

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

IN RE

DBH LIMITED, INC.,

CASE NO. 98-10519

Debtor.

Chapter 7

**MEMORANDUM OPINION AND ORDER RE
DEBTOR'S MOTION TO DISMISS**

In ruling on the debtor's Motion to Dismiss, the Court is called upon to determine whether or not the involuntary chapter 7 petition filed against the debtor, DBH Limited, Inc. ("DBH"), satisfies the statutory requirements of 11 U.S.C. § 303(b). The petition was filed on May 16, 1997, by three of DBH's creditors. DBH alleges that it has more than twelve creditors and that two of the four petitioning creditors do not qualify under § 303. The creditors, on the other hand, assert that all four of them qualify to act as petitioning creditors under § 303. In the alternative, the creditors allege that DBH has less than twelve creditors and, as a result, only one qualifying petitioning creditor is needed to deny DBH's motion to dismiss. For the reasons set forth in this Memorandum Opinion and Order, the Court agrees with the debtor and grants their Motion to Dismiss.

The Court conducted a hearing on the debtor's motion on June 24, 1998. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. § 157(b), this is a core proceeding. After reviewing the testimony from the hearing and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACTS

The involuntary chapter 7 petition was filed against DBH on May 16, 1997, in the Bankruptcy Court for the Middle District of Tennessee. At that time, the petitioning creditors were AZUR-US, Inc., ("AZUR"), Doug Barrons, ("Barrons"), and Hugh Neil, Jr., ("Neil"). The amounts and natures of these creditors' claims were listed on the petition as follows:

- | | | |
|-------------------|-------------|-----------------|
| 1. AZUR-US, Inc. | \$37,865.10 | Promissory Note |
| 2. Doug Barrons | \$68,750 | Wages |
| 3. Hugh Neil, Jr. | \$5,000 | Wages |

Sometime in the Fall of 1997, Carl Ackerman, ("Ackerman"), and Trent-Moran Group, ("Trent-Moran") were added as petitioning creditors. Ackerman's claim was listed as \$264.41 for travel expenses and back pay. Trent-Moran's claim was listed as \$120.42 for computer services. On May 20, 1998, Trent-Moran was deleted from the case as a petitioning creditor. Along with this deletion of Trent-Moran, the nature of AZUR's claim was amended to "Judgment Creditor."

On December 30, 1997, DBH's involuntary case was transferred to the Western District of Tennessee, Eastern Division. This transfer was made based on DBH's primary place of business being in Adamsville, TN. DBH had a satellite office in Nashville.

In response to the involuntary petition, DBH filed their initial motion to dismiss on July 7, 1997. In such motion, DBH asserted that Neil's and Barrons' claims were subject to bona fide disputes and, therefore, they were disqualified from serving as petitioning creditors. DBH alleged that Neil had never been an employee of DBH and was not owed any wages as a result. DBH also alleged that Barrons', a non-US citizen, was not owed any back wages after January 1,

1995, because as of that date, Barrons' did not have a green card or visa which would allow DBH to pay Barrons' any wages without violating US immigration law. DBH did not dispute the validity of AZUR's claim or AZUR's eligibility to serve as a petitioning creditor. DBH did assert, however, that they had more than twelve creditors and, as a result, three qualifying petitioning creditors were required before their involuntary chapter 7 case could continue.

Once the case was transferred to the Western District of Tennessee and Ackerman was added as a petitioning creditor, DBH renewed their motion to dismiss. In this renewal, DBH asserted that Ackerman's claim was also subject to a bona-fide dispute. DBH admitted that they owed Ackerman the \$264.41 for the travel expenses, but asserted that Ackerman owes them over \$700 as reimbursement for a \$1000 travel expense that was advanced but never repaid.

Prior to the hearing on DBH's motion to dismiss, DBH provided the attorney for the petitioning creditors with a list of its creditors. This list included the following creditors:

1. Joe Carson & Associates
2. Clinton Industries
3. Maness Wordworks
4. Lawless Welding
5. Moore's Sawmill
6. Trent-Moran Group
7. Joe Cross
8. AZUR-US
9. James Austin
10. King Manufacturing
11. Carl Ackerman
12. Bell South
13. Nashville Electric Service
14. United Parcel Service

15. DBH Attachments¹
16. Tenn. Dept. Employment Security
17. Communi Group
18. State of Tennessee

Neither Barrons' or Neil was listed by the debtors as a creditor. Absent from this list, but proof of which was introduced at the hearing, are the law firm of Brown, Brasher & Smith and the Clerk and Master of the Chancery Court for Davidson County. Brown, Brasher & Smith handled the legal representation of DBH in AZUR's lawsuit against it. The debt owing to the Clerk and Master is for court costs associated with that litigation.

