affirmed on appeal 3/28/00

not intended for publication

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE

DBH Limited, Inc. **CASE NUMBER 98-10519**

Chapter 7

MEMORANDUM OPINION AND ORDER RE
DEBTOR'S MOTION FOR ATTORNEY FEES AND COSTS

The Court conducted a hearing on the Debtor's Motion for Attorney Fees and Costs on December 16, 1998. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. § 157(b)(2), 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.

By order of this Court, the involuntary chapter 7 petition against DBH Limited, Inc., was dismissed on September 21, 1998. The Court dismissed the petition because it found that three of the four petitioning creditors were not qualified to serve as petitioning creditors under 11 U.S.C. § 303. The debtor has now moved the Court to order the petitioning creditors to pay DBH's attorneys' fees and costs under 11 U.S.C. § 303(i).

Pursuant to § 303(i), a bankruptcy court has the discretion to award the debtor costs and/or "a reasonable attorney's fee." 11 U.S.C. § 303(i)(1); *See also In re Reid*, 854 F.2d 156 (7th Cir. 1988), *In re Gills Creek Parkway Assoc.*, 194 B.R. 59 (Bankr. D.S.C. 1995). In the case of *In re Fox*, 171 B.R. 31 (Bankr. E.D.Va. 1994), a Court's power to award fees under § 303(i) was described as follows:

> Thus, a bankruptcy court is left to its own discretion as to whether costs and attorney fees should be awarded pursuant to § 303(i)(1), and the result is properly determined by a totality of circumstances test.

Id. Unlike its counterpart, § 303(i)(2), § 303(i)(1) does not require a finding of bad faith in order to award costs and fees against the petitioners. Despite this low threshold, few courts have awarded costs and attorney's fees under § 303(i)(1). *In re Allen Rogers and Co*, 34 B.R. 631 (Bankr. S.D.N.Y. 1983); *In re Camelot, Inc.*, 25 B.R. 861 (Bankr. E.D.Tenn. 1982), *aff'd* 30 B.R. 409 (Bankr. E.D.Tenn.1983).

In looking at the totality of the circumstances in this case, the Court does not feel that it is proper to award the debtors attorney's fees and costs under § 303(i)(1). When this case was first transferred to this Court, the Court had to order the debtors to provide the petitioners with a list of creditors. The debtor drug its feet in so doing. As a result of this delay, the Court had to postpone the trial on the motion to dismiss. This continuance caused not only the debtors additional costs and fees but also the creditors. Had the debtor been forthright and provided the list when first requested, the case would have concluded more quickly and the fees and costs would have been substantially less.

III. ORDER

It is therefore **ORDERED** that the Debtor's Motion for Attorney Fees and Costs is **DENIED.**

It is so ordered.

By the Court,

_____

G. Harvey Boswell

United States Bankruptcy Judge

Date: January 29, 1999

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE

DBH Limited, Inc. **CASE NUMBER 98-10519**

Chapter 7

No. 99-1108

-ADDITIONAL FINDINGS OF FACT-

On January 29, 1999, this Court issued a Memorandum Opinion and Order denying the debtor's motion for attorney's fees. In denying this request, the Court relied upon a totality of the circumstances test and held that the debtor's delay in providing the petitioners with a list of creditors did not entitle them to an award of attorney's fees under § 303(i)(2) of the Bankruptcy Code.

Upon the debtor's appeal of that order, the District Court for the Western District of Tennessee, Eastern Division remanded the case to this Court for further findings of fact. In accordance with that order, the Court issues this "Additional Findings of Fact."

The involuntary petition against DBH Limited, Inc., ("DBH"), was originally filed on May 16, 1997, in the Bankruptcy Court for the Middle District of Tennessee. Upon the debtor's motion for a change of venue, the case was transferred to the Western District of Tennessee, Eastern Division on January 6, 1998.

During the hearing for the Motion to Transfer Venue in the Middle District of Tennessee, it was established that the debtor transferred all of its assets to DBH Attachments in order to

avoid paying the judgment AZUR-US had obtained against it prior to filing the involuntary petition. When questioned by the attorney for the petitioners, Carl Ackerman, Vice-President of Sales and a shareholder for DBH Limited, testified as follows:

> Q. In other words, did the Ackermanns — I mean, did the — did the Hunts state why they were making the transfer?
> A. I — in a — deposition I gave to you earlier, you asked me that, and I said, yes, that the discussion was about the debt owed to Azur, and we did not — we were not going to pay that debt.

