UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

KCC-FUND IX,
A Limited Partnership

Case No. 88-808-C H
Chapter 11

Debtor.

ORDER--MOTION TO QUASH INTERROGATORIES AND FOR SANCTIONS

On September 26, 1988, a hearing was held on Debtor's Emergency Motion to Quash Interrogatories and Motion for Sanctions. The following attorneys appeared on behalf of their respective clients: John Martin Klein and Gary A. Norton for Debtor; and T. J. McDonough and Dennis W. Johnson for the creditors, Paul and Charlotte From. At the conclusion of said hearing, the Court took the matter under advisement.

This is a core proceeding pursuant to 28 U.S.C. §157(b) (2). The Court, upon review of the pleadings, arguments of counsel, and briefs, now enters its findings and conclusions pursuant to F.R.Bankr.P. §7052.

FINDINGS OF FACT

1. On February 29, 1988, Debtor filed its voluntary Chapter 11 petition in the U.S. Bankruptcy Court, Western District, Missouri. On March 31, 1988, venue was changed to this Court.

2. Debtor's primary business activity is the ownership and operation of a 114 unit apartment complex

located at 4300 Westbrook, Ames, Iowa, known as “Westbrook Terrace Apartments” (hereinafter “Project”).

3. Debtor is a limited partnership, formed February 6, 1988, pursuant to the laws of the State of Missouri.

4. Paul and Charlotte From, (hereinafter “Froms”) are the primary claimants against Debtor. They hold a real estate mortgage against Debtor’s primary asset, the Project.

5. On June 11, 1988, Froms filed a motion to modify the automatic stay under both grounds of 11 U.S.C. §362(d). As grounds for cause under §362(d)(l), Froms allege there is no adequate protection and Debtor has been in the process of collecting rents and transferring those funds out of state while at the same time committing waste upon the property. Froms also allege,pursuant to §362(d)(2), that Debtor has no equity in the property and it is not necessary to an effective reorganization since no reorganization is possible.

6. On August 11, 1988, Froms filed a motion to dismiss. In said motion Froms prayed the petition be dismissed for lack of good faith in filing these bankruptcy proceedings and, further, that there is no realistic possibility of an effective reorganization and an inability to effectuate a plan pursuant to 11 U.S.C. §1112(b).

7. Froms’ motion to dismiss and motion to modify automatic stay were not served upon Debtor’s limited partners.

8. On August 29, 1988, Debtor filed a Disclosure Statement and Plan of Reorganization. An essential component of the plan is that the limited partners make a capital contribution in the total amount of $475,000.00.

9. On September 7, 1988, counsel for Froms served interrogatories upon Debtor's limited partners. The interrogatories inquired into the interest of the limited partner, distributions from the partnership, and the limited partners' knowledge of several persons.

10. Froms then addressed the following interrogatories to the limited partners:

INTERROGATORY NO. 20. Do you know that a Plan of Reorganization was filed with the Bankruptcy Court in Des Moines, Iowa and that it requires that you pay more than $12,000 to KCC-Fund IX in order to retain your interest in the limited partnership?

INTERROGATORY NO. 21. Have you read KCC-Fund TX's Plan of Reorganization and Disclosure Statement filed with the Bankruptcy Court in Des Moines, Iowa?

INTERROGATORY NO. 22. Has anyone communicated any information about KCC-Fund IX'S Plan of Reorganization to you?

INTERROGATORY NO. 23. If the Bankruptcy Court in Des Moines were to so require you to pay over $12,000 to KCCFund IX to retain an interest in the limited partnership, would you make that payment or surrender your interest?

INTERROGATORY NO. 26. Do you believe an infusion by you of capital in a bankrupt limited partnership like KCCFund IX at this time is in your best interest?

11. On September 8, 1988, Debtor filed its First Amended Disclosure Statement and Plan of Reorganization.

12. Neither disclosure statement had been approved by the Court at the time of the service of the interrogatories.

13. Froms contend Debtor cannot persuade the limited partners to make the necessary capital contribution.

DISCUSSION

Debtor now moves to quash the inteterrogatories and prays that the Court impose sanctions upon Froms and their counsel for the improper service of the interrogatories.

I. Contentions. Debtor contends: (1) the contact with the limited partners by interrogatories was a solicitation of rejection under 11 U.S.C. §1125(b); (2) the limited partners are not parties and the service of interrogatories upon them violates Bankruptcy Rule 7033; (3) the failure to comply with Local Rule 14(e) (formerly Rule 2.2.5), failure to file an affidavit of good faith attempt to resolve these issues without intervention of the Court, is not fatal; and, (4) Froms should be designated as a bad faith entity under 11 U.S.C. §1126(e) as an appropriate sanction.

