

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)
)
DAVID L. JONES,) CASE NO. 05-34988 HCD
) INVOLUNTARY CHAPTER 7
)
ALLEGED DEBTOR.)

Appearances:

James A. O'Brien, Esq., attorney for alleged debtor, O'Brien & Telloyan, P.C., P.O. Box 449, South Bend, Indiana 46624-0449;

Robert T. Sanders, III, Esq., attorney for petitioner B & R Manufacturing, Inc., Sanders Pianowski, 300 Riverwalk Drive, Elkhart, Indiana 46516;

Gary D. Boyn, Esq., William D. Haut, Esq., and Dean E. Leazenby, Esq., attorneys for petitioner C & B Custom Modular, Inc., Warrick & Boyn, LLP, 121 West Franklin Street, Suite 400, Elkhart, Indiana 46516; and

Geoffrey K. Church, Esq., attorney for petitioner Elkhart Steel Service, Inc., Barnes & Thornburg, 121 West Franklin Street, Suite 200, Elkhart, Indiana 46516.

MEMORANDUM OF DECISION

At South Bend, Indiana, on October 17, 2005.

Before the court is the Creditor's Motion for Default Entry and Order for Relief Pursuant to § 303(h), filed on September 9, 2005. That Motion was filed by the petitioning creditor C & B Custom Modular, Inc., against the alleged debtor David L. Jones. For the reasons stated below, the court grants the creditor's motion.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(A) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rule of Bankruptcy Procedure 7052. Any

conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

On August 30, 2005, three petitioning creditors filed an involuntary chapter 7 bankruptcy petition on the alleged debtor David L. Jones. The petition alleged that Mr. Jones (1) is a person against whom an order for relief may be entered, and (2) is not generally paying his debts as they come due. *See* R. 1. The petition was entered on the docket on August 31, 2005, and the “Summons to Debtor in an Involuntary Case” was executed on September 1, 2005. The Summons notified the alleged debtor of the involuntary petition filed against him and required an answer or a motion within twenty (20) days of the receipt of the Summons. It warned the putative debtor that, if he failed to respond, the order for relief would be entered. *See* R. 6.

The “Debtor’s Verified Answer to Involuntary Petition” was filed on September 22, 2005, one day after the deadline announced by the Summons. The Answer did not admit or deny the allegations in the involuntary petition. Instead, it made the following statement: “I ASSERT MY FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION, PURSUANT TO THE UNITED STATES CONSTITUTION.”

The petitioning creditors contended in their Motion that, because the putative debtor failed to assert defenses and objections to the petition, his answer to the petition did not comply with Rule 1011, Federal Rule of Civil Procedure 12(b), or 11 U.S.C. § 303(h). They requested that the order for relief be entered.

Discussion

Once an involuntary petition is filed, an alleged debtor is afforded the opportunity to contest the petition by filing an answer to the petition. *See* 11 U.S.C. § 303(d) (“The debtor . . . may file an answer to a petition under this section.”); Fed. R. Bankr. P. 1011(a) (“The debtor named in an involuntary petition . . . may contest the petition.”). Bankruptcy Rule 1011(b) requires that “[d]efenses and objections to the petition . . . shall

be filed and served within 20 days after service of the summons.” Fed. R. Bankr. P. 1011(b). “If the petition is not timely controverted, the court shall order relief against the debtor.” § 303(h); *see In re SWG Associates*, 199 B.R. 557, 561 (Bankr. W.D. Pa. 1996) (stating that the alleged debtor must file and serve his objections to the petition “within twenty (20) days after service of the summons in order to avoid an automatic grant by this Court of the order for relief sought by the 3 petitioning partners”). If an alleged debtor defaults by failing to file an answer or motion, an order for relief is entered pursuant to 11 U.S.C. § 303(h). *See Fisher v. Bank Leumi Trust Co. (In re MacFarlane Webster Associates)*, 121 B.R. 694, 700 (Bankr. S.D.N.Y. 1990).