Transcript, Motion to Transfer, December 23, 1997, p. 33.

Prior to the transfer of the case from the Middle District, the petitioning creditors filed a motion to require debtor to file a list of creditors with the Middle District Court. Such motion was set for a hearing, but was not resolved before the case was transferred.

On April 16, 1998, the debtors filed a "Renewed Motion to Dismiss."[1] At the original setting for this motion, the attorney for the petitioners told the Court that their repeated requests for a list of DBH's creditors had gone unanswered. When the debtor's representative began testifying, it became apparent that the petitioners' assertion was indeed true. As a result, the Court reset the hearing for June 24, 1998, and orally ordered DBH to turn over the list of creditors to the petitioners prior to that date.

At the June 24, 1998, hearing on DBH's motion to dismiss, the core issue in dispute was the number of creditors the debtor had at the time of the filing of the involuntary petition. It was established through the testimony at this hearing that, the debtors had seventeen creditors at the

[1]The original motion to dismiss was filed in the Middle District of Tennessee, but was not resolved before the motion to transfer venue was granted.

time of filing; however, the testimony also established that DBH selectively paid off several creditors during the pendency of the case, such that at the time the Court heard the motion to dismiss, there were less than twelve creditors.

At the hearing on DBH's motion for attorney's fees, the Court reviewed the entire history of the case prior to ruling on the motion. The Court considered the fact that had DBH cooperated and promptly provided an accurate list of creditors after the filing, the case probably would never have been transferred. Instead DBH chose to withhold the single most important item of evidence. The Court further considered the fact that at the time of filing, DBH was in fact insolvent and further that they were not paying their debts timely. The only dispute ever in the case was whether there needed to be one or three petitioning creditors and if three were needed, were the three who petitioned holding undisputed claims. This fact was not ascertainable until DBH finally provided the list of creditors, some thirteen (13) months after the case filing.

By the Court,

G. Harvey Boswell
United States Bankruptcy Judge

Date: August 11, 1999

UNITED STATES BANKRUPTCY COURT
EASTERN DIVISION
FILED

AUG 0 3 1999

JED G. WEINTRAUB
CLERK OF COURT
WESTERN DISTRICT OF TENN.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

FILED BY ____ D.C.

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ROBERT R. DI TROLIO
CLERK, U.S. DIST. CT.
W. D. OF TN JACKSON

IN RE: DBH LIMITED, INC.,	)	No. 98 - 1108
	)	Bankr. No. 98-10519
DEBTOR,	)	CHAPTER 7

ORDER REMANDING CASE FOR FURTHER FINDINGS

Appellant DBH Limited, Inc. ("Debtor") has appealed the order of the United States Bankruptcy Court denying the Debtor's Motion for attorney fees and costs. Pursuant to 28 U.S.C. § 158, this court has jurisdiction to hear this appeal. For the reasons set forth below, this action is REMANDED for further findings.

Background

On May 16, 1997, three petitioning creditors filed an involuntary chapter 7 petition against the Debtor in the United States Bankruptcy Court for the Middle District of Tennessee. The case was subsequently transferred, on December 30, 1997, to the United States Bankruptcy Court for the Western District of Tennessee because the debtor's primary place of business was located in the Western District. On July 7, 1997, the Debtor filed a successful motion to dismiss the involuntary petition. An appeal has resulted from that decision and is currently in this Court as Civil No. 98-1303. Subsequent to the dismissal of the involuntary petition, the Debtor moved the Bankruptcy Court for recovery of attorney fees and expenses pursuant to 11 U.S.C. §303(i). In a Memorandum Opinion and Order, the Bankruptcy Court denied the Debtor's Motion for

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attorney fees and costs by stating:

> In looking at the totality of the circumstances in this case, the Court does not feel that it is proper to award the debtors attorney's fees and costs under § 303(i)(1). When this case was first transferred to this Court, the Court had to order the debtors to provide the petitioners with a list of creditors. The debtor drug its feet in so doing. As a result of this delay, the Court had to postpone the trial on the motion to dismiss. This continuance caused not only the debtors additional costs and fees but also the creditors. Had the debtor been forthright and provided the list when first requested, the case would have concluded more quickly and the fees and costs would have been substantially less.

The Debtor filed a Motion for Reconsideration on February 26, 1999. The Creditors filed an objection to the motion on March 15, 1999. The Bankruptcy Court denied the Debtor's Motion for Reconsideration. On April 7, 1999 the Debtor filed a Notice of Appeal from the Bankruptcy Court's order denying attorney fees and expenses and order denying motion for reconsideration. No response has been filed.

A fee determination by a bankruptcy judge will not be disturbed absent an abuse of discretion. Such an abuse of discretion "can only occur when the bankruptcy judge fails to apply the proper procedures in making the determination, or bases an award upon findings of fact that are clearly erroneous." In re A&A Energy Properties, Ltd., 1988 WL 135910 (6th Cir.) (citing Matter of U.S. Golf Corp., 639 F.2d 1197, 1201 (5th Cir. 1981).

The Appellant contends that the ruling of the Bankruptcy Court was an abuse of discretion because it was based on the erroneous finding that "the Court had to order the debtors to provide the Petitioners with a list of creditors. The debtor drug it's feet in so doing. As a result of this delay, the Court had to postpone the trial of the Motion to Dismiss." Since that finding of fact appears to be erroneous, the ruling of the Bankruptcy Court was an abuse of

discretion in that specific regard. However, the Bankruptcy Court stated that it based its ruling upon "the totality of circumstances," although the Bankruptcy Court did not mention any other factor in its determination. What is unclear from the Memorandum and Opinion re Debtor's Motion for Attorney's Fees and Costs filed on January 29, 1999 is what other circumstances, if any, the Bankruptcy Court relied upon when it referred to the "totality of circumstances".

Thus, this cause is REMANDED to the United States Bankruptcy Court for the limited purpose of describing what other circumstances, if any, were relied upon when the Bankruptcy Court referred to the "totality of circumstances." Jurisdiction will be retained in this court pending receipt of the supplemental opinion of the Bankruptcy Court.

IT IS SO ORDERED.

James D. Todd

JAMES D. TODD
UNITED STATES DISTRICT JUDGE

August 2, 1999
DATE

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ROBERT R. DI TROLIO
CLERK, U.S. DIST. CT.
W. D. OF TN JACKSON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

DBH LIMITED, INC.

v.

AZUR-US, INC.

JUDGMENT IN A CIVIL CASE

CASE NO. : 99-1108

DECISION BY THE COURT. This action came to consideration before the court. The issues have been considered and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that in compliance with Order Affirming Decision of Bankruptcy Court, filed on March 17, 200, this case is hereby DISMISSED.

UNITED STATES BANKRUPTCY COURT
EASTERN DIVISION
FILED
MAR 28 2000
JED G. WEINTRAUB
CLERK OF COURT
WESTERN DISTRICT OF TENN.

APPROVED:

James D. Todd

JAMES D. TODD
UNITED STATES DISTRICT JUDGE

3-27-2000
DATE

ROBERT R. DI TROLIO
CLERK OF COURT

BY: [signature]
DEPUTY CLERK

This document entered on the docket sheet in compliance with Rule 58 and/or 79 (a) FRCP on 3-27-00

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FILED BY ____ D.C.

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ROBERT R. DI TROLIO
CLERK, U.S. DIST CT.
W. D. OF TN JACKSON

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE: DBH LIMITED, INC.,	)	
	)	
Debtor.	)	
	)	
	)	
DBH LIMITED, INC.,	)	No. 99-1108
	)	Bankr. No. 98-10519-GHB
Appellant,	)	
	)	
VS.	)	
	)	
AZUR-US, INC.,	)	
	)	
Appellee.	)	

UNITED STATES BANKRUPTCY COURT
EASTERN DIVISION
FILED
MAR 28 2000
JED G. WEINTRAUB
CLERK OF COURT
WESTERN DISTRICT OF TENN.

