its rights under 11 U.S.C. § 303(i) for attorney's fees, costs, and damages. Following a trial on those matters, the court took the Motions and Objection under advisement.[1]

## BACKGROUND

On March 9, 2010, the four petitioning creditors commenced an involuntary petition under chapter 7 of the Bankruptcy Code against City Center. *See* R. 1; 11 U.S.C. § 303. The alleged debtor filed a Response to the petition and a Motion to Dismiss, with supporting brief, seeking dismissal and damages pursuant to § 303(b) and § 303(i). *See* R. 23, 24, 25. Five weeks later, the petitioning creditors filed their own Motion to Dismiss. *See* R. 34. The alleged debtor then objected to the creditors' Motion, reiterating the request for fees, costs, and damages incorporated into its original Motion to Dismiss. *See* R. 37. After those filings, the parties requested continuances of pretrial conferences on the dismissal issues, began discovery, and extended discovery deadlines often. The evidentiary hearing on the two Motions to Dismiss and on the alleged debtor's request for damages, originally scheduled as a three-day trial, was completed in one day.

At the trial Richard Michael Plank, owner and manager of City Center, was the first witness. He proffered uncontested background facts underlying this case. Prior to 2004, he had owned and managed Hawk, Incorporated, which did general and masonry contracting. In August 2004, he formed a new company, City Center Complex, an Indiana limited liability company, to build a mixed use development complex on the east side of Crown Point, Indiana. He negotiated a loan for the construction of the complex with Standard Bank, but later accepted a refinancing offer from Fifth Third Bank ("Bank") and signed a Construction Loan Agreement with that Bank on October 21, 2005. *See* Ex. A. He also signed a Security

[1] The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

Agreement in favor of the Bank, as secured party, in the amount of $8,200,000.00, and executed a UCC Financing Statement which listed the collateral securing that debt.[2] *See id.*

Plank hired Hawk as the general contractor for construction of the complex, and Hawk in turn hired the subcontractors Lazzaro, Bloomfield, and C&B.[3] *See* Exs. B, C, D. None of the subcontractors executed contracts with City Center. Construction began in October 2005.[4] City Center received about $4.8 million from the Bank, and at least some of it was used to pay the subcontractors, Plank testified. In July 2006, however, the Bank stopped advancing funds to City Center. On November 17, 2006, the Bank by counsel sent City Center a demand letter concerning the Promissory Note executed between City Center and the Bank. It stated that City Center had failed to remit timely payments on the Note and that it owed $5,040,969.51 (the principal balance of $4,964,904.38 plus interest, late fees, and attorney fees) as of that date. It demanded payment within 10 days. Plank testified that he had not been asked to pay interest; no interest was due, he stated.

After the Bank discontinued its loan payments, the construction stopped. According to Plank, City Center could not pay its contractor Hawk, and Hawk in turn could not pay the subcontractors. In

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[2] The UCC Financing Statement listed the following collateral securing the City Center debt:

> All assets and all personal property now owned and hereafter acquired. All now owned and hereafter acquired inventory, accounts, equipment, general intangibles, goods, fixtures, chattel paper, instruments, investment property, deposit accounts, letter of credit rights, payment intangibles, supporting obligations, software, and all rents, issues, profits, products and proceeds thereof, wherever any of the foregoing is located.

Ex. A, UCC Financing Statement.

[3] IB&B, or Illiana Block and Brick, which provided blocks for the City Center buildings, had done business with Bulldog Masonry LLC, a precursor of Hawk. No subcontract agreement between IB&B and Hawk was entered into evidence at the trial.

[4] Plank testified that Hawk's payments to the subcontractors were made through Ticor Title Company. The Bank paid funds directly to Ticor, and Ticor paid the subcontractors. Any money paid to Ticor was paid to the subs, he stated; the Title Company has no funds left. He also testified that the subcontractors did perform the work and deserved to be paid; according to Plank, Hawk still owed them substantial amounts. He further testified that any money given to him for Hawk or City Center was paid to the subcontractors.