Froms contend: (1) Debtor has failed to engage in a good faith attempt to resolve these issues without

intervention of the Court and the failure to file an affidavit pursuant to Local Rule 14(e) is fatal; (2) the interrogatories do not constitute a solicitation of a rejection of any plan; (3) the limited partners are parties within the meaning of the Bankruptcy Code; (4) they have a right to engage in discovery in contested matters; (5) they have a right to communicate directly with the limited partners; (6) Debtor does not have standing to file a motion to quash discovery served upon the limited partners; and, (7) the Court should grant sactions against Debtor for attorney's fees and expenses incurred by the Froms.

II. Resolution of Discovery Issues Without Court Intervention. Local Rule 14(e) (former Rule 2.2.5) of the United States District Court for the Southern District of Iowa provides that before a motion relating to discovery may be filed, counsel for the movant must file an affidavit stating that counsel has previously conferred in good faith with opposing counsel in an attempt to resolve the issues without intervention of the Court, and have been unable to reach an agreement, and that the resulting motion is therefore necessary and contested. In the alternative, counsel must certify that such a conference was impossible and the efforts made to confer.

In the case at bar, the subject affidavit has not been filed. Further, Debtor did not certify that such a conference was impossible and what efforts had been made to

prevent judicial intervention. Under the rules of practice in the United States District Court in the Southern District of Iowa, the failure to file this affidavit or to certify that a conference was impossible is fatal. Therefore, the Court concludes Debtor's emergency motion to quash interrogatories must be denied.

Assuming arguendo that said failure is not fatal, the Court must address the substantive issue of whether the interrogatories constitute a solicitation of rejection under 11 U.S.C. §1125(b). Said section prohibits solicitation of acceptances or rejections of a plan after the commencement of a case unless, at the time of or before the solicitation, a written, approved disclosure statement is transmitted to the solicitee.

Solicitation as used in §1125(b) is narrowly interpreted to refer only to a specific request for an official vote either accepting or rejecting a plan of reorganization. In re Snyder, 51 B.R. 432, 437 (Bankr. D. Utah 1985). Further, the terms "solicit" or "solicitation" do not encompass discussions, exchanges of information, negotiations, or tentative arrangements made by and between the various parties in interest because to prohibit these activities would preclude meaningful creditor participation. Id. Unauthorized solicitation includes a specific request for an official vote for or against a plan if (a) made before dissemination of an approved disclosure

statement, (b) made after the dissemination of a disclosure statement but containing misrepresentations or deliberate falsehoods and misleading statements calculated to deceive, or (c) making reference to a plan predicated upon arrangements that were arrived at by fraud or were not adequately disclosed to the court and to parties in interest in the approved disclosure statement. Id.

Considering the legislative history of §1125(b), Bankruptcy Reform Act of 1978, Pub.L.No. 95-598, 1978 U.S. Code Cong. & Admin. News (95 Stat.) 5907, the Court finds the Snyder decision persuasive, and concludes the terms "solicit" or "solicitation" should be interpreted narrowly. In the case at bar, the interrogatories to the limited partners are not specific requests for official votes either accepting or rejecting a plan. Consequently, the interrogatories do not constitute an unauthorized solicitation of votes which is proscribed by §1125(b).

III. Standing. Debtor contends the limited partners are not "parties" to the contested matters, and, as a result, argues Froms may not serve interrogatories on the limited partners as provided in Bankruptcy Rule 7033 Froms counter by contending Debtor does not have standing to file a motion to quash interrogatories served on the limited partners..

Limited partners are equity security holders under

§§l0l(15) and 101(16). As a result, they are separate and distinct entities under §1109(b).

In order for a partnership petition to be considered voluntary, it must be joined in by all of the general partners. In re Seychelles, 30 B.R. 72, 74 (Bankr. N.D. Tex 1982); Fed.R.Bankr.P. 1004(a). If fewer than all of the general partners join in and file the petition, the petition is treated as an involuntary case. Id.; 11 U.S.C. §303(b)(3). Limited partners are not required to join in a voluntary petition and their interests may be antithetical to those of a general partner. See In re Bel Air Associates, Ltd., 4 B.R. 168 (Bankr. W.D. Okia. 1980).

Based on the present record, Debtor has failed to show how it has standing to raise issues for the limited partners and assert those rights possessed by the limited partners. Accordingly, Debtor's motion to quash should be denied.

IV. Sanctions. Sanctions may be imposed for abuse of the discovery rules. F.R.Bankr.P. 9014, 7037 and 7026(g).

The Court finds that the motion to quash interrogatones: 1) presented a good faith argument for the extension and modification of existing law; 2) was not interposed for any improper purpose; and 3) was not unreasonable considering the importance of the issues at stake in this case. Consequently, Froms' motion for sanctions must be denied.

IT IS ACCORDINGLY ORDERED, as follows:

(1) The interrogatories do not constitute an unauthorized solicitation of votes either accepting or rejecting a plan;

(2) Debtor's motion to quash interrogatories and for sanctions is overruled; and,

(3) The motion of Paul From and Charlotte From for sanctions is overruled.

Signed and dated this 13th day of January, 1989.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE