In the United States Bankruptcy Court

for the Northern District of Iowa

N2N INCORPORATED	Bankruptcy No. 98-01666-C
Debtor(s).	Chapter 7

RULING ON MOTION TO DISMISS INVOLUNTARY PETITION

On July 8, 1998, the above-captioned matter came on for hearing on Debtor's Motion to Dismiss Involuntary Petition. Debtor appeared by Attorney John Titler. The petitioning creditors and resistors to the Motion to Dismiss appeared by Attorney DJ Smith. The matter was argued to the Court and the parties were granted time to submit additional briefs. The time for filing 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 3, 1998, an involuntary Chapter 7 petition was filed against N2N, Incorporated. The petition lists three unsecured creditors: Cambridge Temp Positions, Inc. with a claim of $25,556.97; Cornerstone Press with a claim of $24,607.19; and PayCo.-General American Credits with a claim of $2,431.74. The request for relief did not contain the signatures of the petitioning creditors but did contain the signature of Attorney DJ Smith as Attorney for Petitioners. On June 8, 1998, counsel for the petitioning creditors filed two affidavits. The first affidavit was an affidavit of mailing. The second affidavit stated that through a scrivener's error the addresses of the petitioning creditors were inadvertently omitted from the petition. Additionally, there was a reference that the listed creditor, PayCo.-General American Credits is the collection agency for Creditor/Petitioner G.E. Capitol Auto Lease Corporation. The affidavit then lists the three following creditors with their addresses: Cambridge Temp Positions, Inc., Cornerstone Press, Inc., and G.E. Capitol Auto Lease Corporation.

On June 23, 1998, Debtor filed a Motion to Dismiss the involuntary petition. The Motion sets out two grounds. First, it asserts that the petition was not executed or verified by three petitioners as required by §303 of the Bankruptcy Code and Rule 1008 of the Bankruptcy Rules. Debtor asserts that Rule 1008 requires that each petitioning creditor sign and verify the contents of the petition. Debtor argues this is jurisdictional and, as the petition was not properly executed, the petition must be dismissed. Secondly, Debtor asserts that the petition was filed in bad faith in an attempt to avoid prosecution of a claim owned by Debtor against Cambridge Temp Positions, Inc.

The petitioning creditors filed a resistance to the Motion to Dismiss on June 25, 1998. On July 6, 1998, two additional creditors filed Motions for Joinder as Petitioner. These two creditors are Koch Brothers, Inc. and Pinnacle Engineering, Inc. The Koch Brothers' claim is in the amount of $177.16 and is verified and signed by Kent Festvog, its treasurer. The claim by Pinnacle Engineering is in the amount of $6,796 and is verified and signed by Joseph Jindrich, its President.

At the time of hearing on the Motion to Dismiss, the Court was presented with verifications signed by representatives of Cornerstone Press, Inc.; Cambridge Temp Positions, Inc.; and G.E. Capitol Auto Lease Corporation.

The parties acknowledge that they are only arguing the issue of whether the petition is adequate to confer jurisdiction on this Court. The issues of bad faith and creditor eligibility are reserved until a subsequent hearing which is scheduled for September 15, 1998 at 9:30 a.m. by separate order. As such, the only issue for adjudication under this Motion to Dismiss is whether the existing involuntary petition must be dismissed because it is fatally defective and does not confer

jurisdiction on this Court under 11 U.S.C. §303 and Federal Rule of Bankruptcy Procedure 1008.

CONCLUSIONS OF LAW

The issue is whether defects in the involuntary petition, if any, are jurisdictional or are curable by amendment. Two specific alleged defects are raised by Debtors. First, Debtor asserts that the petition is inappropriately executed by counsel for the petitioning creditors but is not signed by the creditors or verified. Second, Debtor raises issues concerning the number of creditors. This point is raised in two separate ways. Debtor asserts that in the original petition PayCo.-General American Credits is listed as an unsecured creditor with a claim in the amount of $2,431.74. Several days later, counsel for petitioning creditors filed an affidavit which stated that the original petition had inadvertently omitted the addresses of the petitioning creditors. Also in this affidavit, counsel for the petitioning creditors stated "PayCo.-General American Credits is the collection agency for creditor-petitioner G.E. Capitol Auto Lease Corporation; . . ."

Debtor asserts that it is unclear from these documents who the petitioning creditors are and the petition lists only two valid petitioning creditors. The second point raised by Debtor is that Cambridge Temp Positions, Inc., one of the petitioning creditors, does not qualify because its claim is disputed and the subject of a lawsuit pending in Iowa District Court.

Debtor first asserts that the failure of the petitioning creditors to sign and verify the petition is a fatal and jurisdictional flaw requiring dismissal. Bankruptcy Rule 1008 requires that all petitions filed under Title 11 shall be verified or contain an unsworn declaration. The form used by the petitioning creditors in this case does comply with the official forms which provide a space for the petitioning creditors to date and sign the petition. It is uncontested that the creditors did not sign the petition.

