

In the United States Bankruptcy Court
for the

Southern District of Georgia at 10 O'clock & 45 min AM
Savannah Division

FILED

Date 5-14-92

MARY C. BECTON, CLERK *CR*
United States Bankruptcy Court
Savannah, Georgia

In the matter of:

JAMES P. ATWOOD

Debtor

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Chapter 11 Case

Number 88-41165

MEMORANDUM AND ORDER
ON MOTION FOR SUMMARY JUDGMENT AND
ON MOTION FOR RECONSIDERATION

This case was initiated by the filing of an involuntary bankruptcy petition on October 25, 1988; on May 8, 1989, the named Debtor, James P. Atwood ("Atwood"), filed a Motion for Summary Judgment contending that the bankruptcy should be dismissed. The sole issue before the Court at this point is whether Atwood had twelve or more creditors on the date of the bankruptcy filing so as to require that the petition be filed by three or more petitioning creditors.¹ In an Order dated

¹ This Court previously entered an Order, which was affirmed in part on appeal, finding that the judgment held by two of the three petitioning creditors, Charles Sipple, III and Joel Gibson, constitutes only one claim. As a result, this involuntary petition was filed by only two petitioning creditors for purposes of 11 U.S.C. Section 303(b) so that this Court must now determine whether Atwood had twelve or more qualifying creditors on the date of filing.

February 7, 1992 (entered on February 11, 1992), (the "February Order"), I reviewed the history of this case, which is now before me on remand from the District Court, and concluded that eleven of the creditors identified by Atwood in his affidavit in support of the Motion for Summary Judgment should be counted in determining the total number of creditors.

A hearing was held on March 30, 1992, for the limited purpose of taking testimony on the issues set forth below and for consideration of Sipple and Gibson's Motion for Reconsideration of my February Order. Atwood was present at the hearing, as were Charles Sipple, III ("Sipple") and Joel Gibson ("Gibson") who are resisting Atwood's Motion for Summary Judgment. The other petitioning creditor, Michael Gannam, was represented by counsel, but did not participate in the hearing. The conclusions of this Court, based on the evidence addressed at the hearing are set forth below. To the extent that anything designated herein as a finding of fact addresses a question of law it will be deemed to constitute also a conclusion of law. Similarly, to the extent that anything designated herein as a conclusion of law contains questions of fact, it will be deemed to constitute also a finding of fact.

FINDINGS OF FACT

I. The source of post-petition payments made to Michael Gannam, Alton Park, Edward Siebert, Tony Sterno and Donald MacPherson.

The debts owed to Michael Gannam, Alton Park, Edward Siebert, Tony Sterno² and Donald MacPherson were paid by Atwood after the date of the bankruptcy filing. Consequently, it is necessary to determine the source of payment to ascertain whether the claims should be counted. At the hearing Atwood testified that since the date of the involuntary bankruptcy filing on October 25, 1988, he has received United States Army retirement pay in excess of \$100,000.00. Atwood further stated that he has not used any pre-petition assets to pay the debts he owed on the date of the filing. According to Atwood his military retirement pay was the sole source of payment of these debts except for the payment made to Michael Gannam, which was supplemented by \$1,500.00 borrowed from a friend, Alton Park, and money from Atwood's wife. Alton Park's testimony corroborated Atwood's statement with regard to his loan to Atwood to pay the Gannam debt.

Atwood, who does not maintain a checking account, introduced copies

² It is unclear whether this claim is actually held by Mr. Sterno, or by Mack's Gun Shop. A determination of the correct holder is not required for purposes of this Order and for convenience the creditor will be referred to as Tony Sterno.

of various bank checks, money orders and receipts to substantiate the existence and payment of some of the debts. Although Sipple and Gibson argued that the evidence was insufficient to establish the source of payment, I find that Atwood's testimony, that of Alton Park with regard to the loan he made to Atwood, and the various documents introduced into evidence established that the pre-petition creditors paid after the bankruptcy filing were not paid with property of the estate. Consequently, even though they were paid post-petition, the debts owed to Michael Gannam, Alton Park, Edward Siebert and Tony Sterno should be counted, as Atwood's post-petition income, that is, his military retirement pay, as not property of the estate under 11 U.S.C. Section 541. Although I also find that the debt of Donald MacPherson was paid from Atwood's military retirement payment, it will not be counted for purposes of this Order for the reasons set forth below.

II. The status of the balance of the claims as small, recurring claims and the source of post-petition payments made, if any.

In addition to the debts owed to Michael Gannam, Alton Park, Edward Siebert, Tony Sterno and Donald MacPherson, Atwood testified that at the time of the involuntary bankruptcy filing he owed the following debts in the amounts

indicated:³

Savannah Gas Company	\$264.83
Trust Company Bank	1.11
Great Savannah Hospital for Animals	18.00
Rhodale Library	17.25
Robert Stewart	529.00
Fletcher Farrington	420.00
Donald Graham	375.00
Dr. Tony Heffernan	415.00
St. Joseph's Hospital	35.02
TROA	239.85
MasterCard	12.00

Since I have already found that the source of all post-petition payment of debt was Atwood's military retirement (except for the Gannam claim which was partially paid by the Park loan proceeds and money from Atwood's wife) the only remaining question as to the debts listed above is whether they are small and recurring so as to require their exclusion under the rationale of the former Fifth Circuit case Denham v. Shellman Grain Elevator, Inc., 444 F.2d 1376 (5th Cir. 1971).