This alleged debtor did not fail to file an answer; for that reason, the court declines to find that he procedurally defaulted. Instead, he filed a document entitled “Answer” which invoked his Fifth Amendment right against self-incrimination. The Fifth Amendment provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” “Fifth Amendment rights may be invoked in a bankruptcy proceeding.” *In re Lufkin*, 255 B.R. 204, 209-10 (Bankr. E.D. Tenn. 2000) (citing *McCarthy v. Arndstein*, 266 U.S. 34, 45 S. Ct. 16, 69 L.Ed. 158 (1924)). However, the privilege against self-incrimination “applies only to situations in which an individual ‘is compelled to make a testimonial communication that is incriminating.’” *Id.* at 210 (citing *Fisher v. United States*, 425 U.S. 391, 96 S. Ct. 1569, 1579, 48 L.Ed.2d 39 (1976)). In the *Lufkin* case, a subpoena duces tecum was addressed to the receiver, not the debtor. The bankruptcy court found that the debtor himself was not “compelled to make a testimonial communication and therefore has no Fifth Amendment shield against the Receiver’s production of documents.” *Id.* (citing *Johnson v. United States*, 228 U.S. 457, 33 S. Ct. 572, 572, 57 L.Ed. 919 (1913)); *cf. Braswell v. United States*, 487 U.S. 99, 109, 108 S. Ct. 2284, 2290, 101 L.Ed.2d 98 (1988) (holding that an individual, in his capacity as a custodian of corporate records, “may not resist a subpoena for corporate records on Fifth Amendment grounds”).

In this case, the putative debtor was given the opportunity to respond to the involuntary petition by admitting or denying the allegations in the petition. He was not compelled to testify or to release evidence. The invocation of his Fifth Amendment rights was not an appropriate response in an answer. Moreover, the alleged

debtor herein did not support his Fifth Amendment claim with any plausible factual basis or with any demonstration of a risk of prosecution. *Cf. Butcher v. Bailey*, 753 F.2d 465, 470 (6th Cir. 1985) (“Debtor, after all, bears the ‘burden of establishing a reasonable cause to fear prosecution’ by ‘identifying the nature of the criminal charge or supplying sufficient facts so that a particular criminal charge can reasonably be identified by the court.’”) (*quoting In re Morganroth*, 718 F.2d 161, 167 (6th Cir.1983)); *In re Wincek*, 202 B.R. 161, 169 (Bankr. M.D. Fla. 1996) (dismissing voluntary chapter 13 case because the debtor did not demonstrate “credible reasons why responding to questions concerning his income poses a real danger of incrimination” and because his “refusal to disclose the information impedes the administration of his Bankruptcy case”).

Because the putative debtor filed an “Answer,” in the view of the court he has not defaulted by failing to file. However, the court finds that he failed to file his answer in a timely manner. The Summons was served on September 1, 2005. The answer was due within twenty days of the date of service; the final date for filing an answer, therefore, was September 21, 2005. The filing on September 22, 2005, was untimely. *See In re Albers*, 71 B.R. 39, 43 (Bankr. N.D. Ohio 1987) (stating that the requirements of Rule 1011(b) and § 303(h) “are quite clear: an Answer shall be filed within twenty days after the service of the Summons”). The rule does not provide for an extension of time, and Mr. Jones did not request such an extension.

Moreover, the court finds that the alleged debtor’s Answer, with only an assertion of his Fifth Amendment right against self-incrimination, did not contest the allegations in the involuntary petition. Federal Rule of Bankruptcy Procedure 1011(a) authorizes a debtor named in an involuntary petition to “contest the petition,” and § 303(h) announces: “If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed.” The court determines that, because the alleged debtor did not controvert the petition in his Answer, he admitted that he (1) is a person against whom an order for relief may be entered, and (2) is not generally paying his debts as they come due. Consequently, an order for relief is required pursuant to § 303(h).

Conclusion

On the basis of the record in this case, and for the reasons recited above, the court finds that the putative debtor's Answer was not timely filed and failed to controvert the allegations in the involuntary petition filed against him. Pursuant to § 303(h), therefore, the court "shall order relief against the debtor."

The Creditor's Motion for Default Entry and Order for Relief Pursuant to § 303(h), filed by the petitioning creditor C & B Custom Modular, Inc., is granted.

SO ORDERED.

/s/ Harry C. Dees, Jr.
HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT