

§ 303(b) - involuntary petition - holders of joint claim do not qualify as separate creditors for jurisdictional requirement of 3 separate creditors to file involuntary case.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

FILED
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Date 1/30/90
MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia
Chapter 11 Case
Number 88-41165

In the matter of:)
JAMES P. ATWOOD)
Debtor)

MEMORANDUM AND ORDER

The Motion for Summary Judgment filed by James P. Atwood ("Atwood") in connection with the involuntary bankruptcy proceedings commenced by Chapter Sipple III and Joel Gibson ("Sipple and Gibson") and Michael J. Gannam ("Gannam"), having come on for hearing and briefs and affidavits having been presented and considered, the Court hereby enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The involuntary bankruptcy proceeding in this case was initiated on October 25, 1988, by the filing of a petition by

Sipple, Gibson and Gannam. Atwood filed an answer responding that he was not properly subject to the jurisdiction of this Court. At issue is Atwood's Motion for Summary Judgment wherein he contended that petitioning creditors had not complied with the provisions of 11 U.S.C. Section 303 requiring a minimum of three petitioning creditors where a debtor has twelve or more creditors.

In support of his Motion for Summary Judgment, Atwood attached an affidavit which set forth his creditors and their claims at the time of the filing of the involuntary petition. Atwood's affidavit reveals that Atwood had more than twelve (12) creditors at the time the involuntary petition was filed by petitioners. Indeed, in that affidavit he swears that he owed thirty-five (35) separate creditors as of that date. Some of those debts have been paid by Debtor post-petition and an issue as to what effect post-petition payment has on an involuntary case was raised. Other debts have been asserted by the petitioning creditors not to be bona fide debts of Atwood. However, after an examination of the entire record, including the deposition of Mr. Atwood, I conclude that even after excluding debts that were paid post-petition and debts that are not bona fide obligations of Mr. Atwood, he owed twelve or more creditors as of the filing date. Evidence concerning these debts is found in the record as follows:

Claimant

October 1989 Deposition Page

1) Charles Loncon	18
2) Joe Odum	24
3) Thomas Rachels	25-26
4) William Cook	28-29
5) Sarah Canier	30-31
6) Adam Cerbone	34-35
7) Ken Leonard	41-43
8) Elmer Pratt	43-44
9) Barnard Portman	46-47
10) Neal Judd	47-48
11) Joe Bergen	48-51
12) Oscar Floran	54-55
13) Robert Cook	64-65
14) Sipple and Gibson	Superior Court Judgment

While the documentation underlying some of these debts was not produced Debtor testified under oath as to the basis of each debt and the approximate amount owed in sufficient detail for me to hold that such claims exist. In this regard 11 U.S.C. Section 101(4) defines "claim" as a:

- (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured;

Given the definitional breadth of the word "claim" for bankruptcy purposes and the uncontradicted testimony of Atwood that the above

obligations were owed pre and post petition it is inescapable that the number of holders of claim for purposes of 11 U.S.C. Section 303 analysis is fourteen.

CONCLUSIONS OF LAW

The involuntary bankruptcy process is governed by 11 U.S.C. Section 303, subsection (b)(1), which provides:

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under Chapter 7 or 11 of this title [11 U.S.C. §§701 et seq. 1101 et seq.]--

(1) [If 12 or more claimholders,] 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 aggregate at least \$5,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims.
(Emphasis added)

This Court has determined that Atwood had more than twelve creditors at the commencement of the case by the petitioners. Thus, in order to enter an order for relief against Atwood, this Court must also

find that the case was commenced by three or more entities, each of which is either a holder of a claim against Atwood that is not contingent as to liability or the subject of a bona fide dispute or an indenture trustee representing such a holder. 11 U.S.C. §303(b).

Sipple and Gibson are creditors of Atwood by virtue of a judgment entered in their favor in the Superior Court of Chatham County. On its face, the judgment is in favor of them jointly, there being no indication of separate awards to either of them. Gannam is a creditor by virtue of an order entered in the same Superior Court case which required Atwood to pay Gannam's fees for his services as auditor. Gannam has now filed a request to withdraw as a petitioning creditor indicating that he has been paid post-petition. Inasmuch as I am granting Debtor's Motion for Summary Judgment on alternate grounds, I do not consider herein the effect of post-petition payment to Gannam or his petition to withdraw.

