In the United States Bankruptcy Court

for the Northern District of Iowa

EARL K. KILBERGER
Debtor(s).

Bankruptcy No. 94-11870KC
Chapter 7

ORDER RE DEBTOR'S MOTION FOR ABSTENTION OR DISMISSAL

On December 22, 1994, the above-captioned matter came on for hearing pursuant to assignment. Attorney James Bennett appeared on behalf of Debtor Earl K. Kilberger. Creditor United Fire & Casualty Co. was represented by Attorney Wesley Huisinga. The matter before the Court is Debtor's Motion for Abstention or Dismissal. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

STATEMENT OF THE CASE

United Fire filed a petition for involuntary bankruptcy against Debtor on November 17, 1994. United Fire holds an assignment of a judgment against Debtor in the amount of $192,941.31 plus interest and costs. It asserts that Debtor has failed to pay this claim which is not contingent or subject to a bona fide dispute. United Fire's amended petition claims that Debtor engaged in fraudulent conveyances by transferring property to his spouse without consideration.

Debtor moves for abstention or dismissal under 11 U.S.C. § 305(a)(1). He asserts that a petition in bankruptcy is not in the best interests of his creditors. He argues that adequate State court remedies exist to set aside alleged fraudulent conveyances which are sufficient to address United Fire's primary purpose in filing the involuntary petition.

The judgment held by United Fire arises from a 1990 auto accident in which Scott Cram was injured. The accident led to the commencement of a state court law suit by Scott Cram against Debtor in January 1992. Judgment was entered against Debtor in June 1993. Mr. Cram subsequently assigned his rights in the judgment to his insurer, United Fire.

United Fire is the only party identified as a creditor in this case. The petition states that Debtor has less than twelve creditors. There is no evidence that Debtor has other outstanding debts or that he is not current in paying any other debts. There are, however, notations on Debtor's vehicle titles of liens in favor of D & S Partners and the Tom Riley Law firm.

Debtor conveyed certain real estate to his spouse in March 1993. He states that he made the conveyances for estate planning purposes. Because of his serious health problems, he argues, his wife is better able to manage these income-producing properties on his behalf.

CONCLUSIONS OF LAW

An involuntary case may be commenced against a person pursuant to 11 U.S.C. § 303(a). If the petition is timely controverted, the Court may enter an order for relief against the debtor in an involuntary case if "the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute." 11 U.S.C. § 303(h)(1). The Court may dismiss a case or suspend all proceedings in a case if "the interests of creditors and the debtor would be better served by such dismissal or suspension." 11 U.S.C. § 305(a)(1).

This petition has been timely controverted by Debtor. Thus, a threshold question in this case is whether Debtor is generally not paying his debts as they become due. United Fire's claim does not appear to be subject to a bona fide dispute. Some courts have questioned whether the failure to pay a single creditor constitutes a failure to pay debts as they become due thereby subjecting a debtor to an involuntary petition.

Whether a debtor is paying undisputed debts is a question of fact requiring the court to look at the totality of the circumstances of each individual case. In re Concrete Pumping Serv., Inc., 943 F.2d 627, 629-30 (6th Cir. 1991). A court-developed rule not to allow involuntary cases where there is only a single creditor exists in some circuits. Id. at 629. The Eighth Circuit adopted this rule in In re Nordbrock, 772 F.2d 397, 399 (8th Cir. 1985), by accepting the district court's reasoning. The Court stated that "bankruptcy courts have concluded that, in the absence of fraud or some special need for bankruptcy relief, the failure to pay a single debt does not establish that a debtor is 'generally' not paying his debts." Id. at 400.

Courts frequently conclude that nonpayment of one debt is not a sufficiently general default under § 303(h)(1). Paroline v. Doling, 116 B.R. 583, 585 (Bankr. D. Ohio 1990). Exceptions to this rule exist where 1) there is fraud, trick, sham or artifice by the debtor or 2) the creditor has a special need for bankruptcy relief such as inadequate remedies at state law. Id. "A creditor does not have a special need for bankruptcy relief if it can go to state court to collect a debt." Nordbrock, 772 F.2d at 400.