September 2006, IB&B sued Hawk, City Center, Plank individually, and other defendants in the Lake Circuit Court in Crown Point, Indiana. Other subcontractors joined the suit by filing counter-claims or cross-claims. City Center, in turn, filed a counter-claim against the Bank. The state court appointed a Receiver, who sold the City Center property to the Bank. The court approved the sale on October 26, 2009. On February 10, 2010, the receiver reported to the state court that the net proceeds of the sale, $2,023,726.56, were invested in a money market account with the Bank pending further order by the Lake Circuit Court "as to entitlement to the funds by the parties." Ex. G, Report of Sale. Plank testified that, after the sale, City Center neither owned the property nor held any of the sale proceeds.

On March 9, 2010, Plank reported, the four petitioning creditors – Bloomfield, Lazzaro, C&B, and IB&B – filed involuntary bankruptcy petitions naming as debtors City Center Complex, LLC (Case No. 10-20820) and Hawk LLC (Case No. 10-20822). All activity in the state court action was stayed by the filings. The witness testified that, because the real estate had been sold by the Receiver before the involuntary case was filed against City Center, none of the subcontractors had a claim against City Center. He admitted on cross-examination that he was the sole owner of City Center and of Hawk and that the subcontractors still were owed for some, but not all, of the work they performed on City Center.

The second witness at the trial was Mike Lozevski, partner of Bloomfield Inc., one of the petitioning creditors. He testified that Bloomfield's contract was with Hawk, not City Center. He admitted that his attorney was notified of the sale of the complex in 2009 and that he knew of it. He also admitted that he signed the involuntary bankruptcy petitions against City Center and Hawk at his attorney's office on March 9, 2010, as a petitioning creditor of both entities, even though Bloomfield did not have a contract with City Center. Lozevski testified that his company did duct work on City Center and was owed about $250,000. According to the witness, at times it was difficult to distinguish between Hawk and City Center: There was one owner and it seemed to be one entity. He said Bloomfield built for both companies, and it

increased the value of the City Center. Because he did not recapture the expenses made on the project, Lozevski stated, that loss of $250,000 devastated his company.

The final witness was Frederick L. Carpenter, counsel for City Center. He testified that, as a result of the involuntary petition filing, the alleged debtor had incurred such damages as attorney's fees and a delay in the state court action. He presented an affidavit concerning his requested compensation for legal services rendered on behalf of the alleged debtor. On cross examination, he explained that he had redacted entries concerning descriptions of his services because he considered them work product protected by the attorney-client privilege. When he was asked how he could provide sworn testimony concerning the services of his law partner Daniel Freeland, whose fees were also recorded in the Affidavit, Carpenter was unable to describe the subject matter of Freeland's services on any particular date. He insisted, however, that all the services listed on the fee statement fell into one of four categories set forth in the statement. The court ruled that the redacted fee application was unacceptable. In order to determine whether an attorney's compensation request was reasonable, the court stated, it required an affidavit that demonstrated with specificity the reasonableness of each entry: the legal services rendered, the hours spent on each service, and the hourly rate of the professionals rendering those services. Carpenter then presented an unredacted invoice with the detailed description of his fees, but did not proffer it in evidence. The court allowed for its submission at a future time, with opportunity for response to it by the creditors.[5]

In closing, counsel for City Center argued that the petitioning creditors filed a petition against the wrong party. Under penalty of perjury, he asserted, the petitioners signed the petition certifying that they had undisputed valid claims against City Center. However, their claims were based on an *in rem* action, a mechanic's lien against property that City Center no longer held. Counsel for the alleged debtor insisted that the filing was made in bad faith and that fees and damages should be awarded to the alleged debtor. He

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[5] On August 16, 2011, counsel for the alleged debtor filed a Supplemental Affidavit of additional services performed for the benefit of City Center from August 1-8, 2011. *See* R. 116.

claimed that the delay and wasted time for City Center, its counsel, and the court could not be valued precisely, but he requested compensation of about $18,000 and twice that amount for punitive damages.