ORDER AFFIRMING DECISION OF BANKRUPTCY COURT

On May 16, 1997, three petitioning creditors, including AZUR-US, Inc. (AZUR), filed an involuntary chapter 7 bankruptcy petition against the Debtor, DBH Limited, Inc., in the United States Bankruptcy Court for the Middle District of Tennessee. On July 7, 1997, the Debtor filed both a motion to dismiss the petition and a motion for a change of venue. On January 6, 1998, the bankruptcy court granted the motion for change of venue, and the case was transferred to the Bankruptcy Court for the Western District of Tennessee, Eastern Division. The motion to dismiss the petition was renewed by the Debtor, and the Bankruptcy

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Court for the Western District granted the motion for dismissal on September 21, 1998.[1]

The Debtor filed a motion for attorney fees and costs pursuant to 11 U.S.C. § 303(i) on October 23, 1998, which was opposed by AZUR. The Bankruptcy Court denied the motion on January 29, 1999. A motion for reconsideration was filed, which was denied on March 29, 1999. The Debtor then filed this appeal, and the record was transmitted to this Court on May 6, 1999.

The Debtor filed a brief pursuant to Fed. R. Bankr. P. 8009, but no brief was filed by AZUR within the allotted time period. On August 2, 1999, the Court remanded the case to the Bankruptcy Court for additional findings.[2] The Court noted that in denying the motion for attorney's fees and costs, the Bankruptcy Court had relied, in part, upon the Debtor's failure to promptly provide AZUR with a list of creditors after having been ordered to do so. That statement appeared to be erroneous. However, as the Bankruptcy Court stated that the ruling was based upon the totality of the circumstances, the Court remanded for clarification as to what other circumstances were relied upon in the decision to deny the motion. The Bankruptcy Court issued its additional findings on August 11, 1999, and this Court then allowed both parties to file supplemental briefs.

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[1] AZUR-US appealed the dismissal of the petition to this court, which affirmed the bankruptcy court's decision on June 10, 1999. *In re* DBH Limited, Inc., #98-1303. An appeal is currently pending before the United States Court of Appeals for the Sixth Circuit.

[2] Following the order of remand, Nader Baydoun, counsel for AZUR, contacted the court and advised that neither he nor his co-counsel had received a copy of the notice of appeal, or any other documents thereafter, including the Debtor's brief. Counsel for the Debtor, however, assured Mr. Baydoun that he had served copies of every filing on both Baydoun and his co-counsel, and did not know why they had not received them.

A district court should not overturn the factual findings of a bankruptcy court on appeal unless they are clearly erroneous. Fed. R. Bankr. P. 8013. See *In re* Southern Indus. Banking Corp., 809 F.2d 329, 331 (6th Cir. 1987); *In re* H & S Transp. Co., 110 B.R. 827, 829 (Bankr. M.D. Tenn. 1990). Therefore, when a judge's inferences are reasonable and supported by the evidence, they will not be disturbed. Southern Indus., 809 F.2d at 829. However, questions of law are reviewed de novo. See *In re* Tudor Assocs., Ltd., 20 F.3d 115, 119 (4th Cir. 1994).

Following the dismissal of an involuntary petition, a bankruptcy court has the discretion to award the debtor costs and/or "a reasonable attorney's fee." 11 U.S.C. § 303(i)(1). A finding that the petition was filed in bad faith, while relevant, is not necessary for such an award,[3] and the court should make its determination based on the totality of the circumstances. See *In re* Ross, 135 B.R. 230, 237 (Bankr. E.D. Pa. 1991); see also *In re* Scrap Metal Buyers of Tampa, Inc., 233 B.R. 162, 164-65 (Bankr. M.D. Fla. 1999); *In re* Gills Creek Parkway Assocs., L.P., 194 B.R. 59 (Bankr. D.S.C. 1995). There is no allegation that the petition in this case was filed in bad faith.

As noted in the order of remand, the Bankruptcy Court stated, in the order initially denying the Debtor's motion for attorney's fees and costs:

> the Court had to order the debtors to provide the petitioners with a list of creditors. The debtor drug its feet in so doing. As a result of this delay, the Court had to postpone the trial on the motion to dismiss. This continuance

[3] A determination that the petition was filed in bad faith is necessary under § 303(i)(2), which authorizes an award of compensatory and/or punitive damages. The Debtor did not seek such damages in this case.

> caused not only the debtors additional costs and fees but also the creditors. Had the debtor been forthright and provided the list when first requested, the case would have concluded more quickly and the fees and costs would have been substantially less.