Sipple and Gibson's status as the co-holders of a judgment is similar to that of joint-payees on a promissory note. Other bankruptcy courts have held that joint payees on a promissory note are not each the holders of a different claim against a debtor. In re McMeekin, 18 B.R. 177 (Bankr. D.Mass. 1982). In McMeekin, the court determined that joint ownership of a single claim does not

make each payee the "holder of a claim." Id. at 178. Furthermore, the court held that joint "ownership" of a single claim which is not otherwise severable does not entitle both individuals each to qualify as holders of a claim under 11 U.S.C. Section 303(b)(1).

There being only one claim, as such, both entities cannot be the 'holder' of the same claim, nor is the claim divisible, for the note does not contain a promise to pay \$15,000 to Robert Tolvo and a like promise to pay Ruth Tolvo, but rather, states one promise to pay \$15,000 to the both of them. As such, there arises but one 'right to payment', and therefore, one claim.

Id. at 178 (quoting from McMeekin, 18 B.R. 805 at 809).

The rationale propounded in McMeekin is clearly analogous to the case sub judice. As in McMeekin, Sipple and Gibson are the joint holders of one claim - the judgment. The Order and Judgment entered in the Superior Court does not contain a provision that Atwood is to pay Sipple \$482,913.56 and Gibson \$482,913.56; rather, the Order and Judgment places one obligation upon Atwood - to pay \$482,913.56 to both Sipple and Gibson. As such, there arises but one "right to payment", and therefore one claim.

The petitioning creditors assert that even though the judgment is joint and several, there is one element of the judgment which is held by Gibson alone. Indeed a review of the findings of fact and conclusions of law of the auditor reveals that Gibson alone may have been entitled to recover on such claim. However, the judgment subsequently entered by the Superior Court, which is now final, did not differentiate between Gibson and Sipple but instead was rendered for the identical, full amount in favor of both.

Other courts have dealt with the issue of whether a joint obligation constitutes two claims or merely one because "each" creditor must hold "a claim". In re Averil, Inc., 33 B.R. 562 (Bankr. S.D.Fla. 1983), resolved this issue by referring to Section 303(b)(1) in conjunction with Section 101(4) of the Bankruptcy Code. After applying these statutes to the facts of the case, the court held joint holders of the obligation constitute a single creditor for purposes of Section 303(b)(1). Averil, 33 B.R. at 563. Interestingly, the court went on to hold that the evident purpose in requiring at least three creditors with three claims is to avoid the bringing of involuntary cases by fewer than three creditors, except in de minimus sized cases, by requiring joint effort of at least three creditors in involuntary cases. Id. If the co-owners of a single obligation qualify as separate claimants for this

purpose, that legislative purpose would be frustrated. Id. Averil supports Atwood's contention that the joint obligation owed to Sipple and Gibson constitutes "one claim" and the petitioners should not be allowed to frustrate the legislative purpose behind the Code.

Most recently, Judge Proctor, of the United States Bankruptcy Court for the Middle District of Florida, held in In re T. P. Herndon and Co., 87 B.R. 204 (Bankr. M.D.Fla. 1988), that three beneficiaries of a probate estate who received an undivided interest in a promissory note made payable to the estate, did not qualify as three separate creditors. Id. at 205. Furthermore, Judge Proctor held that because the promissory note was made payable to a single entity, the petitioning creditors held a single right to payment, which constituted one "claim" for purposes of Section 303(b)(1). Id. at 206. I am persuaded by the Averil and Herndon analyses and hold that Sipple and Gibson are holders of a single right to payment, which constitutes only one claim for purposes of Section 303(b)(1).

Since Sipple and Gibson hold one claim, there are, at most, only two petitioning creditors (including Gannam). Since I conclude that there are at least twelve creditors holding claims against Atwood, his Motion for Summary Judgment is granted and the

involuntary bankruptcy case is dismissed for its failure to comply with 11 U.S.C. Section 303(b).



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 29th day of January, 1990.