The four petitioning creditors pointed out that they had filed a motion to dismiss the involuntary, as the alleged debtor had requested. According to them, the alleged debtor made accusations but failed to prove bad faith or to itemize damages. They emphasized that Plank agreed that substantial amounts were owed to the subcontractors and that he had not been paying his debts; for that reason, there was no dispute about the debt, they stated. They insisted that City Center never explained why the creditors had no right to file this petition, and mentioned that a civil charge such as piercing of the corporate veil could be raised in this case. Because City Center raised no specific legal arguments, the creditors concluded, the court should deny any request for damages. The court then took the matters under advisement.

## DISCUSSION

### A. *The Motions to Dismiss*

Since dismissal motions were filed by the debtor and by all the petitioning creditors, the court first must consider whether it will dismiss the involuntary petition "on consent of all petitioners and the debtor." Section 303(i) authorizes a bankruptcy court to award attorney fees, costs, and/or damages to an alleged debtor "[if] the court dismisses a petition under this section other than on consent of all petitioners and the debtor."[6] 11 U.S.C. § 303(i) (emphasis added). Courts interpret this provision to mean that, "if the

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[6] Subsection (i) of § 303 provides:

> (i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment –
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> (1) against the petitioners and in favor of the debtor for –
> (A) costs; or
> (B) a reasonable attorney's fee;
>
> (2) against any petitioner that filed the petition in bad faith, for –
> (A) any damages proximately caused by such filing; or

(continued...)

debtor and all other parties to an involuntary petition unequivocally consent to its dismissal, the language of section 303(i) bars a subsequent damage claim regardless of whether the debtor sought to preserve such a claim." *In re R. Eric Peterson Constr. Co., Inc.*, 951 F.2d 1175, 1181 (10th Cir. 1991). In this case, the debtor first filed a Motion to Dismiss three weeks after the involuntary was commenced, and the creditors filed their Motion to Dismiss five weeks later. It is clear that all the parties to this involuntary bankruptcy consented to dismissal but not to sanctions concerning the dismissal.

The record reflects crucial details concerning that consent by the parties. Less than two weeks after the involuntary petition was filed, City Center, by counsel, sent a letter to the creditors challenging their eligibility to be petitioners and advising them of its intent to file a dismissal motion of the involuntary petition and to seek damages if they did not file their own motion to dismiss within three days. *See* R. 24, Ex. E, Letter of March 22, 2010. On March 30, 2010, having received no response from the creditors, City Center filed its Motion to Dismiss, with a claim for damages. *See* R. 24. Five weeks later, the petitioning creditors filed their Motion to Dismiss Involuntary Bankruptcy, on May 6, 2010. *See* R. 34. They asked for dismissal after a cost-risk analysis, even though they asserted that they had "a good faith argument to proceed." *Id.* The creditors' Motion made no reference to the alleged debtor's claim for monetary compensation and damages. Four days thereafter, however, the alleged debtor filed its Objection, objecting to the dismissal "to the extent that any Order of Dismissal would not preserve the alleged Debtor's rights under 11 U.S.C. § 303(i) for both compensatory and punitive damages."[7] R. 37.

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[6](...continued)

(B) punitive damages.

11 U.S.C. § 303(i).

[7] The court entered the Order of Dismissal of Involuntary Bankruptcy on May 10, 2010, earlier in the same day that the alleged debtor filed its Objection to the creditors' Motion to Dismiss. *See* R. 36. Upon consideration of the alleged debtor's Objection and the petitioning creditors' Response, the court vacated its Order of Dismissal on May 20, 2010. *See* R. 42.

The court finds that the parties are unable to agree on an absolute dismissal, even though "in reality neither the petitioning creditors nor the debtor wish the bankruptcy proceeding to continue." *In re R. Eric Peterson Constr. Co., Inc.*, 951 F.2d at 1180. The creditors asked to withdraw their petition and to be granted an order of dismissal because of "the costs and risks associated with proceeding." R. 34. The alleged debtor earlier sought both dismissal of the petition and consideration of damages in its original dismissal motion; moreover, it objected to the creditors' dismissal motion in order to preserve its rights under § 303(i). The debtor also made explicit in its preliminary letter to the petitioning creditors, as well as its Motion to Dismiss and its Objection, that it was maintaining its right to recovery of damages pursuant to the statute. *See In re R. Eric Peterson Constr. Co., Inc.*, 951 F.2d at 1181 (noting the clear record of debtor's intention not to waive its right under § 303(i)).

