IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA

In the Matter of:

High Plains Investment, Inc. Case No. 12-00829-als7

Alleged Debtor Chapter 7 - Involuntary

MEMORANDUM OF DECISION
(date entered on docket: September 13, 2012)

COURSE OF PROCEEDING

Before the Court is a controverted involuntary bankruptcy petition. Michael P. Mallaney appeared on behalf of Gordon Eaton ("Eaton"), Kent Elbert ("Elbert") and Vaske Livestock, Inc. ("Vaske"), the petitioning creditors (collectively "Creditors"). High Plains Investment, Inc. ("HPI" or "Debtor") was represented by David Morse. At the expiration of additional time for submission of written arguments, the matter was deemed fully submitted. Jurisdiction for these matters is found at 28 U.S.C. sections 157(b)(1) and 1334. The following findings of fact and conclusions of law are entered by the Court pursuant to Federal Rules of Bankruptcy Procedure 7052 and 9014. For the reasons set forth herein the involuntary petition is dismissed without prejudice.

FACTS

When it was an operating business, HPI installed wind turbine generators. Interested customers were contacted by an HPI sales representative who assisted in matching a manufacturer with the customer for the proposed project, identified the availability of grants to defray a portion of the cost, and prepared the General Contractors Contract and Sales Agreement. A turn key contract included all of the following services: zoning and permitting; electrical

engineering, excavation and construction; utility hook up; wiring, erection and assembly; and "any other aspects of installation. . . ." The basic contract provided for an initial deposit, periodic benchmark payments and a lump sum upon completion of the project. In January 2012, HPI ceased operations when its assets were repossessed. On March 20, 2012, Eaton, Elbert and Vaske initiated this involuntary bankruptcy proceeding.

DISCUSSION

Courts diligently review involuntary cases because

> the filing of an involuntary petition is an extreme remedy with serious consequences to the alleged debtor. . . . [a]n involuntary petition should be scrutinized carefully by the courts so as to avoid injustice. Indeed it is for just that reason that Congress has long required strict criteria for qualification to file and for allowance of involuntary petitions.

Huszti v. Huszti, 451 B.R. 717, 719 (E.D. Mich. 2011) (quoting In re McMeekin, 18 B.R. 177, 177-78 (Bankr. D. Mass. 1982)). When a debtor has more than twelve (12)[1] creditors, an involuntary petition may be filed by three or more entities that each holds a claim that is 1) not contingent as to liability and 2) not the subject of a bona fide dispute as to liability or amount. The aggregate amount of these claims must total at least $14,425 more than the value of any lien securing the debtor's property. 11 U.S.C. § 303(a) (2012). These requirements are not jurisdictional and may be waived if the debtor consents to an entry of the order for relief. See In re Belize Airways, Ltd., 18 B.R. 485, 488-89 (Bankr. S.D. Fla. 1982). Here, the Debtor has not waived these requirements and has filed an answer which denies all of the allegations contained in the involuntary petition.

[1] The evidence clearly indicates that HPI had more than twelve (12) creditors at the time the involuntary petition was filed.

At the conclusion of the Plaintiffs' case, HPI asked that the involuntary petition be dismissed, arguing that their claims merely involved a breach of contract and that affirmative defenses that could be raised would diminish the value of the claims asserted by the Creditors. The Court denied the request based upon the following: 1) Plaintiffs had shown that payments were made to HPI for materials and services not provided; 2) that a breach of contract qualifies as a "claim" under the provisions of 11 USC section 303; 3) Plaintiffs testified that the value of goods and services that were provided by HPI were far less than the amounts paid under the contract; and 4) the mere existence of a counter claim does not render a claim unenforceable nor prove the existence of a bona fide dispute. HPI then proceeded with its case in chief. Whether this involuntary petition is granted or must be dismissed rests solely upon a determination of whether the requisite number of creditors holds claims that are not the subject of a bona fide dispute.

Petitioning creditors bear the initial burden to establish a prima facie case that no bona fide dispute exists. The burden then shifts to the alleged debtor to "present evidence demonstrating that a bona fide dispute does exist." In re Rimell, 946 F.2d 1363, 1365 (8th Cir. 1991).

The standard in this Circuit to determine whether a "bona fide dispute" exists is an objective inquiry which requires the bankruptcy court to "determine whether there is an objective basis for either a factual or legal dispute as to the validity of the debt." In re Rimell, 946 F.2d at 1365 (quoting Matter of Busick, 831 F.2d 745, 750 (7th Cir. 1987); Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1544 (10th Cir. 1988)). The objective standard is explained as follows:

> Because the standard is objective, neither the debtor's subjective intent nor his subjective belief is sufficient to meet this burden. The court's objective is to ascertain whether a dispute that is bona fide exists; the court is not to actually resolve the dispute. This does not mean that the bankruptcy court is totally prohibited from

> addressing the legal merits of the alleged dispute; indeed, the bankruptcy court may be required to conduct a limited analysis of the legal issues in order to ascertain whether an objective legal basis for the dispute exists. . . . [T]he determination as to whether a dispute is bona fide will often depend . . . upon an assessment of witnesses' credibilities and other factual considerations . . . .

