In the United States Bankruptcy Court

for the Northern District of Iowa

KOCR-TV, INC.	Bankruptcy No. 95-11128KC
Debtor.	Chapter 7

ORDER RE DEBTOR'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO ABSTAIN

On August 4, 1995, the above-captioned matter came on for hearing pursuant to assignment. Present at the hearing were Janet Hong on behalf of Debtor KOCR-TV, INC. and Peter Riley on behalf of the petitioning creditors. The matter before the Court is Debtor's Motion to Dismiss or, in the Alternative, Motion to Abstain filed July 7, 1995. After the presentation of evidence and arguments of counsel, the Court took the matter under advisement. The deadline for briefs has now passed and this matter is ready for resolution. This is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(A).

STATEMENT OF THE CASE

On June 14, 1995, six creditors filed an involuntary petition against Debtor KOCR-TV, INC. The petition lists "Metro Program Network, Inc." ("Metro") as another name used by Debtor. Debtor is a corporation formed in 1993. It owns the license and other assets of a local television station which has been known by the call letters KOCR-TV since 1988. Gerald Fitzgerald is the sole shareholder of Debtor. Mr. Fitzgerald is also the sole shareholder of Metro which was incorporated in 1982. Metro operates and manages the television station known as KOCR-TV.

Mr. Fitzgerald has been negotiating the sale of the television station. He expresses confidence that the petitioning creditors' claims can be satisfied from the proceeds of the sale. He testified that he has been contacting creditors in an attempt to settle claims in an out-of-court agreement. He maintains that Debtor has no creditors and is not indebted to any of the petitioning creditors. He states that Debtor and Metro operate independently with each having its own function and finances. Debtor argues that it is not liable for debts incurred by Metro.

Creditor Linn Cooperative Oil Co. received a judgment for $7,505.97 plus interest and costs against KOCR-TV, INC. in Linn County District Court on January 4, 1995. MTM Distribution Group, Ltd. received a judgment in U.S. District Court on April 4, 1991 for $20,000 against "Metro Program Network, Inc., Gerald Fitzgerald, and KOCR-TV" pursuant to an agreement wherein the defendants confessed judgment. MTM asserts a total claim of $66,000. Creditor Roslin Television Sales asserts a claim evidenced by a letter dated August 15, 1991 from Gerald Fitzgerald designating Roslin as "KOCR-TV agent" for the purpose of collecting certain invoices to be applied to commissions owing Roslin. It asserts a total claim of $7,474.68 plus interest.

The remaining petitioning creditors are (1) Fosters Heating & Air Conditioning, Inc. with a claim of $725.34 for heating and cooling systems at the former KOCR-TV building; (2) Dodd & McClellan with a claim of $542.26 for legal services and (3) Broadcast Communications with a claim of $13,782.71 for installation of antennas on several towers. These claims are set out in the involuntary petition. No further documentation of these claims appears in the record and they do not appear to have been reduced to judgment. It is not clear from the record when these claims arose.

CONCLUSIONS OF LAW

Debtor requests that the Court dismiss the petition pursuant to 11 U.S.C. 303 or dismiss or abstain under 305. Debtor alleges that KOCR-TV, INC. is not liable for the debts of Metro Program Network, Inc. The petitioning creditors argue

that KOCR-TV, INC. is the alter ego of Metro which allows the Court to ignore the entities' corporate forms and hold Debtor liable for Metro's debts.

SUBJECT TO BONA FIDE DISPUTE UNDER 303

If an involuntary petition is timely controverted, the Court may enter an order for relief against the debtor 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). Debtor has timely controverted this involuntary petition. Thus, threshold questions include whether Debtor is generally not paying his debts as they become due and whether such debts are the subject of a bona fide dispute. 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 contested involuntary petition must be closely scrutinized because it is an extraordinary measure with serious consequences. In re Frailey, 144 B.R. 972, 976 (Bankr. W.D. Pa. 1992).

Section 303(b)(1) requires that an involuntary petition may be filed only by creditors holding claims against the debtor that are "not contingent as to liability or the subject of a bona fide dispute." The petitioning creditors must establish a prima facie case that no bona fide dispute exists, after which the burden shifts to the debtor to demonstrate that such a dispute does exist. In re Rimell, 946 F.2d 1363, 1365 (8th Cir. 1991), cert. denied, 504 U.S. 941 (1992). The Court must determine whether there is an objective basis for either a factual or legal dispute as to the validity of the debt. Id. In making this factual finding, the Court conducts a limited analysis of the legal issues to ascertain if an objective legal basis for the dispute exists. Id. The Court looks at the state of affairs as of the date of the petition in considering whether the petitioning creditors' claims qualify under 303(b). In re Atwood, 124 B.R. 402, 406 (S.D. Ga. 1991). The debtor may not defeat the petition by paying one of the debts after the petition is filed. Id.

In B.D.W. Assoc., Inc. v. Busy Beaver Building Centers, Inc., 865 F.2d 65, 68 (3d Cir. 1989), the court considered whether a bona fide dispute existed as to the debtor's liability under an alter ego theory. It concluded that under proven facts there was no potentially meritorious legal argument because a clear case existed for invocation of alter ego liability. Id. All the entities involved operated out of the same office, had the same principals and one of the entities was undeniably a mere shell. Id. at 67. The Seventh Circuit came to the opposite conclusion in In re Reid, 773 F.2d 945, 947 (7th Cir. 1985). Under the facts of that case, the court held that the individual debtor's personal liability for corporate debts was the subject of a bona fide dispute. Id. The creditors had not shown sufficient cause to pierce the corporate veil. Id. at 948.

PIERCING THE CORPORATE VEIL

The corporate device cannot in all cases insulate owners or other related entities from liability. In re Manchester Hides, Inc., 45 B.R. 794, 799 (Bankr. N.D. Iowa 1985). The corporate veil may be pierced if the corporation is a mere shell or an alter ego of its controlling owner which serves no legitimate business purpose. Adam v. Mt. Pleasant Bank & Trust Co., 355 N.W.2d 868, 872 (Iowa 1984). The following factors are instructive when applying the "pierce the corporate veil" test in Iowa:

[A] corporation's existence is presumed to be separate, but can be disregarded if (1) the corporation is undercapitalized, (2) without separate books, (3) its finances are not kept separate from individual finances, individual obligations are paid by the corporation, (4) the corporation is used to promote fraud or illegality, (5) corporate formalities are not followed or (6) the corporation is merely a sham.

Adam, 355 N.W.2d at 872; Manchester Hides, 45 B.R. at 800 (both citing Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc., 519 F.2d 634, 638 (8th Cir. 1978)).

DISMISSAL OR ABSTENTION UNDER 305

Besides denying liability for Metro's debts, Debtor also asserts that dismissal or abstention under 305(a)(1) would better serve the interests of creditors and Debtor. 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. However, it is an extraordinary remedy which must be invoked with great care. Its use should be the exception rather than the rule. In re Grigoli, 151 B.R. 314, 319 (Bankr. E.D.N.Y. 1993); Iowa Trust, 135 B.R. at 621. 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.

Iowa Trust, 135 B.R. 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.

CONCLUSIONS

Applying the foregoing to this record, the Court concludes that dismissal is appropriate both because the asserted claims are subject to a bona fide dispute and because dismissal would better serve the interests of the creditors and Debtor. Except for the claim of Linn Cooperative Oil, the record does not establish that Debtor KOCR-TV, INC. is itself directly liable to the petitioning creditors. The claims of MTM and Roslin both arose in 1991, prior to Debtor's incorporation in 1993. Fitzgerald's affidavit maintaining that the remaining claims are the liability of Metro, rather than Debtor, is uncontroverted in the record. The fact that Linn Cooperative had a valid claim against Debtor on the petition date is insufficient to support the involuntary petition. Debtor asserts in his post-hearing brief that Linn Cooperative's claim has now been paid. Disregarding the fact that Linn Cooperative's claim may have been paid postpetition, Linn Cooperative appears to be Debtor's only direct creditor. Bankruptcy Court is not the correct tribunal to take jurisdiction over two-party disputes. In re Axl Indus., Inc., 127 B.R. 482, 484 (S.D. Fla. 1991); In re Kilberger, No. 94-11870KC, slip op. at 3 (Bankr. N.D. Iowa Feb. 3, 1995).

The record fails to support the petitioning creditors' assertion that Debtor should be held accountable for Metro's debts under the alter ego theory of liability. The creditors have failed in their burden to establish a prima facie case that no bona fide dispute exists on the issue of piercing the corporate veil between Debtor and Metro. Without deciding the issue, the Court concludes that Debtor has an objective legal basis for disputing its liability for Metro's debts. The record does not establish that Debtor is clearly undercapitalized, without separate books, fraudulent, merely a sham or operating in any other manner which would satisfy the other factors set out in Adam and Manchester Hides.

The petition states that Metro Program Network, Inc. is another name used by Debtor KOCR-TV, INC. The Bankruptcy Court may treat two entities as one where their affairs are so entwined as to make it impossible to administer as separate entities. In re Crabtree, 39 B.R. 718, 723 (Bankr. E.D. Tenn. 1984). The petitioning creditors have not established on this record that Debtor's and Metro's affairs are so entwined. Joint involuntary petitions are not authorized by the Bankruptcy Code. In re Western Land Bank, Inc., 116 B.R. 721, 724 (Bankr. C.D. Cal. 1990).

The claims asserted by the petitioning creditors are subject to bona fide dispute. Therefore, the Court concludes that this case should be dismissed. Additionally, dismissal is in the best interests of the creditors and Debtor under 305(a). Debtor has serious negotiations underway for the sale of the television station license. It asserts that the sale will generate adequate funds to satisfy the claims of the petitioning creditors. Mr. Fitzgerald has also been allegedly

negotiating with creditors to satisfy claims in an out-of-court arrangement. The Court concludes that Debtor's interest in facilitating the sale of the license and the creditor's interests in having their claims satisfied would be better served if these negotiations are allowed to continue without interference by the Bankruptcy Court.

WHEREFORE, Debtor's Motion to Dismiss or, in the Alternative, Motion to Abstain filed July 7, 1995 is GRANTED.

FURTHER, this case is DISMISSED.

SO ORDERED this 19th day of September, 1995.

Paul J. Kilburg
U.S. Bankruptcy Judge