The court finds that the alleged debtor did not "waive the right to judgment" under § 303(i). It also finds that all parties sought dismissal of the petition but did not agree to an award of fees, costs, or damages to the alleged debtor. This case is not one in which the creditors simply acquiesced to the debtor's Motion to Dismiss. *See In re Jett*, 206 B.R. 407, 409 (Bankr. E.D. Va. 1997) (concluding that creditors' "nonopposition to dismissal is not consent" under § 303(i)). The petitioning creditors and the alleged debtor each filed specific Motions to Dismiss the case.

The Tenth Circuit recognized and succinctly described the dilemma of an alleged debtor in such circumstances:

> [T]he debtor would face a Hobson's choice if the creditors moved to dismiss the involuntary petition. On the one hand, the debtor wants to remove the stigma of the involuntary bankruptcy petition as soon as possible. On the other hand, the debtor wishes to preserve its rights to recover costs or damages from the petitioning creditors. However, the debtor cannot seek damages pursuant to section 303(i) until after dismissal of the involuntary petition has occurred.

*In re R. Eric Peterson Constr. Co., Inc.*, 951 F.2d at 1180. Other courts have pointed out the ambiguity of § 303(i) on this consent issue and have agreed with the Tenth Circuit that a debtor should not be required to object to dismissal in order to preserve its rights to claim damages. *See, e.g., In re Express Car & Truck*

*Rental, Inc.*, 440 B.R. 422, 431 (Bankr. E.D. Pa. 2010) ("The better reading of the statute is that once a debtor reserves the right to seek damages under § 303(i), that reservation qualifies the debtor's consent and therefore, the dismissal of the case is *not* 'on consent of *all* petitioners *and* the debtor.' 11 U.S.C. § 303(i) (emphasis added)") (citing cases). This court agrees with those thoughtful analyses.

In this case, the alleged debtor, facing that Hobson's choice, did object to the petitioners' dismissal motion in order to preserve its rights under § 303(i). Consequently, this involuntary bankruptcy has continued for almost two years – with lengthy discovery and with an evidentiary hearing to consider dismissal of the involuntary petition and the alleged debtor's right to a claim for damages.

The petitioning creditors urged the court to grant their Motion to Dismiss pursuant to § 303(j)(1), which permits dismissal "on the motion of a petitioner."[8] They pointed out that all the creditors joined the motion, and thus that they clearly had notice. *See* R. 41 at 2. They sought dismissal because they "decided not to commit further valuable resources litigating a contested action against City Center in bankruptcy court." *Id.*

The court finds that the hearing, attended by all parties and/or their counsel, considered evidence on both dismissal and damages, and therefore that the requirements of notice and hearing under § 303(j) were met. It further finds that the alleged debtor's Motion to Dismiss demanded both a dismissal of the case and damages. It therefore was not an unqualified request for dismissal. The court concludes that there was no "manifestation of consent within the meaning of § 303(i)." *In re Express Car & Truck Rental, Inc.*, 440 B.R. at 431.

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[8] Section 303(j) provides that, "[o]nly after notice to all creditors and a hearing may the court dismiss a petition filed under this section –

> (1) on the motion of a petitioner;
> (2) on consent of all petitioners and the debtor; or
> (3) for want of prosecution.

11 U.S.C. § 303(j).

Based upon the record before it, therefore, the court finds it proper and appropriate to grant the petitioning creditors' Motion to Dismiss the Involuntary Petition pursuant to § 303(j)(1) without denying to the alleged debtor its right to pursue fees, costs, and damages under § 303(i). *See In re R. Eric Peterson Constr. Co., Inc.*, 951 F.2d at 1180 (noting distinction between § 303(j)(1) and (2); finding that debtor did not affirmatively consent to dismissal and did not waive its rights under § 303(i); concluding that § 303(j)(1) dismissal did not preclude consideration of § 303(i) fees and damages); *In re Jett*, 206 B.R. at 409 (dismissing petition pursuant to § 303(j)(1), entering judgment for the debtor under § 303(i)(1)).