In re Rimell, 946 F.2d at 1365 (citations omitted). "The court need not determine probable outcome of the dispute, but merely whether one exists." Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1544 (10th Cir. 1988). To defeat an involuntary petition, the debtor must present "convincing evidence" of a bona fide dispute once the burden shifts because "[o]therwise, any debtor could defeat an involuntary petition . . . by merely asserting that a bona fide dispute exists." In re Taylor, 75 B.R. 682, 684 (N.D. Ill. 1987). Put another way, the bona fide dispute standard "does not require that the bankruptcy court dismiss an involuntary petition simply because the debtor has raised affirmative defenses. Rather, [the standard] requires the court to engage in some analysis of the alleged dispute to determine whether it has an objective factual or legal basis." Rezko v. Sirazi (In re Rezko), No. 08 C 5433, 2009 U.S. Dist. LEXIS 45090, at *9 (N.D. Ill. May 29, 2009).

After the passage of the 2005 amendments to the Bankruptcy Code, the debt must not be disputed as to liability *or amount*. See 11 U.S.C. § 303(b)(1) (emphasis added); In re Euro-American Lodging Corp., 357 B.R. 700, 712 n.8 (Bankr. S.D.N.Y. 2007) ("[A]ny dispute regarding the amount that arises from the same transaction and is directly related to the underlying claim should render the claim subject to a bona fide dispute."); In re Mountain Diaries, Inc., 372 B.R. 623, 633 (Bankr. S.D.N.Y. 2007) ("That a claim could have been filed in good faith when a substantial portion of that claim was the subject of a dispute on its face is untenable"). In some cases, it may be necessary to analyze the underlying legal issues of the

parties' dealings in order to determine whether there is a basis for a debtor's assertion that the liability or amount of a specific claim is disputed.

It is with this understanding of the applicable standards that the Creditors' claims must be evaluated to determine if a bona fide dispute of liability or amount is present under the various contracts.

Eaton and Elbert entered into contracts with HPI for the installation of wind turbines. Each of them made substantial payments to HPI. The goods and services to be provided under the contract were not fulfilled by HPI. Therefore, the dispute to these claims potentially lies in the value of the other services performed for these two Creditors absent the actual delivery of the turbines. The Debtor asserts that considerable work was performed in preparing to install the respective turbines. These goods and services included excavation, foundation, construction and contact with utility providers. Although Eaton and Elbert acknowledge that this work was completed, they testified that the "improvements" made were of no use to them without the actual turbines, some of the services were unnecessary, and at best only nominal value could be assigned to them. The record is silent as to any estimate of the value of the items provided by HPI. Based upon the record, each of these individuals qualify as petitioning creditors under the statutory elements.

Vaske engaged HPI to repair lightning damage to his wind turbine. According to the evidence, HPI subcontracted a majority of this project to Impervious Energy ("Impervious"). This third party contract was not submitted into evidence. Whether the amount of $154,000 to be paid to HPI by Vaske represented an estimate or a flat fee is the subject of inconsistent testimony. When HPI failed to perform under the contract, Vaske began dealing with Impervious directly, and this company completed the repairs. Vaske claims that HPI owes him money equal

to the amounts he paid to get his turbines repaired because HPI did not return them, and he had to pay additional money to Impervious to complete the project. Upon questioning, Vaske admitted that he paid both HPI and Impervious only slightly more than was originally quoted for the repairs that were in fact completed. HPI alleges that it owes no amount to Vaske due to cost overruns that developed which account for the difference paid to Impervious to finish the project. A close examination of the exhibits submitted in support of Vaske's claim include some payment to Impervious for a "controller upgrade."[2] A dispute as to both liability and amount has been sufficiently raised as to Vaske's alleged claim based upon whether there is any amount actually owing from HPI's failure to perform; or whether the amount claimed is due to cost overruns incurred by Impervious and Vaske's election(s) to upgrade components. Consequently, Vaske is not a qualified petitioning creditor and the minimum number of three creditors does not exist as required under 11 U.S.C. section 303(b)(1).

IT IS THEREFORE ORDERED that the involuntary petition is dismissed without prejudice.

/s/ Anita L. Shodeen
Anita L. Shodeen
U.S. Bankruptcy Judge

Parties receiving this Memorandum of Decision from the Clerk of Court:
Electronic Filers in this Adversary Proceeding

[2] Creditors' Exhibit 5(a).