In its additional findings of fact, the Bankruptcy Court stated:

> At the original [May 20, 1998] setting for this motion [to dismiss], the attorney for the petitioners told the Court that their repeated requests for a list of DBH's creditors had gone unanswered. When the debtor's representatives began testifying, it became apparent that the petitioners' assertion was indeed true. As a result, the Court reset the hearing for June 24, 1998, and orally ordered DBH to turn over the list of creditors to the petitioners prior to that date.
>
> At the June 24, 1998, hearing . . . the core issue in dispute was the number of creditors the debtor had at the time of the filing of the involuntary petition. It was established through the testimony at this hearing that, the debtors had seventeen creditors at the time of filing; however, the testimony also established that DBH selectively paid off several creditors during the pendency of the case, such that at the time the Court heard the motion to dismiss, there were less than twelve creditors.
>
> At the hearing on DBH's motion for attorney's fees, the Court reviewed the entire history of the case prior to ruling on the motion. The Court considered the fact that had DBH cooperated and promptly provided an *accurate list of creditors* after the filing, the case probably would never have been transferred. Instead DBH chose to withhold the single most important item of evidence. The Court further considered the fact that at the time of filing, DBH was in fact insolvent and further that they were not paying their debts timely. The only dispute ever in the case was whether there needed to be one or three petitioning creditors and if three were needed, were the three who petitioned holding undisputed claims. This fact was not ascertainable until DBH finally provided the list of creditors, some thirteen (13) months after the case filing. (Emphasis added).

The complete transcript of the May 20, 1998, hearing has been made a part of the record in this appeal. The transcript shows that the Bankruptcy Court was concerned not with the Debtor's failure to provide a list of creditors at all, since it clearly had, but with the failure to provide a current list, along with the documentation that was needed to verify the

accuracy of the list. The Bankruptcy Court noted that a discovery request for the necessary documentation had been made at least five months previously, but there had been no response from the Debtor. Instead, counsel attempted to introduce the documents at the trial without opposing counsel having had adequate time to examine them.

> The Court: Mr. Teel, he has asked for these in discovery and didn't get them. How long ago did you ask for them, Mr. Baydoun?
>
> Baydoun: Months, your honor.
>
> The Court: This hearing in Nashville was in December, Mr. Teel. Now this is May, the end of May, five months, and now you want to give him five minutes. Do you think that is fair? Put yourself in his position. . . . I am going to give you a month. I want the documents copied and served to him like they were requested. It is even in here where he asked for them, in this transcript of the hearing to transfer this case. . . .
>
> . . .
>
> The Court: . . . There has been a request made for production of documents months ago, and now we come in here with them wrapped up in a rubber band saying, "Well, we didn't have a chance to give them to you." . . .
>
> So I am telling you we are going to take this up on June the 24th, and I want the documents produced, I want any other documents produced. I want any other list of creditors. He asked for a list of creditors and now we are saying, well, we got creditors, we don't have creditors. I want to know where they are paid. I see on this list here of creditors, this DBH Attachments is shown as a creditor. Well, if they have been paid by foreclosure on the assets of this, they are not a creditor anymore. I want a current list provided to the petitioner of all of the creditors with addresses and amounts and copies of any invoices or any other related documents that they have. . . .

(Tr. Hrg., May 20, 1998, at 25-28).

Although the Bankruptcy Court perhaps misspoke when it implied that the Debtor had not provided a list of creditors at all, the Court went on to explain that it was the failure to

provide an accurate list of creditors in a timely fashion that caused substantial delay in the disposition of the petition. In assessing the totality of the circumstances, the Bankruptcy Court relied upon this fact, along with the evidence that the Debtor was insolvent and was not paying its debts on time. The Bankruptcy Court also stated that it was established that the Debtor had transferred all of its assets to avoid paying the judgment that AZUR had obtained against it. In addition, the Debtor selectively paid off several of its creditors after the petition was filed, so that there were actually fewer than twelve creditors at the time the Court heard the motion to dismiss.

The Court concludes that the Bankruptcy Court's denial of the Debtor's motion for attorney's fees and costs was not based on factual findings that were clearly erroneous, and was not an abuse of discretion. Therefore, the decision of the Bankruptcy Court is AFFIRMED.

IT IS SO ORDERED.

James D. Todd

JAMES D. TODD
UNITED STATES DISTRICT JUDGE

3-17-2000

DATE