Accordingly, the involuntary petition against the alleged debtor City Center is hereby DISMISSED pursuant to 11 U.S.C. § 303(j)(1).

B. *Jurisdictional Issue*

Under § 303(i), the court may consider monetary awards to the alleged debtor only after it has dismissed the petition on some ground "other than on consent of all petitioners and the debtor" and after it has determined that the debtor did not waive the right to judgment under § 303(i). The court made those determinations and dismissed the involuntary petition in the previous section of this Memorandum of Decision. It retains jurisdiction over the dismissed case, however, to consider the alleged debtor's bad faith claim and its entitlement to compensable and/or punitive damage awards pursuant to § 303(i). Courts have recognized that the statute required dismissal of the case prior to a court's consideration of awards, and they routinely retain jurisdiction to consider such post-dismissal matters. *See, e.g., In re R. Eric Peterson Constr. Co., Inc.*, 951 F.2d at 1179; *In re John Richards Homes Bldg. Co., L.L.C.*, 405 B.R. 192, 210-11 (E.D. Mich. 2009); *see also Pierce v. First Comm'l Leasing Corp.*, 2006 WL 3050816 at *3 (Bankr. M.D. Ala. Oct. 24, 2006) ("Upon dismissal of an involuntary petition, the Bankruptcy Court is to make a determination as to which sanctions . . . are appropriate.").

In light of the procedural posture and development of this case, in which the briefs and hearing incorporated together the issues of dismissal and damages, the court first dismissed the involuntary petition.

Now, having concluded that the prerequisites of dismissal and nonwaiver of § 303(i) rights were met, the court considers the alleged debtor's request for compensation and its bad faith claim for damages.

*C. Claims for Compensation and Damages*

In its claim for compensation and damages under § 303(i), City Center first alleged that none of the petitioning creditors had been eligible to file the involuntary petition against City Center.

> The nature of the Petitioning Creditors' "claims" against the Disputed Debtor, almost exclusively, are non-recourse obligations at best. The Disputed Debtor denies it has any personal liability to any of the Petitioning Creditors. The Disputed Debtor has no contractual relationship with any of the petitioning creditors and any "lien claims" the Petitioning Creditors had against the Disputed Debtor were extinguished when the Receiver sold the property.

R. 25 at 3. Without claims against the alleged debtor, City Center argued, none of the creditors had standing to bring the involuntary petition. Without standing, it further asserted, the creditors brought the petition in bad faith, and compensatory and punitive damages should be awarded against them. The creditors, in their Motion to Dismiss, insisted that they had a good faith argument to proceed, but chose not to pursue the contested matter in light of the costs and risks associated with proceeding. *See* R. 34.

An involuntary Chapter 7 case may be commenced by "three or more entities, each of which is ... a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute." 11 U.S.C. § 303(b)(1). Those "entities," the petitioning creditors, have the burden of establishing that their claims fulfill the criteria of non-contingency and undisputedness set forth in § 303(b). *See In re Reid*, 854 F.2d 156, 157 (7th Cir. 1988); *Draiman v. Multiut Corp.*, 2008 WL 904778 at *5 (N.D. Ill. March 31, 2008).

> [C]laims are contingent as to liability if the debt is one which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability of the debtor to the alleged creditor and if such triggering event or occurrence was one reasonably contemplated by the debtor at the time the event giving rise to the claim occurred.

*In re All Media Properties, Inc.*, 5 B.R. 126, 133 (Bankr. S.D. Tex. 1980) (quoted in *In re Tucker*, 2010 WL 4823917 at *3 (Bankr. N.D. W.Va. Nov. 22, 2010)). Claims are the subject of a bona fide dispute if there are substantial factual or legal questions regarding the alleged debtor's liability to the petitioning creditors.