While Debtor asserts that the failure to properly execute the petition is jurisdictionally fatal, the weight of authority is to the contrary. The petitioning creditors cite In re LaClede Cab Co., 76 B.R. 687, 694 (Bankr. E.D. Mo. 1987), for the proposition that the absence of verification is not a fatal defect in an involuntary petition. Debtor asserts that this portion of the ruling was dicta and therefore, not controlling in this circuit. While true that the comment made in LaClede is dicta and no authority was cited in that case for the conclusion made, other courts nevertheless support this view. Both in Federal civil filings and in the bankruptcy court, courts have been willing to broadly interpret the Rules of Procedure to allow amendments to defective petitions rather than determine that irregularities are jurisdictional. The courts have almost unanimously held that though the petitions may be irregular in form, if the document adequately serves the function of a petition in that it indicates the nature of the dispute, the grounds of jurisdiction and the relief sought, the same will be determined to be a correctable document and not jurisdictionally invalid. Application of the President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1001 (D.C. Cir.), cert. denied 377 U.S. 978 (1964). Other courts, including bankruptcy courts, have determined that the absence of a proper verification does not deprive a bankruptcy court of jurisdiction over an involuntary petition. In re Mid-American Lines, Inc., 178 B.R. 514, 516 (Bankr. D. Kan. 1995); In re Raymark Indus., Inc., 99 B.R. 298, 300 (Bankr. E.D. Pa. 1989).

While the issue has not been directly resolved by the Eighth Circuit, the court in Financial Timing Publications v. Compugraphic Corp., 893 F.2d 936, 939 (8th Cir. 1990), observed that the elimination of the verification requirement is in keeping with the general modern distaste for verified pleadings. And, the Eighth Circuit has held in an older case that the attorney of a creditor may sign the client's name to an involuntary petition in bankruptcy and may verify that petition if the attorney is shown to have knowledge of the facts. Shingleton v. Armour Blvd. Corp., 107 F.2d 440 (8th Cir. 1939); see also In re Hunt, 118 F. 282 (N.D. Iowa 1902).

Thus, as a general proposition of law, the failure of the petitioning creditors to sign and verify the involuntary petition is not a jurisdictional defect and is curable. The petitioning creditors have now filed verifications and signatures by corporate officers of the respective creditors. The defect, if any, has been cured. As such, Debtor's Motion to Dismiss as to this point is not supported by the law and will be overruled.

Debtor next raises issues concerning standing of creditors or confusion over who the petitioning creditors are. Reduced to its essence, Debtor's argument is that three creditors are required to bring an involuntary petition and there is an

inadequate number of creditors either because of their failure to qualify or because of confusion as to the creditor's identity. Debtor claims that an adequate number of creditors filing an involuntary bankruptcy petition is a jurisdictional requirement and the petition must be dismissed.

This Court concludes that defects in the number of creditors in an involuntary petition does not deprive a bankruptcy court of subject matter jurisdiction. A failure to initially comply with requirements of §303(b) of the Code as to the number of creditors does not alone deprive the court of jurisdiction. It is a correctable error, assuming there exists an adequate creditor body to satisfy the requirements of §303(c). See In re Mason, 709 F.2d 1313, 1318-19 (9th Cir. 1983); In re Hutter Assocs., Inc., 138 B.R. 512, 516 (W.D. Va. 1992).

Assuming, without deciding, that an insufficient number of creditors is listed in the petition for either of the reasons stated by Debtor, this flaw, in and of itself, does not deprive the Court of jurisdiction and constitutes a correctable defect. As the record reflects, two additional creditors, Pinnacle Engineering, Inc. and Koch Brothers, Inc., have filed verified motions to join in the involuntary petition as petitioning creditors. Therefore, the defect has now been corrected.

Joinder as a petitioning creditor is a matter of right under §303(c). The language of this section allows an unlimited number of creditors to join in the involuntary petition. In re Kidwell, 158 B.R. 203, 211 (Bankr. E.D. Cal. 1993). As joinder is a matter of right, court approval of the joinder of these additional creditors is unnecessary. Upon their entry as additional creditors under verified joinders, these creditors are considered to be petitioning creditors. Section 303 provides that any unsecured creditor "may join in the petition with the same affect as if such joining creditor were a petitioning creditor under subsection (b) of this section." 11 U.S.C. §303(c). The joinder of the two additional creditors effectively resolves Debtor's objections that two creditors were insufficient to file the involuntary petition.

Debtor has indicated that any issues involving good faith would be reserved for final hearing on September 15, 1998. As such, the Court is not making a determination concerning good faith until the presentation of evidence at the time of full hearing. This ruling is limited to a finding that joinder by the two additional creditors to the existing pool of creditors satisfies the requirements of §303(b)(1). If subsequent issues of good faith continue to be raised, the Court reserves the right to review this joinder and consider the bar-to-joinder doctrine as defined by this Circuit in Basic Elec. Power Cooperative v. Midwest Processing Co., 769 F.2d 483, 486 (8th Cir. 1985), cert. denied 474 U.S. 1083 (1986).

WHEREFORE, Debtor's Motion to Dismiss Involuntary Petition is DENIED without prejudice.

FURTHER, the original Involuntary Petition along with subsequent filings by the petitioning creditors and joinder by additional creditors satisfy the requirements of §303 and Rule 1008.

FURTHER, Debtor may assert its argument that the petition was filed in bad faith at the hearing set for September 15, 1998.

FURTHER, as the pending motion is denied, Debtor shall comply with Fed. R. Bankr. P. 1011(b).

SO ORDERED this 31st day of July, 1998.

PAUL J. KILBURG

Paul J. Kilburg
U.S. Bankruptcy Judge