The petitioning creditors objected to DBH's motion to dismiss. In their brief in opposition to the motion, the creditors asserted that the majority of these debts had been satisfied since the involuntary case against DBH was filed. At the hearing on the debtor's motion, Joe Carson, DBH's outside CPA, admitted that the Tennessee Dept. Of Revenue and the Nashville Electric Service debt had been paid, but that all other debts on the petition had not been paid at the time the petition was originally filed in May 1997. No proof was presented to contradict this testimony.

II. CONCLUSIONS OF LAW

According to 11 U.S.C. § 303(b), an involuntary chapter 7 or 11 case is commenced against a person by the filing of a petition

- (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture trustee representing such a holder, if such claims

¹ DBH Attachments is a business owned by two of DBH Limited's stockholders and owners, Brenda and Dean Hunt. DBH Attachment's claim is for money it loaned DBH Limited.

aggregate at least \$10,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;
(2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more such holders that hold in the aggregate at least \$10,000 of such claims;

11 U.S.C. § 303(b). The number of a debtor's creditors is to be determined as of the date the petition was filed. *In re Norris*, 183 B.R. 437, 450 (Bankr. W.D. La. 1995). Any subsequent satisfaction of a claim does not decrease the number of creditors for purposes of § 303. *Id.*

In the case at bar, the proof presented at the hearing established that DBH had seventeen creditors.² This counting does not include the law firm of Brown, Brasher & Smith or the Clerk and Master for Davidson County. Even if the Court excludes Ackerman as an employee and DBH Attachments as an insider, DBH still had fifteen creditors as of the date the petition was filed. As a result of this number, three qualifying creditors were required to commence an involuntary case against DBH.

Four of DBH's creditors filed the involuntary chapter 7 petition against it. According to § 303, only creditors who hold claims that are "not contingent as to liability or the subject of a bona fide dispute" may join in an involuntary petition as a petitioning creditor. 11 U.S.C. § 303(b). In the case of *Booher Enterprises v. Eastown Auto Co. (In re Eastown Auto Co.)*, 215 B.R. 960 (Bankr. 6th Cir. 1998), the Bankruptcy Appellate Panel for the Sixth Circuit set forth the standard by which the contingency or dispute over a claim is to be judged:

'The legislative history makes it clear that Congress intended to disqualify a

² Trent-Moran is not included in this count, as they indicated in documents presented to the Court that they consider their claim satisfied.

creditor whenever there is any legitimate basis for the debtor not paying the debt, whether that basis is factual or legal.' . . . '[I]f there is either a genuine issue of material fact that bears upon the debtor's liability, or a meritorious contention as to the application of law to undisputed facts, then the petition must be dismissed.' In determining whether a claim is subject to a bona fide dispute, the bankruptcy court must not resolve any genuine issues of fact or law.

Id. at 965 (citing *In re Lough*, 57 B.R. 993, 997 (Bankr. E.D. Mich. 1986)).

In the case at bar, DBH asserts that Barrons is not qualified to act as a petitioning creditor because they do not owe him any back wages. This assertion is based on DBH's understanding that Barrons did not possess a valid green card or visa which entitled him to keep working in the United States after January 1995. DBH testified that if they had paid him, they would have been in violation of federal immigration law. The Court finds this contention to be meritorious in that it disputes the debt based on the application of a particular body of law to the facts. As a result of this finding, the Court finds Barrons is not qualified to act as a petitioning creditor in this case.

DBH also asserts that Neil is not qualified to serve as a petitioner in that he never worked for DBH. No proof was presented to the Court to contradict this assertion. As a result, the Court finds there to be a genuine and bona fide dispute as to DBH's liability with regard to Neil based on this issue of fact. Neil is not qualified to serve as a petitioning creditor in this case.

DBH also alleges that Ackerman is not qualified to serve as a petitioning creditor because he owes DBH money which offsets his claim. The Court also finds this contention to be a bona fide dispute as to Ackerman's claim and disqualifies Ackerman from serving as a petitioning creditor.

Because the Court has found DBH had more than twelve creditors on the date the petition

was filed and because the Court has also found three of the four petitioning creditors are not qualified to serve as petitioning creditors under § 303, the Court has no choice but to grant the debtor's motion to dismiss. An order will be entered accordingly.

III. ORDER

It is therefore **ORDERED** that the Debtor's Motion to Dismiss is GRANTED.

IT IS SO ORDERED.

By the Court,

G. Harvey Boswell
United States Bankruptcy Judge

Date: September 21, 1998