*See B.D.W. Assocs., Inc. v. Busy Beaver Bldg. Ctrs., Inc.*, 865 F.2d 65, 67 (3d Cir. 1989) (adopting the Seventh Circuit's objective test). In the Seventh Circuit, the existence of a "bona fide dispute" is measured objectively: "'[I]f there is a bona fide dispute as to either the law or the facts, then the creditor does not qualify and the petition must be dismissed.'" *Matter of Busick*, 831 F.2d 745, 750 (7th Cir. 1987) (quoting *In re Lough*, 57 B.R. 993, 996 (E.D. Mich. 1986)). This objective standard has been adopted in all circuits addressing the issue. *See In re Byrd*, 357 F.3d 433, 437 (4th Cir. 2004) (listing cases).

> Under this standard, the bankruptcy court must determine whether there is an objective basis for either a factual or a legal dispute as to the validity of the debt. However, "[t]he statute does not require the court to determine the outcome of any dispute, only its presence or absence. Only a limited analysis of the claims at issue is necessary."

*Busick*, 831 F.2d at 750 (quoting *In re Busick*, 65 B.R. 630, 637 (N.D. Ind. 1986)).

The court first examined the debt claimed by the subcontractor creditors in this case. On the involuntary petition, the four petitioning creditors declared that they held "undersecured liens" against City Center. The alleged debtor argued, in its brief and at trial, that the creditors were hired by a general contractor, Hawk, rather than by the debtor, to do subcontracting work on property owned by the debtor. When the general contractor failed to pay them, the creditors filed mechanic's liens against the debtor's property in the Lake Superior Court. Pursuant to an agreed order of the parties (which included these creditors), however, that property was sold by a court-appointed Receiver. The state court approved the sale of the property on October 26, 2009. According to the alleged debtor, City Center thus held no interest in the property on March 9, 2010, when the involuntary petition was filed, and the petitioning creditors no longer held liens against property owned by the alleged debtor. It argued that the creditors, holding only non-recourse obligations, therefore lacked standing to file the involuntary petition.

The court finds that the evidence admitted at trial supports City Center's allegations. First, the "Subcontract Agreements" show clearly that Lazzaro, Bloomfield, and C & B entered into agreements with the general contractor Hawk, and not the alleged debtor, to accomplish certain building projects at City

Center Complex.[9] *See* Exs. B, C, D. Under those contracts, Hawk was responsible for paying each subcontractor "for the satisfactory performance and completion of the Work," and a specific payment sum was attached to each Contract. Exs. B, C, D, ¶ 5. The Contracts also stated that "[a]ll work done and all materials furnished by Subcontractor under this Subcontract must and shall be in strict conformity to and in full compliance with the Contract Documents." *Id.*, ¶ 6. The creditors produced no contracts with the alleged debtor and offered no justification for claiming payment from the alleged debtor rather than Hawk. The court finds that City Center has no contractual liability to any of the petitioning creditors.

Second, the creditors' claims in state court were based upon mechanic's liens, which are liens against real property. They are inherently in rem, non-recourse obligations rather than in personam judgments against the land owner. *See Indiana Law Encyclopedia*, Mechanics' Liens § 1 (Jan. 2012).

> A mechanic's lien was a remedy unknown at common law and is purely a statutory creation. . . . Provisions relating to the creation, existence or persons entitled to claim a mechanic's lien are to be narrowly construed since the lien rights created are in derogation of common law.

*In re Greenland Homes, Inc.*, 227 B.R. 710, 716 (Bankr. S.D. Ind. 1998) (quoting *Premier Investments v. Suites of America, Inc.*, 644 N.E.2d 124, 127 (Ind. 1994)). "Because the mechanic's lien is purely a creature of statute, the burden is on the party asserting the lien to bring itself clearly within the strictures of the statute." *Id.* Nevertheless, "[o]nce a claimant has met this burden, [courts] give the statute liberal construction so as to accomplish the statute's remedial purpose" of "promot[ing] justice and honesty, and [preventing] the inequity of an owner enjoying the fruits of the labor and materials furnished by others, without recompense." *Midwest Biohazard Servs., LLC, v. Rodgers*, 893 N.E.2d 1074, 1077-78 (Ind. App. 2008) (citations omitted).

The petitioning creditors failed to sustain their burden of proof under the mechanic's lien statute. They produced no evidence in this court that they were entitled to claim mechanic's liens against the debtor.