Atwood testified that on the date of the bankruptcy filing he owed

³ Atwood also testified that he has subsequently identified three other creditors (Internal Revenue Service, USAA and Diner's Club) which were owed money at the time of the involuntary bankruptcy filing. In light of Sipple and Gibson's objection to the introduction of new evidence; Atwood withdrew these three new creditors for purposes of the hearing and consequently they are not addressed in this Order.

Savannah Gas Company \$264.83 for the purchase of a propane gas tank. Since this debt was not for ongoing utility service but for this purchase, I conclude that the debt is not a recurring one and should therefore be counted.

Although the debt of \$1.11 owing to Trust Company Bank is admittedly small, the evidence at the hearing established that it is not a recurring debt. Mr. Atwood's testimony and the related exhibits tendered into evidence indicated that the \$1.11 was owed to Trust Company to cover an overdraft in an account previously maintained by Atwood. Atwood did not regularly overdraw that account while it was open. Therefore, the Trust Company Bank claim should be counted for purposes of Section 303(b).

Atwood testified, and a veterinary bill substantiated, that the debt owed to Greater Savannah Hospital for Animals was incurred when Atwood took an injured stray dog for treatment. This bill was not a recurring claim, *see In re Atwood*, 124 B.R. 402 (S.D.Ga. 1991), and consequently should be counted.

The Rhodale Library debt was incurred when Atwood ordered a book from that company. Testimony revealed that this was not a monthly recurring

obligation, but rather, an isolated purchase. As it was not a recurring claim it should therefore be counted.

The debt of \$35.02 to St. Joseph's Hospital was the result of a one-time medical test which Atwood underwent. As that debt is nonrecurring, it should be counted. Similarly, the debts owed to Robert Stewart (for consulting work) and to Don Graham (for engine repair) should be counted as the evidence indicated that they are nonrecurring expenses.

My February Order concluded that eleven creditors⁴ should be counted in determining how many creditors Atwood had at the date of bankruptcy filing. Sipple and Gibson moved for reconsideration of the Court's finding that the debts of Joe Odum, who is now deceased, and Thomas Rachael should be counted. At the March 30, 1992, hearing Atwood testified that \$200.00 of the original \$600.00 owed to Joe Odum remains unpaid. There was no documentation to evidence the debt, but Atwood has been in communication with Joe Odum's mother regarding payment of the debt. Since a debt is not extinguished by the death of the obligee, I find no reason

⁴ Those eleven creditors are Joseph Odum, Thomas B. Rachael, William Cook, Adam Cerbone, Ken Leonard, Elmer Pratt, Bernard Portman, Neal Judd, Joseph Bergen, Sipple and Gibson, and Donald Bacot.

find no reason to revise my earlier opinion that the Odum debt should be counted. Similarly, I reaffirm my earlier conclusion that the Thomas Rachael's debt should be counted. Sipple and Gibson argued that the Rachael's debt should be disallowed as there was no documentation to substantiate the debt; at the hearing, however, Atwood introduced a number of documents, including an invoice, which confirm that the debt was owing at the time of the bankruptcy filing. Accordingly, Sipple and Gibson's Motion for Reconsideration is denied.

In addition to the eleven creditors approved by my February Order, I conclude that the following eleven creditors should be counted:

Michael Gannam
Alton Park
Edward Siebert
Tony Sterno
Savannah Gas Company
Trust Company Bank
Great Savannah Hospital
for Animals
Rhodale Library
Robert Stewart
St. Joseph's Hospital
Donald Graham

Thus, there were a total of at least twenty-two creditors on the date of the involuntary

bankruptcy filing, far more than the twelve creditors which would require three or more petitioning creditors under Section 303. Consequently, there is no need for me to determine whether the claims of Dr. Heffernan, Don MacPherson, Fletcher Farrington, TROA, and the MasterCard debt should be counted, there being an unresolved issue as to whether these debts might be recurring (although other than the Mastercard, they are admittedly not small). Accordingly, I make no finding as to these debts.

CONCLUSIONS OF LAW

Section 303 of the Bankruptcy Code provides that there must be a minimum of three petitioning creditors to place an individual or entity in an involuntary bankruptcy where the named debtor has twelve or more creditors on the date of the filing of the petition. Having found that Atwood had at least twenty-two qualifying creditors on the date of the involuntary bankruptcy filing, the petitioning creditors' involuntary bankruptcy petition fails as there were only two petitioning

creditors.⁵ Accordingly, Atwood's Motion for Summary Judgment is granted and the involuntary bankruptcy petition is hereby dismissed.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 8th day of May, 1992.

⁵ Since, as previously noted, the judgment claim of Charles Sipple, III, and Joel Gibson constitutes one, not two claims.