Similar considerations arise when courts consider abstention under § 305(a)(1). The statutory test under § 305 is "best interests of creditors and the debtor". Courts must recognize that the interests of the debtor and the creditors to be weighed are unique to each case. In re Iowa Trust, 135 B.R. 615, 621 (Bankr. N.D. Iowa 1992). Abstention is most appropriate in involuntary cases. Id. Many courts have looked to a three-part test in considering § 305(a)(1) motions:

> (1) The petition was filed by a few recalcitrant creditors and most creditors oppose the bankruptcy;
>
> (2) there is a state insolvency proceeding or an out-of-court arrangement pending; and
>
> (3) that dismissal is in the best interest of the debtor and all creditors.

Id. at 622. Another case cataloged relevant factors and criteria other courts have used:

> Such factors generally include: (1) economy and efficiency of administration; (2) whether another forum is available to protect the interests of both parties or there is already a pending proceeding in a state court; (3) whether federal proceedings are necessary to reach a just and equitable solution; (4) whether there is an alternative means of achieving the equitable distribution of assets; (5) whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case; (6) whether a non-federal insolvency has proceeded so far in those proceedings that

> it would be costly and time consuming to start afresh with the federal bankruptcy process; and (7) the purpose for which bankruptcy jurisdiction has been sought.

Id., citing In re Fax Station, Inc., 118 B.R. 176, 177 (Bankr. D.R.I. 1990). The Court must be guided by the unique facts of each case and consider only the factors or criteria particularly relevant and applicable. Iowa Trust, 135 B.R. at 622.

Ordinarily, the Bankruptcy Court should not take jurisdiction over a two-party dispute absent special circumstances. In re Axl Indus., Inc., 127 B.R. 482, 484 (S.D. Fla. 1991), aff'd in part, dismissed in part, 977 F.2d 598 (11th Cir. 1992) (table). Allowing creditors to use the Bankruptcy Court as a routine collection device can quickly paralyze a court. Id. Courts should abstain in two-party disputes where the creditor can obtain adequate relief in a non-bankruptcy forum including the use of state court powers to set aside transfers. Id. at 485.

The avoidance of fraudulent transfers is not necessarily an appropriate reason to grant relief in an involuntary case. In re Frailey, 144 B.R. 972, 977 (Bankr. W.D. Pa. 1992). Such transfers could be equally avoided as fraudulent under state law in state court. Id. at 978. The court in Frailey concluded that "[a]side from the fact that this convenient and efficient forum is unavailable, there appears to be little or no prejudice to petitioning creditors if the present involuntary petition is dismissed at this time." Id. As noted above, Nordbrock also recognizes that when a creditor can go to state court for relief, no special need exists for bankruptcy relief. 772 F.2d at 400.

Using the Bankruptcy Court as a forum for the trial and collection of an isolated claim is a practice which has been strongly criticized. Nordbrock, 772 F.2d at 399, quoting In re Nordbrock, 52 B.R. 370, 371 (D. Neb. 1984). The creditor here is not seeking to use the Bankruptcy Court's exclusive powers to avoid a lien or transfer. See In re Grigoli, 151 B.R. 314, 321 (Bankr. E.D.N.Y. 1993) (refusing to dismiss involuntary petition in part because creditor's lien could be avoided under § 547 (b)). The alleged transfers made by Debtor occurred prior to the one-year or 90-day reach-back periods of §§ 547 and 548. United Fire conceded at the hearing that it would rely on Iowa law concerning fraudulent transfers which is governed by a five-year statute of limitations.

This Court concludes that it would be more economical and efficient for the Bankruptcy Court to refrain from becoming involved in this two-party dispute. No compelling reason is shown in this record why the Bankruptcy system should absorb the costs of administering the estate. Although United Fire alleges Debtor made fraudulent conveyances, there is insufficient specific evidence of Debtor's fraud, trick, sham or artifice in avoiding his debts to compel the Court to allow this involuntary case to go forward. State court can protect the interests of both parties through application of Iowa's fraudulent transfer laws. Federal proceedings are not necessary to provide appropriate relief. United Fire's desire to reach alleged fraudulent transfers can be achieved in State Court just as well as it can in this Court. Making this efficient and convenient forum available to United Fire is not sufficient or appropriate reason to allow this case to continue here.

WHEREFORE, Motion for Abstention or Dismissal is GRANTED.

FURTHER, this case is DISMISSED.

SO ORDERED this 3rd day of February, 1995.

Paul J. Kilburg
U.S. Bankruptcy Judge