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[9] As the court noted above, no contract between IB&B and Hawk or City Center was offered in evidence. *See* n. 3 *supra.*

They proffered no argument to rebut the alleged debtor's position that whatever "lien claims" they might have had against the alleged debtor were extinguished when the state court Receiver sold the property.

The court finds that the alleged debtor has established that the petitioning creditors held in rem liens against the alleged debtor's property, and not in personam liens against the property's owner. It also established that the City Center property was no longer in the possession of the alleged debtor when the involuntary bankruptcy was filed. These facts and legal propositions are undisputed. Under *In re Busick*, it is not this court's duty to decide whether the petitioning creditors' liens were extinguished when the state court Receiver sold the property, but rather to decide if a bona fide dispute exists. *See In re Busick*, 831 F.2d at 750. The court determines, therefore, that the alleged debtor has raised substantial questions of law and fact that bear on its liability to the petitioning creditors. *See In re Tama Mfg. Co., Inc.*, 436 B.R. 763, 771-72 (Bankr. E.D. Pa. 2010) (concluding that debtor established facts sufficient to show that creditors' claims raised a bona fide dispute; that creditors lacked standing; and that involuntary petition was dismissed). Moreover, there is an objective basis for concluding that the validity of the creditors' claims against the alleged debtor is the subject of a bona fide dispute. Because those "claims upon which the involuntary petition is based are the 'subject of a bona fide dispute' as the term is used in subsections (b) and (h) of section 303," *In re Busick*, 831 F.2d at 750, this court concludes that the creditors do not qualify as eligible petitioners and that they lacked standing to file this involuntary petition.[10]

To summarize, therefore, the court determines that the involuntary petition must be dismissed on two grounds: first, that the petitioning creditors moved to dismiss their involuntary petition; and second, that the creditors lacked standing to file the involuntary case. The court having dismissed the petition on a

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[10] The court notes that witness Mike Lozevski testified that City Center and Hawk were owned by the same man and seemed at times to be one entity. In addition, creditors' counsel suggested in closing argument that an alter ego or piercing-the-corporate-veil argument might be raised herein. However, the petitioning creditors made no attempt to present facts or any legal argument of agency or alter ego in this bankruptcy case. *See, e.g., Oliver v. Pinnacle Homes, Inc.*, 769 N.E.2d 1188, 1191 (Ind. App. 2002) (establishing that the plaintiff bears the burden of proof with respect to piercing the corporate veil, setting forth the elements of proof to be made in Indiana). With only those conclusory statements at trial, the court finds that the creditors have waived any argument it may have regarding veil piercing, alter ego, or agency relationships.

ground other than consent of the parties and having found that the debtor did not waive its right to recovery under § 303(i), it now considers the alleged debtor's request for fees and damages.

The Seventh Circuit has stated that the "filing of an involuntary petition is an extreme remedy with serious consequences to the alleged debtor, such as loss of credit standing, inability to transfer assets and carry on business affairs, and public embarrassment." *In re Reid*, 773 F.2d 945, 946 (7th Cir. 1985). It has also held that an award of fees and costs to the alleged debtor under § 303(i) is committed to the discretion of the court. *See In re Reid*, 854 F.2d 156, 159 (7th Cir. 1988). When considering whether to award fees, costs, and/or damages, a court should consider both objective and subjective factors regarding the propriety of the creditors' filing of the involuntary petition. *See Draiman v. Multiut Corp.*, 2008 WL 904778 at *5-*6 (N.D. Ill. Mar. 31, 2008). The alleged debtor has the burden of proving bad faith by a preponderance of the evidence. *See In re Mundo Custom Homes, Inc.*, 179 B.R. 566, 570 (Bankr. N.D. Ill. 1995); *see also, e.g., In re Antonini*, 2012 WL 112978 at *8 (Bankr. S.D. Fla., Jan. 12, 2012).

Under the objective test, the court assesses whether a reasonable person in the creditor's position would have acted as this petitioning creditor did. The court should consider whether, for example, the petitioning creditors failed to conduct a reasonable due diligence inquiry into the law and the facts surrounding the case before they filed the involuntary petition. *See Draiman*, 2008 WL 904778 at *5 (finding that petitioning creditor who filed involuntary petition knowing it did not have requisite number of creditors acted in bad faith). The subjective test assesses the petitioner's motive for filing an involuntary case. An improper motive, such as harassing the debtor to collect an unpaid obligation, is subjective evidence of bad faith. *See id.* at *6 (finding petitioner filed involuntary petition to harm alleged debtor without cause or for personal vengeance); *see also, e.g., In re Antonini*, 2012 WL 112978 at *7-*10 (presenting tests for proving § 303(i)(1) and (2) compensatory and punitive damages).

In this case, the alleged debtor argued at trial that its attorneys' fees should be allowed under § 303(i)(1) and that punitive damages should be allowed under § 303(i)(2). It estimated that its fees totaled

approximately $18,000 and that the punitive damages for the delay in state court and the waste of this court's time, while impossible to value accurately, should be measured by doubling the amount of its attorneys' fees. However, when the alleged debtor proffered a redacted statement requesting compensation for legal services, the court disallowed it. It explained that the reasonableness of the compensation could be determined only by reviewing the professionals' itemized services. The court then took under advisement the issues of dismissal and damages, but told the parties that it would allow the alleged debtor's submission of attorney fees, and the creditors' responses to that submission, if the alleged debtor qualified for a compensation award.

After reviewing the record in the case and the testimony and evidence presented at trial, the court finds that there was sufficient evidence to show that the filing of the involuntary petition was misguided and mistaken. However, the court is persuaded that there is insufficient evidence, under either the objective or subjective test, to support a finding that the petitioning creditors filed the involuntary petition in bad faith. No evidence was offered to demonstrate that the petitioning creditors failed to conduct a reasonable inquiry into the law or facts of the case, or that they erred in meeting such procedural filing mandates as dollar requirements or proper numbers of creditors. There was no evidence of the creditors' harassment, vengeance, or harmful conduct toward the alleged debtor. Importantly, the alleged debtor raised no allegations of the creditors' improper motives or of any damages that were proximately caused by the filing. Nor did it provide any actual pecuniary loss as the result of the creditors' bad faith conduct or a method of calculating an award of bad faith damages. The court found the proposed doubling-of-fees calculation insufficient. In its discretion, therefore, the court declines to impose any punitive damages.

However, the court finds that damages of a compensatory nature are warranted in this case. The court determined that there is a bona fide dispute concerning the law and/or the facts that affect the alleged debtor's liability to the petitioning creditors. It held that the petitioning creditors do not qualify as filers of an involuntary petition pursuant to § 303(b) and that the petition must be dismissed. The court therefore will

grant judgment against the petitioning creditors and in favor of the alleged debtor, under § 303(i)(1), in the amount of reasonable attorney fees and costs borne by the alleged debtor as a direct result of the filing of this involuntary petition.

## CONCLUSION

For the reasons set forth in this Memorandum of Decision, the court dismisses the involuntary petition filed against the City Center Complex, LLC, by the petitioning creditors Bloomfield Corporation, Lazzaro Company, Inc., C&B Steel Company, and IB&B, LLC, pursuant to 11 U.S.C. § 303(j)(1). The court grants judgment against the petitioning creditors and in favor of the alleged debtor City Center Complex, LLC, for its reasonable attorney fees and costs pursuant to 11 U.S.C. § 303(i)(1). It denies judgment against the petitioning creditors for damages that are based upon a bad faith filing of the petition pursuant to 11 U.S.C. § 303(i)(2).

The court retains jurisdiction of this dismissed case to determine the amount of the award of compensation. It directs City Center Complex, LLC, to file an affidavit containing the detailed statement of reasonable attorney fees and expenses within twenty-one (21) days of the date of this Order. The petitioning creditors are given twenty-one (21) days from the date of submission of the alleged debtor's affidavit to file a joint response, if they wish. The court will conduct a hearing on the issue if necessary.

SO ORDERED.

/s/ HARRY C. DEES, JR.
HARRY C. DEES, JR., JUDGE
UNITED STATES BANKRUPTCY COURT